Oxford Handbook of International Refugee Law

Chapter 43. Stateless Refugees

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Abstract

This chapter focuses on 'Who is a *stateless* refugee?', hence it examines the relevance of the Refugee Convention to refugees without a nationality. It argues that notwithstanding the adoption of an international regime specifically designed to protect *de jure* stateless persons (namely the Stateless Convention and the Reduction of Statelessness Convention), the international *refugee* protection regime is highly relevant to persons without a nationality and outside their country of residence. Thus, it analyses what it means to be stateless when applying for refugee status and the effects of statelessness on eligibility assessment. The chapter also examines claims for refugee status from individuals whose nationality is ineffective and discredits the notion of *de facto* statelessness as unhelpful and unnecessary in refugee law. It ends by exploring what extra obligations might States have, if any, towards recognised refugees who are stateless, particularly with regard to naturalization.

Key words
Refugee Convention – Statelessness – Stateless Refugees - Nationality

1. Introduction

The question of 'Who is a refugee?' has preoccupied the international community of States, civil society, and people for some time. States have long had a particular duty towards their nationals. However, governments' role towards the stateless (as non-nationals of any States) or towards refugees (as unwanted nationals of another State) has been less dutiful. This chapter focuses on the particular question of 'Who is a *stateless* refugee?'. The 1954 Convention relating to the Status of Stateless Persons (hereafter Stateless Convention)[1] and the 1961 Convention on the Reduction of Statelessness[2] together form the foundation of the international legal framework on statelessness and the protection of stateless persons.[3] At the same time, the Refugee Convention clearly encompasses some categories of stateless persons, considering that Article 1A(2) defines a refugee as a person who,

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

[1] 360 UNTS 117.
[2] 989 UNTS 175.
[3] See Chapter 8 in this volume.

outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it [italics added]

As this definition makes clear, it has always been assumed that having or not having a nationality is not a determinant element for being recognised a refugee;[4] in fact UNHCR datasets record *stateless* refugees as refugees.[5] At the same time, considerations of nationality or lack thereof can have a strong bearing on the assessment of key elements of the refugee definition. For instance, claims for protection from individuals whose nationality was denied or withdrawn or whose nationality is ineffective may be relevant facts in the assessment of persecution or well-founded fear.

This chapter examines the extent to which the Refugee Convention protects stateless persons *as refugees*. Thus, it scrutinizes both parts of the definition in Article 1A(2). It begins with the part of the sentence that follows the semi-colon and that is explicitly concerned with persons who do not have a nationality in law, namely the *de jure* stateless, with Section 2 focusing on the meaning of 'not having a nationality' and Section 3 on its sequels. Section 4 then examines the part of the sentence that precedes the semi-colon and discusses the situation of individuals who despite having a nationality may have a strong case for refugee status on the basis that their nationality is 'ineffective', the so-called *de facto* stateless. It proceeds to discredit the notion of *de facto* stateless as superfluous in international refugee law. The chapter ends by examining what extra obligations, if any, States might have towards recognised refugees who are stateless with a particular focus on naturalization (Section 5).

2. 'Not having a nationality' in the refugee definition

Whether an applicant has or does not have a nationality is often one of the first question a decision-maker has to answer because it is critical to an appreciation of key elements of the refugee definition: the country of reference, the harm feared and the reasons for persecution. Notwithstanding the Refugee Convention as 'the most frequently applied international treaty in the world',[6] legal scholarship on the application of the refugee definition to persons 'not having a nationality' is limited compared to that on persons with a nationality;[7] the enquiry

[4] Guy S. Goodwin-Gill, 'Stateless Persons and Protection under the 1951 Convention or Refugees, Beware of Academic Error!' (December 1992), texte présenté au Colloque portant sur 'Les récents développements en droit de l'immigration', Barreau de Québec, 22 janvier 1993 (hereafter Goodwin-Gill, 'Beware'); UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (Geneva 2011) [101]-[105] (hereafter UNHCR, *Refugee Handbook*).

[5] See Chapter 8 in this volume. The Institute on Statelessness and Inclusion estimates that today 1.5 million of the refugee population is stateless, in addition to an estimated 3.5 million Palestinian stateless refugees and an estimated 1 million stateless Rohingya in Bangladesh https://files.institutesi.org/ISI_statistics_analysis_2018.pdf.

[6] Catherine Dauvergne, *Making People Illegal – What Globalization Means for Migration and Law*, CUP 2008, 35.

[7] But see Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019) (hereafter Foster and Lambert, *Stateless Persons*); Eric Fripp,

has nevertheless received increased attention by courts across the world.[8] This section briefly examines what it means to be stateless in international law prior to considering when a person is without a nationality for the purpose of refugee law.

2.1 Statelessness in international refugee law: technical or humanitarian issue?

Historically, the general view was that refugees and stateless persons walked hand in hand,[9] as both groups were deemed to share the same plight, namely, lack of State protection and being in need of international protection in the form of a legal status.[10] The Refugee Convention and the Stateless Convention clearly reflect this long-standing view.

The Stateless Convention was originally intended to be a Protocol to the Refugee Convention.[11] When in July 1951 the Conference of Plenipotentiaries considered both the draft Refugee Convention and the draft Protocol relating to the Status of Stateless Persons, it was decided that more time was needed to discuss the issue of statelessness in detail and that the most pressing issue for now was that of refugees.[12] When the governments' representatives met again to discuss the draft Protocol for stateless persons, it was agreed (not without dissent) that the meaning of stateless person (considered at the time to be a technical concept) was sufficiently different from the meaning of refugee (considered to be more humanitarian) to regulate their status in a separate Convention independent from the Refugee Convention. The clear understanding at the time was that stateless refugees would be protected under the Refugee Convention, and that the new Stateless Convention would only apply to stateless persons who were *not* also refugees.[13]

For decades, issues surrounding the protection of stateless persons took a back seat whilst refugee protection occupied centre stage during the cold war. UNHCR's itself only came to be conferred certain tasks in relation to the 1961 Convention on the Reduction of

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Nationality and Statelessness in the International Law of Refugee Status (Hart Publishing 2016); Hélène Lambert, 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64 *ICLQ* 1 (hereafter Lambert, 'Comparative Perspectives'); Maryellen Fullerton, 'The Intersection of Statelessness and Refugee Protection in US Asylum Policy' (2014) 2 *Journal on Migration and Human Security* 144 (hereafter Fullerton, 'US Asylum Policy'); Guy S. Goodwin-Gill, 'Nationality and Statelessness, Residence and Refugee Status: Issues Affecting Palestinians' (March 1990).

[8] As comprehensively examined in Foster and Lambert, *Stateless Persons* (n 7).

[9] Guy S. Goodwin-Gill, 'The Rights of Refugees and Stateless Persons', in K P Saksena (ed), Human Rights Perspective and Challenges (Lancers Books 1994) 389.

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

[11] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, I.

[12] Ibid, III. See also Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 *IJRL* 232, 243.

[13] A statement to that effect was put in the Preamble to the Stateless Convention.

Statelessness in 1974[14] but its global mandate to identify, prevent, reduce statelessness *and protect stateless persons* is more recent.[15] Through a more accurate and deeper understanding of international human rights law, which was in its infancy when the Refugee Convention was drafted, it is now recognised that refugees and stateless persons have more than their plight in common, they also often share the source of the problem (i.e., discriminatory treatment). [16] Kerber for instance highlights gender as 'a key factor in the history of statelessness. Only recently have gender-specific asylum claims … been recognized'.[17]

2.2 The significance of statelessness in the refugee definition

The Stateless Convention mirrors the terms of the Refugee Convention in so many respects that one might wonder whether it matters if a person, who is both stateless and refugee, obtains protection under either the Refugee Convention or the Stateless Convention. However, there are significant differences in principle and practice, which render the latter less effective as an instrument of protection than the former. First, there are discrepancies between the rights listed in both Conventions, such as, Articles 15 (freedom of association) and 17 (right to work) which are formulated less favourably in the Stateless Convention, and Articles 31 (right to non-penalization for unauthorized entry), 33 (non-refoulement), and 35 (UNHCR supervision) which are simply absent from the Stateless Convention.[18] Second, despite significant increases in State ratification of the Stateless Convention in recent years, it still enjoys fewer ratifications than the Refugee Convention (91 vs 147).[19] Third, even in those States that have ratified the Stateless Convention, very few have implemented a procedure in domestic law for assessing and according a specific status under that Convention.[20] Finally, even in countries that have a stateless status determination procedure,

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[14] General Assembly Resolutions 3274(XXIX) of 10 December 1974 and 31/36 of 30 November 1976.

[15] General Assembly Resolution 50/152 of 21 December 1995. See Matthew Seet, 'The Origins of the UNHCR's Global Mandate on Statelessness' (2016) 28 *IJRL* 7, 11; Mark Manly, 'UNHCR's mandate and activities to address statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 88.

[16] Foster and Lambert, *Stateless Persons* (n 7) 39. See also Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 *IJRL* 564.

[17] Linda K. Kerber, 'Toward a History of Statelessness in America' (2005) 57 *American Quarterly* 727, 729.

[18] Foster and Lambert, *Stateless Persons* (n 7) 8-9.

[19] https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en [accessed 30 August 2019]. This number is expected to rise following the number of pledges made by States at the High-Level Segment on Statelessness, UNHCR, Executive Committee, Geneva, 11 October 2019 https://www.unhcr.org/en-au/news/press/2019/10/5da04b1d4/watershed-moment-countries-step-forward-tackle-global-statelessness.html?mc_cid=4cfa0fa749&mc_eid=3614d1ba26 [accessed 18 October 2019]

[20] Twelve countries have a stateless status determination procedure (France, Italy, Spain, Hungary, Latvia, Mexico, Switzerland, Georgia, Moldova, the Philippines, the UK, and Kosovo).

refugee status may remain crucial for example where certain rights are accorded only to refugees.[21]

2.3 'Not having a nationality' in international refugee law: in search of a principled approach

The definition of a refugee in the Refugee Convention contemplates a refugee to be with or without a nationality but it fails to explain what 'not having a nationality' means. While judicial approaches unanimously agree that this expression refers to a 'stateless person',[22] the legal test for assessing whether a refugee applicant is stateless (or not) remains inexact. In the great majority of cases,[23] where the nationality of the applicant is clear and undisputed, this is not so much an issue. However, in those cases where nationality is unclear or disputed, courts and tribunals have adopted different approaches to help them decide whether someone is with or without a nationality for the purpose of Article 1A(2) Refugee Convention; some have explicitly adopted the definition of a stateless person in the Stateless Convention, others have done so implicitly, others still have simply made no reference at all to any legal framework.[24] Further discrepancies exist in relation to the burden of proof and evidence of nationality.[25]

Guidance from UNHCR in this respect would help towards greater consistency and a more principled approach to interpreting the phrase 'not having a nationality' in the refugee definition. At present, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter Refugee Handbook) merely recommends that 'Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account'.[26] However, it stays silent on the precise meaning of 'not having a nationality', referring to 'stateless refugees' and 'stateless persons' without any allusion to the language or substance of the definition of a stateless person in international law (in Article 1(1) Stateless Convention).[27] UNHCR Handbook on Protection of Stateless Persons (hereafter Stateless Handbook) nevertheless clearly considers 'stateless refugees' to be stateless within the meaning of Article 1(1) Stateless Convention.[28] This

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The Netherlands and Brazil are to have one soon. UNHCR Good Practices Papers, Action 6 'Establishing statelessness determination procedures to protect stateless persons' available at https://www.refworld.org/pdfid/57836cff4.pdf

[21] As in the case of Hungary and Bulgaria, see : https://index.statelessness.eu/?mc_cid=6b88b29d5c&mc_eid=06c43831f2

[22] Foster and Lambert, *Stateless Persons* (n 7) 105.

[23] 97% according to Cathryn Costello, 'On Refugeehood and Citizenship', in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds) *The Oxford Handbook of Citizenship* (OUP 2017) 716, 720 (hereafter Costello, 'Refugeehood').

[24] Foster and Lambert, *Stateless Persons* (n 7) 107-109.

[25] Ibid, 113-119.

[26] UNHCR, *Refugee Handbook* (n 4) [89].

[27] Ibid, [101]-[105].

[28] UNHCR, *Handbook on Protection of Stateless Persons* (Geneva 2014) [78]-[81] (hereafter UNHCR, *Stateless Handbook*).

position could now be made explicit in UNHCR Refugee Handbook, in addition to some explicit references to UNHCR Stateless Handbook concerning issues of evidence.[29]

Noteworthy is UNHCR's recommendation that proof of nationality be required only in relation to States with which the applicant has 'a relevant link', such as 'birth on the territory, descent, marriage, adoption or habitual residence'.[30] This would exclude scenarios of 'virtual citizenship' whereby a State too happily tries 'to stick' a nationality on an unwilling individual (e.g., Jews from the USSR who despite never having lived in Israel and not wishing to live there, are nevertheless entitled to Israeli citizenship under the Law of Return) or where an individual is 'stuck' with a nationality that she is unable to reject (e.g., the nationality of South Korea in the case of North Korean refugees).[31] In both case scenarios, asylum States have sought to deny refugee status on that ground.[32]

The reality is that international law is not clear cut on the issue of individual consent to nationality. Indeed, in most cases nationality is acquired by birth based on parentage (jus sanguinis) or territory on which they are born (jus soli) or a combination of the two.[33] Yet, the British Digest of International Law along with several distinguished scholars believe that it would be contrary to international law for a State to impose its nationality on an individual against their will in the absence of a real connection with that State.[34] This point was first made in the context of the dispute between France and Great Britain over two French Decrees providing that anyone born in the Regency of Tunis or Morocco (French Zone) 'of parents of whom one, justiciable as a foreigner in the French Courts of the Protectorate, was also born there, is French'.[35] Great Britain objected to British subjects entitled to British nationality being automatically granted French nationality. The Permanent Court of International Justice, in response to the question put to it, advised the parties that contrary to the arguments put forward by France, the matter at hand was not, by international law, solely within the jurisdiction of France.[36] Following negotiations and exchange of notes between the two countries, it was agreed that a British national born in Tunis of a British national should be

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[29] UNHCR, *Refugee Handbook* (n 4) [93] and UNHCR, *Stateless Handbook* (n 28) [22-56] and [95].

[30] UNHCR, *Stateless Handbook* (n 28) [17]. See also the *Nottebohm's* 'genuine link' or 'social fact of attachment' in the international law of diplomatic protection, *Liechtenstein v Guatemala* [1955] ICJ 1.

[31] Audrey Macklin, 'Sticky Citizenship' in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds) *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 223 (hereafter Macklin, 'Sticky Citizenship').

[32] For instance, Canada denies refugee status to all North Koreans on the ground that they are citizens of South Korea and hence can benefit from protection in South Korea, ibid, 230.

[33] *Oppenheim's International Law* vol 1 Peace Parts 2 to 4, in Sir Robert Jennings and Sir Arthur Watts eds (9th ed 1996), 870.

[34] *British Digest of International Law Part VI: The Individual in International Law*, vol 5 (Stevens & Sons 1965) 25, citing Paul Weis, *Nationality and Statelessness in International Law* (Steven & Sons 1956) 110.

[35] http://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf, 7

[36] *Nationality Decrees Issued in Tunis and Morocco* Nov. 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7).

entitled to decline French nationality; this right, however, was not to extend to succeeding generations.[37]

The view that a State should not impose its nationality on a person against her will is also reflected in Article 8(2) of the ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States but with one important caveat concerning individuals who would otherwise be stateless;[38] in such cases, 'a State has the right to attribute its nationality to a person … irrespective of that person's will'.[39]

The weaknesses of a refugee protection regime at the centre of which thrones nationality is captured by Costello as follows: 'If a person flees her country of residence, even if she has never lived in her country of nationality, her refugee assessment still turns on assessing her fear of persecution vis-à-vis her country of nationality'.[40] The just mentioned examples of North Koreans and their 'virtual' right to South Korean nationality, and of Jewish refugees from the Soviet Union who are entitled to Israeli citizenship under the Israeli Law of Return even though they have never lived there are cases in point. In both examples, the consent of the person claiming refugee status in another State is irrelevant; the idea being that a 'virtual citizenship', any nationality, is better than no nationality. The problem which such reasoning is that refugee law decision-makers equate a nationality, any nationality, to protection by the country of nationality and conclude that the individual in question is not in need of refugee protection.

3. The sequel to 'not having a nationality' in the refugee definition

Having established that 'not having a nationality' means being stateless as defined in Article 1(1) of the Stateless Convention, this section examines whether stateless persons are protected *per se* under the Refugee Convention or whether they need to meet the requirements of the refugee definition (i.e., well-founded fear of persecution on a Convention grounds). If the latter, what are the particular challenges faced by stateless persons seeking refugee protection in contrast with persons with a nationality?

3.1 A single test for refugee status: well-founded fear of being persecuted

Scholarly debates on whether a stateless person has to meet the same criteria as a refugee in order to qualify for refugee status or whether statelessness per se is sufficient, has been

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[37] http://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf, 9-10. Proceedings regarding Morocco were also abandoned.

[38] Article 8(2) 'A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless'.

[39] International Law Commission, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries' (1999) 31 [5] available at https://www.refworld.org/pdfid/4512b6dd4.pdf [accessed on 6 September 2019]

[40] Costello, 'Refugeehood' (n 23) 722-723.

comprehensively examined in the literature.[41] The general view is that *all* persons claiming refugee status by application of Article 1A(2) must satisfy the same legal test, namely 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[42] This general view is embraced by senior courts for instance in Australia, Canada, France, Germany, Ireland, New Zealand, the UK, and the US, as well as in EU law; 'not having a nationality' does not lower the threshold for being recognised a refugee. [43]

However, strong arguments to the contrary have been made over the years,[44] and although in the minority, they do question whether the Refugee Convention, correctly applied, shouldn't clearly distinguish between refugees with a nationality and stateless refugees on the ground that nationality remains largely still a discretionary right of States.

As will be discussed next, 'not having a nationality' can also crucially impact on the interpretation of the country of reference, persecution, and the ability to return to that country.

3.2 Country of reference: 'country of former habitual residence'

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[41] Ibid, 92-98.

[42] Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *IJRL* 156. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 69–70 (hereafter Goodwin-Gill and McAdam, *Refugee in International Law*). See also James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) (hereafter Hathaway and Foster, *Law of Refugee Status*).

[43] E.g., *Minister for Immigration and Multicultural Affairs v Savvin* (2000) FCA 478 (12 April 2000) [Australia]; *Thabet v Canada (Minister of Citizenship and Immigration)* [1998] 4 FC 21 (11 May 1998) [Canada] (hereafter *Thabet v Canada*); Cour Nationale du Droit d'Asile, decision no°10018108, 16 November 2011 [France]; Bundesverwaltungsgerichts, 10 C 50.07, 26 February 2009 (Germany]; *AAAAD v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 326 (17 July 2009) [Ireland] (hereafter *AAAAD v Refugee Appeals*); *Refugee Appeal No 72635* [2002] NZRSAA 344 (6 September 2002) [New Zealand]*;* Revenko v Secretary of State for the Home Department [2000] EWCA Civ 500 [UK]; *Fedosseeva v Gonzales*, 492 F 3d 840, 845 (7th Cir, 2007) [US]. See also, Article 2(d), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted *OJ L 337, 20.12.2011, p. 9–26*.

[44] Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (AW Sijthoff 1966) 261 (hereafter Grahl-Madsen, *Status of Refugees*); Guy S. Goodwin-Gill, '*Revenko v Secretary of State for the Home Department*: Report on Behalf of the Appellant' (UK Court of Appeal Civil Division, 23 July 2000); Heather Alexander and Jonathan Simon, '"Unable to Return" in the 1951 Refugee Convention: Stateless Refugees and Climate Change' (2014) 26 *Fla J Int'l L* 531.

Once an individual has been identified as 'not having a nationality', the country of reference for assessing the fear of being persecuted becomes the 'country of former habitual residence'. This was defined by the drafters of the Refugee Convention as 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned',[45] with the term 'country' meaning something more than a State, for example, a part of territory or a camp under the control of an authority that is not recognised as a State.[46] Indeed, stateless persons 'are not free-floating, deracinated individuals, moving aimlessly around the globe', they are usually settled in a particular country.[47] Generally, *actual* residence is necessary (as opposed to a short stay or visit),[48] but it does not need to be lawful.[49] As a result, it is not unusual for a person to have resided in more than one country prior to seeking asylum. In such cases, it is argued that all that is required by Article 1A(2) is that an applicant establishes a well-founded fear in relation to at least one of her countries of former habitual residence,[50] unless Article 1E is found to apply.[51]

3.3 Non-returnability to that country as an eligibility requirement and/or an act of persecution

Article 1A(2) of the Refugee Convention differentiates between persons with a nationality and persons without a nationality on the question of return. While persons with a nationality must show that they are unable or unwilling to avail themselves of the protection of their country of nationality, stateless persons must be able to show their inability or unwillingness to return to their country of former habitual residence.

Despite some isolated arguments to the contrary,[52] practical obstacles to a right of return do not prevent a decision-maker from assessing a hypothetical claim for refugee status, if returned.[53] Further investigation is required as to whether an inability to return is being used as a tool of persecution. While the arbitrary refusal to a national to re-enter her country of

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[45] UNHCR, *Refugee Handbook* (n 4) [103]; *Refugee Appeal No 1/92 Re SA* [1992] NZRSAA 5 (30 April 1992).

[46] French Conseil d'Etat, decision nos°363181, 363182, 5 November 2014; in Australia, *Koe v Minister for Immigration & Ethnic Affairs* [1997] FCA 912 (8 September 1997) (Tamberlin J).

[47] Matthew Gibney, 'Statelessness and the right to citizenship' (2009) 32 *Forced Migration Review* 50.

[48] *El Assadi v Holder*, 418 Fed Appx 484 (6th Cir, 2011) 2.

[49] *SZUNZ v Minister for Immigration and Border Protection* [2015] FCAFC 32 (13 March 2015) [107]

[50] Foster and Lambert, *Stateless Persons* (n 7) 142. This is consistent with UNHCR, *Refugee Handbook* (n 4) [104].

[51] Foster and Lambert, *Stateless Persons* (n 7) 142.

[52] James Hathaway, *The Law of Refugee Status* (Butterworths 1991) 62. Note that Hathaway has since changed his view in Hathaway and Foster, *Law of Refugee Status* (n 42) 69.

[53] *Saad, Diriye and Osorio v Secretary of State for the Home Department* [2001] EWCA Civ 2008. See also, Goodwin-Gill, 'Beware' (n 4); Foster and Lambert, *Stateless Persons* (n 7) 99-103; Goodwin-Gill and McAdam, *Refugee in International Law* (n 42) 31; Grahl-Madsen, *Status of Refugees* (n 44) 261.

nationality is generally accepted as amounting to persecution,[54] the same general conclusion cannot be made with respect to stateless persons. For instance, in a series of UK cases concerning stateless Palestinians, senior courts have ruled that unlike citizens, stateless persons have no right to enter a country, including their country of former habitual residence; hence to deny them such a right cannot be persecutory.[55] In the words of Maurice Kay LJ: 'The lot of a stateless person is an unhappy one, but to deny him a right that he has never enjoyed is not, in itself, persecution';[56] the assumption being that the right to return is attached to nationality, and that stateless persons are protected by the Stateless Convention.

Such reasoning is puzzling considering Article 12(4) ICCPR which guarantees, in very broad terms, the right to enter and remain in one own's country to everyone irrespective of nationality.[57] Instead of concluding that an inability to return cannot amount to persecution in such cases, questions should be asked about the strength of attachments vis-à-vis one's 'own country' and whether the denial of return is arbitrary.[58]

Outside the context of stateless Palestinians, denial of the right to return for stateless persons (particularly where there is evidence of discrimination) has been found to be capable of constituting persecution for the purposes of refugee protection in a number of jurisdictions.[59]

3.4 Well-founded fear of being persecuted

Having established in section 2.1 that a well-founded fear of being persecuted is a prerequisite to refugee protection in *all* applications for refugee status, this section now turns to the meaning of 'being persecuted' for a Convention reason in the context of stateless person.

3.4.1 Denial of nationality

Cases based on denial of nationality involve persons who claim that the failure of their country of origin to afford them nationality constitutes persecution (e.g., based on discriminatory nationality laws). Several of these cases have been met with scepticism by decision-makers

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[54] *Lazarevic v Secretary of State for the Home Department* [1997] EWCA Civ 1007 (Hutchison LJ).

[55] *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304 [26] (Maurice Kay LJ) (hereafter *MA v SSHD*). See further, *HS v Secretary of State for the Home Department* [2011] UKUT 124 (IAC) [185] finding that the Tribunal was bound by the previous UK authority in relation to this point.

[56] *MA v SSHD* (n 55) [26].

[57] UN Human Rights Committee, 'CCPR General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 20; *Nystrom v Australia* (1 September 2011) UN Doc CCPR/C/102/D/1557/2007; *Warsame v Canada* (1 September 2011) UN Doc CCPR/C/102/D/1959/2010.

[58] Foster and Lambert, *Stateless Persons* (n 7) 168.

[59] *Thabet v Canada* (n 43) [31]; *AAAAD v Refugee Appeals* (n 43) [86].

on the ground that States are under no obligation to confer their nationality to an individual who wants it because nationality conferral is a sovereign act of States.[60]

While it is true that a *general* human right to a nationality may not yet exist in international law, except perhaps for children, human rights obligations are nevertheless engaged where there is evidence of discrimination on a protected ground in formulating nationality laws.[61] In such cases, the key issue is not one of operation and conflict of nationality laws but rather one of the apparent neutrality of an existing law, by reference to international human rights treaties, such as CEDAW, ICERD, ICCPR, ICESCR, CRC, and regional treaties, which may (or may not) lead to a finding of risk of persecution upon return.[62]

3.4.2 Withdrawal of nationality

The jurisprudence on active withdrawal of nationality is slightly more nuanced with distinctions made between cases where denationalization can be lawful in international law (on grounds of fraud or misrepresentation, disloyalty, or treason),[63] cases where individuals have one other (or more) nationality to fall back onto, and cases where withdrawal may lead to statelessness, including cases of mass arbitrary deprivation of nationality.

There is now a considerable body of scholarship examining recent legislative changes aiming at withdrawing nationality on national security or public order grounds.[64] This body of scholarship together with international law agree that it is only in the most exceptional circumstances that a State may lawfully denationalize and render an individual stateless. More commonly, withdrawal of nationality is used as a tool for discriminating,[65] deporting

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[60] E.g., *BA v Secretary of State for the Home Department* [2004] UKIAT 00256 [63] (hereafter *BA v SSHD*); *SZTFX v Minister for Immigration and Border Protection* [2015] FCA 402 (30 April 2015) [47].

[61] Foster and Lambert, *Stateless Persons* (n 7) 149-150. See also, Lambert, 'Comparative Perspectives' (n 7).

[62] As was done successfully by the Cour Nationale du Droit d'Asile, decision no.11030207 C+, 22 May 2014. However, for cases to the contrary, see *Refugee Appeal No 72635* [183], and *Refugee Appeal No 74449* [2003] NZRSAA 332 (26 August 2003); *X (Re)*, 2014 CarswellNat 5790, 5791; *BA v SSHD* (n 60) [63].

[63] Foster and Lambert, *Stateless Persons* (n 7) 74-77.

[64] Matthew Gibney, '"A Very Transcendental Power": Denaturalisation and the Liberalisation of Citizenship in the United Kingdom' (2013) 61 *Political Studies* 637; Sangeetha Pillai and George Williams, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations' (2017) 66 *ICLQ* 521. See also, Parliamentary Assembly of the Council of Europe, Resolution 2263 (2019) 'Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach?' (25 January 2019).

[65] *Haile v Holder*, 591 F 3d 572 (7th Cir, 2010) (agreed in principle) (hereafter *Haile v Holder*). In *Stserba v Holder*, 646 F 3d 964 (6th Cir, 2011), the US Court of Appeals Sixth Circuit held that stripping a person of nationality on a protected ground, rendering them stateless, *could* amount to persecution. Fullerton, 'US Asylum Policy' (n 7); David C. Baluarte, 'Life after Limbo: Stateless Persons in the United States and the Role of International Protection in Achieving a Legal Solution' (2015) 29 *Geo. Immigr. L.J.* 351.

or detaining entire groups of population on political, racial or religious ground.[66] Combatting discrimination is a fundamental purpose of the Refugee Convention and decision-makers have accepted that withdrawal of nationality on a protected ground (e.g., race, gender, ethnicity) is contrary to international law and cannot be justified for reason of sovereignty.[67] The harm must nevertheless be sufficiently serious to reach the threshold of persecution;[68] that assessment is context specific. Hence, withdrawal of nationality *on its own* may not necessarily reach the level of persecution; more may be required in terms of harm in particular looking at the consequences of becoming stateless.[69]

3.4.3 Denial of civil and political rights and/or socio-economic rights

It is widely documented that stateless persons often face harm resulting from their lack of access to essential rights attached to nationality, such as education, birth certificates or other ID documents, work, health care, family unity, freedom of movement etc. in their country of former habitual residence. It is difficult to ascertain easily which denials of rights give rise to the level of persecution since very often they are entangled. That said, despite an increased willingness by decision-makers to fully recognise the devastating effects of socio-economic deprivation, reluctance persists in recognising the denial of these rights as persecution unless there is also evidence of physical injury, arrest, detention.[70] The rationale behind such findings is that a stateless person cannot be found to be persecuted under international law for lacking socio-economic rights which she is not entitled to under *domestic law*. The problem with such reasoning is that it ignores provisions of *international law* that require States to respect and ensure the rights protected in human rights treaties, including both ICCPR and ICESCR, to all people within their territory and subject to their jurisdiction, regardless of nationality or lack thereof. Similarly questionable are reasoning that reject the possibility of persecution if harm exists against whole communities or civilians generally.[71] Nevertheless, *significant* hardship/severe treatment resulting from a denial of both civil and political rights and socio-economic rights taken cumulatively have been found to amount to persecution (e.g., in cases of undocumented Bidoons).[72]

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[66] E.g., the mass withdrawal of nationality to 1.9 million mostly Bengali Muslims, in Assam, northeast India, following the 2018 National Register of Citizens. See Suhasini Raj and Jeffrey Gettleman, 'A mass citizenship check in India leaves 2 million people in limbo' *New York Times* (31 August 2019).

[67] E.g., *Haile v Gonzales*, 421 F 3d 493, 494.

[68] *EB (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289; *Haile v Holder* (n 65).

[69] For a full analysis of the relevant case law, see Foster and Lambert, *Stateless Persons* (n 7) 156-164.

[70] Foster and Lambert, *Stateless Persons* (n 7) 176.

[71] Such reasoning contradicts UNHCR Guidelines on International Protection No. 12 (02 December 2016), available at https://www.unhcr.org/en-au/publications/legal/58359afe7/unhcr-guidelines-international-protection-12-claims-refugee-status-related.html

[72] Foster and Lambert, *Stateless Persons* (n 7) 178-185. This would also be the case of those Rohingya able to flee and claim refugee status in a State party to the Refugee Convention

On the whole therefore the particular challenges faced by stateless persons seeking refugee protection seems to be that 'persecution is more about serious human rights violations than a deficit of citizenship per se'.[73]

4. Having an 'ineffective' nationality: the discredited notion of *de facto* statelessness

The preceding sections examined the relevance of the refugee definition to persons without a nationality, namely the *de jure* stateless. This section focuses on the part of the refugee definition that precedes the semi-colon and which refers to refugees with a nationality. It examines the notion of 'ineffective' nationality or so-called *de facto* statelessness with a view to assessing its usability in refugee law.[74]

De facto stateless persons have existed long before the definition of statelessness was adopted in 1954. According to Article I of the Provisional Arrangement of 04 July 1936 concerning the Status of Refugees coming from Germany:

> [T]he term refugee coming from Germany shall be deemed to apply to any person who was settled in that country, who does not possess any nationality other than German nationality, and in respect of whom it is established that in law or in fact he or she does not enjoy the protection of the Government of the Reich[75]

but the term '*de facto* stateless' did not appear until much later, in 1949.[76]

The distinction between *de jure* and *de facto* statelessness, and the terminology '*de facto* stateless', have been disputed for a long time. In 1952, Manley O. Hudson (working at the time with Paul Weis) observed that the distinction introduced in the 1949 Study of Statelessness may have been useful then,

> it has, however, no place in the present paper. *Stateless persons in the legal sense of the term are persons who are not considered as nationals by any State according to its law*. The so-called stateless persons are *de facto* nationals of a State who are outside

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(Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/40/68, 02 May 2019).

[73] Costello, 'Refugeehood' (n 23) 725.

[74] Note that the focus here is on *ineffective* nationality and not on the wider issue of 'effective nationality' in the context of dual or multiple nationalities. Hugo Storey, 'Nationality as an Element of the Refugee Definition and the Unsettled Issues of "Inchoate Nationality" and "Effective Nationality"', RefLaw (June 2, 2019), http://www.reflaw.org/

[75] League of Nations, *Provisional Arrangement concerning the Status of Refugees Coming from Germany*, 4 July 1936, LNTS, Vol. CLXXI, No. 3952, available at: https://www.refworld.org/docid/3dd8d0ae4.html [accessed 5 September 2019]

[76] UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations, August 1949, Lake Success - New York*, 1 August 1949, E/1112; E/1112/Add.1, available at: https://www.refworld.org/docid/3ae68c2d0.html [accessed 5 September 2019]

> of its territory and devoid of its protection; they are therefore, not stateless: it might be better to speak of "*unprotected persons*" and to call this group "*de facto unprotected persons*", in distinction to "*de jure unprotected persons*", i.e., stateless persons.[77]

Cordova, who succeeded to Hudson in the role of Special Rapporteur, saw *de facto* statelessness as a much worse situation than *de jure* statelessness because

> the mere fact that they are not technically deprived of nationality itself renders them incapable of obtaining a legal remedy under the proposed statute for stateless persons unless the Commission has the courage to face the problem and provides the said legal remedy.[78]

In his view, 'a right which cannot be exercised is not a positive one' and Article 15 UDHR recognises human beings an entitlement to possess a positive, and effective, right of nationality.[79] Despite Cordova's efforts, *de facto* statelessness was not embraced by the International Law Commission on the ground that 'the term "*de facto* statelessness" had never been clearly defined',[80] that it 'was not an easy concept' and that the problem of de facto statelessness 'was not extremely urgent'.[81] Hence, it was not included in the Stateless Convention.[82] Notwithstanding, scholarly debate continued with some believing that in the eyes of the drafters of the Refugee Convention '*de facto* stateless persons *were* refugees', whilst others arguing this not to be the case of *all de facto* stateless.[83]

Although the term *de facto* statelessness has remained undefined in law, in its original meaning, it referred to persons who have a nationality that is 'ineffective' in the sense that they were *outside* their country of nationality and their State of nationality wouldn't protect them through the exercise of diplomatic and consular protection ('the unprotected').[84] The requirement that a *de facto* stateless person be outside their country of nationality meant that the overlap between *de facto* stateless and refugees was significant.

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[77] International Law Commission, 'Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur', A/CN.4/50, 1952, 17.

[78] International Law Commission, 'Nationality, Including Statelessness – Third Report on the Elimination or Reduction of Stateless by Mr. Roberto Cordova, Special Rapporteur', A/CN.4/81, 1954, 30, [37].

[79] Ibid, [35] and [36].

[80] Mr Lauterpacht Summary record of the 249th meeting of the International Law Commission, A/CN.4/SR.**249**, 1954, [15] (hereafter Lauterpacht, Summary Record)

[81] Mr Lauterpacht Summary record of the **246th** meeting of the International Law Commission, A/CN.4/SR.**246**, 1954, [18].

[82] Lauterpacht Summary record (n 81) [17].

[83] For this debate, refer to Hugh Massey, 'UNHCR and De Facto Statelessness' (April 2010, LPPR/2010/01) 22 (hereafter Massey, 'De Facto Statelessness') available at: https://www.refworld.org/docid/4bbf387d2.html [accessed 6 September 2019]

[84] Ibid 24, 26.

The rise and development of international human rights and corresponding duties on States to protect these rights within their territory or jurisdiction provided an added meaning to 'ineffective': ineffective nationality could manifest itself also inside a country as a result of State repression and discrimination.[85] However, this expansion of the notion of *de facto* statelessness to persons whose general human rights have been violated has not gone without criticism. For instance, Massey has argued that it conflates two conceptually distinct rights - the right to a nationality and the rights attached to nationality - and a violation of the right to a nationality may not necessarily entail a violation of the rights attached to nationality and vice versa.[86] De Chickera and van Waas describe it as 'the catch-all solution' used (wrongly in their view) to fill shortcomings in the legal definition of a stateless person.[87] They further argue that

> In the absence of an internationally agreed substantive minimum content of nationality, it becomes near impossible to objectively draw a line on a spectrum beyond which statelessness can be assumed on the basis of 'ineffective nationality'

suggesting instead 'effective human rights protection' as a better line of inquiry.[88]

Based on this scholarship, this chapter argues that *de facto* statelessness is a discredited notion,[89] which has no place in the application of the Refugee Convention. For the purpose of refugee law, a person is either with a nationality or without a nationality; this being primarily a question of law and how law operates in practice: 'the term "stateless person" means a person who is not considered as a national by any State *under the operation of its law'* (italics added).

Considerations of 'ineffective' nationality are a mixed question of law and fact; the person is *not* stateless in law since she or he has a nationality but the rights attached to that nationality and how these are protected by the State of nationality may raise concerns under international human rights law which can be relevant to establishing in fact a well-founded fear of being persecuted on a ground protected by the Refugee Convention.

Whilst the distinction between a national and a stateless person may appear straightforward on paper, in practice, decision-makers have introduced doubtful practices aimed at denying refugee protection to asylum seekers. For instance, people who despite being confirmed (*de jure*) stateless in their country of habitual residence, are nevertheless treated by decision-makers as possessing the nationality of another State simply because they might have the technical possibility of applying for citizenship despite having no real links or connection with that country, resulting in these people being denied protection and

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[85] David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons' (2006) 28 *HRQ* 245, 263.
[86] Massey, 'De Facto Statelessness' (n 83) 38, 40.
[87] Amal De Chickera and Laura van Waas, 'Unpacking Statelessness', in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds.), *Understanding Statelessness* (Routledge 2017), 57.
[88] Ibid, 62.
[89] I am thankful to Madeline Garlick for the word 'discredited'.

sent back to that other State. If the lawfulness of such practices may have been uncertain some years ago, they have since been unequivocally discredited by legal scholars.[90]

To be sure, persons whose nationality is ineffective *have* a nationality and the discriminatory treatments to which they are subject should be assessed in terms of persecution by reference to international human rights law standards, including the equal enjoyment of rights by everyone in their country of nationality.[91] Where nationality is disputed or contested, the core issue becomes one of identification, which may or may not lead to the conclusion that the person concerned is without a nationality or with a nationality, and in some cases that nationality may be ineffective.[92]

5. NATURALIZATION AND STATELESS REFUGEES

So far, this chapter has examined questions of nationality in refugee status determination. But what happens once a stateless person has been recognised a refugee? It is well recognised that 'protection should be followed by a "solution" – an end to the period as a refugee, either by naturalizing (in a country of first protection or in a country of resettlement) or by being repatriated if the conditions that induced flight change durably'.[93] This section investigates naturalization as a solution for stateless refugees.[94]

The intention of the drafters of the Refugee Convention was to have refugees, *all* refugees, assimilated and naturalized as much as possible.[95] It was hoped that with Article 34

> refugees may familiarize themselves with the language of the country of reception, its customs and way of life of the nation among whom they live, so that they – without any feeling of coercion – may be more readily integrated in the economic, social and cultural life of the country.[96]

But naturalization is not a right for the stateless or the refugee;[97] at best, it is 'an *opportunity* to enjoy *facilitated* naturalisation'[98] since these acts continue to fall within States' discretion pursuant to UN Charter principles of sovereignty, independence and non-interference in the

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[90] E.g., Macklin, 'Sticky Citizenship' (n 31); Foster and Lambert, *Stateless Persons* (n 7) 127-131 (criticizing the practice of 'inchoate nationality').
[91] Van Waas, *Nationality Matters – Statelessness under International Law* (Intersentia 2008) 24 (hereafter van Waas, *Nationality Matters*); Foster and Lambert, *Stateless Persons* (n 7) 112.
[92] Laura van Waas, *Nationality Matters* (n 92) 24-25.
[93] Costello, 'Refugeehood' (n 23) 730.
[94] See Chapter 58 in this volume.
[95] Articles 3 and 34 mean that no distinction is made between refugees with a nationality and stateless refugees in matters of naturalization.
[96] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951* (UNHCR 1997), Article 34.
[97] Note that Article 32 of the Stateless Convention contains the same provision as Article 34 of the Refugee Convention but for stateless persons.
[98] Van Waas, *Nationality Matters* (n 92) 365.

domestic affairs of a State.[99] However, this discretion is mitigated by rules and principles including non-discrimination and good faith, with the latter arguably calling for 'favourable conditions' to be put in place to facilitate naturalisation *of stateless persons*,[100] and 'the objective of tackling statelessness should be weighed into the equation at all times'.[101]

In the same way that States are not compelled to grant their nationality to refugees within their territory ('shall facilitate as far as possible …'), the compulsory naturalization of refugees was never considered an option.[102] Loyalty to the homeland and a desire to return one day, are some of the reasons that may prevent a refugee from applying for naturalization in his or her new country.[103] One might however ponder whether a *stateless refugee* has a duty to accept an offer of nationality from her country of refuge where she has long been established. Considering the duty of States to eliminate statelessness, can a case ever be made for lawfully imposing a nationality on a *de jure* stateless refugee? The legislation and practices of most States, to grant nationality automatically based on birth (jus sanguinis and jus soli), coupled with States' duty under international human rights law to eliminate statelessness, would suggest that in situations involving stateless persons the will or consent of the individual may be secondary. What is certain is that refugee status can never be lost for refusing to acquire the nationality of the country of refuge because the cessation clauses for refugee status (Article 1C) are clear and limited.[104]

6. CONCLUSION

This chapter has examined statelessness in a refugee law context. It has highlighted that nationality is not just relevant to identifying who a person claims she is, but also the country of return, and the reasons for persecution. Nationality is further relevant in the identification of persecution itself because commonly with *stateless* refugees the source of persecution relates to matters concerning nationality (namely, discrimination on political, racial or religious grounds). Increasingly, arbitrary denial of nationality and arbitrary withdrawal of nationality alone or together with the harm resulting from statelessness, including severe deprivation of the rights to subsistence, basic health care and education, are being recognized as the basis for refugee protection in countries across the world. However, significant gaps remain for certain large groups of stateless refugees, such as Palestinians.

The chapter has also argued that the refugee definition in article 1A(2) Refugee Convention calls for decision makers to question the quality of the *nationality* of refugees in terms of access and enjoyment of human rights. This is not the same though as embracing *de facto* statelessness, which this chapter has argued is a discredited notion that has no place in refugee law.

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[99] Foster and Lambert, *Stateless Persons* (n 7) 45-46.
[100] E.g., European Convention on Nationality, Art.6(4)(g), Explanatory report (1997).
[101] Van Waas, *Nationality Matters* (n 92) 369.
[102] James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 982, fn 303.
[103] Ibid, 982.
[104] Hathaway and Foster note that 'only the voluntary acquisition of a new citizenship is grounds for cessation' in *Law of Refugee Status* (n 42) 497.

While the issue of statelessness has increasingly attracted international attention, the particular challenges pertinent to stateless refugees have been overlooked. This chapter calls for more explicit analysis and guidance from UNHCR, the agency with the remit for both refugees and stateless persons, on the unique challenges in identifying and protecting stateless refugees. In particular, better alignment between the UNHCR Refugee Handbook and the UNHCR Stateless Handbook, especially on the meaning of key elements of the refugee definition such as 'not having a nationality', is required. More broadly, issues at the heart of the intersection between refugee protection and statelessness would be worthy of further judicial and scholarly exploration.