Comparative Perspectives on Statelessness and Persecution

Maryellen Fullerton[*]

I. INTRODUCTION

In a world of nation states, citizens rely on their states for protection. The U.S. Foreign Affairs Manual proclaims: "The U.S. Department of State and our embassies and consulates abroad have no greater responsibility than the protection of U.S. citizens overseas."[1] The Vienna Convention on Consular Relations states that the core of consular functions consists of protecting "the interests of the sending State and of its nationals."[2] Yet, in today's world, millions of individuals lack state protection. The stateless and refugees comprise two of the major groups that, in the words of former U.S. Supreme Court Justice Earl Warren, lack "the right to have rights."[3]

Stateless people cannot claim membership in any of the more than 190 states in the international system. No state views them as integral members of the national community. As noncitizens, they cannot access the levers of power; they cannot access the courts; they cannot access the law. In a world of nation states, the stateless fall between the cracks. The lack of state protection is the defining characteristic of statelessness. "Remove [citizenship] and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to

---

[*] Professor of Law, Brooklyn Law School. I thank Brooklyn Law School for its generous support and Alexander Eleftherakis for excellent research assistance.

1. U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL 011(a) (2012).

2. Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 5(a), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

3. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, J., dissenting), *overruled in part by* Afroyim v. Rusk, 387 U.S. 253 (1967). Earlier, Hannah Arendt had written: "We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation . . . . Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether." HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 294 (1951).

protection from any nation, and no nation may assert rights on his behalf."[4]

The lack of state protection is also the hallmark of refugee status. Although refugees generally are citizens of a state, frequently possess passports, and often have a national identity, they cannot rely on their own state to protect them. For refugees, these indicia of citizenship are formalities. In a world of nation states, refugees are effectively on their own. They are de facto stateless. As a consequence, they need other states to step in and provide surrogate protection: refugee status.

Statelessness and refugee law both overlap and diverge. In this Article, I will explore some of the intersections between statelessness and refugee law. In particular, I will examine judicial opinions in Canada, the United Kingdom, and the United States which review claims of persecution submitted by stateless applicants for asylum.

To set the context, I will first provide a short overview of the treaty frameworks concerning statelessness and refugee status. I will then describe some of the major populations of stateless people in the world and where they are located. Next I will note some of the principal mechanisms that result in statelessness. Then I will turn to the jurisprudence involving stateless individuals seeking protection as refugees in Canada, the United Kingdom, and the United States. Four recent cases present different aspects of the vulnerability of stateless individuals. Some of the claims involve statelessness resulting from government wartime decrees stripping groups of people of their citizenship.[5] Another involves succession of states, with statelessness a consequence of naturalization laws that impose language requirements on long-time inhabitants. Yet another involves statelessness from birth, compounded by lack of proof of identity. In all four instances, the courts are sympathetic to the claimants' contention that their experiences of statelessness make them fear persecution. Yet, jurisprudential attention to the intersection of statelessness and refugee law is in its early stages, and the courts are cautious, remanding three of the cases for further factual and legal development of the issue. Despite the incomplete assessments of the refugee claims of these stateless individuals, the

4. *Perez*, 356 U.S. at 64 (Warren, J., dissenting).

5. I use the following terminology in this article: "Denationalization" refers to the withdrawal of citizenship from people who currently possess it. "Denaturalization" is one type of denationalization; it refers to the withdrawal of citizenship from people who acquired citizenship through a government process called naturalization, as opposed to acquiring citizenship at birth. The rejection of an application for citizenship is neither denationalization nor denaturalization; denial of a new applicant for citizenship is different from withdrawal of citizenship from one already in possession of it.

tentative framework that emerges provides useful guideposts. It also leaves many questions unanswered. In closing, I will identify several contemporary situations that raise new and important inquiries about the intersection of statelessness and refugee law.

II. THE TREATY FRAMEWORKS

Three international treaties form the framework for considering refugees and stateless individuals. The first of these treaties, the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention),[6] was forged in the ashes of World War II. Its central tenet: refugees need protection from persecution.[7] One hundred forty-five states have become parties[8] and are bound by its command, "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[9] In addition to the absolute prohibition against "refoulement," Contracting States agree on the criteria that qualify individuals for refugee status:

> [T]he term "refugee" shall apply to any person who . . . owing to a 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 . . . .[10]

This well-known refugee definition refers expressly both (1) to fears of persecution and (2) to individuals who have a nationality. It does not directly address statelessness or equate statelessness with persecution. But the 1951 Refugee Convention acknowledges the existence of statelessness and the persecution that stateless individuals may face. It explicitly extends refugee protections to those *lacking a nationality* who fear persecution on account of one of the five enumerated grounds.[11]

---

6. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].

7. *See id.*

8. *Convention relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION (Mar. 30, 2015,5:40 AM), https://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en.

9. 1951 Refugee Convention, *supra* note 6, at art. 33(1).

10. *Id.* at art. 1(A)(2) (emphasis added).

11. *Id.*

These stateless individuals are eligible for refugee status so long as they are "*outside the country of [their] former habitual residence*."[12] Under the 1951 Refugee Convention, the stateless—like those possessing citizenship—must have crossed an international border to qualify for refugee protection. Thus, from its inception, the 1951 Refugee Convention foresaw that stateless individuals would sometimes face serious threats of persecution on racial, religious, ethnic, political, and/or social grounds, and on those occasions would qualify as refugees if they had left the country where they lived.

When the 1951 Refugee Convention was drafted, in the wake of the World War II, the general view was that refugees presented a more urgent humanitarian challenge than stateless people and that statelessness would decrease as decolonization proceeded and a new world order emerged.[13] Indeed, for decades the United Nations, an organization of *states*, did not task any unit or agency to attend to the *stateless*.[14] Finally, in the 1990s, the United Nations formally acknowledged that the stateless constitute a sizeable and vulnerable world-wide population, and the United Nations General Assembly assigned the United Nations High Commissioner for Refugees (UNHCR) responsibility for the stateless.[15]

The lack of United Nations' oversight of stateless populations did not mean that international law was blind to statelessness. In fact, shortly after the conclusion of the 1951 Refugee Convention, the international community negotiated two separate treaties directly addressing the phenomenon of statelessness. The 1954 Convention relating to the Status of Stateless Persons (1954 Statelessness Convention) sets forth the basic definition of statelessness: "[T]he term 'stateless person' means a person who is not considered as a national by any State under the operation of its law."[16]

Echoing the 1951 Refugee Convention, the 1954 Statelessness Convention requires State Parties to provide stateless persons with access

---

12. *Id.* (emphasis added).

13. JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 64–65 (2d ed. 2014).

14. In 1974, the United Nations General Assembly instructed UNHCR to assist stateless peoples pursuant to the terms of the 1961 Convention. UNHCR, A SPECIAL REPORT: ENDING STATELESSNESS WITHIN 10 YEARS 7, *available at* http://unhcr.org/statelesscampaign2014/Stateless-Report_eng_final3.pdf [hereinafter ENDING STATELESSNESS]. However, UNHCR did not receive operational responsibility to protect as well as prevent/reduce statelessness until 1996. *See infra* note 15 and accompanying text.

15. G.A. Res. 50/152, ¶ 1, U.N. Doc. A/Res/50/152 (Feb. 9, 1996); *Stateless - UNHCR Actions*, UNHCR, http://www.unhcr.org/pages/49c3646c16a.html (last visited May 25, 2015).

16. Convention relating to the Status of Stateless Persons art. 1(1), *adopted* Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960) [hereinafter 1954 Statelessness Convention].

to courts,[17] to housing,[18] to elementary education,[19] to employment,[20] and to many other aspects of public life. Nonetheless, the promise of this treaty has largely been unfulfilled for two principal reasons. First, relatively few states have acceded to the 1954 Statelessness Convention. By 2010, only 65 (of 190) states had become parties;[21] in contrast, 144 states had ratified the 1951 Refugee Convention.[22] In recent years, the UNHCR campaign to encourage treaty ratifications has borne fruit and 82 states had become parties to the 1954 Statelessness Convention by early 2015.[23] Nonetheless, the number of Contracting Parties is still relatively small.

Second, and more importantly, many of the rights enumerated in the 1954 Convention are limited to stateless individuals lawfully present within the territory.[24] In reality, many states with large populations of stateless people insist that the stateless residents are unlawfully present.[25] Therefore, even if the state becomes a party to the treaty, the treaty provisions frequently do not apply to its stateless inhabitants.

In the decade following the 1954 Statelessness Convention, statelessness did not disappear on its own, and the international community took renewed interest in the phenomenon. A more proactive treaty approach was adopted, the 1961 Convention on the Reduction of Statelessness (1961 Convention), requiring State Parties to take action to decrease the conditions that give rise to statelessness.[26] The 1961 Convention features two major avenues of statelessness reduction. State Parties agree both to grant citizenship more generously and, at the same

17. *Id.* at art. 16.

18. *Id.* at art. 21.

19. *Id.* at art. 22(1).

20. *Id.* at art. 17–19.

21. *Convention relating to the Status of Stateless Persons*, UNITED NATIONS TREATY COLLECTION (Mar. 30, 2015 5:00 AM), https://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&lang=en#6.

22. *Convention relating to the Status of Refugees*, *supra* note 8.

23. *Convention relating to the Status of Stateless Persons*, *supra* note 21; *see also* ENDING STATELESSNESS, *supra* note 14, at 7.

24. *See, e.g.*, 1954 Statelessness Convention, *supra* note 16, at art. 17(1) ("The Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage in wage-earning employment.").

25. For example, the Myanmar authorities refer to many of the one million Rohingya residents as illegal immigrants. *See* Todd Pitman, *Myanmar Conflict Spurs Hatred for Asia's Outcasts*, AP THE BIG STORY (June 14, 2012, 5:54 AM), http://bigstory.ap.org/article/myanmar-conflict-spurs-hatred-asias-outcaSTs; *see also* ENDING STATELESSNESS, *supra* note 14, at 19.

26. Convention on the Reduction of Statelessness, *adopted* Aug. 30, 1961, G.A. Res. 896(IX), 989 U.N.T.S. 175 (entered into force Dec. 13, 1975) [hereinafter 1961 Convention].

time, to reduce the circumstances in which loss of citizenship may occur.[27] First, states commit to providing citizenship to persons born within their territory if they would otherwise be stateless.[28] States have the option to provide citizenship at birth to the otherwise stateless or to establish an application process that stateless individuals can pursue during their childhood or early adult years.[29] Second, State Parties agree to prevent the loss of citizenship if that would render the individual stateless.[30] For example, states shall not deprive a person of nationality if that would render him or her stateless.[31] States shall not allow renunciation of nationality unless the person has or acquires another nationality.[32] States whose laws tie loss of nationality to marriage, divorce, adoption, or other change in personal status shall make the loss contingent on the acquisition of another nationality.[33]

---

27. *See id.*

28. *Id.* at art. 1(1).

29. *Id.* at art. 1(1)–(2). Article 1 of the 1961 Convention allows states to attach multiple prerequisites to awarding nationality to individuals born in their territory:

> 1. A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:
>
> (*a*) at birth, by operation of law, or
>
> (*b*) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this article, no such application may be rejected.
>
> A Contracting State which provides for the grant of its nationality in accordance with sub-paragraph (*b*) of this paragraph may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law.
>
> 2. A Contracting State may make the grant of its nationality in accordance with sub-paragraph (*b*) of paragraph 1 of this article subject to one or more of the following conditions:
>
> (*a*) that the application is lodged during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years, so, however, that the person concerned shall be allowed at least one year during which he may himself make the application without having to obtain legal authorization to do so;
>
> (*b*) that the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all;
>
> (*c*) that the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge;
>
> (*d*) that the person concerned has always been stateless.

Id. at art. 1(1)–(2).

30. *Id.* at art. 5–8, 10.

31. *Id.* at art. 8.

32. *Id.* at art. 7.

33. *Id.* at art. 5.

Relatively few states have ratified the 1961 Convention, although there has been an increase from 37 to 63 parties in recent years.[34] The small number of State Parties to the 1961 Convention that commits states to take concrete measures to reduce statelessness is particularly troubling. Many of the new cases of statelessness in the twenty-first century involve children born to stateless parents.[35] Adherence to the 1961 Convention—and according citizenship to children born in their territory if the children would otherwise be stateless[36]—would effectively reduce the growth in statelessness. The failure to ratify this treaty or to include the substance of its central provisions in national legislation ensures that the problem of statelessness will continue to fester in many places around the globe.

III. WHO ARE THE STATELESS AND WHERE DO THEY LIVE?

The treaties presuppose the existence of stateless people and sketch out basic definitions and legal protections. They do not attempt to count how many stateless people there are in the world today and where they live. Stateless populations often are omitted from national registries, creating insuperable challenges in gathering reliable data.[37] The UNHCR estimates that there are more than 10 million stateless individuals,[38] and that they are found all around the globe: Asia, Africa, Europe, the Middle East, and the Americas.[39] Roughly one-third of the stateless individuals are children.[40]

Palestinians are the largest stateless population in the world. Recent surveys count more than 11 million Palestinians, with 2.7 million in the West Bank and East Jerusalem, 1.7 million in Gaza, 1.4 million inside Israel, 2 million in Jordan, 525,000 in Syria, 450,000 in Lebanon, almost 200,000 in Saudi Arabia, and smaller groups in other countries all over the world.[41] Not all Palestinians are stateless, but many—perhaps half—

---

34. *Convention on the Reduction of Statelessness*, UNITED NATIONS TREATY COLLECTION (Feb. 14, 2015, 5:05 AM), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en; ENDING STATELESSNESS, *supra* note 14, at 7.

35. One-third of the stateless people in the world today are children. ENDING STATELESSNESS, *supra* note 14, at 8.

36. 1961 Convention, *supra* note 26, at art. 1, 3.

37. ENDING STATELESSNESS, *supra* note 14, at 6.

38. UNHCR, GLOBAL TRENDS 2013: WAR'S HUMAN COST 2 (2014), http://www.unhcr.org/5399a14f9.html [hereinafter WAR'S HUMAN COST].

39. ENDING STATELESSNESS, *supra* note 14, at 2.

40. *Id*. at 4.

41. *Palestinians to Outnumber Jewish Population by 2020, Says PA Report*, HAARETZ (Jan. 1, 2013, 5:59 AM), http://www.haaretz.com/news/middle-east/palestinians-to-outnumber-jewish-popul

are.[42] Of those Palestinians who are stateless, the 1954 Statelessness Convention excludes from its protections those who receive assistance and protection from the United Nations Relief Works Administration (UNRWA).[43]

Some of those without passports travel on Refugee Travel Documents issued by the Middle Eastern countries that host large Palestinian refugee camps.[44] Others possess a residence permit as a foreign national.[45] Still others have no official documents. The lack of proof of citizenship impedes their ability to work, to change their residence, to receive an education, and much more. These problems have been exacerbated by the 2014 war in Gaza, which impelled many Palestinians to flee.[46] The ongoing civil war in Syria, with massive

---

ation-by-2020-says-pa-report-1.491122; *Where We Work*, UNRWA, http://www.unrwa.org/where-we-work (last visited May 25, 2015); *Estimated Number Of Palestinians in the World by Country of Residence, End Year 2010*, PALESTINIAN CENTRAL BUREAU OF STATISTICS, http://www.pcbs.gov.ps/Portals/_Rainbow/Documents/PalDis-POPUL-2010E.htm (last visited May 25, 2015); *11 Million Palestinians Scattered Around World*, JORDAN TIMES (Dec. 20, 2012, 10:54), http://jordantimes.com/11-million-palestinians-scattered-around-world.

42. *See* Abbas Shiblak, *Stateless Palestinians*, 26 FORCED MIGRATION REV. 8, 8–9 (2010). *But see* Nina Larson, *UN Aims to End Statelessness in 10 Years,* BUSINESS INSIDER (Nov. 4, 2014, 2:01 AM), http://www.businessinsider.com/afp-un-aims-to-eliminate-statelessness-within-10-years-2014-11 (UNHCR does not record Palestinians as stateless due to the U.N. General Assembly's recognition of Palestine as a non-member observer state).

43. 1954 Statelessness Convention, *supra* note 16, at art. 1(2)(i) ("This Convention shall not apply [t]o persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance."). The 1951 Refugee Convention contains a similar exclusion. 1951 Refugee Convention, *supra* note 6, at art. I(D).

44. Of the 5 million Palestine refugees eligible for UNRWA services, approximately 1.5 million live in 58 official refugee camps located in Lebanon, Syria, Jordan, Gaza, and the West Bank. *Palestine Refugees*, UNRWA, http://www.unrwa.org/palestine-refugees (last visited May 25, 2015). Many other Palestine refugees live in towns and cities near the camps. *Id.* The host countries, such as Lebanon, Syria, and Jordan, provide travel documents to refugees. *See, e.g.*, *Consular Services*, *Palestinian Travel Documents*, CONSULATE GENERAL OF LEBANON, http://www.lebanonconsulate-uae.com/en/home/services (last visited May 25, 2015) (providing detailed information about obtaining and renewing travel documents for Palestinian refugees); *see also* Rep. of the Comm'r Gen. of UNRWA for Palestine Refugees in the Near East, ¶¶ 59–61, U.N. Doc. A/62/13; GAOR, 62d Sess., Supp. No. 13 (2006); Oroub El-Abed, *The Case of Palestinian Refugees- Holders of Egyptian Travel Documents in Egypt and Jordan*, ACADEMIA.EDU https://www.academia.edu/205536/The_case_of_Palestinian_refugees-_holders_of_the_Egyptian_travel_documents_in_Egypt_and_Jordan (last visited Mar. 30, 2015).

45. *See, e.g.*, Ouda v. Immigration & Naturalization Serv., 324 F.3d 445, 447–48 (6th Cir. 2003) (stateless Palestinians born in Kuwait traveled on Egyptian travel documents); Faddoul v. Immigration & Naturalization Serv., 37 F.3d 185, 187 (5th Cir. 1994) (stateless Palestinian born in Saudi Arabia traveled on Lebanese travel documents). *See generally Palestine Refugees,* UNRWA, http://www.unrwa.org/etemplate.php?id=86 (last visited May 25, 2015).

46. Renee Lewis, *Palestinian Migrants Fleeing Gaza Strip Drown in Mediterranean Sea*, AL JAZEERA AMERICA (Sept. 14, 2014, 11:14 AM), http://america.aljazeera.com/articles/2014/9/14/

displacement both within and across Syria's borders, has also increased the vulnerabilities of stateless Palestinians in the region.[47]

Across the world to the east, Myanmar has more than one million stateless people, many of them Rohingya Muslims who live on the borders of Myanmar and Bangladesh, denied nationality by each state.[48] The Rohingya are derided as illegal immigrants, though their families have resided in the same villages for multiple generations.[49] They need government permission to leave their villages or to marry or to have more than two children.[50] Fleeing from communal violence, boatloads of Rohingya have been turned back by coast guard units in Bangladesh and elsewhere.[51] In the spring 2014 census, Myanmar officials refused to allow the Rohingya to describe themselves as "Rohingya."[52] Instead they registered them as "Bengali," implying that they had illegally crossed the border from neighboring Bangladesh and had a homeland that recognized them.[53]

Statelessness is a major problem further north in Asia and in Europe. The Soviet Union, which stretched through Europe and Asia for seventy years, ceased to exist in 1991, leaving nearly 300 million people in need of new sources of citizenship.[54] The fifteen post-Soviet states each created their own citizenship laws, and hundreds of thousands of former Soviet citizens fell between the cracks.[55] Two decades later, more than 600,000 remain stateless.[56]

---

gaza-migrants-boat.html.

47. *See Analysis: Palestinian Refugees from Syria Feel Abandoned*, IRIN NEWS (Aug. 29, 2012), http://www.irinnews.org/report/96202/analysis-palestinian-refugees-from-syria-feel-abandoned.

48. Pitman, *supra* note 25.

49. *Id.*

50. *Id.*

51. *Id.* Malaysian and Indonesian authorities reported a large upsurge in boats containing Rohingya refugees in May 2015. Thomas Fuller, *Muslims Flee to Malaysia and Indonesia by the Hundreds*, N.Y. TIMES (May 11, 2015), http://www.nytimes.com/2015/05/12/world/asia/more-than-1000-refugees-land-on-malaysian-resort-island.html. UNHCR, however, reported that more than 25,000 Rohingya and Bangladeshi boat people had fled during the first quarter of 2015. UNHCR Regional Office for South-East Asia. *Irregular Maritime Movements: Jan.–Mar. 2015*, http://www.unhcr.org/554c6a746.html (last visited Mar. 30. 2015).

52. Associated Press, *Religious Tensions Cloud Myanmar Census*, N.Y. TIMES (Mar. 30, 2014), http://www.nytimes.com/2014/03/31/world/asia/religious-tensions-cloud-myanmar-census.html.

53. *Id.*

54. *In Legal Limbo: Asylum-seekers and Statelessness*, REFUGEES MAGAZINE, May 1, 1996, *available at* http://www.unhcr.org/3b5587ce4.html [hereinafter *In Legal Limbo*].

55. *Id.*

56. ENDING STATELESSNESS, *supra* note 14, at 3.

In the western hemisphere, the Dominican Republic is home to another sizeable stateless population. In September 2013, the Constitutional Court of the Dominican Republic ruled that children born in the Dominican Republic to undocumented parents were children born in transit.[57] As such, the Constitutional Court concluded that they did not acquire citizenship at birth.[58] By making this ruling retroactive to 1929, the Constitutional Court denationalized more than 200,000 individuals of Haitian descent.[59] They and their parents had lived and worked in the Dominican Republic for generations; they had registered as Dominicans; they speak Spanish, not Creole; many of them had never been to Haiti.[60] In a stroke, they became stateless. Subsequent legislation to authorize citizenship is likely to benefit only a few, leaving hundreds of thousands of vulnerable stateless individuals in the Dominican Republic at the beginning of the twenty-first century.[61]

Stateless people live in every corner of the world. There are roughly 700,000 stateless people in Côte d'Ivoire.[62] More than 250, 000 are stateless in Latvia.[63] Roughly 100,000 Nubians reside in Kenya, many of

---

57. *Sentencia TC/0168/13*, Constitutional Court of the Dominican Republic, Sept. 23, 2013, *available at* http://www.refworld.org/docid/526900c14.html.

58. *Id*. The 2013 ruling by the Constitutional Court concluded that Ms. Juliana Dequis Pierre, who had been born in the Dominican Republic to parents who had migrated from Haiti decades earlier, was not a Dominican citizen even though Ms. Dequis Pierre had been officially registered at birth as a Dominican citizen. *Id.*

59. *Id*. The Constitutional Court did more than deny citizenship to Ms. Dequis Pierre, herself the mother of four Dominican-born children. According to the court, government officials had the duty to identify similarly situated persons who had been registered as Dominican citizens since 1929. *Id.*

60. *See generally* Shaina Abner & Mary Small, *Citizen or Subordinate: Permutations of Belonging in the United States and Dominican Republic*, 1 J. ON MIGRATION & HUM. SEC. 76, 76–79 (2013).

61. The government of the Dominican Republic stated it would propose legislation to provide a pathway for long-term residents to regularize their status and eventually to naturalize. Ezra Fieser, *Can Haiti and the Dominican Republic Repair Relations After Citizenship Ruling?*, CHRISTIAN SCI. MONITOR (Jan. 8, 2014), http://www.csmonitor.com/World/Americas/2014/0108/Can-Haiti-and-the-Dominican-Republic-repair-relations-after-citizenship-ruling. In May 2014, the Congress of the Dominican Republic enacted legislation granting citizenship to children born to foreign parents, provided the children have Dominican government identification documents and are listed in the civil registry. Randal C. Archibold, *Dominican Republic Passes Law for Migrants' Children*, N.Y, TIMES (May 22, 2014), http://www.nytimes.com/2014/05/23/world/americas/dominican-republic-passes-law-for-migrants-children.html. Commentators believe the great majority of stateless individuals in the Dominican Republic will not benefit from the new law. *2015 UNHCR Subregional Operations Profile - North America and the Caribbean*, UNHCR, http://www.unhcr.org/pages/49e4915b6.html (last visited May 25, 2015).

62. *Who is Stateless and Where?*, UNCHR, http://www.unhcr.org/pages/49c3646c15e.html (last visited May 25, 2015).

63. *Id.*

them stateless.[64] While the international community has focused greater attention on the phenomenon of statelessness in recent years, an accurate estimate of statelessness is impossible. Many census figures do not include them;[65] they occupy the fringes of society; some of them are nomadic. Like many stigmatized, vulnerable populations, they may resist encounters with officials and remain silent about their legal status.[66] A rough estimate, including both stateless Palestinians and the UNHCR estimates, which omit Palestinians from consideration,[67] is that 15 million people are stateless in the world today.[68]

IV. BECOMING STATELESS

In addition to a greater acknowledgement of the numerous and widely dispersed stateless populations, there is a growing understanding of the multiple trajectories that lead to statelessness. The succession of states has been the primary cause of statelessness in contemporary times.[69] As noted above, the dissolution of the former Soviet Union in 1991 resulted in more than 300 million people who needed to obtain new nationalities, a legacy of statelessness still haunting hundreds of thousands of former Soviet citizens.[70] Other examples of statelessness triggered by state succession occurred when Czechoslovakia split apart in 1993.[71] Most of the inhabitants found citizenship in one of the successor states, either the Czech Republic or Slovakia, but there were many—mainly Roma—who acquired citizenship in neither.[72]

War is another major engine of statelessness. The Eritrea-Ethiopia war that took place from 1998 to 2000, for example, led to major denationalizations and deportations.[73] Ethiopia expelled more than

64. Adam Hussein Adam, *Kenyan Nubians: Standing Up to Statelessness*, 32 FORCED MIGRATION REV. 19, 19 (2009), *available at* http://www.fmreview.org/FMRpdfs/FMR32/19-20.pdf.

65. ENDING STATELESSNESS, *supra* note 14, at 6–7.

66. *Id.* at 18–19.

67. Larson, *supra* note 42 (UNHCR does not record Palestinians as stateless due to the U.N. General Assembly's recognition of Palestine as a non-member observer state).

68. *See id.* (stating UNHCR does not include Palestinians in its total); UNHCR, *supra* note 38, at 5 (estimating there were 10 million stateless people in 2013); Larson, *supra* note 42 (estimating 4.5 million stateless Palestinians in the West Bank and Gaza alone, and "millions more living around the world").

69. *See supra* Part III.

70. *See supra* notes 54–56 and accompanying text.

71. *See* MARK CUTTS ET AL., THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION 189 (Mark Cutts ed., 2000), http://www.unhcr.org/4a4c754a9.html.

72. *Id.*

73. HUMAN RIGHTS WATCH, THE HORN OF AFRICA WAR: MASS EXPULSIONS AND THE NATIONALITY ISSUE 4 (2003), http://www.hrw.org/sites/default/files/reports/ethioerit0103.pdf.

75,000 individuals of Eritrean descent.[74] Eritrea, though smaller in population and territory, imprisoned 7,500 individuals of Ethiopian origin and expelled thousands more.[75] Many on both sides lost their land, their property, and their citizenship.[76]

The war that engulfed the former Yugoslavia between 1992 and 1995 also led to massive dislocation, flight, and loss of citizenship.[77] Montenegro, one of the former Yugoslav republics, for instance, currently has more than 3,000 registered stateless individuals.[78] In current times, the Russian occupation of Crimea and of eastern Ukraine has resulted in significant population shifts. Many Ukrainians residents have moved eastward into Russia; others have moved west.[79] Ukraine's government no longer controls large portions of its territory, and Russian-speakers in the east swear allegiance to the self-proclaimed Donetsk People's Republic, a government not recognized by any other state.[80] It is exceedingly likely that this conflict will create more stateless populations.

Jus sanguinis, one of the primary methods of acquisition of citizenship, is an additional mechanism that can lead to statelessness.[81] Under the *jus sanguinis* principle, at birth children acquire the citizenship of their parents.[82] The children of stateless individuals, therefore, automatically become stateless. *Jus sanguinis* can also contribute to statelessness in other regards. For example, in *jus sanguinis* regimes, children born to citizens who are living outside their homeland

---

74. *Id.* at 5.

75. *Id*. at 7.

76. *Id.* at 5.

77. UNHCR, THE STATE OF THE WORLD'S REFUGEES 1997: A HUMANITARIAN AGENDA 7–8 (1997), http://www.unhcr.org/3eb7ba7d4.pdf.

78. *Who is Stateless and Where?*, *supra* note 62.

79. *UNHCR Says Internal Displacement Affects Some 10,000 People in Ukraine,* UNHCR (May 20, 2014), http://www.unhcr.org/537b24536.html.

80. Thomas Grove & Gabriela Baczynska, *East Ukraine Separatists Hold Vote to Gain Legitimacy, Promise Normalcy*, REUTERS (Oct. 30, 2014), http://www.reuters.com/article/2014/10/30/us-ukraine-crisis-east-idUSKBN0IJ22G20141030. South Ossetia recognized the Donetsk People's Republic in June 2014, but South Ossetia is another breakaway region in the former Soviet sphere and itself is not recognized as a state by most other governments. *South Ossetia Recognizes Independence of Donetsk People's Republic,* ITAR-TASS (June 27, 2014), http://itar-tass.com/en/world/738110.

81. Elizabeth Grieco, *Defining 'Foreign Born' and 'Foreigner' in International Migration Statistics*, MIGRATION POLICY INSTITUTE (July 1, 2002), http://www.migrationpolicy.org/article/defining-foreign-born-and-foreigner-international-migration-statistics. The two major approaches to transmission of citizenship at birth are known as *jus sanguinis* and *jus soli*. *Id.* Under *jus sanguinis* principles, citizenship is based on the citizenship of the parents; under *jus soli*, citizenship is based on the territory in which the birth occurs. *Id.*

82. *Id.*

become—at birth—citizens of their parents' homeland.[83] But sometimes states require a period of physical residence in the homeland in order to retain citizenship, or in order to pass citizenship on to the next generation.[84] Expatriates who live abroad for long periods of time may, as a result, become stateless.

Gender discrimination in the operation of citizenship laws also plays a role in statelessness. Currently, there are twenty-nine states in which women are not allowed to acquire, retain, or transmit their nationality on terms equal to that of men.[85] In some states, women lose their citizenship at marriage and assume the citizenship of their husbands.[86] What happens if the husbands die, or divorce them? In states in which women assume the citizenship of their husbands at marriage, a woman who marries a stateless man is denationalized.[87] Her children, even if born in the state of the mother's original citizenship, will be stateless at birth.[88] Multiple other scenarios can result in statelessness when gender discrimination burdens the citizenship of women.

A major, though underappreciated, cause of statelessness is lack of birth certificates.[89] UNHCR reports that 70% of babies born to refugees who have fled the Syrian civil war do not have birth certificates.[90]

---

83. *Id.*

84. For example, consider the United States, which is well known as a *jus soli* country, but also has legislation that includes *jus sanguinis* principles. Under the United States' *jus sanguinis* provisions, children born outside of U.S. territory to parents who are U.S. citizens become U.S. citizens at birth, but only if one of the parents resided in the U.S. prior to the birth of the child. 8 U.S.C. § 1401(c) (2012). If one parent is an U.S. citizen and the other is not, a child born outside of U.S. territory acquires citizenship at birth only if the U.S. citizen parent was physically present in the U.S. for at least five years or more, at least two years of which were after the parent was fourteen years old. *Id.* at § 1401(g).

85. Women's Refugee Commission, Our Motherland, Our Country: Gender Discrimination and Statelessness in the Middle East and North Africa 1 (2013), www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.womensrefugeecommission.org%2Fresources%2Frefugee-protection%2F942-our-motherland-our-country-gender-discrimination-and-statelessness-in-the-middle-east-and-north-africa-1%2Ffile&ei=7ujhVMTwG4OiNpL3g7gH&usg=AFQjCNFYnfYkpV5JZt6KlPVBxnH5w33T4Q&bvm=bv.85970519,d.eXY; *see also Unequal Treatment of Women Risks Creating Statelessness in At Least 25 Countries*, UNHCR (Mar. 8, 2012), http://www.unhcr.org/4f58aee79.html; *see generally* UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness (2014), http://www.unhcr.org/4f5886306.html; UNHCR, Gender Equality, Nationality Laws, and Statelessness: Testimonials on the Impact on Women and their Families (2012), http://www.unhcr.org/4f587d779.html.

86. WOMEN'S REFUGEE COMMISSION, *supra* note 85, at 11.

87. *See id.* at 12 (discussing one woman's choice not to register her marriage because her husband was stateless).

88. *See id.* at 1, 12 (explaining the relationship between a father's nationality and the nationality a child will inherit).

89. ENDING STATELESSNESS, *supra* note 14, at 8–10.

90. Larson, *supra* note 42.

Displaced people on the move may have nowhere to register.[91] They may want to wait until they return to their homes or until they settle in a new location. By that time, it may be too late. The birth registry may not be open to them. They may lack necessary witnesses or documents to prove citizenship.[92] The children born during flight may be orphans by the time they approach a birth registry office, with no proof of parentage.

Even when parents are not in flight when their children are born, they may face administrative or bureaucratic impediments to registering births. The registry process may be accessible only at certain places and hours or with certain types of proof. Or local norms may interfere. In many communities it is not customary that parents register births. For example, roughly 95% of Ethiopians lack birth certificates.[93]

V. COMPARATIVE JURISPRUDENCE

In light of the myriad ways in which people become stateless and the millions of people who exist without the protection of citizenship in any state, the scant legal commentary on statelessness is surprising. Perhaps due to the current UNHCR ten-year campaign to end statelessness,[94] it has become a higher profile issue. One example of this is a renewed attention to the intersection of statelessness and refugee law.

In the second decade of the twenty-first century, tribunals in Canada, the United Kingdom, and the United States have examined applications for asylum from stateless individuals.[95] Central to these cases was the claim that statelessness constituted persecution.[96] In other words, the applicants contended that the particular circumstances that gave rise to their statelessness qualified them as refugees.[97] Jurisprudence concerning the intersection of statelessness and persecution has been sparse in all three countries, and it remains so today. Nonetheless, it is growing. The legal analyses proffered by the courts in the cases discussed below have been tentative and incomplete.[98] They do, however, all share a sympathy for legal orphans—stateless individuals

91. ENDING STATELESSNESS, *supra* note 14, at 8–10; *In Legal Limbo*, *supra* note 54.

92. ENDING STATELESSNESS, *supra* note 14, at 10.

93. S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [107] (appeal taken from IAT) (IAC).

94. *See* ENDING STATELESSNESS, *supra* note 14, at 20.

95. *See infra* Part IV.A–C.

96. *See infra* Part IV.A–C.

97. *See infra* Part IV.A–C.

98. *See infra* Part IV.A–C.

marooned in faraway lands who have no country to call their own—and a willingness to look with a skeptical eye on arguments that citizenship decisions are a matter of state sovereignty.[99]

A. Choudry v. Canada

Choudry v. Canada confronted the Federal Court of Canada with a bewildering and heartbreaking series of circumstances worthy of Charles Dickens.[100] Robin Choudry, a young Bengali-speaking man, applied for asylum in Canada in early 2009.[101] His parents had died when he was a small child and he spent seven years in an orphanage in Pakistan.[102] He did not have a birth certificate and did not know his place of birth, but thought he was born in 1982.[103] Nor did he remember his parents or know where they were born; the sole information he had about them was a letter from the orphanage with his parents' names.[104] He believed that his family belonged to the Bihari ethnic group that is centered in northeastern India and extends into Bangladesh, Pakistan, and elsewhere.[105]

As a teenager, Choudry left the orphanage and set out for Canada in the company of a man known as Johnny Kahn.[106] Instead, he ended up in Greece, where he supported himself by working in a garment factory until the factory owners fired all the illegal workers.[107] Choudry then worked as an unlicensed street vendor, and was regularly harassed by the police.[108] Fed up with his unstable situation, Choudry paid a smuggler to secure passage to Canada, where he applied promptly for refugee status.[109]

Without a birth certificate or information about his parents, Choudry was effectively stateless. Moreover, even if his birth had been registered, it might well show that he had been born to parents who were themselves stateless. Hundreds of thousands of the Biharis, the group to which Choudry believed he belonged, have lived as stateless people in camps in

99. *See infra* Part IV.A–C.
100. [2011] F.C. 1406 (Can.).
101. *Id.* at paras. 2, 5.
102. *Id.* at para. 3.
103. *Id.* at paras. 2, 7–8, 35.
104. *Id.*
105. *Id.* at para. 2.
106. *Id.* at para. 3.
107. *Id.*
108. *Id.* at para. 4.
109. *Id.*

Bangladesh for more than fifty years.[110] Many Biharis who lived in what was then East Pakistan, had sided with the authorities in West Pakistan in the 1971 war that resulted in the independence of Bangladesh.[111] Despised as traitors by Bangladeshi officials, they were not accorded citizenship in the new country,[112] nor did the Pakistani government, more than one thousand miles away, invite them to move west or extend citizenship to them.[113]

The Canadian Immigration and Refugee Board assessed Choudry as credible and believed his report of the things that had occurred to him.[114] Nonetheless, the Board was troubled by the lack of proof of Choudry's identity.[115] The Board concluded, based on the historical circumstances, the fact that his parents' names were Bengali, and the evidence that his mother tongue was Bengali, that Choudry had likely been born to a Bihari family in Bangladesh.[116] After examining the citizenship legislation of Bangladesh, the Board further concluded that Choudry's birth in Bangladesh did not qualify him for citizenship there.[117] As he could not claim citizenship through his parents, whose citizenship status was unknown, the Board ruled that Choudry was stateless.[118]

In cases of statelessness, the 1951 Refugee Convention specifies that the refugee applicant must be outside the country of his former habitual residence and unable to return to it due to his fear of persecution.[119] Accordingly, the Board examined the mistreatment Choudry had suffered in Greece, where he had most recently resided, and concluded that it did not rise to the level of persecution.[120] In response to Choudry's claim that Greece might deport him to Bangladesh, the Board reasoned (1) that it would be lawful for Greece to expel a non-citizen such as Choudry, and (2) that if he were deported to Bangladesh Choudry would likely face discrimination, rather than persecution, as a

110. ENDING STATELESSNESS, *supra* note 14, at 3.

111. Sumit Sen, *Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia-Part 1*, 11 INT'L J. REFUGEE L. 625, 632 (1999).

112. ENDING STATELESSNESS, *supra* note 14, at 3. Since 2005, Bangladesh has accorded citizenship to 300,000 stateless Urdu-speakers. *Id*. at 7.

113. Eric Paulsen, *The Citizenship Status of the Urdu-Speakers/Biharis in Bangladesh*, 25 REFUGEE SURV. Q. 54, 54–68 (2006).

114. Choudry v. Canada, [2011] F.C. 1406, para. 7 (Can.).

115. *Id.* at para. 8.

116. *Id.* at paras. 8–9.

117. *Id.* at para. 9.

118. *Id*. at para. 8.

119. 1951 Refugee Convention, *supra* note 6, at art. 1(A)(2).

120. Choudry v. Canada, [2011] F.C. 1406, para. 12 (Can.).

stateless person.[121] As a result, the Board denied protection to Choudry.[122]

On appeal, Choudry argued that the Board had failed to address the central issue: did the Bangladeshi denial of citizenship to Biharis constitute persecution on account of one of the 1951 Refugee Convention grounds?[123] The Board had made multiple relevant findings—that Greece would likely refuse to accept Choudry and try to deport him to Bangladesh; that Choudry was a stateless Bihari born in Bangladesh; and that stateless Biharis suffered widespread discrimination and lived in poor conditions in Bangladesh.[124] But it had not examined whether the Bangladeshi authorities' denial of citizenship was itself a persecutory act.[125]

In response, the Canadian government acknowledged that the Board's analysis had focused on Choudry's reception in Greece rather than in Bangladesh, but noted that the Board had taken into account Choudry's fear that Greece might send him to Bangladesh and had discounted that as the basis of a well-founded fear of persecution.[126] The government advanced two arguments to support the Board's ruling that Choudry did not qualify for protection.[127] First, it claimed that the Board had incorrectly assessed the citizenship law of Bangladesh, and that Choudry might be eligible for citizenship.[128] Second, it asserted that statelessness itself does not constitute persecution and that Choudry had not produced evidence of harm other than the "discrimination [of] a denial of citizenship."[129]

Although the Federal Court agreed with Choudry that the Immigration and Refugee Board's decision was fatally flawed, the Court did not address directly the argument that denial of citizenship in Choudry's circumstances constitutes persecution.[130] Rather the Court criticized the Board's focus on Greece as Choudry's former habitual residence and its failure to examine thoroughly the situation in

---

121. *Id.* at para. 13.

122. *Id.* at para. 15.

123. *See id* at para. 34.

124. *Id.* at para. 13.

125. *Id.*at paras. 36–37.

126. *Id.* at para. 39.

127. *Id.* at paras. 32, 36.

128. *Id.* at para. 36. According to UNHCR, Bangladesh has accorded citizenship to 300,000 stateless Urdu-speakers in Bangladesh since 2005. ENDING STATELESSNESS, *supra* note 14, at 7. It is unknown whether this development would affect Mr. Choudry.

129. Choudry v. Canada, [2011] F.C. 1406, para. 32 (Can.).

130. *Id.* at para. 36.

Bangladesh, where Choudry had also previously lived, and remanded the case for reconsideration.[131] Citing the Federal Court of Appeals decision in *Thabet v. Canada*, the Court emphasized:

> [When a stateless person] has been resident in more than one country it is not necessary to prove that there was persecution at the hands of all those countries. But it is necessary to demonstrate that one country was guilty of persecution, and that the claimant is unable or unwilling to return to *any of the states* where he or she formerly habitually resided.[132]

Furthermore, the Court concluded that the cursory attention the Board paid to Bangladesh impermissibly undermined the Board's analysis:

> Because the [Board] made the mistake of focusing upon Greece, a proper assessment of the situation facing the Applicant in Bangladesh was never done. It is not clear from its reasons that the [Board] considered all the evidence before it on Bangladesh. Even if it did so, the [Board's reasoning about statelessness in Bangladesh is] not adequate to support the conclusion the Applicant does not face persecution in Bangladesh because he is Bihari. In my view, the Decision is both unreasonable and procedurally unfair.[133]

Having identified the areas in which the Board's assessment of the claim was flawed, the Court quashed the Board's decision and returned the case for reconsideration by another panel of the Board.[134] Results of the re-evaluation of Choudry's claim have not been published, and it is possible that the statelessness aspects have been mooted under a fuller examination of the citizenship law of Bangladesh.

The *Choudry* opinion, while offering an indication of circumstances when a stateless person might require protection, does little beyond suggesting that the Court was uncomfortable with the Board's reasoning and result. The Court rejected the view that the denial of citizenship to a stateless person can at most constitute discrimination, thereby falling below the persecution threshold.[135] Yet it offered no insight into fundamental questions in this case: does Bangladesh's refusal to

131. *Id.* at para. 39.

132. *Id.* at para. 28 (emphasis added) (quoting Thabet v. Canada, [1998] 4 F.C. 21, paras. 27–28 (Can.)). Canadian jurisprudence has devoted significant attention to determining which countries qualify as a "former habitual residence" when assessing refugee claims filed by stateless individuals. *See* Martchenko et al. v. Canada, [1995] 104 F.R.T. 59, para. 6 (Can.); *see also* Maarouf v. Canada, [1994] 1 F.C. 723, paras. 5–6 (T.D.).

133. Choudry v. Canada, [2011] F.C. 1406, para. 39 (Can.).

134. *Id.* at para. 40.

135. *Id.* at paras. 39–40.

recognize long-term Bihari residents as citizens constitute persecution? Would refusal to allow Choudry to return to Bangladesh constitute persecution when Choudry has no country of nationality or other place of lawful residence?

B. S.T. v. Secretary of State for the Home Department

In contrast to the Canadian inquiry in *Choudry*, the United Kingdom adopted a more demanding approach when it examined the impact of lack of citizenship in *S.T. v. Secretary of State for the Home Department.*[136] S.T., an Ethiopian citizen of Eritrean background, was a lifelong resident of Ethiopia until he fled the country during its war with Eritrea.[137] He was born in Ethiopia in 1979 to Ethiopian citizens; his mother was of Eritrean origin; his father was not.[138] The applicant's father died in 1992, but the family continued to live in Ethiopia until the war broke out between Ethiopia and Eritrea.[139] In 1998 the applicant's mother, who ran a bar frequented by Eritreans and organized a savings club for Eritreans, was arrested, detained, and ultimately deported to Eritrea.[140] In 1999 the applicant was detained for a month in Ethiopia where he was beaten and interrogated about his mother's activities in support of Eritrea.[141] His Ethiopian identity card showing that he was a dual national was taken from him.[142] He was released from prison, but one week later he was ordered to report to government authorities.[143] After consulting his father's brother, an Ethiopian citizen living in Ethiopia, he concluded he was in serious danger in Ethiopia and decided to flee.[144] Several weeks later, in September 1999, he applied for asylum in the United Kingdom.[145]

---

136. [2011] UKUT 00252 (appeal taken from AIT) (IAC).

137. *Id.* at [8].

138. *Id.* at [4]. His father was Oromo. *Id.* The Oromo are the largest ethnic group in Ethiopia. *Ethiopia—Ethnic groups*, ENCYCLOPEDIA OF THE NATIONS, http://www.nationsencyclopedia.com/Africa/Ethiopia-ETHNIC-GROUPS.html (last visited May 25, 2015).

139. S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [6]–[7] (appeal taken from AIT) (IAC).

140. *Id.* at [7].

141. *Id.* at [4], [7]–[9].

142. *Id.* at [10]–[11] (citing S.T. v. Sec'y of State for Home Dep't, [2008] UKAIT 00032, [41] (AIT)).

143. *Id.* at [8].

144. *Id.* at app. A, [3]–[4].

145. *Id.* at [9].

The United Kingdom denied his asylum application in 2005, five years after the Ethiopia-Eritrea war ended.[146] The immigration judge found the applicant credible and ruled that he had been persecuted in 1999, but concluded that he was unlikely to face future persecution because the war had ended five years earlier and the applicant's prior persecution had concerned his mother's activities, not his own.[147] While the case was on appeal, the applicant went to the Ethiopian embassy in London to apply for a passport to allow him to return to Ethiopia.[148] The embassy refused to process his application on the grounds that he provided insufficient proof of his Ethiopian citizenship.[149] He had fled the country without a passport, no longer had an identity card, and lacked a birth certificate—which 95% of Ethiopians do not possess.[150]

The appeal was denied.[151] The judge agreed that the applicant had provided insufficient proof of his nationality.[152] The judge presumed that Ethiopia would recognize him as a citizen if he could gather evidence that he truly was from Ethiopia.[153] Once S.T. presented the requisite evidence, the judge expected the Ethiopian embassy to issue a passport and allow him to return to Ethiopia.[154]

The applicant filed another appeal, and in subsequent proceedings the applicant produced evidence that he had returned to the Ethiopian embassy with further detailed information supporting his claim to Ethiopian nationality, but that the embassy staff repeatedly refused to process his citizenship application.[155] He also introduced extensive expert opinion about the widespread denationalization of citizens in Ethiopia during the war and the continuing problems that Ethiopians of Eritrean background have in obtaining recognition as Ethiopian citizens.[156] In light of the exhaustive information presented concerning the conditions in Ethiopia both during the war and a decade later, the tribunal in 2011 was more sympathetic than the earlier court that had reviewed the asylum seeker's claim. The tribunal concluded that the

146. *Id.*
147. *Id.* at [12].
148. *Id.* at [11] (citing S.T. v. Sec'y of State for Home Dep't, [2008] UKAIT 00032, [42] (AIT)).
149. *Id.*
150. *Id.* at app. A, [47], [107].
151. *Id.* at [11].
152. *Id.*
153. *Id.* (citing S.T. v. Sec'y of State for Home Dep't, [2008] UKAIT 00032, [41] (AIT)).
154. *Id.* (citing S.T. v. Sec'y of State for Home Dep't, [2008] UKAIT 00032, [41]–[42] (AIT)).
155. *Id.* at app. A, [6], [11]–[14].
156. *Id.* at app. A, [45]–[46].

applicant had taken all reasonable steps to furnish information supporting his claim to citizenship and that the embassy had arbitrarily refused to consider his application for a passport.[157] As a consequence, the tribunal ruled that the embassy's actions in 2011 constituted persecution because it effectively denied an Ethiopian citizen the ability to exercise his right to return to his country.[158]

In contrast to the Canadian case, the U.K. tribunal did not emphasize statelessness that the applicant had experienced in the past. Instead it directed attention to the current action of the government that, after having driven its citizens abroad, now refused to acknowledge them or allow them to come back home:

> [I]t matters not whether a person who has been arbitrarily deprived of their nationality is, as a result, regarded as stateless or as a person who, in terms of international law, still possesses that nationality, albeit that the rights associated with it cannot in practice be exercised. The challenging issue is whether deprival of the right to return is per se persecution.[159]

Nonetheless, the U.K. court viewed S.T. as, in effect, stateless. This is striking because the opinion noted in passing that in 1999 the applicant had possessed an Ethiopian identity card categorizing him as a dual national.[160] There was no discussion, however, of his other nationality, how he acquired it, whether he could rely on it, or whether any other country would recognize it. Describing S.T. as an individual born and raised in Ethiopia by an Ethiopian father, the tribunal did not inquire into whether he had had ever entered or lived in Eritrea nor did it suggest that

---

157. *Id.* at [104].

158. *Id.* at [90]. Although the tribunal concluded that Ethiopia refused to allow the applicant to return, for purposes of providing guidance for future cases the tribunal hypothesized that long-time residents of Ethiopia might be allowed to return as non-nationals in the future. *Id.* at [114]. Accordingly, the tribunal analyzed whether return to Ethiopia without citizenship would constitute persecution. *Id.* at [119]. The tribunal concluded that non-citizens of Ethiopia would likely be able to work and own property; but that their employment opportunities in Ethiopia would be limited—they would not likely have access to health and education services, would be unable to vote, and would live in an atmosphere of insecurity, particularly if they were viewed as Eritrean by family background. *Id.* at [119]–[25]. In a case such as the applicant's, the tribunal ruled that such circumstances would amount to persecution: "[T]he accumulated difficulties he would face, arising from what . . . is an arbitrary deprivation of citizenship/refusal to recognize citizenship, based on the discriminatory grounds of the appellant's ethnicity, crosses the persecution threshold . . . ." *Id.* at [127].

159. *Id.* at [87].

160. *Id.* at [11] (citing S.T. v. Sec'y of State for Home Dep't, [2008] UKAIT 00032, [41] (AIT)).

he should seek protection from Eritrea or any other state.[161] Nor did the tribunal refer to the 1951 Convention's caveat concerning multiple nationalities:

> In the case of a person who has more than one nationality . . . a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.[162]

Instead, the tribunal's opinion kept its focus on Ethiopia, both on its past persecution of S.T. while he was in Ethiopia and its current mistreatment of the applicant in the United Kingdom by refusing to process his passport application or otherwise provide him with another means by which he could return to Ethiopia—the only homeland he had ever known.[163] It was the Ethiopian government's refusal to accord him the protection a state owes its nationals that constituted persecution.[164] The government's action constituted persecution because it made the applicant *de facto* stateless: alone in the world of nation states with no state to protect him.

In comparing the Canadian and the United Kingdom cases, there are several notable factual differences. S.T. had lived his entire life in Ethiopia,[165] whereas Choudry had spent his childhood in Bangladesh, followed by portions of his adolescence and young adulthood in Pakistan and Greece.[166] Furthermore, S.T.'s deprivation of citizenship had occurred after his mother had been deported from Ethiopia due to her Eritrean background and S.T. himself had been arrested, detained, and deprived of his Ethiopian identity card.[167] Choudry, in contrast, seemed to have been born into statelessness, and there was no evidence that the Bangladesh government even knew of his existence, much less directed action at him with the intent of depriving him of citizenship.[168]

Nonetheless, the *S.T.* and *Choudry* applications for protection raise similar issues. The claimants in both cases argued that the state in which

---

161. *Id.* at [6], app. A, [1].

162. 1951 Refugee Convention, *supra* note 6, at art. 1.

163. S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [60]–[127] (appeal taken from AIT) (IAC).

164. *Id.* at [90]–[91], [125]–[27].

165. *Id.* at [8].

166. Choudry v. Canada, [2011] F.C. 1406, paras. 2–3 (Can.).

167. S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [7]–[8] (appeal taken from AIT) (IAC).

168. Choudry v. Canada, [2011] F.C. 1406, paras. 2–4, 8–10 (Can.).

they were born and raised had made them stateless.[169] They contended that the state had an obligation to treat them as citizens and allow them to return.[170] They asserted that the refusal to honor that obligation constituted persecution.[171] The *S.T.* court agreed with this perspective, and concluded that the historical evidence and the expert testimony amply supported the applicant's claim.[172] The *Choudry* court, facing different facts, was more equivocal.[173] It appeared sympathetic to the applicant's perspective concerning statelessness as persecution, but it remanded for further development of the relevant law and facts.[174]

C. Haile v. Holder

In 2010 and 2011 two U.S. federal appellate courts also had occasion to address claims for asylum based on statelessness. *Haile v. Holder*,[175] like *S.T.*, arose out of the border war between Ethiopia and Eritrea.[176] The U.S. Court of Appeals for the Seventh Circuit examined the asylum application of Temesgen Woldu Haile, who had been born in Addis Ababa, Ethiopia in 1976 to parents of Eritrean background.[177] Haile and his parents were all citizens of Ethiopia,[178] at that time ruled by Mengistu, the Soviet-backed military dictator.[179] When the Soviet Union collapsed, Mengistu's government was overthrown, a new transitional government was formed, and a referendum on the independence of Eritrea from Ethiopia took place. The referendum voters were overwhelmingly in favor of independence, and Eritrea became independent in 1993.[180] A year earlier, in 1992, Haile's parents had

---

169. *Id.* at para. 13.

170. *Id.* at paras. 21–23; S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [4]–[11] (appeal taken from AIT) (IAC).

171. Choudry v. Canada, [2011] F.C. 1406, para. 34 (Can.); S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [127] (appeal taken from AIT) (IAC).

172. S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [127] (appeal taken from AIT) (IAC).

173. Choudry v. Canada, [2011] F.C. 1406, paras. 39–40 (Can.).

174. *Id.*

175. 591 F.3d 572, 573 (7th Cir. 2010). For my analysis of *Haile v. Holder* in the context of U.S. asylum policy, see Maryellen Fullerton, *The Intersection of Statelessness and Refugee Protection in US Asylum Policy*, 2 J. ON MIGRATION & HUM. SECURITY 144 (2014).

176. *Haile*, 591 F.3d at 573.

177. *Id.*

178. *Id.*

179. *Mengistu Haile Mariam*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/Mengistu_Haile_Mariam.aspx (last visited May 25, 2015).

180. *Eritrea-Ethiopia Conflict*, WASHINGTON POST, http://www.washingtonpost.com/wp-srv/inatl/longterm/eritrea/overview.htm (last updated Mar. 1999).

moved to Eritrea, leaving their teenage son in Ethiopia.[181] After independence, the parents renounced their Ethiopian citizenship and acquired Eritrean citizenship.[182]

The son apparently remained in Ethiopia and was there in 1998 when war broke out between Eritrea and Ethiopia over the territorial boundary between the two countries.[183] The war brought mass deportations, with each country deporting thousands of citizens and residents of the "wrong" background.[184] For example, Ethiopia decided to identify and expel residents of Eritrean origin who provided support to Eritrea.[185] This led to the expulsion of more than 75,000 Ethiopian citizens of Eritrean background, many in an arbitrary and vengeful manner with no proof of disloyalty to Ethiopia.[186] The war ended in 2000, but tensions remained high between Ethiopia and Eritrea.[187] After the fighting concluded, Ethiopia passed several laws allowing certain categories of former citizens and residents who had suffered during the war to apply to regain their property and their citizenship.[188] It is unclear whether these laws have been effective.[189]

Haile, twenty-one or twenty-two years of age when war broke out between Ethiopia and Eritrea, fled Ethiopia for Kenya.[190] Sometime later he entered the United States, where he applied for asylum, alleging that Ethiopia's removal of citizenship from ethnic Eritreans constituted persecution.[191] The immigration judge rejected his application after reviewing a record that apparently contained no evidence that Haile had been arrested, harassed or otherwise targeted for persecution before he left Ethiopia.[192] The immigration judge ruled that a country has the sovereign right to define its citizenry, and that the removal of citizenship does not constitute persecution per se.[193] The immigration judge concluded that other than losing his citizenship Haile had not suffered

181. *Haile*, 591 F.3d at 573.
182. *Id.*
183. *Id.*
184. *Id.*
185. HUMAN RIGHTS WATCH, *supra* note 73, at 5–6.
186. *Id.*
187. *Id.* at 18.
188. *Id.*
189. *Id.*
190. Haile v. Gonzales, 421 F.3d 493, 495 (7th Cir. 2005).
191. *Id.* at 495–96.
192. *Id.* at 495.
193. *Id.* (citing Faddoul v. Immigration Naturalization Serv., 37 F.3d 185, 189 (5th Cir. 1994); De Souza v. Immigration Naturalization Serv., 999 F.2d 1156, 1159 (7th Cir. 1993)).

harm in Ethiopia.[194] The immigration judge also concluded that, now that the war had ended, Haile, a noncombatant, was not likely to suffer future harm.[195] The Board of Immigration Appeals (BIA) affirmed.[196]

When the U.S. Court of Appeals for the Seventh Circuit first reviewed the BIA's decision in 2005, it agreed that Haile had not submitted evidence that he had been personally harmed while still in Ethiopia or that he would be likely to be targeted if he returned.[197] The court remanded the case to the BIA, however, to examine more closely the claim that Haile had been or would be deprived of his Ethiopian citizenship:

> [The immigration judge's] reasoning is problematic—it fails to recognize the fundamental distinction between *denying* someone citizenship and *divesting* someone of citizenship. . . . [No] case of which we are aware . . . suggests that a government has the sovereign right to strip citizenship from a class of persons based on their ethnicity. It is arguable that such a program of denationalization and deportation is in fact a particularly acute form of persecution.[198]

The court expressly declined to analyze "[w]hether denationalization as such amounts to persecution" and further noted that the record was insufficient to determine the current citizenship status of ethnic Eritreans who had left Ethiopia during the war.[199] Accordingly, the court remanded the case to the BIA for further factual findings and legal consideration.[200]

The BIA rejected the asylum claim a second time.[201] It reasoned that denationalization does not always constitute persecution, and referred to the nationalization changes that occur when borders are altered or states like the Soviet Union dissolve.[202] Further, the BIA concluded, denationalization that occurs based on ethnic status or another ground protected by the 1951 Refugee Convention does not, on its own, constitute persecution.[203] Rather, the BIA ruled, an asylum applicant

194. *Id.* at 494–95.
195. *Id.* at 495.
196. *Id.*
197. *Id.*
198. *Id.* at 496.
199. *Id.* at 496–97.
200. *Id.* at 497.
201. Haile v. Holder, 591 F.3d 572, 573 (7th Cir. 2010).
202. *Id.*
203. *Id.* at 573–74.

must produce some evidence of actual harm that he suffered as a result of the loss of citizenship.[204]

Haile filed another appeal with the Seventh Circuit, which again disapproved of the BIA's approach to the case.[205] This time the court emphasized the problem of statelessness:

> [Although] a change of citizenship incident to a change in national boundaries is not persecution per se, it does not follow that taking away a person's citizenship because of his religion or ethnicity is not persecution. If Ethiopia denationalized the petitioner because of his Eritrean ethnicity, it did so because of hostility to Eritreans; and [this] created a presumption that he has a well-founded fear of being persecuted should he be returned to Ethiopia. Indeed, *if to be made stateless is persecution, as we believe*, at least in the absence of any [contrary explanation], then *to be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution even if the country will allow you to remain and will not bother you as long as you behave yourself*.[206]

The court noted that the Ethiopian citizenship law followed the *jus sanguinis* principle, conferring citizenship on children if at least one parent is an Ethiopian citizen.[207] The record, though, appeared to lack information concerning the impact, under either Ethiopian or Eritrean law, on a minor child of parental renunciation and/or acquisition of citizenship.[208] It also failed to include information about the applicability to Haile of a 2003 law allowing Ethiopians to regain their nationality if they had lost it by acquiring another nationality.[209] As the court pointed out, Haile had not renounced his Ethiopian citizenship in order to acquire another nationality; the converse was true: Ethiopia had acted in a manner that apparently rendered him stateless.[210]

The court further discounted the significance of the Ethiopian government's agreement to provide Haile with a *laissez passer* document to enter Ethiopia.[211] Although the record indicated that the Ethiopian embassy in the United States in some circumstances issues *laissez passer* documents to individuals it presumes are Ethiopian citizens, it was not

---

204. *Id*.
205. *Id.*
206. *Id.* at 574 (emphasis added).
207. *Id.* (citing ETHIOPIAN CONST. art. 6, § 1; Ethiopian Nationality Law of 1930, § 1).
208. *Id.* at 574–75.
209. *Id.* at 575 (citing Proclamation on Ethopian Nationality, No. 378/2003, § 22 (2003)).
210. *Id.*
211. *Id.* at 575–76.

clear if Ethiopia also issues *laissez passer* documents to noncitizens.[212] Moreover, the court was troubled at the record's silence concerning the likelihood that Ethiopia would recognize Haile as a citizen if he entered on a *laissez passer*.[213] Once more, the court remanded the case to the BIA for further analysis and proceedings.[214]

The Seventh Circuit's 2010 decision did not yield a definitive conclusion regarding statelessness in the context of refugee law. It did, however, provide general guidance on this topic. Under the Seventh Circuit's reasoning, there is an important distinction between loss of citizenship as a result of territorial changes and removing citizenship from a group that continues to reside within settled boundaries.[215] Withdrawal of citizenship in the first scenario does not necessarily constitute persecution, according to the court.[216] Whether the deprivation of citizenship in the absence of redrawn borders always leads to an inference of persecution is unclear. But the court is emphatic that such a deprivation of citizenship *presumptively constitutes persecution* if it is based on ethnic or other Convention grounds.[217] Moreover, without specifying whether it is referring to all losses of citizenship or only those occurring within undisputed boundaries, the court insists that withdrawal of citizenship that *results in statelessness is presumptively persecutory* even if the country allows the stateless individuals to remain and carry on their daily lives.[218] To determine whether these lines of reasoning justify the conclusion that Haile suffered persecution as a result of Ethiopia's actions, the court remanded the case for further fact-finding.[219]

D. Stserba v. Holder

Shortly after the Seventh Circuit's *Haile* decision, the Sixth Circuit considered *Stserba v. Holder*, involving a stateless claim that developed in Estonia in the 1990s.[220] Lilia Stserba was born in Estonia during the

212. *Id.* at 576.
213. *Id.* at 575–76.
214. *Id.* at 576.
215. *See id.* at 574.
216. *Id.*
217. *See id.* (analogizing the Ethiopian treatment of Eritreans to "the Nazi treatment of the Jews").
218. *Id.*
219. *Id.* at 576.
220. 646 F.3d 964, 968–69 (6th Cir. 2011). For my analysis of *Stserba v. Holder* in the context of U.S. asylum policy, see Maryellen Fullerton, *The Intersection of Statelessness and Refugee Protection in US Asylum Policy*, 2 J. ON MIGRATION & HUM. SECURITY 144 (2014).

Soviet era to an ethnic Russian family.[221] She received medical training in St. Petersburg, Russia, at the Leningrad Pediatric School and returned to Estonia where she practiced medicine.[222] She married a Russian citizen and gave birth in Estonia to a son, Artjom.[223]

Estonia, which had been occupied by the Soviet Union since World War II, regained its independence in 1991.[224] There was great hostility to the Soviet era efforts that had diluted the Estonian population by encouraging ethnic Russians to move to Estonia and help pacify the area,[225] and the new Estonian nationality law restricted citizenship to those whose families had possessed Estonian citizenship prior to the Soviet occupation in 1940.[226] Others, including lifelong residents, were eligible for citizenship if they could speak Estonian and pass a language test.[227]

Lilia Sterbsa and Artjom were citizens of the Soviet Union, but when the Soviet Union dissolved, they did not qualify for citizenship under the new Estonian law, rendering them stateless.[228] In 1993, however, Stserba and her son Artjom became Estonian citizens, apparently as part of an electoral change.[229] Stserba's second son, Anton, who was born in 1992, also gained Estonian citizenship in 1993, while it appeared that her husband remained a Russian citizen.[230] Stserba's troubles were not over, however. She testified that five years later, in 1998, Estonia stopped recognizing scientific degrees issued by Russian institutions, with apparent retroactive effect because Stserba reported that this policy change meant that she could no longer practice medicine in Estonian hospitals.[231] In addition, Stserba testified that the Estonian medical

221. *Stserba*, 646 F.3d at 969.

222. *Id.*

223. *Id.* at 968–69 (discussing details of Sterbsa's life).

224. *Estonia's History*, ESTIONIA.EU, http://estonia.eu/about-estonia/history/estonias-history.html (last visited May 25, 2015).

225. *Id.*; *Stserba*, 646 F.3d at 969. Ethnic Estonians constituted 88.1% of the population of Estonia in 1934, by 1989, they constituted only 61.5%. *Population by Nationality*, ESTIONIA.EU, http://estonia.eu/about-estonia/country/population-by-nationality.html (last visited May 25, 2015).

226. Lowell W. Barrington, *The Making of Citizenship Policy in the Baltic States*, 13 GEO. IMMIGR. L.J. 159, 177 (1999). *See generally* Richard C. Visek, *Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT'L L.J. 315 (1997) (discussing the history of Estonia's independence and its impact on citizenship).

227. *Citizenship*, ESTONIA, http://estonia.eu/about-estonia/society/citizenship.html (last updated Mar. 4, 2015).

228. *Stserba*, 646 F.3d at 969.

229. *Id.*

230. *Id.*

231. *Id.*

treatment for her son Anton, who was born with a severe medical condition, changed for the worse.[232]

Lilia Stserba, her son Anton, and her husband came to the United States in 2003, where Stserba applied for asylum based on the persecution she had suffered on account of her Russian ethnicity.[233] The persecution consisted of her statelessness between 1991 and 1993, her inability to practice her profession after Estonia revoked its recognition of Russian scientific degrees, the inferior medical care her son Anton received, and mistreatment her son Artjom had suffered in Estonia after the rest of the family had left for the United States.[234]

The immigration judge concluded that the adverse experiences that Stserba had suffered did not constitute persecution; as a result, he denied asylum.[235] With regard to the statelessness claim, the record showed that ethnic Russians living in Estonia without Estonian citizenship could remain residents, obtain travel documents, and vote in local elections.[236] Noncitizens, however, could not vote in national elections, purchase property, or join political parties.[237] Those who could speak Estonian could apply for Estonian citizenship, and roughly 65,000 ethnic Russians were naturalized in Estonia during the 1990s.[238] The immigration judge noted that Stserba had regained citizenship relatively quickly and had not suffered "any adverse consequences" during the time she was stateless.[239] With regard to the other claims of persecution, the immigration judge concluded that Stserba's diminished professional opportunities did not constitute persecution, nor did the medical treatment that her son received.[240] The BIA affirmed.[241]

The Sixth Circuit was more sympathetic to the argument that statelessness constitutes persecution than the immigration judge and the BIA:

> Regardless of the practical ramifications that befall a denationalized person, the inherent qualities of denationalization are troubling when a

232. *Id.* at 969–70.
233. *Id.* at 970.
234. *Id.*
235. *Id.* at 971.
236. *Id.* at 973–74.
237. *Id.*
238. *Id.*
239. *Id.* at 971.
240. *Id.*
241. *Id.* The BIA also specified that the events involving the son who remained in Estonia did not constitute persecution.

> country denationalizes a person who is not a dual national, thereby making him or her stateless. Statelessness is "a condition deplored in the international community of democracies." The essence of denationalization is "the total destruction of the individual's status in organized society" because, "[i]n short, the expatriate has lost the right to have rights." "While any one country may accord [a denationalized person] some rights, . . . no country need do so because he is stateless." "The calamity is 'not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever.'" The United States Supreme Court has described denationalization as "a form of punishment more primitive than torture." Accordingly, because denationalization that results in statelessness is an extreme sanction, denationalization may be per se persecution when it occurs on account of a protected status such as ethnicity. Although the status of "[s]tatelessness . . . does not entitle an applicant to asylum," a person who is made stateless *due to his or her membership in a protected group* may have demonstrated persecution, even without proving that he or she has suffered collateral damage from the act of denationalization.[242]

The Sixth Circuit summarized: "Although not every revocation of citizenship is persecution, ethnically targeted denationalization of people *who do not have dual citizenship* may be persecution."[243] Because the immigration judge and the BIA had failed to analyze whether the Estonian citizenship law constituted ethnic discrimination, the Sixth Circuit remanded the case for consideration of this issue.[244] The court noted that there was reason to suspect that the law, though neutral in its terms, impermissibly targeted ethnic Russian residents of Estonia.[245] If that was so, said the court, then Lilia Stserba may have suffered past persecution when she became stateless, no matter the practical import, or lack thereof, on her daily life.[246]

The Sixth Circuit provided further guidance for the BIA's reconsideration of the case. The court emphasized that if the BIA concluded that Lilia Stserba had suffered past persecution, then U.S. law would entitle her to a presumption that she will fear persecution in the future.[247] At that point the government could introduce evidence to rebut

---

242. *Id.* at 974 (quoting Trop v. Dulles, 356 U.S. 86, 101–02 (1958) (plurality opinion); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 (1963); Makismova v. Holder, 361 F. App'x 690, 693 (6th Cir. 2010)) (citing Haile v. Holder, 591 F.3d 572, 574 (7th Cir. 2010); Mengstu v. Holder, 560 F.3d 1055, 1059 (9th Cir. 2009)).

243. *Id.* at 973 (emphasis added).

244. *Id.* at 979.

245. *Id.* at 974–75.

246. *Id.* at 975.

247. *Id.* at 972 (citing 8 C.F.R. § 208.13(b)(1) (2013)).

the presumption by showing that circumstances had changed so substantially that future persecution would be unlikely.[248] The court noted that Stserba's reacquisition of citizenship in 1993 might suggest that things have changed in such a way that she would not have a well-founded fear of future persecution.[249]

The court cautioned the BIA, however, that the fact that Stserba was no longer stateless would not necessarily end the analysis.[250] If the BIA concluded that two years of statelessness constituted past persecution, thus triggering the rebuttable presumption of future persecution, then the BIA must take an expansive look at the potential future harm Stserba might face.[251] Even though Stserba may have no fear of future loss of Estonian citizenship, the BIA must evaluate other forms of persecution that Stserba could reasonably fear as an ethnic Russian in Estonia.[252]

In addition to remanding the case to the BIA for further development of the factual and legal issues regarding Stserba's loss of citizenship between 1991 and 1993, the Sixth Circuit ruled that the Estonian invalidation of Russian medical degrees constituted persecution on ethnic grounds.[253] The record was unclear as to whether Estonia had withdrawn recognition from all non-Estonian scientific degrees.[254] Nonetheless, the court concluded that the invalidation of medical degrees from Russian institutions constituted persecution.[255] This imposed a heavier burden on ethnic Russians, the court said, since they were the Estonian residents most likely to have language skills that allowed them to seek training in Russian schools.[256] Based on the Sixth Circuit's conclusion that Stserba had suffered past persecution when her medical degree was invalidated, the court directed the BIA to determine whether this qualified Stserba for asylum.[257]

In light of the alternative ground for asylum, no further analyses of the statelessness claim have been published in the *Stserba* case. As a result, the Sixth Circuit, like the Seventh Circuit in *Haile*, did not render definitive conclusions regarding statelessness in the context of refugee

248. *Id.* at 975.
249. *Id.* at 976.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id*. at 977–78.
254. *Id*.
255. *Id.* at 978.
256. *Id*. at 977–78.
257. *Id*. at 978.

law. Like the *Haile* court, though, the *Stserba* court provided some general guidance on this topic.

The Sixth Circuit's approach to statelessness is succinct: Statelessness is deplored by the international community, but statelessness itself does not constitute persecution.[258] Government action to withdraw citizenship is not necessarily unlawful, but withdrawal of citizenship on ethnic or other protected grounds from people who *lack dual citizenship may* constitute *persecution per se*.[259] Further, government action that renders persons *stateless due to their membership in a protected group* constitutes *persecution per se*, which relieves asylum applicants from the burden of producing evidence on the harm statelessness caused them personally.[260]

Though they examined asylum applicants who had experienced statelessness in dramatically different circumstances, the Sixth and the Seventh Circuit federal appellate courts offer strikingly similar perspectives. Of course, both courts employ the unique U.S. framework in which past persecution automatically gives rise to a presumption of future persecution,[261] a presumption not embraced by international refugee law.[262] Both courts emphasize that governments that deprive citizens of nationality based on grounds protected by the 1951 Refugee Convention engage in persecution.[263] Both courts signal that depriving citizens of their nationality in situations that render them stateless is presumptively persecutory.[264] Further, both courts suggest that when the two factors are present—(1) denationalization done on ethnic grounds (2) resulting in statelessness—this may constitute persecution per se, obviating the need for applicants to show they have suffered individual harm due to statelessness.[265]

The courts' analyses diverge, though, in a fundamental respect. *Haile* acknowledges an apparently more benign situation when loss of citizenship follows from territorial changes rather than from

---

258. *See id.* at 973–76.

259. *See id.* at 974.

260. *See id.*

261. *See supra* notes 247–48 and accompanying text (discussing 8 C.F.R. § 208.13(b)(1) (2013)).

262. *See* HATHAWAY & FOSTER, *supra* note 13, at 251. Under international refugee law the focus is on whether the applicant has a well-founded fear of persecution in the future, and States that allow former citizens to return and live ordinary lives are unlikely to be viewed as future persecutors. *Id.*

263. *Stserba*, 646 F.3d at 974; Haile v. Holder, 591 F.3d 574, 574 (7th Cir. 2010).

264. *See Stserba*, 646 F.3d at 974; *Haile*, 591 F.3d at 574.

265. *See Stserba*, 646 F.3d at 974; *Haile*, 591 F.3d at 574.

denationalization.[266] *Stserba,* though conceding that statelessness does not always constitute persecution, appears to equate all loss of citizenship with denationalization.[267] Unfortunately, denationalization is not the appropriate lens through which to analyze Lilia Stserba's claim. Both *Haile* and *S.T.* involved denationalization and more: wartime governments issuing decrees withdrawing citizenship and deporting individuals newly shorn of their citizen status.[268] Years after these hostile acts took place, the state continued to refuse to provide passports to allow the former citizens to return, which triggered the requests for refugee status.[269] *Stserba*, in contrast, involves the dissolution of the Soviet Union and the attendant problem of successor states.[270] In the words of the Seventh Circuit, Stserba's "change of citizenship [was] incident to a change in national boundaries."[271] Statelessness did not result from government withdrawal of status, but from a vacuum—from legislation enacted by a successor state that did not extend citizenship to all longtime inhabitants. Moreover, the state later granted citizenship and did not interfere with Stserba's efforts to obtain a passport.[272]

Although the Sixth Circuit was wrong about the cause of Stserba's statelessness, this does not mean that its conclusion that she may have suffered persecution was necessarily incorrect. When territorial changes impel states to enact new citizenship laws, it is possible that the new citizenship legislation is drafted in order to render stateless an ethnic or religious group.[273] Is that what happened in the *Stserba* case? The terms of the Estonian citizenship law did not extend nationality to long-time resident Stserba.[274] To remedy her statelessness, she faced a naturalization process that included a language requirement.[275] While naturalization provided an avenue to citizenship, its language

266. *See Haile*, 591 F.3d at 573.

267. *See Stserba*, 646 F.3d at 974.

268. *Haile*, 591 F.3d at 573; S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [7] (appeal taken from.IAT) (IAC).

269. *Haile*, 591 F.3d at 573, 576; S.T. v. Sec'y of State for the Home Dep't, [2011] UKUT 00252, [11] (appeal taken from.IAT) (IAC).

270. *See Stserba*, 646 F.3d at 969.

271. *Haile*, 591 F.3d at 574.

272. *Stserba*, 646 F.3d at 976.

273. *See id.* at 974–75 ("By limiting citizenship to pre–1940 citizens and their descendants, Estonia manipulated its citizenship rules to exclude ethnic Russians who immigrated during the Soviet occupation.").

274. *Id.* at 974–75.

275. *Id.* at 975.

requirement was burdensome for inhabitants like Stserba who did not speak Estonian.[276]

The pertinent question, which the Sixth Circuit did not address, is whether the imposition of the language requirement constituted persecution.[277] Fluency in the national language is a standard prerequisite for naturalization,[278] and is often justified as a means of increasing communication among members of the society and heightening a sense of national unity.[279] Thus, whether or not one agrees with the wisdom of including a language requirement for naturalization, it is hard to conclude that the imposition of one—without more—constitutes persecution.

Yet, further consideration of this aspect of Stserba's claim may be warranted. Perhaps Stserba might protest the need for her to undergo the naturalization process at all. Naturalization traditionally affords individuals the opportunity to become members of a state to which they have immigrated. But Stserba and her fellow ethnic Russians were not immigrants. They had always lived in Estonia, and after decades their homeland required them to naturalize in order to maintain the status quo.[280] In order to retain membership in the society in which they had been born and lived their whole lives, they were forced to learn a new language and otherwise satisfy the prerequisites for naturalization.[281] From this perspective, Stserba might argue that imposing any naturalization process, with or without a language requirement, on longtime residents constitutes persecution, particularly if it is likely to

---

276. *Id.*

277. The opinion did not refer to evidence that the Estonian citizenship legislation was animated by the desire to render stateless ethnic Russian inhabitants. Evidence on this point would be highly relevant in evaluating the occurrence of persecution on account of grounds prohibited by the 1951 Refugee Convention.

278. *E.g.*, Immigration and Nationality Act, § 312(a) (codified as amended at 8 U.S.C. § 1423(a) (2012)) (U.S. naturalization law requires applicants to demonstrate "an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language"). Similar language prerequisites exist in the naturalization law of France, Germany, and many other states. CODE CIVIL [C. CIV.] art. 21–24 (Fr.); S*TAATSANGEHÖRIGKEITSGESETZ* [STAG] [Nationality Act], July 22, 1913, RGBL. I at 583, last amended by *Zweites Gesetz zur Änderung des Staatsangehörigkeitsgesetzes* [Second Act Amending the Nationality Act], Nov. 13, 2014, BGBL. I at 1714, § 10, no. 1(6) (Ger.).

279. *See* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 119–22 (7th ed. 2012) (discussing U.S. naturalization requirements); Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 267–68 (1994).

280. *Stserba*, 646 F.3d at 968–69, 975.

281. *Id.*

result in statelessness for those who do not or cannot undergo naturalization.

This line of reasoning was not developed in the *Stserba* opinion. It is likely, however, to run head-on into traditional international law principles that allow states wide leeway in determining their citizenship laws.[282] Though states' rights to define their nationality laws may not be absolute,[283] the longstanding sovereignty interests in prescribing prerequisites for naturalization, coupled with the evidence that the Estonian naturalization process was in reality an effective avenue for thousands,[284] make it unlikely that the naturalization process itself would be seen as persecutory.

Nonetheless, it would be important to inquire whether the citizenship laws, including the naturalization requirements, are animated by hostility toward an ethnic minority. Under the views expressed in *Haile* and *Stserba,* legislation enacted with the purpose of targeting ethnic Russians is presumptively persecutory.[285] Further, *Haile* and *Stserba* both indicate that citizenship legislation designed to render certain ethnic populations stateless would constitute persecution per se.[286] Therefore, evidence concerning the intent behind the citizenship laws would be relevant in evaluating whether the statelessness that Stserba experienced constituted persecution on account of race, religion, nationality, social group, or political opinion, the grounds prohibited by the 1951 Refugee Convention.

The record in *Stserba* did not appear to contain direct evidence on the purpose of the Estonian citizenship legislation, and the judges, as is often the case in the refugee context, relied on indirect evidence.[287] The Sixth Circuit indicated that neutral legislation containing a language requirement constituted persecution because it had a disparate impact on ethnic Russians.[288] This conclusion, in the absence of other relevant evidence, is unwarranted. Language requirements generally impose a heavier burden on some social groups than others. For this reason, language requirements may be bad social policy. But, in light of the long

---

282. *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 72 (2d ed. 2012) ("Each state has the right to determine how a person may acquire its nationality.").

283. *See* Nottebohm (Liechtenstein v. Guatemala), Preliminary Objection, [1955] I.C.J. 4, 6 (Guat.).

284. *See Stserba*, 646 F.3d at 973; *Citizenship*, *supra* note 227.

285. *See Stserba*, 646 F.3d at 974; Haile v. Holder, 591 F.3d 574, 574 (7th Cir. 2010).

286. *See Stserba*, 646 F.3d at 974; *Haile*, 591 F.3d at 574.

287. *See Stserba*, 646 F.3d at 974–75.

288. *See id.*

tradition and frequency of language requirements in naturalization proceedings,[289] their differential impact on groups in society does not render them persecutory per se.

In addition to raising the significance of language requirements, the *Stserba* case provides food for thought concerning the level of injury that amounts to persecution. This was a major concern in the *Choudry* decision as well, although the context was different. The *Stserba* and *Haile* opinions discussed the possibility that statelessness might qualify as persecution per se, obviating the need for applicants to show how statelessness caused them harm personally.[290] The *Choudry* court, in contrast, remanded the case for further development on two issues: whether Choudry would be stateless under the citizenship laws of Bangladesh, and, if so, whether Choudry's stateless status in Bangladesh would give rise to a well-founded fear of persecution.[291] Suppose that the record developed on remand in *Choudry* presented circumstances similar to those in *Stserba*: stateless individuals have the right to reside, obtain travel documents, and vote in local elections, but do not have the right to vote in national elections, purchase property, or join political parties. Those who can speak the national language can apply for citizenship, and many thousands have done so.[292] Would statelessness in these circumstances constitute persecution? Such a society would certainly not provide full membership to the stateless. Nonetheless, the provision of residence rights, authorization to work, and the ability to obtain travel documents would afford basic protection that is inconsistent with persecution.[293]

The statelessness issues discussed in the *Stserba* case provide great contrast to those examined in *S.T.* and *Haile*. In wartime Ethiopia, the government took affirmative and hostile action against a group of lifelong citizens.[294] The state had not dissolved; the borders had not changed; the citizens had not moved from their homes. The withdrawal

289. *See supra* notes 277–78 and accompanying text.

290. *See Stserba*, 646 F.3d at 974; *Haile*, 591 F.3d at 574.

291. Choudry v. Canada, [2011] F.C. 1406, paras. 39–40 (Can.).

292. *See Stserba*, 646 F.3d at 973–74 (noting the number of people to go through the Estonian naturalization).

293. *See, e.g.*, HATHAWAY & FOSTER, *supra* note 13, at 193–287 (providing a framework with which to identify the harm that constitutes persecution). The experience of past denationalization would not automatically lead to the conclusion that serious harm should be feared in the future. *Id.* at 252. In this respect, Lilia Stserba's statelessness between 1991 and 1993, which had not recurred for 20 years, would be an unwarranted predicate for refugee status. Under U.S. law, however, if the statelessness Stserba experienced were persecution per se, it would give rise to a presumption that she had a well-founded fear of future persecution.

294. *Haile*, 591 F.3d at 573, 575; *see supra* notes 73–76 and accompanying text.

of Ethiopian citizenship likely rendered many stateless.[295] Moreover, it was accompanied by confiscation of property, the risk of detention, and massive deportations.[296] The government provided no naturalization or other process through which longtime residents could reclaim or gain Ethiopian citizenship.[297] Furthermore, after the war subsided and legislation restored some property and citizenship rights, the Ethiopian government continued to deny passports to former citizens it had rendered stateless.[298] In these hostile circumstances the lack of protection accorded to former citizens supported the conclusion that the applicants had a well-founded fear of persecution in Ethiopia.[299]

VI. QUESTIONS FOR THE FUTURE

These judicial opinions, in the longstanding common law tradition, examined the statelessness experienced by four individual asylum applicants. The courts did not consider the countless other circumstances in which statelessness might qualify as persecution, leaving a multitude of issues yet to be addressed at the intersection of statelessness and refugee law. Nonetheless, common concerns resonate within these decisions and they posit several legal presumptions. Most notably, they all resoundingly reject the international law maxim that citizenship law is solely a matter for the sovereign.[300] Indeed, states that remove citizenship from current citizens—states that issue denationalization decrees or enact denationalization laws—are suspected of acting illegitimately.[301] When denationalization is linked to religious or ethnic or other Convention ground, it is presumptively persecutory.[302] When such discriminatory denationalization results in statelessness it amounts to persecution per se.[303]

In contrast, the cases suggest that loss of citizenship as a consequence of the dissolution of states is not presumptively persecutory.[304] Denial of citizenship to those who do not possess it is

295. *See supra* notes 73–76 and accompanying text.

296. *See supra* notes 73–76 and accompanying text.

297. *See generally* HUMAN RIGHTS WATCH, *supra* note 73.

298. *Id.*

299. *See Haile*, 591 F.3d at 574.

300. *But see* MURPHY, *supra* note 282, at 72 ("Each state has the right to determine how a person may acquire its nationality.").

301. *See* Stserba v. Holder, 646 F.3d 964, 974–75 (6th Cir. 2011).

302. *See Stserba*, 646 F.3d at 974; *Haile*, 591 F.3d at 574.

303. *See Stserba*, 646 F.3d at 974; *Haile*, 591 F.3d at 574.

304. *E.g.*, *Haile*, 591 F.3d at 573.

less problematic than withdrawal of existing citizenship. This does not give states carte blanche to deny citizenship to vulnerable minority group inhabitants. New citizenship legislation that provides no avenue through which longtime residents can acquire citizenship will heighten concern. Naturalization requirements that lack legitimate rationales will trigger suspicion. When lack of citizenship makes residence and work authorization insecure and daily life a hardship, it will raise warning flags that well-founded fears of persecution may exist.

Turning these insights onto the broader world stage, the *Haile* and *Stserba* presumptions of persecution when statelessness results from citizenship laws that burden ethnic minorities[305] may seem justified, but they raise many perplexing questions. For example, in the context of independence from a colonial power, is it unlawful for citizenship laws to disfavor the colonizers and their descendants? In response to government policies that have intentionally aimed to change the ethnic composition of a restive area (consider Tibet under Chinese rule), would it be unlawful for new citizenship laws to disfavor those groups that arrived as part of the former government's pacification plan? Is differential treatment acceptable so long as there is a realistic path to naturalization for those long-term residents who would otherwise be stateless? Do language tests, generally viewed as a legitimate requirement for naturalization, become unlawful when applied to lifelong residents? Is it relevant whether large numbers of the minority population have successfully coped with the language requirement?

In addition, the suggestion of dual nationality that lurked in the background of several of the cases evokes the need for further nuanced analyses of this dimension. Should a 16 year-old who never left the country of his birth and citizenship be deprived of his nationality because his parents departed and renounced their citizenship? Is it lawful to deprive an individual of citizenship and refuse him the right to return based on claims that he is a national of a state that he has never visited?[306] Does it matter if he cannot speak the language of the second country or has no economic prospects there? What if the government removes the nationality of an individual who is not currently a dual national, but has the ability to acquire citizenship in another state through a parent (perhaps S.T. and Haile) or through a spouse (perhaps Stserba)? These questions have not been explored and do not yet have answers.

---

305. *See Stserba*, 646 F.3d at 974; *Haile*, 591 F.3d at 574.

306. *See generally* Jon Bauer, *Multiple Nationality and Refugees*, 47 VAND. J. TRANSNAT'L L. 905 (2014) (providing a thorough discussion of issues of multiple nationality and eligibility for refugee status under international and U.S. law).

Implicit in all four of these judicial opinions is that assumption that states have responsibilities to their long-term residents.[307] The *S.T.* tribunal was particularly exasperated at the obstacles placed in the way of former residents returning to their homeland and deemed Ethiopia's refusal to grant a passport an instance of current persecution. This ruling may have great significance as many stateless people have been forced to move by the Arab Spring, the war in Gaza, and the ongoing Syrian civil war. Many are stranded where conflict has pushed them. Others are stranded when their jobs evaporate and their residence permits as temporary workers expire. Would it constitute persecution if their country of habitual residence refused to renew their travel documents to allow them to return home after conflict or employment took them abroad?[308] Would it matter how many years they had relied on those travel documents? Are there other circumstances in which the refusal to accept the return of a stateless longtime former resident constitutes persecution?

Turning from the country of habitual residence to the country where stateless individuals have been employed, are there circumstances in which expulsion could constitute persecution? National law generally requires noncitizens to leave when their residence permission expires, but is this always true? Does it matter if they are stateless and have lived their whole lives there? If they have done nothing to trigger the expiration of their residence permit? If no other state will grant them lawful admission?

These questions beget practical concerns. If expelled for no longer having a work/residence permit, where does a stateless person go? If a state cannot remove a stateless person, does living under the perpetual threat of deportation constitute persecution?

---

307. *See* HATHAWAY & FOSTER, *supra* note 13, at 250–51 (discussing the right of stateless individuals to reenter their country of long-term residence).

308. Under U.S. law, the refusal of the country of last habitual residence to readmit stateless Palestinians can constitute persecution. *See* Legal Opinion Palestinian Asylum Applicants, Genco Op. No. 95-14, 1995 WL 1796321 (Oct. 27, 1995) ("[The] expulsion of or denial of reentry to a stateless Palestinian . . . by his country of last habitual residence may result in such serious violations of the applicant's basic human rights as to constitute persecution. Whether such an asylum applicant can establish that he has been persecuted will depend on the particular circumstances of each case. If he does establish [persecution] because of his national origin as a Palestinian, or because of another protected ground, he may qualify as a refugee under United States law."). *But see* M.A. (Palestinian Territories) v. Sec'y of State for the Home Dep't, [2008] EWCA (Civ) 304, [21], [2009] INLR 163 (Eng.) (state denial of entry to stateless person, "who, unlike a citizen, has no right of entry into the country" is not persecution (quoting A.K. v. Sec'y of State for the Home Dep't, [2006] EWCA (Civ) 1117, [47], [2007] INLR 195 (Eng.))).

The answers are not simple or obvious. The crossroads of statelessness and international refugee law is uncharted and urgently in need of exploration. A comprehensive legal framework has not yet emerged to ensure that refugee law fully addresses the plight of stateless individuals who fear persecution, and we must continue to work to afford protection to human beings who live in the shadows cast by statelessness.