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# Life after Limbo: Stateless Persons in the United States and the Role of International Protection in Achieving a Legal Solution

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# LIFE AFTER LIMBO: STATELESS PERSONS IN THE UNITED STATES AND THE ROLE OF INTERNATIONAL PROTECTION IN ACHIEVING A LEGAL SOLUTION

DAVID C. BALUARTE\*

## INTRODUCTION

*Mikhail came to the United States from Turkmenistan on a Soviet passport when he was twenty-two. This was the final destination of a long circuitous journey that began when his ethnically Armenian family was forced to flee Azerbaijan, his country of birth, during the war between Azerbaijan and Armenia. He initially sought refuge in Russia, but faced strong anti-Armenian sentiments that kept him and his family moving. He entered Turkmenistan easily at a time when it was part of the Soviet Union, and traveled to the United States on a Soviet travel document at his earliest opportunity to seek safe haven.*

*In the United States, Mikhail applied for asylum, but his application was denied because the harm he suffered was not considered sufficiently severe to merit such relief. He was ordered removed to Russia, or Turkmenistan in the alternative. However, Mikhail's Soviet travel documents had expired and the independent countries of Russia and Turkmenistan did not consider him a citizen, and therefore refused his return. Mikhail was ultimately placed into detention while immigration authorities carried out efforts to remove him to Azerbaijan and Armenia. However, neither of those countries would take him—Azerbaijan, because it considered him Armenian, and Armenia, because it did not. Mikhail languished in detention without any clear solution to his situation. He applied for travel documents from more than a dozen countries, and was soon forced to recognize that there was no country*

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*in the world that considered him its national, and that none would ever take him. He was stateless, unwanted and completely without the protection of any nation. The immigration authorities were eventually forced to admit that chances for his removal were so remote that he had to be released.*

*Mikhail lived more than a decade on supervised release from detention, surviving under varying levels of restriction placed on him by the immigration officials charged with his supervision in Houston and Los Angeles. Mikhail travelled to American Samoa on vacation in 2012, made a day trip to Western Samoa, and inadvertently executed his removal order. He spent the next year of his life stranded in American Samoa, living on the kindness of strangers and working desperately to return to his life in the mainland United States. Mikhail's health suffered, as he toiled day-after-day sending messages around the world in hopes that someone would take up his case. It was only through tireless advocacy by Mikhail, the United Nations High Commissioner for Refugees, and a cadre of lawyers that it was possible to convince U.S. immigration authorities to exercise their humanitarian discretionary authority to permit his return to the U.S. mainland. Mikhail returned to his stateless legal limbo, threatened again by removal proceedings, detention, or worse.<sup>1</sup>*

There are migrants in the United States who have no land to call home; they are stateless and they exist in a precarious legal limbo within U.S. borders. To be stateless is to have no nationality, which the U.S. Supreme Court has called “a fate of ever increasing fear and distress” that is “deplored by the international community of democracies.”<sup>2</sup> Stateless persons are not recognized as citizens by any country, and as such, their enjoyment of fundamental human rights depends on the good faith of host countries, and their basic human security and dignity are often subject to the whims of immigration authorities.

Despite this intense level of vulnerability, U.S. immigration law does not explicitly recognize statelessness, nor does it provide for humanitarian protection to relieve stateless persons of their suffering. Rather, stateless persons are treated like any other unauthorized migrants in the United States; when they are ordered removed, they are mandatorily detained while immigration officials undertake efforts to execute those orders. Such removal

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1. This summary of Mikhail's life is drawn from news reports that covered his story while he was stranded in American Samoa, and after he returned. See *Stateless And Stranded On American Samoa*, NAT'L PUBLIC RADIO (Oct. 7, 2012), available at <http://www.npr.org/2012/10/07/162445840/stateless-and-stranded-on-american-samoa>; Moises Mendoza, *Back from Samoa: Stateless Man Allowed Entry into US*, GLOBAL POST (Feb. 16, 2013), <http://www.globalpost.com/dispatch/news/regions/americas/united-states/130215/samoa-stateless-us>.

2. See *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (holding that denationalization of U.S. citizens who had abandoned their mandatory military service was cruel and unusual punishment prohibited by the 8th Amendment of the U.S. Constitution).

efforts are futile in the case of stateless persons, and when they are ultimately released from detention, they are cast into a legal limbo in which they spend the rest of their lives on immigration parole, uncertain as to what their future may hold. This troubling gap in humanitarian protection has gone unaddressed in the United States for too long.

Notably, U.S. lawmakers have made great strides to codify international humanitarian protections for certain at-risk migrants.<sup>3</sup> In particular, over the last thirty-five years, the United States has incorporated international refugee law into U.S. immigration law, and created a process through which persons who demonstrate a fear of persecution abroad because of some protected characteristic may seek asylum in the United States.<sup>4</sup> While an analogous body of international law exists for the protection of stateless persons who have no nationality under the operation of laws of any country, this body of law has never been made part of the U.S. protection framework. While some stateless persons are also refugees, and therefore may benefit from the U.S. system of asylum protection, many are not. Therefore, stateless persons—like Mikhail—are left stranded without protection under U.S. immigration law.

An important development in this regard was a proposal by the U.S. Senate to establish a mechanism for the protection of stateless persons under the Immigration and Nationality Act (INA) as part of its 2013 comprehensive immigration reform bill, the Border Security, Economic Opportunity, and Immigration Modernization Act (SB 744).<sup>5</sup> This proposed incorporation of statelessness protection into U.S. immigration law has been underreported, and its potential as a humanitarian remedy that would mitigate bureaucratic inefficiency has been underappreciated. The current ebb in the tide of reform of the U.S. immigration system provides an important moment for reflection about the recent proposal to address the problem of statelessness in the United States.

This article argues that it is imperative to establish a protection mechanism for stateless persons in the United States, but that the proposed mechanism may fail to meaningfully address the statelessness problem if it is not tethered to the international protection framework. This discussion is divided into three sections.

The first section provides a brief overview of the historical roots for the international protection regimes for refugees and stateless persons. It describes the overlap between the two populations and the relationship between the two governing legal regimes so as to highlight the importance of utilizing the experience of refugee protection in the project to eradicate

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3. See 8 U.S.C. § 1231(b)(3).

4. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); see also 8 U.S.C. § 1158.

5. See S. 744, 113th Cong. § 3405 (2013), available at <https://beta.congress.gov/bill/113th-congress/senate-bill/744/text>.

statelessness. The section then goes on to explain how refugee law has been incorporated into U.S. immigration law, while the law of statelessness has not, and suggests that the U.S. experience with asylum law could be instrumental in efforts to identify and protect stateless persons.

The second section describes how the failure of U.S. immigration law to account for stateless persons has created a legal limbo that engulfs an unknown number of stateless persons today. This section lays plain the inefficiencies of a system that conducts removal operations against persons who cannot practically be removed. The section further highlights the inhumanity of conducting such operations against internationally protected persons, and illustrates the human suffering that often results when they are kept in mandatory immigration detention and then monitored on immigration parole for the rest of their lives. Finally, this section explains how U.S. asylum law is ill-suited to provide necessary protection for stateless persons, and lends emphasis to the call for complementary protection under U.S. immigration law for this population.

The third section of this article analyzes the proposed U.S. mechanism to protect stateless persons under the standards of the international law of statelessness. This analysis relies in part on an analogy to the U.S. experience with asylum protection, highlighting those areas in which international guidance has been crucial to establishing the proper scope of refugee protection. The section follows the framework provided by recently issued United Nations High Commissioner for Refugees (UNHCR) guidance on statelessness protection and scrutinizes the definition of “stateless person” set forth in SB 744, the legal status contemplated for this protected group, and the determination procedures that must be implemented. This section demonstrates how a failure to follow international standards could give way to restrictive statutory interpretations and burdensome standards of proof and evidence that could undermine the goal of the law.

The legal and factual complications inherent in making statelessness determinations require both a contextualized understanding of the problem of statelessness as well as analytical precision. International guidance on statelessness protection provides both, and there are important reasons for the United States to follow this guidance. First, the legal limbo to which stateless persons are currently condemned in the United States perpetuates the deleterious effects of human rights violations that stateless persons have often suffered at the hands of foreign powers. Additionally, detaining stateless persons as if they were removable, and conducting futile efforts to deport them squanders the resources of an overburdened system of immigration regulation. In effect, the stateless legal limbo distracts U.S. immigration authorities from their work to further the national security while they inadvertently contribute to the dehumanization of an internationally protected people. The United States should promulgate a system of protection

for stateless persons, and it should harmonize that system with the guidance provided by the international protection framework.

### I. INTERNATIONAL PROTECTION AND THE UNITED STATES

International protection, particularly as it relates to stateless persons and refugees, has been a feature of the global community's efforts to provide humanitarian relief for nearly a century.<sup>6</sup> The international community developed specific legal regimes to resettle refugees and stateless persons in the wake of the Second World War, and as the dimensions of these problems have evolved, so have the protection regimes themselves. Throughout this process of evolution, the statelessness protection framework has been the quiet sibling of the refugee protection regime. However, statelessness protection has more recently commanded international attention, after hundreds of thousands of people were left stateless during the succession and reformation of states in the post-Cold War era.<sup>7</sup> It is primarily the plight of persons left stateless by these large scale political shifts, and the accompanying legal reforms, that has brought this issue to the attention of U.S. officials in a more focused way.

Philosopher Hannah Arendt described the "calamity of the rightless" in *The Origins of Totalitarianism*, her 1951 account of the process of dehumanization that came to a crescendo in the atrocities of WWII.<sup>8</sup> Of the stateless, Arendt said: "Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed, but that nobody wants to oppress them. Only in the last stage of a rather lengthy process is their right to live threatened."<sup>9</sup> Arendt suggested that the Nazi denationalization of the Jewish people that resulted in their statelessness was a decisive step in the effort to eliminate them from existence.<sup>10</sup>

At the same time that Arendt wrote of the intense vulnerabilities of stateless persons, the United Nations (U.N.) convened a Conference of Plenipotentiaries to complete the drafting and signature of a convention for

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6. Soon after the establishment of the League of Nations in 1920, Fridtjof Nansen was named as the High Commissioner for Refugees. See UNHCR, *THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION 15* (2000), available at <http://www.unhcr.org/4a4c754a9.html>; 2006 Y.B. Int'l L. Comm'n, U.N. Doc. A/61/10 (discussing deliberation about conflicts between nationalities at the 1930 Hague Conference).

7. INSTITUTE ON STATELESSNESS AND INCLUSION, *THE WORLD'S STATELESS 96* (2014), available at <http://www.institutesi.org/worldsstateless.pdf> (reporting that "Some 85% of stateless persons reported in Europe can be found in just four countries (Latvia, the Russian Federation, Estonia and Ukraine)—in all cases as an enduring product of the dissolution of the Soviet Union.").

8. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 295-96 (1951).

9. *Id.*

10. *Id.* ("Even the Nazis started their extermination of the Jews by first depriving them of all legal status (the status of second-class citizenship) and cutting them off from the world of the living by herding them into ghettos and concentration camps, and before they set the gas chambers in motion they had carefully tested and found to their satisfaction that no country would claim these people. The point is that a condition of complete rightlessness was created before the right to live was challenged.").

refugees with a protocol for stateless persons.<sup>11</sup> In so doing, the U.N. recognized the interconnectedness of these two vulnerable populations, citing two main causes of statelessness: (1) flight from racial, religious, or political persecution, and (2) mass emigration caused by changes in a country's political or social system.<sup>12</sup> Despite the interconnectedness of the stateless and refugee experiences, the Conference of Plenipotentiaries ultimately drafted two separate, though very similar conventions: the 1951 Convention on the Status of Refugees (Refugee Convention) and the 1954 Convention on the Status of Stateless Persons (Statelessness Convention).<sup>13</sup>

These conventions set forth legal regimes that were intended primarily to facilitate the settlement of refugees and stateless persons who had no country to which they could reasonably return after WWII. The Refugee Convention provided a framework for the resettlement of persons with a well-founded fear of persecution in their country of nationality or former habitual residence, where that persecution would be on account of race, religion, nationality, political opinion, or membership in a particular social group.<sup>14</sup> The Statelessness Convention provided analogous protection to persons not considered nationals under the operation of law of any country.<sup>15</sup>

For those who meet the 1954 Convention definition of statelessness, the Convention provides four bundles of guarantees: (i) juridical status, including personal status, property rights, right of association, and access to courts; (ii) gainful employment, including wage-earning employment, self-employment, and access to the "liberal professions"; (iii) welfare, including rationing, housing, public education, public relief, labor legislation, and social security; and (iv) administrative measures, including administrative assistance, freedom of movement, identity papers, travel documents, fiscal changes, transfer of assets, expulsion, and naturalization.<sup>16</sup> These guarantees track those provided by the Refugee Convention, evidencing the goal of providing seamless protection to stateless persons and refugees.<sup>17</sup>

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11. Ad Hoc Committee on Statelessness and Related Problems, *Status of Refugees and Stateless Persons—Memorandum by the Secretary-General*, U.N. Doc. E/AC.32/2 (Jan. 3, 1950).

12. E.S.C. Res. 1949/248 (IX) B, U.N. Doc. A/RES/972 (IV) (Aug. 8, 1949) at 131, 141-42.

13. U.N. Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Statelessness and Related Persons*, U.N. Doc. E/1618; E/AC.35/5 (Feb. 17 1950), available at <http://www.unhcr.org/refworld/docid/40aa15374.html>; UNHCR, UNHCR HANDBOOK ON THE DETERMINATION OF STATELESSNESS (2010).

14. Convention Relating to the Status of Refugees art. 1.A, July 28, 1951, available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter Refugee Convention].

15. Convention Relating to the Status of Stateless Persons art. 1.1, Sept. 28, 1954, 360 U.N.T.S. 117, available at <http://www.unhcr.org/3bbb25729.html> [hereinafter Statelessness Convention].

16. See *id.* at art. 12-32; UNHCR, HANDBOOK ON PROTECTION OF STATELESS PERSONS ¶ 129 (2014) [hereinafter Statelessness Handbook]. Notably, the Statelessness Convention does not contain any protection against *refoulement* or penalties for illegal entry, and it provides lower standards of treatment with respect to employment and freedom of association than the Refugee Convention. *Id.* at ¶ 127.

17. Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 172 (1998).

While the refugee and statelessness protection frameworks were born of similar concerns and track each other closely in the guarantees they provide, the international community has received them in very different manners since they were opened for ratification. The Refugee Convention was initially limited both temporally and geographically in its scope,<sup>18</sup> but was followed by a 1967 Protocol, which eliminated those limitations.<sup>19</sup> Since that time, a virtual consensus has formed among the international community with regard to the importance of ensuring international protection for refugees, reflected in the fact that 145 states are parties to the Refugee Convention.<sup>20</sup> Moreover, many states have taken seriously these obligations and enacted them in the form of national legislation to provide asylum to refugees.<sup>21</sup>

Where the international protection regime for refugees has seen tremendous success over the last sixty years, the parallel regime for the protection of stateless persons has languished. Indeed, it is only somewhat recently that stateless persons have once again made their way into the humanitarian agenda of the international community. Specifically, with the fall of the Soviet Union followed closely by the dissolution of the Former Yugoslavia, the global community was forced to recognize the persistent humanitarian needs of stateless persons. These turbulent shifts from large socialist republics to substantial numbers of independent successor states were accompanied by efforts to consolidate national identities. One manner in which this identity formation was carried out was through the drafting of nationality laws that defined who would become a citizen of the newly independent nations. Persons were excluded from these new nationalities for a variety of reasons, and many of them became stateless.<sup>22</sup> This increased visibility of stateless persons and their struggle led to a renewed recognition of the importance of the international regime for the protection of stateless persons.

The UNHCR currently estimates that there are at least ten million stateless persons in the world today.<sup>23</sup> While this is not as substantial as nearly 17 million refugees,<sup>24</sup> the magnitude of this problem certainly calls for a

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18. Refugee Convention, *supra* note 14, at art. 1.B.

19. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

20. See Refugee Convention, *supra* note 14.

21. See Law No. 26.165, Nov. 8, 2006, B.O. 1 (Arg.), available at <http://www.refworld.org/docid/46d559e92.html>; Asylgesetz 2005 [2005 Asylum Act] Federal Law Gazette [FGL] No. 100/2005 (Austria), available at <http://www.refworld.org/docid/46adc62c2.html>; Act No. 493/1999, May 1, 1999 (Fin.), available at <http://www.refworld.org/docid/3ae6b59510.html>; Legge 30 luglio 2002, n.189 (It.), available at <http://www.refworld.org/docid/3fd9cd6d4.html>.

22. See *Kuric and Others v. Slovenia* (No. 26828/06), Eur. Ct. H.R. (2010) (finding human rights violations against persons who were left stateless after the dissolution of the Yugoslavia who later had their records removed from the population register, leading to their loss of residence), available at [http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ECHR\\_GC\\_Kuric%20v%20Slovenia\\_June2012.pdf](http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ECHR_GC_Kuric%20v%20Slovenia_June2012.pdf).

23. See INSTITUTE FOR STATELESSNESS & INCLUSION, *supra* note 7, at 55.

24. See *Facts and Figures about Refugees*, UNHCR, available at <http://www.unhcr.org.uk/about-us/key-facts-and-figures.html> (last visited Jan. 21, 2016).



similarly vigorous protection effort. Nevertheless, by the end of 2014, only eighty-four countries had ratified the Statelessness Convention.<sup>25</sup> While this indicates less concern for the stateless population on the international level, roughly a quarter of those ratifications have occurred in the previous five years, which serves as evidence of increasing concern.<sup>26</sup> A dozen countries, including France, Spain, Italy, Hungary, the United Kingdom, Mexico and the Philippines, have established national mechanisms for the protection of stateless persons.<sup>27</sup> The UNHCR has recently initiated a ten-year campaign to end statelessness, which may build on current momentum to identify and protect this vulnerable population.<sup>28</sup>

Recent efforts by some legislators in the United States to provide protection to stateless persons should be understood in the context of these global trends in international protection.

The United States did not sign the Refugee Convention or the Statelessness Convention in the post-war era. However, as part of the global recognition of the persistent need for refugee protection, the United States did sign the 1967 Protocol to the Refugee Convention. In so doing, the United States took on the international obligation to protect persons fleeing persecution, without the temporal or geographic limitations of the Refugee Convention.<sup>29</sup> The U.S. Congress later implemented these international obligations in the form of the 1980 Refugee Act, which established the regime for asylum under U.S. law.<sup>30</sup> In ratifying the international obligations of the Refugee Convention and establishing a national protection mechanism for asylum seekers, the United States joined a global community that recognized the need to address the needs of refugees on a global scale.

While the United States has been paying increasing attention to the global problem of statelessness, there is no indication that it intends to ratify the Statelessness Convention. The United States participated in the Ministerial and Intergovernmental Event on Refugees and Stateless Persons at the United Nations in December 2011 to commemorate the anniversaries of the 1951 Refugee Convention and the 1961 Convention on the Reduction of Statelessness.<sup>31</sup> At that meeting, sixty-one countries made a variety of

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25. See Statelessness Convention, *supra* note 15.

26. See *Convention Relating to the Status of Stateless Persons*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&lang=en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&lang=en) (last visited Jan. 22, 2016).

27. See EUROPEAN NETWORK ON STATELESSNESS, STATELESSNESS DETERMINATION AND THE PROTECTION STATUS OF STATELESS PERSONS 7 (2013), available at <http://www.refworld.org/docid/53162a2f4.html>.

28. *UNHCR Launches 10-year Global Campaign to End Statelessness*, UNHCR (Nov. 4, 2014), <http://www.unhcr.org/545797f06.html>.

29. Protocol Relating to the Status of Refugees, Jan. 31 1967, available at <http://www.refworld.org/docid/3ae6b3ae4.html>.

30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); see also 8 U.S.C. § 1158.

31. See *State Action on Statelessness*, UNHCR, <http://www.unhcr.org/pages/4ff2bdff6.html> (last visited Jan. 21, 2016).

pledges to promote and protect the rights of stateless persons around the world.<sup>32</sup> U.S. officials participated in that meeting, and made a series of very important pledges, one of which was to “[a]ctively work with Congress to introduce legislation that provides a mechanism for stateless persons in the United States to obtain permanent residency and eventually citizenship.”<sup>33</sup> While some countries used this meeting as an opportunity to manifest their intention to ratify or accede to either the 1954 or the 1961 Statelessness Conventions, the United States made no such pledge.

It is unclear why the possibility of ratifying the Statelessness Convention has never been the subject of serious debate in the United States. Perhaps it is because the U.S. stateless population only numbers in the thousands—a tiny fraction of the global stateless population,<sup>34</sup> and it is not a domestic problem substantial enough to justify the political investment required for the debate and ratification of an international convention.

Regardless, the U.S. pledge to work with Congress to introduce legislation on statelessness protection represents an important step forward on this discrete, though pressing issue. Indeed, the movement for comprehensive reform of the U.S. immigration system may provide the most viable political alternative for advancing statelessness protection in the United States. If this is the case, then the SB 744 proposal for a national protection mechanism could be the most effective model for eliminating the stateless legal limbo. In order to better understand the scope and nature of the problem of statelessness in the United States, the following section explores this phenomenon as a matter of law and fact.

## II. THE LEGAL LIMBO OF STATELESS PERSONS IN THE UNITED STATES

Statelessness is not a legal condition specifically recognized under U.S. law. It naturally follows from the fact that U.S. law fails to identify stateless persons, that their protection needs are not specifically addressed. This gap in humanitarian protection has the simultaneous effect of unnecessarily taxing the U.S. system of immigration regulation, which is built in part on the understanding that persons without permission to reside in the United States can be removed. Removal operations for people who are not welcome anywhere in the world consume scarce immigration court resources, detention beds, and precious time from detention and removal officers. This futile administrative expenditure only acts to compound the effects of substantial

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32. *Id.*

33. See UNHCR, PLEDGES 2011: MINISTERIAL GOVERNMENTAL EVENT ON REFUGEES AND STATELESS PERSONS (2011), available at <http://www.unhcr.org/commemorations/Pledges2011-preview-compilation-analysis.pdf>.

34. See H.R. REP. NO. 112-091, at 123 (2012) (congressional record for the Department of Homeland Security Appropriations Bill).

human rights violations that have left stateless people homeless and adrift in the world.

A. *U.S. Immigration Law Fails to Account for Stateless Persons*

The Immigration and Nationality Act (INA) has never provided a definition of “stateless person” under U.S. law or guidance on how statelessness should be determined.<sup>35</sup> Because there is no legal framework for the recognition or protection of stateless persons, they are rarely identified as such until they come to the attention of U.S. immigration authorities. Most commonly, the significance of a person’s statelessness will become most evident when he or she is placed in removal proceedings. At that moment, the effects of having no home, nowhere to return to, and no state to speak up for that individual become apparent.

The lack of legal definition or determination process in the United States means both that some nationals can be mistakenly deemed stateless by immigration authorities and that stateless persons can be determined to be foreign nationals in error. According to data collected from U.S. immigration authorities by Transactional Records Access Clearinghouse (TRAC) at Syracuse University between 1994 and 2014, deportation proceedings were initiated against individuals who were either stateless or unable to provide a nationality in 2,126 cases.<sup>36</sup> This means that Immigration and Customs Enforcement (ICE) identified approximately one hundred stateless persons a year over a twenty-year span, and initiated deportation proceedings against them. While it is not possible to use this data to identify stateless persons who were miscounted as nationals of some country, the inclusion of categories for “Unknown Nationality” and “Soviet Union,” which did not actually exist during the relevant twenty-year period, confirm some lack of clarity around who is stateless.

When removal proceedings are initiated against stateless persons, even when they are identified as such at the outset, there is no specific provision that applies to them. Indeed, the U.S. system of immigration enforcement

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35. Immigration & Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, 182 Stat. 66 (current version at 8 U.S.C. §§ 1-1778 (2012)); *see also* 8 U.S.C. § 1351 (2012) (showing the only mention of the term “stateless” in the entire Immigration and Nationality Act under the title authorizing the Secretary of State to set non-immigrant visa fees). While the INA does acknowledge in some provisions relating to humanitarian relief that immigrants may have “no nationality,” this distinction is mainly intended to cover potential gaps in application of those provisions, as opposed to signal an interest in providing protection to this population. *See* 8 U.S.C. § 1254(a) (2012); *see also* 8 U.S.C. § 1158 (2012). At the same time, the “no nationality” formulation is only included in some provisions for humanitarian immigration relief; namely, the provisions that govern temporary protected status (TPS), *see* 8 U.S.C. § 1254(a), and asylum, *see* 8 U.S.C. § 1158. Interestingly, the regulations developed by the U.S. Department of Justice at 8 C.F.R. § 208.13 to provide guidance to its officers in exercising their statutory mandate replace the “no nationality” formulation with the term “stateless.”

36. *See U.S. Deportation Proceedings in Immigration Courts*, TRAC IMMIGR., [http://trac.syr.edu/phptools/immigration/charges/deport\\_filing\\_charge.php](http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php) (last visited Jan. 21, 2016).

rests on some fundamental assumptions, one of which is that someone who does not have authorization to reside in the United States may be sent to another country. This assumption does not bear out in reality in the case of stateless persons, who are not nationals of any country, and no country in the world is obliged to issue them documents to facilitate their return. The legal limbo that engulfs stateless persons arises from this very disconnect between the letter and spirit of immigration law, which require an individual's removal, and the reality that there is no way to effectuate that removal as a practical matter.

Whether an individual is regarded as stateless, or mislabeled as a national of a country that no longer exists or fails to recognize that individual, the proceedings will initiate in a manner identical to any other removal proceedings: with the designation of a country for removal. Immigration judges follow a statutory framework in designating the country for removal, and the U.S. Supreme Court has summarized that framework as a four-step process:

(1) An alien shall be removed to the country of his choice, unless one of the conditions eliminating that command is satisfied; (2) otherwise he shall be removed to the country of which he is a citizen, unless one of the conditions eliminating that command is satisfied; (3) otherwise he shall be removed to one of the countries with which he has a lesser connection; or (4) if that is impracticable, inadvisable or impossible, he shall be removed to another country whose government will accept the alien into that country.<sup>37</sup>

This fairly routine matter raises very complicated issues for stateless persons, who have no citizenship and therefore no way to seek diplomatic protection from any country. First, a person can only choose a country for removal that will issue travel documents to him or her.<sup>38</sup> A stateless person will be unable to reasonably identify such a country. The second step is similarly not available to a stateless person, who is by definition not a citizen of any country. The third step is likely the step in which a stateless person will be assigned a country for removal.<sup>39</sup> However, in the case of a stateless person it is unlikely that the "lesser" connection required to designate a country for removal will be sufficient to ultimately secure travel documents from that country.<sup>40</sup> Indeed, stateless persons are not likely ever to be

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37. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (summarizing the instructions codified in 8 U.S.C. § 1231(b) (2012)).

38. *See* 8 U.S.C. § 1231(b)(2)(C).

39. At least one court has required immigration authorities to address the issue of nationality in the case of a stateless person before moving on to the third inquiry, and ordering the person removed to a country "with which he has a lesser connection." *See Hadera v. Gonzales*, 494 F.3d 1154, 1157 (9th Cir. 2007) (finding error in an immigration judge's decision under the second inquiry to "designate Ethiopia for whatever it may be worth," regardless of whether the respondent was "a subject, national, or citizen").

40. *See* 8 U.S.C. § 1231(b)(2)(C) (2012).

removed by virtue of the fact that they have no unfettered right to enter any state in the world.

The U.S. Supreme Court has been faced with the quandary of the unenforceable removal order in the case of Keyse Jama, a native and citizen of Somalia who argued that Somalia would never issue him travel documents because it did not have a functioning government.<sup>41</sup> The Supreme Court held that the statute outlined above did not explicitly require that the target country consent to removal,<sup>42</sup> and because it was such a high profile case, immigration authorities promptly flew Jama to a region of Somalia known as Puntland on a private jet and hired private escorts to take him through the airport.<sup>43</sup> However, because Jama did not have a travel document, he was denied entry into the country and returned to the United States—a failed operation that reportedly cost taxpayers two hundred thousand dollars.<sup>44</sup> While Jama was not stateless as a legal matter, the futility of his removal order at the time that it was issued is analogous to the case of stateless persons.

Fortunately, the U.S. government does not spend hundreds of thousands of dollars on failed efforts to remove all stateless persons. However, because there is no legal process for ICE to recognize whether its statutorily mandated removal efforts will be futile in the case of stateless persons, these individuals may suffer inordinate periods of detention while pleading in vain for countries to take them. When they ultimately secure their release from detention, they face an uncertain life on immigration parole with clear impediments to ever settling in the United States.

#### B. *Stateless Persons Move from Arbitrary Detention to a Life on Immigration Parole*

Whether an individual has been designated as stateless by the Department of Homeland Security (DHS), or mistakenly deemed a national of a country that does not recognize him or her as a citizen, a removal order will trigger an established process of detention and removal. It is at this stage that the administrative inefficiency of the U.S. immigration system, caused by its failure to recognize statelessness, and the inhumanity of the stateless legal limbo become most evident.

Persons ordered removed from the United States are mandatorily detained under statute in order to facilitate the execution of the removal order, an

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41. *Jama*, 543 U.S. at 337-38.

42. *Id.* at 341-51.

43. Elizabeth Stawicki, *U.S. Immigration Spent \$200K on Keyse Jama Deportation*, MINNESOTA PUBLIC RADIO (June 23, 2006), <http://minnesota.publicradio.org/display/web/2006/06/23/jamafight/> (indicating that the efforts to remove Jama cost upwards of \$200,000).

44. *Id.* (reporting that after six months of checking in with ICE twice a week, Jama fled to Canada to seek asylum).

action DHS should complete within a ninety-day “removal period.”<sup>45</sup> Even if it has been established in the removal proceedings that an individual is stateless, and a country for removal has been assigned as a matter of course and without a real expectation that the person will be removed, detention necessarily follows. Moreover, persons can be detained beyond the removal period, and such post-removal period detention is a matter of course for certain “inadmissible or criminal aliens.”<sup>46</sup>

Fortunately, the U.S. Supreme Court has placed a limit on the amount of time that ICE can hold an individual in post-removal order detention. In *Zadvydas v. Davis*, the Court held that the INA authorized immigration authorities to detain resident non-citizens beyond the removal period because of criminal convictions, only as long as “reasonably necessary” to remove them from the country.<sup>47</sup> Significantly, three years after deciding *Zadvydas*, the Supreme Court extended the same reasoning to the case of inadmissible non-citizens who challenged their detention beyond the removal period in *Clark v. Martinez*.<sup>48</sup> The effect of the Supreme Court’s decisions in *Zadvydas* and *Clark* was to guarantee, under the law, that all non-citizens have the right to release after six months of being deemed removable if there is “no significant likelihood of removal in the reasonably foreseeable future.”<sup>49</sup> This rule was subsequently incorporated into DHS operations through the “*Zadvydas* regulations.”<sup>50</sup>

These regulations are often interpreted by ICE to require some period of post-removal order detention, even if that person is clearly stateless and has no reasonable likelihood of ever being removed to another country. This detention can last ninety days to six months under the regulations without any justification. Moreover, even after six months, when the *Zadvydas* regulations require release if removal is not reasonably foreseeable, many have observed weaknesses in this regime’s implementation.<sup>51</sup> For example, the DHS Office of the Inspector General has concluded that the likelihood of

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45. 8 U.S.C. § 1231(a)(1)(A) (2001); *see also* 8 U.S.C. § 1231 (2001) (substituting the Secretary of Homeland Security for the Attorney General).

46. *See* 8 U.S.C. § 1182 (2012); 8 U.S.C. § 1231(a) (2012) (providing specifically that the alien may be detained beyond the presumptively reasonable period, if the alien is found removable under 8 U.S.C. §§ 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4)).

47. *Zadvydas v. Davis*, 533 U.S. 678, 689, 699 (2001).

48. *Clark v. Martinez*, 543 U.S. 371 (2005) (noting that the removal of two men could not be effectuated and both were detained beyond the removal period because the United States did not have diplomatic relations with Cuba).

49. *Zadvydas*, 533 U.S. at 701.

50. The regulations provide the procedures to determine: (1) whether an individual detainee will be detained or released following the ninety-day removal period, 8 C.F.R. § 241.4 (2011); (2) whether there is a significant likelihood of removal in the reasonably foreseeable future after 180 days in detention, 8 C.F.R. § 241.13 (2011); and (3) whether detention can be continued on account of ‘special circumstances’ beyond 180 days, even where removal is not foreseeable, 8 C.F.R. § 241.14 (2011).

51. *See* KATHLEEN GLYNN & SARAH BRONSTEIN, SYSTEMIC PROBLEMS PERSIST IN U.S. ICE CUSTODY REVIEWS FOR “INDEFINITE” DETAINEES (Catholic Legal Immigration Network, Inc. 2005), available at <http://idcoalition.org/wp-content/uploads/2009/06/clinicindefinitereportfinal.pdf>.

removal standard is not sufficiently documented and transparent.<sup>52</sup> There is little question that stateless persons are particularly vulnerable in the detention context considering their vulnerability as unclaimed persons who are often far from anyone who is in a position to shed light on their case.

The case of Artour Minasian, a former stateless detainee, reveals the weaknesses in the current system of custody review.<sup>53</sup> Artour was born in Georgia and is of Armenian descent. He came to the United States on a Soviet passport in 1992 to apply for asylum because the Georgian authorities were persecuting and expelling everyone in the country who was not Georgian, and he was a target because of his Armenian ethnicity. Artour was denied asylum and transferred into mandatory post-removal order detention.

After two months in detention, Artour was asked to reach out to Armenia for travel documents, but was denied. Nevertheless, after six months, he received a letter stating that his removal to the Republic of Georgia was foreseeable and that his detention would continue. After nine months, a Georgian consular official indicated that travel documents would not likely be issued. Nevertheless, he received another notice after eleven months that his removal was foreseeable and his detention would therefore be continued. Artour continued in detention until a *pro bono* lawyer filed a petition for *habeas corpus* on his behalf, and he was released a week later, after 14 months, without the petition even being adjudicated.

Artour's case provides anecdotal evidence that the regulatory framework is imperfect, and that stateless persons are particularly vulnerable to its imperfection. However, as oppressive as extended periods of detention may be, release from detention does not always bring peace to stateless persons in the United States, who continue without status or recourse within U.S. borders, never really able to integrate or regularize their situation.

The *Zadvydas* regulations provide the framework for supervised release of those persons with a final order of removal but for whom removal is not reasonably foreseeable. The regulations provide that an order of supervision will govern the terms of release, and that it will include conditions that the individual: (1) appear before an immigration officer periodically for identification; (2) submit, if necessary, to a medical and psychiatric examination; (3) give information under oath about his nationality, circumstances, habits, associations, activities, and any other information requested by the authori-

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52. DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, OIG07-28, ICE'S COMPLIANCE WITH DETENTION LIMITS FOR ALIENS WITH A FINAL ORDER OF REMOVAL FROM THE UNITED STATES 31 (2007), available at [http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_07-28\\_Feb07.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-28_Feb07.pdf) (reporting that while the *Zadvydas* regulations include a list of factors to consider when determining whether removal is reasonably foreseeable, they do not provide guidance on how to incorporate the Supreme Court's requirement that custody determinations receive greater scrutiny over time).

53. DAVID BALUARTE, FROM MARIEL CUBANS TO GUANTANAMO DETAINEES: STATELESS PERSONS DETAINED UNDER U.S. AUTHORITY 27 (Equal Rights Trust 2010), available at [http://www.equalrightstrust.org/ertdocumentbank/Statelessness\\_in\\_USA\\_17\\_Jan.pdf](http://www.equalrightstrust.org/ertdocumentbank/Statelessness_in_USA_17_Jan.pdf) (the full interview with Artur Minasian is on file with the author).

ties; (4) obey all applicable laws, and other reasonable written restrictions on conduct or activities; (5) continue to seek travel documents, assist authorities in obtaining such documents, and provide the authorities with all correspondence with relevant Embassies seeking the issuance of travel documents; (6) obtain advance approval of travel beyond previously specified times and distances; and (7) provide notice of change of address.<sup>54</sup>

Stateless individuals released under this regime with no cognizable end date have unsuccessfully challenged such conditions under a variety of constitutional theories.<sup>55</sup> Without a framework for their protection in the United States, most stateless persons are forced to remain in this condition of perpetual legal limbo, unable to leave the United States, but also unable to escape the stigma of living under a removal order and needing to justify their presence to ICE detention and removal authorities in regular intervals.

Tatianna Lesnikova has spoken publicly about the challenges faced by stateless persons condemned to a life of supervised release.<sup>56</sup> Tatianna fled to the United States from the Ukraine when it was under Soviet rule to save her son, who was being threatened because of politically controversial statements he had made in school.<sup>57</sup> Tatianna left her older son in the Soviet Union, thinking that once she had brought her younger son, David, to safety, she would be able to send for his older brother. Their claim for asylum was denied, and the two of them were whisked away to detention in shackles.<sup>58</sup> Efforts to remove them failed because Ukraine would not recognize them as citizens, and Tatianna has now lived in the United States under a regime of supervision for approximately twenty years.

The psychological impacts of this are clear in both David and his mother. Tatianna speaks about David's hesitation to marry because of his fear that he could be torn away from his family. For David the regular reporting to ICE reminded him of how vulnerable he and his mother were and that they could be detained at any time just as they had been the day their asylum applications were denied. Moreover, Tatianna cannot leave the United States, which means that she has not seen her oldest son since she originally escaped the Soviet Union. She struggles daily with the reality that she may never see her son, and that her act of bravery to save her child from harm may have permanently torn her family apart.

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54. See 8 C.F.R. § 241.13(h) (2011) (incorporating INA § 241(a)(3) and 8 CFR § 241.5 by reference).

55. See *Berry v. Adducci*, No. 10-10969, 2010 WL 2105130 (E.D. Mich. May 25, 2010); *Abusheikh v. Attorney General of United States*, 225 F. App'x 56 (3rd Cir. 2007).

56. See Tatianna Lesnikova, *Stateless Person Residing in the U.S., Address at the Washington Peace Center Conference on Statelessness* (Oct. 30, 2009) (speaking on a panel along with experts in the field); Shamander Dulai & Moises Mendoza, *Stateless: The Ultimate Legal Limbo*, NEWSWEEK (Apr. 10, 2015), <http://www.newsweek.com/stateless-ultimate-legal-limbo-319461>.

57. Interview with Tatianna Lesnikova, in Washington, D.C. (June 21, 2011).

58. Neel Arora, *Stateless in America*, A DIFFERENT PERSPECTIVE (July 11, 2010), <https://neelarora.wordpress.com/2010/07/11/stateless-in-america/>.



The inefficiency of this system of protracted removal proceedings, post-removal order detention, and perpetual immigration parole compound the problem of the stateless legal limbo. The cost of detaining one individual in immigration detention has been estimated to be anywhere between \$122 and \$164 per day.<sup>59</sup> It is difficult to calculate the cost of the time spent by detention and removal officers on follow-up with countries that will not claim would-be stateless deportees from the United States, but there is little question that the time is wasted. While the failed attempt to actually remove Keyse Jama that cost taxpayers an estimated two hundred thousand dollars is not common, the potential for such waste is clearly in evidence.

Similarly, the monitoring of these individuals in perpetuity once they are released is both unnecessary and a waste of scarce immigration resources. The efficiency concerns speak nothing of the opportunity cost of keeping otherwise productive individuals in a constant state of instability and economic precariousness, in which they must compete on the job market with the stigma of being removable and apply for a temporary work permit every year.

These bureaucratic inefficiencies pale in comparison to the inhumanity of a system that treats an internationally protected person like a common criminal, who is sent to jail and released to life on parole. Notably, when the humanitarian dimensions of the challenges faced by stateless persons are made evident, the response is often that they should qualify as refugees. This is often not the case, and the reasons for the inadequacy of the system of asylum protection for the protection of stateless persons assists in an understanding of the need for a separate protection mechanism.

*C. Stateless Persons Invariably Apply for Asylum, but are Often Found Ineligible and Ordered Removed*

Often, the one hope that stateless persons have to escape legal limbo is to successfully petition U.S. authorities for asylum. Myriad issues face stateless asylum seekers, who in some regards must meet an even more difficult burden than asylum seekers who have a nationality. Indeed, while asylum is available both to persons with a nationality and those without, the novelty of adjudicating asylum claims of stateless persons can lead to prejudicial errors in findings of fact and law. For example, a mistake in the determination that someone is or is not a national of a country can lead to a denial of asylum against the wrong country, and a removal order will issue that can be near impossible to revisit. In addition to the unique pitfalls that await stateless asylum seekers, they also must meet the burden of every other refugee. This can pose particular challenges to stateless persons where adjudicators often

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59. Kirk Semple, *Mass Release of Immigrants Is Tied to Impending Cuts*, N.Y. TIMES (Feb. 26, 2013), <http://www.nytimes.com/2013/02/27/us/immigrants-released-ahead-of-automatic-budget-cuts.html>.

do not understand the nature of their suffering as persons without a nationality, and fail to grasp the nature of the harm that they have suffered or that they will likely suffer in the future.

Persons can often become stateless because of some vulnerability, such as ethnicity, migratory status, or even some disfavored political opinion. Their statelessness can compound their already existing vulnerability, and it can be difficult to disaggregate which vulnerabilities are refugee-related and which are related to stateless status. In the case of Mikhail, he originally sought safety in the United States because of harm and insecurity he had suffered his entire life on account of his Armenian ethnicity. While Mikhail was seeking safe haven in the United States, he became stateless as a result of the dissolution of the Soviet Union. This new dimension of vulnerability was never considered part of his claim for refugee relief, which was ultimately denied. Mikhail's story is not uncommon in this regard; many stateless persons seek asylum but fall short of that legal showing and fall into the stateless legal limbo.

In order to receive asylum in the United States, a person must demonstrate that he or she is:

*outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .*<sup>60</sup>

U.S. courts have consistently found that asylum law does not protect stateless persons *per se*.<sup>61</sup> Courts have reasoned that by requiring those with “no nationality” to demonstrate a well-founded fear of persecution on account of a protected ground, the INA explicitly precludes the mere condition of being stateless as a basis for asylum, “[n]otwithstanding the recognition by both the United States and the international community of the problem of statelessness.”<sup>62</sup> Accordingly, the challenge of stateless persons in the United States,

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60. 8 U.S.C. § 1101 (2010).

61. *Ahmed v. Ashcroft*, 341 F.3d 214 (3rd Cir. 2003); *see also* *Faddoul v. Immigration & Naturalization Service*, 37 F.3d 185 (5th Cir. 1994); *Maksimova v. Holder*, 361 F. App'x 690 (6th Cir. 2010); *Fedosseeva v. Gonzales*, 492 F.3d 840 (7th Cir. 2007); *Pavlovich v. Gonzales*, 476 F.3d 613 (8th Cir. 2007); *Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001). Notably, there is also broad international consensus that a person who qualifies as stateless under the terms of the Statelessness Convention does not necessarily qualify for protection under the Refugee Convention. *See* UNHCR, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* ¶ 102 (revised ed. 1992) (noting “that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.”); *Revenko v. Sec'y of State for the Home Dep't*, [2000] A.C. (appeal taken from Immigration Appeal Tribunal) (U.K.).

62. *Ahmed*, 341 F.3d at 218.

like their refugee counterparts, is to demonstrate that the harm they have suffered rises to the level of persecution and that their persecutor was motivated in some substantial part by a protected characteristic.

Stateless persons, however, face an additional problem of demonstrating that they have “no nationality” and which is their “country of last habitual residence.” It bears emphasis that this threshold inquiry can be the difference between protection and removal. For example, in the asylum case of a man who had been raised as a strict Muslim in the West Bank, but later converted to Christianity, the main point of contention was whether he was a Jordanian citizen.<sup>63</sup> The immigration court had determined that the individual was a citizen of Jordan, and because he provided no evidence of any threat of harm in that country, denied his asylum claim and ordered him removed to Jordan.<sup>64</sup> Upon review, the Seventh Circuit noted ample evidence in the record that the petitioner was a stateless Palestinian, not a Jordanian citizen, but because the petitioner had admitted Jordanian citizenship in the proceedings, the court declined to overturn the agency determination.<sup>65</sup> In so finding, the circuit court noted the extremely deferential standard of review with which it was compelled to the review agency’s “factual finding” as to citizenship.<sup>66</sup>

Another threshold issue that stateless persons face in pursuing asylum claims is whether they can establish that the country against which they want their claim tested is indeed the country of last habitual residence. Courts have made inconsistent determinations about what constitutes a stateless refugee’s last habitual residence,<sup>67</sup> and have struggled to determine what standard should be applied in making this determination.<sup>68</sup> The Third Circuit is the

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63. *See Zahren v. Gonzales*, 487 F.3d 1039, 1041 (7th Cir. 2007).

64. *Id.*

65. *Id.* at 1041-42.

66. *Id.* at 1042. The conclusion of the Seventh Circuit highlights a problem with failing to provide a legal definition for statelessness in the INA or to create regulations to guide statelessness determinations, namely, that many courts treat this as a factual determination that federal appeals courts have limited capacity to review. *See, e.g.*, *In re S-H-*, 23 I. & N. Dec. 462 (B.I.A. 2002) (explaining that pursuant to 8 C.F.R. § 1003.1(d)(ii)(3), the Board of Immigration Appeals reviews findings of fact for “clear error”). *But see Almuhtaseb v. Gonzales*, 453 F.3d 743, 746 (6th Cir. 2006) (“[T]he BIA reversed the IJ’s conclusion regarding Jordanian citizenship, and instead concluded that Almuhtaseb is a stateless Palestinian.”). Significantly, in the Seventh Circuit case, a petition for rehearing was granted after the government spent three years trying to determine whether the petitioner was indeed a Jordanian citizen, and upon re-review, the court remanded the case for further deliberation at the agency level. *See Zahren*, 637 F.3d at 698. While crisis may have been averted in that case, it illustrates the precariousness faced by stateless asylum seekers who must resolve the complex question of their statelessness in order to secure relief.

67. Sarah B. Fenn, Note, *Paripovic v. Gonzalez: Defining Last Habitual Residence for Stateless Asylum Applicants*, 40 U.C. DAVIS L. REV. 1545, 1561-63 (2007) (demonstrating that courts have found a stateless person’s last habitual residence to be the country where the person was born in some instances, and in other instances have found it to be the country where the stateless person lived temporarily for a two-year period, and in still other cases the courts have declined to even decide which country would constitute the person’s last habitual residence).

68. *See id.* at 1466 (arguing that the Third Circuit’s decision in *Paripovic v. Gonzales* incorrectly defined last habitual residence quantitatively, and instead should have considered intent).

only court to date to specifically address the meaning of “last habitually resided” for a stateless individual.<sup>69</sup> That court gave deference to and accepted the agency interpretation that someone who became stateless after the dissolution of the former Yugoslavia had subsequently established habitual residence during a two-year stint in a Serbian refugee camp.<sup>70</sup> The applicant did not have an asylum claim against Serbia, however, and was ordered removed. Under this rule, stateless persons who are forced to flee conflict and seek safe haven in a refugee camp may lose the possibility of pursuing asylum relief in the United States because the country where the camp is located becomes the “last habitual residence.”

Once a stateless asylum seeker makes these threshold showings of “no nationality” and the “country of last habitual residence,” he or she must demonstrate “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>71</sup> Volumes have been written about this phrase, but for the purposes of this discussion, it can be considered as two separate showings. First, a stateless asylum seeker must show that harm suffered in the past was sufficiently severe to trigger protection, or that there is a likelihood of sufficiently severe harm in the future.<sup>72</sup> Second, a stateless asylum seeker must demonstrate that such harm was, or will be, inflicted to overcome or punish one of the five grounds for refugee protection.<sup>73</sup>

While stateless persons consistently seek refugee protection, there is surprisingly little clarity on the exact relationship between statelessness and persecution. One reason for this is that the term “persecution” is not defined in the INA.<sup>74</sup> Courts have interpreted persecution to cover a wide range of physical, psychological, and even economic abuse,<sup>75</sup> and have reached consensus as to the qualification of certain forms of severe abuse as persecution *per se*.<sup>76</sup> Importantly, the notion that certain mistreatment, such

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69. *Paripovic v. Gonzales*, 418 F.3d 240, 245-46 (3rd Cir. 2005).

70. *Id.* at 245 (citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

71. INA § 101(a)(42); *see also* 8 U.S.C. § 1101(a) (2012).

72. 8 C.F.R. § 208.13(b) (2012).

73. 8 C.F.R. § 208.13(b)(1) (2012).

74. For a discussion of efforts to define persecution, *see* Scott Rempell, *Defining Persecution*, 2013.1 UTAH L. REV. 283 (2013).

75. *See, e.g.*, *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (defining persecution as “the infliction of suffering or harm . . . regarded as offensive . . . [but it] does not include every sort of treatment our society regards as offensive . . . . Discrimination . . . does not ordinarily amount to ‘persecution’ . . . [but], in extraordinary cases, [it can] be so severe and pervasive as to constitute ‘persecution’ . . . .”); *Ngure v. Ashcroft*, 367 F.3d 975, 989-90 (8th Cir. 2004) (observing that persecution encompasses “the infliction or threat of death, torture, or injury to one’s person or freedom . . . .”); *In re T-Z*, 24 I. & N. Dec. 163 (B.I.A. 2007) (holding that nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution).

76. *See* *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (finding persecution occurred where there was rape or sexual assault); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1212 (9th Cir. 2004) (finding that ethnic cleansing was persecution); *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (holding that female genital mutilation was persecution).

as harassment, is an insufficiently severe form of “punishment or . . . infliction of harm” to qualify as persecution, is common.<sup>77</sup>

Courts have found stateless persons to have suffered persecution when they have been able to demonstrate sufficiently severe treatment related to their stateless status. For example, the Ninth Circuit has found that a stateless Palestinian who fled his native Kuwait, established asylum eligibility based on his minority status, where Kuwait engaged in forced expulsions and discrimination of Palestinians, who were also denied the right to work, go to school, or obtain drinking water.<sup>78</sup> This is different from the important question of when, if ever, government actions that leave people stateless may be considered persecution.

A number of federal courts of appeal have raised questions with regard to the relationship between deprivation of nationality—also called denationalization—and persecution.<sup>79</sup> The most notable example is the Seventh Circuit litigation in *Haile v. Gonzalez* (*Haile I* and *Haile II*), which involved ethnic Eritreans born in Ethiopia who sought asylum based on Ethiopia’s arbitrary expulsion and denationalization of approximately 75,000 persons of Eritrean ethnicity.<sup>80</sup> The asylum seekers in *Haile I* had escaped from Ethiopia without personally suffering any mistreatment, though they were effectively stripped of their Ethiopian citizenship and left stateless.<sup>81</sup> The Seventh Circuit found it “arguable that such a program of denationalization and deportation is in fact a particularly acute form of persecution,” and remanded this question to the Board of Immigration Appeals (BIA).<sup>82</sup> In *Haile II*,<sup>83</sup> after the BIA once again affirmed the removal order of one individual,<sup>84</sup> the Seventh Circuit found that “[i]f Ethiopia denationalized the petitioner because of his Eritrean ethnicity, it did so because of hostility to Eritreans,” and concluded that “if to be made stateless is persecution, as we believe, . . . then to be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution even if the country will allow you to remain and will not bother you as long as you

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77. See, e.g., *Bace v. Ashcroft*, 352 F.3d 1133, 1137 (7th Cir. 2003) (stressing that the actions must go beyond mere harassment).

78. *Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004).

79. See discussion of Sixth and Seventh Circuit decisions in Maryellen Fullerton, *The Intersection of Statelessness and Refugee Protection in US Asylum Policy*, 2.3 J. MIGRATION & HUMAN SECURITY 144 (2014), available at <http://jmhs.cmsny.org/index.php/jmhs/article/view/30>.

80. *Haile v. Gonzales* (*Haile I*), 421 F.3d 493 (7th Cir. 2005); *Haile v. Holder* (*Haile II*), 591 F.3d 572 (7th Cir. 2010).

81. *Haile I*, 421 F.3d at 494-95.

82. *Id.* at 496-97.

83. *Haile II*, 591 F.3d 572.

84. It is unclear from the opinion of the court what happened in the case of the second petition in *Haile I* on remand.

behave yourself.”<sup>85</sup>

While this decision of the Seventh Circuit provides a reasonably clear rule for that jurisdiction, the court’s reasoning leaves some unanswered questions. One such question is when denationalization may be considered to have occurred “on account of” a protected ground.

This question adds a layer of complexity to the persecution inquiry, which concerns the severity of the harm suffered. The U.S. Supreme Court has found that in order to establish a nexus to a protected ground, an asylum applicant must show through direct or circumstantial evidence that the persecutor was motivated by a desire to overcome a protected ground.<sup>86</sup> The U.S. Congress has further clarified that the protected ground must be “one central reason” for the persecution.<sup>87</sup> The nexus problem surfaces in many cases of denationalization through state succession, like the many cases that result from the dissolution of the former Soviet Union and Yugoslavia,<sup>88</sup> where individuals suffer a deprivation of nationality but face difficulty in providing evidence that the denationalization occurred on account of a protected ground.<sup>89</sup>

Once a removal order has been issued against a stateless person, who cannot be removed, the predictable chain of events described above unfolds. Indeed, the stories of Mikhail trapped in American Samoa, Artour languishing in unending detention, and Tatianna and David struggling to assert their humanity, all followed asylum denials. Nevertheless, their experiences illustrate perfectly why stateless persons are an internationally protected group and provide a narrative that demands a legislative solution. Now that such a solution has been proposed, the challenge is to both keep the momentum

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85. See *Haile II*, 591 F.3d at 574.

86. *INS v. Elias Zacarias*, 502 U.S. 478 (1992).

87. 8 U.S.C. § 1158(b)(1)(B)(i).

88. See, e.g., *Stserba v. Holder*, 646 F.3d 964 (6th Cir. 2011). In *Stserba*, one petitioner lost her citizenship when Estonia gained independence from the Soviet Union in 1991. *Id.* at 969. The Sixth Circuit remanded the case to the BIA for further consideration whether the denationalization was ethnically motivated. *Id.* The court considered that she was an Estonian citizen under Soviet rule, and that the decision of Estonia to limit citizenship only to pre-1940 citizens after independence was very possibly a manipulation of “citizenship rules to exclude ethnic Russians who immigrated during the Soviet occupation.” *Id.* at 974. The court further noted that policies required that persons who had become citizens during Soviet rule could only become citizens if they demonstrated language ability and knowledge of history, and as such it considered that they contained “an irreducible ethnic element.” *Id.* at 975.

89. There are clear indications that this population accounts for a substantial portion of the stateless persons in the United States. In August 2011, the author submitted a study of statelessness in the United States to the UNHCR and the Open Society Justice Initiative (OSJI), entitled “Stateless Persons in the United States: Without Status, Protection or Recourse.” Among other analyses, this study presented the results of a review of every federal court decision that involved a stateless party, an analysis of close to a decade of asylum statistics published by the U.S. government, and a survey of immigration practitioners around the country. This report ultimately served as the basis for the 2012 report published jointly by UNHCR and OSJI. UNHCR & OPEN SOCIETY JUSTICE INITIATIVE, *CITIZENS OF NOWHERE: SOLUTIONS FOR THE STATELESS IN THE U.S.* (2012), available at <http://www.refworld.org/docid/50c620f62.html>.

towards passage into law and to ensure that it is implemented in a way that will meaningfully address the problem of statelessness.

### III. THE LEGISLATIVE SOLUTION AND THE ROLE FOR INTERNATIONAL GUIDANCE

It is only very recently that a coordinated response to statelessness within the United States has been seriously suggested by the legislature.<sup>90</sup> Most significantly, a provision for “The Protection of Certain Stateless Persons in the United States” in the bi-partisan Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 (SB 744) would provide a comprehensive legal framework to address the stateless legal limbo.<sup>91</sup>

The SB 744 statelessness protection proposal was included among a series of reforms to the U.S. system of asylum and refugee protection, which is fitting when one considers the historic connection between these populations. It is also fitting in the sense that the proposed statelessness determination and protection mechanism mirror asylum protection in many significant ways. Namely, the proposal includes: a legal definition of stateless person that would be incorporated into the INA; an application procedure, which includes eligibility criteria, exclusions and waivers, and rules for employment authorization and derivative beneficiaries; considerations for stateless persons to adjust status to Lawful Permanent Resident (LPR); some information about evidentiary considerations; and provisions establishing rules for administrative review, reopening proceedings, and judicial review.<sup>92</sup>

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90. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-38 (1987) (“[O]ne of Congress’ primary purposes was to bring the United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . .”). Senator Patrick Leahy (D-VT) made the first legislative proposal to protect stateless persons in his Refugee Protection Act (RPA) of 2010, a section of which would provide for the “Protection of Stateless Persons in the United States.” S. 3113, 111th Cong. § 24 (2010). A hearing on the RPA provided important visibility for this legislation. *Reviewing America’s Commitment to the Refugee Convention: The Refugee Protection Act of 2010: Hearing on S. 3113 Before the S. Committee on the Judiciary*, 111th Cong. (May 19, 2010), available at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg58223/pdf/CHRG-111shrg58223.pdf>. The statelessness provision of the 2010 RPA was included in the 2010 Comprehensive Immigration Reform Act, presented by Senator Robert Menéndez (D-NJ). Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 257 (Sept. 29, 2010), available at <http://www.opencongress.org/bill/s3932-111/text>. Sen. Leahy introduced the RPA again in June 2011, with some changes, and in this way it continued to be a centerpiece for the conversation about statelessness in the United States. However, none of these proposals gained the traction in the Senate achieved by SB 744.

91. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 3405 (2013), available at <https://beta.congress.gov/bill/113th-congress/senate-bill/744/text>.

92. See generally Refugee Protection Act of 2011, S. 1202, 112th Cong. § 210A(b)(2). Indeed, the procedural similarities between the stateless persons determination and protection proposal and U.S. asylum procedures are striking. Namely, one would be able to apply affirmatively or defensively for stateless status. § 210A(e). Denials could be appealed to Federal Circuit Courts. § 3405(b). Once granted stateless status, an individual receives work authorization, may request a travel document, and may apply for derivative spouses and children to join his or her stateless status. § 210A(b)(5), (6), (7). After one year in stateless status, an individual would be eligible to apply to adjust his or her status to LPR. § 210A(c).

This means that a stateless person who is not a refugee would be able to submit to a very similar process and acquire rights very similar to that of a refugee, thereby eliminating the stateless legal limbo. However, before such a law and the necessary regulations are implemented and before adjudications commence, it is difficult to say how effective such a protection will ultimately be. Nevertheless, due to the relatively small population at issue, the administrative inefficiency associated with the stateless legal limbo, and the intense level of vulnerability endured by this population, it is imperative to develop a meaningful critique of the proposal so as to ensure that the version that is ultimately passed into law addresses the problem it was designed to resolve.

The UNHCR has recently produced the Handbook on Protection of Stateless Persons (Statelessness Handbook or Handbook),<sup>93</sup> which provides a framework for the analysis of the SB 744 proposal. The Statelessness Handbook provides authoritative interpretations of the provisions of the 1954 Statelessness Convention, and was produced through a process of international expert consultations that informed the production of the first-ever regulations on statelessness protection. The Handbook guidance addresses the criteria for determining statelessness, including the definition and the interpretation of relevant terms, the procedures for the determination of statelessness, and the status of stateless persons on the national level.<sup>94</sup> An analysis of the SB 744 proposal in light of this international guidance highlights the ways in which a U.S. statelessness mechanism may fail to address the stateless legal limbo.

A. *The Proposed Definition and Status of Stateless Persons in the United States are Consistent with Standards for International Protection*

The definition of “stateless person” and the legal status that will be accorded to persons who qualify as such are set forth in SB 744 proposed sections 210A(a) and (b), respectively. The definition is a clear, single sentence that, most importantly, mirrors the 1954 Convention definition in all meaningful ways. The legal status envisioned by SB 744 for stateless persons is described in provisions 210A(b)(5), (6), and (7), which provide for conditional legal status, work authorization, travel documents, and the opportunity to apply for derivative legal status for spouses and children. Further, section 210A(c) provides the framework for stateless persons to adjust their status to LPR, which puts them on a path towards U.S. citizenship. In this regard, the legal status set forth in the SB 744 proposal puts stateless persons on the track to resolving their stateless status through

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93. UNHCR, HANDBOOK ON THE PROTECTION OF STATELESS PERSONS UNDER THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS (2014), available at <http://www.unhcr.org/53b698ab9.pdf> [hereinafter STATELESSNESS HANDBOOK].

94. *Id.*



the acquisition of citizenship, and thereby meets international standards articulated in the Statelessness Handbook.

According to the UNHCR, perhaps the most significant contribution of the Statelessness Convention to international law is its definition of “stateless person,”<sup>95</sup> which is now considered customary international law.<sup>96</sup> It is therefore particularly important that the SB744 proposal largely tracks the definition of “stateless person” provided in the Statelessness Convention. Specifically, proposed Section 210A of the INA would define “stateless person” as “an individual who is not considered a national under the operation of the laws of any country.”<sup>97</sup> This is nearly identical to the Statelessness Convention, which provides protection to any “person who is not considered as a national by any State under the operation of its law.”<sup>98</sup>

The symmetry between the Convention definition of stateless person and the U.S. proposal is encouraging. At first blush, it would appear that Mikhail, as well as Artour and Tatianna, would be covered by this definition. Of course, it is impossible to establish this to a certainty without analyzing the documentation of each individual, his or her lived experience, and of course the nationality laws of any country implicated. Nevertheless, the fact that they all traveled with passports from the Soviet Union, which ceased to exist, and that successor states subsequently refused to recognize their rights as nationals at the very least constitutes a *prima facie* case of statelessness under the proposed definition.

However, while the nearly identical language of the Statelessness Convention definition and the U.S. proposal might suggest that the latter would be interpreted in a manner consistent with the former, there is no guarantee of interpretive harmony. Potential pitfalls could arise in the interpretation of the single sentence definition of “stateless person” by U.S. immigration authorities, as restrictive interpretations could substantially limit the availability of this relief.

Here, an analogy to the U.S. asylum context is instructive. Over the years, numerous questions with regard to the definition of terms have been the subject of extensive litigation. Ambiguities relating the intended meaning of “persecution,”<sup>99</sup> as well as the exact nature of the “on account of” nexus requirement,<sup>100</sup> are just a few prominent examples that were discussed above in relation to stateless asylum seekers. On both of these points, observers have leveled critiques against the United States for departing from international standards and guidance and thereby limiting important refugee protec-

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95. Statelessness Convention, *supra* note 15, at 3.

96. See Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/65/10, at 49.

97. S. 744, 113th Cong. § 3405 (proposed INA § 210A(a)(1)).

98. Statelessness Convention, *supra* note 15.

99. See Rempell, *supra* note 74.

100. See, e.g., Karen Musalo, *Revising Social Group and Nexus in Gender Asylum Cases: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777 (2003).

tions domestically.<sup>101</sup>

The definition of “stateless person” is no less open to debate, and the limited experience with this subject in the United States makes it an area in which guidance will be particularly important in order to accurately identify stateless persons and to eliminate their legal limbo along with its many detrimental consequences. The Statelessness Handbook, in its first section on the criteria for determining statelessness, hones in on these interpretive questions and provides thoughtful, expert insight into everything from the meaning of “state,” to the potentially murky concept of “not considered as a national . . . under the operation of its law.”<sup>102</sup>

Practical examples of how this guidance could assist in arriving at sound stateless determinations in the case studies provided above abound. Notably, while Mikhail was born in Azerbaijan and Artour was born in Georgia, they were both ethnically Armenian. Indeed, their Armenian descent was the root cause of their initial displacement and migration throughout the Soviet Union. It is also true that their Armenian ethnicity, or the potential Armenian citizenship of their parents, could serve as the basis for a finding that they are Armenian nationals. In fact, Article 10 of the 1995 Armenian citizenship law provides that: “Ethnic Armenian citizens of the former Arm. SSR, who live out side the Republic of Armenia and have not acquired the citizenship of another country,”<sup>103</sup> will be recognized as citizens of the Republic of Armenia.<sup>104</sup>

The proper consideration of this statement of black letter Armenian law, and the inquiry into whether Mikhail and Artour are “not considered . . . national[s] under the operation of the laws of any country,” are at the heart of the statelessness determination. It would be easy to read this statement and make a reflexive determination that both Mikhail and Artour are citizens of the Republic of Armenia and therefore not entitled to statelessness protection. But that would be the wrong outcome in their cases, evidenced by the fact that Armenia refused to recognize either man as a citizen when they were in post-removal order detention and ICE was engaged in exhaustive efforts to deport them.

The Statelessness Handbook provides helpful insight in this regard, emphasizing that whether a person is “not considered a national” is an individualized determination that is a mixed question of law and fact, and providing guidance on a wide-range of related inquiries.<sup>105</sup> The Handbook articulates the concepts of automatic and non-automatic citizenship, and

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101. See, e.g., Joan Fitzpatrick, *The International Dimensions of U.S. Refugee Law*, 15 BERKELEY J. INT’L L. 1, 15-24 (1997).

102. STATELESSNESS HANDBOOK, *supra* note 93.

103. The Law indicates that this was the product of an August 2011 amendment.

104. LAW OF THE REPUBLIC OF ARMENIA ON THE CITIZENSHIP OF THE REPUBLIC OF ARMENIA (1995), available at <http://www.refworld.org/docid/51b770884.html>.

105. STATELESSNESS HANDBOOK, *supra* note 93, at 23.

insists on an inquiry into competency of the authorities that make determinations in this regard for purposes of establishing statelessness. The Handbook takes the additional helpful step of equating “operation of law” with “law and practice,” which widens the range of relevant evidence beyond black letter law, and provides criteria for evaluating evidence of actions by competent authorities.<sup>106</sup> Applying this guidance to Mikhail and Artour’s cases would certainly boost the chance that the conclusory phrase in Armenian citizenship law would not be determinative in their cases, and relegate them to the stateless legal limbo in error.

It is also very important that, once persons are determined to be “stateless persons” pursuant to the definition proposed by SB 744, the law also envisions a status for them that complies with the international law of statelessness. The UNHCR has reiterated that the object and purpose of the Statelessness Convention is to “ensure that stateless persons enjoy the widest possible exercise of their human rights.”<sup>107</sup> Those determined to be “stateless persons” under the SB 744 regime would achieve a level of security in ways that relate to fundamental human rights, such as the right to work, the freedom to circulate, the protection of family unity, to say nothing of the drastically reduced risk of detention.

Those relegated to the stateless legal limbo in the United States regularly refer to precariousness in acquiring work authorization, strict travel restrictions, and an inability to reunite with family members in other parts of the world. Indeed, all of these concerns have been voiced in many forms by Tatianna.<sup>108</sup> The proposed stateless status would address these concerns head on by virtually guaranteeing the rights to work, travel and family reunification. The uneasiness Tatianna describes at her check-ins with immigration authorities and the fear that she could be arbitrarily detained would be eliminated. Indeed, the proposed protection mechanism envisions a clear path to LPR status, which potentially leads to citizenship—the ultimate solution to statelessness and the insecurity that accompanies that precarious state.

Under the SB744 proposal, stateless persons who apply for stateless status become eligible for work authorization as soon as they are determined to be *prima facie* eligible.<sup>109</sup> This is a significant recognition both of the importance of work to persons awaiting status in the United States, as well as the possible delays in adjudication once the mechanism is in place. By only requiring a *prima facie* eligibility finding, the law creates a framework to

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106. *Id.* at 25-36.

107. *Id.* at 14.

108. See Lesnikova, *supra* note 56; Shamander Dulai and Moises Medoza, *Stateless: The Ultimate Legal Limbo*, NEWSWEEK (Apr. 10, 2015), <http://www.newsweek.com/stateless-ultimate-legal-limbo-319461>.

109. See S. 744, 113th Cong. § 3405(5).

ensure that people are able to support themselves while immigration authorities are engaged in the complex analysis of foreign laws and alleged facts.

This leaves open the question of how authorities will determine *prima facie* eligibility, which again raises a caution about the possible negative effects of strict interpretation. In the U.S. asylum context, where asylum seekers are eligible for work authorization 180 days after applying for asylum, many difficulties have arisen with arbitrary tolling of this waiting period.<sup>110</sup> Indeed, the desperation of persons awaiting work authorization has been evidenced in a wide range of cases for humanitarian immigration relief,<sup>111</sup> and the model set forth in the SB 744 statelessness mechanism could be a best practice if it is effectively put into practice.

Once immigration authorities confer stateless status under the proposed law, a stateless individual would become eligible for travel documents.<sup>112</sup> This is important both because it permits stateless persons to travel and visit family in other parts of the world and because it provides stateless persons with a possibility to migrate to another country where they may have family or other important ties. It is important to remember that stateless persons do not necessarily want to stay in the United States.<sup>113</sup> Rather, they are stranded; and providing them with travel documents would give them the freedom to reestablish themselves where they feel most at home. Further, and perhaps even more important, a family reunification provision permits those persons conferred stateless status in the United States to obtain conditional lawful status for their spouse and children, assuming they are not subject to certain grounds of inadmissibility and that the qualifying relationship existed before the status was granted.<sup>114</sup>

Stateless persons granted stateless status under the law would be eligible to adjust their status to LPR after one year.<sup>115</sup> The proposed law requires that applicants for adjustment of status qualify as stateless, be physically present in the United States for at least one year after being granted their stateless status, and not be firmly resettled in another country.<sup>116</sup> Moreover, applicants

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110. See, e.g., LEGAL ACTION CENTER, A.B.T. ET AL. V. USCIS, ET AL.: A NATIONWIDE CLASS ACTION TO FIX THE "ASYLUM CLOCK" TERMS OF SETTLEMENT, available at [http://legalactioncenter.org/sites/default/files/KLOK\\_fact\\_sheet\\_4-15-13.pdf](http://legalactioncenter.org/sites/default/files/KLOK_fact_sheet_4-15-13.pdf) (last visited Jan. 21, 2016).

111. See KRISZTINA E. SZABO ET AL., EARLY ACCESS TO WORK AUTHORIZATION FOR VAWA SELF-PETITIONERS AND U VISA APPLICANTS (NIWAP 2014), available at <http://www.niwap.org/reports/Early-Access-to-Work-Authorization.pdf>.

112. See S. 744, 113th Cong. § 3405 (proposed INA § 210A(a)(1)).

113. Yury Decyatnik, 'I want to leave the US forever', PRAVDA REPORT (Oct. 6, 2014), [http://english.pravda.ru/society/stories/10-06-2014/127768-leave\\_usa-0/](http://english.pravda.ru/society/stories/10-06-2014/127768-leave_usa-0/).

114. S. 744, 113th Cong. § 3405 (proposed INA § 210A(a)(1)).

115. *Id.* This timeline for adjustment has shifted with the different proposals for statelessness protection in recent years. While the 2010 version of the RPA only required one year in stateless status before adjustment, the 2011 version increased the required period of stateless status to five years. Compare Comprehensive Immigration Reform Act of 2010 S. 3932, 111th Cong. § 257 (proposed INA § 210A(c)(1)), with Refugee Protection Act of 2011, S. 1202, 112th Cong. § 17 (proposed INA § 210A(c)(1)).

116. S. 744, 113th Cong. § 3405.

must not have become inadmissible to the United States under the provisions of the INA that would have disqualified them for stateless status.<sup>117</sup> Finally, once a stateless person has adjusted to LPR status, he or she would become eligible to become a U.S. citizen in five years and thus resolve their stateless status permanently.<sup>118</sup>

The proposed stateless status under the INA is in harmony with the Statelessness Convention, as well as the recent guidance published by the UNHCR in the Statelessness Handbook. Indeed, the Handbook interprets the Convention as permitting the conferral of rights on a gradual, conditional scale.<sup>119</sup> Specifically, the Handbook provides that individuals awaiting the decisions of statelessness determination mechanisms should enjoy, *inter alia*, identity papers, a right to employment, freedom of movement, and protection against expulsion.<sup>120</sup> The Handbook further interprets the Statelessness Convention to require that residence permits be provided to persons determined to be stateless and that stateless status be accompanied by the right to work, healthcare and social assistance, as well as a travel document.<sup>121</sup> Accordingly, the security provided to those seeking stateless protection, the status accorded to those persons determined to be stateless, and the path to citizenship available to stateless persons are all consistent with the framework for international protection set forth in the Statelessness Convention. Finally, the SB 744 proposal leaves little room for interpretation on this question of the quality of stateless status; thus, compliance with the Statelessness Convention in this regard appears manifest.

If indeed both the proposed definition of “stateless person” and the status that such a person would enjoy under the law comply with the international law of statelessness, the looming question relates to how a person will achieve this status. If the definition, on its face, covers persons such as Mikhail, Artour, and Tatianna, it must next be resolved whether there is anything in the procedure set out by the law that would prevent them from qualifying for the law’s protection. In this regard, an area of concern is the procedure for determining whether a person is stateless, and a number of key issues relating to standards of proof and evidence remain open for interpretation. There is little guidance on these issues in the current version of the law, and should U.S. authorities take a restrictive approach to these matters, stateless persons’ access to stateless status could be severely limited.

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117. *Id.*

118. *See* Immigration and Naturalization Act of 1952, Pub. L. 82-414, 66 Stat. 163.

119. STATELESSNESS HANDBOOK, *supra* note 93, at 47.

120. *Id.* at 52.

121. *Id.* at 53.

B. *The Proposed Protection Mechanism May Be Too Limited to Meaningfully Address the Stateless Legal Limbo*

The protection mechanism proposed by SB 744 includes five eligibility criteria. Pursuant to these criteria, the person seeking protection must show that he or she: (A) is a stateless person present in the United States; (B) has applied for such relief; (C) has not lost his or her nationality as a result of his or her voluntary action or knowing inaction after arrival in the United States; (D) is not inadmissible under certain criminal and security provisions of the INA;<sup>122</sup> and (E) has not participated in the persecution of others.<sup>123</sup> This protection mechanism can best be understood as encompassing a statelessness determination on the one hand and then an assessment of bars to eligibility on the other. In exploring the challenges that may arise in the functioning of this mechanism, international law and guidance will again provide important insight.

Here, U.S. asylum law again provides a helpful analogy in understanding challenges that may emerge in statelessness adjudication because of their historical, substantive, and procedural similarities. As a historical matter, it is important to recall that the 1954 Statelessness Convention was elaborated alongside the 1951 Refugee Convention and that the two Conventions were intended to work together to provide a comprehensive scheme for relief to persons in need of international protection. In fact, UNHCR has suggested that national systems for protection for refugees and stateless persons should be linked,<sup>124</sup> and many countries that have developed stateless protection systems have linked them to systems for asylum adjudication.<sup>125</sup>

The substantive and procedural similarities between U.S. asylum law and the proposed stateless person protection framework also serve as a rationale for utilizing this analogy. With regards to the statelessness determination, embodied in provisions (A) and (B) of the stateless protection mechanism, there is the implicit need to establish a standard of proof and articulate evidentiary considerations. These have been major areas of contention in U.S. asylum adjudications, and that experience has relevance to this analysis, particularly where international law guidance has provided assistance to U.S. adjudicators. In the same manner, many of the exceptions embodied in provisions (C) through (E) are also exceptions to asylum protection, and there is a body of jurisprudence and scholarship that provides insight both in the compatibility of these exceptions with international law norms as well as

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122. While certain other grounds of inadmissibility do apply, most are waivable. *See* S. 744 § 3405 (proposed INA § 210A(b)(1), (2), (3)).

123. 8 C.F.R. § 208.13(c)(2)(ii).

124. STATELESSNESS HANDBOOK, *supra* note 93, at 31.

125. *See* EUROPEAN NETWORK ON STATELESSNESS, STATELESSNESS DETERMINATION AND THE PROTECTION STATUS OF STATELESS PERSONS 9 (2013), available at <http://www.refworld.org/docid/53162a2f4.html> (highlighting that the asylum authorities in France, Moldova, Spain, the Philippines, and the United Kingdom are responsible for statelessness determinations).

their impact on U.S. asylum protection. The following sections explore in greater detail the potential problems that may arise with these aspects of the proposed stateless person protection mechanism.

1. *Potential Challenges in Establishing Standards of Proof and Evidence for a Statelessness Determination*

Together, provisions (A) and (B) require an application for relief and an official statelessness determination. Presumably, regulations would follow the passage of these statutory provisions into law that will specify how to make such an application as well as how immigration authorities will make the determination. One substantial question that is left open in the current legislative proposal is the standard of proof for establishing that one is a “stateless person” under the law. While it is understandable that this is not an issue that legislators would think to resolve at the outset, this was perhaps one of the most contentious issues in the early years of implementation of the Refugee Act.

In *INS v. Cardoza-Fonseca*, the U.S. Supreme Court established the standard of proof for asylum protection and thereby defined the scope of protection in a way that meant the difference between protection and death for hundreds of thousands of people.<sup>126</sup> In that case the U.S. Supreme Court addressed the hotly contested meaning of the statutory language “well-founded fear of persecution” that is central to the refugee definition.<sup>127</sup> It considered this legal question in the context of Luz Marina Cardoza Fonseca’s asylum claim, in which she claimed that the *Sandinistas* in her native Nicaragua would imprison and torture her to discover the whereabouts of her brother, who was a known political dissident.<sup>128</sup> The immigration court had applied the “more likely than not” standard to both her claim for withholding of deportation as well as her claim for asylum, denying both when it found that she had not demonstrated more than a fifty percent likelihood of being

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126. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

127. *Id.* at 440. By way of background, just three years before deciding *Cardoza-Fonseca*, the U.S. Supreme Court decided *INS v. Stevic*, 467 U.S. 407 (1984), in which it found that a non-citizen applying for “withholding of deportation” was required to show that “it is more likely than not that the alien would be subject to persecution” in the country to which he or she would be returned. Withholding of deportation, now also known as withholding of removal (currently at both INA §§ 243(h) and 241(b)(3), respectively), was considered by the Court in *Stevic* to be the domestic incarnation of the *nonfoulemont* protection embodied in Article 33 of the Refugee Convention. *Stevic*, 467 U.S. at 418-19. While parties did not dispute that withholding of deportation required a “more likely than not” showing prior to the ratification of the Protocol to the Refugee Convention in 1968, *Stevic* argued that such ratification changed the standard of proof to “well-founded fear,” which he also argued was a lower standard. *Id.* at 413-14. The Court concluded that Congress had intended to retain the “more likely than not” standard in the withholding of deportation context when it ratified the 1967 Protocol and that the showing of a more-than-fifty-percent likelihood of harm therefore persisted under the 1980 Refugee Act. *Id.* at 425-26. The Court deferred the question of which standard should be used to assess a “well-founded fear of persecution” in the context of an asylum claim, inasmuch as this issue was not squarely presented in *Stevic*. *Id.* at 429-30.

128. *Cardoza-Fonseca*, 480 U.S. at 424-25.

harmed in Nicaragua.<sup>129</sup> The U.S. Supreme Court disagreed, finding that the “well-founded fear” that is required to establish eligibility for asylum pursuant to the 1980 Refugee Act required a showing of only a ten percent likelihood of persecution.<sup>130</sup>

There were a number of very compelling reasons for the Court to decide *Cardoza-Fonseca* in the way it did,<sup>131</sup> but for the purposes of this discussion it is most important to highlight the Court’s determination that its conclusion was supported by authoritative interpretations of the Refugee Convention.<sup>132</sup> In so finding, the Court noted that Congress had intended to bring the United States into compliance with its international obligations under the Refugee Convention when it passed the Refugee Act.<sup>133</sup> The Court demonstrated this intent by pointing to the similarities in the language used to define “refugee” in the Convention and the Act. The Court went a step further and explored the intent of the Conference of Plenipotentiaries in crafting the refugee definition in the manner that it did, assuming that intent must be consistent with the intent of Congress in passing the Refugee Act.<sup>134</sup>

The Supreme Court then looked to the UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status (Refugee Handbook), and found that it supported the Court’s understanding of the intent of the Conference of Plenipotentiaries in crafting the refugee definition. It observed that “[t]here is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.”<sup>135</sup> Accordingly, it found that this must have also been the intent of the U.S. Congress in passing the 1980 Refugee Act. The Supreme Court concluded that the plain language of the INA, its symmetry with the Refugee Convention, and its legislative history clearly supported a lower standard of proof to demonstrate eligibility for asylum.

Recalling this extremely contentious question in the early years of asylum adjudications in the United States, one can easily imagine how a similar question may arise when adjudicators must determine whether an applicant for stateless status is indeed stateless. Under the SB 744 proposal, one must demonstrate that they are “not considered a national under the operation of the laws of any country.” As a starting point, to hold an applicant for stateless status to a 100% standard of proof could be practically impossible, where it would conceivably require communications with every country in the world. The Statelessness Handbook suggests limiting the inquiry to those states with

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129. *Id.*

130. *Id.* at 449.

131. *Id.* at 431-32, 441-43.

132. *Id.* at 449.

133. *Id.* at 436-37.

134. *Id.* at 437.

135. *Id.* at 440.



which the applicant enjoys a “relevant link, in particular by birth on the territory, descent, marriage, adoption or habitual residence.”<sup>136</sup> Even with a more limited scope of inquiry, though, it is easy to imagine how exhaustive applications to every state authority that could opine as to the nationality of an individual could take years to complete.

The Statelessness Handbook advises using the same standard of proof as a refugee status determination, requiring that applicants establish to a “reasonable degree” that they are not considered a national by any country.<sup>137</sup> Applying the standard of proof set by the Supreme Court in *Cardoza-Fonseca* to the statelessness context would mean that an applicant for stateless status would have to demonstrate a ten percent likelihood that he or she is not considered a national under the operation of laws of any country.

In addition to the guidance of the international refugee and statelessness protection frameworks, and the precedent of the U.S. Supreme Court, which explicitly incorporated the former, there are many practical reasons why U.S. immigration authorities should follow this guidance. First, one must recall the difficulties that were presented in the discussion above of Mikhail and Artour’s cases of statelessness under the law of Armenia. The difficult factual questions that arise in a statelessness determination must be answered with country conditions evidence, as well as individual factual accounts that—like the refugee context—may rely heavily on hearsay and inference. Indeed, the difficulties that arise in proving the likelihood of future harm in an asylum case, where the individuals seeking protection often fled dangerous situations with little more than the clothes on their backs, seem to characterize the statelessness case as well. Stateless persons must prove a negative and do so with evidence that likely does not exist.

The Statelessness Handbook highlights the difficulties inherent in proving statelessness, and lends additional emphasis to the consequences of incorrectly rejecting an application.<sup>138</sup> While the Handbook refers more to the troubling implications of denying humanitarian relief to an internationally protected person—sound concerns to be sure—there is an additional dimension that is particularly relevant in the U.S. context. Specifically, the prior section laid plain the administrative inefficiencies attendant in the stateless legal limbo in the United States. Rather than expend resources on futile removal efforts that distract immigration officers and squander taxpayer dollars and that aggravate open human rights wounds, applying a standard that requires only a “reasonable degree” of certainty is preferable.

As for the evidentiary considerations that will be relevant for meeting this standard of proof, the SB 744 proposal offers limited guidance. First, the proposed law provides that the Attorney General or Secretary of Homeland

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136. STATELESSNESS HANDBOOK, *supra* note 93, at 11.

137. *Id.*

138. *Id.*

Security may consider any credible evidence in making the determination of eligibility for stateless status and gives those authorities sole discretion in determining what evidence is credible and the weight that should be accorded to any evidence presented.<sup>139</sup> Second, the proposed law includes an explicit requirement that any applicant submit any passport or travel document in his or her possession, or a sworn affidavit explaining why such passport or travel document either does not exist or cannot be submitted.<sup>140</sup>

Evidentiary standards have also been a very important topic in U.S. asylum law. About a decade after the Supreme Court decided *Cardoza-Fonseca*, the BIA sent another similarly powerful message to immigration authorities with *In re S-M-J*.<sup>141</sup> In that case, the immigration judge had denied a Liberian woman's claim for asylum, which arose out of a coup against the Liberian government, for failure to carry her burden of proof. According to the applicant she would likely be targeted because of her relationship to her father, who was the governor of the Vai tribe in Liberia and had been targeted by the government; her uncle, who was the Liberian Ambassador in Zaire and needed to be evacuated to the United States; and her brother-in-law "Prince Anderson," though she provided no details about him.<sup>142</sup> There was exceedingly little evidence in the record about the events of which the applicant testified, such that her claim was denied due to inadequate support.

The BIA began its analysis of the relevant evidentiary requirements by recalling that the U.S. Congress had intended to implement obligations under the Refugee Convention when it created asylum protection under U.S. law.<sup>143</sup> It went on to observe that: "Because this Board, the Immigration Judges, and the Immigration and Naturalization Service are all bound to uphold this law, we all bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim."<sup>144</sup> The BIA specifically discussed the roles of the applicant, the INS, and the immigration judge in providing evidence during the claim's adjudication. With respect to the applicant, the BIA specifically referenced the guidance of the UNHCR Handbook, finding that the applicant had to testify credibly and provide all corroborating evidence that could reasonably be provided.<sup>145</sup>

As for the INS, the BIA reiterated that: "the Service has an obligation to uphold international refugee law, including the United States' obligation to

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139. See S. 744 § 3405 (proposed INA § 210A(d)).

140. See *id.* (proposed INA § 210A(b)(4)).

141. *In re S-M-J*, 21 I. & N. Dec. 722 (B.I.A. 1997).

142. *Id.* at 723.

143. *Id.*

144. *Id.*

145. *Id.* at 724-25.

extend refuge where such refuge is warranted.”<sup>146</sup> Similarly, as to the immigration Judge, the BIA recalled that the UNHCR Handbook provided that the “role of the asylum adjudicator is to ensure that the applicant presents his case as fully as possible and with all available evidence.”<sup>147</sup> Ultimately, the BIA concluded that both the INS and the immigration judge had an obligation to present evidence and to ascertain the level of risk faced by the asylum applicant despite the fact that it was the applicant’s burden of proof.<sup>148</sup> The BIA then remanded the case before it and ordered the INS and immigration judge to take seriously their responsibility to evaluate the claim for protection.<sup>149</sup>

In addition to sending a strong message to the principal actors in immigration enforcement about their obligations under international refugee law, the BIA set standards for assessment of the credibility of applicants and the need to corroborate claims made in the application. These standards reverberated throughout the system of asylum adjudication for nearly a decade before they were codified into law with the passage of the REAL ID Act of 2005.<sup>150</sup> Inasmuch as the standards set forth by the BIA in *In re S-M-J-* were informed by the Board’s reading of the UNHCR Handbook,<sup>151</sup> the important relationship between U.S. ratification of the 1967 Protocol to the Refugee Convention and the protection of asylum seekers in the United States is evident.

In the same way, there is an important role for international guidance in helping to conduct rigorous statelessness determinations that arrive at the correct result. Indeed, the Statelessness Handbook divides relevant evidence into two categories: evidence relating to the individual’s personal circumstances and evidence concerning the laws and conditions in the country in question.<sup>152</sup> It then goes on to provide extensive lists of examples of these types of evidence, as well as guiding considerations for assessing the reliability of evidence.<sup>153</sup> These insights could be of particular use to U.S. adjudicators, who have substantial experience examining the personal circumstances of non-citizens applying for immigration relief but are not well prepared for complex nationality determinations. As discussed in the previous section, making nationality determinations has been a challenge for U.S.

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146. *Id.* at 727.

147. *In re S-M-J-*, 21 I. & N. Dec. 722, 729 (B.I.A. 1997).

148. *Id.* at 727, 729-30.

149. *Id.*

150. See Deborah Anker, et al., *Any Real Change? Credibility and Corroboration after the REAL ID Act*, in IMMIGR. & NATIONALITY L. HANDBOOK 357 (2008) (arguing that despite widespread concern that the standards set forth in the REAL ID Act created more stringent standards for credibility and corroboration, they were in fact consistent with *In re S-M-J-*).

151. See *In re S-M-J-*, 21 I. & N. Dec. at 725.

152. STATELESSNESS HANDBOOK, *supra* note 93, at 32.

153. *Id.* at 32-33.

courts in the asylum context,<sup>154</sup> and international guidance on this point would be illuminating.

The Statelessness Handbook also emphasizes that non-cooperation or actions to deliberately withhold information from adjudicating authorities are reasonable bases to find that an applicant has not met the standard of proof unless evidence clearly indicates that the person is stateless.<sup>155</sup> Balanced advice of this nature is the product of expert input and substantial experience with nationality law research and statelessness determinations. Such guidance will be essential to ensure that those who are intended to receive protection as stateless persons are properly found to be stateless, while those who legitimately are not stateless can be appropriately documented for removal.

The questions relating to standards of proof and evidence taken up by the U.S. Supreme Court and the BIA in *Cardoza-Fonseca* and *In re S-M-J* respectively will almost certainly come up in the statelessness determination context. Notably, in both of the cases, the notion of international protection and the guidance of international refugee law was important in order to set the scope of humanitarian assistance in a way that resonates with the global consensus on protection. The potential for high standards of proof and evidence, coupled with additional statutory restrictions and exceptions that also fail to comport with international standards for protection, create a risk that statelessness protection in the United States will simply reach too few people to have the intended impact.

## 2. *Numerous Exclusions from Protection will Further Limit the Path Out of the Stateless Legal Limbo*

The remaining sections of the proposed protection mechanism, provisions (C) through (E), relate to grounds on which stateless persons can be denied protection under the U.S. mechanism. Section (C) excludes from statelessness protection all persons who became stateless because of voluntary action or knowing inaction.<sup>156</sup> As an initial matter, it is unsurprising that the proposed mechanism would deny protection to stateless persons who voluntarily renounce their nationality in order to become stateless. If there were no such exception, nothing would stop any person intent upon immigrating to the United States from traveling to a port of entry and renouncing their citizenship in order to pursue protection as a stateless person.<sup>157</sup> Moreover,

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154. *See* *Zahren v. Gonzales*, 487 F.3d 1039 (7th Cir. 2007); *Urgen v. Holder*, 768 F.3d 269 (2d Cir. 2014).

155. STATELESSNESS HANDBOOK, *supra* note 93, at 35.

156. *See* S. 744 § 3405 (proposed INA § 210A(b)(1)(c)).

157. The 1961 Convention on the Reduction of Statelessness does include a prohibition on voluntary renunciation of nationality that requires states party to the Convention to prohibit under their nationality laws the renunciation of nationality that would leave a person stateless. Nevertheless, many countries, including the United States, do not prevent such renunciation under their laws.

the Statelessness Handbook provides that an individual's free choice may affect the status accorded once a statelessness determination has been made, and a denial of protection to those who voluntarily renounce their nationality or otherwise refuse to reacquire a nationality may be appropriate.<sup>158</sup> In this regard, SB 744 likely complies with international law inasmuch as a person who voluntarily renounces his nationality will likely still be considered stateless under the proposed framework<sup>159</sup> but will be ineligible for protection under exception (C).

One concern is that the term "voluntary action" clearly encompasses more than voluntary renunciation, and the term "knowing inaction" encompasses a host of negative actions that will be open to interpretation by adjudicators. Broad interpretations of these exceptions could swallow the rule. As an example, there are stateless persons in the United States who were citizens of the former Soviet Union, and who failed to return to post-Soviet successor states and became stateless because they did not meet residency requirements under newly promulgated nationality laws. Questions about whether this constitutes "knowing inaction" that results in statelessness could certainly arise and interpretations among immigration judges could vary. In fact, in any statelessness determination, there will often be moments when an individual could have taken a different course of action that may have led to a grant of citizenship under the operation of laws of some country. However, the Handbook does not support an interpretation under which a reasoned failure to act would result in a limitation on protection,<sup>160</sup> and it would be helpful to have this interpretive guide when U.S. adjudicators consider different scenarios under exception (C).

The other exceptions to stateless protection set forth in sections (D) and (E), such as criminal grounds for inadmissibility,<sup>161</sup> including national security grounds,<sup>162</sup> and the persecutor bar,<sup>163</sup> are fairly expansive,<sup>164</sup> particularly when compared with the 1954 Statelessness Convention. Specifically, the Statelessness Convention excludes from protection persons who have: (a)

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158. STATELESSNESS HANDBOOK, *supra* note 93, at 55-56.

159. *Id.* at 10, 21.

160. *See generally* STATELESSNESS HANDBOOK, *supra* note 93, ¶¶ 55-56.

161. The proposal excludes from statelessness protection all applicants who are inadmissible under INA § 212(a), with certain limited exceptions. *See* S. 744 § 3405 (proposed INA § 210A(b)(1)(D), (b)(2)-(b)(3)).

162. Specifically those included in the unwaivable section 212(a)(3), titled "Security and related grounds." *See id.*

163. Specifically described in INA § 241(b)(3)(B)(i). *See* S. 744 § 3405 (proposed INA § 210A(b)(1)(E)).

164. Interestingly, the 2010 version of the RPA also included a variety of exceptions from stateless person protection, but in that version of the bill all grounds except persecution of others were waivable by the Attorney General or the Secretary of Homeland Security. *See* Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 257 (proposed INA § 210A(b)(2)). In the 2011 version, certain criminal and security grounds for exclusion from relief were made unwaivable, and this persists in the most recent version of the protection mechanism proposed in SB 744. *See* Refugee Protection Act of 2011, S. 1202, 112th Congress § 17 (referring to INA § 212(a)(2)(C), (3)(A)-(C), or (E)).

committed a crime against peace, a war crime, or a crime against humanity; (b) committed a serious non-political crime outside the country of their residence prior to their admission to that country; or (c) been guilty of acts contrary to the purposes and principles of the United Nations.<sup>165</sup> In principle, any exclusion to statelessness protection that is legislated in the United States that is not listed in the Statelessness Convention would be inconsistent with the international law of statelessness. However, there is limited international guidance on how these exclusions should be applied, and the Statelessness Handbook itself fails to elaborate them.<sup>166</sup>

As an initial matter, it is uncontroversial to suggest that the United States has the authority under international law to exclude persons who pose a threat to public order, even where international protection concerns are implicated.<sup>167</sup> At the same time, however, international law does require individualized consideration of claims for international protection.<sup>168</sup> Concerns in this regard have been raised with respect to the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), which vastly expanded the grounds for crime and national security exceptions to asylum eligibility.<sup>169</sup> IIRAIRA disqualified all non-citizens who had been convicted of an “aggravated felony” from eligibility for asylum, and when such crime receives a sentence of five years or more, the perpetrator also becomes ineligible for the mandatory form of relief withholding of removal.<sup>170</sup> These provisions have been criticized as being non-compliant with international refugee law,<sup>171</sup> and as such, blanket crime-based grounds for exclusion from statelessness protection are at least suspect.

Another potential concern about the availability of statelessness protection relates to the national security exceptions. IIRAIRA’s mandatory denial of asylum and withholding of removal where an applicant is found to have engaged in an expansive category of “material support” for terrorist activity has been criticized as overbroad.<sup>172</sup> International law requires that such cases are evaluated on a case-by-case basis,<sup>173</sup> and advocacy groups such as Human Rights First have urged U.S. immigration authorities to reasonably

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165. Statelessness Convention, *supra* note 15, at art I(2)(iii).

166. *See generally* STATELESSNESS HANDBOOK, *supra* note 93.

167. *See* Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT’L L. 117, 146 (2001) (discussing the undeniable right of the U.S. government to exclude refugees who pose a threat to the public order).

168. *Id.*; *see also* Bobbie Marie Guerra, *A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act’s Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law*, 28 ST. MARY’S L.J. 941, 975-78 (1997).

169. *See* Ramji, *supra* note 167, at 146-48.

170. INA § 241(b)(3)(B); 8 U.S.C. § 1251(b)(3)(B).

171. *See* Ramji, *supra* note 167, at 146-47; Guerra, *supra* note 168, at 975-78.

172. INA § 212(a)(3)(B)(iii); 8 U.S.C. § 1182(a)(3)(B)(iii).

173. *See* Ramji, *supra* note 167, at 147-48.

define the parameters of what may be considered “material support.”<sup>174</sup> Nevertheless, the BIA rejected reasoning along these lines advanced by the UNHCR “that there must be a link between the provision of material support to a terrorist organization and the intended use by that recipient organization of the assistance to further a terrorist activity.”<sup>175</sup> Efforts to establish a duress exception to the material support bar have similarly failed,<sup>176</sup> exacerbating concerns about the conflict between this exception and norms of international protection.

Just as the number of stateless persons is unknown, it not possible to know how many of them would be ineligible for the proposed protection scheme because of crimes they committed or “material support” they provided to organizations listed as terrorists. Considering how well engrained these particular limitations are in our system of immigration regulation and enforcement, it may be unrealistic to suggest that they should be modified to conform with international law in the case of statelessness protection, where such arguments have failed in the refugee context. Nevertheless, it is important to note that these limitations exist and that they will almost certainly operate to further limit the number of stateless persons who will be able to escape the legal limbo to which stateless persons are currently condemned.

More significantly, when all of these exceptions to relief are considered in conjunction with the potential for restrictive interpretations of standards of proof and evidence that would limit the scope of relief, the potential for relief appears quite limited. A statelessness protection mechanism must protect stateless persons and close the legal loophole that drives removal efforts against internationally protected people who cannot be removed. There is a dire need for protection of stateless persons in the United States, who are trapped in a legal limbo and suffering in a way that is not adequately appreciated. As the United States moves to address the problem of statelessness and remedy the situation of this discrete population, it must act with precision and in a manner informed by the global experience with this

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174. See HUMAN RIGHTS FIRST, *ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM* 11-12 (2006), available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/06925-asy-abandon-persecuted.pdf>.

175. See *In re S-K-*, 23 I. & N. Dec. 936, 944 (B.I.A. 2006).

176. See, e.g., *Barahona v. Holder*, 691 F.3d 349 (4th Cir. 2012). *But see* USCIS, *FACT SHEET CONCERNING THE SECRETARY’S EXERCISE OF AUTHORITY UNDER SEC. 212(d)(3)(B)(i) (2007)*, available at <http://www.rcusa.org/uploads/pdfs/Tier%20I%20and%20Tier%20II%20Duress%20Waiver%20Fact%20Sheet%205-10-07.pdf> (DHS in 2007 gave blanket authority to waive, in the exercise of discretion, the bar for those who give material support to Tier Three organizations under duress.); USCIS, *POLICY MEMORANDUM RE: IMPLEMENTATION OF THE DISCRETIONARY EXEMPTION AUTHORITY UNDER SECTION 212(D)(3)(B)(I) OF THE IMMIGRATION AND NATIONALITY ACT FOR THE PROVISION OF CERTAIN LIMITED MATERIAL SUPPORT (2015)*, available at [http://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0508\\_Certain\\_Limited\\_Material\\_Support\\_PM\\_Effective.pdf](http://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0508_Certain_Limited_Material_Support_PM_Effective.pdf) (DHS expanded the waiver remedy in 2014, by covering those who give “limited” support under “substantial pressure” that does not rise to the level of duress).

internationally protected population. Only then will the United States succeed in resolving the legal limbo in which stateless persons languish.

#### IV. CONCLUSION

As this article goes to print, the UN High Commissioner for Refugees is ramping up its ten-year, #IBELONG campaign to eradicate statelessness by 2024. The campaign's message is that statelessness is a problem of global proportions and that the entire international community needs to work to ensure that citizens of nowhere find safe harbor. As long as statelessness persists in the world, migrants in the United States risk becoming stateless and trapped in legal limbo within U.S. borders. The United States has made an important international pledge to do its part to end statelessness by establishing a stateless person protection mechanism under the Immigration and Nationality Act. In pursuit of this goal, the U.S. Senate proposed such a mechanism as part of the SB 744 comprehensive immigration reform effort. Stateless persons in the United States need this legislative project to come to fruition, but it will only provide an effective solution to their quandary if it is designed in harmony with the international system for protection.

The stateless population in the United States is discrete, but their suffering is intense. The little that is known about these individuals also reveals that their pasts are complicated, and a serious analysis of their factual accounts and complex legal histories will require both precision and compassion in order to arrive at the correct result. The Statelessness Convention and the recently released Statelessness Handbook provide the most reliable tools to ensure a systematic, protection-oriented approach to statelessness determination. Just as the Refugee Convention and Handbook have provided U.S. adjudicators with essential guidance in the effort to define substantive law and procedure for asylum seekers in the United States, international guidance will be crucial for statelessness protection.

Without the guidance of the international protection framework, there is a danger that restrictive interpretations, high standards of proof, and broad application of exceptions could prevail. The practical result of this in the context of a statelessness determination and protection mechanism will be to limit relief to stateless persons, and their legal limbo will persist. This is an important aspect to the statelessness problem in the United States, in which stateless individuals denied relief could continue to receive removal orders and loop into the default mandatory detention and immigration parole scheme already in place. There is no hope of removing these lost souls, and the system of detention and removal is unduly burdened by this humanitarian quandary. The most effective way to identify stateless persons in the United States and provide them with protection is to implement a mechanism in harmony with the guidance from the international community, developed in response to the global statelessness crisis.