

COMMENTARY

TO THE PRINCIPLES ON DEPRIVATION OF NATIONALITY
AS A NATIONAL SECURITY MEASURE

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LIST OF ABBREVIATIONS AND ACRONYMS

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| 1930 Hague Convention | Convention on Certain Questions Relating to the Conflict of Nationality Laws |
| 1951 Refugee Convention. | Convention Relating to the Status of Refugees |
| 1954 Convention | Convention Relating to the Status of Stateless Persons |
| 1961 Convention | Convention on the Reduction of Statelessness |
| ACHR | American Convention on Human Rights |
| ACHPR | African Charter on Human and Peoples' Rights |
| ACmHPR | African Commission on Human and Peoples' Rights |
| ACtHR | African Court on Human and Peoples' Rights |
| ACERWC | African Charter on the Rights and Welfare of the Child |
| ASEAN | Association of South East Asian Nations |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CED | Convention for the Protection of All Persons from Enforced Disappearance |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination |
| CIS | Commonwealth of Independent States |
| CJEU | Court of Justice of the European Union |
| CMW | Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families |
| CoE | Council of Europe |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention of the Rights of Persons with Disabilities |
| ECHR | European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) |
| ECN | European Convention on Nationality |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| HRC | Human Rights Committee |
| IACtHR | Inter-American Court of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ILC | International Law Commission |
| ILEC | Involuntary Loss of European Citizenship |
| OUA | Organization of African Unity |
| OHCHR | Office of the High Commissioner for Human Rights |
| PACE | Parliamentary Assembly of the Council of Europe |

UDHR
UN
UNHCR
UNSC
UK

Universal Declaration of Human Rights
United Nations
United Nations High Commissioner for Refugees
United Nations Security Council
United Kingdom

INTRODUCTION

“ **Everyone has the right to a nationality.
No one shall be arbitrarily deprived of his nationality...**”

*Article 15 (1) & (2) of
the Universal Declaration of Human Rights*

The **Principles on Deprivation of Nationality as a National Security Measure** were developed over a 30-month research and consultation period, with input from more than 60 leading experts in the fields of human rights, nationality and statelessness, counter-terrorism, refugee protection, child rights, migration, and other related areas.¹ The Principles restate or reflect international law and legal standards under the UN Charter, treaty law, customary international law, general principles of law, judicial decisions and legal scholarship, regional and national law and practice. They articulate the international law obligations of States and apply to all situations in which States take or consider taking steps to deprive a person of nationality as a national security measure.

This Commentary to the Principles, updated and (re)published in March 2022, draws from and builds on research working papers that were developed to inform expert discussions on the Principles and an earlier preparatory document which consolidated various international law standards and norms upon which the Principles are based. It also benefits from feedback and input on an earlier Draft Commentary that was published together with the Principles in March 2020.

RATIONALE BEHIND THE DEVELOPMENT OF THE PRINCIPLES

The Principles were developed in response to a 21st Century trend of a small, but growing number of States resorting to deprivation of nationality as a counterterrorism and national security measure. While some States have amended their laws to expand existing powers or introduce new powers to enable deprivation of nationality, others have relied on existing powers, which have been construed expansively to apply to situations not previously envisaged. There has also been an increase in deprivation of nationality for other stated purposes (such as fraud), which

¹ The Principles were drafted by the Institute on Statelessness and Inclusion in collaboration with the Open Society Justice Initiative and with support from the Asser Institute and Ashurst LLP. Over a 30 month period, extensive research was conducted into global trends, the effectiveness of citizenship deprivation and international standards related to deprivation, three expert meetings were convened (London – 2017, and The Hague – 2018 & 2019) and multiple drafts were developed by the team, under the guidance of an expert Drafting Committee and subject to the review of a wider group of experts. The Principles were finalised in February 2020 and remain open for institutional and individual endorsement. For more information, visit www.institutesi.org.

serve as proxies to the purpose of safeguarding national security; as well as proxy measures, which do not amount to deprivation of nationality but are likely to have a similarly adverse impact on individual human rights (such as the revocation of passports, refusal to repatriate and the imposition of travel and entry bans).

The deprivation of nationality as a national security measure disproportionately targets those of minority and migrant heritage and is likely to be discriminatory on various grounds including race, ethnicity, religion, political or other opinion, and national origin. Such measures are also likely to be arbitrary and can cause statelessness. There is no evidence to support the use of such measures as being an effective means of protecting national security, and there is growing concern that such actions may actually be counterproductive. There are also significant concerns related to the permanent nature of the measure of deprivation of nationality, its disproportionate impact on individuals, families and communities, and its detrimental impact on other fundamental human rights.

States have a duty to cooperate with each other and to act responsibly and in accordance with international law, to maintain international peace and security, and to foster respect for human rights and fundamental freedoms. The practice of deprivation of nationality, especially when coupled with the refusal to repatriate and the imposition of entry bans, runs contrary to these obligations and can result in the ‘exporting’ of a challenge for other States to deal with.

The Principles present a wide range of both well-established and developing international law standards, which States are obliged to uphold when considering the introduction of new powers or the implementation of existing powers to deprive the nationality of their citizens. The Principles serve to provide a clear and authoritative overview of existing international law obligations; they do not establish any new standards. However, by collating the numerous international law standards at play, the Principles articulate the extremely high threshold to be met for a State to deprive nationality while satisfying its international obligations. An analysis of current State practice shows that this threshold is not being met by any State which has taken the measure of depriving nationality of its citizens to safeguard national security.

WHAT YOU WILL FIND IN THE COMMENTARY

This Commentary provides the international law base for each provision contained in the Principles, with the exception of the **Preamble** and Principle 1 on **Scope of application, sources and interpretation**. The Commentary is organised in the same order as the Principles, with separate commentary text for each Principle. Under each section, a table provides in its left-hand column the text of the Principle, and in its right-hand column the most directly relevant legal standards, principles and/or sources of international law. This table is followed by further analytical discussion and an overview of the legal basis of each Principle.

At the very centre of the Principles, are four international norms: **the right to a nationality** (Principle 2), **the prohibition of arbitrary deprivation of nationality** (Principle 7); **the prohibition of discriminatory deprivation of**

nationality (Principle 6); and **the avoidance of statelessness** (Principle 5). The Principles demonstrate how these norms collectively protect the individual from having their nationality deprived, and clarify that these norms must be viewed together to understand how they reinforce and complement each other. Viewing any of the stated norms in isolation, or relying primarily on an international treaty which addresses only one of them, risks violating or undermining the others. This Commentary provides an overview of the jurisprudence, standards and developments in relation to each of these four norms, and examines how they come together and complement each other to provide robust and holistic protection against citizenship deprivation.

The Principles also address **further human rights, humanitarian and refugee law obligations and standards** (Principle 9), which – though less central – provide important protection in specific contexts and in relation to various possible outcomes of citizenship deprivation. For example, the right to enter and remain in one’s own country; the prohibition of *refoulement*; the prohibition of torture and cruel, inhuman or degrading treatment or punishment; the liberty and security of the person; the right to private and family life; legal personhood; and the rights of the child; all stand to be negatively impacted as a direct consequence of citizenship deprivation. Therefore, in addition to the assessment of the four central norms as set out above, all of these (and other factors) must be considered when assessing the proportionality and lawfulness of any decision to deprive nationality. The Principles refer to each of these standards, but do not address them with the same degree of comprehensiveness as the four central norms. This is partly because to do so would have made the Principles an unwieldy document, but mostly because there already exists, a rich body of jurisprudence, guidance, and study on each of these norms. Any effort to collate this together would have resulted in omissions. While the Commentary provides an overview of some of the main standards related to each of these norms, this is not as extensive as with the central norms. It serves to also point the reader in the direction of other resources, should they wish to learn more. Any omissions in the Commentary in relation to these norms are therefore not indicative of a lack of relevance, but rather, stand as acknowledgement that there are far greater authorities on these norms, which should be viewed as complementing this text.

The third type of norm addressed in the Principles relates to access to justice. These norms are directly relevant to the question of arbitrariness and are therefore partially addressed within the principle on the prohibition of arbitrary deprivation of nationality (**procedural safeguards** – Principle 7.6). However, they are also addressed separately through a closer analysis of the **rights to a fair trial, effective remedy and reparation** (Principle 8). The Commentary also provides a closer look at the standards at play in relation to these procedural aspects. Again, the reader is advised to study other texts, particularly treaty specific texts, should they wish to look at how these rights and protections are approached and fulfilled in different systems.

Principle 2 (*definitions*), Principle 10 (*deprivation by proxy and proxy measures*) and Principle 11 (*international cooperation*) are also further elaborated on in the Commentary.

The **Basic Rule** articulated in Principle 4, synthesises all relevant international standards, to conclude that “States shall not deprive persons of nationality for the purpose of safeguarding national security”. It asserts that any exercise of an exception to this rule must be “interpreted and applied narrowly”, and is further limited by the various norms set out above. The Commentary provides an overview of the rationale behind the construction of the Basic Rule and demonstrates how the different norms drawn on in the Principles relate to it.

ACKNOWLEDGEMENTS AND COMMITMENT

As a document which evolved organically, initially created to help understand the scope of the issue at play, subsequently revised to assist experts in the drafting of the Principles, and now finally as a Commentary to the Principles, so many people have contributed to the development of this text, in so many ways, that it would be impossible to individually acknowledge all contributions. While the team at the Institute on Statelessness and Inclusion took the lead in drafting the text, the research, review and drafting contributions of partner organisations – Ashurst LLP, Open Society Justice Initiative and the Asser Institute – are integrally woven into the fabric of this text. The expert review of numerous actors, including leading academics, UN independent experts, international organisations, and litigators, have enhanced this Commentary.

At a time when the institution of citizenship is increasingly under threat, the Principles and this Commentary serve to remind us of the longstanding and strong international law framework that obligates States to respect, protect, promote and fulfil everyone’s right to a nationality; and which recognises the importance of doing so, in order to also protect other fundamental human rights. It is no coincidence that these international standards were developed in response to our shared world history in which the State’s power to deprive citizens of their nationality has been a precursor to committing the gravest crimes and unimaginable atrocities.

The Commentary is hopefully useful to litigators, policy makers, judges, advocates and students around the world, whose important work over the coming years will shape this field and have a profound impact on how the institution of citizenship and the right to a nationality is protected for future generations.

PRINCIPLES

ON DEPRIVATION OF NATIONALITY
AS A NATIONAL SECURITY MEASURE

PREAMBLE

Affirming that States are obligated under the Charter of the United Nations to take joint and separate action to maintain international peace and security and to achieve universal respect for, and observance of, human rights and fundamental freedoms for all without distinction;

Recalling basic principles of international law, as set out in the UN Charter, general principles of law, treaties, customary international law, judicial decisions and legal scholarship, regional legal frameworks and other sources;

Recognising that States have an international legal obligation to protect all persons in their territory or subject to their jurisdiction and a right to take effective and lawful steps to protect national security;

Upholding the principle of non-regression and encouraging the progressive development and codification of international law;

Reaffirming that States and the international community as a whole must ensure that any measures taken to protect security and counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law and international humanitarian law;

Underscoring that respect for human rights, fundamental freedoms and principles of non-discrimination, equality and the rule of law are complementary and mutually reinforcing with effective security measures, and are an essential part of a successful security and counter-terrorism effort;

Remembering our shared world history in which the State's power to deprive citizens of their nationality has been a precursor to committing the gravest crimes and unimaginable atrocities which deeply shocked the conscience of humanity;

Noting that a small but growing number of States have resorted to deprivation of nationality as a counter-terrorism and national security measure, with some States amending their laws to expand existing powers or introduce new powers to enable deprivation of nationality, and other States relying on existing powers, which are being construed expansively to apply to situations not previously envisaged;

Recognising that States have increasingly used deprivation of nationality to safeguard national security, despite the lack of any evidence of its effectiveness and in the face of evidence that such practices are likely to be counterproductive.

Recalling Article 15 of the Universal Declaration of Human Rights, according to which everyone has the right to a nationality and no one shall be arbitrarily deprived of his or her nationality, and asserting that States should ensure that they exercise their discretionary powers concerning nationality issues in a manner that is consistent with their international obligations in the field of human rights;

Concerned at the permanent nature of the measure of deprivation of nationality, and its potential for being unnecessary, without legitimate purpose, disproportionate, discriminatory, arbitrary and unlawful, while at the same time being ineffective and subject to abuse;

Equally concerned that the deprivation of nationality can entail or facilitate other violations of international law, affecting both the person deprived and connected persons including children, impairing access to a wide range of civil, cultural, economic, political and social rights, including through: denial of the right to enter and remain in one's own country; discrimination; *refoulement*; torture, cruel, inhuman or degrading treatment or punishment; deprivation of liberty and security of the person; denial of access to education, healthcare and housing; denial of legal personhood; denial of private and family life; denial of access to justice; and denial of the right to an effective remedy;

Affirming that the prohibition of racial discrimination is a peremptory norm of international law, and noting that prevailing national laws and practices of deprivation of nationality are likely to disproportionately target members of minority or marginalised communities;

Recognising that international law prohibits the expulsion of nationals, as a measure which undermines international cooperation and the national sovereignty of other States, and emphasising that it is not a legitimate purpose to deprive nationality in order to effect expulsion;

Recognising that under relevant UN Security Council, Human Rights Council and General Assembly Resolutions, States are required and called upon to address threats to international peace and security, in a manner consistent with international human rights law, international humanitarian law and international refugee law, and through a comprehensive approach that addresses underlying factors which can be conducive to terrorism, including by promoting political and religious tolerance, good governance, economic development, and social cohesion and full national inclusion;

These **Principles** restate international law, reflect existing standards and draw on practices that guide and limit State power to deprive persons of their nationality as a purported counter-terrorism and national security measure.

PRINCIPLES

ON DEPRIVATION OF NATIONALITY AS A NATIONAL SECURITY MEASURE

1. SCOPE OF APPLICATION, SOURCES & INTERPRETATION

1.1. Scope of application

- 1.1.1. These Principles apply to all situations in which States take or consider taking steps to deprive a person of nationality as a national security measure.
- 1.1.2. Any existing or proposed national legal provisions which provide for the deprivation of nationality for the purpose of safeguarding national security should fully comply with international law standards as set out in these Principles.
- 1.1.3. The Principles are also relevant in the interpretation and application of international law to other situations of deprivation of nationality.
- 1.1.4. The Principles are also relevant to other practices, including measures to revoke passports, expel or prohibit entry of nationals as a national security measure.

1.2. Sources of law

The Principles restate or reflect international law and legal standards under the UN Charter, treaty law, customary international law, general principles of law, judicial decisions and legal scholarship, regional and national law and practice.

1.3. Interpretation

- 1.3.1. In all circumstances, the Principles should be interpreted in accordance with international human rights law and standards, applying the most favourable provision of protection.
- 1.3.2. The Principles set out minimum standards. Nothing in these Principles shall be invoked as a reason to apply a lower level of protection against deprivation of nationality than that currently provided in national laws.

- 1.3.3. Where permitted, any exceptions stated in the Principles should be interpreted in the narrowest possible manner.

2. DEFINITIONS

For the purpose of the Principles, the following definitions are applied:

2.1. Nationality

- 2.1.1. *Nationality* refers to a legal status of an individual in relation to a State and embodies the legal bond between the individual and State for the purposes of international law.
- 2.1.2. It is for each State to determine who is considered a national according to its law, in compliance with international law standards.
- 2.1.3. For the scope of application and interpretation of the Principles, the terms *nationality* and *citizenship* are synonymous.

2.2. Deprivation of nationality

- 2.2.1. *Deprivation of nationality* refers to any loss, withdrawal or denial of nationality that was not voluntarily requested by the individual. This includes where a State precludes a person or group from obtaining or retaining a nationality, where nationality is automatically lost by operation of the law, and where acts taken by administrative authorities result in a person being deprived of a nationality.
- 2.2.2. *Deprivation of nationality* also covers situations where there is no formal act by a State but where the practice of its competent authorities clearly shows that they have ceased to consider a person as a national, including where authorities persistently refuse to issue or renew documents, or in cases of confiscation of identity documents and/or expulsion from the territory coupled with a statement by authorities that a person is not considered a national.

2.3. Statelessness

- 2.3.1. The term *stateless person* means a person who is not considered as a national by any State under the operation of its law.
- 2.3.2. Establishing whether a person is considered as a national under the operation of a State's law requires a careful analysis of how the competent

authority of a State applies its nationality laws in an individual's case in practice; it is a mixed question of law and fact.

3. THE RIGHT TO A NATIONALITY

- 3.1. Every person has the right to a nationality.
- 3.2. No one shall be arbitrarily deprived of their nationality nor denied the right to change their nationality.

4. BASIC RULE

- 4.1. States shall not deprive persons of nationality for the purpose of safeguarding national security.
- 4.2. Where a State, in exception to this basic rule, provides for the deprivation of nationality for the purpose of safeguarding national security, the exercise of this exception should be interpreted and applied narrowly, only in situations in which it has been determined by a lawful conviction that meets international fair trial standards, that the person has conducted themselves in a manner seriously prejudicial to the vital interests of the state.
- 4.3. The exercise of this narrow exception to deprive a person of nationality is further limited by other standards of international law. Such limitations include:
 - 4.3.1. The avoidance of statelessness;
 - 4.3.2. The prohibition of discrimination;
 - 4.3.3. The prohibition of arbitrary deprivation of nationality;
 - 4.3.4. The right to a fair trial, remedy and reparation; and
 - 4.3.5. Other obligations and standards set forth in international human rights law, international humanitarian law and international refugee law.
- 4.4. This basic rule also applies to the deprivation of nationality for other purposes, which serve as proxies to the purpose of safeguarding national security, as well proxy measures, which do not amount to deprivation of nationality but are likely to have a similarly adverse impact on individual rights.

5. THE AVOIDANCE OF STATELESSNESS

- 5.1. States must not render any person stateless through deprivation of nationality.
- 5.2. An assessment of whether deprivation of nationality will render a person stateless, is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of deprivation, the individual is considered by the competent authority of any other State, as a national under the operation of its law.

6. THE PROHIBITION OF DISCRIMINATION

- 6.1. A State must not deprive any person or group of persons of their nationality as a result of direct or indirect discrimination in law or practice, on any ground prohibited under international law, including race, colour, sex, language, religion, political or other opinion, national or social origin, ethnicity, property, birth or inheritance, disability, sexual orientation or gender identity, or other real or perceived status, characteristic or affiliation.
- 6.2. Each State is bound by the principle of non-discrimination between its nationals, regardless of whether they acquired nationality at birth or subsequently, and whether they have one or multiple nationalities.

7. THE PROHIBITION OF ARBITRARY DEPRIVATION OF NATIONALITY

7.1. Arbitrary deprivation of nationality

The deprivation of nationality of citizens on national security grounds is presumptively arbitrary. This presumption may only be overridden in circumstances where such deprivation is, at a minimum:

- 7.1.1. Carried out in pursuance of a legitimate purpose;
- 7.1.2. Provided for by law;
- 7.1.3. Necessary;
- 7.1.4. Proportionate; and
- 7.1.5. In accordance with procedural safeguards.

7.2. Legitimate purpose

- 7.2.1. The following, among others, do not constitute legitimate purposes for deprivation of nationality:

- 7.2.1.1. Administering sanction or punishment;
- 7.2.1.2. Facilitating expulsion or preventing entry; or
- 7.2.1.3. Exporting the function and responsibility of administering justice to another State.

7.2.2. Regardless of the stated purpose, any punitive impact incurred by deprivation of nationality is likely to render this measure incompatible with international law.

7.3. Legality

There must be a clear and clearly articulated legal basis for any deprivation of nationality. This requires *inter alia* that:

- 7.3.1. The powers and criteria for deprivation of nationality are provided in law, publicly accessible, clear, precise, comprehensive and predictable in order to guarantee legal certainty;
- 7.3.2. The power to deprive nationality must not be enacted or applied with retroactive effect; and
- 7.3.3. Deprivation of nationality must only be considered lawful if it is carried out by an appropriate and legally vested competent authority whose deprivation powers are clearly established by law.

7.4. Necessity

The deprivation of nationality as a national security measure must be strictly necessary for achieving a legitimate purpose, which is clearly articulated.

7.5. Proportionality

The decision to deprive someone of their nationality must respect the principle of proportionality. This requires that in any case of deprivation:

- 7.5.1. The immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued;
- 7.5.2. The deprivation of nationality is the least intrusive means of achieving the stated legitimate purpose; and

- 7.5.3. The deprivation of nationality is an effective means of achieving the stated legitimate purpose.

7.6. Procedural Safeguards

Any administrative, executive or judicial process to deprive nationality must be in accordance with procedural safeguards under international law, including:

- 7.6.1. Deprivation of nationality for the purpose of national security must never be automatic by operation of the law.
- 7.6.2. The individual concerned must be notified of the intent to deprive nationality prior to the actual decision to do so, to ensure that the person concerned is able to provide facts, arguments and evidence in defence of their case, which are to be taken into account by the relevant authority.
- 7.6.3. Decisions on deprivation of nationality must be individual, as opposed to collective.
- 7.6.4. With regard to the principle of the avoidance of statelessness, the burden of proof in determining that the person concerned holds another nationality must lie with the competent authorities of the depriving state.
- 7.6.5. Individuals must be notified in writing of the decision to deprive nationality and of the reasons underlying the decision. This must be done so in a prompt manner and in a language that they understand.
- 7.6.6. Decisions on the deprivation of nationality must be open to effective judicial review and appeal to a court, in compliance with the right to a fair trial.
- 7.6.7. No person whose nationality has been withdrawn shall be deprived of the right to enter and remain in that country in order to participate in person in legal proceedings related to that decision.

8. THE RIGHTS TO A FAIR TRIAL, EFFECTIVE REMEDY AND REPARATION

- 8.1. Everyone has the right to a fair trial or hearing. In any proceedings concerning the deprivation of nationality, the right to equal access to a competent, independent and impartial judicial body established by law

and to equal treatment before the law must be respected, protected and fulfilled.

- 8.2. Everyone has the right to an effective remedy and reparation. States must provide those who claim to be victims of a violation with equal and effective access to justice and effective remedies and reparation, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

9. FURTHER HUMAN RIGHTS, HUMANITARIAN AND REFUGEE LAW OBLIGATIONS AND STANDARDS

Deprivation of nationality is also limited by other obligations and standards set forth in international human rights law, international humanitarian law and international refugee law.

9.1. The right to enter and remain in one's own country

- 9.1.1. All persons have the right to enter, remain in and return to their own country.
- 9.1.2. States are prohibited from expelling their own nationals.
- 9.1.3. In no situation, including where a person has been deprived of their nationality, may a person be arbitrarily expelled from their own country or denied the right to return to and remain in their own country.
- 9.1.4. The scope of the term “own country” is broader than the term “country of nationality”. It includes a country of former nationality that has arbitrarily deprived the individual of its nationality, regardless of the purpose of the measure and whether or not this deprivation causes statelessness.

9.2. The prohibition of *refoulement*

- 9.2.1. In line with principles of international refugee law, States must not expel or return (*refouler*) any person, including one whom they have stripped of nationality, to a situation in which they face a threat to life or freedom or risk facing persecution, including on the grounds of race, religion, nationality, membership of a particular social group or political opinion.
- 9.2.2. In line with the principles of international human rights law, States must not expel or return (*refouler*) any person, including one whom they have stripped of nationality, to a situation in which they face a real risk of

serious human rights violations, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearances, capital punishment, flagrant denial of justice and the right to liberty, or arbitrary deprivation of life.

9.3. Prohibition against torture and cruel, inhuman or degrading treatment or punishment

- 9.3.1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- 9.3.2. Deprivation of nationality is likely to constitute cruel, inhuman or degrading treatment or punishment, particularly where it results in statelessness.
- 9.3.3. Attempted expulsion consequent to deprivation of nationality is likely to meet the threshold of cruel, inhuman or degrading treatment or punishment when this leads to:
 - 9.3.3.1. arbitrary detention;
 - 9.3.3.2. a violation of the principle of *non-refoulement*; or
 - 9.3.3.3. the forcible separation of families.

9.4. Liberty and security of person

- 9.4.1. Everyone has the right to liberty and security of the person and no one shall be subject to arbitrary arrest or detention.
- 9.4.2. The arbitrary detention of persons who have been deprived of their nationality is prohibited.

9.5. Legal personhood

- 9.5.1. Everyone has the right to recognition everywhere as a person before the law. All persons are equal before the law.
- 9.5.2. It is not permissible for States to deny any person's legal personhood or their equality before the law through the deprivation of nationality and denial of the right to enter and remain in their own country.

9.6. Right to private and family life

- 9.6.1. Everyone has the right to private and family life.

- 9.6.2. This includes the right to live together as a family and not be separated as a result of a family member being deprived of their nationality and subject to detention or expulsion in violation of international law.

9.7. The rights of the child

- 9.7.1. Every child has the right to a nationality. States must protect the child's right to acquire and preserve their nationality and to re-establish their nationality when arbitrarily deprived of it.
- 9.7.2. States are required to treat all persons under the age of 18 in accordance with their rights as children.
- 9.7.3. States must protect the rights of the child and the best interests of the child must be a primary consideration in all proceedings affecting the nationality of children, their parents and other family members.
- 9.7.4. It can never be in the best interest of a child to be made stateless or be deprived of nationality.
- 9.7.5. States must take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

9.8. Derivative deprivation of nationality

The derivative deprivation of nationality is prohibited.

10. DEPRIVATION BY PROXY AND PROXY MEASURES

- 10.1. States must not use powers to deprive nationality for other stated purposes, including fraud, with the ulterior purpose of depriving nationality as a national security measure.
- 10.2. States must not subject persons to proxy measures, which do not amount to deprivation of nationality, but which have a similar impact and implications on human rights, without subjecting such decisions to the same tests and standards set out in these Principles. Such measures may include the withdrawal or refusal to renew passports or other travel documents and the imposition of travel or entry bans.

- 10.3. The measures referred to in section 10.2 may in some circumstances, be considered to constitute deprivation of nationality, particularly when imposed on persons when they are abroad.

11 INTERNATIONAL COOPERATION

- 11.1. States have a duty to cooperate and to act responsibly and in accordance with international law to maintain international peace and security and to promote and encourage respect for human rights and fundamental freedoms.
- 11.2. States must not undermine the principle of reciprocity or commitments to international cooperation, by stripping a person of nationality, expelling a person to a third country or subjecting a person to removal proceedings, thereby exporting the stated security risk to a third country and failing to take responsibility for their own nationals.
- 11.3. States are obligated to take responsibility for their own citizens and to investigate and prosecute crimes and threats to national security through their national criminal justice frameworks in accordance with international standards.

COMMENTARY

TO THE PRINCIPLES ON DEPRIVATION OF NATIONALITY
AS A NATIONAL SECURITY MEASURE

PRINCIPLE 2:

DEFINITIONS

2.1 NATIONALITY

| PRINCIPLE | LEGAL STANDARD |
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| <p>2.1.1. Nationality refers to a legal status of an individual in relation to a State and embodies the legal bond between the individual and State for the purposes of international law.</p> <p>2.1.2. It is for each State to determine who is considered a national according to its law, in compliance with international law standards.</p> <p>2.1.3. For the scope of application and interpretation of the Principles, the terms “nationality” and “citizenship” are synonymous.</p> | <p>1930 Hague Convention, Art. 1:</p> <p>“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”</p> <p>Nottebohm case (ICJ):</p> <p>“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.”</p> |

1. Nationality was defined in the *Nottebohm* case by the International Court of Justice (ICJ) as “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.”² It may be defined as constituting 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.
2. A definition of *nationality* is also contained in Article 2 of the European Convention on Nationality, where the concept is held to mean “the legal bond between a person and a State.” The Explanatory Report to the European Convention on Nationality offers a more detailed explanation, stating that the

² ICJ, *Nottebohm case (second phase)* (1995), ICJ Reports 1955, p. 4, available at: <https://www.icj-cij.org/en/case/18https://www.icj-cij.org/en/case/18>, p. 23.

concept of *nationality* “refers to a specific legal relationship between an individual and a state which is recognized by that state”.³ In the European Convention on Nationality, the terms *nationality* and *citizenship* are synonymous.⁴

3. According to the Inter-American Court of Human Rights, “[n]ationality can be deemed to be the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state”.⁵ Furthermore, the Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa defines nationality as “a legal bond between a person and a state [that] shall not be understood as a reference to ethnic or racial origin”.⁶
4. In some countries, the term ‘nationality’ is used to denote ‘ethnicity’. However, for the purpose of these Principles, nationality is understood in the international law sense of the word, following the definitions above, as this document is about determining state responsibility at the international level. Consequently, nationality does not indicate a person's ethnic origin nor membership of a religious, linguistic, or ethnic group. This is reflected in numerous international instruments, including Article 2 of the ECN,⁷ and the African Draft Protocol mentioned above.
5. The 1954 Convention on the Status of Stateless Persons (1954 Convention) is concerned with ameliorating the negative effect, in terms of dignity and security, of an individual being denied a fundamental relationship and status within the system for human rights protection: that of a nationality. As such, the definition of stateless person in Article 1(1) of the Convention incorporates a concept of national which reflects a formal link, of a political and legal character, between the individual and a particular State. This is distinct from a concept of *nationality* that is concerned with membership of a religious, linguistic or ethnic group. As such, the treaty’s concept of *national* is consistent with the traditional understanding of this term under international law; that is, persons over whom a State considers it has jurisdiction on the basis of nationality, including the right to bring claims against other States for their ill-treatment.⁸ Nationality, by its nature, reflects a linkage between the State and the individual, often on the basis of birth on the territory or descent from a national and this is often evident in the criteria for acquisition of nationality in most

³ Explanatory Report to the European Convention on Nationality (ECN), ETS No. 166 (6 November 1997), available at: <https://rm.coe.int/16800ccde7https://rm.coe.int/16800ccde7>, para. 23.

⁴ Explanatory Report to the ECN, para. 23.

⁵ IACtHR, Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), ILR, vol. 79, p. 284.

⁶ African Union, the Draft Protocol to the African Charter on Human and Peoples’ Rights on [the Specific Aspects of] the Right to a Nationality and the Eradication of Statelessness in Africa (November 2018) <http://citizenshiprightsafrika.org/meeting-of-the-extraordinary-session-of-the-specialised-technical-committee-stc-on-migration-refugees-and-internally-displaced-persons/>.

⁷ European Convention on Nationality (ECN), adopted 6 November 1997, entered into force 1 March 2000, ETS No. 166, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166>, Art. 2.

⁸ UNHCR, ‘Handbook on Protection of Stateless Persons’ (June 2014), para 52.

countries. However, a person can still be a *national* for the purposes of Article 1(1) despite not being born or habitually resident in the State of purported nationality.⁹

6. A person may, as a matter of fact, hold the nationality of a State whether or not they have valid official documents recognising that nationality.
7. According to the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930 Hague Convention): “[i]t is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality”. The ECN repeats the provision of the 1930 Hague Convention in Article 3. Similarly, the Court of Justice of EU (CJEU) has held that “[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.”¹⁰ States provide for different modes of acquisition of nationality, which may include birth on the territory, descent, registration and naturalisation.
8. However, state discretion in nationality matters can be limited by human rights law:

“The development, after the Second World War, of international norms for the protection of human rights gave the rules of international law a greater say in the area of nationality. By virtue of these norms and principles, some of the processes of internal law, such as those leading to statelessness or any type of discrimination, have become questionable at the international level. States are therefore subject to two types of limitations in the area of nationality, the first type relating to the delimitation of competence between States (whose non-compliance with the rules results in the non-enforceability against third States of the nationality thus conferred) and the second, to the obligations associated with the protection of human rights (whose non-observance entails international responsibility).”¹¹

These Principles are addressed holistically to the latter question: they link deprivation of nationality to international state responsibility in the field of human rights law.

9. The view of many international human rights law scholars is that the terms nationality and citizenship can be used interchangeably, because “the label is

⁹ UNHCR, ‘Handbook on Protection of Stateless Persons’ (June 2014), para 54.

¹⁰ CJEU, *Micheletti and Others v Delegación del Gobierno en Cantabria* (1992), Case C-369/90, para 10.

¹¹ ILC, First report on State succession and its impact on the nationality of natural and legal persons submitted by the Special Rapporteur, Mr. Mikulka (A/CN.4/467).

less important than the ability to exercise rights".¹² The Principles therefore consider these terms synonymous.

2.2. DEPRIVATION OF NATIONALITY

| PRINCIPLE | LEGAL STANDARD |
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| <p>2.2.1. <i>Deprivation of nationality refers to any loss, withdrawal or denial of nationality that was not voluntarily requested by the individual. This includes where a State precludes a person or group from obtaining or retaining a nationality, where nationality is automatically lost by operation of the law, and where acts taken by administrative authorities result in a person being deprived of a nationality.</i></p> | <p>A/HRC/13/34 (2009 Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality), para. 23:</p> <p>“While the question of arbitrary deprivation of nationality does not comprise the loss of nationality voluntarily requested by the individual, it covers all other forms of loss of nationality, including those that arbitrarily preclude a person from obtaining or retaining a nationality, particularly on discriminatory grounds, as well as those that automatically deprive a person of a nationality by operation of the law, and those acts taken by administrative authorities that result in a person being arbitrarily deprived of a nationality.”</p> |
| <p>2.2.2. <i>Deprivation of nationality also covers situations where there is no formal act by a State but where the practice of its competent authorities clearly shows that they have ceased to consider a person as a national, including where authorities persistently refuse to issue or renew documents, or in</i></p> | <p>UNHCR Guidelines on Statelessness No. 5 (2020), para. 9:¹³</p> <p>“The prohibition of arbitrary deprivation of nationality also covers situations where there is no formal act by a State but where the practice of its competent authorities shows that they have ceased to consider a particular individual (or group) as a national (or nationals)”</p> |

¹² E.g. A. Edwards, ‘The Meaning of Nationality in International Law in an Era of Human Rights. Procedural and Substantive Aspects’ in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) p. 14: “They argue that while distinction between nationality (international law) and citizenship (municipal law) can be maintained in many contexts, it is also true that there is a close relationship between the two, such that making such a clear distinction is not always necessary or helpful. From a rights perspective, the label is less important than the ability to exercise rights. Such an approach is adopted because [...] ‘[n]ationality has no positive immutable meaning. On the contrary its meaning and import have changed with the changing character of States ... Nationality always connotes, however, membership of some kind in the society of a State or nation.’ Likewise, the substantive content of ‘citizenship’ will depend to a large extent on one’s country of citizenship.”

¹³ UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, May 2020, HCR/GS/20/05, available at: <https://www.refworld.org/docid/5ec5640c4.html>. The Guidelines provide authoritative guidance on the interpretation of Articles 5 – 9 of the 1961 Convention on the Reduction of Statelessness. They draw on the Summary Conclusions of the Expert Meeting on Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation held in Tunis, Tunisia on 31 October-1 November 2013 (“Tunis Conclusions”) and the Expert Meeting on Developments related to Deprivation of Nationality held in Geneva, Switzerland on 5-6 December 2019.

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| <p>cases of confiscation of identity documents and/or expulsion from the territory coupled with a statement by authorities that a person is not considered a national.</p> | |
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- 10.** The terminology with regard to deprivation of nationality varies and includes: loss, withdrawal, denial, and stripping of nationality, as well as imputed renunciation of nationality. For the purpose of these Principles, however, any loss, withdrawal or denial of nationality that does not occur at the explicit initiative of the individual in accordance with formal renunciation procedures is considered to be deprivation of nationality.
- 11.** Deprivation of nationality includes situations in which there is no formal act of the State but in which the practice of the authorities responsible for nationality indicates that they have ceased to consider a particular individual (or group) as a national. This interpretation of deprivation of nationality is rooted in the Tunis Conclusions' interpretation of the 1961 Convention on the Reduction of Statelessness (1961 Convention).¹⁴ This interpretation has been fully adopted in later instruments, such as the UNHCR Guidelines on Statelessness No. 5 (UNHCR Guidelines No 5).¹⁵ It includes, for example, situations in which individuals who were previously documented as nationals are denied all identity documents which prove nationality.¹⁶ In addition, actions by officials that do not have formal legal authorisation, such as confiscation or destruction of identity documents and/or expulsion from the territory, together with statement by authorities that a person is not a national, would also be evidence of withdrawal of nationality.¹⁷ Where a State repeals or restricts with retroactive effect a legislative ground for acquisition of nationality, persons who possessed the nationality of the State concerned may be deemed by the State never to have acquired its nationality. The effect is that these persons are deprived of nationality. The same applies to deprivation of nationality in a concrete case with retroactive effect. Participants of the Expert Meeting for the Tunis Conclusions agreed that this is deprivation rather than non-acquisition of nationality. These situations therefore fall under the Articles 5-8 of the 1961 Convention, a conclusion supported by the *travaux préparatoires*.¹⁸ Similarly, the 2020 UNHCR Guidelines No. 5 on the 1961 Convention state that any legislation relating to the deprivation of nationality should be "in line with the general principle that a person may not be tried for conduct that was not an

¹⁴ UN High Commissioner for Refugees (UNHCR), 'Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality' ("Tunis Conclusions") (March 2014), available at:

<https://www.refworld.org/docid/533a754b4.html><https://www.refworld.org/docid/533a754b4.html>.

¹⁵ UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, ("UNHCR Guidelines No. 5") (May 2020) available at:

<https://www.refworld.org/docid/5ec5640c4.html>, para 9.

¹⁶ UNHCR, 'Tunis Conclusions' (2014).

¹⁷ UNHCR, 'Tunis Conclusions' (2014), para 11.

¹⁸ UNHCR, 'Tunis Conclusions' (2014), para 12 ; see also *Travaux Préparatoires of the 1961 Convention on the Reduction of Statelessness*, available at : https://legal.un.org/diplomaticconferences/1959_statelessness/.

offence at the time the conduct occurred.”¹⁹ The same conclusion is to be drawn in all cases where a State *ex post* claims that the conditions for acquisition were never fulfilled, for example where it is established that the conditions which led to the automatic (*ex lege*) acquisition of the nationality were not satisfied.²⁰

12. The revocation of passports and the imposition of travel or entry bans are not the same as the deprivation of nationality. However, such measures are often implemented together with the measure of deprivation of nationality or may be indicative that the State has ceased to consider an individual as a national, and such decisions should be subject to these Principles. The withdrawal or refusal to renew a passport or other travel document in relation to a person who is currently outside the borders of that State may, in some circumstances, be considered to constitute deprivation of nationality. *On this matter, please also refer to the Commentary on Principle 10 on deprivation by proxy and proxy measures.*

13. The African Court has found that in cases where a State denies or invalidates an individual’s documents proving nationality held from birth the burden of proof lies with the State: “since the Respondent State is contesting the Applicant’s nationality held since his birth on the basis of legal documents established by the Respondent State itself, the burden is on the Respondent State to prove the contrary.”²¹ If the State is refusing to issue nationality documents on the basis that the individual is in fact a national of another state and has in the past or is trying to fraudulently acquire nationality documents to the refusing state, the burden is on the state to produce “concrete evidence to support its assertion that the Applicant has other nationalities.”²²

2.3. STATELESSNESS

| PRINCIPLE | LEGAL STANDARD |
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| <p>2.3.1. The term “stateless person” means a person who is not considered as a national by any State under the operation of its law.</p> | <p>1954 Convention, Art. 1(1): “A stateless person is a person who is not considered as a national by any State under the operation of its law.”</p> |

¹⁹ UNHCR Guidelines No 5 (2020), para 93.

²⁰ UNHCR, ‘Tunis Conclusions’ (2014), para 13.

²¹ ACtHPR, *Anudo v Tanzania* (2018), Application no. 012/2015, para 80, available at: <https://en.african-court.org/index.php/56-pending-cases-details/877-app-no-012-2015-anudo-ochieng-anudo-v-united-republic-of-tanzania-details>; see also ACtHPR, *Robert John Penessis vs United Republic of Tanzania*, Application No 013/2015, Para 92 ff; available at: <https://www.african-court.org/en/images/Cases/Judgment/YJudgement%20in%20the%20Matter%20of%20Robert%20John%20PENESSIS%20Vs%20United%20Republic%20of%20Tanzania%20Delivered%20on%2028%20November%202019%20-%20Optimized.pdf>

²² See ACtHPR, *Robert John Penessis vs United Republic of Tanzania*, Application No 013/2015, para 102.

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| <p>2.3.2. Establishing whether a person is considered as a national under the operation of a State’s law requires a careful analysis of how the competent authority of a State applies its nationality laws in an individual’s case in practice; it is a mixed question of law and fact.</p> | <p>UNHCR Handbook on the Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons (2014), para. 23:</p> <p>“Establishing whether an individual is not considered as a national under the operation of [a State’s] law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status. This is a mixed question of fact and law.”</p> |
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- 14.** The 1954 Convention defines a stateless person in Article 1(1) as “a person who is not considered as a national by any State under the operation of its law.” The definition contained in Article 1(1) of the 1954 Convention has become part of customary international law, according to the International Law Commission (ILC).²³
- 15.** According to the UNHCR Handbook, establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review or appeal decisions that may have had an impact on the individual’s status. Applying this approach of examining an individual’s position in practice may lead to a different conclusion than one derived from a purely formalistic analysis of the application of nationality laws of a country to an individual’s case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to “law” in the definition of statelessness in Article 1(1) therefore covers situations where the written law is not adhered to when it comes to its implementation in practice.²⁴ To establish whether a State considers an individual to be its national, it is necessary to identify which institution(s) is or are the competent authority or authorities for nationality matters in the country with which the individual has relevant links. Competence in this context relates to the authority responsible for conferring or withdrawing nationality from individuals, or for clarifying nationality status where nationality is acquired or withdrawn automatically.²⁵

²³ ILC, *Draft Articles on Diplomatic Protection with Commentaries* (2006), available at: <https://www.refworld.org/docid/525e7929d.html>. On the definition of “stateless person” contained in Article 1(1) of the 1954 Convention, p. 49: “This definition can no doubt be considered as having acquired a customary nature.”

²⁴ UNHCR, ‘Handbook on the Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons’ (2014), available at: <https://www.refworld.org/docid/53b676aa4.html>, para 24. In view of its mandate on statelessness, UNHCR provides authoritative guidance on the Statelessness Conventions. This was acknowledged, for instance, in *Al-Jedda v Secretary of State for the Home Department* (2013) UKSC 62, available at: <https://www.supremecourt.uk/cases/docs/uksc-2012-0129-judgment.pdf> as follows: “The Court of Appeal’s interpretation of section 40(4) comports with the international framework for avoiding statelessness and protecting stateless persons, including authoritative guidance from the United Nations High Commissioner for Refugees (UNHCR), the U.N. agency with a formal mandate to prevent and reduce statelessness and to protect stateless persons globally.”

²⁵ UNHCR, ‘Handbook on Protection of Stateless Persons’ (June 2014), para 27.

- 16.** In determining statelessness, attention should be paid not only to the nationality law of the state, but also to government practice.²⁶
- 17.** Articles 5 to 8 of the 1961 Convention establish a basic rule that an individual should not lose or be deprived of their nationality if that would cause statelessness. Where the 1961 Convention requires that a person shall not lose or be deprived of nationality if this would render them stateless, States are required to examine whether the person possesses another nationality at the time of loss or deprivation, not whether they could acquire a nationality at some future date.²⁷ An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, they cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention. Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have only been partially fulfilled or completed, the individual is still a national for the purposes of the stateless person definition.²⁸ This principle is reflected in the decision of *Al-Jedda v Secretary of State*,²⁹ in which the Court held that a plain reading of the relevant statute and surrounding guidance indicated that the State must look at whether the person holds another nationality at the date of the deprivation order, not whether he could have obtained another nationality and failed to do so.
- 18.** In addition, States must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national. A State cannot avoid its obligations based on its own interpretation of another State's nationality laws which conflicts with the interpretation applied by the other State concerned.³⁰ Where there is an assertion that an individual holds another nationality, this assessment "should be informed by consultations with and written confirmation from the State in question."³¹
- 19.** This was established also in *Stoeck v. Public Trustee* (1921).³² The plaintiff in this case, Max Stoeck, was born in Prussia in 1872 and relinquished his German nationality in 1896. While he permanently settled in England in that same year

²⁶ *Pham v Secretary of State for the Home Department* (2015) UKSC 19(1), available at: <https://www.supremecourt.uk/cases/docs/uksc-2013-0150-judgment.pdf>, para 38.

²⁷ UNHCR, Guidelines No 5 (2020), para 101.

²⁸ UNHCR, 'Handbook on Protection of Stateless Persons' (June 2014), para 50.

²⁹ *Al-Jedda v Secretary of State for the Home Department* (2013) UKSC 62, available at: <https://www.supremecourt.uk/cases/docs/uksc-2012-0129-judgment.pdf>. The UK Secretary of State had argued that it was the failure of the applicant to apply for another nationality, rather than the deprivation order, which left the applicant stateless; the deprivation order itself did not render Al-Jedda stateless because he could have regained Iraqi nationality by application.

³⁰ UNHCR, 'Tunis Conclusions' (2014), para 6.

³¹ UNHCR, Guidelines No 5 (2020), para 81.

³² Chancery Division, *Stoeck v. Public Trustee*, Annotated Law Reports, <http://www.uniset.ca/naty/maternity/19212Ch67.htm>. For a more detailed analysis of the case and its significance, see M.L. Siegelberg, *Statelessness: A Modern History* (Harvard University Press 2020), ch. 1.

and established himself as a businessman, Stoeck never acquired British nationality or made any attempt to do so until war broke out in 1914. Originally from an enemy country and a non-national of Britain, Stoeck sought to obtain British nationality to prevent the internment and loss of his property and personal possessions, which were considered ‘enemy property’. When his request was denied, Stoeck was declared an enemy alien and subject to the confiscation of his property by the Public Trustee. Subsequently, Stoeck brought a case against the Public Trustee before the Chancery Division of the High Court in England, seeking to pursue recognition as a ‘stateless person’ and as such to recover the possessions interned. The Court, asked to determine whether Stoeck could be considered a stateless person, ruled as follows:

“Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person is a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany.”³³

In laying down this ruling, the Court accepted the line of reasoning put forward by Stoeck’s legal representation: given the formal equality of sovereign States under international law and hence the need to mutually recognize the nationality legislation of other States, only the recognition of Stoeck’s status as a ‘stateless person’ would honour Prussia’s sovereign prerogative to dissolve the legal bond of nationality.³⁴ It follows that a determination of statelessness can only be made with sufficient regard for the perception of the relevant person as a (non-)national under foreign law, as this respects the sovereignty of other States to determine that a person is not a national. Indeed, as has been held in a later case, “the question whether or not the person is a national or citizen of the country must be answered in the light of the law of that country, however inequitable, oppressive or objectionable it may be.”³⁵

³³ Ibid, para 82.

³⁴ M.L. Siegelberg, *Statelessness: A Modern History* (Harvard University Press 2020), p. 23

³⁵ J.G. Merrills, ‘One Nationality or Two?’ (1974), *The International and Comparative Law Quarterly*, Vol. 23(1) pp. 143-159, p. 152 (citing the *Oppenheimer v. Cattermole* case).

PRINCIPLE 3:

THE RIGHT TO A NATIONALITY

| PRINCIPLE | LEGAL STANDARD |
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| <p>3.1. Every person has the right to a nationality.</p> <p>3.2. No one shall be arbitrarily deprived of their nationality nor denied the right to change their nationality.</p> | <p>UDHR, Art. 15:</p> <p>“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.”</p> <p>ICCPR, Art. 24(3):</p> <p>“Every child has the right to acquire a nationality.”</p> |

- 20.** International law explicitly provides for the right to nationality as well as the prohibition of arbitrary deprivation of nationality. The right of everyone to a nationality was first stated in Article 15 of the Universal Declaration of Human Rights (UDHR).³⁶ The right of every individual to a nationality, including the right to retain and change nationality has since been enshrined in various international human rights treaties and regional instruments, including: CERD, Art. 5(d)(iii); CEDAW, Art. 9; CRC, Arts. 7 and 8; ACHR, Art. 20; ECN, Art. 4; Arab Charter on Human Rights, Art. 24; Covenant on the Rights of the Child in Islam, Art. 7; ASEAN Human Rights Declaration, para. 18; CIS Convention on Human Rights and Fundamental Freedoms, Art. 24.
- 21.** Although all persons are equal under the law and entitled to human rights, the right to a nationality often acts as an enabling right, and its enjoyment plays a central role in the recognition, protection, fulfilment, and respect of the full range of other human rights.³⁷ Bar some exceptions, e.g. Article 25 and Article 12(1) ICCPR, ICCPR human rights apply ordinarily to everyone – irrespective of nationality or immigration status, without discrimination. As outlined in CEDAW General Recommendation No. 21 on Article 9, “[n]ationality is critical to full participation in society”.³⁸ Similarly, the African regional bodies have repeatedly noted that “[t]he specific right [to legal status] protected under Article 5 of the Charter is [...] the guarantee of an obligation incumbent on every State Party to the Charter to recognize for an individual, a human being, the capacity to enjoy rights and exercise obligations...nationality is an intrinsic component of

³⁶ The UDHR is recognized as part of customary international law. See ACtHPR, *Anudo v Tanzania* (2018), Application no. 012/2015.

³⁷ See HRC, ‘Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/19/43 (2011), available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/43

³⁸ CEDAW, ‘General Recommendation No. 21: Equality in Marriage and Family Relations’ (1994) HRI/GEN/1/Rev.6 (p. 250), para 6.

this right, since it is the legal and socio-political manifestation of the right.”³⁹ For example, without nationality, individuals are deprived of the right to vote or to stand for public office, and they may be denied access to public benefits.

- 22.** The right to nationality exists in close relation to the duty to avoid statelessness; avoidance of statelessness is a “corollary” to the right to a nationality.⁴⁰ The object and purpose of the 1961 Convention is to prevent and reduce statelessness, thereby ensuring every individual’s right to a nationality. International law places some restrictions on each State’s right to establish its own rules related to nationality. These include the prohibition of arbitrariness (see also *Principle 7*), the prohibition of discrimination (see also *Principle 6*) and the avoidance of statelessness (see also *Principle 5*).

PRINCIPLE 4:

BASIC RULE

PRINCIPLE

- 4.1.** States shall not deprive persons of nationality for the purpose of safeguarding national security.
- 4.2.** Where a State, in exception to this basic rule, provides for the deprivation of nationality for the purpose of safeguarding national security, the exercise of this exception should be interpreted and applied narrowly, only in situations in which it has been determined by a lawful conviction that meets international fair trial standards, that the person has conducted themselves in a manner seriously prejudicial to the vital interests of the state.
- 4.3.** The exercise of this narrow exception to deprive a person of nationality is further limited by other standards of international law. Such limitations include:
- 4.3.1.** The avoidance of statelessness;
 - 4.3.2.** The prohibition of discrimination;
 - 4.3.3.** The prohibition of arbitrary deprivation of nationality;
 - 4.3.4.** The right to a fair trial, remedy and reparation; and
 - 4.3.5.** Other obligations and standards set forth in international human rights law, international humanitarian law and international refugee law.
- 4.4.** This basic rule also applies to the deprivation of nationality for other purposes, which serve as proxies to the purpose of safeguarding national

³⁹ ACtHPR, *Robert John Penesis vs United Republic of Tanzania*, Application No 013/2015, Para 89 citing ACHPR *Open Society Justice Initiative v Cote d’Ivoire*, 318/06 (2016).

⁴⁰ UN Human Rights Council (UNHRC), ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), available at: <http://undocs.org/en/A/HRC/25/28><http://undocs.org/en/A/HRC/25/28>, p. 3; see also the commentary on Principle 5 below.

security, as well proxy measures, which do not amount to deprivation of nationality but are likely to have a similarly adverse impact on individual rights.

23. The Principles draw on seven decades of international law, which emerged, as the preamble recalls, from “*our shared world history in which the State’s power to deprive citizens of their nationality has been a precursor to committing the gravest crimes and unimaginable atrocities which deeply shocked the conscience of humanity*”. The Principles and the international law standards that they restate therefore recognise both the deep cost of citizenship deprivation on the individual and on international order. As the Inter-American Commission on Human Rights pointed out in 1977:

“The deprivation of nationality ... always has the effect of leaving a citizen without a land or home of his own, forcing him to take refuge in an alien country. That is, it inevitably impinges on another jurisdiction, and no state may take upon itself the power to adopt measures of this sort. ... [T]he Commission believes that this penalty [is] anachronistic, outlandish and legally unjustifiable.”⁴¹

24. The Basic Rule distils the Principles down to one succinct statement (Principle 4.1), followed by an elaboration on the limitations that apply to any exceptions to this rule (Principles 4.2 and 4.3), as well as the application of the rule to proxy measures (Principle 4.4). It does so by synthesising different international law standards and relating them to each other. The Basic Rule draws on the principle of harmonization: “a generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”.⁴² The Principles encourage a holistic application of international law.

25. In taking this holistic approach, the highest protective standard must always apply. This is because international human rights law is obligatory and not aspirational, setting out a floor or minimum standards to be adhered to, and States are obligated to give effect to their treaty obligations and international customary obligations in good faith (*pacta sunt servanda*).⁴³ If there is inconsistency among different treaties or standards, it is the highest protective standard that should serve as this ‘floor’. This is a standard rule of interpretation in the Principles themselves (see Principle 1.3.1 on interpretation):

“In all circumstances, the Principles should be interpreted in accordance with international human rights law and standards, applying the most favourable provision of protection”.

⁴¹ Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40, Doc 10, 11 February 1977, at. 80-1.

⁴² ILC, ‘Conclusions of the Work of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) 2 Yearbook of the International Law Commission, Part Two, 178; UN Doc A/61/10, para 251.

⁴³ Art 26 Vienna Convention on the Law of Treaties; Human Rights Committee, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) CCPR/C/21/Rev.1/Add.13, para 3.

This is the inevitable consequence of applying overlapping law and standards which are complementary: that which is most protective (of the individual's right to a nationality or a composite of individual human rights interests) will remain applicable.

- 26.** A holistic and purposive analysis and application of international law standards, led the experts involved in drafting the Principles to extract the norm that “states shall not deprive persons of nationality for the purpose of safeguarding national security” (Principle 4.1). Though there is no explicit treaty body or other source, which articulates this norm in the clear terms set out in the Principles, this does not mean that the Principle is establishing a new norm. Rather, the rule simply integrates the cumulative import of relevant international law standards, putting them together and applying them to the context of citizenship deprivation for the (purported) purpose of safeguarding national security.
- 27.** To distil the international law underpinnings of the Basic Rule, it is necessary to refer to the commentary to the other Principles as follows:
- a. *Principle 5* (the avoidance of statelessness),
 - b. *Principle 6* (the prohibition of discrimination),
 - c. *Principle 7* (the prohibition of arbitrary deprivation of nationality),
 - d. *Principle 8* (the rights to fair trial, effective remedy and reparation),
 - e. *Principle 9* (further human rights, humanitarian and refugee law obligations and standards), and
 - f. *Principle 10* (deprivation by proxy and proxy measures).
- 28.** Principle 4.2 recognises that some States do, “in exception to this basic rule, provide for the deprivation of nationality for the purpose of safeguarding national security”. Such State conduct may even be based on a particular interpretation of treaty obligations. There is an international treaty provision for example, which allows for an exception to the general prohibition of deprivation of nationality: if a person has conducted themselves in a manner seriously prejudicial to the vital interests of the State.⁴⁴ Some States interpret this as synonymous with national security. Applying general norms of interpretation, Principle 4.2. goes on to articulate that “the exercise of this exception should be interpreted and applied narrowly”. International law continues to evolve, and as set out above, must be applied in whole, without prejudice. As such, the aforementioned exception concerning conduct that is ‘seriously prejudicial to the vital interests of the State’ must be interpreted and applied narrowly.
- 29.** In accordance with the principle of non-regression and the continuity of obligations under international human rights law,⁴⁵ States should not implement new laws or enter into new treaty provisions which expand State

⁴⁴ Art. 8(3)(a)(ii) 1961 Convention.

⁴⁵ Human Rights Committee, ‘General Comment No. 26: Continuity of Obligations’ (1997) CCPR/C/21/Rev.1/Add.8/Rev.1.

power to deprive a person of nationality for the purpose of safeguarding national security. Furthermore, it would be good practice for States to review any existing treaty or national legal provisions which, in exception to this Basic Rule, are interpreted as allowing the deprivation of nationality for the purpose of safeguarding national security, in order to ensure full compliance with international law. Such a process of review and amendment would be in line with the principle of non-regression and the continuity of obligations under international human rights law.

- 30.** Principle 4.2 also states that the narrow interpretation and implementation of such exceptions should result in nationality deprivation “only in situations in which it has been determined by a lawful conviction that meets international fair trial standards, that the person has conducted themselves in a manner seriously prejudicial to the vital interests of the state.” This provision relates to the right to a fair trial (Principle 8) as well as the prohibition of arbitrariness (Principle 7). It also directly draws on language from Article 8(3) of the 1961 Convention.⁴⁶
- 31.** Further, the legal provisions that set out deprivation powers should not be construed expansively or applied by analogy, so that they are applied in a context which is not manifestly covered by the wording of the provision.
- 32.** As set out in Principle 4.3, “the exercise of this narrow exception to deprive a person of nationality is further limited by other standards of international law”. The relevant Commentary text below elaborates on each of these standards.
- 33.** It is important to note that a number of the human rights which stand to be impinged as a result of citizenship deprivation, are non-derogable rights under international human rights law. Consequently, even in a time of emergency, any contemplation of citizenship deprivation must adhere to the prohibition of arbitrariness (Principle 7), equal protection of the law and the prohibition of discrimination (Principle 6). Further, in no circumstances should such deprivation result in violations of other non-derogable rights under the ICCPR, including the right to life (see Principle 9.2 on *non-refoulement*), freedom from torture, cruel, inhuman or degrading treatment or punishment (see Principles 9.2 and 9.3), and the right to recognition as a person before the law (see Principle 9.5).⁴⁷

⁴⁶ For a more detailed analysis of the relevance and application of this clause, see the commentary on *Principle 5* on the avoidance of statelessness.

⁴⁷ Institute on Statelessness and Inclusion, Open Society Foundations, Asser Institute and Ashurst, “Expert Roundtable on Citizenship stripping as a Security Measure” *Discussion Paper 2: Legal issues and international standards* (June 2018), pp. 5-6.

PRINCIPLE 5:

THE AVOIDANCE OF STATELESSNESS

| PRINCIPLE | LEGAL STANDARD |
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| <p>5.1. States must not render any person stateless through deprivation of nationality.</p> <p>5.2. An assessment of whether deprivation of nationality will render a person stateless, is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of deprivation, the individual is considered by the competent authority of any other State, as a national under the operation of its law.</p> | <p>1961 Convention, Art. 8(1):</p> <p>“A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.”</p> <p>European Convention on Nationality, Art. 4(b):</p> <p>“The rules on nationality of each State Party shall be based on the following principles: [...] statelessness shall be avoided [...]”</p> <p>Report of the UN Secretary-General 2012 (A/HRC/25/28):</p> <p>“As a corollary to this right [to a nationality], States must make every effort to avoid statelessness through legislative, administrative and other measures.”</p> <p>UNHCR Guidelines No. 5 (2020), para 81:</p> <p>“the question relevant to whether an individual will be rendered stateless through withdrawal of nationality is whether the individual <i>currently possesses</i> and has proof of another nationality.”⁴⁸</p> <p>UNHCR Handbook on the Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons (2014), para. 50:</p> <p>“An individual’s nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question.”</p> |

⁴⁸ UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, (“UNHCR Guidelines No. 5”) (May 2020) available at: <https://www.refworld.org/docid/5ec5640c4.html>, para. 5.

34. The duty to avoid statelessness, outlined in *Principle 5.1*, is “a fundamental principle of international law”⁴⁹ and has been acknowledged as an obligation of customary international law.⁵⁰ According to the UN Secretary General’s Guidance Note on the UN and Statelessness, the avoidance of statelessness exists “as a corollary to” the right to nationality itself and “States must make every effort to avoid statelessness through legislative, administrative and other measures”.⁵¹

35. Based on this principle, the International Law Commission recognises that:

*“Neither loss of nationality nor denationalization should lead to statelessness. In the case of denationalization in particular, there is a general obligation not to denationalize a citizen who does not have any other nationality”.*⁵²

Case law, in particular that of regional human rights courts, has affirmed that States’ discretion to set the rules for acquisition and loss of nationality is limited by their “obligation to prevent, avoid and reduce statelessness”⁵³ and that “the power to deprive a person of his or her nationality has to be exercised in accordance with international standards, to avoid the risk of statelessness”.⁵⁴

36. To render a person *stateless* through denationalisation would not accord with the understanding that “States should always be guided by the principle that restrictions on the rights of an individual should not impair the *essence* of the rights”.⁵⁵ To deprive a person of nationality and thereby render them stateless is to deprive the person of the essence of the right to a nationality. It has also been argued that “in so far as deprivation of nationality results in statelessness, it must be regarded as retrogressive”.⁵⁶

37. Article 4(a) ECN stipulates that each State Party’s rules on nationality must be based on the principle that statelessness shall be avoided. Deprivation of

⁴⁹ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), p. 3.

⁵⁰ Explanatory Report to the ECN, para 33.

⁵¹ UN Secretary-General (UNSG), ‘Guidance Note of the Secretary General: The United Nations and Statelessness’ (November 2018), available at: <https://www.refworld.org/pdfid/5c580e507.pdf>, p. 4.

⁵² International Law Commission, ‘Fourth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur’, A/CN.4/594 (24 March 2008) para 29.

⁵³ IACtHR, *Girls Yean and Bosico v Dominican Republic* (2005), Series C No. 130, para 140. See also Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40, Doc 10, 11 February 1977, at. 80-1.

⁵⁴ ACtHPR, *Anudo v Tanzania* (2018), Application no. 012/2015, para 78.

⁵⁵ Global Counterterrorism Forum (GCTF), *Glion Recommendations on the Use of Rule of Law-Based Administrative Measures in a Counterterrorism Context* (25 September 2019), p.2. The Global Counterterrorism Forum (GCTF) is an informal, a-political, multilateral counterterrorism platform working at strengthening the international architecture for addressing terrorism, bringing together states, international and regional organisations, academics and think tanks. See also <https://www.thegctf.org/>. The GCTF Criminal Justice and Rule of Law Working Group (GCTF CJ-ROL Working Group) has developed these Recommendations, which offer guidance to policy makers, law enforcement officials, and other relevant stakeholders for the design, implementation, and monitoring of administrative measures in accordance with applicable domestic law and in full respect of applicable international law.

⁵⁶ R. Y. Jennings and A. Watts, *Oppenheim’s International Law*, 9th edn., (London: Longman 1991), 880 as cited in Guy Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law: More Authority (if it were needed...)’ (5 May 2014) p. 8.

nationality which results in statelessness is likely to be disproportionate and therefore arbitrary. A number of other regional instruments also stipulate the prohibition of arbitrary deprivation of nationality (see also *Principle 3.2* and *Principle 7.1*). Articles 5 through 8 of the 1961 Convention⁵⁷ also forbids the loss of nationality where it causes statelessness. Specifically, Article 7(6) states:

“Except in the circumstances mentioned in this Article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.”

- 38.** The 1961 Convention and the ECN do provide for limited exceptions to this general principle of avoidance of statelessness. Both instruments allow deprivation of nationality to result in statelessness in the specific case of fraudulent acquisition of nationality. However, even in such cases deprivation of nationality must not violate other international law standards, requiring, for instance, that a proportionality test be applied and that deprivation is based on a decision for each person individually (see also *Principles 6-9*).⁵⁸
- 39.** The 1961 Convention also includes a provision on nationality deprivation even if statelessness results, if a person rendered service to another State or conducted him or herself in a manner that is prejudicial to the vital interests of the State.⁵⁹ Contracting States may only retain the power to deprive people of nationality leading to their statelessness if in accordance with the following exceptions: (1) if their law already provided for such deprivation at the moment of accession and, (2) a declaration was made to that effect. Importantly, the “proportional relationship of declarations submitted in relation to the total amount of State Parties has been characterized by a continuous decline since the Convention’s entry into force in 1975”.⁶⁰ As of March 2020, just 16% of State parties to the 1961 Convention had made this declaration, which means that the vast majority of Contracting States have committed to refraining from depriving a person of nationality on this ground if it would lead to statelessness. Moreover, these exceptions employ restrictive language and as exceptions to a general rule they are to be interpreted narrowly.⁶¹

⁵⁷ The discussion of the provisions of the 1961 Convention in this commentary only relates to the specific context of citizenship stripping as a national security measure. For a more general discussion of the provisions on deprivation of nationality of the 1961 Convention, please refer to UNHCR, ‘Tunis Conclusions’ (2014).

⁵⁸ ILEC Guidelines (2015), p. 6, para 4. . ILEC Project, *Guidelines Involuntary Loss of European Citizenship* (“ILEC Guidelines”) (2015), available at: <http://www.ilecproject.eu/sites/default/files/GUIDELINES%20INVOLUNTARY%20LOSS%20OF%20EUROPEAN%20CITIZENSHIP%20.pdf>. The “ILEC project”, led by the University of Maastricht from 2013-2015, culminated in the publication of a set of Guidelines on Involuntary Loss of European Citizenship (ILEC Guidelines). These guidelines offer a useful example for the development of principles relating to arbitrary deprivation of nationality, but relate specifically to the European Union context, drawing on norms, jurisprudence and practices that may not have global applicability.

⁵⁹ Art. 8(3) of the 1961 Convention.

⁶⁰ L. Bucken and R. de Groot, ‘Deprivation of nationality under article 8 (3) of the 1961 Convention on the reduction of statelessness’ (2018), *Maastricht Journal of European and Comparative Law*, Vol. 25(1) pp. 38–51, p. 42.

⁶¹ UNHRC, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’ A/HRC/25/28 (2013), para 12.

- 40.** Developments in human rights law have considerably narrowed further the circumstances in which these exceptions may be applied. In all cases, consideration is to be given to the person’s responsibility for the act(s) which provide the basis for the deprivation as well as the circumstances in which they were committed, in line with the general requirement of proportionality. Further, even States that do invoke this option are restricted by other obligations under international law, as set out in these *Principles*.
- 41.** In order to meet their obligation to ensure that a person shall not lose or be deprived of nationality if this would render them stateless, States are required to examine whether the person possesses another nationality at the time of loss or deprivation, not whether they could acquire a nationality at some future date.⁶² This assessment should not be made on the basis of one State’s interpretation of another State’s nationality law but rather should be informed by consultations with and written confirmation from the State in question.⁶³ In accordance with the general rule that “the responsibility for substantiating a claim lies with the party which advances that claim [...] the burden lies primarily with authorities of a State that is seeking to apply rules for loss or deprivation of nationality to show that the person affected has another nationality”.⁶⁴ The State should demonstrate conclusively that this is indeed the case, for example, by providing an attestation from the other State of nationality that the person concerned is regarded as a national (see further also *Principle 2.3*).

PRINCIPLE 6:

THE PROHIBITION OF DISCRIMINATORY DEPRIVATION OF NATIONALITY

| PRINCIPLE | LEGAL STANDARD |
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| <p>6.1. A State must not deprive any person or group of persons of their nationality as a result of direct or indirect discrimination in law or practice, on any ground prohibited under international law, including race, colour, sex, language, religion, political or other</p> | <p>ICCPR, Art 26:</p> <p>“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or</p> |

⁶² UNHCR, ‘Tunis Conclusions’ (2014), para 5, p. 3.

⁶³ Ibid, p. 6; see also UNHCR Guidelines No. 5 (2020), para 81.

⁶⁴ Ibid, p. 7.

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| <p>opinion, national or social origin, ethnicity, property, birth or inheritance, disability, sexual orientation or gender identity, or other real or perceived status, characteristic or affiliation.</p> <p>6.2. Each State is bound by the principle of non-discrimination between its nationals, regardless of whether they acquired nationality at birth or subsequently, and whether they have one or multiple nationalities.</p> | <p>other opinion, national or social origin, property, birth or other status.”</p> <p>1961 Convention, Art. 9:</p> <p>“A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.”</p> <p>CERD, Art. 5(d)(iii):</p> <p>“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (d) Other civil rights, in particular: [...] (iii) The right to nationality [...].”</p> <p>ECN, Art. 5(1):</p> <p>“The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.”</p> <p>ECN, Art. 5(2):</p> <p>“Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.”</p> <p>ECN, Art. 17(1):</p> <p>“Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party.”</p> <p>UNHCR Guidelines No. 5, para. 77:</p> <p>“Article 9 [of the 1961 Convention] applies irrespective of whether or not statelessness would result from the deprivation.”</p> <p>UNHCR Guidelines No. 5, para. 111:</p> <p>“States should take steps to ensure that the practical effort of withdrawal of nationality is not that certain groups (e.g., ethnic or religious minorities) are disproportionately affected by</p> |
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| | laws and policies on and practices of withdrawal of nationality. Such discriminatory effect on a particular group may be present even when legislation in the State contains strong safeguards against statelessness.” |
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- 42.** The prohibition of discrimination is one of the foundational tenets of international human rights law. UDHR Article 1 declares that “all human beings are born free and equal in dignity and rights” and Article 2 provides that all rights shall be enjoyed without discrimination. The rights to equality and non-discrimination are enshrined in all the core international and regional human rights treaties. Article 2 of the two Covenants (ICCPR⁶⁵ and ICESCR⁶⁶) obligate State parties to ensure that Covenant rights are exercised without any discrimination or distinction of any kind as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.
- 43.** Further, as set out in the table above, Article 26 of the ICCPR protects every person’s equality before the law and prohibits discrimination on any ground. Importantly, Article 26 is autonomous from Article 2. It does not only ensure freedom from discrimination in relation to enjoyment of Convention rights (as Article 2 does), it also “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.⁶⁷ This would include any measures related to the deprivation of nationality.
- 44.** The prohibition of discrimination is also a foundational, guiding principle of the issue-specific international human rights treaties.⁶⁸ As articulated by the Committee on the Elimination of Racial Discrimination, “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights.”⁶⁹ Article 1(3) of the CERD stipulates that “[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality”. Nevertheless, practice has shown that Article 1(3) does not allow for discrimination on any of the grounds identified in Article 1(1) with regards to the right to nationality

⁶⁵ International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

⁶⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

⁶⁷ Human Rights Committee, General Comment 18, para. 12.

⁶⁸ For example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13; Convention on the Elimination of All forms of Racial Discrimination (CERD), adopted 7 March 1966, entered into force 4 January 1969, 660 UNTS 195; Convention on the Rights of Persons with Disabilities (CRPD), entered into force 3 May 2008, 2515 UNTS 3; and Convention on the Rights of the Child (CRC), adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.

⁶⁹ Committee on the Elimination of Racial Discrimination (CERD), ‘General Recommendation XIV on article 1, paragraph 1, of the Convention’, Contained in Document A/48/18 (1993).

under Article 5(d)(iii) of the CERD.⁷⁰ The Committee on the Elimination of Racial Discrimination has also explicitly affirmed that “deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality”.⁷¹

- 45.** Further, primary regional human rights treaties also protect these core rights,⁷² and the Constitutions and laws of most States protect against discrimination while enshrining equality before the law. In addition to these general provisions on discrimination and equality, which must be applied also in relation to deprivation of nationality, a number of international treaties explicitly prohibit the discriminatory deprivation of nationality.⁷³
- 46.** Article 9 of CEDAW specifically sets out that State Parties “shall ensure [...] 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”. Articles 3, 7, and 8 of the CRC read together can be understood to preclude the loss of nationality by a child due to adoption.⁷⁴ The CRPD states in Article 18 that States Parties must ensure that persons with disabilities “have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability.”⁷⁵ Committee on the Elimination of Racial Discrimination has stated that “deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality.”⁷⁶ Similarly, in a resolution on the right to nationality for women and children, the Human Rights Council acknowledged that “the right to nationality is a universal right and that no one may arbitrarily be denied or deprived of nationality, including on discriminatory grounds, such as race, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status” and urged States to “reform nationality laws that discriminate against women”.⁷⁷ In his report on the prohibition of arbitrary deprivation of nationality of the child, the Secretary General states that “where

⁷⁰ Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination* (Oxford University Press, 2016).

⁷¹ Committee on the Elimination of Racial Discrimination, ‘General Recommendation 30 on Discrimination against Non-citizens’ (2004) CERD/C/64/Misc.11/Rev.3, para. 14. See further CERD, Concluding Observations: Lithuania, (2006) CERD/C/LTU/CO/3, para 23; Turkmenistan, (2005) CERD/C/TKM/CO/5, para. 16; Jordan (2012) CERD/C/JOR/CO/13-17, paras. 12-13; Jordan (2017) CERD/C/JOR/CO/18-20, paras 14-15; Dominican Republic (2013) CERD/C/DOM/CO/13-14, paras 18-21.

⁷² The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, entry into force 3 September 1953, ETS 005; the American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36; the African Charter on Human and People’s Rights, 27 June 1981, entry into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; and the ASEAN Human Rights Declaration all have non-discrimination provisions.

⁷³ See UNHCR Guidelines No 5 (2020), para 109; see also UNHCR Tunis Conclusions (2014), para 18.

⁷⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UNTS vol 1577, p 3; see also UNHCR Guidelines No 5 (2020) para 17.

⁷⁵ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution/ adopted by the General Assembly*, 24 January 2007,

⁷⁶ General Recommendation 30, Discrimination against Non-citizens (2004), para 14.

⁷⁷ Human Rights Council, Resolution 20/4 (2012), A/HRC/RES/20/4.

a child is precluded from obtaining a nationality on discriminatory grounds, this amounts to arbitrary deprivation of nationality”.⁷⁸

- 47.** The 2009 Secretary-General’s report on arbitrary deprivation of nationality recalls that “the principle of non-discrimination is a common feature applicable to the context of international human rights instruments”, including in respect to “issues related to nationality”.⁷⁹ Any deprivation of nationality on discriminatory grounds is considered arbitrary for the purposes of international law. This is affirmed across different international conventions, soft law instruments, jurisprudence, and enjoys broad consensus in doctrinal writings. The 2016 resolution of the UN Human Rights Council on this issue provides the following non-exhaustive list of discriminatory grounds in relation to understanding when the deprivation of nationality is arbitrary: “race, colour, sex, language, religion, political or other opinion, national or social origin, propensity, birth, or other status, including disability”.⁸⁰
- 48.** Article 9 of the 1961 Convention prohibits the deprivation of nationality on racial, ethnic, religious or political grounds, irrespective of whether the deprivation would lead to statelessness or not. In other words, the Article 9 prohibition is not subject to the limitations and exceptions set out in Articles 5 – 8 of the Convention (see also the commentary to *Principle 5* above⁸¹). It clearly establishes the principle of non-discrimination as a stand-alone and absolute bar against nationality deprivation in any context.
- 49.** The 1961 Convention explicitly refers to race, ethnicity, religion, and political opinion as prohibited grounds. However, through a purposive reading of the Convention, in line with developments in human rights law, other protected characteristics may also be imputed. As there is no reasonable justification to privilege these four grounds over others – such as gender, disability, and sexual orientation (to name a few) – a human rights based interpretation and application of the Convention will lead to the conclusion that any form of discriminatory deprivation of nationality is to be prohibited. The UNHCR Guidelines No. 5 establish that the list of discriminatory grounds is continuously non-exhaustive and that “Article 9 of the 1961 Convention is complemented by developments in international human rights law”.⁸² Indeed, as set out in the Tunis Conclusions, Article 9 of the 1961 Convention “was designed to give effect to Article 15 of the UDHR and is complemented by provisions of conventions such as the CERD, CEDAW and CRPD”.⁸³ It is instructive that

⁷⁸ Human Rights Council, ‘Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and the existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they would otherwise be stateless: Report of the Secretary-General’, A/HRC/31/29 (2015), para 8.

⁷⁹ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2009), available at: <http://www.refworld.org/docid/4b83a9cb2.html>, paras 18 and 26.

⁸⁰ UN Human Rights Council, A/HRC/RES/32/5 (2016), paras 2 and 4.

⁸¹ As set out in the commentary on *Principle 5* on the avoidance of statelessness, many of these limitations have anyway been surpassed.

⁸² UNHCR Guidelines No. 5 (2020), para 79.

⁸³ UNHCR, ‘Tunis Conclusions’ (2014), paras 70-71.

the outcome of this UNHCR facilitated expert meeting was to connect Article 9, not only with CERD (racial discrimination), but also with CEDAW (gender) and the CRPD (disability) – which protect against discrimination on the basis of characteristics not explicitly mentioned in Article 9.

- 50.** The prohibition on racial discrimination is a peremptory norm of international law⁸⁴ and is an obligation *erga omnes*.⁸⁵ Therefore, States cannot derogate from these obligations—including during times of emergency—without violating international law.⁸⁶
- 51.** It is important to contextualise this customary law prohibition of racial discrimination within the historical use of deprivation of nationality by States. As articulated by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance:

*“historically, citizenship stripping has been a favoured political tool of ethnonationalist governments wishing to isolate, marginalize or exclude certain racial, ethnic, religious, and national groups.”*⁸⁷

- 52.** UN treaty bodies have frequently held that the rights enshrined in treaties are guaranteed to those belonging to national, religious, racial, and ethnic minorities, without discrimination.⁸⁸ Commenting on the centrality of the principle of non-discrimination and the obligations of States in this regard, the UN Human Rights Council has affirmed that:

⁸⁴ Human Rights Committee General Comment No. 29, CCPR/C/21/Rev.1/Add.11, para. 8, 13(c). See also, UN General Assembly, ‘Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur’, A/CN.4/727 (31 January 2019), available at <https://undocs.org/en/A/CN.4/727>.

⁸⁵ Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (5 February), p. 32, para 34.

⁸⁶ Human Rights Committee General Comment No. 29, CCPR/C/21/Rev.1/Add.1, paras 8-9, 13, 15-16. It has also been held that the prohibition of any form of discriminatory treatment, such as based on gender, nationality or birth status, is a peremptory norm, see IACtHR, Advisory Opinion OC-18/03 of 17 September 2003, Juridical Condition and Rights of Undocumented Migrants, para 101.

⁸⁷ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Amicus Brief before the Dutch Immigration and Naturalisation Service’ (23 October 2018), para 9. The Special Rapporteur cites numerous sources in support of this claim:

A/HRC/7/23, paras. 20-27 (in which the then-UN Independent Expert on Minority Issues explains the discriminatory history of citizenship-stripping and denial of citizenship); Lawrence Pruss, International Law and Deprivation of Nationality, 23 GEO. IJ. 250, 274-75 (1934) (concluding that “[l]egislation imposing the loss of nationality as a penalty is primarily dictated by political motives, and is designed to rid the state of citizens whose conduct is deemed inconsistent with their obligations of loyalty to the state, or, more accurately, to the government in power.”). For specific examples, see A/HRC/RES/34/22, para. 5 (calling for Myanmar to review its 1982 Citizenship Law because the law results in human rights deprivations and contributes to “systematic and institutionalized discrimination against members of ethnic and religious minorities”); E/CN.4/RES/1987/14 - (denouncing-Apartheid South Africa’s practices of denationalizing and forcibly removing Black South Africans, and noting that Apartheid denied Black South Africans full citizenship rights); A/HRC/WG.6/12/SYR/3, para. 60-64 (discussing the effects of Syria’s denial of citizenship to its Kurdish minority); CERD/C/SDN/CO/12-16 (noting that Sudan’s citizenship revocation policies discriminated against South Sudanese populations); CCPR/C/NLD/QPR/5, paras. 10-11 (noting that the Netherlands counterterrorism measures, which include revocation of citizenship for certain offenses, may perpetuate discrimination against minority populations).

See also UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’, A/HRC/38/52 (25 April 2018).

⁸⁸ For example, see Human Rights Committee General Comment No. 18; Committee on the Elimination of Racial Discrimination General Recommendations Nos. 22, 23, 25, 27, 29, 30 & 34; Committee on Economic, Social and Cultural Rights General Comment No. 20.

*"racism, racial discrimination, xenophobia and related intolerance condoned by governmental policies violate human rights, as established in the relevant international and regional human rights instruments, and are incompatible with democracy, the rule of law and transparent and accountable governance."*⁸⁹

The Human Rights Council has also urged "governments to summon the necessary political will to take decisive steps to combat racism in all its forms and manifestations."⁹⁰

- 53.** The most comprehensive articulation of the prohibition of racial discrimination can be found in the CERD, which defines racial discrimination as:

*"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*⁹¹

- 54.** Further, the Committee on the Elimination of Racial Discrimination has explained that discrimination on grounds not strictly listed in Article 1(1) of the Convention may still be impermissible. When multiple forms of discrimination are concerned, the Committee adopts an intersectional approach, extending categories of impermissible discrimination if the unlisted ground "appears to exist in combination with a ground or grounds listed in article 1 of the Convention."⁹² For example, although Article 1(1) does not explicitly mention discrimination on the basis of religion, a violation of the Convention may be found where discrimination on religious grounds intersects with other forms of discrimination that are specifically prohibited under Article 1(1).⁹³ In regions where intersectional forms of discrimination have been pervasive, supranational bodies have introduced measures to combat discrimination. For instance, Articles 2 and 3 of the EU's Race Equality Directive prohibits racial and ethnic discrimination in a broad range of public and private sectors.⁹⁴ Measures to combat multiple discrimination have not only been legislative or achieved through litigation, the EU has also pursued proactive measures including mainstreaming policy.⁹⁵

- 55.** Particularly relevant to the area of focus under the *Principles on Deprivation of Nationality*, the Committee on the Elimination of Racial Discrimination has also looked closely at:

⁸⁹ UN Human Rights Council Resolution, 'The Incompatibility between Democracy and Racism' A/HRC/RES/38/19, (6 July 2018).

⁹⁰ UN Human Rights Council, 'From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance' A/HRC/RES/7/33 (28 March 2008).

⁹¹ CERD, Article 1(1).

⁹² Committee on the Elimination of Racial Discrimination General Recommendation No. 32, para 7.

⁹³ Committee on the Elimination of Racial Discrimination General Recommendation No. 32, para 7; P.S.N. v. Denmark (CERD/C/71/D/36/2006), para 6(3).

⁹⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁹⁵ European Commission, "Intersectional discrimination in EU gender equality and non-discrimination law", European Network of Legal Experts on gender equality and non-discrimination, (written by Fredman, S.), 2016, pp. 71-86.

“The potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deportation of non-citizens from a country, as well as legislation that has the effect of penalizing without legitimate grounds certain groups or membership of certain communities. States should seek to eliminate the discriminatory effects of such legislation and in any case to respect the principle of proportionality in its application to persons (belonging to racial, ethnic and other minority groups).”⁹⁶

The Committee also calls upon States to ensure that immigration policies and counter-terrorism measures do not discriminate against on the basis of grounds prohibited under CERD;⁹⁷ and that those belonging to specific racial or ethnic groups do not face harsher punishments if accused of terrorism offences.⁹⁸ As stated by the UN Special Rapporteur, “the same must be true of national origin and descent, as discrimination on both these grounds constitutes prohibited racial discrimination under ICERD.”⁹⁹

- 56.** As set out in the table above, Article 5(d)(iii) of the CERD prohibits nationality deprivation that is discriminatory on the basis of race, colour, national, or ethnic origin. In its general recommendations, the Committee on the Elimination of Racial Discrimination has further reiterated that the deprivation of citizenship on these grounds violates States parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality.¹⁰⁰ The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has therefore concluded that:

“States’ obligations to ensure equality and non-discrimination with regards to the enjoyment of nationality apply with regard to all citizenship deprivation decisions, not only in cases where deprivation of citizenship might result in statelessness.”¹⁰¹

- 57.** The international law prohibition of racial discrimination in relation to citizenship deprivation also relates to the stigmatising effect that such discriminatory policies can have on minority communities. For example, in a country review, the Human Rights Committee asked the Netherlands to justify its policy of nationality deprivation in relation to their likely perpetuation of “stereotypes resulting in discrimination, hostility and stigmatization of certain groups such as Muslims, foreigners and migrants”.¹⁰² As confirmed by the Meijers Committee, dual nationals are typically of a migratory background and

⁹⁶ Committee on the Elimination of Racial Discrimination General Recommendation No. 31, para 4(b).

⁹⁷ Committee on the Elimination of Racial Discrimination General Recommendation No. 30, paras 9-10.

⁹⁸ Committee on the Elimination of Racial Discrimination General Recommendation No. 31, para 34.

⁹⁹ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Amicus Brief before the Dutch Immigration and Naturalisation Service’ (23 October 2018), para 19.

¹⁰⁰ Committee on the Elimination of Racial Discrimination (CERD), ‘General Recommendation No. 30: Discrimination against non-citizens’, HRI/GEN/1/Rev.7/Add.1 (2005), para. 14; CERD, ‘General Recommendation No. 34: Racial discrimination against people of African descent’, CERD/C/GC/34 (2011), para 48.

¹⁰¹ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Amicus Brief before the Dutch Immigration and Naturalisation Service’ (23 October 2018), para 30.

¹⁰² UN Human Rights Committee, ‘List of Issues prior to submission of the fifth periodic report of the Netherlands’ CCPR/C/NLD/QPR/5 (3 May 2017), para 10.

belong to societal groups that are perceived as racial or ethnic ‘others’ in society, meaning that deprivation of their nationality serves as a further exacerbation of their minority status.¹⁰³ States must therefore ensure that their practice of effecting deprivation of citizenship does not further entrench racial discrimination and inequality, including, *inter alia*, by stigmatising racialised and marginalised groups as threats to national security, or by depriving members of racialised and marginalised groups of their nationality at a disproportionate rate.

58. Discrimination on the basis of political or other opinion is also prohibited under international law (1961 Convention, ICCPR Article 2 and 26, for example). Any such discrimination which leads to deprivation of nationality is also prohibited.¹⁰⁴

59. The International Law Commission has established that States do not have an absolute right to decide who their nationals are,¹⁰⁵ and the Human Rights Council has stated in that context “deprivation of nationality, especially on discriminatory grounds [...] constitutes a violation of human rights and fundamental freedoms. The Council further explicitly includes “political or other opinion” in the non-exhaustive list of discriminatory grounds.¹⁰⁶ The UNHCR Guidelines No. 5 state that “in no circumstances should deprivation of nationality be used as a means to delegitimize political points of view that are different from those of the government in power, or to delegitimize [sic] groups holding certain political views.”¹⁰⁷

60. As further set out in the Tunis Conclusions, in relation to Article 9 of the 1961 Convention:

“The line between deprivation on political grounds and deprivation due to conduct inconsistent with the duty of loyalty to the State will not always be clear. However, a consequence of Article 9 is that a State will need to establish that a deprivation decision is not being made on political or other discriminatory grounds. Furthermore, the deprivation must not be based on conduct which is consistent with an individual’s freedom of expression, freedom of assembly or other rights guaranteed under international human rights law.”¹⁰⁸

61. Even in the absence of explicit treaty norms, “the prohibition of arbitrary deprivation of nationality, which aims at protecting the right to retain a nationality, is implicit in provisions of human rights treaties that proscribe specific forms of discrimination”.¹⁰⁹ International jurisprudence confirms this.

¹⁰³ Meijers Committee, ‘Policy brief on differential treatment of citizens with dual or multiple nationality and the prohibition of discrimination’ (2020), p. 22, available at: <https://www.commissie-meijers.nl/en/commentaar/cm2016-policy-brief-differential-treatment-citizens-dual-or-multiple-nationality>.

¹⁰⁴ See UNHCR Guidelines No 5 (2020), para 78.

¹⁰⁵ *Official Records of the General Assembly, Sixty-first Session, Supplement No 10 (A/61/10)*, chap IV, commentary on article 4, para 6.

¹⁰⁶ HRC, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, (2009), A/HRC/13/34, para 22.

¹⁰⁷ (2020), para 78.

¹⁰⁸ UNHCR, ‘Tunis Conclusions’ (2014), paras 70-71.

¹⁰⁹ UN Human Rights Council, A/HRC/13/34 (2009), para. 26.

For instance, in *Open Society Justice Initiative v. Côte d'Ivoire*, the African Commission on Human and Peoples' Rights found a violation of Articles 2 and 3 of the African Charter, which provide for non-discrimination and protect equality before the law.¹¹⁰ This rule is also recognised in *Girls Yean and Bosico v. Dominican Republic* where the IACtHR underlined the prohibition of discrimination regarding access to a nationality;¹¹¹ similarly in *Ivcher-Bronstein v. Peru*, where the court recognised “the right to nationality without making a distinction about the way in which it was acquired, either by birth, naturalization or some other means established in the law of the respective State”.¹¹² Further, discriminatory deprivation of nationality may even amount to persecution in the sense of the 1951 Convention relating to the Status of Refugees.¹¹³

- 62.** Some States differentiate in their law and practice between deprivation of nationality from so-called “mono nationals” (persons with only one citizenship) and individuals with dual or multiple nationalities.¹¹⁴ Some State practice also differentiates between “citizens by birth” and “naturalised citizens”. Such practices dangerously result in two different tiers of citizenship, whereby, for example, someone who has two nationalities, or is a naturalised citizen, is more vulnerable to being deprived of their nationality than someone who has only one citizenship or is a citizen by birth. While such discrimination is purportedly justified on the basis of “protecting against statelessness”, it is important to note that “protection of mono nationals from statelessness cannot be a legal justification or defence for exposing dual nationals to citizenship stripping”.¹¹⁵
- 63.** Such discrimination between different classes of citizen is contrary to the principle of equality before the law and equal protection of the law, enshrined in Article 26 of the ICCPR and a number of other instruments.
- 64.** The jurisprudence and guidance of UN treaty bodies and Special Procedures situates such differential treatment as a form of direct discrimination. For example, the CERD Committee has raised concern about making distinctions between dual and mono-nationals,¹¹⁶ as they “could give rise to discriminatory practices contrary to (CERD)”.¹¹⁷ Further, the Working Group on Arbitrary Detention has held that discrimination against dual nationals “aims towards or can result in ignoring the equality of human beings”.¹¹⁸ The Working Group also concluded that Iran's targeting of dual nationals constitutes direct

¹¹⁰ ACmHPR, *Open Society Justice Initiative v. Côte d'Ivoire* (2015), paras 151 and 156.

¹¹¹ IACtHR, *Girls Yean and Bosico v. Dominican Republic* (2005).

¹¹² IACtHR, *Ivcher-Bronstein v. Peru* (2014), para 90.

¹¹³ See for an in depth discussion, E. Fripp, *Nationality and statelessness in the international law of refugee status* (Hart Publishing 2016); M. Foster and H. Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press 2019).

¹¹⁴ See for an in depth discussion, Meijers Committee, ‘Policy brief on differential treatment of citizens with dual or multiple nationality and the prohibition of discrimination’ (2020), available at: <https://www.commissie-meijers.nl/en/commentaar/cm2016-policy-brief-differential-treatment-citizens-dual-or-multiple-nationality>.

¹¹⁵ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Amicus Brief before the Dutch Immigration and Naturalisation Service’ (23 October 2018), para 40.

¹¹⁶ CERD/C/75/D/42/2008; CERD/C/RWA/CO/18-20.

¹¹⁷ CERD/C/RWA/CO/18-20, paras 8-9.

¹¹⁸ Working Group on Arbitrary Detention opinion No. 49/2017, paras 3(e), 43-45.

discrimination on the basis of "national or social origin".¹¹⁹ As set out by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance:

*“Applying the Working Group’s finding to the citizenship-stripping context mandates that States never use a mono-/dual-citizen distinction, as this distinction prevents dual nationals from enjoying equal treatment before the law and equal enjoyment of their human rights.”*¹²⁰

- 65.** At the European regional level, the ECN specifies that this inequality between nationals is discriminatory, stating that “[e]ach State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently” (Article 5(2)). The European Court of Human Rights has also held that any arbitrary distinctions between those who acquired citizenship through naturalisation and those who acquired citizenship through birth can result in a violation of the prohibition of discrimination under the European Convention on Human Rights.¹²¹
- 66.** *Principles 9.7* (on the rights of the child) and *9.8* (on derivative loss of nationality) together set out international law provisions related to the child’s right to preserve their nationality, and to not be deprived of their nationality as a result of a parent or guardian’s nationality being deprived. The prohibition of discrimination by association is integrated within the general anti-discrimination clause of the CRC (Article 2):

*1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, **irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.***

*2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs **of the child’s parents, legal guardians, or family members.** (Emphasis added)*

Article 8 of the CRC, which protects the child’s right to preserve their nationality, is strengthened by this anti-discrimination provision: that no child should be deprived of their nationality as a result of discrimination by association. Please also refer to the Commentary on *Principles 9.7* and *9.8*. The European Union has also incorporated protection from discrimination by association into its equality law framework. The two landmark CJEU cases are *Coleman v. Attridge Law*¹²² and *CHEZ*¹²³. In *Coleman*, the CJEU found that a

¹¹⁹ Working Group on Arbitrary Detention opinion No. 7/2017, 39-40; opinion No. 49/2017, 43-45; opinion No. 28/2016, paras 45-49.

¹²⁰ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Amicus Brief before the Dutch Immigration and Naturalisation Service’ (23 October 2018), para 38.

¹²¹ ECtHR, *Biao v. Denmark*, App. no. 38590/10.

¹²² CJEU, *S. Coleman v Attridge Law, Steve Law* (2008), Case C-303/06.

¹²³ CJEU, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (2015), Case C83/14.

mother without disability of a child with disability suffered discrimination on ground of disability because the treatment of her employer was contrary to the Employment Equality Directive. In *CHEŽ* it was held that a woman who had lived in an area with a predominantly Roma population, although not Roma herself, had been discriminated against due to racial/ethnic origin contrary to the Race Equality Directive. Please also refer to the commentary on *Principles 9.7 and 9.8*.

PRINCIPLE 7:

THE PROHIBITION OF ARBITRARY
DEPRIVATION OF NATIONALITY

7.1. ARBITRARY DEPRIVATION OF NATIONALITY

| PRINCIPLE | LEGAL STANDARD |
|---|----------------|
| <p>7.1. The deprivation of nationality of citizens on national security grounds is presumptively arbitrary. This presumption may only be overridden in circumstances where such deprivation is, at a minimum:</p> <ul style="list-style-type: none"> 7.1.1. Carried out in pursuance of a legitimate purpose; 7.1.2. Provided for by law; 7.1.3. Necessary; 7.1.4. Proportionate; and 7.1.5. In accordance with procedural safeguards. | |

67. The prohibition of arbitrary deprivation of nationality is set out in Article 15(2) of the UDHR and is subsequently enshrined in different international and regional legal instruments. Article 18(1)(a) of the Convention of the Rights of Persons with Disabilities (CRPD) obliges States Parties to ensure that persons with disabilities “have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability”. Article 9(1) of CEDAW also provides that “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”. Further, alongside Article 7 of CRC setting out a child right to acquire a nationality, Article 8(1) provides that states “undertake to respect the right of the child to preserve his or her identity, including nationality[...] as recognized by law without unlawful interference”. At the regional level, the American Convention on Human Rights (ACHR) includes the same provision as the UDHR in Article

20(3).¹²⁴ Provisions similar to Article 15(2) UDHR are also found in Article 24 of the Arab Charter on Human Rights, Article 18 of the ASEAN Human Rights Declaration, Article 24(2) of the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, and Article 4(c) of the ECN. The UN General Assembly has reiterated the importance of the prohibition of arbitrary deprivation of nationality by noting that it constitutes a “fundamental principle of international law”.¹²⁵ Furthermore, the European Court of Human Rights (ECtHR) has held that arbitrary denial or revocation of citizenship might, in certain circumstances, raise an issue under Article 8 of the ECHR because of the impact of such a denial on the private life of the individual.¹²⁶

- 68.** Deprivation of nationality refers to, as noted in *Principle 2.2*, any loss, withdrawal, or denial of nationality that was not voluntarily and explicitly requested by the individual. In principle, such deprivation will be considered arbitrary, unless several conditions are met. According to a Secretary General Report:

*“deprivation of nationality must meet certain conditions in order to comply with international law, in particular the prohibition of arbitrary deprivation of nationality. These conditions include serving a legitimate purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected.”*¹²⁷

- 69.** Similarly, the African Court on Human and Peoples’ Rights, in the case of *Anudo*, provided the following:

*“International law does not allow, save under very exceptional circumstances, the loss of nationality. The said conditions are: i) they must be founded on clear legal basis; ii) must serve a legitimate purpose that conforms with international law; iii) must be proportionate to the interest protected; iv) must install procedural guarantees which must be respected, allowing the concerned to defend himself before an independent body.”*¹²⁸

- 70.** When assessing whether deprivation of nationality (or denial of nationality) is contrary to Article 8 of the ECHR, the European Court of Human Rights examines: a) whether it was arbitrary, and b) the consequences for the individual:

“In determining arbitrariness, the Court has had regard to whether the revocation was in accordance with the law; whether it was accompanied by the necessary procedural safeguards, including whether the person deprived of citizenship was allowed the opportunity to challenge

¹²⁴ The Inter-American Court of Human Rights has found violations of Article 20(3) ACHR in different cases, e.g. *Iucher-Bronstein v Peru* (2001), Series C No. 74, paras 95-96; *Girls Yean and Bosico v Dominican Republic* (2005), Series C No. 130, para 174; *Gelman v Uruguay* (2011), Series C No. 221, para 128.

¹²⁵ UN General Assembly, Resolution 50/152: Office of the United Nations High Commissioner for Refugees (9 February 1996), para. 16

¹²⁶ eg ECtHR, *Karashev v Finland* (1999), Application no. 31414/96; ECtHR, *Genovese v Malta* (2011), Application no. 53124/09, para 30; ECtHR, *Ramadan v Malta* (2016), Application no. 76136/12, para 85.

¹²⁷ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para 4.

¹²⁸ ACtHPR, *Anudo v Tanzania* (2018), Application no. 012/2015, para 79.

*the decision before courts affording the relevant guarantees; and whether the authorities acted diligently and swiftly.*¹²⁹

- 71.** Considering the above, it is possible to distil five core and interrelated components of the prohibition of arbitrary deprivation: (1) legitimate purpose; (2) firm legal basis; (3) necessity; (4) proportionality; and (5) procedural safeguards. These components are separately discussed in this Section, and a commentary for each of them is provided. It must be noted that the (non-)arbitrariness test is a cumulative one: if a measure or decision falls short in any of these areas it must be understood to be arbitrary. It should further be noted that even if conditions (1) to (5) are satisfied, a deprivation of nationality decision may still be unlawful under international law if a competent authority fails to apply the overarching principles of the avoidance of statelessness and non-discrimination in reaching their decision. On the application or exercise of functions, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has said: “[t]he exercise of such functions and powers may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right.”¹³⁰

7.2. LEGITIMATE PURPOSE

| PRINCIPLE | LEGAL STANDARD |
|---|---|
| <p>7.2.1. The following, among others, do not constitute legitimate purposes for deprivation of nationality:</p> | <p>UDHR, Art. 9: “No one shall be subjected to arbitrary arrest, detention or exile.”</p> |
| <p>7.2.1.1. Administering sanction or punishment;</p> | <p>UDHR, Art. 13(2): “Everyone has the right to leave any country, including his own, and to return to his country.”</p> |
| <p>7.2.1.2. Facilitating expulsion or preventing entry; or</p> | <p>ICCPR, Art. 12(4): “No one shall be arbitrarily deprived of the right to enter his own country.”</p> |
| <p>7.2.1.3. Exporting the function and responsibility of administering justice to another State.</p> | <p>ILC Draft Articles on the Expulsion of Aliens, Art. 8:</p> |
| <p>7.2.2. Regardless of the stated purpose, any punitive impact incurred by deprivation of nationality is</p> | |

¹²⁹ ECtHR, *K2 v United Kingdom* (2017), Application no. 42387/13, para 50. Similar reasoning can be found in consecutive cases, such as *Johansen v Denmark* (2022), Application no. 27801/19.

¹³⁰ UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin : ten areas of best practices in countering terrorism*, 22 December 2010, A/HRC/16/51, available at: <https://www.refworld.org/docid/4e0c2ace15.html> [accessed 16 June 2020].

| | |
|--|--|
| <p>likely to render this measure incompatible with international law.</p> | <p>“A State shall not make its national an alien by deprivation of nationality for the sole purpose of expelling him or her”.</p> <p>UNSC Res. 2178 (2014), para. 4:</p> <p>“Calls upon all Member States, in accordance with their obligations under international law, to cooperate in efforts to address the threat posed by foreign terrorist fighters, [...] and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters”.</p> <p>UNSC Res. 2178 (2014), para. 6:</p> <p>“[...] decides that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense: (a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training [...]”</p> <p>UNSC Res. 1373 (2001), para. 2:</p> <p>“Decides also that all States shall: (...) (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;”</p> |
|--|--|

72. In order to override the presumption that the deprivation of nationality of a citizen on national security grounds is arbitrary, the deprivation must first be carried out in pursuance of a legitimate purpose “that is consistent with international law and, in particular, the objectives of international human rights law”.¹³¹ Deprivation of nationality that does not serve a legitimate aim is

¹³¹ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/13/34 (2009), para. 25.

arbitrary under international law, and therefore prohibited.¹³² In order to assess whether the purpose is legitimate, it has been held that the purpose must be clearly defined.¹³³

73. According to Article 8(1) of the 1961 Convention, a “Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless”. However, in the paragraphs that follow, some exceptions are made in which deprivation of nationality could serve a legitimate purpose. The 1961 Convention allows for deprivation of nationality, resulting in statelessness, in the following cases:

- When nationality is acquired by misrepresentation or fraud (Art. 8(2)(b) 1961 Convention);
- When a citizen acts inconsistently with his duty of loyalty to the Contracting State (Art 8(3)(a) 1961 Convention), which includes rendering services or receiving emoluments from another State in disregard of an express prohibiting by the Contracting State (Art. 8(3)(a)(i) 1961 Convention), or conducts “himself in a manner seriously prejudicial to the vital interests of the State” (Art. 8(3)(a)(ii) 1961 Convention);
- When a “person has taken an oath, or made a formal declaration, of allegiance to another State” or “given definite evidence of his determination to repudiate his allegiance to the Contracting State” (Art. 8(3)(b) 1961 Convention).

Furthermore, the ECN also lists a number of legitimate purposes which could warrant the loss of nationality *ex lege* or at the initiative of a State Party in Article 7(1), which are largely similar to those listed in the 1961 Convention. However, it explicitly states that these should not result in statelessness, with the exception of acquisition of the nationality of a State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant (Art. 7(3) ECN).

74. The Tunis Conclusions, interpreting the 1961 Convention and drawing from the *travaux préparatoires*, clarify that ‘legitimate purpose’ must be narrowly interpreted to mean that:¹³⁴

- Conduct must threaten the foundations and organization of the State whose nationality is at issue;
- The individuals concerned have the capacity to impact negatively the State;
- “Vital interests” sets a considerably higher threshold than “national interests”;
- Criminal offences of a general nature are not covered.

75. The Convention’s provisions on nationality deprivation in the context of loyalty and allegiance to the State are recognized to be mostly outdated. In relation to Article 8(3)(b), the Tunis Conclusions state that “this provision [...] has [...] been largely superseded by later developments in domestic nationality laws

¹³² UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para. 40.

¹³³ Glion Recommendation (2019), p. 9.

¹³⁴ UNHCR, ‘Tunis Conclusions’ (2014), para 68.

which increasingly place less importance on formal allegiance to the State, in particular due to the marked decline in compulsory military service and the increasing acceptance of dual nationality.”¹³⁵

- 76.** However, “depending on the domestic context, certain ‘terrorist acts’ may fall within the scope of Article 8(3)(a)(ii)”. The threshold for this is very high. Denaturalization can only be based on conduct ‘seriously prejudicial to the vital interests of the State’. Attention to a State’s own national security interests alone may be insufficient when deprivation of nationality may affect the national security of another State and “mere membership in a terrorist group or the fact of receiving training from a terrorist group generally does not constitute a terrorist act.”¹³⁶
- 77.** In addition, the Explanatory Report to the ECN explains with regard to “conduct seriously prejudicial to the vital interests of the State Party” that it “[...] 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.”¹³⁷ Below, different purposes for deprivation of nationality that cannot be considered as legitimate are considered in more depth. This is not an exhaustive list.
- 78.** *A Study of Statelessness* by the UN¹³⁸ and the later absence of any language in the 1961 Convention permitting sanction or punishment to be used as a purpose for nationality deprivation indicate that this cannot constitute a legitimate purpose for deprivation of nationality of a citizen.
- 79.** Furthermore, an established principle of human rights law is that restrictions on human rights (in this case, the right to a nationality) are only allowed in certain specified circumstances and/or need to meet certain criteria. Any grounds allowing for deprivation of nationality, as included in the 1961 Convention, must, additionally, be interpreted in light of subsequent developments of international law, which “have considerably narrowed the circumstances in which these exceptions may be applied”.¹³⁹ Indeed, “[n]either the ECN nor the 1961 Convention allow States to deprive a person of nationality in response to ordinary crime.”¹⁴⁰ The Explanatory Report to the ECN emphasizes that this prohibition applies however serious the offence may be.¹⁴¹
- 80.** Deprivation of nationality of a suspected terrorist (or for any suspected criminal offence), without a criminal conviction and the accompanying procedural

¹³⁵ UNHCR, ‘Tunis Conclusions’, (2014), para 69.

¹³⁶ UNHCR, ‘Guidelines No 5’ (2020), paras 64, 66.

¹³⁷ Explanatory Report to the ECN, para 67.

¹³⁸ UN Economic and Social Council, *A Study of Statelessness* (August 1949) UN Docs E/1112; E/1112/Add.1, p.

146: “Deprivation of nationality should not be applied as a punishment”.

¹³⁹ UNHCR, ‘Tunis Conclusions’ (2014), para 53.

¹⁴⁰ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para 20.

¹⁴¹ Explanatory Report to the ECN, para 67.

safeguards of criminal law, violates “basic elements of the rule of law”. The Parliamentary Assembly of the Council of Europe has expressed concern about some of its Member States that allow for deprivation of liberty by way of administrative decisions particularly because such decisions lack procedural safeguards and are mostly made without the knowledge and/or the presence of the person concerned.¹⁴² Deprivation of nationality as a punishment for terrorist acts (or any criminal acts), may also breach the legal principle to ensure that no one is prosecuted twice for the same acts (*ne bis in idem*), where it is imposed in addition to a criminal sentence.¹⁴³

- 81.** Furthermore, the IACtHR has held that nationality is an “inherent attribute” of every person and should never be withdrawn as a punishment or reprisal.¹⁴⁴
- 82.** Arbitrary deprivation of nationality falls within the ambit of Article 8 of the ECHR. Interference with Article 8 rights are exceptionally permitted in a narrow range of circumstances that are strictly applied. Any interference which is too broad would be unjustified and interference which has an ulterior motive to that provided for by Article 8 may violate Article 18 of the ECHR. Article 18 prohibits States from using restrictions permitted under the ECHR rights and freedoms for any purpose other than those for which they have been prescribed. Therefore, if a person is deprived of their nationality for a purpose not permitted by Article 8 it could violate Article 18. Similarly, such an interference may violate Article 5 of the ECHR in conjunction with Article 18. The ECtHR is currently considering applications which engage Article 18, in conjunction with Article 8, due to States allegedly depriving applicants of their nationality in order to silence or punish their human rights activities rather than for a purpose contemplated by Article 8.¹⁴⁵
- 83.** Depriving a national of their nationality, thus making the national an alien, *for the purpose of expelling them*, is not legitimate.¹⁴⁶ This is explicitly affirmed in Article 8 of the Draft Articles on the Expulsion of Aliens, adopted by the International Law Commission in 2014, which provides that: “A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling

¹⁴² CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, available at: <http://website-pace.net/documents/19838/4246196/20181213-PRESS-CITIZENSHIP-EN.pdf>, para 5.

¹⁴³ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013) para 20; CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, para 6. In the specific case of *Ghounid and Others v. France*, the ECtHR found that the principle of *ne bis in idem* had not been violated, see ECtHR, *Ghounid et Autres c. France* (2020), Application no. 52273/16.

¹⁴⁴ Inter-American Commission on Human Rights, ‘Third Report on the Situation of Human Rights in Chile’ (1977) OEA/Ser.L/V/II.40, Chapter 9, para. 10.

¹⁴⁵ For example ECtHR, *Emin Rafik Oglu Huseynov v. Azerbaijan*, Application no. 1/16.

¹⁴⁶ This is widely recognised in early international law scholarship and in discussions at the 1930 League of Nations Hague Conference, as set out in Guy Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014). He cites, among others, Lauterpacht’s work from 1933 which sets out that “The indiscriminate exercise by a State of the right of denationalizing its subjects, when coupled with the refusal to receive them when deported from a foreign country, constitutes an abuse of rights which could hardly be countenanced by an international tribunal”. H. Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933; repr’d 2011), 309 as cited in G. Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014) p. 7.

him or her”.¹⁴⁷ Expulsion of nationals is expressly prohibited in several international and regional human rights instruments, including Article 9¹⁴⁸ and 13(2) of the UDHR and Article 12(4) of the ICCPR.¹⁴⁹ Similarly, depriving nationality of a national while they are abroad, for the purpose of prohibiting them from (re-)entering, is prohibited. Indeed, the Human Rights Committee has held with regard to Article 12(4) ICCPR:

*“In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative, and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.”*¹⁵⁰

The same principle is referred to in the Explanatory Report to Protocol 4 to the ECHR. Even though this principle was not included in the text of Article 3 of Protocol 4, the ECtHR held in *Naumov v. Albania* that: “[...] in some cases the revocation of the citizenship followed by expulsion may raise potential problems under Article 3 of Protocol No. 4 [...]”.¹⁵¹

84. The right of a national “to live in his or her own country is commonly considered an essential element of the relationship between a State and its

¹⁴⁷ These Draft Articles were welcomed by the UN General Assembly in Resolution 69/119 of 10 December 2014 (UN Doc A/RES/69/119). See also the preparatory work of the International Law Commission in which it was agreed that “States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of aliens”. Emphasis added, *Yearbook of the International Law Commission 2008* Volume II Part Two, Chapter VIII, para 171.

¹⁴⁸ Note that deprivation of nationality has been characterised as ‘banishment’ or ‘exile’, e.g. A. Macklin and R. Bauböck (eds), ‘The return of banishment: do the new denationalisation policies weaken citizenship?’ (2015) EU Working Paper RSCAS 2015/14, available at: https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf; A. Macklin, ‘Citizenship revocation and the privilege to have rights’ (December 2014) (Podcast, part of the RSC Michaelmas term 2014 Public Seminar Series) available at: <https://www.rsc.ox.ac.uk/news/citizenship-revocation-and-the-privilege-to-have-rights-professor-audrey-macklin>.

¹⁴⁹ Note that Article 13 ICCPR sets further standards with regard to the expulsion of aliens. See also Article 22 of the Draft articles on the expulsion of aliens adopted by the International Law Commission in 2014 which states that “An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law”; Annex 9 to the Convention on International Civil Aviation that provides in paragraph 5.22 that “A Contracting State shall admit into its territory its nationals who have been deported from another State”; and Article 6 of the *Convención sobre condiciones de los extranjeros* [Convention regarding the status of Aliens in the respective Territories of the Contracting Parties], adopted in Havana on 28 February 1928.

¹⁵⁰ Human Rights Committee, ‘General Comment No. 27: Freedom of movement (article 12)’ (1999) CCPR/C/21/Rev.1/Add.9, para 21.

¹⁵¹ ECtHR, *Naumov v Albania* (2005), Application no. 10513/03, para 5. See also the case of *Hadž Boudellaa et al v Bosnia and Herzegovina* CH/02/8679, 192-3 (Human Rights Chamber of Bosnia and Herzegovina): The Chamber declared denationalisation a violation of the ECHR, Protocol 4, Article 3, if undertaken for the “sole purpose” of expulsion. The Chamber reached this conclusion based on reading the absolute prohibition on the expulsion of nationals in conjunction with Art. 17 ECHR. Otherwise, the Chamber argued, “if States could simply withdraw the citizenship of one of their citizens in order to expel him without being in violation of Article 3 of Protocol No. 4 to the Convention, then the protection of the right enshrined in that provision would be rendered illusory and meaningless”.

nationals”.¹⁵² The duty of a State to (re)admit its own nationals is understood to constitute a “vital means of regulating the coexistence of sovereign entities while also being a necessary corollary thereof”.¹⁵³ It is a duty that the State does not owe to the individuals concerned, but rather “it is an international duty which it owes to its fellow-states”.¹⁵⁴ As such, the principle of non-expulsion of nationals is “indisputable in international law”.¹⁵⁵

For further explanation on the right to enter and remain in one’s own country, please refer to the commentary on *Principle 9.1*.

- 85.** Depriving a person of their nationality for national security reasons may increase national security risks to the host State where that person resides and/or may shift the responsibility for ensuring the proper administration of justice to that State and the international community as a whole. This is contrary to UN Security Council Resolution 2178,¹⁵⁶ as it undermines the principle of international cooperation in combatting terrorism and the State’s obligation to investigate and prosecute terrorist offences.¹⁵⁷

*“[Deprivation of nationality] can also make more difficult or impossible the monitoring and prosecution of [supposed terrorists]. Therefore, States neglect and escape their obligation to investigate and prosecute terrorist offences at the cost of a durable and worldwide security. National security is only protected in the short-term and the main threat is moved abroad, exposing local populations to violations of international human rights and humanitarian law.”*¹⁵⁸

- 86.** Also, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States emphasizes the duty of States to cooperate with each other in accordance with the UN Charter. In particular, “States shall co-operate with other States in the maintenance of international peace of security [...] and] shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all [...]”.¹⁵⁹ If depriving a person of their nationality for national

¹⁵² International Law Commission, ‘Third report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur’, A/CN.4/581 (19 April 2007), para 48.

¹⁵³ Ibid, para 19.

¹⁵⁴ Sir J. F. Williams, ‘Denationalization’ (1927), 8 British Yearbook of International Law 45, 55-6 (emphasis supplied) as cited in G. Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014), available at: <https://www.kaldorcentre.unsw.edu.au/sites/default/files/gsgg%204-deprivationcitizenship-moreauthority.pdf>, p. 4.

¹⁵⁵ A conclusion reached after canvassing treaty law, state practice, jurisprudence and doctrinal writings in International Law Commission, ‘Third report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur’, A/CN.4/581 (19 April 2007), para 39.

¹⁵⁶ UN Doc S/RES/2178 (24 September 2014), paras 4, 6.

¹⁵⁷ cf CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, para 49.

¹⁵⁸ cf CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, para 49. See also, UNSC Res. 1373, para. 2(f), in which the UNSC decided that all states shall “[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts”.

¹⁵⁹ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UNGA Res 26/25 (XXV) (adopted 24 October 1970) UN Doc A/RES/2625(XXV), p. 123.

security reasons increases security risks for the host State or the international community, such depreciation may be contrary to principle of international cooperation as reiterated by *Principle 11*.

87. At the European regional level, the 2005 Council of Europe (CoE) Convention on the Prevention of Terrorism and its Additional Protocol also include the obligation for States Parties to prevent terrorist offences and, “if not prevented, to prosecute and ensure that they are punishable by penalties which take into account their grave nature”.¹⁶⁰ In particular, the Convention demonstrates in Article 14(1)(c) – “when the offence is committed by a national of that Party” - and 14(3) that a State has a responsibility in this regard when it concerns a national of that State or someone who is present in its territory.¹⁶¹ States Parties should therefore prosecute the alleged terrorist instead of depriving a person of nationality and deporting this person or preventing him from re-entering the country. States are under the obligation to prosecute persons suspected of terrorist acts if they have jurisdiction and “the deprivation of nationality on grounds related to terrorism may not serve as a pretext for doing away with the State’s responsibility to prosecute a terrorist”.¹⁶² On international cooperation please also refer to *Principle 11*.

88. Regardless of the stated purpose, the punitive impact of deprivation of nationality renders the measure untenable under international law. Deprivation of nationality renders an individual an alien with regard to their former State of nationality, meaning that they no longer hold the rights they held as nationals. This can cause cumulative human rights violations, with particularly severe consequences if deprivation results in statelessness:¹⁶³

*“Arbitrary deprivation of nationality leads the affected persons to become noncitizens with respect to the State that deprived them of their nationality. Arbitrary deprivation of nationality, therefore, effectively places the affected persons in a more disadvantaged situation concerning the enjoyment of their human rights because some of these rights may be subjected to lawful limitations that otherwise would not apply, but also because these persons are placed in a situation of increased vulnerability to human rights violations.”*¹⁶⁴

Consequential human rights violations therefore indicate that the measure of deprivation of nationality is unreasonably punitive and may be untenable under international law. Whether this is the case is circumstantial. With regard to this,

¹⁶⁰ Preamble to the CoE Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 01 June 2007) CETS No. 196.

¹⁶¹ Article 14 Convention on the Prevention of Terrorism: “1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention: [...] c. when the offence is committed by a national of that Party. [...] 3. Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention in the case where the alleged offender is present in its territory and it does not extradite him or her to a Party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party.”

¹⁶² CoE Bureau of the European Committee on Legal Co-Operation (CDCJ-BU), ‘Nationality issues and the denial of residence in the context of the fight against terrorism. Feasibility study’, CDCJ-BU (2006) 22, available at: <https://rm.coe.int/168070029a>, para 4.4.

¹⁶³ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary General’, A/HRC/25/28 (2013), para 23.

¹⁶⁴ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/19/43 (2011), available at: <https://undocs.org/en/A/HRC/19/43>, para 47.

also refer to *Principle 7.5* on proportionality, as well as to *Principle 9* on further human rights more generally.

7.3. LEGALITY

| PRINCIPLE | LEGAL STANDARD |
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| <p>There must be a clear and clearly articulated legal basis for any deprivation of nationality. This requires <i>inter alia</i> that:</p> <p>7.3.1. The powers and criteria for deprivation of nationality are provided in law, publicly accessible, clear, precise, comprehensive and predictable in order to guarantee legal certainty;</p> <p>7.3.2. The power to deprive nationality must not be enacted or applied with retroactive effect; and</p> <p>7.3.3. Deprivation of nationality must only be considered lawful if it is carried out by an appropriate and legally vested competent authority whose deprivation powers are clearly established by law.</p> | <p>1961 Convention, Art. 8(4):</p> <p>“A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this Article except <u>in accordance with law</u>, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.”</p> |

89. In order for any deprivation of nationality to not to be arbitrary, the measure must be applied in accordance with a clear and clearly articulated legal basis. This principle flows from the general principle of legal certainty and the way in which human rights are normally regulated in international human rights law: such restrictions should, *inter alia*, be provided by law¹⁶⁵ to provide legal certainty with regard to the application of such provisions.

90. According to Article 8(4) of the 1961 Convention, however, a State should not exercise the power of deprivation as permitted in that instrument except in accordance with the law. Deprivation of nationality needs to have “a firm basis in national law” and deprivation provisions must be “predictable”. Furthermore, such provisions “may not be interpreted by analogy (i.e. applied

¹⁶⁵ e.g. Arts. 12(3) and 19(3) ICCPR; Arts. 8-11 ECHR.

to facts which are not evidently covered by the wording of the provisions concerned”¹⁶⁶

- 91.** At the European regional level, the Explanatory Report to the ECN, with regard to arbitrary deprivation of nationality, provides in Article 4(c) that “the deprivation must in general be foreseeable, proportional and prescribed by law” for it not to be arbitrary.¹⁶⁷
- 92.** In the context of Article 8 ECHR, an interference or restriction of this right, for instance by (arbitrary) deprivation of nationality, should be based on a legal norm that is clear, accessible (meaning that it is published or otherwise possible for an individual to have knowledge thereof) and foreseeable (meaning that it enables a person to act in accordance with the law).¹⁶⁸
- 93.** Deprivation of nationality “must have a firm legal basis”, should not be interpreted extensively or applied by analogy and “deprivation-provisions must be predictable”.¹⁶⁹ Furthermore, the 2020 UNHCR Guidelines No. 5 state that “laws that permit deprivation of nationality on the grounds of terrorism should be publicly available and precise enough to enable individuals to understand the scope of impermissible conduct.”¹⁷⁰ The use of administrative measures, which include deprivation of nationality, must be prescribed by law. This law should “be clear, predictable and accessible to the public”.¹⁷¹
- 94.** As with all laws dealing with criminal offences, the power to deprive a person of his nationality must not be enacted or applied with retroactive effect. This is indicated by the provision in Article 8(4) of the 1961 Convention according to the Tunis Conclusions:

“[...] a legal provision regarding loss or deprivation of nationality may not be enacted or applied with retroactivity, nor may a provision regarding the acquisition of nationality be repealed or restricted with retroactivity.

To establish whether a person acquired or had a nationality withdrawn on account of certain acts or circumstances, the legislation which was in force at the moment these acts occurred is to be applied. Where a new ground for loss or deprivation of nationality is introduced in national law, the State must include a transitional provision to avoid an individual losing his or her nationality due to acts or facts which would not have resulted in loss or deprivation of nationality before the introduction of the new ground.”¹⁷²

Similarly:

¹⁶⁶ UNHCR, ‘Tunis Conclusions’ (2014), para 16.

¹⁶⁷ Explanatory Report to the ECN, para 36.

¹⁶⁸ This follows from case law of the European Court of Human Rights, with regard to Article 8 for instance in *Silver and Others v United Kingdom* (1983), Application no. 7136/75 et al, para 86-88; *Lebois v Bulgaria* (2017), Application no. 67482/14, para 66-67.

¹⁶⁹ ILEC Guidelines (2015), Section I.1, I.3, I.7.

¹⁷⁰ para 65.

¹⁷¹ Glion Recommendations (2019), p. 8.

¹⁷² UNHCR, ‘Tunis Conclusions’ (2014), para 16-17.

*“The principle of ‘tempus regit factum’: To establish whether a person acquired or had a nationality withdrawn through certain acts or facts, the legislation has to be applied which was in force at the moment when these acts or facts took place. [...]”*¹⁷³

- 95.** A legal standard on deprivation of nationality may not be enacted with retroactivity (*‘nulla perditio, sine praevia lege’*). States are, however, allowed to retroactively enact laws that restrict deprivation of nationality.
- 96.** States sometimes try to deprive persons of their nationality by applying new laws retroactively. The principle of legal certainty, however, prevents States from using their power to deprive a person of his nationality retroactively.¹⁷⁴
- 97.** The power to deprive a person of his nationality should be with an appropriate and legally vested competent authority, whose powers on this matter are clearly established by law. The authority should be appropriate in the sense that it is suited and possesses sufficient expertise to deal with matters of nationality deprivation and should be at the appropriate level of responsibility. Officials authorised to deprive a person of nationality must be authorised by law. Their functions (and procedures for deprivation of nationality see also *Principle 7.6* on procedural safeguards) must also be clearly established by law.
- 98.** The question of deprivation of nationality in the context of the UK Home Secretary applying a regulation found to be *ultra vires* was raised in the case of *D4 v Secretary of State for the Home Department*. In that case, the UK Court of Appeal examined whether the Home Secretary had the power to dispense of the requirement for written notice to be served in deprivation of nationality proceedings, as set out in s. 40(5) of the British Nationality Act. The Home Secretary argued that it was empowered by Regulation 10(4) of the British Nationality (General) Regulations 2003 (“the Regulations”) to deprive the Respondent of nationality, which took effect after immediately after a private note was placed on her Home Office file. The Home Secretary argued this constituted notice within the meaning of s. 40(5) of the British Nationality Act and was therefore valid. The Court of Appeal, agreed with the lower court that the Regulations were *ultra vires* and therefore Home Secretary did not have the power to deprive the Respondent of nationality, since s. 40(5) of the British Nationality Act requires that written notice to be served in cases involving deprivation of nationality and placing a private note in one’s file could not constitute written notice within the meaning of that section.¹⁷⁵
- 99.** Some further guidance on this is provided by the Tunis Conclusions on Article 8(4) of the 1961 Convention:

“Given the serious criminal nature of many of the acts which give rise to deprivation of nationality, participants underlined that where criminal conduct is alleged, it is strongly

¹⁷³ ILEC Guidelines (2015) I.6.

¹⁷⁴ Dutch Council of State 17 April 2019, ECLI:NL:RVS:2019:990; Dutch Council of State 17 April 2019, ECLI:NL:RVS:2019:1246.

¹⁷⁵ *D4 v The Secretary of State for the Home Department* [2022] EWCA Civ 33.

*advisable that deprivation of nationality only occur following a two-step process, logically beginning with a finding of guilt by a criminal court. A decision by the competent authority (preferably a court) on deprivation of nationality would follow.*¹⁷⁶

100. The importance of a “competent authority” regarding loss of nationality due to undesirable behaviour has been often highlighted. Considering the principle or proportionality, loss of nationality in such circumstances should always occur “by deprivation through means of an explicit decision by competent authorities”.¹⁷⁷

101. Case law of the Inter-American Court of Human Rights pertaining to the prohibition of arbitrary deprivation of nationality in the ACHR¹⁷⁸ provides an example of when the authorities’ lack of competence - and in particular, lack of appropriate decision-making power - leads to arbitrariness in nationality deprivation. In this case of *Ivcher-Bronstein v. Peru*,

“[...] the authorities who annulled Mr. Ivcher’s nationality title did not have competence. [...] Mr. Ivcher Bronstein acquired Peruvian nationality through a “supreme resolution” of the President, and his nationality title was signed by the Minister for Foreign Affairs; however, he lost his nationality as the result of a “directorial resolution” of the Migration and Naturalization Directorate”, which is undoubtedly of a lower rank than the authority that granted the corresponding right [...], and, consequently, could not deprive the act of a superior of its effects. Once again, this demonstrates the arbitrary character of the revocation of Mr. Ivcher’s nationality, in violation of Article 20(3) de the American Convention.”¹⁷⁹

7.4. NECESSITY

| PRINCIPLE | LEGAL STANDARD |
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| <p>The deprivation of nationality as a national security measure must be strictly necessary for achieving a legitimate purpose, which is clearly articulated.</p> | <p>ICCPR, Art. 12(3):</p> <p>“[freedom of movement] shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (<i>ordre public</i>), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”</p> <p>HRC General Comment No. 31, para. 6:</p> <p>“State Parties must refrain from violation of the rights recognized by the Covenant, and</p> |

¹⁷⁶ UNHCR, ‘Tunis Conclusions’ (2014), para 27.

¹⁷⁷ ILEC Guidelines (2015), section IV.3.b See also CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17.

¹⁷⁸ Art. 20(3) ACHR.

¹⁷⁹ IACtHR, *Ivcher-Bronstein v Peru* (2001), Series C No. 74, para 96.

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| | <p>restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”</p> |
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102. In principle deprivation of nationality as a national security measure must be strictly necessary for achieving the stated legitimate purpose.

103. The notion that any restrictions to human rights must be necessary for achieving a legitimate purpose is well articulated in legal instruments at both international and regional level. For instance, the ICCPR¹⁸⁰ and further guidance in a General Comment of the Human Rights Committee (HRC) provide:

“States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”¹⁸¹

104. At the European regional level, the Charter of Fundamental Rights of The European Union provides that limitations to the rights in this Charter “must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.¹⁸²

105. To consider whether a restriction on a right is “necessary”, the test most commonly used is that of “least intrusive” or “least restrictive” means. Indeed, according to the Secretary-General, “[m]easures leading to the deprivation of nationality [...] must be the least intrusive instrument of those that might achieve the desired result, and they must be proportional to the interest to be protected.”¹⁸³ Further, the deprivation of nationality must be the least intrusive means necessary of those that might achieve the desired aim of the State.¹⁸⁴ According to, for instance, the Court of Justice of the European Union (CJEU), this means that “[...] when there is a choice between several appropriate

¹⁸⁰ Art. 12(3) ICCPR; Art. 2(1) ICCPR.

¹⁸¹ Human Rights Committee, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) CCPR/C/21/Rev.1/Add.13.

¹⁸² Art. 52(1) Charter of Fundamental Rights of the EU.

¹⁸³ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/13/34 (2009), para 25.

¹⁸⁴ See UNHCR, ‘Tunis Conclusions’ (2014), para 19, *see also* UNHRC Guidelines No 5 (2020), para 94.

measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”.¹⁸⁵

- 106.** From case law on the ECHR, it follows that interferences with human rights need to be necessary in a democratic society,¹⁸⁶ which entails a slightly different test than the one described above. With regard to Article 8 of the ECHR specifically, the European Court of Human Rights has held that “necessity” entails that “the interference must correspond to a pressing social need, and, in particular, must remain proportionate to the legitimate aim pursued”.¹⁸⁷ In assessing whether an interference was “necessary” it is the duty of the State to demonstrate the existence of the pressing security, social, or economic (and so forth) need behind the interference.¹⁸⁸ Also, it is not just the use of powers in a specific situation that must be necessary, but also the introduction of general measures or new powers.
- 107.** The effectiveness of the framework of administrative measures, including deprivation of nationality, should be monitored and progress towards expected results should be tracked.¹⁸⁹ This indicates that the necessity of nationality deprivation in a national security context should be carefully considered. Furthermore, “States should also consider whether the person still poses a terrorist threat and include any new facts, information or current assessments”,¹⁹⁰ showing that the necessity of a measure must be based on current threat. This is particularly important in the context of nationality deprivation, as this is permanent, whereas administrative measures generally are of a temporary nature.¹⁹¹ This therefore breaches the rule of necessity.
- 108.** Necessity should be taken into account at the policy and decision level. For the purpose of the principle here, also in light of the above, for nationality deprivation to be “strictly necessary”, the State should have fully explored all other (existing), less intrusive options before introducing (new) citizenship stripping powers. The State must consider whether the (new) powers are effective to the stated aim and substantially contribute to that purpose. Also, “necessity” implies that the conduct of the person concerned must create an imminent, ongoing and permanent risk to the vital interests of the State because citizenship deprivation is permanent.

¹⁸⁵ CJEU, *United Kingdom v Commission* (1998), Case C-180/96, para 96.

¹⁸⁶ See, for instance, Art. 8(2) ECHR. Article 8(2) ECHR also lists broad legitimate purposes for interferences with this right: “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

¹⁸⁷ ECtHR, *Piechowicz v Poland* (2012), Application no. 20071/07, para 212.

¹⁸⁸ ECtHR, *Piechowicz v Poland* (2012), Application no. 20071/07, para 212.

¹⁸⁹ Glion Recommendations (2019), p. 13.

¹⁹⁰ Glion Recommendations (2019), p. 12.

¹⁹¹ Glion Recommendations (2019) p. 12: “Generally, administrative measures are temporary measures imposed on an individual”.

7.5. PROPORTIONALITY

| PRINCIPLE | LEGAL STANDARD |
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| <p>The decision to deprive someone of their nationality must respect the principle of proportionality. This requires that in any case of deprivation:</p> <p>7.5.1. The immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued;</p> <p>7.5.2. The deprivation of nationality is the least intrusive means of achieving the stated legitimate purpose; and</p> <p>7.5.3. The deprivation of nationality is an effective means of achieving the stated legitimate purpose.</p> | <p>HRC General Comment No. 27 on Art. 12 ICCPR:</p> <p>“[R]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instruments amongst those, which might achieve the desired result.”</p> <p>UNHCR Guidelines No. 5 (2020), para. 94 ff:</p> <p>“Withdrawal of nationality must always be proportionate to a legitimate aim”</p> <p>Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General, A/HRC/25/28, para. 40:</p> <p>“Even where loss or deprivation of nationality does not lead to statelessness, States must weigh the consequences of loss or deprivation of nationality against the interest it is seeking to protect.”</p> <p>Tunis Conclusions (2013), para. 19:</p> <p>“Deprivation of nationality must be the least intrusive means of those that might achieve the desired result.”</p> <p>Tunis Conclusions (2013), para. 20:</p> <p>“Deprivation of nationality must be proportionate to the interest which the State seeks to protect. This requires a balancing of the impact on the rights of the individual and the interests of the State.”</p> |

109. Deprivation of nationality is arbitrary when it is not proportionate. The consequences of a decision to deprive someone of their nationality must be assessed against the principle of proportionality. Invocation of processes to deprive a person of nationality must never serve to suspend the obligations of the State to respect and protect the human rights of the person who is the object of the deprivation. The direct and indirect human rights impacts on the person(s), their family members, in particular their children, must be taken into account where deprivation of nationality is sought. This requires the State to carry out an individual assessment to determine this. Indeed, the Tunis Conclusions reiterate:

*“Deprivation of nationality must be proportionate to the interest which the State seeks to protect. This requires a balancing of the impact on the rights of individual and the interests of the State.”*¹⁹²

- 110.** Furthermore, the UN Human Rights Council has stated that “loss or deprivation of nationality must meet certain conditions in order to comply with international law, in particular [...] being proportional to the interest to be protected.”¹⁹³ They added that “with any decision to deprive a person of nationality, States have a duty to carefully consider the proportionality of this act [...]”.¹⁹⁴
- 111.** The principle of proportionality should be paramount in all decisions on deprivation of nationality¹⁹⁵ and the consequences of a decision to deprive a person of his nationality should be assessed against it.¹⁹⁶
- 112.** This Principle therefore requires States to carry out an individual assessment to determine, *inter alia*, that the immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued; the deprivation of nationality is the least intrusive means of achieving the stated legitimate purpose; and the deprivation of nationality is an effective means of achieving the stated legitimate purpose.
- 113.** The question of whether the impact of deprivation of nationality on the rights of the individual(s) concerned is proportionate to the legitimate purpose that is pursued by this measure is an important part of the ‘proportionality test’. The Tunis Conclusions provide further guidance in this regard:

*“In assessing the impact on the individual, consideration must be given to the strength of the link of the person with the State in question, including birth in the territory, length of residence, family ties, economic activity as well as linguistic and cultural integration. The time that has passed since the act in question is also relevant for the assessment as to whether the gravity of the act justifies deprivation of nationality. The longer the period elapsed since the conduct, the more serious the conduct required to justify deprivation of nationality. Some States therefore provide for a limitation period in respect to the time elapsed between commission of an act and its discovery by the authorities, and between the discovery and the issuance of the deprivation decision.”*¹⁹⁷

- 114.** A key question in determining the proportionality is “the impact of withdrawal of nationality on the individual’s ability to access and enjoy other human

¹⁹² UNHCR, ‘Tunis Conclusions’ (2014), para 20.

¹⁹³ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013).

¹⁹⁴ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para 10.

¹⁹⁵ ILEC Guidelines (2015), section II.

¹⁹⁶ ILEC Guidelines (2015), section I.10.

¹⁹⁷ UNHCR, ‘Tunis Conclusions’ (2014), para 21.

rights.”¹⁹⁸ Other relevant considerations include whether the person is in possession of another nationality, where this is found to be the case, the impact of the deprivation for the individual concerned, and the impact upon their family, the impact of the loss of the right to reside in the country of which the individual held nationality, as well as rights attached to residence.¹⁹⁹ In this context, deprivation resulting in statelessness would be arbitrary as the impact on the individual outweighs the purpose of the measure pursued by the State.²⁰⁰

115. The proportionality of a measure in the national security context refers to “the assessment of the seriousness of the terrorist threat the individual or entity poses, and the purpose of the measure to curb that terrorist threat as compared to the potential direct and indirect impact the measure will have on the individual or entity and third parties involved, and the limitation of the exercise on relevant human rights”.²⁰¹

116. Furthermore, States must pay attention to a number of elements when applying the principle of proportionality, consequences of the deprivation for the person involved and their family members, with particular regard to whether or not they would lose their residence rights in the country where the person held nationality.²⁰² The risk of consequential violations flowing from decisions to deprive nationality has also been raised by UN human rights experts in commenting on State practice. For instance, in their communication on the case of Fatima H. in the Netherlands, UN mandate holders remarked that:

*“The removal of citizenship status from a family member based on assumptions or claims of radicalisation, extremism or engagement in or support of terrorism and/or the failure to preserve family units affect the fundamental rights of all its members. The burden that a mother’s deprivation of her nationality will inevitably have on her underage children, even if their right to a nationality is not affected, must therefore be a key aspect of the proportionality assessment”.*²⁰³

Also, the proportionality test should be applied individually for each person affected by the deprivation of nationality and special consideration should be given to the status of children, with “best interests of the child” being the guiding principle.²⁰⁴

117. The CJEU has considered proportionality in relation to nationality matters more elaborately in *Janko Rottmann v. Freistaat Bayern*. In this case, the Court

¹⁹⁸ UNHCR Guidelines No 5 (2020), para 94.

¹⁹⁹ See UNHCR, ‘Tunis Conclusions’ (2014), para 22, see also UNHRC Guidelines No 5 (2020), para 95.

²⁰⁰ UNHCR, ‘Tunis Conclusions’ (2014), para 23.

²⁰¹ Glion Recommendations (2019), p. 9.

²⁰² ILEC Guidelines (2015), section II.4.

²⁰³ Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children, Letter to the Netherlands (8 December 2021) UA NLD 4/2021, p. 7. Available at:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26814>.

²⁰⁴ ILEC Guidelines (2015), sections II.5 and II.6.

confirmed that an EU principle of proportionality applies to domestic decisions of EU Member States on the withdrawal of nationality. It explained that it is “for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law”.²⁰⁵ The Court continues:

*“[I]t is necessary [...] to take into account 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. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.”*²⁰⁶

118. In the case of *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*, the CJEU provides further guidance on the principle of proportionality, adding to the explanations in the *Rottmann* case. In case of loss of EU citizenship, the authorities need to carry out a full assessment based on the principle of proportionality enshrined in EU law.

*“That examination requires an individual assessment of the situation of the person concerned and that of his or her family in order to determine whether the consequences of losing the nationality of the Member State concerned, when it entails the loss of his or her citizenship of the Union, might, with regard to the objective pursued by the national legislature, disproportionately affect the normal development of his or her family and professional life from the point of view of EU law. Those consequences cannot be hypothetical or merely a possibility.”*²⁰⁷

The competent national authorities or courts should furthermore ensure, as part of this assessment, that the loss of nationality is consistent with the Charter of Fundamental Rights of the EU, and in particular consistent with the right to respect for family life as stated in Article 7 of the Charter. That article is required to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter.²⁰⁸ Indeed, with regard to minors, the Court states that authorities must also take into account, in the context of their individual examination, possible circumstances from which it is apparent that the loss of nationality by the minor concerned fails to meet the child’s best interests as enshrined in Article 24 of the Charter because of the consequences of that loss for the minor under EU law.²⁰⁹ On the rights of children, please also see *Principle 9.7* below.

²⁰⁵ CJEU, *Janko Rottmann v Freistaat Bayern* (2010), Case C-135/08, para 55.

²⁰⁶ CJEU, *Janko Rottmann v Freistaat Bayern* (2010), Case C-135/08, para 56.

²⁰⁷ CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, para 44.

²⁰⁸ CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, para 45.

²⁰⁹ CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, para 47.

119. In addition to sources mentioned in the Commentary on *Principle 7.4* above, it has been emphasized that “deprivation of nationality must be the least intrusive instrument of those that might achieve the desired result, and [it] must be proportional to the interest to be protected”.²¹⁰ Also, the HRC in General Comment No. 27 on Article 12 ICCPR held that: “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instruments amongst those, which might achieve the desired result”.²¹¹

120. When considering the proportionality of a measure, it should be kept in mind whether the means are rationally connected to the objective of the measure. In particular,

*“the right should be impaired as little as possible to achieve the objective; and there should be proportionality between the deleterious effect on the right and the salutary effects of the measure in furthering its objective. In this respect, it will be important that authorities avoid unacceptably broad application of the measure, an application that places an excessive or unreasonable burden on an individual or entity. Authorities therefore must not destroy the essence of the right in question, and henceforth impair the right as little as possible, as well as to avoid being arbitrary or unfair, or making decisions based on irrational considerations.”*²¹²

121. The principle of proportionality also requires that deprivation of nationality is effective in achieving the stated legitimate purpose: “[a]ccording to the principle of proportionality, a measure must be necessary, effective, as well as proportional to the goal to be achieved”.²¹³ Effectiveness of deprivation of nationality

*“[...] relates to the expected effectiveness of the measure to serve the national security interests or public order interest of the State or community. Both the rights of the individual that might be limited as a result of the implementation of the administrative measure and the interests of the State or community should be considered. The appropriate authority should henceforth justify that the measures taken are necessary to serve the legitimate aim. Authorities should therefore assess the facts available concerning the behavior of the individual and question whether these facts contribute to a serious threat to national security, and subsequently whether the measures taken will effectively curb that threat.”*²¹⁴

²¹⁰ ILEC Guidelines (2015), section I.10.

²¹¹ Human Rights Committee, ‘General Comment No. 27: Freedom of movement (article 12)’ (1999) CCPR/C/21/Rev.1/Add.9, para 14.

²¹² Glion Recommendations (2019), p. 9-10.

²¹³ ILEC Guidelines (2015), section I.10.

²¹⁴ Glion Recommendations (2019), p. 9.

7.6. PROCEDURAL SAFEGUARDS

| PRINCIPLE | LEGAL STANDARD |
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| <p>Any administrative or executive process to deprive nationality must be in accordance with procedural safeguards under international law, including:</p> <p>7.6.1. Deprivation of nationality for the purpose of national security must never be automatic by operation of the law.</p> <p>7.6.2. The individual concerned must be notified of the intent to deprive nationality prior to the actual decision to do so, to ensure that the person concerned is able to provide facts, arguments and evidence in defence of their case, which are to be taken into account by the relevant authority.</p> <p>7.6.3. Decisions on deprivation of nationality must be individual, as opposed to collective.</p> <p>7.6.4. With regard to the principle of the avoidance of statelessness, the burden of proof in determining that the person concerned holds another nationality must lie with the competent authorities of the depriving State.</p> <p>7.6.5. Individuals must be notified in writing of the decision to deprive nationality and of the reasons underlying the decision. This must be done so in a prompt manner and in a language that they understand.</p> <p>7.6.6. Decisions on the deprivation of nationality must be open to effective judicial review and appeal to a court, in</p> | <p>ICCPR, Art. 14(3):</p> <p>“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. [...] (d) To be tried in his presence, [...]”</p> <p>1961 Convention, Art. 9:</p> <p>“A Contracting State may not deprive any person or <u>group of persons</u> of their nationality on racial, ethnic, religious or political grounds.”</p> <p>1961 Convention, Art. 8(4):</p> <p>“A Contracting State shall not exercise a power of deprivation [...] except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.”</p> |

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| <p>compliance with the right to a fair trial.</p> <p>7.6.7. No person whose nationality has been withdrawn shall be deprived of the opportunity to enter and remain in that country in order to participate in person in legal proceedings related to that decision.</p> | |
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- 122.** The Tunis Conclusions state that “procedural safeguards are essential to prevent abuse of the law” and are “derived from the prohibition of arbitrary deprivation of nationality”.²¹⁵ Procedural safeguards to avoid arbitrary deprivation of nationality are necessary regardless of whether the withdrawal of nationality would result in statelessness or not.²¹⁶ As detailed in the Commentary to *Principle 3.2* above, the prohibition on arbitrary deprivation of nationality is included in different international and regional instruments.
- 123.** While a number of international treaties refer to due process obligations in the context of criminal trials, it has been established that these apply to other types of disputes as well. Thus, ‘criminal charges’ under Article 14(3) of the ICCPR “may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity”²¹⁷ and, at regional level, Article 6 ECHR for instance also applies to disciplinary and other proceedings.²¹⁸ These interpretations regarding the severity of the penalty imposed correspond with the recommendations set out in the Tunis Conclusions that deprivation of nationality should only occur following a two-step process, logically beginning with a finding of guilt by a criminal court. A decision by the competent authority (preferably a court) on deprivation of nationality would follow.²¹⁹
- 124.** Deprivation of nationality for the purpose of national security must never be automatic by operation of the law. This follows from the standards and commentary provided in *Principle 7.5*, as these demonstrate that any decision on deprivation of nationality in a national security context requires an individual assessment of the situation of the person concerned and should therefore never be automatic. At EU level, the CJEU has held that loss of nationality under the operation of Member States’ law is possible, but is subject to competent national authorities’ examination, including of national courts where appropriate, of the consequences of the loss of that nationality.²²⁰

²¹⁵ UNHCR, ‘Tunis Conclusions’ (2014), para 25.

²¹⁶ UNHRC Guidelines No 5 (2020), para 97.

²¹⁷ Human Rights Committee, ‘General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial’ (2007) CCPR/C/GC/32, para 15.

²¹⁸ ECtHR, *Marusic v Croatia* (2017), Application no. 79821/12, para 72-73.

²¹⁹ UNHCR, ‘Tunis Conclusions’ (2014), para 27.

²²⁰ CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, para. 48.

- 125.** The individual concerned must be notified of the intent to deprive nationality prior to the actual decision to do so, to ensure that the person concerned is able to provide facts, arguments, and evidence in defence of their case, which are to be taken into account by the relevant authority as a basic feature of due process and in view of Article 14(3) of the ICCPR. Where States would adopt provisions that “could effectively dispense [...] authorities to inform citizens of the decision based on rather vague grounds” could be “contrary to the requirements of due process” and risk breaching “Article 8(4) of the 1961 Convention and Article 14 of the ICCPR”.²²¹ Similarly, a person whose nationality has been withdrawn should not be deprived of the opportunity to enter and remain in that country in order to participate in-person for legal proceedings related to that decision. Indeed, *“[an individual must continue to enjoy nationality until such time as the appeal has been completed. Access to the appeals process may become problematic and related due process guarantees nullified if the loss or deprivation of nationality is not suspended and the former national, now alien, is expelled.”*²²²
- 126.** In line with Article 9 of the 1961 Convention, decisions on deprivation of nationality must be individual, as opposed to collective. In fact, “where withdrawal of nationality is linked to past persecution against a particular group within the society of a State, the State is encouraged to implement a simple, non-discretionary application procedure for individuals from this group to re-acquire nationality.”²²³ Article 9 obliges States not to deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds. As the Tunis Conclusions demonstrate, the decision to deprive persons of their nationality needs to be made individually for each person involved. This is clear from the terms used in Article 8 (“a person”, “the person”) of the 1961 Convention and also from the requirement in paragraph 4 of that Article (“each individual is to be afforded a fair hearing”). Indeed, if two spouses acquired nationality on the basis of one naturalization decree, separate deprivation decisions have to be made for each.²²⁴
- 127.** In view of *Principle 5* above, States have the obligation not to render any person stateless through deprivation of nationality. As such, the obligation is on the competent authorities of the depriving State to ensure and prove that the person concerned holds another nationality. The latter can be practically ensured by the State concerned securing confirmation of nationality from another State.

²²¹ Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls, Letter to Her Excellency Ms. Elizabeth Truss, Secretary of State for Foreign and Commonwealth Affairs (11 February 2022) OL GBR 3/2022, p. 8. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27073>.

²²² Ibid.

²²³ UNHRC Guidelines No 5 (2020), para 108.

²²⁴ UNHCR, ‘Tunis Conclusions’ (2014), para 61.

128. Individuals must be notified in writing of the decision to deprive nationality and of the reasons underlying the decision. This must be done so in a prompt manner and in a language that they understand in keeping with Article 14(3)(a) ICCPR. Similar norms are found in the ECN. According to Article 10 ECN, States must ensure that applications relating to the loss of its nationality are processed within a reasonable time. Furthermore, Article 11 ECN says States need to assure that decisions relating to loss of its nationality contain reasons in writing. Furthermore, the ECtHR has held that States must act “diligently and swiftly” to avoid arbitrariness.²²⁵ All decisions on loss and deprivation of nationality need to be “provided in writing, and have to contain explicit reasons for the deprivation”.²²⁶

129. Article 8(4) of the 1961 Convention provides that States “shall not exercise a power of deprivation [...] except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body”.

*“Accordingly, loss and deprivation of nationality may only take place in accordance with law and accompanied by full procedural guarantees, including the right to a fair hearing by a court or other independent body. It is essential that the decisions of the body concerned be binding on the executive power. The person affected by deprivation of nationality has the right to have the decision issued in writing, including the reasons for the deprivation. Deprivation decisions are only to enter into effect at the moment all judicial remedies have been exhausted.”*²²⁷

130. Such safeguards must apply in all cases of loss and deprivation, including in cases where authorities maintain that a given person never acquired a nationality in the first place.²²⁸ Indeed:

*“It must be possible to challenge the application of loss-provisions or acts of deprivation in court. Violations of the right to a nationality must be open to an effective remedy, before a court bound to observe minimum procedural standards. [...] All decisions relating to the loss or deprivation of nationality should be open to judicial review, i.e. access to an independent judge leading to a reasoned decision [...]”*²²⁹

131. Similarly, Article 12 ECN provides that every State must ensure that decisions on loss of nationality are open to an administrative or judicial review in conformity with its internal law.

132. In order for the person facing denationalization to have a fair proceeding, they need access to all the relevant information and documents related to their denationalization. In *McGinley and Egan v. The United Kingdom*, the ECtHR found that where the State, without good cause, prevents appellants from gaining access to documents in its possession that would have assisted in the defence of

²²⁵ ECtHR, *K2 v United Kingdom* (2017), Application no. 42387/13, para 50.

²²⁶ ILEC Guidelines (2015), section III.1.

²²⁷ UNHCR, ‘Tunis Conclusions’ (2014), para 26.

²²⁸ ILEC Guidelines (2015), section III.

²²⁹ ILEC Guidelines (2015), sections I.9 and III.1.

their case, it would have the effect of denying them a fair hearing under Article 6(1) ECHR.²³⁰

133. Furthermore, the right to bring action or to lodge an appeal under international law must arise from the moment the parties effectively become aware of a legal decision imposing an obligation on them or potentially harming their legitimate rights and interests.²³¹ Thus, a person who has been deprived of his nationality must be promptly informed of this and given the opportunity to challenge the denationalization. The burden on ensuring that the litigants are appraised of relevant proceedings lies with the domestic authorities.²³² The UK cases of *D4* and *Begum* provide further context and interpretation to the obligations to notify the individual of the decision to deprive and the right to fair trial; and the right to enter and remain in a country in order to participate in person in legal proceedings. Please refer to *Principle 7.3 above* on the *D4* case and the obligation to notify and to *Principle 8 below* for the *Begum* case and the right to a fair trial.

134. Also, a resolution of the Parliamentary Assembly of the Council of Europe (PACE) has expressed concern that the decision to withdraw nationality can be made without criminal conviction and any appeal to such administrative decisions without the procedural safeguards of criminal law and mostly without the knowledge and/or presence of the person concerned violate basic elements of the rule of law.²³³ For more information about fair trial, please also refer to *Principle 8 below*.

PRINCIPLE 8:

THE RIGHTS TO A FAIR TRIAL,
EFFECTIVE REMEDY AND REPARATION

| PRINCIPLE | LEGAL STANDARD |
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| <p>8.1. Everyone has the right to a fair trial or hearing. In any proceedings concerning the deprivation of nationality, the right to equal access to a competent, independent and impartial judicial body established by law and to</p> | <p>UDHR, Art. 10: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”</p> |

²³⁰ ECtHR, *Mcginley and Egan v United Kingdom* (1998), Applications nos. 21825/93 and 23414/94, paras 86 and 90.

²³¹ See e.g. ECtHR, *Miragall Escolano and Others v Spain* (2000), Application no. 38366/97 et al., para 37.

²³² See ECtHR, *Schmidt v Latvia* (2017), Application no. 22493/05. The applicant had not been informed of divorce proceedings and the Court emphasized that given what was at stake in the proceedings, special diligence had been required on the authorities' part to ensure that the right of access to a court was respected.

²³³ CoE PACE Resolution 2263 (2019).

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| <p>equal treatment before the law must be respected, protected and fulfilled.</p> | <p>ICCPR, Art. 14(1):</p> <p>“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”</p> |
| <p>8.2. Everyone has the right to an effective remedy and reparation. States must provide those who claim to be victims of a violation with equal and effective access to justice and effective remedies and reparation, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.</p> | <p>UDHR, Art. 8:</p> <p>“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”</p> <p>ICCPR, Art. 2(3):</p> <p>“Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”</p> <p>HRC General Comment No. 31, paras. 15 to 19:</p> <p>“Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children [...] 16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6,</p> |

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| | <p>the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations [...] 18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6) [...] 19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.”</p> |
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135. The right to a fair trial, or its constituent elements, is a fundamental principle of international law, and is reflected in human rights instruments such as CEDAW (Article 15), CRC (Article 40), the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, Article 18), the Convention for the Protection of All Persons from Enforced Disappearance (CED, Article 11(3)), CRPD (Article 13), the African Charter on Human and Peoples’ Rights (ACHPR, Article 7), the African Charter on the Rights and Welfare of the Child (ACRWC, Article 17(c)), the ACHR (Articles 8-9, and 24), the American Declaration on the Rights and Duties of Man (Articles 18 and 26), the Arab Charter on Human Rights (Articles 11-13), and the Charter of Fundamental Rights of the EU (Article 47). It is well established that this international legal right includes the rights to qualified legal counsel of one’s choice, legal representation and assistance, and legal aid. These constituent elements are often the most critical safeguards in the context of any person deprived of their nationality.²³⁴

²³⁴ Human Rights Committee, ‘General Comment No. 32’ (2007) CCPR/C/GC/32, paras. 10 and 23.

- 136.** The right to a fair trial is composed of various other guarantees and rights. Among those rights are the right to equality before the courts and tribunals and that of equal access to them, as is set out in *Principle 8.1*. The right to equality before courts and tribunals contains within it the requirement that parties involved in the proceedings in question are treated without discrimination. This right to non-discrimination also extends to the right of access to the courts, indicating that no-one shall be limited in their ability to claim justice. Furthermore, this right of access is not restricted to the citizens of the State in question, but rather extends to all individuals under the jurisdiction of the State. As such, persons who have been deprived of their nationality by the State should not be denied access to justice on the basis that they are not (any longer) a national of that State. It must be noted from the outset that the right of access to justice applies regardless of whether the decision to deprive the person of their nationality was taken administratively or following a criminal conviction.
- 137.** Article 14(1) of the ICCPR establishes that “all persons shall be equal before the courts and tribunals”, which applies equally to criminal and non-criminal cases. This guarantee is contained in other international instruments, such as the UDHR and the ECHR. With regard to deprivation of nationality, this would be relevant only if deprivation of nationality were based on a criminal conviction. Yet, the Human Rights Committee confirmed in its General Comment No. 32 that “the notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity” thus clarifying its application to non-criminal cases.²³⁵ General Comment No. 32 provides important detail on the scope of application of Article 14 (1) confirming that “[t]he right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party”.²³⁶ It also confirms that

*The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant [...] The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party. In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.*²³⁷

²³⁵ Human Rights Committee, ‘General Comment No. 32’ (2007) CCPR/C/GC/32, para 15.

²³⁶ Human Rights Committee, ‘General Comment No. 32’ (2007) CCPR/C/GC/32, para 9.

²³⁷ Human Rights Committee, ‘General Comment No. 32’ (2007) CCPR/C/GC/32, para 13.

- 138.** In addition to this, the right to a fair trial guarantees the person concerned the right to “a fair public hearing by a competent, independent and impartial tribunal established by law”.²³⁸
- 139.** As mentioned in the Commentary on *Principle 7.6*, because deprivation of nationality has an inherent penal nature, and its consequences are particularly severe and permanent, the right to a public hearing must also extend to measures of deprivation – even if these measures should never be used as punishment and even where they are administrative and do not follow a prior criminal conviction. The right to a fair trial also entails that everyone is entitled to certain minimum procedural guarantees without discrimination.²³⁹ Some of these were already discussed under *Principle 7.6* and include, for instance, the right for any affected person to be informed promptly and in detail in a familiar language of the nature and cause of the charges against them.²⁴⁰
- 140.** Any person deprived of their nationality must be able “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.²⁴¹ This contains three distinct guarantees. First, everyone has the right to be present during the proceedings in order to defend themselves. According to the HRC, this provision

*“[...] requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3(d) [ICCPR] if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.”*²⁴²

- 141.** The right to be present during the proceedings has been subject to regular violation. In the Netherlands, for instance, a person deprived of their nationality on national security grounds is automatically declared an undesirable alien and thereby prevented from return to the Netherlands to appeal the decision.²⁴³ Similarly, Shamima Begum, whose British nationality was deprived after joining Islamic State, has been denied multiple requests to return to the UK to attend her appeal proceedings. While the UK Court of Appeal ruled in 2020 that Ms. Begum’s presence in the proceedings constituted a prerequisite for the fulfilment of the right to a fair trial²⁴⁴, this was

²³⁸ Art. 14(1) ICCPR.

²³⁹ Art. 14(3) ICCPR.

²⁴⁰ Art. 14(3)(a) ICCPR.

²⁴¹ Art. 14(3)(d) ICCPR, see also Art. 6(3)(c) ECHR.

²⁴² Human Rights Committee, ‘General Comment No. 32’ (2007) CCPR/C/GC/32, para 36.

²⁴³ Institute on Statelessness and Inclusion (2020). Deprivation of nationality as a national security measure: An assessment of the compliance of the Netherlands with international human rights standards (Expert Report) (p. 23). Available at: https://files.institutesi.org/Deprivation_of_nationality_under_Dutch_law_and_practice.pdf

²⁴⁴ UK Court of Appeal (16 July 2020). On Appeal from the Special Immigration Appeals Commission (T2/2020/ 0644) (sitting also as a Divisional Court in CO/798/2020) (T3/2020/0708) and the Administrative Court (T3/2020/0645). Available at: <https://www.judiciary.uk/judgments/shamima-begum-v-sshd/> (para 121).

subsequently overruled by the UK Supreme Court in early 2021²⁴⁵. The preceding examples demonstrate that notwithstanding the well-established procedural principle that protects the right of the accused to be present during his or her proceedings, current State practice continues to violate this right, underscoring the need for better adherence to the procedural standards, especially in instances of deprivation of nationality. Furthermore, the right to enter and remain in one's own country – see *Principle 9.1* – may be of relevance to considerations regarding the possibility to return to appeal against a decision to deprive.

142. Second, the person concerned has the right to be assisted by a lawyer if they desire. Third, if the person is unable to afford legal assistance, but nevertheless wishes to be represented by a lawyer, they shall be granted legal aid. Once a decision has been taken, the person concerned has the right to “have access to a duly reasoned, written judgment of the trial court,” clearly stating the reasons underlying the decisions taken.²⁴⁶ According to the HRC, as expressed in General Comment No. 32, this right must be respected in order for the person concerned to effectively exercise their right to have the decision taken by a judicial body, or a relevant administrative body, “reviewed by a higher tribunal according to law”.²⁴⁷ Finally, everyone has the right not to be “tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.²⁴⁸ This last guarantee is of fundamental importance in cases of deprivation of nationality, as such measures must always be considered to constitute ‘punishment’ for this purpose.²⁴⁹

143. The right to a fair trial is complemented by the right to an effective remedy and reparation where appropriate. The right to an effective remedy is further set out in, for instance, the CERD (Article 6), the ACHR (Article 10), the ECHR (Article 13) the Arab Charter on Human Rights (Article 12), and the Charter of Fundamental Rights of the European Union (Article 47). At the UN level, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by General Assembly Resolution, is the normative authority for States making available adequate, effective, prompt and appropriate remedies, including reparation, for violations of international human rights law.²⁵⁰

²⁴⁵ UK Supreme Court (26 February, 2021). *R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant)*. Available at <https://www.supremecourt.uk/cases/uksc-2020-0157.html> (para 94, 135).

²⁴⁶ Human Rights Committee, ‘General Comment No. 32’ (2007) CCPR/C/GC/32, para 49.

²⁴⁷ Art. 14(5) ICCPR.

²⁴⁸ Art. 14(7) ICCPR.

²⁴⁹ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para 20; CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, para 6.

²⁵⁰ The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005.

144. This right has two distinct elements. First, everyone whose right to a fair trial has been violated should be remedied for this violation. In addition to this, anyone who has had their nationality revoked contrary to international (human rights) law, shall also have the right to an effective remedy and reparation. Alongside, paragraphs 15 to 19 of the HRC’s General Comment No. 31, this was confirmed by the UN General Assembly, which urged States, particularly in the counter-terrorism context, to

*“ensure that any person who alleges that his or her human rights or fundamental freedoms have been violated has access to a fair procedure for seeking full, effective and enforceable remedy within a reasonable time and that, where such violations have been established, victims receive an adequate, effective and prompt remedy, which should include, as appropriate, restitution, compensation, rehabilitation and guarantees of non-recurrence”.*²⁵¹

145. The right to an effective remedy includes the right to appeal with suspensive effect. Indeed,

*“[w]here a person is subject to loss or deprivation of nationality and a review process is available, lodging an appeal should suspend the effects of the decision, such that the individual continues to enjoy nationality — and related rights — until such time as the appeal has been settled. Access to the appeals process may become problematic and related due process guarantees nullified if the loss or deprivation of nationality is not suspended and the former national, now alien, is expelled.”*²⁵²

PRINCIPLE 9:

FURTHER HUMAN RIGHTS, HUMANITARIAN AND
REFUGEE LAW OBLIGATIONS AND STANDARDS

PRINCIPLE

Deprivation of nationality is also limited by other obligations and standards set forth in international human rights law, international humanitarian law and international refugee law.

146. Where deprivation of nationality would directly lead to a violation of one of the rights below, in particular where it concerns non-derogable rights, it is arbitrary and therefore prohibited.

²⁵¹ UNGA Res 72/180 (10 December 2017), UN Doc A/RES/72/180, pp. 5.

²⁵² UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary General’, A/HRC/25/28 (2013), para. 33.

9.1. THE RIGHT TO ENTER AND REMAIN IN ONE'S OWN COUNTRY

| PRINCIPLE | LEGAL STANDARD |
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| <p>9.1.1. All persons have the right to enter, remain in and return to their own country.</p> <p>9.1.2. States are prohibited from expelling their own nationals.</p> <p>9.1.3. In no situation, including where a person has been deprived of their nationality, may a person be arbitrarily expelled from their own country or denied the right to return to and remain in their own country.</p> <p>9.1.4. The scope of the term “own country” is broader than the term “country of nationality”. It includes a country of former nationality that has arbitrarily deprived the individual of its nationality, regardless of the purpose of the measure and whether or not this deprivation causes statelessness.</p> | <p>UDHR, Art. 13(2): “Everyone has the right to leave any country, including his own, and to return to his country.”</p> <p>UDHR, Art. 9: “No one shall be subjected to arbitrary arrest, detention or exile.”</p> <p>ICCPR, Art. 12(4): “No one shall be arbitrarily deprived of the right to enter his own country.”</p> <p>ICCPR, Art. 12(4): “No one shall be arbitrarily deprived of the right to enter his own country.”</p> <p>American Convention on Human Rights, Art. 22(5): “No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.”</p> <p>Protocol No. 4 to the ECHR, Art. 3: “No one shall be expelled, by means either of an individual or a collective measure, from the territory of the State of which he is a national. No one shall be arbitrarily deprived of the right to enter the territory of the State of which he is a national.”</p> <p>Arab Charter on Human Rights, Art. 27(2): “No one shall be expelled from his country or prevented from returning thereto.”</p> <p>HRC General Comment No. 27, para. 20: “The scope of ‘his own country’ is broader than the concept ‘country of his nationality’. It 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</p> |

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| | <p>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.”</p> <p>ILC Draft Articles on the Expulsion of Aliens, Art. 8:</p> <p>“A State shall not make its national an alien by deprivation of nationality for the sole purpose of expelling him or her”.</p> |
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147. In addition to the international (human rights) law standards mentioned above, the principle on the right to enter and remain in one’s own country also clearly reflects other international and regional laws including Article 5(d)(iii) CERD, Article 10(2) CRC, Article 8(2) CMW, Article 18(1)(c) CRPD, Article 3 of Protocol 4 ECHR, Article 22(5) ACHR, Article 8 of the American Declaration on the Rights and Duties of Man, Article 27(2) of the Arab Charter on Human Rights, Article 12(2) ACHPR, and HRC General Comment No. 27, para. 19.

148. A reciprocal duty to admit nationals exists between States, meaning also that States should not expel nationals. Authoritative guidance on the definition of ‘expulsion’ is provided by the International Law Commission in its Draft Articles on the Expulsion of Aliens, holding that it means “a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State.”²⁵³ The prohibition of States to expel nationals is “a firmly established rule of international law.”²⁵⁴ This duty is derivative from the obligation to admit nationals who have been expelled from a third country,²⁵⁵ which, in turn, derives from the right of States under international law to expel aliens.

*“The expulsion of nationals forces other States to admit aliens, but, according to the accepted principles of international law, the admission of aliens is in the discretion of each State. [...] It follows that the expulsion of a national may only be carried out with the consent of the State to whose territory he is to be expelled, and that the State of nationality is under a duty towards other States to receive its nationals back on its territory.”*²⁵⁶

²⁵³ Art. 2(a) ILC, *Draft Articles on the Expulsion of Aliens* (2014).

²⁵⁴ L. Sohn and T. Buergenthal, ‘The Movement of Persons Across Borders’ ASIL Studies in Transnational Legal Policy No. 23 (1992), p. 85.

²⁵⁵ Article 6 of the Inter-American Convention on the Status of Aliens (adopted 20 February 1928, entered into force 3 September 1929) 46 Stat. 2753; Treaty Series 815, provides that “States are required to receive their nationals expelled from foreign soil who seek to enter their territory.” Available at: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0710.pdf>.

²⁵⁶ P. Weis, *Nationality and Statelessness in International Law* (Sijthoff & Noordhoff 1979, 2nd ed), p. 45-46.

- 149.** Depriving a national of their nationality, thus making the national an alien, for the purpose of expelling them, is not legitimate.²⁵⁷ This is explicitly affirmed in Article 8 of the Draft Articles on the Expulsion of Aliens, adopted by the International Law Commission in 2014, which provides that: “A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her”.²⁵⁸
- 150.** Furthermore, the prohibition is also related to the right of individuals to enter and remain in their own country.²⁵⁹ It was stated by the HRC in General Comment No. 27 that “liberty of movement is an indispensable condition for the free development of a person”.²⁶⁰ As such, it is every person’s prerogative to enter, remain in, and return to their own country, regardless of whether or not they have been stripped of their nationality. Under no circumstance may a person be arbitrarily deprived of their right to enter, return and remain in their own country. Most importantly, this right implies that States are not permitted under international law to, by depriving a person of their nationality, violate their right to remain in their own country or prevent them from returning to their own country. In General Comment No. 27, the HRC stated that “a State Party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country”.²⁶¹ This means that by depriving a person of their nationality and expelling them as a result, a State is, by definition, arbitrarily denying that person the right to return and remain in their own country, amounting to a violation of international law. This is further articulated by Article 8 of the ILC Draft Articles on the Expulsion of Aliens, which provides that “a State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her”.
- 151.** The rights contained in this Principle can be exercised even by those who have been deprived of a nationality, as is in line with the definition of ‘one’s own country’. The concept of ‘one’s own country’ is not synonymous with the concept of ‘one’s country of nationality’, but rather is broader in scope. According to the HRC, “it embraces, at the very least, an individual who,

²⁵⁷ This is widely recognised in early international law scholarship and in discussions at the 1930 League of Nations Hague Conference, as set out in Guy Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014). He cites, among others, Lauterpacht’s work from 1933 which sets out that “The indiscriminate exercise by a State of the right of denationalizing its subjects, when coupled with the refusal to receive them when deported from a foreign country, constitutes an abuse of rights which could hardly be countenanced by an international tribunal”. H. Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933; repr’d 2011), 309 as cited in G. Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014) p. 7.

²⁵⁸ These Draft Articles were welcomed by the UN General Assembly in Resolution 69/119 of 10 December 2014 (UN Doc A/RES/69/119). See also the preparatory work of the International Law Commission in which it was agreed that “States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of aliens”. Emphasis added, *Yearbook of the International Law Commission 2008* Volume II Part Two, Chapter VIII, para 171.

²⁵⁹ On the existing framework of corollary and related rights, see J.-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff Publishers 1995) p. 79, as well as L. Sohn and T. Buergenthal, ‘The Movement of Persons Across Borders’ ASIL Studies in Transnational Legal Policy No. 23 (1992), pp. 85-86.

²⁶⁰ Human Rights Committee, ‘General Comment No. 27: Freedom of movement (article 12)’ (1999) CCPR/C/21/Rev.1/Add.9, para 1.

²⁶¹ Human Rights Committee, ‘General Comment No. 27’ (1999) CCPR/C/21/Rev.1/Add.9, para 21.

because of his or her special ties to or claims in relation to a given country, cannot be considered a mere alien”.²⁶² This means that the concept also applies to nationals who have been stripped of their nationality, as they can have special ties to the country whose nationality they have been deprived of. According to the HRC in *Nystrom v. Australia*:

*“[...] there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words ‘his own country’ invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.”*²⁶³

152. The UN Special Rapporteur further belaboured this point in her Amicus Brief in the Shamima Begum case, where she articulated

*“Significantly in the context of these proceedings, it must be appreciated that the right to return is a self-standing fundamental right, distinct from the right not to be arbitrarily deprived of citizenship. As such, the right to return cannot be presumed to be automatically extinguished through ‘de-nationalisation’. It, too, must be respected.”*²⁶⁴

In accordance with this *Principle*, dual nationals should not be expelled from ‘their own country’. If they are deprived of the nationality of the country which is ‘their own country’ due to ‘close and enduring connections’ they should nonetheless retain the right to enter and remain in that country in accordance with this *Principle*.

²⁶² Human Rights Committee, ‘General Comment No. 27’ (1999) CCPR/C/21/Rev.1/Add.9, para. 20.

²⁶³ Human Rights Committee, *Nystrom v Australia*, Communication no. 1557/2007 (18 July 2011) CCPR/C/102/D/1557/2007, para. 7.4.

²⁶⁴ UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while combatting terrorism, ‘Amicus Brief before the UK Supreme Court’ (26 October 2020), para. 18(2).

9.2. THE PROHIBITION OF REFOULEMENT

| PRINCIPLE | LEGAL STANDARD |
|---|--|
| <p>9.2.1. In line with principles of international refugee law, States must not expel or return (“refouler”) any person, including one whom they have stripped of nationality, to a situation in which they face a threat to life or freedom or risk facing persecution, including on the grounds of race, religion, nationality, membership of a particular social group or political opinion.</p> <p>9.2.2. In line with the principles of international human rights law, States must not expel or return (“refouler”) any person, including one whom they have stripped of nationality, to a situation in which they face a real risk of serious human rights violations, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearances, capital punishment, flagrant denial of justice and the right to liberty, or arbitrary deprivation of life.</p> | <p>1951 Refugee Convention, Art. 33(1):</p> <p>“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”</p> <p>CAT, Art. 3(1):</p> <p>“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”</p> <p>CED, Art. 16(1):</p> <p>1. “No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.</p> <p>2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.”</p> |

153. The prohibition of *refoulement* constitutes customary international law. According to UNHCR:

“Within the framework of the 1951 Convention/1967 Protocol, the principle of non-refoulement constitutes an essential and non-derogable component of international refugee protection. The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. The fundamental and non-derogable character of the principle of non-refoulement has also been reaffirmed by the Executive Committee of UNHCR in numerous

*Conclusions since 1977. Similarly, the General Assembly has called upon States “to respect the fundamental principle of non-refoulement, which is not subject to derogation.”*²⁶⁵

- 154.** The non-derogable nature of this principle is also affirmed in human rights law context in Article 2(2) CAT, which provides that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”²⁶⁶ The CED contains a similar Article 16(1), stating that “no State Party shall expel, return (“*refouler*”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance”. The HRC has interpreted Article 7 of the ICCPR on the prohibition of torture to include exposing individuals to the danger thereto by way of their extradition, expulsion, or *refoulement*.²⁶⁷
- 155.** In addition to the international human rights instruments above, protection from *refoulement* is also included in several regional refugee law instruments, including Art. 8(2) of the Arab Convention on Regulating Status of Refugees in the Arab Countries, Art. II(3) of the OAU Convention Governing Specific Aspects of Refugee Problems in Africa; and Art. 3 of the Bangkok Principles on the Status and Treatment of Refugees. It has also been reflected in instruments such as Conclusion 5 of the Cartagena Declaration on Refugees.
- 156.** In addition to the international human rights instruments above, protection from *refoulement* is also included in several regional human rights law instruments, including Article 13(4) of the Inter-American Convention to Prevent and Punish Torture, Article 22(8) ACHR, and Article 19(2) of the Charter of Fundamental Rights of the EU.
- 157.** The Committee Against Torture has stated in 2018 that

*“each State party must apply the principle of non-refoulement in any territory under its jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to any person, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law.”*²⁶⁸

The Committee also held that anyone at risk of torture should be allowed to remain in the territory as long as this risk persists. Furthermore, the person

²⁶⁵ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Geneva, 26 January 2007, <https://www.unhcr.org/4d9486929.pdf>, para 12.

²⁶⁶ UN Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’ A/HRC/22/44 (December 2012), on Deliberation No. 9 (p. 16), para 51.

²⁶⁷ Human Rights Committee, ‘General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)’ (1992) HRI/GEN/1/Rev.9 (Vol. I, p. 200), para 9.

²⁶⁸ CAT, ‘General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22’ (2017) CAT/C/GC/4, para 10.

concerned should not be detained “without proper legal justification and safeguards.”²⁶⁹

158. Furthermore, according to the OHCHR:

*“The prohibition of refoulement under international human rights law applies to any form of removal or transfer of persons, regardless of their status, where there are substantial grounds for believing that the returnee would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious breaches of human rights obligations. As an inherent element of the prohibition of torture and other forms of ill-treatment, the principle of non-refoulement is characterised by its absolute nature without any exception. In this respect, the scope of this principle under relevant human rights law treaties is broader than that contained in international refugee law.”*²⁷⁰

The OHCHR also states that the prohibition of *refoulement* “applies to all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and it applies wherever a State exercises jurisdiction or effective control, even when outside of that State’s territory.”²⁷¹ They also pay particular attention to the position of children, saying that States must act in accordance with the best interests of the child.²⁷²

159. Within the ECHR system, like many other human rights systems, the prohibition on *refoulement* is absolute. This prohibition has been well established since the landmark judgment of *Soering v. UK*²⁷³ which established that the extradition of a German national to the United States to face charges of capital murder violated his right to be free from inhuman and degrading treatment rights under Article 3. In *Al Husin v. Bosnia and Herzegovina*, the ECtHR found there was a real risk that Syrian national Al Husin would be subjected to ill-treatment if deported from Bosnia to Syria, and that this deportation would thus violate Article 3.²⁷⁴ The Court ruled that in this case that if there are substantial grounds to believe that a person would face a real risk of ill-treatment when being expelled, Article 3 implies an obligation not to expel the individual. In particular, the ECtHR held that the conduct of the person concerned, even if undesirable or dangerous, cannot be taken into account because the prohibition of torture is absolute.²⁷⁵

²⁶⁹ CAT, ‘General Comment No. 4’ (2017) CAT/C/GC/4, para 12. See also CAT, *Aemei v Switzerland*, Communication no. 034/1995 (9 May 1997) CAT/C/18/D/34/1995, para 11.

²⁷⁰ OHCHR, ‘Global Compact for Migration – Technical note: The principle of non-refoulement under international human rights law’ (2018), available at:

<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>, p 1.

²⁷¹ OHCHR, ‘Global Compact for Migration – Technical note: The principle of non-refoulement under international human rights law’.

²⁷² OHCHR, ‘Global Compact for Migration – Technical note: The principle of non-refoulement under international human rights law’, p 1.

²⁷³ ECtHR, *Soering v. UK* (1989), Application no. 14038/88.

²⁷⁴ ECtHR, *Al Husin v Bosnia and Herzegovina* (2012), Application no. 3727/08.

²⁷⁵ ECtHR, *Al Husin v Bosnia and Herzegovina* (2012), Application no. 3727/08, para 49.

160. The UN General Assembly reaffirms the importance of full respect for the principle of non-refoulement on a yearly basis in its resolution on UNHCR.²⁷⁶

9.3. PROHIBITION AGAINST TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

| PRINCIPLE | LEGAL STANDARD |
|---|--|
| <p>9.3.1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.</p> <p>9.3.2. Deprivation of nationality is likely to constitute cruel, inhuman or degrading treatment or punishment, particularly where it results in statelessness.</p> <p>9.3.3. Attempted expulsion consequent to deprivation of nationality is likely to meet the threshold of cruel, inhuman or degrading treatment or punishment when this leads to:</p> <p>9.3.3.1. arbitrary detention;</p> <p>9.3.3.2. a violation of the principle of <i>non-refoulement</i>; or</p> <p>9.3.3.3. the forcible separation of families.</p> | <p>UDHR, Art. 5:</p> <p>“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”</p> <p>ICCPR, Art. 7:</p> <p>“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”</p> <p>CAT, Art. 2(1):</p> <p>“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”</p> <p>CAT, Art. 1:</p> <p>“[T]he term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [...] punishing him for an act he or a third person has committed or is suspected of having committed.”</p> |

161. The prohibition against torture is a clearly established principle of both international and regional (human rights) law, and is established in the UDHR (Article 5), the ICCPR (Article 7), CAT, the CRC (Article 37(a)), the ECHR (Article 3), the Charter of Fundamental Rights of the EU (Article 4), the ACHR (Article 5(2)), the ACHPR (Article 5), the ACRWC (Article 16), and the Geneva Conventions (Common Article 3).

162. The Committee against Torture (CAT) states that the prohibition against torture is a fundamental principle of customary international law.²⁷⁷ The prohibition against torture is absolute and non-derogable. The absolute nature

²⁷⁶ For instance, during its 73rd session in 2018: UNGA Res 73/151 (17 December 2018) UN Doc A/RES/73/151, preamble.

²⁷⁷ CAT, ‘General Comment No. 2: Implementation of article 2 by States parties’ (2008) CAT/C/GC/2, para 1.

of this prohibition is evident from Article 4 ICCPR, which lists the prohibition of torture among the non-derogable human rights in times of a public emergency. Article 2(2) CAT emphasizes that “no exceptional circumstances whatsoever whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”. The Committee against Torture identified threats of terrorist acts or violent crime to be among these exceptional circumstances that cannot constitute justification of torture.²⁷⁸

163. The term “torture” is defined in Article 1(1) CAT as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” It is clear from this definition that it covers both the physical and mental integrity of the person. The HRC has emphasised in relation to the ICCPR that “the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.”

164. By depriving persons of their nationality, States risk violating the absolute and customary prohibition of torture, cruel, inhuman or degrading treatment or punishment. In and of itself, deprivation of nationality may cause severe mental suffering, as the identity of the person concerned has been taken away and that person is left in a state of uncertainty. It was recognized by the IACtHR in *Maritza Urrutia v. Guatemala* that “the elements of the concept of torture [...] include methods to obliterate the personality of the victim in order to attain certain objectives, such as [...] intimidation or punishment.”²⁷⁹ In *Trop v. Dulles*, the United States Supreme Court found that denaturalization was cruel and unusual because “the punishment strips the citizen of his status in the national and international political community. [...] In short, the expatriate has lost the right to have rights.”²⁸⁰ In addition to directly constituting inhumane treatment, measures following the deprivation of nationality, such as the leaving the individual stateless, may also violate this provision of international law and could rise to the level of constituting torture. The ACmHPR emphasised this by stating that “[b]y forcing [applicants] to live as stateless persons under degrading conditions, the government [...] has deprived them of their family and is depriving their families of the men’s support, and this constitutes a violation of the dignity of a human being, thereby violating Article 5 of the [ACHPR]”.²⁸¹ Thus, the deprivation of nationality in the case of an individual at risk of statelessness, may cause a level of mental anguish that constitutes

²⁷⁸ CAT, ‘General Comment No. 2’ (2008) CAT/C/GC/2, para 5.

²⁷⁹ IACtHR, *Maritza Urrutia v Guatemala* (2003), Series C No. 103, para 94.

²⁸⁰ United States Supreme Court, *Trop v Dulles*, 356 US 86 (1958), available at: <https://supreme.justia.com/cases/federal/us/356/86/>.

²⁸¹ ACmHPR, *Amnesty International v Zambia* (1999), Communication 212/98. See also ACmHPR, *John K. Modise v Botswana* (2000), Communication 97/93_14AR.

torture, in light of the fact that stateless people are left in legal limbo, lacking access to basic rights.

- 165.** International humanitarian law further posits a requirement for combatants, such as foreign terrorist fighters, to be treated humanely. Furthermore, in conflicts of an international character, deprivation of nationality may negatively affect the right of combatants to protection when in the hands of the adversary, which is afforded solely to *nationals* of States that are signatories to the relevant Geneva Convention.²⁸²
- 166.** A State shall not cause the arbitrary detention of a person, either by expulsion or denaturalization (see also *Principle 9.4* on liberty and security of person). Specific protections exist for particularly vulnerable groups in detention, including stateless individuals, who are at a particularly high risk of arbitrary and indefinite detention.²⁸³ The UN states that any deprivation of liberty can only be carried out in accordance with provisions found in the law²⁸⁴ and the HRC held that detention must be proportionate and require a legitimate aim.²⁸⁵ Everyone in detention must be afforded the right to challenge the legality of that detention.²⁸⁶ The UN Special Rapporteur on the Human Rights of Migrants has stated that “substandard detention conditions may potentially amount to inhuman or degrading treatment, and may increase the risk of further violations of economic, social and cultural rights, including the right to health, food, drinking water and sanitation.”²⁸⁷
- 167.** As set out above, the prohibition on *refoulement* is absolute and includes the extradition of a national to a country where they face a real risk of being subjected to ill-treatment (see *Principle 9.2* on *non-refoulement*). It also includes situations where there is a risk of ill-treatment from non-State actors. It includes situations in which the national has been deemed a threat to national security: “Since the prohibition of torture or inhuman or degrading treatment or punishment is absolute, the conduct of applicants, however undesirable or dangerous, cannot be taken into account.”²⁸⁸ Such ill-treatment can include violations relating to prison conditions,²⁸⁹ solitary confinement and incommunicado detention, including depriving an individual of contact with their family.²⁹⁰ Refusing to repatriate and/or blocking the right to (re)admission through deprivation of nationality leaves persons trapped in such detention

²⁸² C. Paulussen, ‘Stripping foreign fighters of their citizenship: International human rights and humanitarian law considerations’ (2021) *International Review of the Red Cross* 1, 9, doi:10.1017/S1816383121000278.

²⁸³ See e.g. UNHCR, ‘Handbook on Protection of Stateless Persons’ (June 2014).

²⁸⁴ ‘Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment’, UNGA Res 43/173 (9 December 1988) UN Doc A/RES/43/173.

²⁸⁵ Human Rights Committee, *A v Australia*, Communication no. 560/1993 (30 April 1997) CCPR/C/59/D/560/1993.

²⁸⁶ Human Rights Committee, ‘General Comment No. 8: Article 9 (Right to liberty and security of persons)’ (1982) HRI/GEN/1/Rev.9 (Vol. I, p. 179).

²⁸⁷ UN Human Rights Council, ‘Report of the Special Rapporteur on the rights of migrants, François Crépeau’, A/HRC/20/24 (2012), para 26.

²⁸⁸ ECtHR, *Al Husin v Bosnia and Herzegovina* (2012), Application no. 3727/08.

²⁸⁹ See Human Rights Committee, ‘General Comment No. 9: Article 10 (Humane treatment of persons deprived of liberty)’ (1982) HRI/GEN/1/Rev.9 (Vol. I, p. 180), para 1.

²⁹⁰ ACmHPR, *Law Office of Ghazi Suleiman v Sudan* (2003), Communication 222/98 and 229/99.

conditions. The HRC has also held explicitly that a risk of a violation of the right to life is a bar to removal from the territory.²⁹¹

9.4. LIBERTY AND SECURITY OF THE PERSON

| PRINCIPLE | LEGAL STANDARD |
|--|--|
| <p>9.4.1. Everyone has the right to liberty and security of the person and no one shall be subject to arbitrary arrest or detention.</p> <p>9.4.2. The arbitrary detention of persons who have been deprived of their nationality is prohibited.</p> | <p>UDHR, Art. 3: “Everyone has the right to life, liberty and security of the person.”</p> <p>UDHR, Art. 9: “No one shall be subjected to arbitrary arrest, detention or exile.”</p> <p>ICCPR, Art. 9(1): “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”</p> <p>HRC General Comment No. 35, para. 18: “The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.”</p> |

168. In addition to the international (human rights) law standards mentioned above, the principle on the right to liberty and security of the person is also contained in other international and regional instruments, including the CRC (Article 37), the CMW (Article 16(1)), the CRPD (Article 14), the ECHR (Article 5), the Charter of Fundamental Rights of the EU (Article 6), the ACHR (Article 7), the American Declaration of the Rights and Duties of Man (Article 1), and the ACHPR (Article 6).

169. The right to liberty and security of the person is composed of two separate rights, where the former concerns “freedom from confinement of the body, not a general freedom of action” and the latter concerns “freedom from injury to

²⁹¹ Human Rights Committee, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) CCPR/C/21/Rev.1/Add.13, para 12; imposition of the death penalty without guarantees of a fair trial constitutes a violation of the right to life, Human Rights Committee, ‘General Comment No. 6: Article 6 (The right to life)’ (1982) HRI/GEN/1/Rev.1 (p. 6), para 7.

the body and the mind, or bodily and mental integrity”.²⁹² This right extends to everyone, including, but not limited to, “girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity”.²⁹³ The right to liberty and security is, however, not absolute.²⁹⁴ It has been recognised by the HRC, and is also implicit in Article 9 of ICCPR, that detention may, in certain instances, be justified. This is the case, for example, where concerns the enforcement of criminal laws. According to the Working Group on Arbitrary Detention, the prohibition of arbitrary detention is, however, a “non-derogable norm of customary international law, or *jus cogens*.”²⁹⁵ The requirement of non-arbitrariness is absolute, and arbitrary detention cannot be justified on grounds of national emergencies, maintaining national security or controlling the movements of immigrants or asylum seekers. States must thus not arbitrarily detain a person. This means that detention may only be justified when the principles of legitimacy of purpose, legality, necessity, proportionality, and due process are respected.²⁹⁶ Furthermore, it is essential that anyone deprived of their liberty has their right to bring proceedings before a court, so that the court may decide on the lawfulness of the detention.

- 170.** Those deprived of their nationality, regardless of whether or not they have been left stateless as a result, are at a higher risk of arbitrary detention. According to the Working Group on Arbitrary Detention, detention during the period when attempts are being made to establish the identity or nationality of a person or to secure their deportation can result in prolonged detention.²⁹⁷ This is particularly the case when the country of origin (or of the second nationality) is unable or refuses to cooperate in the determination (of nationality) or expulsion proceedings, which prevents the completion of such proceedings and may even result in indefinite detention. Such prolonged or indefinite detentions are clearly arbitrary. Those left stateless as a result of deprivation of nationality, or persons deprived of nationality with a presumed second nationality that is not recognised by that State or is refused readmission, are even more likely to be detained arbitrarily.²⁹⁸ The ECtHR held that stateless persons are highly vulnerable to be “left to languish for months and years [...] without any

²⁹² Human Rights Committee, ‘General Comment No. 35: Article 9 (Liberty and security of person)’ (2014) CCPR/C/GC/35, para 3.

²⁹³ Id.

²⁹⁴ Ibid, para 10.

²⁹⁵ UN Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’ A/HRC/22/44 (December 2012), on Deliberation No. 9 (p. 16), para 51.

²⁹⁶ This is in accordance with Principle 7 on arbitrary deprivation of nationality. See also, Equal Rights Trust, *Guidelines to Protect Stateless Persons from Arbitrary Detention* (June 2012), available at: <https://www.equalrightstrust.org/ertdocumentbank/guidelines%20main.pdf>, Guideline 25, p. 16 (Guidelines with Commentary: <https://www.equalrightstrust.org/ertdocumentbank/guidelines%20complete.pdf>, Guideline 25 w commentary, p. 76.]

²⁹⁷ UN Human Rights Council, ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Working Group on Arbitrary Detention’, A/HRC/7/4 (2008), para 46.

²⁹⁸ European Network on Statelessness, ‘Protecting Stateless Persons from Arbitrary Detention: An Agenda for Change’ (April 2017), available at: <https://www.statelessness.eu/resources/protecting-stateless-persons-arbitrary-detention-agenda-change>, p. 7.

authority taking an active interest in his fate and well-being.”²⁹⁹ The UN Secretary General has similarly stated that “stateless persons are [...] uniquely vulnerable to prolonged detention and States should be sensitized to respect the rights of stateless persons to be free from arbitrary detention as a result of their stateless status.”³⁰⁰

9.5 LEGAL PERSONHOOD

| PRINCIPLE | LEGAL STANDARD |
|---|--|
| <p>9.5.1. Everyone has the right to recognition everywhere as a person before the law. All persons are equal before the law.</p> <p>9.5.2. It is not permissible for States to deny any person’s legal personhood or their equality before the law through the deprivation of nationality and denial of the right to enter and remain in their own country.</p> | <p>UDHR, Art. 6:</p> <p>“Everyone has the right to recognition everywhere as a person before the law.”</p> <p>ICCPR, Art. 16:</p> <p>“Everyone shall have the right to recognition everywhere as a person before the law.”</p> |

171. The right to be recognized as a person before the law or ‘legal personhood’ is firmly established in both international and regional human rights instruments, including the CERD (Article 5), CEDAW (Article 15(1)), CMW (Article 24), CRPD (Article 12(1)), ACHPR (Article 3), ACHR (Article 3), the American Declaration on the Rights and Duties of Man (Article 2), the Arab Charter on Human Rights (Articles 11-12), and the Charter of Fundamental Rights of the EU (Article 20).

172. Under Article 16 ICCPR and Article 6 UDHR, everyone has the right to recognition everywhere as a person before the law. It is not permissible for States to deny any person’s legal personhood or their equality before the law through the deprivation nationality and the right to enter and remain in their own country. This right in Article 16 ICCPR is non-derogable.³⁰¹ According to the Working Group on Enforced or Involuntary Disappearances,

“[t]his right is central to the conception of human rights, as it expresses the right and the capacity of each human being to be the holder of rights and obligations under the law. It has

²⁹⁹ ECtHR, *Kim v Russia* (2014), Application no. 44260/13, para 54.

³⁰⁰ UN Secretary-General, ‘Guidance Note of the Secretary General: The United Nations and Statelessness’ (June 2011), available at: <https://www.refworld.org/docid/4e11d5092.html>, p. 6.

³⁰¹ See Art. 4 ICCPR.

often been described as the ‘right to have rights’ and as a direct consequence of the right to respect for human dignity.”³⁰²

173. The UN Secretary-General has recognized that “full enjoyment of all human rights is generally only possible when an individual possesses nationality”³⁰³ and the HRC have reflected that “international human rights law reserves a very limited set of rights to citizens, in particular in relation to political rights, freedom of movement, and economic rights.”³⁰⁴ Furthermore, the IACtHR has held that the right of every person to recognition as a person before the law is a parameter for assessing “whether a person is entitled to any given rights and whether such person can enforce such rights” and that lack of recognition as a person before the law “implies the absolute denial of the possibility of being holder of such rights and of assuming obligations, and renders individuals vulnerable to the non-observance of the same by the State or by individuals”.³⁰⁵ The Court continues, making special note of States’ obligations with regard to persons who are vulnerable, excluded and/or discriminated against:

“The State has a duty to provide the means and legal conditions in general, so that the right to personality before the law may be exercised by its holders. Specially, the State is bound to guarantee to those persons in situations of vulnerability, exclusion and discrimination, the legal and administrative conditions that may secure for them the exercise of such right, pursuant to the principle of equality under the law.”³⁰⁶

The right to recognition as a person before the law and equality before the law are thus “bedrocks of human rights, administrative law and the notion of the rule of law”³⁰⁷, and strongly connected to the notion of legal identity.³⁰⁸ Indeed, any individual, regardless of their status or level of documentation is entitled to recognition as a person before the law and equality before the law because (legal) identity is inherent to all people.³⁰⁹ Identity includes, amongst others, a person’s “nationality, name and family relations as recognized by law”.³¹⁰ In view of this, depriving a person of these elements of identity such as nationality and the right to enter and remain in one’s own country (see *Principle 9.1*), would constitute a violation of the right to legal personality and equality before the law.

174. Indeed, it has been held that deprivation of nationality is a violation of the right to legal personhood. According to the IACtHR,

³⁰² UN Working Group on Enforced or Involuntary Disappearances, ‘General comment on the right to recognition as a person before the law in the context of enforced disappearances’ (2011) A/HRC/19/58/Rev.1 (p. 9), para 42.

³⁰³ UN, ‘Guidance Note of the Secretary-General: The United Nations and Statelessness’ (2011), p 7.

³⁰⁴ HRC, ‘Human rights and arbitrary deprivation of nationality’ (2011), A/HRC/19/43, para 3.

³⁰⁵ IACtHR, *Sawhoyamaya Indigenous Community v Paraguay* (2006), Series C No. 146, para 188.

³⁰⁶ IACtHR, *Sawhoyamaya Indigenous Community v Paraguay* (2006), Series C No. 146, para 189.

³⁰⁷ ISI, ‘Statelessness, Human Rights and the Sustainable Development Agenda. A Working Paper’ (February 2017), available at: https://files.institutesi.org/SDG_working-paper2017.pdf, p. 16.

³⁰⁸ See also Sustainable Development Goal 16.9: “By 2030, provide legal identity for all, including birth registration.”

³⁰⁹ ISI, ‘Statelessness, Human Rights and the Sustainable Development Agenda. A Working Paper’ (February 2017), p. 15-16.

³¹⁰ Art. 8 CRC.

“[...] the violation of the right to nationality of the [applicants], the situation of statelessness in which they were kept, and the non-recognition of their juridical personality and name, denaturalized and denied the external or social projection of their personality. Based on the above, the Court considers that by depriving the [applicants] of their nationality, the [State] violated the rights to juridical personality and to a name embodied in Articles 3 and 18 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1(1) of the Convention.”³¹¹

175. Similarly, the African Court found that “a person’s arbitrary denial of his/her right to nationality is incompatible with the right to human dignity, reason for which international human rights instruments, including the Charter, provide that ‘Everyone shall have the right to have his legal status recognized everywhere’.”³¹²

9.6. RIGHT TO PRIVATE AND FAMILY LIFE

| PRINCIPLE | LEGAL STANDARD |
|--|--|
| <p>9.6.1. Everyone has the right to private and family life.</p> <p>9.6.2. This includes the right to live together as a family and not be separated as a result of a family member being deprived of their nationality and subject to detention or expulsion in violation of international law.</p> | <p>UDHR, Art. 12:</p> <p>“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”</p> <p>ICCPR, Art. 17(1):</p> <p>“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”</p> |

176. The right to respect for private and family life is a firmly established principle in international and regional law, and is contained in the UDHR (Article 12), ICCPR (Article 17), CRC (Article 16), CMW (Article 14), CRPD (Article 22), ACRWC (Article 10), ECHR (Article 8), the Charter of Fundamental Rights of the EU (Article 7), and the ACHR (Article 11).

177. The principle encompasses two distinct rights: the right to family life and the right to private life. Under Article 8 of the ECHR, the right to family life must be interpreted as the right to live together as a family.³¹³ With regard to the term ‘family’, the Human Rights Committee noted in its General Comment

³¹¹ IACtHR, *Girls Yean and Bosico v Dominican Republic* (2005), Series C No. 130, paras 186-187.

³¹² ACtHPR, *Robert John Penesis vs United Republic of Tanzania*, Application No 013/2015, para 88.

³¹³ Directorate of the Jurisconsult, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (2016 - updated 2019), available at: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

No. 16 that this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.³¹⁴

178. As deprivation of nationality of a family member increases the risk of that person being expelled, refused (re)admission or arbitrarily detained, contrary to *Principle 9.1* and *Principle 9.4*, this may result in a violation of the right to family life. A measure of expulsion or detention engages the right to family life of both the person being deprived of his or her nationality and their family members, in particular parents and their minor children and immediate family members. This is because they may all be denied the effective enjoyment of family life. To that end, the ECtHR has examined the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination.³¹⁵ It has also affirmed that the best interests of minor children should be taken into account in the balancing exercise with regard to expulsion of a parent, including the hardship of returning to the country of origin of the parent.³¹⁶

179. Much like the right to family life, the right to private life is a broad concept, embracing multiple aspects of a person's identity. It has been recognized by the ECtHR that nationality falls under the right to private life on multiple occasions. This was an important point in the case of *Genovese v. Malta*, in which it was held that arbitrary denial of nationality could raise an issue under the right to private life as it is part of a person's social identity protected as part of this right.³¹⁷ This was subsequently broadened by the Court in *Ramadan v. Malta* to include situations of arbitrary revocation of nationality, arguing that the loss of nationality already acquired can have a similar or even bigger impact on the private and family life of a person.³¹⁸ With regard to determining whether a violation of the above right exists, the Court held in *K2 v. United Kingdom* that not only the question of arbitrariness should be addressed, but that the consequences of revocation for the person should also be addressed, which allows for an examination of the consequences thereof on private and family life.³¹⁹

³¹⁴ Human Rights Committee, 'General Comment No. 16: Article 17 (Right to privacy)' (1988) HRI/GEN/1/Rev.9 (Vol. I, p. 191).

³¹⁵ ECtHR, *Üner v. the Netherlands* (2006), Application no. 46410/99, para 58; *Udeh v. Switzerland* (2013), Application no. 12020/09, para 52.

³¹⁶ ECtHR, *Jeunesse v. the Netherlands* (2014), Application No. 12738/10, para 117-118.

³¹⁷ ECtHR, *Genovese v Malta* (2011), Application no. 53124/09, para 30.

³¹⁸ ECtHR, *Ramadan v Malta* (2016), Application no. 76136/12, para 85.

³¹⁹ ECtHR, *K2 v United Kingdom* (2017), Application no. 42387/13, para 49.

9.7. THE RIGHTS OF THE CHILD

| PRINCIPLE | LEGAL STANDARD |
|---|---|
| <p>9.7.1. Every child has the right to a nationality. States must protect the child’s right to acquire and preserve their nationality and to re-establish their nationality when arbitrarily deprived of it.</p> | <p>ICCPR, Art. 24(3): “Every child has the right to acquire a nationality.”</p> |
| <p>9.7.2. States are required to treat all persons under the age of 18 in accordance with their rights as children.</p> | <p>CRC, Art. 7(1): “The child 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 his or her parents.”</p> |
| <p>9.7.3. States must protect the rights of the child and the best interests of the child must be a primary consideration in all proceedings affecting the nationality of children, their parents and other family members.</p> | <p>CRC, Art. 8(1): “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”</p> |
| <p>9.7.4. It can never be in the best interest of a child to be made stateless or be deprived of nationality.</p> | <p>CRC, Art. 1: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”</p> |
| <p>9.7.5. States must take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.</p> | <p>CRC, Art. 2(2): “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”</p> |
| | <p>CRC, Art. 3(1): “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”</p> |
| | <p>ACERWC, <i>Nubian Minors</i>, para. 46:</p> |

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| | “[...] being stateless as a child is generally the antithesis to the best interests of the child.” |
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- 180.** In addition to the right to a nationality that is generally provided under international and regional law, that right is also specifically tailored to children in a number of international and regional legal instruments, such as the CRC (Articles 7 and 8), ICCPR (Article 24(3)), ACRWC (Article 6(3)), and the Covenant on the Rights of the Child in Islam (Article 7(1)). Furthermore, the principle of the best interests of the child is protected under the CRC (Article 3(1)), CRPD (Article 7(2)), the Charter of Fundamental Rights of the EU (Article 24(2)), ACRWC (Article 4) and the Covenant on the Rights of the Child in Islam (Article 3(3)).
- 181.** Every child, defined in Article 1 CRC as any person under the age of eighteen, has the right to acquire a nationality (Article 7(1) CRC) as well as to preserve this nationality. This latter right is clear from Article 8(1) of the Convention on the Rights of the Child, which provides that States are to “respect the right of the child to preserve his or her identity, including nationality”. This article is complemented by Article 8(2) to “provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity” in cases where “a child is illegally deprived of some or all of the elements of his or her identity”.³²⁰ Whenever a child is deprived of nationality, a State thus risks violating the provisions of the CRC, as well as other international standards.
- 182.** In particular, the four guiding principles of the CRC – non-discrimination, best interests of the child, respect for the views of the child and the right to life, survival and development – individual and cumulatively, can be adversely impacted by deprivation of nationality. Indeed, many children who are deprived of the nationality of a country they consider their own have to deal with discrimination from an early age.³²¹ It has also been shown that children who are deprived of their nationality and/or stateless cannot access certain important rights, including health care and education, which has a negative impact on the development of the child.³²² Furthermore, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.³²³ Considering the negative impact of deprivation of nationality on the identity of the child, such measures are unlikely to adhere to this standard. Depriving a child under 18 of nationality could therefore be considered contrary to the CRC. In cases where statelessness ensues, the consequences of the lack of a nationality are negative to such an extent that the African Committee on the Rights and Welfare of the

³²⁰ Art. 8(2) CRC.

³²¹ UNHCR, ‘I Am Here, I Belong. The Urgent Need to End Childhood Statelessness’ (November 2015), available at: https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf.

³²² UNHCR, ‘I Am Here, I Belong. The Urgent Need to End Childhood Statelessness’ (November 2015).

³²³ Art. 3(1) CRC.

Child (ACERWC) recognized in *Nubian Minors* that “in sum, being stateless as a child is generally antithesis to the best interests of children”.³²⁴

- 183.** Preserving a child’s nationality or depriving them of a nationality, while depriving the parent, can have an impact on private and family life (see also *Principle 9.7*) and the best interests of the child. This should therefore be taken into account in an individual examination of the child’s deprivation of nationality as spelled out in *Tjebbes and Others v. Minister van Buitenlandse Zaken*:

“As for minors, the competent administrative and judicial authorities must also take into account, in the context of their individual examination, possible circumstances from which it is apparent that the loss of [...] nationality by the minor concerned, which the national legislature has attached to the loss of [...] nationality by one of his or her parents in order to preserve unity of nationality within the family, fails to meet the child’s best interests as enshrined in Article 24 of the Charter [of Fundamental Rights of the EU] because of the consequences of that loss for the minor from the point of view of EU law.

- 184.** The relevance of the best interests of the child, regardless of the actions of their parents, is thus paramount in any decision regarding them. This has also been confirmed by the ECtHR in the case of *Mennesson v. France*. Here, the Court ruled that, although the parents had chosen to break the law (in that case by using surrogacy while prohibited under French law), the effects of the State’s denial of certain elements of the children’s identity not only affected the parents, but also the children. As such, “a serious question arises as to the compatibility of that situation with the child’s best interests, respect for which must guide any decision in their regard”.³²⁵

- 185.** It is thus important to recognise that children are persons in their own right. As such, actions on the part of parents or family members should not negatively affect the child and his or her rights. This notion is included in Article 2(2) of the Convention on the Rights of the Child, which requires States to “take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.” Consequently, should a parent be deprived of their nationality, this should not result in the derivative loss of nationality of the child. Similarly, a child should not be denied the right to acquire a nationality on the basis of their parents’ actions, for instance where parents have moved to conflict zones and/or have been associated with terrorist organisations.

³²⁴ ACERWC, *Children of Nubian descent in Kenya v Kenya* (2011), Communication no. 002/Com/002/2009, para 46.

³²⁵ ECtHR, *Mennesson v France* (2014), Application no. 65192/1, para 99.

9.8. DERIVATIVE LOSS OF NATIONALITY

| PRINCIPLE | LEGAL STANDARD |
|---|---|
| <p>The derivative loss of nationality is prohibited.</p> | <p>CRC, Art. 8:</p> <p>“1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.</p> <p>2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”</p> <p>CEDAW, Art. 9(1):</p> <p>“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.”</p> |

186. As was discussed with regard to *Principle 9.5* above, every individual has the right to recognition everywhere as a person before the law and equality before the law. As such, individuals can be viewed as autonomous rights holders, whose status and rights are in principle not dependent on anyone else or on any relationship. In some instances, however, nationality and deprivation thereof have been made dependent on the nationality (and deprivation thereof) of another person. Children and female spouses are most likely to be subject to this derivative loss of nationality. Even though this practice is recognised in Article 6 of the 1961 Convention, this is contrary to human rights norms that supersede this provision and should never occur.

187. Article 7(2) ECN, similarly, allows for the loss of nationality by children whose parents both lose that nationality, except in cases of voluntary service in a foreign military force and/or conduct seriously prejudicial to the vital interests of the State. At the same time, the ECN provides in Article 4(d) as a general principle that neither marriage nor the dissolution of a marriage between a national of a State and an alien, nor the change of nationality by one of the spouses during marriage, automatically affects the nationality of the other spouse.

188. Importantly, international human rights law recognises the individual, independent right to a nationality of children and women in, among others, Articles 7 and 8 of the CRC and Article 9 CEDAW. The Committee on the Elimination of Discrimination against Women has therefore recommended, for instance, that States

*“[r]eview and reform their nationality laws to ensure equality of women and men with regard to the acquisition, changing and retention of nationality and to enable women to transmit their nationality to their children and to their foreign spouses and to ensure that any obstacles to practical implementation of such laws are removed [...]; [r]epeal laws stipulating [...] automatic loss of a woman’s nationality as a result of changes in the marital status or nationality of her husband [...]”*³²⁶

189. That laws that deprive persons of their nationality based on, for instance, the national origin of their parents, are contrary to the relevant standards on children’s rights is confirmed by the African Committee of Experts on the Rights and Welfare of the Child:

*“[T]he Committee concludes that the Republic of the Sudan has violated its obligation under article 3 of the African Children’s Charter, by introducing a legislation which arbitrarily deprives children of South Sudanese origin their Sudanese nationality on the basis of the national origin of their parents. The Respondent State, due to its discriminatory law, has violated [applicant’s] right not to be discriminated on the ground of the country of origin of her father and as a result has arbitrarily deprived her Sudanese Nationality which otherwise, she would have been entitled to.”*³²⁷

190. The right to nationality is thus an individual right and should not depend on the deprivation of citizenship of another.³²⁸ Importantly, the CRC recognises in Article 2(2) that actions of the parents of the child should not impact the rights of the child, including their individual right to a nationality (see also *Principle 9.7.5* above).

³²⁶ Committee on the Elimination of Discrimination against Women, ‘General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (2014) CEDAW/C/GC/32, para 63.

³²⁷ ACERWC, *African Centre of Justice and Peace Studies (ACJPS) and People’s Legal Aid Centre (PLACE) v the Government of Republic of Sudan* (2015) No. 005/Com/001/2015, para 53.

³²⁸ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary General’, A/HRC/25/28 (2013).

PRINCIPLE 10:

DEPRIVATION BY PROXY AND PROXY MEASURES

| PRINCIPLE | LEGAL STANDARD |
|---|--|
| <p>10.1. States must not use powers to deprive nationality for other stated purposes, including fraud, with the ulterior purpose of depriving nationality as a national security measure.</p> | <p>1961 Convention, Art. 8(4):</p> <p>“A Contracting State shall not exercise a power of deprivation [...] except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.”</p> <p>ILC Draft Articles on the Expulsion of Aliens, Art. 8:</p> <p>“A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.”</p> <p>See <i>Principle 7</i> – The prohibition of arbitrary deprivation of nationality.</p> |
| <p>10.2. States must not subject persons to proxy measures, which do not amount to deprivation of nationality, but which have a similar impact and implications on human rights, without subjecting such decisions to the same tests and standards set out in these Principles. Such measures may include the withdrawal or refusal to renew passports or other travel documents and the imposition of travel or entry bans.</p> | <p>ICCPR, Art. 12(2):</p> <p>“Everyone shall be free to leave any country, including his own.”</p> <p>ICCPR, Art. 12(4):</p> <p>“No one shall be arbitrarily deprived of the right to enter his own country.”</p> <p>HRC General Comment No. 27, para. 9:</p> <p>“[T]he right to leave a country must include the right to obtain the necessary travel documents.”</p> |
| <p>10.3. The measures referred to in section 10.2 may in some circumstances, be considered to constitute deprivation of nationality, particularly when imposed on persons when they are abroad.</p> | <p>HRC General Comment No. 27, para. 21:</p> <p>“A state party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.”</p> |

- 191.** Deprivation of nationality for ulterior motives or as the means to an end without the necessary due process and not related to intentional fraudulent acts to the acquisition of that nationality do not meet the high standards set out by international law on due process requirements and arbitrariness more broadly and do not fall within the limited set of circumstances permitting the deprivation of nationality.
- 192.** Besides issues related to national security, the grounds that remain most relevant regarding the deprivation of nationality today are those relating to fraud or misrepresentation in the acquisition of nationality.³²⁹ The HRC has stated that “loss or deprivation of nationality can only be justified where the fraud or misrepresentation was perpetrated for the purpose of acquiring nationality and was material to its acquisition.”³³⁰
- 193.** Measures that cause the *de facto* deprivation of nationality, such as restricting a person’s ability to leave or enter their country of nationality or limiting access to travel documents necessary to that end, can constitute arbitrary deprivation of nationality (see also *supra* Principle 7). Such a restriction also risks leaving a person *de facto* stateless, whereby they may have the right to a nationality on paper but are unable to make use of that right or any of the associated fundamental rights.
- 194.** In line with the prohibition on *de facto* deprivation of nationality, the HRC has stated that any restrictions of the right to leave one’s country must be narrowly interpreted and must not impair the essence of the right.³³¹ In particular:
- “In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her country.”*³³²
- 195.** The ECtHR, in considering a tax-fraud related travel ban, found that even when the State has a legitimate aim, a limitation of the right to travel can be disproportionate.³³³ The rules prohibiting passport revocations while a national is abroad, relate not only to the relationship between a country and its national

³²⁹ See ‘Tunis Conclusions’ (2014) para 69 stating that provisions relating to loyalty and allegiance to the State have “been largely superseded by later developments in domestic nationality laws”.

³³⁰ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary General’, A/HRC/25/28 (2013), para 10.

³³¹ Human Rights Committee, ‘General Comment No. 27: Freedom of movement (article 12)’ (1999) CCPR/C/21/Rev.1/Add.9, para 13.

³³² Human Rights Committee, ‘General Comment No. 27’ (1999) CCPR/C/21/Rev.1/Add.9, para 21.

³³³ ECtHR, *Riener v Bulgaria* (2006), Application no. 46343/99.

but also to obligations from one country towards another. See also *Principle 9.1* and *Principle 11*.

- 196.** The United Nations Conference on the Elimination or Reduction of Future Statelessness recommended that “persons who are stateless *de facto* should as far as possible be treated as *de jure*, to enable them to acquire an effective nationality.”³³⁴ The conference noted that “it was easy to imagine, for example, the case of a person who, while abroad, was refused an extension of his passport by the consular authorities of the country of which he was a national and was instructed to return to that country. If that person [...] did not return to his country he was henceforth deprived of the protection of the diplomatic and consular authorities of his country and thus became a *de facto* stateless person”.³³⁵ To refuse documents and/or diplomatic assistance to a person effectively renders a person stateless and is prohibited under international law.

PRINCIPLE 11:

INTERNATIONAL COOPERATION

| PRINCIPLE | LEGAL STANDARD |
|---|--|
| <p>11.1. States have a duty to cooperate and to act responsibly and in accordance with international law to maintain international peace and security and to promote and encourage respect for human rights and fundamental freedoms.</p> <p>11.2. States must not undermine the principle of reciprocity or commitments to international cooperation, by stripping a person of nationality, expelling a person to a third country or subjecting a person to removal proceedings, thereby exporting the stated security risk to a third country and failing to take responsibility for their own nationals.</p> | <p>Charter of the UN, Art. 55:</p> <p>“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”</p> <p>HRC General Comment No. 31, para. 15:</p> <p>“The Committee attaches importance to States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of right violations under domestic law.”</p> <p>UN Security Council Resolution 2178 (2014):</p> |

³³⁴ Resolution I, United Nations, *Treaty Series*, vol 989, p. 279.

³³⁵ Conference of Plenipotentiaries on the Status of Refugees and Stateless persons, ‘Summary Record of the Third Meeting’ (12 October 1954) UN Doc E/CONF.17/SR.13, p. 10.

11.3. States are obligated to take responsibility for their own citizens and to investigate and prosecute crimes and threats to national security through their national criminal justice frameworks in accordance with international standards.

“[...] Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and noting that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity.”

197. A key principle of international law, also in view of the UN Charter, is the duty of States to cooperate and to maintain peaceful and friendly relations and adhere to the principle of reciprocity. As a further explication, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States contains duty to co-operate with other States in the maintenance of international peace and security. Successive UN Security Council Resolutions reaffirm this duty to co-operate specifically with regards to “the fight against terrorism”³³⁶ and “efforts to address the threat posed by foreign terrorist fighters”³³⁷

198. Although a State depriving a person of nationality may argue that this is necessary for its own security, the national security of another State may be jeopardised by this action and so too the collective efforts of States to combat international terrorism:

“The practice of depriving of their nationality persons involved in terrorist activities (including “foreign fighters”) or suspected of such involvement may lead to the “exporting of risks”, as those persons may move to or remain in terrorist conflict zones outside [the country which has deprived them of nationality]. Such a practice goes against the principle of international co-operation in combating terrorism, reaffirmed, inter alia, in United Nations Security Council Resolution 2178 (2014) which aims at preventing foreign fighters from leaving their State of residence or nationality, and may expose local populations to violations of international human rights and humanitarian law. It also undermines the State’s ability to fulfil its obligation to investigate and prosecute terrorist offences. In this context, deprivation of

³³⁶ Including UN Security Council Resolutions 1566 (8 October 2004) UN Doc S/RES/1566 (2004); 1624 (14 September 2005) UN Doc S/RES/1624 (2005).

³³⁷ Including UN Security Council Resolutions 2178 (24 September 2014) UN Doc S/RES/2178 (2014); 2396 (21 December 2017) UN Doc S/RES/2396 (2017).

*nationality is an ineffective anti-terrorism measure and may even work against the goals of counter-terrorism policy.*³³⁸

199. Both the UN General Assembly and the UN Security Council have repeatedly stressed that the maintenance of fair trial and due process guarantees, as well as effective criminal justice systems, are among “the best means for effectively countering terrorism and ensuring accountability”.³³⁹ The UN Security Council noted that “failure to comply with these and other international obligations [...] is one of the factors contributing to increased radicalization and fosters a sense of impunity”.³⁴⁰ States are under an obligation to bring terrorists to justice, under the principle to extradite or prosecute (*aut dedere aut judicare*), as has been noted by the Security Council as well as the General Assembly on various occasions.³⁴¹ This principle has been particularly important in the fight against ‘impunity’, which refers to the impossibility of bringing perpetrators of violations to account “since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims”.³⁴² The need to prevent impunity by holding perpetrators to account domestically is evidenced in the number of treaties that require a State party to ensure that prohibited acts are considered an offence and punishable under national laws.³⁴³ The UNHCR Guidelines No. 5 state that “wherever possible, the countries of nationality of individuals who become members of armed or non-State groups abroad (for example, foreign terrorist fighters) should effectively investigate and prosecute those individuals.”³⁴⁴ This similarly holds for the customary international humanitarian law duty of States to “investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.”³⁴⁵

200. A violation of international law is clear whenever States, by means of depriving a person of their nationality, expel known terrorists from their territory, as they fail to investigate and punish terrorist action and potentially committed war

³³⁸ CoE PACE Resolution 2263 (2019) para 8. See further also *Principle 7.2*.

³³⁹ See UN Security Council Resolution 2925, pp. 1, and UNGA Res 72/180 (10 December 2017), UN Doc A/RES/72/180, pp. 2.

³⁴⁰ UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 (2014), pp. 1-2.

³⁴¹ E.g., UN Security Council Resolutions 1456 (20 January 2003) UN Doc S/RES/1456 (2003), 1566 (8 October 2004) UN Doc S/RES/1566 (2004), 1624 (14 September 2005) UN Doc S/RES/1624 (2005), 2178 (24 September 2014) UN Doc S/RES/2178 (2014). As well as: General Assembly Resolutions 72/180 (10 December 2017), UN Doc A/RES/72/180 and 72/284 (26 June 2018) UN Doc A/RES/72/284. This is not an exhaustive list.

³⁴² UN Commission on Human Rights, ‘Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher. Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity’, E/CN.4/2005/102/Add.1 (February 2005), available at: <https://undocs.org/E/CN.4/2005/102/Add.1>, pp. 6.

³⁴³ E.g., 1948 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 09 December 1948, entered into force 12 January 1951) UNTS vol 78, No 1021, p. 277, art V; see also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1948, entered into force 26 June 1987), UNTS vol 1465, No 24841, p. 85.

³⁴⁴ Para 68 citing UNGA res 2625 (XXV), 24 October 1970.

³⁴⁵ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge University Press 2005, reprinted with corrections 2009), p. 607; see also C. Paulussen, ‘Stripping foreign fighters of their citizenship: International human rights and humanitarian law considerations’ (2021) *International Review of the Red Cross* 1, doi:10.1017/S1816383121000278.

crimes. However, a violation also occurs when a State expels a former national from its territory because that person is suspected of having committed terrorist acts. By depriving a person of their nationality and expelling or stranding them to a third country, a State loses effective control over that individual. This has been recognised to make it more difficult or even impossible to monitor and prosecute terrorists, which is at odds with durable, worldwide security.³⁴⁶ As recalled in the context of *Principle 7.2*, States are under the obligation to prosecute persons suspected of terrorist acts if they have jurisdiction and “the deprivation of nationality on grounds related to terrorism may not serve as a pretext for doing away with the State’s responsibility to prosecute a terrorist”.³⁴⁷

201. Furthermore, under the 1933 Montevideo Convention on the Rights and Duties of States, States have committed to respect the sovereign equality of all States as well as their territorial integrity. These principles were expanded upon in the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States and were held to comprehend, amongst others, the right to “sovereignty, political independence, territorial integrity, national unity and security of all States”.³⁴⁸ The act of deprivation of nationality “inevitably impinges on another jurisdiction”.³⁴⁹ By stripping an individual of his or her nationality for the stated reason of national security and subsequently expelling them to another State, the expelling State is not only exporting a security risk to another country, it is thereby also violating that State’s sovereignty and territorial integrity. Should the individual deprived of their nationality already be in the foreign territory, a relationship between the two States is created under which the depriving State has a similar duty not to impinge upon the other’s State sovereignty by frustrating its ability to expel an alien who entered its territory as a foreign citizen.

202. As was articulated with regard to *Principle 7.2* and *Principle 9.1*, the duty of a State to (re)admit its own nationals is understood to constitute a “vital means of regulating the coexistence of sovereign entities while also being a necessary corollary thereof”.³⁵⁰ It is a duty that the State does not owe to the individuals concerned, but rather “it is an international duty which it owes to its fellow-states”.³⁵¹ States should not deprive nationals of their nationality, thus making the national an alien, for the purpose of expelling them. States’ right to expel aliens is “inherent in the (territorial) sovereignty of the State; but it is not an absolute right, as it must be exercised within the limits established by

³⁴⁶ cf CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, para 49.

³⁴⁷ *Ibid*, para 4.4.

³⁴⁸ UNGA Res 36/103 (9 December 1981) UN Doc A/RES/36/103, p. 79.

³⁴⁹ Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40, Doc 10, 11 February 1977, at 80-1.

³⁵⁰ *Ibid*, para 19.

³⁵¹ Sir J. F. Williams, ‘Denationalization’ (1927), 8 *British Yearbook of International Law* 45, 55-6 (emphasis supplied) as cited in G. Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014), available at: <https://www.kaldorcentre.unsw.edu.au/sites/default/files/gsgg%204-deprivationcitizenship-moreauthority.pdf>, p. 4.

international law.”³⁵² The principle of non-expulsion of nationals, the right of any person to return to his or her country and States’ duty to admit nationals have been identified as such limits.³⁵³ States can, under circumstances even be obliged to admit a former national, for instance when a person has become stateless.³⁵⁴

203. In international law, States are thus responsible for their own citizens and should not undermine this principle through deprivation of nationality, expelling a person, refusing (re)admission, and/or withdrawing travel documents. It has been held that depriving a person of nationality while present on the territory of a third country could even be construed as an abuse of power on account of the depriving State because of the burden imposed on the third State in view of the continued presence of an alien in its territory.³⁵⁵ As was stated at the Hague Codification Conference “a kind of contract or obligation results from the granting of a passport to an individual by a State so that when that individual enters a foreign State with that passport, the State whose territory he enters is entitled to assume that the other State whose nationality

³⁵² ILC, 59th Session, ‘Third report on the expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur’ (2007) A/CN.4/581, para 7.

³⁵³ ILC, 62nd Session, ‘Sixth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur’ (2010) A/CN.4/625.

³⁵⁴ Art. 1 1930 Special Protocol concerning Statelessness (adopted 12 April 1920, entered into force 15 March 2004) UNTS Vol. 2252, p. 435.

³⁵⁵ E.g., R. Donner, *The Regulation of Nationality in International Law* (Transnational Publishers, 2nd ed, 1994) p. 153.