

# Protection of Stateless Persons in International Asylum and Refugee Law

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## Abstract

International refugee law is a mechanism whereby States deal with persons seeking asylum within their borders. While this area of law has its roots in international human rights concepts, it has been influenced by less noble forces over the years. This article looks at how interactions between international human rights law, international relations and domestic decision making have impacted the ability of international refugee law to protect one of the most powerless groups, namely, stateless people.

By exploring the analytical approaches applied by the Courts in the United Kingdom, the United States, Canada, Australia and New Zealand, this article attempts to demonstrate the ways in which stateless persons have been excluded from effective international human rights protection. Specifically, the article argues that states have not considered their own human rights obligations when making individual refugee status decisions. Further, it observes that, in some cases, decision makers have tended to refer to international compendia on international refugee law and international human rights law rather than to reflect directly on the law itself. This in turn has encouraged an increasingly restrictive approach to refugee determination.

In its conclusion, this article offers suggestions for reintegrating the foundations of international human rights law into claim determinations for stateless persons. It suggests that a return to first principles and foundational concepts will realign the implementation of international refugee law with its intended purpose: the protection of the world's most vulnerable people.

## 1. Introduction

In 2005, 19,735 individuals lodged applications for asylum in Canada. In the same year, 30,460 people applied in the United Kingdom and 34,462 made claims in the United States. New Zealand saw 348 applications come in, while Australia received 3,203.<sup>1</sup> Each of these 88,208 applications included a lifetime of personal details and relationships; a complicated patina of cultural, political and historical realities; and, not least troubling, an actual person – full of uncertainties, frustrations, fears and

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<sup>1</sup> 'Asylum Levels and Trends in Industrialized Countries, Second Quarter 2006: Overview of Asylum Applications Lodged in 31 European and 5 Non-European Countries', online, UNHCR Homepage: <<http://www.unhcr.org/cgi-bin/texis/vtx/statistics/openssl.pdf?tbl=STATISTICS&id=450fa85d2>>, page 8 (last accessed 25 Mar. 2007). For the purposes of this article, the numbers are significant only to give a sense of the number of applications dealt with annually.

hopes. The decisions that these countries have made with respect to these 88,208 applicants form the basis for the analysis below.

The process by which an applicant gains status as a refugee, pursuant to the 1951 Refugee Convention and the 1954 Statelessness Convention,<sup>2</sup> and, therefore, protection in the country of asylum, is intentionally individualistic.<sup>3</sup> As a result, decision makers must necessarily engage in a factually dense inquiry with respect to each applicant. This individualized analysis of each case does two things. First, it places heavy demands on decision makers, making short-hand, cut and paste analysis a tempting alternative.<sup>4</sup> Second, it often prohibits the decision maker from assessing their decisions in the context of the international human rights objectives of the 1951 Refugee Convention.<sup>5</sup>

All of this fosters a sort of feedback loop, which makes it easier for states to take a more restrictive approach to refugee determination without being exposed as toeing the lower limits of their international obligations. In defining 'persecution', for the purposes of refugee determination, for example, states have routinely required that applicants demonstrate threat to life or freedom on account of one of the Convention grounds. This is the case despite the fact that cumulative violations of human rights could also constitute persecution under the 1951 Refugee Convention.

States are the intended mechanism through which individuals access the rights conferred by international human rights law. Having no state obliged to ensure those rights, stateless persons can easily be excluded from the purview of that body of law. In some cases, stateless persons must rely entirely on the international refugee law regime for the protection of the rights to which they are entitled. In such cases, these individuals stand fully exposed to any reduction in the protections that this regime offers. Even at its most generous, the international refugee protection regime requires more of stateless persons than it does of nationals who seek refugee status.

<sup>2</sup> Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 (entered into force 22 Apr. 1954); Convention Relating to the Status of Stateless Persons (entered into 26 Apr. 1954).

<sup>3</sup> Sarah Davies, "'Truly' International Refugee Law? Or Yet Another East/West Divide?" (2002) 21 *Social Alternatives* 37. Davies explains that the goal of the High Commissioner for Refugees under the League of Nations in 1920 was to facilitate state recognition and protection for refugee groups seeking asylum. The United Nations General Assembly, however, agreed on a definition of refugee based on the persecuted individual. The author notes that this was the subject of intense debate.

<sup>4</sup> It is not the intention of this article to criticize the investment of time and resources in the refugee determination process. The author simply recognizes the reality that some decision makers are assigned more files than perhaps they can approach in a fulsome way.

<sup>5</sup> The 1951 Refugee Convention states at Para. 1 of the Preamble: 'Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'. Fundamental rights and freedoms form the basis of this agreement and so must inform the decisions made pursuant to it. Although each decision maker may not be obliged to carry out this assessment with respect to each candidate, in general, states have an obligation that their refugee determination systems correspond with this underlying value.

This article attempts to demonstrate the difficult relationship between statelessness and the elements of the definition of refugee under the Refugee Convention. Part 2 outlines the parameters of the analysis. Part 3 locates, in several international instruments, the human rights protections to which stateless persons are entitled. Part 4 evaluates the circumstances that led to the omission of stateless persons from effective international refugee protection. Part 5 looks at how selected states have interpreted their protection obligations towards stateless persons under international refugee law. Part 6 suggests some of the effects of certain methods of analysis of the situations stateless persons face. Part 7 recommends a return to basic principles as a more effective approach to the unique situation of stateless refugee claimants.

## 2. Parameters

This article offers a viewpoint on the low priority that the international community gives stateless persons. It also provides examples of the legal analysis industrialized states<sup>6</sup> have used with respect to this group, which has in turn reinforced and legitimized that low priority. Specifically, the article focuses on the initial refugee determination process<sup>7</sup> for individual stateless applicants<sup>8</sup> at the inland offices in the prospective countries of asylum. The examples provided do not constitute an exhaustive list. The discussion begins with the location of statelessness, and its converse of nationality, in the international human rights framework.

## 3. Nationality as a fundamental human right

It is axiomatic that nationality forms the basis of the legal and moral obligations between the individual and the state. As the US-Mexico General Claims Commission defines this relationship in *Re Lynch*, the individual owes allegiance to the state and in return may avail him or herself of the state's protections.<sup>9</sup> Tsao explains that this relationship underpins a

<sup>6</sup> Case law from Australia, Canada, New Zealand, the United Kingdom and the United States forms the basis of this article. I have also taken advantage of academic appraisals of this case law.

<sup>7</sup> Other processes such as pre-removal risk assessments and judicial and discretionary decisions based on factors other than convention grounds may be equally prone to failing stateless applicants. These have evolved in a slightly different historical and political context, however, and as such are better left to a separate critique.

<sup>8</sup> Events giving rise to statelessness en masse, such as occupation, foreign domination and decolonization, introduce some unique questions that require further study. It should be noted that over one third of all UNHCR persons of concern reside in the regions of Africa and Latin America. In these regions a significant number of states have adopted, at least notionally, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa or the 1984 OAS Cartagena Declaration on Refugees. As these instruments have more inclusive refugee definitions, it might be predicted that relatively more stateless persons are afforded status by virtue of being stateless.

<sup>9</sup> *Re Lynch* (1929-30), 5 Ann. Dig. 221 (US – Mexico General Claims Commission), 222.

fundamental philosophical concern in a system of nation states: 'The rights conferred with membership in a formally organized political community are themselves indispensable for living a fully human existence, so much so that to lack them is to be deprived of the very basis of human dignity . . . A person denied a recognized place in a community . . . exists at the indulgence of the state and because of this their fate is out of their hands'.<sup>10</sup>

Specific to the refugee context, the 1951 Refugee Convention, the 1967 Protocol<sup>11</sup> and the 1954 Statelessness Convention<sup>12</sup> provide machinery through which states can provide for this basis of human dignity and through which states can give effect to their international human rights obligations. Both Conventions list the criteria that Contracting States use to determine which applicants need the protections that, as a state, the Contracting State can provide. The 1954 Statelessness Convention recognizes that stateless persons, whether or not they qualify as refugees, require services, protection, and so forth, from the Contracting State.

These Conventions do not create the fundamental right to nationality, nor can they limit its existence. Similarly, states' interpretations of their obligations thereunder – and their consequential approach to refugee determination – do not limit their actual obligations with respect to fundamental rights under the International Covenant on Civil and Political Rights (1976) (ICCPR), the International Covenant on Economic Social and Cultural Rights (1976) (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD). However, the process by which states refer to other states' decisions and to documents embodying state practice as interpretive of their international human rights obligations denies the legal regime the necessary reflection on the basic underlying principles. This article holds that decision makers must return to these principles in their analysis in order to resist the erosion of international human rights law standards.

The Universal Declaration of Human Rights (1948) (UDHR) recognizes the fundamental bargain between a state and its constituents. It provides in Article 15: 1) Everyone has the right to a nationality; and, 2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.<sup>13</sup> Despite its declaratory status and the oft argued

<sup>10</sup> Roy T. Tsao, 'Arendt and the Modern State: Variations On Hegel in the *Origins of Totalitarianism*' (2004) 66 *The Review of Politics* 105-36 at 125 and 126.

<sup>11</sup> Australia, Canada, New Zealand and the United Kingdom have ratified the 1951 Refugee Convention. The United States has not. The 1961 Convention on the Reduction of Statelessness, which Australia, Canada, New Zealand and the United Kingdom have signed, stands as another expression of the obligation states have with respect to the protection of stateless persons. However, it applies only to those stateless persons born within a state's borders. As such, consideration of this lies beyond the narrow scope of this article.

<sup>12</sup> Only Australia and the United Kingdom have ratified this convention.

<sup>13</sup> Universal Declaration of Human Rights (10 Dec. 1948), online: UN Homepage <<http://www.un.org/Overview/rights.html>> (UDHR).

point that this instrument does not create a specific obligation towards stateless persons,<sup>14</sup> this statement of international priorities and values does form the basis of succeeding international human rights agreements, including the 1951 Refugee Convention itself.<sup>15</sup> International law obliges states to interpret these latter treaties 'in light of their object and purpose'.<sup>16</sup> So, the 1951 Refugee Convention must be interpreted in light of the principal objective in its preamble, namely the protection of the fundamental rights that the UDHR embodies.

Similarly, the ICCPR provides in Article 24(3) that every child shall have the right to acquire a nationality.<sup>17</sup> Further, Article 25, in brief, states that every *citizen* shall have the right and the opportunity to take part in democratic institutions and to avail themselves of the services offered by the state.<sup>18</sup> While 'citizen' as it is written here appears to be exclusive to those who come under a state's jurisdiction, one must read it in conjunction with the opening paragraph of the preamble, which provides that every human is entitled to the rights provided for in the ICCPR. If the rights under Article 25 are only available to citizens of a state, then every human must be entitled to a nationality from *some* state in order for the right to retain its substantial and logical foundation.<sup>19</sup>

The sister instrument of the ICCPR, the ICESCR, directs in Article 4 that a state can only limit the rights that it provides in a way consistent with the objects of those rights in a democratic society and with international law.<sup>20</sup> Articles 6, 7 and 8 provide for fair working conditions within the state. Article 9 ensures the right to access the state social security program. Article 12 provides for a certain standard of health and Article 13 for an education. All these rights constitute the vestiges of nationality. While that right does not exist in a provision of its own, the ICESCR regards all its essential elements as fundamentally protected.<sup>21</sup>

<sup>14</sup> See, Rachel Settlege, 'No Place to Call Home: Stateless Vietnamese Asylum Seekers in Hong Kong' (1997) 12 *Georgetown Immigration Law Journal* 194.

<sup>15</sup> Above n. 2.

<sup>16</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(1). Art. 2 requires states to look to the preamble of the treaty in order to inform their approach to the rest of the provisions of the instrument.

<sup>17</sup> Note that the International Convention on the Rights of the Child (ICRC) ensures a similar protection against statelessness in Art. 7 of that convention. Cite: (20 Nov. 1989), online: UNHCR <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>.

<sup>18</sup> International Covenant on Civil and Political Rights (16 Dec. 1966), online: UNHCR Homepage <[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)> (ICCPR), Arts. 24, 25 and para. 1 of the Preamble.

<sup>19</sup> Australia, Canada, New Zealand, the United Kingdom and the United States, the states discussed herein, have ratified the ICCPR.

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights (16 Dec. 1966), online: <[http://www.unhchr.ch/html/menu3/b/a\\_icescr.htm](http://www.unhchr.ch/html/menu3/b/a_icescr.htm)> (ICESCR), Art. 4.

<sup>21</sup> Australia, Canada, New Zealand and the United Kingdom have ratified the ICESCR and the United States has signed the instrument. These states are noted for the purpose of providing background for the case law analysis below.

Finally, Article 5 of the ICERD<sup>22</sup> requires contracting states to guarantee several rights without distinction as to, among other personal aspects, nationality. Contracting states agree that Canadians and Australians, just like Stateless Palestinians and Stateless Bidun, are entitled to, *inter alia*, 'the right to security of person and protection by the State against violence or other bodily harm whether inflicted by government officials or by any individual, group or institution'.<sup>23</sup>

So entrenched is this guarantee that in refugee determination systems around the world, applicants must overcome the presumption that their state will not or cannot protect them. That stateless applicants do not need to overcome this presumption in Canada, for example, stands as recognition that this guarantee has not often been extended to this group.<sup>24</sup> However, decision makers have not gone beyond this to really investigate what this lack of state protection means both for the stateless applicant and for the destination country vis à vis its international human rights obligations. As will be seen in Part 5, the approach that states have taken to the analysis of claims made by stateless persons has resulted in the insulation of the refugee law regime from the impact of existing international human rights obligations.

The ICERD further provides that all human beings are entitled to a series of civil rights, including the right to nationality;<sup>25</sup> the right to leave any country, including one's own; and the right to return to that country.<sup>26</sup> Finally, contracting parties under the ICERD agree that everyone has inherent to them economic, social and cultural rights, such as the rights to work, to free choice of employment, and to just and favourable conditions of work.<sup>27</sup> However, stateless persons frequently encounter limitations to these civil and economic rights due to requirements for work and residency permits, exposing such individuals to costly employment-sponsor arrangements, as well as from work quotas restricting the types of employment they can undertake.<sup>28</sup> Contracting States have obliged themselves to eliminate the situation where nationality (or the lack thereof) forms a basis for the denial of the above rights. Yet, when the opportunity is presented, these states reach for proof that they are not so legally bound.

<sup>22</sup> International Convention on the Elimination of All Forms of Racial Discrimination (21 Dec. 1965), online: UNHCR <[http://www.unhcr.ch/html/menu3/b/a\\_cesr.htm](http://www.unhcr.ch/html/menu3/b/a_cesr.htm)> (ICERD).

<sup>23</sup> *Ibid.*, Art. 2(b).

<sup>24</sup> *Thabet v. Canada (MCI)*, A-20-96, May 11, 1998 (FCA), online: <<http://reports.fja.gc.ca/en/index.html>> (*Thabet*).

<sup>25</sup> ICERD, Art. 5(d)(iii)

<sup>26</sup> *Ibid.*, Art. 5(d)(ii)

<sup>27</sup> *Ibid.*, Art. 5(e)(i)

<sup>28</sup> See, Karma Nabulsi, 'Politics of Identity – III: Being Palestinian' (2003) 38 *Government and Opposition* 479.

The following section sets out some of the context that has fostered the development of the feedback loop. Attention to context is valuable here for disentangling the foundational principles of the international refugee regime from the forces that have been at work on them for the last half-century – in other words, the law from the international relations. Looking at the development of the feedback loop also helps illuminate the fact that the loop ultimately serves states' interests rather than the interests of stateless persons.

## 4. The omission of stateless persons from protection

### 4.1 The current view

In February 2007, the Committee on the Elimination of Racism (CERD) released its 17<sup>th</sup> Canada Report. Paragraph 18 of that report indicates Canada's current position with respect to stateless asylum seekers:

The 1954 Convention relating to the Status of Stateless Persons to a large extent duplicated the 1951 Convention relating to the Status of Refugees; in the Canadian context, therefore, there was no need for both. Furthermore, Canada believed that it had the necessary safeguards in both its citizenship and immigration legislation to adequately cover the situation of stateless persons. Stateless persons were eligible to make refugee protection claims with respect to their country or countries of former habitual residence. Individuals whose claims for refugee protection had been rejected could apply for 'pre-removal risk assessment', or apply to remain in Canada for humanitarian and compassionate reasons. Successful refugee claimants, as well as those whose applications were accepted on humanitarian grounds, could apply for permanent residence within Canada with the prospect of becoming permanent citizens once they fulfilled the requirements applicable to all permanent residents of Canada. Stateless persons were also eligible to apply in other categories, including skilled immigrants or family reunification.<sup>29</sup>

In a matter of fact way, Canadian officials explained to the Committee that their refugee regime responds fairly and effectively to the unique situation of stateless persons. The rationale seems to be that because stateless persons are allowed to apply for refugee protection,<sup>30</sup> to argue

<sup>29</sup> Committee on the Elimination of Racial Discrimination, Summary Record of the 1790<sup>th</sup> Meeting, 17<sup>th</sup> Report of Canada, 20 Feb. 2007, para. 18. CERD/C/SR.1790, online: <<http://daccessdds.un.org/doc/UNDOC/GEN/G07/405/76/PDF/G0740576.pdf?OpenElement>>.

<sup>30</sup> Immigration and Refugee Protection Act, RSC 2001, c. 27 (IRPA). In Canada, applicants can obtain Convention Refugee status under s. 96 or protected person status under s. 97 of the Act. Unique to Canada in reference to the other state cited in this article is the fact that the 1951 Refugee Convention has been interpreted and inserted into the Act. Other states have decided to incorporate by reference the Convention.



for stays of removal<sup>31</sup> and to request Ministerial discretion,<sup>32</sup> Canada's international human rights obligations towards persons deprived of nationality is satisfied. In other words, because the procedures are equally *available* to stateless persons, this group is in fact being adequately protected.<sup>33</sup> Notably, this reasoning contrasts the adverse impact approach to substantive rights that is entrenched in Canadian human rights jurisprudence. As suggested above, however, neither the 1951 Refugee Convention nor the 1954 Statelessness Convention create or limit the fundamental human right to a nationality. The Canadian position hints at the way in which the development of refugee law has been insulated from the impact of international human rights obligations and how this in turn has led to a legitimization of the treatment of stateless persons.

This tactic of evading substantive human rights obligations by hiding behind boilerplate refugee determination formulae seems to meet with approval from other industrialized states. Two principle compendia illuminate this situation. The United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees (the 'Handbook') constitutes the first of these.<sup>34</sup> The Handbook suggests answers to international refugee law questions on the basis of knowledge accumulated by the High Commissioner's office since the entry into force of the 1951 Refugee Convention in 1954 and on the basis of state practice.<sup>35</sup> Paragraph 102 of the Handbook states: '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'.<sup>36</sup> So elegantly equitable in its application, this statement masks the inequity of its effect.

The second compendium is the series of statements, or 'Conclusions on International Protection', that the UNHCR Executive Committee (the 'ExCom') publishes after consensus is reached on an issue raised at its

<sup>31</sup> IRPA, s. 112. To give a sense of what the Pre-Removal Risk Assessment process means in terms of additional protection for stateless persons under a removal order, in Canada success rate stands at 5% annually. See, Pia Zambelli, 'Is Canada a Safe Country for Refugees?', online: ILW <<http://www.ilw.com/articles/2005/0204-zambelli.shtm#bio>>.

<sup>32</sup> IRPA, s. 25(1). Applications on Humanitarian and Compassionate grounds have a success rate of 5% and a fee of \$550. See, Citizenship and Immigration Canada, 'Humanitarian and Compassionate Grounds Applications', online: CIC Homepage <<http://www.cic.gc.ca/english/applications/guides/5291E5.html>>.

<sup>33</sup> This reasoning contrasts with that which has developed in Canada with respect to substantive rights.

<sup>34</sup> United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees (Jan. 1992), HCR/IP/4/ENG/Rev. 1. Reedited, Geneva.

<sup>35</sup> Ibid., Foreword, para. VI.

<sup>36</sup> Ibid., para. 102.



annual meeting.<sup>37</sup> Conclusion 78 issued in 1995 stressed ‘that the prevention and reduction of statelessness and the protection of stateless persons are important in the prevention of potential refugee situations’.<sup>38</sup> Eight years later, the Executive Committee issued Conclusion 96 and urged States to take steps to avoid cases of statelessness as well as to adopt measures leading to the grant of a legal status to stateless persons.<sup>39</sup> Inconspicuous in their absence at first glance, the Conclusions fail to reference the obligations already in existence for States Parties to international human rights conventions. What is more, the statements amplify an ambivalence towards these obligations that do not exist in the treaties themselves. While these Conclusions are not intended to have a binding effect, the ExCom explains that they are relevant to the interpretation of the international protection regime and constitute expressions of opinion, which are broadly representative of the views of the international community.<sup>40</sup> What they do not necessarily reflect, are the existing international human rights obligations of Contracting States.

Importantly, the current attitude towards stateless persons did not always reign. Neither did a single law or convention expressly and comprehensively castigate stateless persons as ‘bogus’ asylum seekers<sup>41</sup> who could not satisfy the Convention Refugee definition. A particular historical-political context, reinforced by legal arguments and their cannibalized manifestations in different legal systems, has generated the view that while it would be nice to give nationhood to the stateless, no state is obliged to do so and there exists no legal mechanism through which to accomplish it. To deconstruct a legal regime, one must understand how it was built.<sup>42</sup> The remainder of this section

<sup>37</sup> The UNGA established the Executive Committee by Resolution 1166 (XII): ‘The General Assembly requests the Economic and Social Council to establish an Executive Committee of the High Commissioner’s Programme to consist of representatives of from twenty to twenty-five States Members of the United Nations or members of any of the specialized agencies, to be elected by the Council on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem’. These members, now 40, meet once a year in early Oct.

<sup>38</sup> Office of the United Nations High Commissioner for Refugees, Department of International Protection, *A Thematic Compilation of Executive Committee Conclusions* (2d edn., June 2002), online: <<http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d4ab3ff2>> (last accessed 28 Feb. 2007).

<sup>39</sup> Ibid.

<sup>40</sup> Executive Committee Conclusions on International Protection, online: UNHCR Homepage <<http://www.unhcr.org/excom/3bb1cb676.html>> (last accessed 25 Mar. 2007).

<sup>41</sup> See, Nevzat Soguk, *States and Strangers: Refugees and Displacements of Statecraft* (Minneapolis, Minnesota: University of Minnesota Press, 1999) 31. Soguk references a statement made by Michael Howard, British Interior Minister, 1995: ‘We have a real problem in this country. We are seen as a very attractive destination because of the ease with which people can gain access to jobs and benefits. We must take firm action against *bogus* asylum seekers’. This notion that those who do not fit the definition of refugee are not deserving of protection is one of the fallacies that seems to have taken hold regarding stateless persons. Because it is tendered as a fact, it has become fact in the experience of both stateless persons and the people that make decisions about them.

<sup>42</sup> There is an inherent conundrum involved in building with the intent to deconstruct. However, there is a valuable perspective to be gained here, even if only for the purposes of this argument.

attempts to explain how it is possible for Canada's comments in the CERD Report, the ExCom Conclusions and the Handbook clarifications respecting stateless persons to have been deemed acceptable.

## 4.2 Formation of the current view

The current refugee law regime, with the 1951 Refugee Convention as its flagship, took its official shape in the post Second World War period.<sup>43</sup> The Convention dealt two serious, but non-fatal, blows to the prospect of protecting stateless persons under the international refugee regime. First, the drafters of the Convention decided on the following refugee definition:

The term refugee shall apply to any persons who . . . as a result of events occurring before 1 January 1951 and 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 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.<sup>44</sup>

While the semicolon's exact meaning has attracted a commendable amount of debate,<sup>45</sup> what is important to note here is the parallel treatment accorded to applicants with a nationality and to applicants without a nationality. Over time, a judicial treatment of this definition has entrenched the notion that the situation of stateless persons can be analyzed in the same way as persons possessing a nationality by inserting 'former habitual residence' for 'country of nationality'.<sup>46</sup> Since stateless persons are specifically referred to, courts would reason, the condition of statelessness does not *prima facie* lend itself to persecution, as being a woman does in some countries, and belonging to a particular social group does in others.<sup>47</sup>

<sup>43</sup> Davies, above n. 3, accounts for refugee law as it existed under the League of Nations. While the focus of this article does not permit a thorough historical review, what is relevant from Davies' research is that stateless persons were considered as a group to be entitled to international protection. The refugee definition was reformulated on the basis of persecution of the individual.

<sup>44</sup> Above n. 2.

<sup>45</sup> *Savvin v Minister of Immigration and Multicultural Affairs* [1999] 166 ALR 348, para. 51, online: Federal Court Reports <<http://reports.fja.gc.ca/en/index.html>> (*Savvin* 1999).

<sup>46</sup> *Amer Mohamed El-Ali and Secretary of State for the Home Department* [2002] UKIAT 00159 (*El-Ali*). This case discusses the parallel treatment of persons with a nationality and persons without.

<sup>47</sup> *Fathi-Rad v Canada (Secretary of State)* (1994), 77 FTR 41 (FCTD), online: Federal Court Reports <<http://reports.fja.gc.ca/en/index.html>> (*Fathi Rad*). The Canadian Federal Court presents the dichotomy between the stateless and individuals possessing a nationality.

The second blow came in an appendix to the Final Act of the Conference of Plenipotentiaries, in which the Convention draftspersons stated simply, but devastatingly:

The Conference,

*Having Considered* the draft Protocol relating to the Status of Stateless Persons,

*Considering* that the subject still requires more detailed study,

*Decides* not to take a decision on the subject at the present Conference and refers the draft Protocol back to the appropriate organs of the United Nations for further study.<sup>48</sup>

The matter of how to address stateless persons was therefore deferred. Although legally this appendix bears no more weight on the interpretation of the Convention than any other piece of extrinsic evidence,<sup>49</sup> the appendix has, ironically, become a foundation for the exclusion of stateless persons from the realm of international protection.

In *Revenko v. Secretary of State for the Home Department*,<sup>50</sup> the British Court of Appeal considered the question of whether or not, 'having referred the draft Protocol relating to the Status of Stateless Persons back for further study' stateless persons as a group are included for specific protection.<sup>51</sup> Professor Goodwin-Gill prepared a report on the issue of stateless persons for the Applicant, which was cited in the decision and subsequently dismissed. At paragraph 51 of that report, Professor Goodwin-Gill stated:

In short, the drafters of the 1951 Convention intended to protect stateless refugees who were outside their country of former habitual residence 'as a result of events' occurring before January 1951. Such events included political, social and related displacements, as well as the wholesale 'writing off' of stateless individuals and populations, for example, by bureaucratic methods (failure to renew travel documents, to reply to correspondence, etc.). It was not necessary that the individual be outside that country because of a well-founded fear. The reason for treating the stateless refugee differently is found in the stateless person's *a priori* unprotected status, which was considered to justify, in this one regard, a different treatment.<sup>52</sup>

<sup>48</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 1951, online: <<http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b66c2aa10>> (last accessed 1 Mar. 2007).

<sup>49</sup> Arts. 31 and 32, Vienna Convention on the Law of Treaties United Nations, Treaty Series, vol. 1155, 331.

<sup>50</sup> *Revenko v. Secretary of State for the Home Department* [2000] 3 WLR 1519; [2001] QB 601 (CA), online: Federal Court Reports <<http://reports.fja.gc.ca/en/index.html> (*Revenko*).

<sup>51</sup> *Ibid.*, 7.

<sup>52</sup> *Ibid.*, 8. Pill LJ sets out portions of Professor Goodwin-Gill's report prepared for the Applicant for the purposes of his appeal.

The British Court of Appeal's response was interesting in two ways. First, the Court discounted the explanation as being merely one 'reason' why stateless persons should be protected, in other words, they considered it to be a contextual analysis of the drafting of the Convention rather than a textual analysis of the Convention.<sup>53</sup> Even if this is the case, when much of the interpretation of rights and obligations under international refugee law revolves around drafters' intent, it would seem that the attitude towards the statelessness issue at the time ought to be given credence. So, then, what is the fear with respect to treating stateless persons differently on the mere basis of their unprotected status? Is it that this might entail a broad purposive interpretation of the 1951 Refugee Convention beyond what the drafters intended? Or is it that there is an inherent discomfort within the judiciary of exposing the state to the fabled mass of claims, in particular where that state has established international human rights obligations towards such claimants?

Regardless of the answer, the Court went on to adopt Hathaway's position, which had been used by the respondent in evidence: 'It was the intention of the drafters, however, that all other refugees should have to demonstrate "a present fear of persecution" in the sense that they "are or may in the future be deprived of the protection of their country of origin"''.<sup>54</sup> While this appears to be a mere clash of expert opinions, provided for the purposes of the hearing, the Court's later summation revealed that perhaps the Court was not consistent in its search for a strict textual analysis, as suggested with respect to Goodwin-Gill's argument. The Court stated: 'I also give weight to Professor Hathaway's statement, consistent as it is with the contents of the UNHCR Handbook . . . That opinion is not, in my view, discredited by Professor Hathaway's more controversial views upon the relevance of the absence of a country of residence'.<sup>55</sup> Here, the Court relied heavily on the UNHCR Handbook,<sup>56</sup> citing an expert academic's position where it supported the UNHCR Handbook, while dismissing the arguments that conflicted with it.

This decision missed a key point, namely, that even accepting Hathaway's position, there was room in the early decades for statelessness to be adequately addressed under the international refugee regime. As persecution is not defined in the Convention,<sup>57</sup> the law could have developed a presumption

<sup>53</sup> Ibid.

<sup>54</sup> Ibid., 7. The Court refers to the book by Professor James Hathaway, *The Law of Refugee Status* (Cambridge, UK: Cambridge University Press, 1991) at 68-9. This was advanced as evidence in the arguments of the Secretary of State. It should be noted that this is an early text by this author and does not necessarily represent his definitive view on this subject. What is important to draw is that where the jurisprudence could have sought to develop a more inclusive interpretation of the words remaining in the 1951 refugee definition, courts have instead consistently looked for more restrictive interpretations of the definition and the underlying intent of the drafters.

<sup>55</sup> Ibid., 13.

<sup>56</sup> Earlier in the judgment, the Court frequently cited the UNHCR Handbook. See, *ibid.*, 9.

<sup>57</sup> *Altavil v. Canada* (M.E.I.) (1996) FCJ No. 986, online: Federal Court Reports <<http://reports.fja.gc.ca/en/index.html>> (*Altavil*). The Court in this case discusses the threshold level that discrimination must meet to constitute persecution. The Court refers to dictionary definitions for insight.

in favour of these applicants with respect to this part of the definition. However, various forces, reflected in the High Commissioner's experiences, as detailed in both the UNHCR Handbook and the ExCom decisions, were at work. A brief discussion of these forces provides the necessary context for these two documents.

The Statute of the United Nations High Commissioner for Refugees predicted cooperation between the UNHCR and States Parties to the Refugee Convention in the voluntary repatriation and resettlement of refugees.<sup>58</sup> According to the Statute, stateless persons were included in the list of intended beneficiaries.<sup>59</sup> This coverage is unsurprising if you consider the context. United Nations documents show that at around this time the distinction between stateless persons and refugees was not entrenched in any way. The sense among some was that if a person was stateless for political reasons, in other words, not as a matter of convenience, they should be treated as refugees.<sup>60</sup> In fact, in the pre-Refugee Convention era under the League of Nations, the emphasis was on a collective response to protect groups that required protection, including stateless persons.<sup>61</sup> The focus on individual applicants, with its attendant characteristic of state discretion, was a later development.

Goodwin-Gill's gloss on the departure from this view, with respect to the position of stateless persons in international asylum law, highlights the unofficial development of the exclusive policy: 'Historically, refugees and stateless persons walked hand in hand, and after the First World War, their numbers and condition were coterminous ... [Later] their paths diverged, with refugees being identified by reference to the reasons of flight, and their statelessness, if it existed was seen as incidental to the primary cause'.<sup>62</sup>

The UNHCR Statute mandates that the 'work of the High Commissioner shall be of an entirely nonpolitical character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees'.<sup>63</sup> However, as the literature emphasizes, decisions by states with

<sup>58</sup> Statute of the Office of the United Nations High Commissioner for Refugees (14 Dec. 1950), online: UNHCR Homepage <[http://www.unhcr.ch/html/menu3/b/o\\_unhcr.htm](http://www.unhcr.ch/html/menu3/b/o_unhcr.htm)>, Art. 1.

<sup>59</sup> Note that the definition of those covered by the UNHCR Statute is expressly more inclusive than that found in the 1951 Refugee convention: 'Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, *owing to such fear or for reasons other than personal convenience*, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, *owing to such fear or for reasons other than personal convenience*, is unwilling to return to it' (emphasis added).

<sup>60</sup> UN doc. E/CONF.17/SR. 10, 11.

<sup>61</sup> Davies, above n. 3, 37.

<sup>62</sup> Cited in Sumit Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part I' (1999) 11 *IJRL* 625 at 644.

<sup>63</sup> Above n. 58 Art. 2.

respect to refugees have always been made in the realm of politics with social and humanitarian ethics important, yet secondary, considerations.<sup>64</sup> It was in this politically charged post-war environment that the UNHCR had to figure out how to advance refugee interests while maintaining good relations with states and securing its own existence so that it could continue to advance the interests of the beneficiaries of its mandate.

The question that needs to be asked here is whether the UNHCR turned away from a protracted battle on behalf of stateless persons in favour of emergency refugee situations, which brought more attention and funding. As Gil Loescher suggests in his thorough work on the history of the organization, 'in order to have any impact in the world political arena, the High Commissioners have had to use the power of their expertise, ideas, strategies and legitimacy to alter the information and value contexts in which states make policy'.<sup>65</sup>

In the early Cold War environment, the UNHCR was valuable to western countries, principally the United States, as it was in a prime position to facilitate flows of refugees out of the Eastern Bloc.<sup>66</sup> However, the focus of states changed and organizations such as the International Committee of European Migration (ICEM)<sup>67</sup> and the United States Escapee Programme (USEP),<sup>68</sup> as well as the United Nations efforts in the Korean Peninsula and the Middle East,<sup>69</sup> created an increasingly competitive environment for the UNHCR. In order to preserve its relevance in the international sphere, the agency began to adopt a rapid, on-site, emergency response role.<sup>70</sup> As well as providing tents and blankets, containment and repatriation<sup>71</sup>

<sup>64</sup> Seyed Mohammad Ghari Seyed Fatemi, 'Who is a Refugee? Comparison of a Misconstrued Concept in International Human Rights, *Shi'i Fiqh* and the Iranian Legal System' (2005) 9 *International Journal of Human Rights* 183 at 185.

<sup>65</sup> Gil Loescher, *The UNHCR and World Politics* (Oxford, England: Oxford University Press, 2001) at 4.

<sup>66</sup> *Ibid.*, 7.

<sup>67</sup> Intergovernmental Committee for European Migration (19 Oct. 1953) online: <<http://138.25.65.50/au/other/dfat/treaties/1954/22.html>> (last accessed 3 Mar. 2007).

<sup>68</sup> The United States Program for Assisting Escapees and Refugees was launched in 1952. President Eisenhower proclaimed the following goal for the US and the world to be achieved through the program: 'I Believe that the task of caring for the escapees should have the highest emphasis in the minds of all the free world, and I am happy that the United States has already done so much of this work. It is the unswerving aim of the United States that the burden of arms, the fear of oppression, and the need of flight shall, some day, be lifted from mankind in order that there may no longer be refugees or escapees, and that all may live in peace and freedom'. While mankind was the focus of the speech, people fleeing Communist China and Eastern Europe were the focus of the program. See, 'The American Presidency Project', online: <<http://www.presidency.ucsb.edu/ws/index.php?pid=9775>>.

<sup>69</sup> Above n. 65, 7.

<sup>70</sup> The Hungarian Refugee Crisis of 1956 was the first example of this kind of emergency response. This example has been followed and surpassed through the UNHCR's assistance to various displacements caused by a host of crises, such as, in recent times, the Gulf War, the Balkan War, the Rwandan Genocide, and the war in Afghanistan.

<sup>71</sup> For the last two decades, the UNHCR has developed its policy of voluntary repatriation, placing much greater emphasis on ensuring 'safe returns' of persons of concern. Simultaneously, the UNHCR has become increasingly involved in working with stateless persons. They currently constitute 7.6% of the UNHCR's mandate.

were part of UNHCR's activities.<sup>72</sup> Whereas Article 1 of the UNHCR Statute calls specifically for cooperation between the agency and states in order to facilitate the assimilation of the persons under its mandate into new national communities, alongside voluntary repatriations, the displaced and the stateless have increasingly been 'encouraged' to return.

Although the UNHCR undoubtedly plays a necessary role in these emergency operations, this central focus on crises obstructs the agency from addressing the structural and long-term problems experienced by people coming within its mandate. Settlege elucidates this phenomenon. After the fall of Saigon in 1975, a small group of ethnic Chinese migrants were driven from Vietnam. Currently residing in Hong Kong, neither the Chinese nor the Vietnamese government will recognize them as nationals.<sup>73</sup> Like the majority of stateless populations, their prospects for work, education, healthcare and mobility are severely limited. Pertinent here is the fact that, while Settlege finds that these individuals come under the terms of the 1951 Refugee Convention<sup>74</sup> (an interpretation issue that will be addressed in the following sections), she also notes the following option: were the UNHCR to confer on them mandate refugee status under their statute, these stateless ethnic Chinese could be resettled in an appropriate country.<sup>75</sup> Instead, however, the UNHCR has shown reluctance to 'assume this decisive role' and has emphasized repatriation to a country unwilling to grant them status.

All of this helped to create the context in which Canada could confidently report to the Committee on the Elimination of Racial Discrimination that stateless persons received adequate protection under its asylum procedures. The human rights violations that have received the attention of the UNHCR have been those that are catastrophic and immediate – violations that can be mitigated through the delivery of life's necessities. However, the stateless person's condition of rightlessness,<sup>76</sup> a condition that makes all other fundamental human rights effectively precarious, remains persistent and protracted. By focusing all efforts on emergency response, the latter condition has evolved into a so-called 'bogus'<sup>77</sup> use of the regime's resources. As such, the neglect of stateless persons has become legitimate and not in conflict with states' international human rights responsibilities.

<sup>72</sup> Jacob Stevens, 'Prisons of the Stateless: Derelictions of the UNHCR' (2006) 42 *New Left Review* 54.

<sup>73</sup> Settlege, above n. 14, 190.

<sup>74</sup> *Ibid.*, 199.

<sup>75</sup> *Ibid.*, 200.

<sup>76</sup> Tsao, above n. 10. In the interest of transparency, Arendt's philosophy on citizenship as providing the right to rights gives the undercurrent to this article, that stateless persons must be entitled to state protection, its substance.

<sup>77</sup> Above n. 41.



Having explained the above context, it is unnecessary and unhelpful to assign fault. More important is how the international refugee law regime that the High Commissioner has come to represent, through its fight for survival and influence, has seeped into developing domestic asylum regimes. What is also important, is a recognition of two ensuing consequences: first, international refugee law succumbs to the lowest common denominator through a process of adopting other countries' judgments; and, secondly, through continued use and misuse of interpretations of international refugee law, ideas become entrenched as law.

## 5. Deciding claims of stateless applicants

This section describes how courts and tribunals in Australia, Canada, New Zealand, the United Kingdom and the United States have approached refugee claims in cases of stateless applicants. It is organized on the basis of selected factors, which are often encountered in the refugee determination process: (a) Refugee Definition, (b) Country of Reference, (c) Discrimination Amounting to Persecution, (d) Denial of Re-entry, and (e) Deportation. These particular issues have become something of a battleground for those trying to press the refugee protection regime to recognize the uniquely precarious situation experienced by stateless persons. The aim of this section is both to demonstrate that the refugee law regime insulates decision makers from reflecting on their state's international human rights obligations and to show that this legitimizes the persistent vulnerability of stateless persons.

### 5.1 Definition

Article 1A(2) of the Refugee Convention sets out the thrust of the refugee definition, as quoted in Part 4.2 above.

While definitions are generally useful for organizing the allocation of rights, it must be recognized that the negative space thus created by the strict adherence to a definition can essentially *make* some people refugees and *unmake* others.<sup>78</sup> The peculiar, insulated way in which the interpretation of the Convention has developed has entrenched a dividing line between those entitled and those not entitled to protection.

Verstad asserts: 'While there have been developments in the refugee definition at the level of the UNHCR through its expanded mandate<sup>79</sup> and at the level of some regional instruments, the 1951 Refugee Convention

<sup>78</sup> Sarah Kiyambi, 'National Identity and Refugee Law' in Peter Fitzpatrick and Patricia Tuitt (eds.), *Critical Beings: Law Nation and the Global Subject* (Hants, England: Ashgate Publishing Ltd., 2004) 19, at 26.

<sup>79</sup> The UNHCR's expanded mandate includes both the persons of concern under its originating statute and the expansions made to reflect the OAU 1969 and the OAS 1984 Cartagena Declaration refugee definitions.

definition remains the legal base for refugee determination in Europe'.<sup>80</sup> This is true for the states canvassed here as well, therefore, the following analysis centers on the approaches taken to that definition.

## 5.2 Country of reference

The basic principle of refugee law is to grant such status only to those requiring surrogate protection and not to those who have access to protection elsewhere.<sup>81</sup> The first step in determining whether the applicant passes this particular hurdle requires courts to refer to countries that have a prior obligation to provide protection to the applicant. For applicants who possess a nationality, the country of reference is the country of that person's nationality. This makes sense, since in law the states have an obligation to protect the human rights of their own citizens.<sup>82</sup>

With respect to stateless persons, the surrogacy inquiry proceeds on the basis of the last former habitual residence of that individual. Immediately apparent here is the fact that this former habitual residence does not owe any duty to protect the rights of the stateless applicant. Stateless persons do not have to show that they are unwilling to avail themselves of state protection.<sup>83</sup> However, the way that the country of reference analysis has been approached by states, and embodied in the UNHCR Handbook, has excluded the possibility of a presumption that because the applicant does not have a country of nationality, he or she is more predisposed to being persecuted.

In support of the proposed argument, after reviewing paragraph 104 of the Handbook,<sup>84</sup> the Canadian Federal Court of Appeal in *Marwan Youssef Thabet v. Canada (Minister of Citizenship and Immigration)* [1998] outlined its test for determining former habitual residence at paragraphs 55–6:

Stateless people should be treated as analogously as possible with those who have more than one nationality. There is a need to maintain symmetry between these groups, where possible. It is not enough to show persecution in any of the countries of habitual residence – one must also show that he or she is unable or unwilling to return to any of these countries. While the obligation to receive refugees and offer safe haven is proudly and happily accepted by Canada, there is no obligation to a

<sup>80</sup> Vigdis Vevstad, *Refugee Protection: A European Challenge* (Oslo, Norway: Tano Auschehoug, 1998) 95.

<sup>81</sup> *Grygorian v. Canada* (MCI)(1995), 33 Imm. LR (2d) 52 (FCTD), online Federal Court Reports <<http://reports.fja.gc.ca/en/index.html>>; (*Grygorian*). The Court engages with the basis of the rationale.

<sup>82</sup> Notable is the fact that in some instances where a state fails to fulfill this responsibility, under the 'Responsibility to Protect' doctrine that state loses its inherent right to territorial sovereignty. See, Ramesh Thakur, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, ON: International Development Research Centre, 2001).

<sup>83</sup> Above n. 2. Art. 1A(2) states: '[an individual] not having a nationality and being 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'.

<sup>84</sup> Above n. 34, 104.

person if 'alternate and viable haven' is available elsewhere. This is in harmony with the language in the definition. . .<sup>85</sup>

The test itself is straightforward. The claimant must establish that there is persecution in one former habitual residence and that he or she cannot return to any former habitual residence. However, in adopting the shorthand approach presented in the UNHCR Handbook, which emphasizes the value of symmetry between two differently situated groups, the court avoids a discussion of what a 'viable haven' actually is in the facts of this case.

The following demonstrates the cross-pollination of this shorthand approach between determination systems. In 2002, the New Zealand Refugee Status Appeals Authority<sup>86</sup> claimed to adopt the approach advanced in *Thabet*. At paragraph 121, the decision maker states:

Our conclusion (paraphrasing Article 1A(2)) is that where a stateless person has habitually resided in more than one country, in order to be found a Convention Refugee, such person must show that he or she has a well-founded fear of being persecuted for a Convention reason in *at least one* country of former habitual residence, and that he or she is unable or, owing to such fear, is unwilling to return to *each* of his or her *other* countries of former habitual residence. In short, the well-founded fear of being persecuted for a Convention reason must be established in relation to each and every country of former habitual residence. . .<sup>87</sup>

Clearly, while symmetry is claimed by the latter decision maker too, there is a disconnect between what the two courts understand to be required of the applicant. The latter decision imposes a far heavier onus on the applicant than does the former. This demonstrates why using the UNHCR Handbook (by the Court in *Thabet*) and using decisions from other jurisdictions as interpretive tools should be approached with caution. Had either court engaged in a fact-based analysis of what a country of reference actually represents in the respective cases, namely the state that has the presumed prior obligation towards the applicant, the two decisions may have been more analytically consistent. Further, and more importantly, these courts may have developed an approach that is more realistic vis à vis the needs of stateless persons and the states' international human rights obligations.

Germov nails down the analytical conundrum that has led to inconsistency in this part of the refugee determination process. Decision makers have to decide whether stateless persons face persecution and are therefore entitled to protection under the Convention. Based on the approach to this issue as espoused by Hathaway, an applicant must establish that they are

<sup>85</sup> *Thabet*, above n. 23, 56.

<sup>86</sup> New Zealand Refugee Status Appeals Authority, Refugee Appeal No. 72635/01, 6 Sept. 2002.

<sup>87</sup> *Ibid.*, 121 (emphasis added).

outside a country of former habitual residence owing to a well-founded fear of persecution, which is a prospective analysis that is heavily influenced by evidence of past persecution. The common thread for stateless persons, however, is that there is often no possibility for return and, therefore, no future threat emanating from that country and, consequently, no way to determine that the person meets the refugee definition.<sup>88</sup>

While this approach seems analytically correct, in the present refugee determination regimes it ties the hands of the decision makers and may place stateless persons at an even greater disadvantage. Leaving the resolution of this for another day, the problem that Germov and Hathaway present points to two defects that have developed in the international refugee regime. First, the stark differences between stateless persons and those in possession of nationalities gets passed-over in favour of symmetry, neglecting the real circumstances of stateless persons. Second, since discussions of state obligations under the ICCPR, the ICESCR, the ICERD and the CRC have been excluded from refugee analysis at the state level, as well as in the UNHCR Handbook and the ExCom conclusions,<sup>89</sup> this has resulted in states having people in their territories with respect to whom they have no applicable legal machinery.

### 5.3 Discrimination amounting to persecution

Whereas the country of reference analysis above seeks to determine whether the applicant should have sought protection from a state having prior obligations to the claimant, the persecution analysis seeks to determine whether the applicant is really in need of protection at all. In order to prove that he or she needs protection, the refugee regimes canvassed here oblige the applicant to prove a well-founded fear of persecution.<sup>90</sup> The issues addressed at this stage of the analysis are: what type, what level, what duration, or what combination of these three qualifiers of human rights abuses amounts to persecution?

The vast majority of stateless people experience a series of low-level discriminatory rules, laws and customs that make existence difficult.<sup>91</sup> Consider the following scenario: 'Palestinians who leave Egypt can ensure their return in one of two ways. They must either return every six months or provide papers proving they are working or documents stating educational enrolment abroad . . . Any delay in return beyond this date, however, results

<sup>88</sup> Roz Germov and Francesco Motta, *Refugee Law in Australia* (South Melbourne, Australia: Oxford University Press, 2003) at 153–4.

<sup>89</sup> Above n. 38. Note that Conclusions 78 in 1995, 96 in 2003, and 101 in 2004 each 'urge states' to 'work towards' 'taking measures leading to' the grant of legal status. None of these mentions other international human rights obligations that bear on the issue.

<sup>90</sup> Above n. 2, Art. 1A(2).

<sup>91</sup> David Palmer, 'Between a Rock and a Hard Place: the Case of Papuan Asylum-Seekers' (2006) 52 *Australian Journal of Politics and History* 576.

in denial of entry'.<sup>92</sup> Because of poor employment prospects, many stateless persons are forced abroad. And because they can be denied the right of return if they do not comply with these so-called laws of general application,<sup>93</sup> stateless persons must constantly uproot. Appended to this condition of limited mobility rights and restricted work prospects is differential treatment with respect to healthcare and education for everyone in the applicant's family. Looming over all of this is the reality that this has been the situation for generations and promises, without intervention, to be the prospect for generations to come. Does this amount to persecution? Do Contracting States have a responsibility to limit this situation when presented with an opportunity to do so; or, does it lie beyond their obligations?

Persecution finds no definition in the Convention itself. Paragraph 53 of the Handbook states: 'In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds"'. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances . . .'.<sup>94</sup>

The absence of a bright line amount or degree of discrimination constituting persecution has inspired quite a bit of literature and quite a bit more case law.<sup>95</sup> The basic concept is that incidents negatively affecting relatively minor derogable<sup>96</sup> rights may amount to persecution when they are assessed together and may support a finding of harm on the person's everyday life. One author notes, however, 'it is often difficult to determine when harassment becomes persecution, and is therefore one area where states tend to set too high a threshold on the interpretation of what constitutes persecution'.<sup>97</sup>

For example, in *Sahar Ouda v. Immigration and Naturalization Service* [2003], the Court had to determine whether a stateless Palestinian woman claiming refugee status on the basis of mistreatment by the Kuwaiti Government could establish persecution. The Court decided that persecution can include not only threats to life, but also economic restrictions so severe that

<sup>92</sup> Oroub El-Abed, 'Palestinian Refugees of Egypt: What Exit Options Are Left for Them?' (2004) 22 *Refugee* 21.

<sup>93</sup> I have argued in Federal Court that although the requirement for residency permits might be a law of general application, it is certainly not a law of general effect. These negatively impact stateless persons in a way not experienced by persons with a nationality.

<sup>94</sup> Above n. 34. Para. 53 of the Handbook states: 'In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds"'. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances . . .'

<sup>95</sup> Of the 53 Canadian cases surveyed for the purposes of this article, e.g., 42 of them involved discrimination amounting to persecution analysis.

<sup>96</sup> Professor Hathaway's hierarchy of rights is often referenced in deciding the threshold.

<sup>97</sup> Above n. 88.

they constitute a real threat to life or freedom. Further, confiscation of property has been cited as one type of action that can cross the line from harassment to persecution.<sup>98</sup>

Compare this with the decision in *Kuwait (CG) v. The Secretary of State for the Home Department* [2006] where the UK Asylum and Immigration Tribunal heard the application of an undocumented Bidoon. The AIT outlined the test that it applied: 'For discrimination to amount to persecution, measures must involve persistent and serious ill-treatment without just cause and must be of a substantially prejudicial nature and must affect a significant aspect of the individual's or the group's existence to the extent that it would make their life intolerable if they were to return'.<sup>99</sup> Finally, compare the above two approaches with the decision in *Sagarichi v. Canada* (1993),<sup>100</sup> where the Canadian Federal Court of Appeal described the threshold thus:

The dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in refugee law, it has been found that discrimination may very well be seen as amounting to persecution. It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact, but is a mixed question of law and fact, legal concepts being involved. It remains, however, that, in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding in a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein.<sup>101</sup>

The Federal Court of Appeal has determined that discrimination amounting to persecution in Canada requires a factually dense analysis. This is significant in the administrative law context as it accords a greater amount of deference to the Immigration and Refugee Board. This administrative body may not be properly equipped to interpret Canada's international human rights obligations in light of certain discriminatory treatment experienced by stateless persons.

Likely owing to the lack of specific guidance in the Refugee Convention, there is some disparity between the thresholds emerging from these three states. That coming out of the UK case law seems to stand the highest, the one described in the Canadian case somewhere in the middle and the threshold in the US jurisprudence at the lower end. All three approaches require the applicant to mount a relatively extensive and therefore burdensome evidentiary record. If states allowed a presumption that statelessness implied certain violations of human rights, the applicant would not be forced into the difficult task of establishing that they have met the threshold.

<sup>98</sup> *Sahar Ouda v. Immigration and Naturalization Service* [2003] 324 F.3d 445 (*Sahar*).

<sup>99</sup> *Kuwait CG and The Secretary of State for the Home Department* [2006] UKAIT 00051 (*Kuwait CG*).

<sup>100</sup> *Sagarichi v. Canada (Minister of Citizenship and Immigration)* [1993] 182 NR 398 FCA, online: Federal Court Reports <<http://reports.fja.gc.ca/en/index.html>> (*Sagarichi*).

<sup>101</sup> *Ibid.*, para. 14.

As a note, no matter what part of refugee determination is involved, legal analysis that reaches for political statements as interpretive of the law should be approached with caution. In Australia, the literature concedes, where ambiguity or confusion has confounded Australian decision makers, they have referred to the UNHCR Handbook for guidance in interpretation of their international obligations.<sup>102</sup> In the trial level decision in *Savvin v MIEA* [1999] FCA,<sup>103</sup> Dowsett J reasoned that the Handbook ought to be used only as a general guide. However, in coming to a conclusion on what constitutes persecution, Dowsett J cited the Supreme Court of Canada case, *Canada (Attorney General) v Ward*.<sup>104</sup> The Canadian Supreme Court in turn endorsed the use of the Handbook and referenced it in coming to its conclusion on the interpretation of persecution in the Convention.<sup>105</sup>

#### **5.4 Denial of re-entry and deportation of stateless persons**

Whereas travel from and return to one's country of nationality constitutes a fundamental human right under international human rights law, a stateless person can be strictly limited with respect to his or her right to move across borders. Just as these restrictive laws are significant in the persecution analysis, they also have an illuminating effect on how refugee determination has become insulated from the international human rights regime.

For example, laws requiring stateless persons to have work permits in order to remain in the country are benignly identified in the international refugee regime as 'laws of general application' (LOGA). Under refugee law, when a rule is characterized as a LOGA, the consequences and penalties arising from contravention of it do not generally attract the scrutiny of the of the decision maker (to the disadvantage of the applicant). While the purpose of the LOGA might be well within the sovereign purview of regulating the flow of workers and other migrants, their effect on stateless persons is unique. If a Jordanian citizen working in the UAE fails to renew his contract with his employment sponsor, that Jordanian citizen returns home to Jordan. A stateless person does not benefit from that same security of being able to return 'home' because they cannot be guaranteed that any state will allow them entry onto their soil. Wherever they are, stateless persons are there at the indulgence of the state.

Paragraph 59 of the UNHCR Handbook reflects an understanding derived from state practice that a law *may* be persecutory if it violates international human rights standards. In other words, within the refugee regime,

<sup>102</sup> Above n. 101.

<sup>103</sup> Above n. 45, para. 35.

<sup>104</sup> *Ibid.*, para. 63.

<sup>105</sup> *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 (*Ward* cited to SCR).



violation of human rights is legitimate in some circumstances and therefore does not engage obligations on the part of the asylum state. For example, the court in *Mahmoud Kadoura v. Canada (Minister of Citizenship and Immigration)*,<sup>106</sup> decided that the non-issuance of a residency permit and subsequent expulsion from the country *did* not constitute a basis for refugee protection in Canada.<sup>107</sup> The Court found that the state did not specifically target the applicant in its decision not to issue a residency permit and it reasoned that it was within the purview of a state to control population flows in this way. However, Kadoura in this case did not *have a country of nationality or habitual residence to which to return once expelled*. The Court did not deal with the claimant's particular situation of statelessness or the *effects* of such a law of general application on him.

*KF Iran* [2005] offers an example of how removal decisions under the Refugee Convention impact stateless persons differently than other applicants. In this case, a Kurd who was born in Iran in 1972 was removed to Iraq in 1976 by invading Iraqi forces. The claimant was not a citizen of either Iran or Iraq. In its decision to remove the claimant to Iran, the then IAT reasoned that the country specified in the removal notice is not material for the determination of whether or not the claimant is a refugee. The question of whether someone is or is not a refugee depends on whether he is outside his country of former habitual residence and not upon the country to which he might be returned. The country proposed for removal is only relevant with respect to whether Articles 32 and 33 of the Refugee Convention would be breached should that person be removed there.<sup>108</sup> These Articles, of course, relate to the prohibition against the *refoulement* of refugees and are not engaged unless a claimant has been granted refugee status.

The IAT did not consider the impact of removal to a country where the claimant does not have citizenship and where mobility rights, access to healthcare, primary education, and the right to gainful employment may be severely constrained. Without a presumption that statelessness implies discrimination amounting to persecution, making a case for this at the removal stage is very unlikely. Notably, for a claimant that was forcibly removed from Iran at the age of four, such an evidentiary record would be difficult to produce. The discussion about what removal means for stateless persons simply does not take place and existing international human rights obligations are not reflected upon.

Underlying all removal discussions in cases of statelessness is the sticky question: what do we do with people who are not refugees, yet, who have

<sup>106</sup> *Mahmoud Kadoura v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1057, online: Federal Court Reports <<http://reports.fja.gc.ca/en/index.html>> (*Kadoura*).

<sup>107</sup> *Ibid.*, para. 17.

<sup>108</sup> *KF Iran* [2005] UKIAT 00109 at 63.

no state willing to accept them on their territory either as temporary residents or as citizens? In some cases, failed stateless claimants just wait in the destination country, under the constant threat of being deported one day, uncertain of their present or future status. Perhaps under the current system, this is the only answer.

An interesting comparison is apparent when considering the parallels between the analysis for Internal Flight Alternatives<sup>109</sup> and the discrimination amounting to persecution analysis for stateless persons. The reason that these are assessed is that refugee law is meant to be a surrogate for protection and not merely a means to bypass immigration controls. Hathaway and Foster discuss the fourth and controversial aspect of the IFA analysis, namely, the requirement that the state provide for basic human rights in the proposed relocation area. The authors note: “Protection” is not simply the absence of risk of being persecuted. That is, a person may not be at risk of persecution, yet simultaneously not be protected. The notion of protection clearly implies the existence of some affirmative defence or safeguard . . . At the very least, this includes the legal rights stipulated in the Convention’.<sup>110</sup> For stateless persons, there is often no place in their country of former habitual residence where such basic human rights are actively safeguarded.

## 6. The risks of this approach

### 6.1 Risks for the applicant

As Fatemi explains, someone does not become a refugee merely by virtue of being granted that status in a country, rather, it occurs as soon as he or she fulfils the criteria.<sup>111</sup> Where the interpretation of the criteria has been such that the boundary between those included within and those excluded from the realm of protection has been erroneously placed, a person may be a refugee even following a negative determination. There is a valuation and corresponding devaluation that accompanies a decision to exclude. It seems that stateless persons who cannot overcome presumptions against them in order to convince their tribunals that what they have experienced does in fact amount to persecution, face being labeled as illegitimate claimants.

Given that these individuals often cannot return to their former habitual residence, these failed claimants are forced to exist as second class citizens

<sup>109</sup> In the industrialized states noted here, in order for a court to determine that an applicant qualifies for surrogate protection, that applicant must prove that there is nowhere else in their country of nationality or former habitual residence where they can go.

<sup>110</sup> James C. Hathaway and Michelle Foster, ‘Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination’ in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law* (New York, NY: Cambridge University Press, 2003) 405.

<sup>111</sup> Above n. 65.

accused of having tried to take advantage of surrogate protection so generously offered by the state. Indeed, as one author argues, 'the destination country has no obligation to a person not found in the humanitarian group. No rights arise on the part of the rejected claimant where authorities decide [they cannot] deport that claimant'.<sup>112</sup> Dr Ezat Mossallanejad, Policy Analyst with the Canadian Centre for Victims of Torture, describes the state of limbo as one of torture – a state in which you forget your own identity, having spent so long without status.<sup>113</sup>

This juxtaposition between policy and experience provides a sort of microcosmic Canadian example of what occurs on the international stage. Two paradigms exist in parallel: one where a community of nation-states engage in dialogue to solve problems between themselves as the only actors, the other where there is only a series of cross-cutting boundaries, none of which include the individual.

## 6.2 Risks for the international community

Goldston suggests that governments often manipulate citizenship access and mistreat non-citizens without incurring political costs from other states or their own citizens.<sup>114</sup> Though indirect, there may be security risks associated with a more exclusive reading of a state's obligations towards refugee claimants.<sup>115</sup>

For example, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa contains a more inclusive definition of refugee. It includes within the definition of 'refugee' those that have left a country for reasons of serious disturbances of public order. This recognition has helped to mitigate the harm to individuals (by providing safe havens) and to limit the size of the region affected by such disturbances (by limiting the distance refugees must travel before finding a secure location). It has also helped to defuse a crisis before it reaches catastrophic proportions. However, as Crisp suggested in a presentation to the International Security Forum, signatories to the 1969 OAU Convention have begun to mirror the more restrictive approach being taken by industrialized states. In some cases, refugee determinations are being made on a more narrow basis, therefore excluding more people from asylum.<sup>116</sup> These failed claimants must either move into more distant regions, thereby

<sup>112</sup> Peter van Krieken, 'Return and Responsibility' (2000) 38 *International Migration* 23 at 29.

<sup>113</sup> Dr Ezat Mossallanejad delivered a talk at the Mar. 2007 Spinlaw Conference in Toronto.

<sup>114</sup> James A. Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship and the Rights of Noncitizens' (2006) 20 *Ethics and International Affairs* 321 at 342.

<sup>115</sup> This possible ramification extends beyond the discussion of decision making with respect to the claims of stateless persons. However, the approaches to stateless claims provide an example of how narrowly the refugee definition has been construed.

<sup>116</sup> Jeff Crisp, 'Refugees and International Security: An Introduction to Some Key Issues and Policy Challenges', Prepared for the 4<sup>th</sup> International Security Forum (Nov. 2000), online: <[http://www.isn.ethz.ch/4isf/4/Papers/ISF\\_WS\\_II-4\\_Crisp.pdf](http://www.isn.ethz.ch/4isf/4/Papers/ISF_WS_II-4_Crisp.pdf)> (last accessed Mar. 30, 2007).

destabilizing a greater area, or move back to the crisis, thereby increasing friction and risk within that state.

From the perspective of industrialized states these effects may indeed be indirect. On the other hand, a less absorbent neighbouring state may result in increased claims in states overseas. Further, states involved in peacekeeping missions to affected regions have an interest in crises, having a way to cool the conflict.

## 7. Return to basic principles

Over time, by treating stateless applicants on the same footing as other applicants, states have avoided the sometimes difficult discussion of their specific plight. This omission has been subtle and powerful. There are ways, though, to reintroduce this important discussion to the order paper. One of them, as mentioned at the beginning of this article, is the report of the Committee on the Elimination of Racial Discrimination Report of Canada. While these communications do not attract a huge readership, they do draw attention to Canada's Human Rights obligations, which should inform its interpretation of its commitments to refugees under the 1951 Convention.

Goldston recommends that statelessness must increasingly be seen not as an arcane legal matter, but as a human tragedy, political problem and security threat. He suggested that all relevant provisions regarding statelessness should be gathered into one document, as their dispersion in different materials has contributed to their relative anonymity and lack of effective force.<sup>117</sup>

## 8. Conclusion

By ratifying the 1951 Refugee Convention, State Parties undertook a significant commitment. These states promised that refugees, including stateless refugees, in their jurisdiction would be afforded the opportunity to enjoy the fundamental rights and freedoms to which they are entitled under international law.

Today, stateless persons do not see this promised access to their fundamental rights and freedoms coming true. Due to a system where excessively narrow interpretations of 'refugee' are legitimized internationally, the chronic human rights violations that stateless persons experience remain ignored. There is no legal basis for maintaining an approach to decision making that avoids thorough consideration of a state's international human rights obligations. It is time to incorporate these obligations into the analysis.

<sup>117</sup> Above n. 114.