

# Statelessness as Rhetoric: The Case for Revisioning Statelessness in Our Statist World

Francis Tom Temprosa\*

*This article argues that the definition of statelessness in international law should be changed. When the international statelessness regime was instituted, the ultimate goal was the full protection of unprotected persons who are not refugees. Yet, in our statist world, the definition of statelessness—as embodied in the 1954 Convention relating to the Status of Stateless Persons—has become rhetoric. Contrary to the claim that the definition is merely declaratory of a status, this article contends that the definition lends itself to having features and facets of a discretionary design of rhetoric. It does more than accord States with discretion. It also allows them to constitute and ordain who is stateless and therefore entitled to the benefits of the statelessness regime in international law—which ensures protection and rights. Principally combining insights from critical rhetoric as theory, this article also posits that ideologies animate and persist in the determinations of statelessness: 'formalism' and 'discretionism'. The definition, instead of*

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<https://doi.org/10.15779/Z384F1MK01>

\* S.J.D. Candidate (Doctor of Juridical Science), Michigan Grotius Fellow, University of Michigan Law School; LL.M., Clyde Alton DeWitt Fellow, 2017, University of Michigan Law School; J.D. (Second Honors), 2010, Ateneo de Manila University School of Law; B.A. (cum laude), 2006, University of the Philippines. The author is a faculty member of the Ateneo de Manila University School of Law and a lecturer at the Far Eastern University Institute of Law. He is the director of the Human Rights Education and Promotion Office of the Commission on Human Rights.

He is grateful for the comments and suggestions of David M. Hughes and the encouragement and support of Professor Steven R. Ratner and James A. Goldston. An earlier version of this piece also benefited from the very helpful and thoughtful comments of Professor James C. Hathaway. Thank you. Many of the ideas here were inspired by the author's wonderful years of working as focal point for stateless concerns of the United Nations High Commissioner for Refugees in its Philippine office, a time when the Philippines became the first country in Southeast Asia to be a party to the 1954 Stateless Convention and the first to establish a statelessness determination procedure in the region. He later on became counsel of the Commission on Human Rights before the Philippine Supreme Court in a case involving foundlings and statelessness. He is eternally grateful to the editors and entire staff of the Berkeley Journal of International Law for their hard work, patience, and comments on the piece. Without them, this piece would not have been possible. All errors are his alone.

being an emancipatory tool of international law, entrenches and reifies State power over citizenship matters.

Drawing on an analysis of the legal definitions of statelessness all over the world and different cases of stateless status determination, this article is the first to directly question and critically engage with the definition of statelessness in international law, theorizing on the definition in rhetoric and building the case for why it should be changed. It develops the connection between the definition of statelessness to ideographs, ideologies, and categories in order to analyze statelessness determinations. Existing literature on categories, labels, and definitions in the social sciences, refugee studies, and migration studies are incorporated in an interdisciplinary analysis.

This article thereafter proposes that the definition be 'revised'. A two-pronged protection framework that recalibrates the definition is suggested. The first prong turns the attention of the definition from formal protection to substantive and functional protection. A determiner of stateless status is allowed to look beyond mere formal protection, encouraging the piercing of the veil of citizenship in certain cases and placing nondiscrimination as a core tenet. The definition should also be tied to the right to nationality. The second prong reorients State responsibilities and duties in statelessness determinations, limiting the discretion of the State and assigning more duties to the international community as a whole. It takes into account the goal-oriented dimensions of the 1954 Convention relating to the Status of Stateless Persons and recommends ways forward to reimagine the concept of statelessness. If a State is allowed to consider who its citizens are and are not, as well as who is entitled to rights under the treaty on statelessness, then the State is more than a determiner of status; it is the giver of status, rights, and even life. The definition has to respond to this reality.

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"Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment . . . The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks, but . . . he decides that it would be better to wait until he gets permission to go inside. The gatekeeper gives him a stool and allows him to sit down at the side in front of the gate. There he sits for days and years."

– Excerpt from Franz Kafka's "Before the Law"<sup>1</sup>

#### INTRODUCTION: CITIZENSHIP (OR THE LACK OF IT) IN OUR STATIST WORLD

Over the last two and a half centuries, the State and its forerunners have held power over norms that regulate access to citizenship,<sup>2</sup> which includes the rights

1. THE COMPLETE STORIES 5 (Nahum Glatzer ed., 1971).

2. Used in this Article, citizenship is nationality in its legal sense as most legal documents and theorists refer to it as one and the same concept.

and duties associated with being a citizen of a State.<sup>3</sup> Scholars argue that this discretion over citizenship is declining.<sup>4</sup> Everyone has the right to nationality under international law, and citizenship is slipping out of the State's control.<sup>5</sup> Yet, the State still controls much of citizenship and the lack of it—statelessness. The State is the overwhelming gatekeeper of citizenship. Even in today's globalized world, the State continues to possess authority to govern its borders.<sup>6</sup> The authority is not reposed upon an international parliament or people. In fact, since 9/11, there is a steady rise of laws opening up citizenship to the privileged, while restricting access to or stripping citizenship for the disadvantaged in the name of national security, the economy, national unity, and a host of other reasons.<sup>7</sup>

The inclusion and exclusion of collectives from political communities is an enduring theme of history. In the United States, perhaps no other case has so captured disdain for utter racism than *Dred Scott v. Sandford*, where the US Supreme Court declared that black people "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."<sup>8</sup> By a stroke of the racist pen, the court condemned countless African-Americans lives to slavery. Today, there are moves at exclusion, including a reconfiguring of birthright citizenship and border controls. The US Supreme Court declared as arbitrary and capricious the decision to rescind the Deferred Action for Childhood Arrivals program that protected undocumented immigrants brought to the United States as children.<sup>9</sup> Elsewhere, exclusionary regimes reign and threaten peoples' livelihood. The case before the ICJ against Myanmar claims that the persecution of the Rohingya for decades had been made possible, among others, by the enactment of a citizenship law that stripped the Rohingya of citizenship.<sup>10</sup> India's National Register of Citizens, published in

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3. Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink, *Introduction: Citizenship—Quo Vadis?*, in THE OXFORD HANDBOOK OF CITIZENSHIP 3, 8 (Ayelet Shachar et al. eds., 2017).

4. See e.g., DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP 9 (1996) (arguing that the distinction between citizen and alien has eroded because rights are more and more predicated on residency); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 449–50 (2000) (arguing that efforts to conceive of citizenship beyond the nation-state are coherent and desirable). Certainly, I agree that thinking of citizenship as a changing or changed concept has merits, States nonetheless still control access to citizenship, as well as to its bundle of rights and duties.

5. JACOBSON, *supra* note 4.

6. *Id.* at 6.

7. For an excellent review of the shifts in formal legal citizenship, see Catherine Dauvergne, *Citizenship with a Vengeance*, 8(2) THEORETICAL INQ. L. (2007).

8. *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857).

9. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. \_\_\_, 140 S.Ct. 1891 (2020).

10. See Priya Pillai, *State Responsibility for Citizenship in India: Lessons for Myanmar, and the CERD Inter-State Communications Mechanism*, OPINIOJURIS (Dec. 12, 2019), <http://opiniojuris.org/2019/12/21/state-responsibility-for-citizenship-in-india-lessons-from-myanmar-and-the-cerd-inter-state-communications-mechanism/>.

August 2019, declared more than 1.9 million people, mainly from the state of Assam, on the verge of statelessness.<sup>11</sup>

At the individual level, take the tales of two women from across the Atlantic as recent demonstrations of the pervasive, almost plenary, power of the State over inclusion and exclusion. In November 2014, Hoda Muthana from the United States, and in February 2015, Shamima Begum from the United Kingdom left their home countries. Muthana and Begum married Islamic State fighters and had children in Syria. When the Islamic State began to fall, both desired to return home. But both States denied their return because the women lacked citizenship.<sup>12</sup> According to the US Department of State, Muthana was not a US citizen, had no legal basis for return, did not hold a US passport, the right to a passport, or possess a visa to travel to the United States.<sup>13</sup> Meanwhile, the United Kingdom intended to strip Begum of citizenship based on an amendment to its nationality law. The amendment allowed the UK Secretary of State to deprive individuals of citizenship if "conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom."<sup>14</sup>

These stories are not unique. Our world, at least as far as citizenship is concerned, is largely statist. The State decides who a citizen is and who is stateless.<sup>15</sup> International law embraces this truth: the 1954 Convention Relating to the Status of Stateless Persons (1954 Statelessness Convention) defines a "stateless person" as a "person who is not considered as a national by any State under the operation of its law."<sup>16</sup> In embracing the power of the State to say who a stateless person is

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11. See M. Mohsin Alam Bhat, *Twilight Citizenship*, [https://privpapers.ssrn.com/sol3/papers.cfm?abstract\\_id=3603707&dgcid=ejournal\\_html\\_email\\_law:courts:ejournal\\_abstractlink](https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3603707&dgcid=ejournal_html_email_law:courts:ejournal_abstractlink) (last visited Aug. 24, 2020).

12. See Jonathan Shaub, *Hoda Muthana and Shamima Begum: Citizenship and Expatriation in the US and UK*, *LAWFARE* (Feb. 25, 2019), <https://www.lawfareblog.com/hoda-muthana-and-shamima-begum-citizenship-and-expatriation-us-and-uk>. Although both Muthana and Begum's situations also concern issues of revocation of citizenship and denial of return to countries of citizenship or habitual residence, they also engage with what statelessness is. See also Steve Vladeck, *Unpacking (Some of) the Legal Issues Surrounding Hoda Marijuana*, *JUST SEC.* (Feb. 20, 2019), <https://www.just-security.org/62659/unpacking-some-of-issues-surrounding-hoda-muthana>.

13. U.S. DEP'T OF STATE, *Statement on Hoda Mutha*, <https://www.state.gov/statement-on-hoda-muthana/> (last visited Apr. 15, 2019).

14. Immigration Act, 2014, c.22, § 17(3) (Eng.). The UK Secretary of State must have reasonable grounds to believe that the person being stripped of citizenship will be able to become a national of another country or territory, or in other words, that they will not become stateless.

15. See Annemarieke Vermeer-Künzli, *Diplomatic Protection as a Source of Human Rights Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 250, 253 (Dinah Shelton ed., 2013).

16. Convention Relating to the Status of Stateless Persons, art. 1(1), Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter, "1954 Statelessness Convention"]. This Article will not engage in a discussion of the categories of people to whom the Convention does not apply as stated in article 1(2) of the Convention since they do not modify the general definition of statelessness.

or is not, the 1954 Statelessness Convention's definition betrays the very purpose of the 1954 Statelessness Convention, which is to assure that people have the widest possible exercise of fundamental rights and freedoms.<sup>17</sup> That is the paradox. The 1954 Statelessness Convention wrongly assumed that stateless determinations are a straightforward, clinical process of applying citizenship law, and that a State can always rightly determine whether another State "considers" a person a citizen. While it recognizes the power of the State to grant or withhold citizenship, it does not take into account that if the State has discretion over citizenship matters, then statelessness can also be discretionary. It is not always black or white.

This Article is the first to critically theorize international law's definition of statelessness in design rhetoric to build the case for 'revisoning' the definition. In this way, we can develop a new vision of statelessness and revise international law. For the purposes of this Article, statelessness pertains to the definition in the 1954 Statelessness Convention. Using statelessness determination cases, I analyze international law's definition of statelessness and argue that international law's definition has discretionary features and facets. The definition does more than accord States with discretion. It allows States to constitute and ordain who is stateless, and therefore, decide who is entitled to the benefits of the 1954 Statelessness Convention, which establishes specific protections and rights to the stateless. It also entrenches and reifies State power over citizenship matters.

My central argument is that international law's definition of statelessness operates in a rhetoric that privileges the State, and because of this, should be revised. Without this revisoning, the statelessness regime, decisively converging with human rights principles, loses its emancipatory power.

Drawing insights from critical rhetoric as theory, I explore ideologies that animate and persist in the determinations of statelessness.<sup>18</sup> Critical rhetoric "examines the dimensions of domination and freedom as these are exercised in a

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Stateless persons differ from refugees. Although a person may simultaneously be stateless and a refugee, the 1951 Refugee Convention adequately addresses the situation of refugees. Stateless persons can qualify for refugee status if they are unable to return to their country of habitual residence owing to a well-founded fear of being persecuted for a reason listed in the Refugee Convention. Where a stateless refugee seeks rights from a State that is not a party to the Refugee Convention, however, their stateless status must still be determined. See FOSTER & LAMBERT, *infra* note 57, at 422.

17. See 1954 Statelessness Convention, *supra* note 16, at Preamble ("to assure stateless persons the widest possible exercise of these fundamental rights and freedoms").

18. Critical rhetoric is "[a] perspective on rhetoric that explores, in theoretical and practical terms, the implications of a theory that is divorced from the constraints of a Platonic conception." See Raymie E. McKerrow, *Critical Rhetoric: Theory and Praxis*, 56 COMM. MONOGRAPHS 91 (1989). Although related, critical rhetoric should not be confused with "critical legal rhetoric," which is legal analysis that critiques claims about the nature of the law. For a discussion of the basic distinction, see Lolita Buckner Inniss, 'Other Spaces' in *Legal Pedagogy*, 28 HARV. J. RACIAL & ETHNIC JUST. 67, 72 (2012). Critical legal rhetoric has developed its own basic assumptions that are focused on domestic law, particularly the domestic law of the United States. See generally MAROUF HASAIN, JR., *LEGAL MEMORIES AND AMNESIAS IN AMERICA'S RHETORICAL CULTURE* (2000). I relate it now to international law.

relativized world."<sup>19</sup> It is an examination of power as both marginalizing (domination) and productive (freedom), and of how this happens in argumentation.<sup>20</sup> Here, rhetoric refers to the way that language operates, especially in argument.<sup>21</sup> The Latin phrase "*finis autem conversatio*" (end of citizenship)<sup>22</sup> captures the phenomenon, highlighting the tentative and rhetoricized nature of statelessness determinations. I also develop the connection of the definition to ideographs, ideologies, and categories to analyze statelessness determinations. Existing literature on categories, labels, and definitions in the social sciences, refugee studies, and migration studies are incorporated in an interdisciplinary analysis. Throughout this Article, I consider status determinations as institutional State practices and not just mere opinions and adjudications of statelessness judges or officers. I draw from the practice of States that have established domestic procedures to determine statelessness.<sup>23</sup>

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19. McKerrow, *supra* note 18, at 91.

20. Sara L. McKinnon, *Critical Theory*, in ENCYCLOPEDIA OF COMMUNICATION THEORY 237, 241 (Stephen Littlejohn & Karen Foss eds., 2009). As McKinnon explains: "A central thread in critical theory research is the examination of social conditions for the hidden productive structures of marginalization. This sort of examination looks at the constraints placed on people's subjectivity, agency, and access to resources in particular contexts... In both creating knowledge about people and allocating resources to those people, these structures privilege some while marginalizing others. It is this inequality that is at the heart of critical theory's analysis. The goal in critiquing such structures of domination, however, is to produce possibilities for transforming social relations." *Id.* at 238.

21. See Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to in Re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J. LEGAL COMMENT 649, 655 (2010)

22. This can also be translated as *finis autem civitatis*. I thank Velentina Vadi for her help in the translation and for her thoughts. Note that my use of this term should not be confused with postnationalism, which "involves the extension of rights to noncitizen immigrants, which blurs the dichotomy between nationals and aliens." See Yasemin Soysal, *Postnational Citizenship: Reconfiguring the Familiar Terrain*, in THE BLACKWELL COMPANION TO POLITICAL SOCIOLOGY 333 (Kate Nash & Alan Scott eds., 2001).

23. For an overview of the statelessness determination models in Europe, see generally KATIA BIANCHINI, PROTECTING STATELESS PERSONS: THE IMPLEMENTATION OF THE CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS ACROSS EU STATES (2018). See also Gábor Gyulai, *The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 122 (Alice Edwards & Laura van Waas eds., 2014). Gyulai provides a slightly more general account of statelessness determination models, including five procedures largely utilized in Europe. Most of the procedures are in Europe. Around twenty-five procedures exist as of this writing. *Id.* This Article also considers judicial decisions in addition to statelessness determination procedures.

Statelessness has been a forgotten human rights crisis,<sup>24</sup> an invisible theme in the history of international law,<sup>25</sup> and generally neglected in the field of human rights.<sup>26</sup> But an examination of the definition of statelessness is of utmost importance given its impact on the lives of people, societies, and States. Re-examining the definition of statelessness is particularly crucial not only for parties to the 1954 Statelessness Convention, which have direct obligations under the Convention,<sup>27</sup> but for all States because they are generally bound by the definition as a matter of customary international law.<sup>28</sup> States also have multifarious treaty obligations on citizenship or nationality, although statelessness is not defined in those other treaties.<sup>29</sup>

As such, this Article attempts to make analytic and normative contributions. It offers a critical perspective on international law's statelessness definition. An analytic contribution helps to theorize the disparity and divergence in the results of stateless status determinations. There is a dearth in academic legal discussion

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24. Lindsey Kingston, *"A Forgotten Human Rights Crisis": Statelessness and Issue (Non)Emergence*, 14 HUM. RTS. REV. 73, 80–82 (2013) (arguing that statelessness has "failed to successfully emerge onto the international agenda" because of two factors: issue heterogeneity that creates strategic obstacles, and a lack of widely recognized global solutions encompassing issue characteristics that relate to an issue's potential for change); see also Bill Frelick & Maureen Lynch, *Statelessness: A Forgotten Human Rights Crisis* (2015), <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/sudan/frelick-lynch.pdf> (last visited Apr. 15, 2019).

25. See Will Hanley, *Statelessness: An Invisible Theme in the History of International Law*, 25 EUR. J. INT'L L. 321, 322 (2014) (asserting that while scholars who study statelessness "seem to think that it is, or ought to be, part of international law," scholars of international law tend to view statelessness as a problem of nationality law); see also REFUGEES INT'L, *Statelessness: International Blind Spot Linked to Global Concerns* (2009), <https://reliefweb.int/report/bosnia-and-herzegovina/statelessness-international-blind-spot-linked-global-concerns> (last visited Apr. 15, 2019) (calling statelessness a "blind spot").

26. Michael Freeman, *Conclusion: Reflections on the Theory and Practice of Economic and Social Rights*, in THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 365, 381–82 (Lanse Minkler ed., 2013) (stating that the field of human rights has even more neglected socioeconomic rights of the stateless).

27. See Vienna Convention on the Law of Treaties [hereinafter, "VCLT"], art. 26, May 23, 1969, 1155 U.N.T.S. 331.

28. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, U.N. Doc. A/61/10, at 49 (2006).

29. See, e.g., Convention on the Rights of the Child [hereinafter, "CRC"], arts. 7–8, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of Discrimination against Women [hereinafter, "CEDAW"], art. 9(2), Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights [hereinafter, "ICCPR"], art. 24(3), Dec. 19, 1966, 999 U.N.T.S. 171; Convention on the Rights of Persons with Disabilities, art. 18, Mar. 30, 2007, 2515 U.N.T.S. 3; International Convention for the Protection of All Persons from Enforced Disappearances, art. 25(4), Dec. 20, 2006, 2716 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 29, Dec. 18, 1990, 2220 U.N.T.S. 3; Convention on the Nationality of Married Women, arts. 1–3, Jan. 29, 1957, 309 U.N.T.S. 65. See also, for the various instruments, David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 246 (2006).



on the application of the definition of statelessness in international law.<sup>30</sup> In my research, I have yet to encounter a piece that directly questions and addresses the definition of statelessness in international law from a distinct critical rhetoric vantage point. This Article aims to fill those gaps in the academic literature. This Article also offers a normative contribution, building the case towards 'revisioning' the definition and encouraging States to revise their approach to statelessness. The 1954 Statelessness Convention allows any State that is a party to the Convention to request a 'revision' of the Convention through a notification addressed to the UN Secretary-General.<sup>31</sup> I believe that international law's approach to statelessness should not be entirely thrown out, for its approach grants rights and aims to protect people without citizenship, but the definition must be so reformed as to fulfill the promise of emancipation.<sup>32</sup>

This Article proposes a two-pronged framework that recalibrates the definition. The first prong moves the definition of statelessness from formal to substantive protection, thus allowing a piercing of the veil of citizenship and placing non-discrimination as the core tenet of statelessness determinations. The second prong reorients the State's responsibilities and duties in statelessness determinations, limiting the discretion of the State and assigning more duties to the international community as a whole. To be clear, I do not advocate for the abandonment of legal statelessness for de facto statelessness, but rather advocate for revisioning the definition of *legal* statelessness itself. That is, the definition that is codified in the 1954 Statelessness Convention. Doing so, I take into account the goal-oriented dimensions of the 1954 Statelessness Convention and propose assigning wider duties to the international community.<sup>33</sup> While this Article's analysis and prescriptions around the domination-emancipation discourse of statelessness may neither be definitive nor comprehensive, the aim is to spark a debate that will move the law forward.<sup>34</sup>

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30. Alice Edwards & Laura Van Waas, *Statelessness*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 290, 296 (Elena Fiddian-Qasimiyeh et al. eds., 2014). ("In contrast, there has been little discussion of the application of the definition of a stateless person that is provided by international law and to which rights are attached.")

31. 1954 Statelessness Convention, *supra* note 16, at art. 41.

32. For a critical view of citizenship as a flawed model, see Barry Hindess *Citizenship for All*, 8 CITIZENSHIP STUD. 305 (2004).

33. This approach is inspired by literature that aims to "bridge" international law and moral philosophy. See Steven Ratner, *Ethics and International Law: Integrating the Global Justice Project(s)*, 5 INT'L THEORY 1 (2013); Steven Ratner, *International Law and Political Philosophy: Uncovering New Linkages*, 14 PHIL. COMPASS (2018); see also Samantha Besson, *Moral Philosophy and International Law*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 385 (Anne Orford & Florian Hoffman eds., 2016).

34. Indeed, further studies in other disciplines can lend more light on whether the definition actually leads to meaningful positive change in the lives of the stateless.

## I.

THE PRESCRIBED ORTHODOXY: THE INTERNATIONAL DEFINITION OF  
STATELESSNESS

If a State is allowed to consider who its citizens are and are not, and if a State could determine who is entitled to rights under the Statelessness Convention, then the State is more than a determiner of status; it is the giver of status, rights, and even life. Given these realities, the first question should be: why and how should statelessness be revisioned to respond to our present reality of a statist world?

Before arguing why and how statelessness should be revisioned, this Section first discusses the international definition of statelessness. I present a very brief history of the quest to define statelessness, then examine international law's current definition of statelessness, and analyze the dominant approaches to interpreting the definition. Then, I describe the identification of statelessness and its nature in our predominantly statist world.

*An Abbreviated History of Defining Statelessness*

Prior to its development as a legal concept in 1954, statelessness was sporadically discussed in the humanities, and even less so in law.<sup>35</sup> Statelessness is an old phenomenon,<sup>36</sup> perhaps as old as the State and State discretion.<sup>37</sup> People

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35. See Mira Siegelberg, *The Question of Questions: The Problem of Statelessness in International History, 1921-1961*, Doctoral Dissertation, Harvard University (2014) (arguing that the transformation of statelessness from an important intellectual problem in the period after World War I to an ambiguous moral problem associated with human rights after 1948 contributed to its marginalization as an object of humanitarian concern and as an important category for comprehending international political and legal order). Cf. literature in history and social sciences. See generally CENTERING THE MARGIN: AGENCY AND NARRATIVE IN SOUTHEAST ASIA (Alexander Horstmann & Reed L. Wadley eds., 2006); C. MAGBAILY FYLE, INTRODUCTION TO THE HISTORY OF AFRICAN CIVILIZATION: PRECOLONIAL AFRICA (1999); JOHN PARKER & RICHARD REID, THE OXFORD HANDBOOK OF MODERN AFRICAN HISTORY (2013); C. PATTERSON GIERSCHE, ASIAN BORDERLANDS: THE TRANSFORMATION OF QING CHINA'S YUNNAN FRONTIER (2006); Kataoka Tatsuki, *Becoming Stateless: Historical Experience and Its Reflection on the Concept of State among the Lahu in Yunnan and Mainland Southeast Asian Massif*, 2 SE. ASIAN STUD. 69 (2013).

36. See United Nations High Commissioner for Refugees [hereinafter "UNHCR"], *Current UNHCR Activities on Behalf of Stateless Persons*, ¶ 1, U.N. Doc. EC/1995/SCP/CRP.6 (Sept. 21, 1995); UNHCR, *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, ¶ 8 (1996, revised in 1999). If ancient Rome were considered a State, then the earliest deprivations of citizenship in Roman law, including banishment (*aquae et ignis interdictio*) and deportation in its severe form (*deportation in insulam*), would be some of the nascent causes of statelessness. PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 117 (2d ed. 1979).

37. Despite the problems associated with statelessness, some give up on citizenship and voluntarily choose to become stateless. These individuals retain, in a limited sense, the discretion to be stateless if and only if they choose to be and if the State says they are. The Westphalian system ushered in dogmas and doxas of sovereignty: territorial sovereignty (*dominium*) and personal sovereignty (*imperium*), or supreme authority over all citizens of the State at home or abroad. We can trace discretion from sovereignty. See Eric Allen Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIAC L. REV. 23, 24 n.5 (2004).

have been "displaced from formal belonging"<sup>38</sup> in the nation-State system since at least the nineteenth century.<sup>39</sup> However, statelessness had not been defined as an international law concept until 1954.<sup>40</sup>

States created the concept of statelessness against the backdrop of their top-down bureaucratic perspective that only States determine who a citizen-national is.<sup>41</sup> The current definition still embodies this perspective. The Universal Declaration of Human Rights (UDHR) of 1948 included the right to nationality, paving the way for the 1954 Statelessness Convention.<sup>42</sup> After drafting the UDHR, Eleanor Roosevelt wrote that a treaty on statelessness "seem[ed] to be knocking at our doors for consideration almost immediately."<sup>43</sup> But States remained unwilling to wholly surrender their discretion in defining statelessness. Consequently, State privilege in international law influenced the evolution of the agreed-upon definition. The State was regarded as supreme not only in granting civil rights, but also that the grant of an individual's status was exclusive to the State.<sup>44</sup>

After the Second World War, the international community drew attention to the loosely-defined "statelessness." States were still reeling from the harrowing loss of lives and from witnessing the suffering of "stateless persons" in Europe.<sup>45</sup> But statelessness was (and still is) an amorphous concept. Initially intertwined with the concept of refugee protection,<sup>46</sup> the broad concept of statelessness originally encompassed both States' original definition of refugees as groups of (de jure) stateless people and other "stateless persons" in general.<sup>47</sup>

In December 1947, the Human Rights Commission (HRC) noted the lack of agreements protecting refugees from the Second World War and highlighted the

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38. KRISTY A. BELTON, STATELESSNESS IN THE CARIBBEAN: THE PARADOX OF BELONGING IN A POSTNATIONAL WORLD 27 (2017).

39. *Id.*

40. See Amal de Chickera & Laura van Waas, *Unpacking Statelessness*, in UNDERSTANDING STATELESSNESS 53 (Tendayi Bloom et al. eds., 2017) (describing the historic evolution and contemporary understanding of statelessness).

41. See Aaron Hale & Fredline M'Cormack-Hale, *Statelessness, Nationality, and Citizenship in Sierra Leone*, 35 J. GLOB. S. STUD. 311 (2018).

42. Universal Declaration of Human Rights, G.A. Res. 217 A(III), art. 15, U.N. Doc. A/RES/3/217A (Dec. 10, 1948).

43. Mrs. Franklin D. Roosevelt, *The Promise of Human Rights*, 26 FOREIGN AFFS. 470, 477 (1948).

44. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 390 (5th ed. 1998); Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L. J. 241 (2001); Dinah Shelton, *Proceedings of the Annual Meeting*, 100 AM. SOC. INT'L L. 249 (2006).

45. Brad Blitz, *The State and the Stateless: The Legacy of Hannah Arendt Reconsidered*, in UNDERSTANDING STATELESSNESS 70, 72 (Tendayi Bloom et al. eds., 2017). I put stateless persons in quotes because, at this time, States did not really explicitly know what they meant when they used this term.

46. For an excellent historical overview, see James Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT'L & COMP. L. Q. 348 (1984).

47. *Id.* See also ATLE GRAHL-MADSEN, I THE STATUS OF REFUGEES IN INTERNATIONAL LAW 77 (1966).

need to adapt existing treaties to postwar conditions and new developments in international law.<sup>48</sup> The HRC requested that the Economic and Social Council (ECOSOC) initiate action, and the ECOSOC requested the Secretary-General undertake a study on it. Improving the position of stateless persons "require[d] their integration in the framework of international law, which, by tradition, has dealt with cases of foreigners possessing nationality."<sup>49</sup> The UN Secretary-General undertook a study on the situation of "stateless persons" even though statelessness was still ill-defined.<sup>50</sup> The UN's 1949 study constituted a step towards creating an international regime for protecting the unprotected.<sup>51</sup> The study recommended providing stateless persons with status that would ensure their enjoyment of "rights necessary to enable them to lead an existence worthy of human beings, and . . . [provide] adequate international protection."<sup>52</sup>

Eventually, States came up with two different treaties for refugees and stateless persons.<sup>53</sup> Drafters of the 1954 Statelessness Convention believed that States could fix statelessness through the liberal State system, which was supposed to ensure universal rights and shared development.<sup>54</sup> Most importantly, for our purposes, drafters debated whether to include a statelessness definition in the first place.<sup>55</sup> When States initially drafted a protocol for stateless persons, they did not intend to establish the meaning of statelessness and their draft did not contain a definition.<sup>56</sup> The draft protocol reflected a State-preferred arrangement, leaving States to decide who does and does not qualify as stateless.<sup>57</sup> Even as States drafted a treaty on statelessness separate from the protocol, delegates could not

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48. NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS: ITS HISTORY AND INTERPRETATION (1995), [https://www.oas.org/dil/1954\\_Convention\\_relat-ing\\_to\\_the\\_Status\\_of\\_Stateless\\_Persons.pdf](https://www.oas.org/dil/1954_Convention_relat-ing_to_the_Status_of_Stateless_Persons.pdf) (last visited Apr. 15, 2019).

49. *Id.*

50. *Id.*

51. LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 66 (2008). The study is proof of the shared history and concern of the international community. The study refers to refugees as stateless persons: de jure stateless if they had been deprived of nationality by their country of origin and de facto stateless if they did not enjoy the protection and assistance of national authorities.

52. United Nations, *A Study of Statelessness*, at 43, U.N. Doc. E/1112/E/1112/Add.1 (Aug. 1, 1949).

53. For background, see ROBINSON, *supra* note 48. See also Paul Weis, *The Convention Relating to the Status of Stateless Persons*, 10 INT'L & COMP. L. Q. 255 (1961).

54. Tendayi Bloom, Katherine Tonkiss & Phillip Cole, *Introduction: Providing a Framework for Understanding Statelessness*, in UNDERSTANDING STATELESSNESS 5 (Tendayi Bloom et al. eds., 2017). In this regard, one might say that statelessness is a challenge to the liberal order of States, and the liberal order's failure is part of the overall rise of the sentiment against (neo)liberalism.

55. See United Nations Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Comments of the Committee on the Draft Convention*, U.N. Doc. No. E/AC.32/L/32 (Feb. 10, 1950).

56. *Id.*

57. ROBINSON, *supra* note 48; see also MICHELLE FOSTER & HÉLÈNE LAMBERT, INTERNATIONAL REFUGEE LAW AND THE PROTECTION OF STATELESS PERSONS 40–46 (2019).

agree on a definition.<sup>58</sup> A drafting committee was designated to address the impasse.<sup>59</sup> States realized that the 1954 Statelessness Convention needed a definition to delimit its field of application.<sup>60</sup> Some States, including Israel, argued that without a definition, States would have unbridled discretion to include and exclude beneficiaries from the treaty's provisions.<sup>61</sup>

Another relevant question for our purposes was the substance of the definition. States struggled with how to define statelessness.<sup>62</sup> The Secretary-General's memorandum on the draft protocol,<sup>63</sup> which referred to a definition of statelessness in a report by Manley Hudson, the Special Rapporteur of the International Law Commission (ILC), attracted much attention.<sup>64</sup> States integrated Hudson's definition into the 1954 Statelessness Convention. However, the Hudson definition was not declarative of the concept of statelessness per se, but more about statelessness in its "strict, legal sense."<sup>65</sup> Notably, the UN study on statelessness contained "definitions" of stateless persons, which were longer and more elaborate than Hudson's strict, formalistic, and legalistic definition. The UN study defined stateless persons as "persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one."<sup>66</sup> This definition is more specific than that of Hudson, containing causes of statelessness and without qualifying "national" with "considered." Notwithstanding this difference, the framers of the 1954 Statelessness Convention chose Hudson's definition despite the reservations of States like Israel and Norway.<sup>67</sup>

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58. See generally Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. Nos. E/CONF.17/SR.1 to E/CONF.17/SR.15.

59. The President of the Conference (Denmark) and the representatives of Australia, Belgium, Brazil, Germany, France, Israel, and the UK formed the committee. See Final Act of the United Nations Conference on the Status of Stateless Persons, at 120, New York, Sept. 26, 1965, <https://www.refworld.org/pdfid/3ae6b3840.pdf> (last visited Apr. 15, 2019).

60. See debates in U.N. Doc. No. E/CONF.17/3, pages 5 onwards; see also U.N. Doc. No. E/CONF.17/21. States were concerned about the relationship between the definition of statelessness and the concept of a refugee. States resolved to draft a definition of statelessness that would exclude persons who are or could become subject to the refugee treaty.

61. ROBINSON, *supra* note 48.

62. *Id.*

63. *Id.*

64. *Id.*; see Report on Nationality, Including Statelessness by Manley O. Hudson, Special Rapporteur, at 17, U.N. Doc. A/CN.4/50 (Feb. 21, 1952). ("Stateless persons in the legal sense of the term are persons who are not considered as nationals by any State according to its law.")

65. Hudson, *supra* note 64.

66. United Nations, *A Study of Statelessness*, *supra* note 52, at 7. (The study also advances that: "Stateless persons *de facto* are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.")

67. ROBINSON, *supra* note 48. Israel argued that the definition should be about the State's lack of proof of a person's citizenship. Meanwhile, Norway foresaw that the "negative aspect" would affect a person's ability to claim stateless status.

This abbreviated history reveals decisions that were path-determinative for the contemporary understanding of statelessness. The decisions taken, among others, conceptually defined refugees separately from stateless persons. States also took a very particular approach to defining statelessness that would later have implications on the interpretation and application of the definition, which is discussed in Part II.C of this Article.

#### *International Law's Definition*

The stateless individual has been compared to a *res nullius* (a thing that does not belong to anyone), a flotsam, a vessel on the open sea not sailing under the flag of a State, a *caput lupinum* (an outlaw), a bird that flies alone, and an international vagabond.<sup>68</sup> Under international law, however, a person is stateless when they are "not considered as a national by any State under the operation of its law."<sup>69</sup> All States are generally bound by this definition as a matter of customary international law.<sup>70</sup>

States opted for the de jure definition of statelessness over what was perceived to be an unclear, ambiguous de facto one.<sup>71</sup> According to Edwards and van Waas:

Despite the preceding work of the ILC to deal with the distinctions between de jure and de facto statelessness, and the passionate appeal by the Special Rapporteur Roberto Cordova to include both categories in any instrument, the Conference decided only to cover 'de jure' stateless persons. As discussed further herein, this definition requires establishing a negative condition, which can make it particularly complex to apply in practice. Nevertheless, the non-binding Final Act of the Conference called on States parties to accord to persons who have

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68. Myers McDougal, Harold Lasswell & Lung-chu Chen, *Nationality and Human Rights: The Protection of the Individual in External Areas*, 83 YALE L. J. 900, 961 (1974).

69. 1954 Statelessness Convention, *supra* note 16, at art. 1(1).

70. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, U.N. Doc. A/61/10, at 49 (2006). Although this statement was made when there was comparatively less State action on statelessness, to the ILC's mind, the definition expressed a customary rule probably because of the action of States in ratifying and accepting the definition that did not allow reservations. To contextualize this, however, the ILC made this statement in the articles on diplomatic protection.

Customary law is established from a widespread, consistent State practice and *opinio juris*. *Opinio juris* is the manifestation of the normative legal force of a principle. See *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, 44 (Feb. 20) [hereinafter "North Sea"]. Before a treaty provision can create a customary norm, there are a number of conditions that must be established, including the normative character of the treaty provision; widespread and representative participation in State practice, especially the most affected States; and the extensiveness of the practice and virtual uniformity. *Id.* at ¶¶ 73–74.

71. Edwards & van Waas, *supra* note 30, at 295–96. For a brief discussion of the other categories of persons who are excluded from the application of the 1954 Convention, see Budislav Vukas, *International Instruments Dealing with the Status of Stateless Persons and of Refugees*, 8 REV. B.D.I. 143, 168–70 (1972).

renounced the protection of their nationality for valid reasons (de facto stateless persons) the benefits of the Convention.<sup>72</sup>

At the heart of the 1954 Statelessness Convention is the definition in Article 1(1), which embraces an essentialist and deductive approach to defining the term "stateless person." Definitions are among the most basic concerns of international law.<sup>73</sup> In language, definitions can either be essentialist or polythetic as well as deductive or inductive.<sup>74</sup> Essentialist definitions identify the elements necessary for something to be designated as such.<sup>75</sup> By contrast, polythetic definitions do not require all things falling within a definition to have specific common elements.<sup>76</sup> In a famous illustration, philosopher Ludwig Wittgenstein explained that the word "game" does not point to what all games have in common, but allows us to identify things that bear "family resemblances."<sup>77</sup> Deductive definitions articulate a general concept with reference to certain criteria, which identify activities associated with that concept.<sup>78</sup> The definition of statelessness is essentialist because it has two constituent elements that tell us when someone is stateless: (1) "not considered as a national... under the operation of its law;" and (2) "by any State."<sup>79</sup> The two elements must be present. It is deductive in that we refer to the elements as criteria to know whether a person is stateless or not.

The State's vision of statelessness is the converse of citizenship, the latter being understood in the traditional sense as the possession of the formal status of membership of a political and legal entity.<sup>80</sup> If one is not formally a member of the entity, then they are stateless. Thus, international law has adopted a dichotomous vision of citizenship in relation to statelessness: either one is a citizen or not of any State.

States that ratified or acceded to the 1954 Statelessness Convention are parties to the treaty that accept this definition of statelessness. The treaty prohibits

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72. Edwards & van Waas, *supra* note 30, at 291–92; Cordova argued that “de facto statelessness is much worse than de jure statelessness not only quantitatively but also qualitatively.”

73. See, e.g., Ben Golder & Williams George, *What is 'Terrorism'? Problems of Legal Definition*, 27 U.N.S.W.L.J. 270 (2004); T. Jeremy Gunn, *The Complexity of Religion and the Definition of 'Religion' in International Law*, 16 HARV. HUM. RTS. J. 189, 194 (2003); Steven R. Ratner, *Self Defense Against Terrorists: The Meaning of Armed Attack* (Public Law And Legal Theory Working Paper Series, Working Paper No. 270, (2012)).

74. Gunn, *supra* note 73, at 194.

75. *Id.*

76. *Id.*

77. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 15 (G. E. M. Anscombe trans., 3rd ed. 1968).

78. Golder & George, *supra* note 73, at 273, 286 (as Golden and George explain, deductive and inductive approaches may also be combined within a single definition).

79. UNHCR, *HANDBOOK ON PROTECTION OF STATELESS PERSONS* 11 (2014) [hereinafter "UNHCR, HANDBOOK"].

80. See Richard Bellamy, *Introduction: The Theories and Practices of Citizenship*, in *CITIZENSHIP: CRITICAL CONCEPTS IN POLITICAL SCIENCE* 1, 2 (Richard Bellamy & Madeleine Kennedy-Macfoy ed., 2014).

reservations to the definition, ensuring it has a normative character.<sup>81</sup> While the 1954 Statelessness Convention has one of the poorest ratification and accession records among all human rights treaties,<sup>82</sup> it is mostly subscribed to by Western liberal democracies.<sup>83</sup> Consequently, a worldwide campaign has encouraged new ratifications from countries in Latin America, Asia, Africa, and Oceania.<sup>84</sup> Since 2010, some twenty-seven States either ratified or acceded to the treaty, representing almost thirty percent of State parties to the treaty.<sup>85</sup> It seems, on this metric, that States have largely accepted or are increasingly accepting the binding force of the definition.

In addition, supranational entities like the Council of Europe now adopt the definition.<sup>86</sup> The UN hailed the definition as the treaty's "most significant contribution to international law."<sup>87</sup> The UN Secretary-General has released a guidance note on the UN and statelessness, explicitly declaring that the definition is universally accepted and has established an internationally-recognized status.<sup>88</sup> UN specialized agencies, such as the UN High Commissioner for Refugees (UNHCR), routinely turn to the treaty definition when talking about statelessness.<sup>89</sup> The Inter-Parliamentary Union (IPU), a global organization of national parliaments,

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81. 1954 Statelessness Convention, *supra* note 16, art. 38(1).

82. As of this writing, the 1954 Statelessness Convention has 97 States parties. See United Nations Treaty Collection, *Chapter V Refugees and Stateless Persons*, [https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en) (last visited Aug. 24, 2020).

83. SRINI SITARAMAN, STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES 124 (2009).

84. Nour Dados & Raewyn Connel, *The Global South*, 11 KEY CONCEPTS IN SOC. RSCH. (2012), <https://journals.sagepub.com/doi/pdf/10.1177/1536504212436479>.

85. United Nations Treaty Collection, *Chapter V Refugees and Stateless Persons*, *supra* note 82.

86. Council of Europe Convention on Avoidance of Statelessness in Relation to State Succession, Jan. 5, 2009, CETS No. 200, Article 1(c) (incorporating a definition of statelessness that mirrors Article 1(1) of the 1954 Statelessness Convention).

87. UNHCR, *Introductory Note to the Text of the 1954 Convention Relating to the Status of Stateless Persons*, Sept. 28, 1954, 360 U.N.T.S. 3, [https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons\\_ENG.pdf](https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf) (last visited Apr. 15, 2014).

88. UNITED NATIONS, *The United Nations and Statelessness: Guidance Note of the Secretary-General* 4 (2011), <https://www.un.org/ruleoflaw/files/FINAL%20Guidance%20Note%20of%20the%20Secretary-General%20on%20the%20United%20Nations%20and%20Statelessness.pdf> (last visited Apr. 15, 2019) [hereinafter "UNITED NATIONS, *Guidance Note*"] (listing the identification and protection of stateless persons and the prevention and reduction of statelessness as action points).

89. See UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII)* (2006), <https://www.unhcr.org/excom/ex-conc/453497302/conclusion-identification-prevention-reduction-statelessness-protection.html> (last visited Apr. 15, 2019); see also UNHCR, *UNHCR Action to Address Statelessness: A Strategy Note* (2010), <https://www.unhcr.org/protection/statelessness/4b960ae99/unhcr-action-address-statelessness-strategy-note.html> (last visited Apr. 15, 2019).



accepts it as *the* definition of statelessness.<sup>90</sup> As we shall see later, authorities around the world increasingly recognize the definition—but with variations—whether in pronouncements as to the content of the law, or in judicial and administrative decisions and opinions on statelessness determinations.

Legal scholars likewise endorse the definition. Guy Goodwin-Gill, for instance, referred to the definition as a description of the stateless person in international law.<sup>91</sup> Alice Edwards has taken the position that the definition is descriptive of the situation of *de jure* stateless persons.<sup>92</sup> Laura van Waas submits that it is the official and internationally endorsed definition of statelessness.<sup>93</sup>

### *Interpretations of the Definition of Statelessness*

The literature on legal statelessness prescribes at least two standard interpretations of the statelessness definition. This Section highlights the two top-line approaches, according to competing schools of thought on the matter in legal literature. The idea that there are largely only two ways to interpret the definition is the orthodox view in international law. However, interpretation in international law is a rhetorical enterprise, which involves matters of choice and of values and can enable us to generate new insights.<sup>94</sup>

#### *The First Approach*

The first approach regards the definition as purely objective: a person is stateless if no State considers them a national under its law.<sup>95</sup> The value is put on what the domestic laws of the relevant States provide. A person claiming stateless status must prove that no State recognizes them as a national.<sup>96</sup> According to this

90. See INTER-PARLIAMENTARY UNION, NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS (2005).

91. See Guy Goodwin-Gill, *Stateless Persons and Protection Under the 1951 Convention (or Refugees, Beware of Academic Error!)* 4 (1992), [http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:979](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:979) (last visited Apr. 16, 2019) (referring to the definition in response to James Hathaway's position on stateless status vis-à-vis refugees).

92. Alice Edwards, *Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination Against Women*, Background Paper for a Joint UNHCR and United Nations Committee on the Elimination of Discrimination against Women Seminar, held at the United Nations in New York, Jul. 16–17, 2009, at 17 (Apr. 2009); see also Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 156, 171 (1998) (Article 1 contains a description of statelessness).

93. VAN WAAS, *supra* note 51, at 228 (Mark Manly's position seems to reflect van Waas's stand on the issue).

94. Ian Scobbie, *Rhetoric, Persuasion, and Interpretation in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 71, 75 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015) (For instance: "should one argue that the text is clear in the light of the treaty's object and purpose; or should it be read in the light of the parties' subsequent practice; or that recourse should be made to the *travaux préparatoires* to clarify matters?").

95. ROBINSON, *supra* note 48.

96. *Id.*

view, the phrase "operation of its law" was inserted into Article 1(1) of the 1954 Statelessness Convention to cover people who lost their nationality automatically through the application of law and people who lost their nationality through the application of a rule (e.g., an executive act).<sup>97</sup> Whether a person is stateless depends on a point of law, "an arguably unremarkable approach since nationality is itself a *legal* connection between a person and a [S]tate."<sup>98</sup>

Under this first approach, statelessness is a question of law. Whether a State includes or excludes someone through the blackletter law is controlling. This mandates a strict, textual reading of the relevant laws. The IPU gives the impression that it endorses this view because Article 1(1) is a "strictly legal definition"<sup>99</sup> binding on all States. To illustrate, if A's status is under determination, the determination officers of State Y would have to check the laws of all relevant States to know if A is not considered a national under the laws of those States. Relevant States are usually those States in which A has an important life connection (for example, birth and parentage, or where A lives or lived). Take for example that one such State is State X. If State X's *law* provides that all persons born in its territory are automatically citizens of State X, and A was born in the territory of State X, then A is not stateless because A is a citizen of X.

### *The Second Approach*

The second approach, endorsed by UNHCR, is rooted in the renewed attention to statelessness. In 2010, UNHCR organized an expert meeting in Prato, Italy on the concept of statelessness.<sup>100</sup> The meeting's summary conclusions stressed the importance of interpreting the definition in line with the 1954 Statelessness Convention's object and purpose.<sup>101</sup> At the meeting, scholars' views were taken into account on how the definition should be interpreted.<sup>102</sup> UNHCR's position was that a more holistic interpretation is best, paying due regard to the ordinary meaning of the term "statelessness," but at the same time, examining the elements of the definition.<sup>103</sup>

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97. *Id.*

98. VAN WAAS, *supra* note 51, at 20.

99. INTER-PARLIAMENTARY UNION, NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS 10 (2005).

100. See UNHCR, *Expert Meeting, The Concept of Stateless Persons under International Law: Summary Conclusions*, (May 27–28, 2010), <http://www.unhcr.org/4cb2fe326.pdf> (last visited Apr. 15, 2019) [hereinafter "UNHCR, *Expert Meeting*"].

101. *Id.* at 2.

102. *Id.*

103. *Id.*

Under this second approach, statelessness is a mixed question of law and fact, putting greater value on the "operation of law" clause of the definition.<sup>104</sup> This approach takes into account the law as applied to a specific case and rejects a purely formal analysis. Law refers to legislation, decrees, regulations, orders, and case law.<sup>105</sup> The law is not just the constitution or citizenship statute of a State. According to UNHCR, the word "operation" in the definition of statelessness "requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status."<sup>106</sup> This approach reflects the general principles of law set out in Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.<sup>107</sup>

To illustrate, if A's status is under determination by State Y, the determination officers of State Y would have to check the laws of relevant States to know if A is *not considered a national under the laws* of those States. If State X's law provides that all persons born in its territory are citizens, and A was born in the territory of State X, it cannot be readily concluded that A is not stateless by being a citizen of State X. It may well happen that despite the provision of the law of State X, A is *not considered* a citizen by State X. To be determined stateless, other evidence would have to show that State X does *not consider* A as its citizen under the *operationalization* of its law and that no other State in the world considers them a citizen. Stated otherwise, there must be some *negative evidence* to show and prove that A is stateless. UNHCR explains that a State may not follow the letter of the law in practice.<sup>108</sup> In fact, a state may ignore the law's substance.<sup>109</sup>

There is, however, a problem with proving "nothing." What counts as negative evidence is not clear. UNHCR tells us that the evidence can be one of two kinds: evidence relating to the individual's personal circumstances or evidence concerning the laws and other circumstances in the States concerned.<sup>110</sup> In its determination, the State does not look to its own laws, but primarily looks at the

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104. UNHCR, HANDBOOK, *supra* note 80, at 12. See Betsy Fisher, *The Operation of Law in Statelessness Determinations under the 1954 Statelessness Convention*, 33 WIS. INT'L L. J. 254 (2015) (contending that "operation of law" is not just nationality law, but also other legal provisions including civil registration law and state practice, and that a totality approach is necessary).

105. See, e.g., European Convention on Nationality, art. 2(d), Nov. 6, 1997, E.T.S. No. 166.

106. UNHCR, HANDBOOK, *supra* note 79, at 12.

107. Accordingly, the Hague Convention provides:

Article 1. It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State.

Convention on Certain Questions Relating to the Conflict of Nationality, arts. 1–2, Apr. 13, 1930, 179 L.N.T.S. 89.

108. UNHCR, HANDBOOK, *supra* note 79, at 13.

109. *Id.*

110. *Id.* at 32.

laws of another. If the State wants to be exhaustive in its determination, it must look at the laws of all the States in the world.<sup>111</sup> Of course, the most direct piece of evidence is a letter or statement from all States declaring that A is not their citizen. But such a letter or statement is difficult to obtain. Moreover, not every piece of evidence is as clear and direct in evidencing statelessness. For example, a passport could be evidence of citizenship or a mere passport of convenience. A person may possess a travel document but not be a citizen. A person could have a voting document but not be actually allowed to vote. A birth certificate could explicitly state one's citizenship or merely state the citizenship of one's parents. Additionally, a State does not have the duty to cooperate with another State's determination of statelessness. The current definition of statelessness privileges State gaze, which is the State's vicarious view of another State's perception of an individual. As I discuss more specifically in Part II.B.2, this view is fraught with danger.

*More Alike than Different: Some Preliminary Critiques of the Orthodoxy*

How different are the two approaches from each other? I submit that they are more alike than different. First, unlike the first approach, the second approach professedly attempts to broaden the number of people considered legally stateless by emphasizing that people *not considered* citizens by any State under the *operation* of its law are stateless. The premise is that:

Applying this approach of examining an individual's position in practice may lead to a different conclusion than a purely formalistic analysis of the application of a country's nationality laws to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to "law" in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when implemented in practice.<sup>112</sup>

But it does not necessarily follow that the application of the second approach broadens the number of people considered stateless. It cannot plausibly do so because of the explicit State-centered language of the definition and is thus still like the statist orientation of the first approach. The Hague Convention, which inspired

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111. *Id.* at 32–33 (UNHCR provides a non-exhaustive list of the types of evidence that may be pertinent: testimony of the applicant, responses from another State's authorities, identity documents (ex. birth certificate, extract from the civil registrar, national identity card, voter registration), travel documents, documents regarding applications to acquire nationality or obtain proof of nationality, certificate of naturalization, certificate of renunciation of nationality, marriage certificate, military service record, school certificates, medical certificates/records, record of sworn oral testimony of neighbors and community members, etc.).

112. *Id.* at 13. (To quote the UNHCR, what matters is the State's position: "Where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national.").

the second approach, itself works from the premise of State discretion,<sup>113</sup> as the Hague Convention primarily promotes deference to the State.<sup>114</sup>

Second, the first approach emphasizes the law, while the second approach emphasizes both the law and the facts attendant to the individual's circumstances. However, applying the first approach also compels the determiner to examine an individual's factual circumstances. In determining statelessness, an individual or group of individuals presents their case before a determination officer—either a judge or an administrative officer—who considers their personal circumstances. Whether in the first or second approach, a State cannot determine an individual's citizenship status without an analysis of the attendant facts and their personal circumstances. If State Y determines A's citizenship status, it would have to determine if A is born in State X to ascertain which relevant provisions of State X's law must be included in its analysis. State Y has to consider A's life events and personal and family histories, including their residence, work, education, and other intimate details of life, from the most banal to the monumental. Otherwise, an adjudicator would not know which provisions of law are relevant to their analysis. Both approaches thus involve mixed questions of law and fact.

Perhaps what the second approach ultimately does, or hopes to do, is urge the State to exercise due diligence in fulfilling its obligations under the 1954 Statelessness Convention by engaging the State to look more carefully at the individual's situation whose citizenship or stateless status is under determination. In the second approach, the State is encouraged to be more diligent and look into a myriad of evidence, mainly documentary and oral evidence or narratives, relating to the facts and circumstances of the individual and the laws of other States. However, there are still significant challenges to the execution of the statelessness regime under the two approaches. For example, in both approaches, it is challenging to ascertain the information relevant for determining non-citizenship or stateless status. Here, negative evidence is required, and it is highly dependent on the cooperation other States. At minimum and depending on the situation, without direct, relevant, and clear evidence from other States, a determining State may merely have perceptions of people's status.

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113. See Peter Spiro, *Citizenship, Nationality, and Statelessness*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 281, 283 (Vincent Chetail & Céline Bauloz eds., 2014).

114. McDougal et al., *supra* note 68, at 914–15; see also *Nottebohm Case* (Liechtenstein v. Guatemala), Second Phase, 1955 I.C.J. 1, 4 (Apr. 6) [hereinafter "*Nottebohm Case*"]; *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7) [hereinafter "*Nationality Decrees Case*"].

*It's A Statist World, After All: Constituting Statelessness Within and Without  
Circles of Citizenship*

1. *Identification of Statelessness*

States create procedures used to identify stateless persons. During a "stateless status determination," the State formally identifies stateless persons falling either under the 1954 Statelessness Convention's definition or another definition chosen by the State. At the moment, most States do not have a consistent or formal procedure for identifying statelessness in their national jurisdictions.<sup>115</sup> Even States that are parties to the 1954 Statelessness Convention lack such procedures.<sup>116</sup> Only a few determination machineries exist.<sup>117</sup> Other less recognized means of identification of statelessness include quantitative methods—such as censuses, surveys, and the Delphi method—and qualitative methods—such as focus groups, semi-structured interviews, participatory assessment, and life histories.<sup>118</sup>

Identification procedures are important for several reasons. First, identification procedures aid the State in complying with international obligations. Identifying people entitled to the protection of the 1954 Statelessness Convention is the paramount initial step in protecting stateless persons and eradicating statelessness.<sup>119</sup> While the 1954 Statelessness Convention does not explicitly obligate the

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115. Edwards & van Waas, *supra* note 30, at 296.

116. Gyulai, *supra* note 23, at 122–23; see *X v. The Mayor and City Council Members of the City of Utrecht*, 201302776/1/A3, The Netherlands: Council of State (Raad van State) (2014), [http://www.refworld.org/cases,NTL\\_COS,539085a64.html](http://www.refworld.org/cases,NTL_COS,539085a64.html) (last visited Apr. 15, 2019) (explaining that because there is no procedure to determine whether a person without a nationality is stateless, such persons cannot claim the protection of the 1954 Statelessness Conventions or relevant Dutch legislation).

117. See generally Gyulai, *supra* note 23, at 122. Mechanisms for protection can be grouped into five categories: (1) statelessness-specific mechanisms based on clearly established procedural rules; (2) statelessness-specific mechanisms without clearly established procedural rules, but with a general "consensus" on procedural modalities; (3) statelessness-specific mechanisms without clearly established procedural rules in law and without general consensus; (4) non-statelessness-specific mechanisms where legal and/or practical obstacles to expulsion provide grounds for residence rights; and (5) no protections available. *Id.* As Gyulai explains, "a handful of countries already have specific identification and protection mechanisms in place (including France, Georgia, Hungary, Italy, Latvia, Mexico, Moldova, the Philippines, Spain, and the United Kingdom." *Id.* at 123; cf. *R (on the application of Semeda) v. Secretary of State for the Home Department* (statelessness; Pham [2015] U.K.S.C. 19 applied) I.J.R. [2015] U.K.U.T. 00658 (I.A.C.) [hereinafter "*Semeda Case*"] (referencing previous decisions that cited and deferred to UNHCR's guidance and position).

118. See UNHCR, *Guidance Document on Measuring Stateless Populations*, <https://www.refworld.org/pdfid/4f6887672.pdf> (last visited May 19, 2020).

119. See Michelle Foster et al., *Part One: The Protection of Stateless Persons in Australian Law - The Rationale for a Statelessness Determination Procedure*, 40 MELB. U. L. REV. 401, 445–46 (2016) (arguing that the introduction of a specific status determination procedure in Australia could meet the dual objectives of identifying stateless persons and conferring a status that accords rights and the potential for naturalization); Ayane Odagawa et al., Study Group on Statelessness in Japan,

State to establish a procedure to determine statelessness, the State cannot effectively implement the treaty's provisions without a mechanism for identifying its beneficiaries.<sup>120</sup> Only after the State identifies stateless persons can it confer an established status and accord basic rights under the 1954 Statelessness Convention. This process also creates potential naturalization in accordance with international law.<sup>121</sup>

Second, identification procedures open the door for the international community to enforce rights-related duties that apply to individuals who lack citizenship. The human dimension of statelessness affects lives and goes beyond basic State interests. Many studies portray the human impact of lacking citizenship.<sup>122</sup> People without citizenship often lack formal identities, and consequently, are often not entitled to the protection (diplomatic or otherwise) that is extended to citizens. The stateless are unable to exercise and enjoy such basic rights as the right to an education, the right to vote, the right to work, and access to basic social services.<sup>123</sup>

Third, identification procedures impact the rights to which a person is entitled. The protections and rights codified in the 1954 Statelessness Convention are not the same as the rights of citizens.<sup>124</sup> The 1954 Statelessness Convention does not have an omnibus bill of rights for stateless people. It only provides what international law considers to be the bare minimum rights for the stateless. Therefore, if a person is determined to be stateless, they are entitled only to the rights in the 1954 Statelessness Convention—assuming other customary and treaty State obligations do not apply. For instance, the 1954 Statelessness Convention does not guarantee the right to vote or the right to political participation for a stateless individual. In the same manner, these individuals are generally entitled to practice

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*Typology of Stateless Persons in Japan* 150 (Dec. 2017) (arguing that it is essential to identify stateless persons in Japan to protect them); UNHCR, *Note on International Protection*, ¶ 33, U.N. Doc. No. EC/SC/69/CRP.8 (Jun. 4, 2018) (stating that statelessness determination "assists States in fulfilling their commitments" under the 1954 Statelessness Convention).

120. See Katja Swider & Maarten den Heijer, *Why Union Law Can and Should Protect Stateless Persons*, 19 EUR. J. MIGRATION & L. 101, 109 (2017) (analogizing to the 1951 Refugee Convention, which does not contain an explicit obligation to establish a refugee status determination procedure, but which States have recognized as creating an implied duty).

121. See Foster et al., *supra* note 119.

122. There have been several studies on the impact of statelessness, with some studies using different definitions. One of the earliest was UN-sponsored, which used the traditional definition from the 1940s. See Report on Nationality, Including Statelessness by Manley O. Hudson, Special Rapporteur, at 17, U.N. Doc. A/CN.4/50 (Feb. 21, 1952). See, e.g., Manly van Waas & Berry, *Statelessness*, p. 2; UNHCR, *I am Here, I Belong*.

123. Hudson, *supra* note 122, at 19–20.

124. Depending on the right concerned, the 1954 Statelessness Convention establishes minimum standards of treatment along the following scale: (1) "treatment which is to be afforded to stateless persons irrespective of the treatment afforded to citizens or other aliens;" (2) "the same treatment as nationals;" (3) "treatment as favorable as possible, and in any event, not less favorable than that accorded to aliens generally in the same circumstances; and" (4) "the same treatment accorded to aliens generally." UNHCR, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level* 3–4 <https://www.refworld.org/docid/5005520f2.html> (last visited Nov. 26, 2019).

their professions in the State that protects them or admits them, but only to the same degree as other non-citizens. On the other hand, if these individuals are determined to be citizens of another country, they are, in theory, entitled to citizen rights of that country. Assuming they are not disqualified, citizens are entitled to vote and participate in public affairs.<sup>125</sup> They are also allowed to practice their professions if able, duly authorized, and capacitated to do so.<sup>126</sup> Citizen rights offer higher protection and more entitlements than the rights of the stateless. Either way, identification procedures guarantee at least some legal protection.

#### *The Constitutive Nature of Statelessness Identification*

It has been asserted that identification procedures only declare an existing status because determinations only formally recognize people who are already stateless.<sup>127</sup> My position is different: identifying statelessness constitutes the status of persons, and therefore affords them the rights allocated to that status by the 1954 Statelessness Convention. By its very nature, the definition in the 1954 Statelessness Convention is constitutive because the State determines whether or not an individual is a citizen within what I call "circles of citizenship." During the determination process, the State or group of States exclude or include a person in their polities. When the State ascertains whether a State or group of States *considers* a person a citizen, the State "gazes" and passes a vicarious *judgment* on that person's status through its own perception of another State or group of States' polities. The determining State can also look into its own polity to consider them a citizen or not. Unlike refugee status, where being persecuted is among the objective crux of determination,<sup>128</sup> States determine who belongs or does not belong inside those circles of citizenship or polities.

To illustrate, when State Y wants to determine A's citizenship status, it must determine whether State X (assuming X is the only State with a connection to A) considers A a citizen or not. In the course of the determination process, State Y passes judgment based on the laws, life events, and personal and family histories of A. State Y generates its own perception of State X's circle of citizenship and whether State X considers A to belong within it. Or, State Y could directly ask State X if it considers A a citizen or not. Assuming that State X replies in the negative (even if A believes they are a citizen of State X), A is deemed a stateless person.

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125. ICCPR, art. 25(b), Dec. 19, 1966, 999 U.N.T.S. 171.

126. Stateless persons are also allowed to practice their professions, but only if they are "lawfully staying" in the territory of the State, among other conditions. *See* 1954 Statelessness Convention, *supra* note 16, art. 19.

127. UNHCR, HANDBOOK, *supra* note 79, at 10 ("An individual is a stateless person from the moment that the conditions in Article 1(1) of the 1954 Convention are met. Thus, any finding by a state or UNHCR that an individual satisfies the test in Article 1(1) is declaratory, rather than constitutive, in nature.")

128. *See* 1951 Convention Relating to the Status of Refugees, art. 1(1).



What I refer to as "circles of citizenship" resonates with what political and social theorists call "imagined communities."<sup>129</sup> Citizenship is membership to imagined communities that States create. One of the oldest civilizations, Rome, began as an "association" that was initially comprised of stateless peoples.<sup>130</sup> In Michael Ignatieff's contemporary classic, *The Myth of Citizenship*, citizenship is described as a "noble myth," a reminder that, from its conception, citizenship is an "exclusionary category" that justifies the coercive rule of the included over the excluded.<sup>131</sup> The anthropological perspective accepts that States "legibilize" populations when they imagine polities. Legibility is related to statecraft—the management of State affairs; statecraft's authority lies in the "distinct power to define citizenship membership in the social whole."<sup>132</sup> In his influential book, *Seeing Like a State*, anthropologist James Scott demonstrates the modern State's ability to "legibilize" populations and territories by simplifying and standardizing measurement and documentation according to its view.<sup>133</sup>

If citizenship is a construct of the State, then so is statelessness. Noora A. Lori writes that because the world's outlier populations do not neatly align with State configurations, most States have populations that do not fit into their imagined communities—that is, the dominant national narratives of what the States look like.<sup>134</sup> Consequently, States have resorted to three options when responding to these populations: "incorporate, expel, or ignore."<sup>135</sup> When States ignore them, they become "invisible in the [S]tate's legal self-image."<sup>136</sup> The result is statelessness, as these populations are excluded from the States' circles of citizenship.

Statelessness determination is one process through which States create and re-create imagined communities. At the moment of determination, the State decides whether an individual is a member of the imagined communities of States, thereby changing or maintaining the configuration of the circles. A configuration is changed if a person is excluded or included. Circles can have thick or thin

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129. See, e.g., BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6, 25 (1983).

130. JOY CONNOLLY, *THE STATE OF SPEECH: RHETORIC AND POLITICAL THOUGHT IN ANCIENT ROME* 87 (2007).

131. Michael Ignatieff, *The Myth of Citizenship*, in *CITIZENSHIP: CRITICAL CONCEPTS IN POLITICAL SCIENCE* 137, 140 (Richard Bellamy & Madeleine Kennedy-Macfoy eds., 2014).

132. See Janet Coleman, *Citizenship and the Language of Statecraft*, in *FINDING EUROPE: DISCOURSES ON MARGINS, COMMUNITIES, IMAGES* 223–53 (Anthony Molho, Diogo Ramado Curto & Niki Koniordos eds., 2007) (For an excellent exposition of how citizenship and its relationship to statecraft had been variously defined, spanning from the period of the Christian Roman imperial statecraft as experienced and described by St. Augustine to its much later realizations during the 17th and 18th centuries, and arguing that in some way, these conceptions continue to the present).

133. See generally JAMES SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998).

134. Noora A. Lori, *Statelessness, 'In-Between' Statuses, and Precarious Citizenship*, in *THE OXFORD HANDBOOK OF CITIZENSHIP* 743, 748 (Ayelet Shachar et al. eds., 2017).

135. *Id.*

136. *Id.*

boundaries; they can be permeable or airtight; they can overlap concentrically or form a Venn diagram. They can also vary in the firmness of their qualifications and disqualifications, as well as in their prerogatives and discretions. By this, I mean that they can allow multiple citizenships, identities, and permutations. Circles can also be stand-alone, thereby preventing dual or multiple citizenships.

It has long been acknowledged that a law containing norms could be constitutive: "The law constitutes when it composes, constructs, or forms."<sup>137</sup> Constitutive norms "define an identity."<sup>138</sup> The law can also be the tool to constitute something and someone;<sup>139</sup> in this case, statelessness and stateless persons. The policy school of international law acknowledges lawmaking as a constitutive process:<sup>140</sup> in international relations, particularly in constructivism, States engage in constitutive practices.<sup>141</sup> One such practice, I argue, is the State's determination of whether a person is a citizen, which effectively determines that person's status as stateless or otherwise.

## II.

### THE REALITY: STATELESSNESS AS RHETORIC

In this section, I propose arguments for revisioning the definition of statelessness. This section moves away from the top-line, dominant approaches to interpreting statelessness, and instead shifts to a searching, critical interpretation and application of the definition. Although the 1954 Statelessness Convention strives to secure for stateless people "the widest possible enjoyment of their human rights and regulating their status,"<sup>142</sup> international law's definition in the treaty has been an avenue for the State to engage in rhetoric around citizenship and statelessness. I argue for a new statelessness definition that draws insights from critical rhetoric as a theory to analyze international law's definition of statelessness as applied in stateless status determination cases.

#### A. Critical Rhetoric as Theory

Critical rhetoric is used in this Article as an aid to theorize about the definition of statelessness as a concept. Critical rhetoric provides a set of

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137. See, e.g., John Brigham, *The Constitution of Interests: Institutionalism, CLS, and New Approaches to Sociolegal Studies*, 10(2) *YALE J. L. & HUM.* 421–22 (1998).

138. Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23(1) *INT'L SEC.* 171, 193 (1998).

139. *Id.*

140. ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 11 (2007).

141. See Hopf, *supra* note 138, at 1983.

142. See UNHCR, *Expert Meeting*, *supra* note 100, at 2.

methodological principles that inform our subsequent analysis.<sup>143</sup> For our purposes, this article utilizes critical rhetoric to theorize about the concept of a "stateless person" as articulated in the definition in the 1954 Statelessness Convention. Through critical rhetoric, legal artifacts (i.e., decisions and rulings) can be critiqued to uncover meanings.<sup>144</sup> Subjectivities can be exposed.<sup>145</sup> Within the critical humanist paradigm of communication studies, critical rhetoric assumes that reality is socially constructed.<sup>146</sup> Since lack of citizenship is a social construction—determined by, for, and because of the State—this lens sheds light on the discourse surrounding statelessness. States determine statelessness for, among other reasons, the purposes of treaty compliance, and people are stateless because of their perceived non-admission into the States' circles of citizenship.

Critical rhetoric has been used in legal studies.<sup>147</sup> Considering power relations imprinted in the legal text, critical rhetoric is "capable of indicating and specifying the political dimensions of legal language and further capable of explaining its apparently non-communicative qualities . . ." <sup>148</sup> Jeremy Bentham, in his analysis of abstract and uncertain concepts,<sup>149</sup> was one of the earliest scholars to apply critical rhetoric in legal scholarship. Illustratively, Bentham posited that the word *order* is employed in rhetoric to cloak tyranny.<sup>150</sup> Whether in relation to a law that is transitory or permanent, order can be invoked to justify any good or bad action.<sup>151</sup> Bentham showed, using critical rhetoric, that a measure enacted in the maintenance of order can lead to the persecution of individuals.<sup>152</sup> In recent

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143. See generally Raymie McKerrow, *Critical Rhetoric*, in *ENCYCLOPEDIA OF COMMUNICATION THEORY* 235 (Stephen Littlejohn & Karen Foss eds., 2009) (stating the non-exhaustive eight principles of critical rhetoric); see McKerrow, *supra* note 18, at 102–08 for the original articulation of the principles.

144. Marouf Hasian Jr., *Myth and Ideology in Legal Discourse: Moving from Critical Legal Studies Toward Rhetorical Consciousness*, 17 *LEGAL STUD. F.* 347, 349–50 (1994).

145. See Kent A. Ono & John M. Sloop, *The Critique of Vernacular Discourse*, 62 *COMM. MONOGRAPHS* 19, 25 (1995). Their allusion is poignant: "Just as rap, jazz, and black power may not always construct positive representations of culture, Japanese American discourse may not construct positive representations in every instance." *Id.*

146. See Judith Martin & Thomas Nakayama, *Thinking Dialectically About Culture and Communication*, 9 *COMMUN THEORY* 1, 6–9 (1999).

147. E.g., Peter Goodrich, *Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language*, 4 *OXFORD J. LEGAL STUD.* 88, 90 (1984).

148. *Id.* at 90. In this regard, it is "an alternative to the 'authoritarian monologue' of dominant legal discourse which depicts itself as clear, technical and formal, but whose language rests on unarticulated exclusions that reflect power." Rebecca Moosavian, *A just balance or just imbalance? The role of metaphor in misuse of private information*, 7 *J. MEDIA L.* 196, 208 (2015).

149. Goodrich, *supra* note 147, at 88–89.

150. JEREMY BENTHAM, *THE BOOK OF FALLACIES: FROM UNFINISHED PAPERS OF JEREMY BENTHAM, BY A FRIEND* 232 (1824).

151. *Id.* at 232–33.

152. *Id.*

decades, scholars of domestic law have suggested that critical rhetoric could supply important schools of thought with theoretical understanding.<sup>153</sup>

To understand critical rhetoric and its developments, I must briefly explain the theory of ideographs.<sup>154</sup> Ideographs are concepts that possess "force and meaning because of how they constitute and trigger a particular ideology."<sup>155</sup> They are abstract, standing "for beliefs and commitments that constitute ideologies."<sup>156</sup> However, they often have competing and contradictory dimensions.<sup>157</sup> To illustrate, the right to life and the right to choose are presented as oppositional in the abortion debate; gun control and the right to bear arms are positioned as oppositional in the debate over guns in the United States. Guns can be used to both protect and destroy lives.

Since ideographs have the capacity to be used in contradictory ways,<sup>158</sup> critical rhetoric posits that the analysis should recognize discursive indeterminacy.<sup>159</sup> Based on Martin Koskenniemi's idea of radical indeterminacy, international law standards are porous, malleable, and can defend any State's course of action.<sup>160</sup> International law is not free from decisionism; it involves choices.<sup>161</sup> States argue based on choices amidst indeterminacy. Much like ideographs (although he does not call them ideographs), Koskenniemi validates international law's creation of various binarisms—reality is "constituted as language and as such, of binary distinctions."<sup>162</sup> In other words, the language of international law is indeterminate as it creates, sustains, and reinforces ideographs, while the ideographs themselves create and recreate international law.

Proceeding from this, I put forward that States are rhetors who create citizens and stateless persons and constitute status. They pull together the conceived meanings of statelessness, citizenship, or both from fragments of texts. In rhetoric

153. See, e.g., Warren Sandmann, *Critical Legal Studies and Critical Rhetoric: Toward a Reconceptualization of the Acting Human Agent*, 17 *LEGAL STUD. F.* 367, 367 (1994). Despite this call, there remains a dearth in legal literature of scholarship that explicitly takes critical rhetoric as informative of critical approaches to law.

154. STEPHEN LITTLEJOHN, KAREN FOSS & JOHN OETZEL, *THEORIES OF HUMAN COMMUNICATION* 451 (11th ed. 2017).

155. *Id.* at 451–52.

156. *Id.* at 425.

157. *Id.*; see Michael Calvin McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 *Q. J. SPEECH* 1 (1980). McGee observed that "many use the term [ideology] innocently, almost as a synonym for 'doctrine' or 'dogma' in political organizations; and others use the word in a hypostatized sense that obscures or flatly denies the fundamental connection between the concept and descriptions of mass consciousness. The concept seems to have gone the way of the dodo." *Id.* at 1–2.

158. LITTLEJOHN, FOSS & OETZEL, *supra* note 154, at 452.

159. See McKerrow, *supra* note 18, at 98 (adding that ideas and concepts could be reconstructed after discursive indeterminacy is recognized in a critical rhetoric analysis).

160. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 25, 591 (2006).

161. *Id.* at 596.

162. Martti Koskenniemi, *A Response*, 7(12) *GERMAN L. J.* 1103, 1104 (2006).

studies, Aristotle is credited for a normative view of rhetoric centered around the role of the State.<sup>163</sup> Rhetoric is "an expertise in discharging public speaking roles"<sup>164</sup> that is employed as people deliberate on State matters. In the words of Neil MacCormick: "[w]herever there is a process of public argumentation, there is rhetoric."<sup>165</sup> The enterprise includes decisions on laws, policies, and court rulings.<sup>166</sup>

It has long been recognized that argumentation about the organization and management of the State is a rhetorical process.<sup>167</sup> State management, insofar as it entails communicating with others through persuasion, is an exercise of rhetorical power at the most basic level.<sup>168</sup> Why certain management ideas are more widely accepted than others is likewise attributed to rhetoric.<sup>169</sup> The determination of status—who belongs and does not belong in polities—is thus a way in which the State organizes and manages itself. The features of this rhetorical enterprise are analyzed in the next subsections.

On the whole, critical rhetoric prescribes an analysis of power and knowledge to examine an ideograph.<sup>170</sup> The focus is on how power is both marginalizing and productive.<sup>171</sup> What ideologies underlie discourses? What symbolisms, if any, accompany language? How do those symbolisms and ideologies influence the overall rhetoric? Applied to law, "rhetoric creates ideology and ideology creates, empowers and sustains law."<sup>172</sup>

#### *Statelessness as an Ideograph*

The 1954 Statelessness Convention's object and purpose is to protect stateless persons who are not refugees.<sup>173</sup> Scholars interpret this directive as securing stateless persons with "the widest possible enjoyment of their human rights and regulating their status."<sup>174</sup> States are supposed to accord these persons the widest

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163. JAMES DOW, *PASSIONS & PERSUASION IN ARISTOTLE'S RHETORIC* 226 (2015).

164. *Id.* at 65.

165. NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 17 (2005) (arguing "[n]otwithstanding the restriction to what is rationally arguable, the very idea of law as arguable leads us at once to consider the rhetorical character of legal argumentation. Wherever there is a process of public argumentation, there is rhetoric.").

166. JAMES DOW, *PASSIONS & PERSUASION IN ARISTOTLE'S RHETORIC* 65 (2015).

167. CHRISTOPHER HOOD, *THE ART OF THE STATE: CULTURE, RHETORIC, AND PUBLIC MANAGEMENT* 177 (1998).

168. *Id.* at 192.

169. *Id.*

170. McKerrow, *supra* note 18, at 91.

171. *Id.*

172. Inniss, *supra* note 21, at 665.

173. See 1954 Statelessness Convention, *supra* note 16, preamble at 5 (stating that the UN has expressed concern for stateless persons and endeavored to assure them the "widest possible exercise" of rights, and that many stateless persons are not covered by the 1951 Refugee Convention).

174. See UNHCR, *Expert Meeting*, *supra* note 100, at 2.

possible rights. A few States, including the UK, even stress full compliance with international obligations under all applicable statelessness treaties (the other global treaty being the 1961 Convention on the Reduction of Statelessness).<sup>175</sup> Others proclaim compliance with all international law norms,<sup>176</sup> or with regional human rights treaties and statelessness treaties.<sup>177</sup> Some add humanitarian traditions.<sup>178</sup> The professed objectives underlying these proclamations appear commendable.

The reality, however, is that statelessness is used to provide rights to the excluded, but is simultaneously deployed in tyranny to subject people to the rule of the State without the status of citizenship. When the State constitutes one to be stateless, the State is declaring that they have official status as "stateless" and are entitled to rights under the 1954 Statelessness Convention, constituting their exclusion from politics but according them only very limited rights. A stateless person receives the protection of the State, albeit in a limited and abstruse sense. Furthermore, when the State constitutes one as stateless, the State could declare them a thrall subject to the State's rule with very limited rights to participate in society. According to Matthew J. Gibney, based on the principle of subjection, everyone "living under or subject to" the laws of a State should be members of the polity.<sup>179</sup> State rule "is legitimate only if the people consent to its rule, and decisions are only legitimate if those affected by them are consulted and involved in the decision-making process."<sup>180</sup> Therefore, when stateless people are mandated to follow the laws of the State but are accorded no voice in State affairs and

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175. U.K. BORDER AGENCY, *Home Office Instruction*, 6 (2016), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/501509/Statelessness\\_AI\\_v2.0\\_EXT\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/501509/Statelessness_AI_v2.0_EXT_.pdf) (last visited May 2, 2019) [hereinafter "U.K. BORDER AGENCY, *Home Office Instruction*"].

176. Law of Georgia on the Legal Status of Aliens and Stateless Persons, art. 1, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/99405/118651/F-1390570618/GEO99405%20Eng.pdf> (last visited Apr. 15, 2019). Georgia also refers to rights and freedoms guaranteed under its Constitution.

177. See the Republic of Panama's *Ministerio de Relaciones Exteriores' Decreto Ejecutivo Numero 10 (de 16 de Enero 2019)*, Preamble. Panama refers to the norms of international law, the American Convention on Human Rights, and the statelessness conventions. Panama has explicitly declared that the purpose of determining statelessness is to ensure the widest possible enjoyment of human rights for stateless persons and to provide extraterritorial effect to the status of a stateless person. *Id.*, ch. 1, arts. 2–3. Interpretation should largely favor the person applying for stateless status. *Id.*, ch. 1, art. 4.

178. See the Republic of the Philippines' *Department Circular No. 58, series of 2012: Establishing the Refugee and Stateless Status Determination Procedure*, sec. 2 (asserting consistency with "the laws, international commitments and humanitarian traditions and concerns").

179. Matthew J. Gibney, *Statelessness and the Right to Citizenship*, 32 FORCED MIGRATION REV. 50, 51 (2009).

180. *Id.*

only limited rights in the State, the law assumes a tyrannical structure.<sup>181</sup> People become "*subjects but not members* of the political community."<sup>182</sup>

This dichotomy has been the confounding moral tragedy of the law. Under international law, the State can make stateless persons live with only minimum rights and without full participation in society,<sup>183</sup> subject nonetheless to naturalization if required under the law. This has been the situation ever since international law began allowing statelessness to be contingent on the interests and values of States.<sup>184</sup> Because ideographs, such as statelessness, are equivocal and ill-defined, they accommodate "the use of power [and] excuse[] behavior[s] and belief[s]."<sup>185</sup>

### 1. *Vicissitudes of Statelessness*

The ideographic nature of the definition is most pronounced in the vicissitudes of statelessness. Orthodoxy dictates that there are two main ways of interpreting the definition of statelessness. However, despite the international definition of statelessness detailed in Part I.B, not all States have the same understanding of statelessness, even when they refer to the definition in the 1954 Statelessness Convention. Polysemy or "the existence of determinate but non-[singular denotational meanings]"<sup>186</sup> is a direct manifestation of the ideograph.

There are at least three general ways in which States display their polysemic attitudes toward statelessness. Firstly, some States drop the "operation of law" component of the definition, a direct disregard of its customary nature. In civil law jurisdictions, whose laws specifically provide a definition of statelessness, like Georgia and Panama, reference to "operation of law" is completely omitted from the definition.<sup>187</sup> Betsy L. Fisher demonstrated that Australian and New

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181. Odessa Gonzalez Benson & Yoosun Park, *Resettled. Yet Stateless: Elderly Monoglot Refugees in the United States as a Limit Case to Citizenship*, 10 J. HUM. RTS. PRACT. 423, 430 (2018).

182. *Id.*

183. *See supra* note 124, and accompanying text.

184. State interests vary. For example, in the United States, Gerald Neuman's work elucidated that the State looks into ideological qualifications, English-language skills, and renunciation of foreign allegiance. Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 16 IMMIGR. & NAT'LITY L. REV. 83 (1994–1995).

185. *See* McGee, *supra* note 160, at 15. For a reading of citizenship as a "slippery concept," see THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT (Rhoda E. Howard-Hassmann & Margaret Walton-Roberts eds., 2015). While this edited collection uses the term "slippery concept," I argue that citizenship can also be read as an ideograph.

186. Leah Ceccarelli, *Polysemy: Multiple Meanings in Rhetorical Criticism*, 84(4) Q. J. SPEECH 395, 399 (1998).

187. Law of Georgia on the Legal Status of Aliens and Stateless Persons, art. 2(b), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/99405/118651/F-1390570618/GEO99405%20Eng.pdf> (last visited May 6, 2019) (defining a stateless person as "a person who is not considered a citizen by any state under its legislation"). Panama has similarly defined statelessness without reference to operation of law: "A person who is not considered as a national by

Zealand tribunals have also disregarded how law operates in some of their cases.<sup>188</sup> Most States, in theory, deny or grant stateless status based exclusively on reading another State's citizenship law, rather than by analyzing how that law (and other related laws) operates with respect to a particular person. Adjudicators either fail to interpret the definition "properly," are confused with de facto and de jure statelessness, or are dissuaded by the complexities, time, and effort required to make a "proper" analysis of statelessness.<sup>189</sup> But the problem is that State practice can contradict or alter the reading of citizenship laws,<sup>190</sup> and States grant (or withdraw) citizenship at their discretion, even when they are not so authorized under their own laws.<sup>191</sup>

Secondly, other States add or subtract other elements to international law's definition of statelessness. In the United Kingdom, immigration rules add that one cannot be stateless if they are not in the United Kingdom.<sup>192</sup> Canada's approach, another Commonwealth common-law jurisdiction, is to include a stateless person in its definition of "foreign national," as if to say that stateless persons are nationals of another State.<sup>193</sup>

Finally, there could be more eclectic approaches to interpreting the definition that work around and within indeterminacy. Despite the customary nature of the definition, the US Department of State, for instance, refers to a stateless person as "someone who, under national laws, does not enjoy citizenship."<sup>194</sup> The emphasis is on the "enjoyment" of citizenship.<sup>195</sup> In the Czech Republic, a person who is not a Czech citizen is stateless.<sup>196</sup> Hence, although statelessness has a definition in international law, it operates in vagueness.<sup>197</sup>

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any State, according to its legislation, is considered a stateless person." The Republic of Panama's *Ministerio de Relaciones Exteriores' Decreto Ejecutivo Numero 10 (de 16 de Enero 2019)*, ch. 11, art. 5.

188. Fisher, *supra* note 104, at 271.

189. *Id.* at 274–78.

190. *Id.* at 278.

191. See UNHCR, HANDBOOK, *supra* note 79, ¶ 22.

192. Immigration Rules Part 14 <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons>.

193. See Immigration and Refugee Protection Act - S.C. 2001, c. 27 (Section 2) <https://laws.justice.gc.ca/eng/acts/i-2.5/>.

194. U.S. DEP'T OF STATE, *Statelessness*, <https://www.state.gov/other-policy-issues/statelessness/>.

195. Note, however, that US practice is not consistent. US adjudicators rule on a person's status as "somewhat ambiguous" despite a statement from the State concerned that a person is not its citizen. Fisher, *supra* note 104, at 270.

196. Helena Hofmannová, *Legal Status of Stateless Persons in the Czech Republic*, 3 L. Q. 55, 67 (2013).

197. Two State practices are most noteworthy. Hungary's definition looks into the applicant's "national law" without explaining how to determine what a person's national law is. This allows Hungarian agents to pick and choose which laws and instruments to apply. See Hungary's Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, RRTN Section 2 (b),



*Explaining the Ideograph: State Privilege and State Gaze*

In a world that privileges State discretion, States have an opportunity to constructively engage in an ideational imposition of interests and identities in relation to the individual. In communication studies, concepts are the State's agents of social control. States are able to control societies through ideographs, or abstractions with highly contingent meanings open to interpretation and negotiation.<sup>198</sup> This is so with statelessness. Statelessness has no definite meaning but is given the impression of a clear meaning for political positions.

The definition allows what I call State gaze. State gaze is the State's vicarious view of the individual's situation. Through State gaze, the State gazes and passes a vicarious *judgment* on a person's status through its own perception of another State or group of States' politics. Under international law's definition, the presence or absence of statelessness is disappointingly contingent on whether the State *considers* one as a citizen or not. To decide whether a person should be a citizen in a constructivist activity, the State uses a value and interest system. This system entertains factors that in turn have normative and instrumental dimensions that construct "realities."<sup>199</sup> Part II.C describes some of these factors.

Belief takes center stage in State gaze because international law's definition of statelessness relates to whether a State "consider[s]" a person (the referent in discourse) as its national under the operation of its laws.<sup>200</sup> The State's perceptions of other States' actions or inactions, and at limited times, the actions or inactions of the person claiming statelessness, become conclusive. The determining

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<https://www.refworld.org/pdfid/4979cae12.pdf> (last visited May 6, 2019) ("[S]tateless person' shall mean a person who is not recognized as a citizen by any country under his/her national law") [hereinafter "Hungary's Act II of 2007"]. In Latvia, a person is stateless if "some other [S]tate" does not recognize them as a citizen. See Latvia's Law of 2004 on Stateless Persons, sec. 2(1), <https://www.refworld.org/docid/41387c6c4.html> (last visited May 6, 2019) ("A person may be recognised as a stateless person in the Republic of Latvia if some other state has not recognised the person as a citizen thereof in accordance with the laws of such state.")

198. See McGee, *supra* note 157, at 5. See also Inniss, *supra* note 21, at 665–68.

199. See John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 878–79 (1998). For an example of a work on the social constructivism of statelessness, see Jocelyn Kane, *The Social Construction of Statelessness in Canada: A Study of National Media 1930-2011* (2013) (Master's Thesis, Ryerson University).

200. It is not even clear from the international definition of statelessness which States have a stake in the status of a person: the State where they applied for stateless status, a collection of States, or any other third-party state. For an opinion on which States should have a stake in status determinations, see *Sentenza n. 4262/2015*, Italy: Italian Supreme Court (Corte Suprema di Cassazione) (Nov. 4, 2014), [https://www.refworld.org/cases,ITA\\_CC,556da6cf4.html](https://www.refworld.org/cases,ITA_CC,556da6cf4.html) (last visited May 2, 2019). Italy's practice is to look into the country of origin of the person and any countries where they have "relevant links." *Id.* In the UK, Justice McLaughlin opined that "countries who are potential candidates for granting" a person citizenship are relevant to statelessness determinations. *Fedorovski, Re Judicial Review*, (2007) N.I.Q.B. 119, United Kingdom: High Court (Northern Ireland), ¶ 13 (Nov. 23), [https://www.refworld.org/cases,GBR\\_HC\\_NI,492accba2.html](https://www.refworld.org/cases,GBR_HC_NI,492accba2.html) (last visited May 2, 2019); but see ROBINSON, *supra* note 48 (seemingly advocating for a more exhaustive search into the different States of the world).

State can "read its substantive conception of world society as well as its view of the extent of sovereign freedom into legal concepts and categories."<sup>201</sup>

The absence of a duty by the non-determining State to cooperate with a determining State's procedures compounds this reliance on belief. A variety of interpretations can be drawn from a State's silence or refusal to respond to a request verifying citizenship status.<sup>202</sup> The non-communication between States could take place while applicants for recognition of stateless status remain in detention. Applicants may be detained for months or even years, and many do not receive diplomatic assistance.<sup>203</sup> In *Kim v. Russia*, the European Court of Human Rights found that an applicant had been "left to languish for months and years, locked up in his cell, without any authority taking an active interest in his fate and well-being."<sup>204</sup> Equally important, because a determining State cannot compel cooperation or demand information from other States, the State may rule on a person's status based on an incomplete set of information or an erroneous interpretation and application of another State's law. States do not know, and are presumed not to know, the laws of other States.<sup>205</sup> The State determining stateless status thus runs the risk of performing legally incorrect analysis.

In sum, the State engages in a construction of who is, and who is not, stateless based on a gaze. Thus, the definition presents a paradox because the State determines who is in fact stateless, based on law that States themselves create and implement. Not only does the term "statelessness" bear multiple meanings, but whatever its "autonomous and international meaning"<sup>206</sup> is, it is relativized in relation to the State's concept of who is the 'other' based on its own interests and values.<sup>207</sup>

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201. See Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 30 (1990) (speaking in the general context of international law).

202. To illustrate, in *B2 v. The Secretary of State for the Home Department*, UK Justice Jackson wrote that a non-determining State may choose not to respond to a request from a determining State to confirm whether an individual is its national. As UK Justice Jackson explained, the non-determining State may lack institutional capacity to carry out the necessary investigations or may simply be unwilling to respond. It should be noted that Justice Jackson in turn relied on UNHCR's analysis. See *B2 v. Secretary of State for the Home Department*, (2013) E.W.C.A. Civ. 616, ¶ 36 (May 24).

203. For information on the detention of applicants, see Amal de Chickera & Nina Murray, *Protecting Stateless Persons from Arbitrary Detention* (2017), [https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS\\_LockeInLimbo\\_Detention\\_Agenda\\_online.pdf](https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_LockeInLimbo_Detention_Agenda_online.pdf). (last visited May 2, 2019).

204. *Kim v. Russia*, Application no. 44260/13, Eur. Ct. H.R., p. 11, para. 54.

205. For problems in the proof and interpretation of foreign law, see generally Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT'L & COMP. L. 225 (1995). For a much earlier overview, see Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L. J. 1018 (1941).

206. See UNHCR, Submission by the United Nations High Commissioner for Refugees in the case of *AS (Guinea) v. Secretary of State for the Home Department before the Court of Appeal (Civil Division)*, C5/2016/3473/A, ¶13 (Feb. 20, 2018) [hereinafter UNHCR Submission in *AS (Guinea)*] (asserting that the definition of statelessness has autonomous and international meaning).

207. See Ronald Lee, *Ideographic Criticism*, in RHETORICAL CRITICISM 285, 296 (Jim Kuypers ed., 2009). An ideograph is always understood in relation to the 'other.'

While the binary category (stateless or citizen) is generally maintained,<sup>208</sup> States understand and use the legal concept of statelessness differently.

As a doctrinal matter, this leads to an implicit contestation of the definition of statelessness in international law. While the ILC declared that the definition of statelessness is a matter of customary international law,<sup>209</sup> and seemed to suggest that its customary status derives from the fact that the definition in the 1954 Statelessness Convention is singular in international law and not subject to any reservation,<sup>210</sup> a careful review reveals that States do not uniformly and consistently use the definition of statelessness set forth in the 1954 Statelessness Convention. Given disparate State practices, it may be questioned whether States are in contempt of their obligation or if contrary practices have arisen as seeds for a new rule.<sup>211</sup> These subsequent practices could also be evidence of the true meaning of the term. How States apply the definition in practice elucidates the agreement of the parties on its interpretation.<sup>212</sup> This Article suggests that differences are not merely due to the States' desire to flagrantly violate the definition of statelessness or to renege on treaty obligations, but are also a function of States interpreting and applying the definition differently because of the ideographic character of statelessness.

#### *Statelessness Identification as a Playing Field of Ideologies*

Understanding statelessness as rhetoric reveals not only the important ideographic nature of the term, but also the ideologies behind the process of identifying statelessness. I have previously introduced the identification of statelessness, together with stateless status determination, in Part I.D.1. The law bears ideologies that are not easily revealed through a reading of its text and the text's avowed objectives and the related declarations of States. Since the time of Hans Morgenthau, one of the major twentieth-century figures in the study of international

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208. UNHCR Submission in *AS (Guinea)*, *supra* note 206, ¶ 16. *Cf.* In citizenship studies, scholars posit that citizenship could be "graduated" since the concomitant layers of rights associated with legal, social, racial, and economic constructs differentiate the groups of people. See Avyanthi Azis, *Urban Refugees in a Graduated Sovereignty: The Experiences of the Stateless Rohingya in the Klang Valley*, 18 *CITIZENSHIP STUD.* 839 (2014). Aihwa Ong, *Graduated Sovereignty in South-East Asia*, 17 *THEORY, CULT. & SOC.* 55 (2000). See also Marie McAuliffe, *Protection Elsewhere, Resilience Here: Introduction to the Special Issue on Statelessness, Irregularity, and Protection in Southeast Asia*, 15 *J. IMMIGR. REFUGEE STUD.* 221, 227–28 (2017). Studies also demonstrated that citizenship exists along a spectrum and does not just require a grant of a formal citizenship. See also ELIZABETH F. COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* 15 (2009); Lindsey N. Kingston, *Statelessness as a Lack of Functioning Citizenship*, 19 *TILBURG L. REV.* 127 (2014).

209. International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, U.N. Doc. A/61/10, at 36 (2006).

210. UNHCR, *HANDBOOK*, *supra* note 79, at 9; see 1954 Statelessness Convention, *supra* note 16, at art. 38(1) (prohibiting reservations to Article 1).

211. See Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95(4) *AM. J. INT'L L.* 757, 790.

212. See VCLT, *supra* note 27, art. 31(3)(b).

relations, international law has been regarded as an ideological structure that States use to retain the status quo.<sup>213</sup> International law is a prime, though not the only, determinant of relative power positions between and among States.<sup>214</sup> While international law may herald a manifest ideology (or objective), it could itself also reflect a latent, hidden ideological underpinning.<sup>215</sup>

I claim here that ideologies latent in the text of the 1954 Statelessness Convention's definition of statelessness influence rhetors in the identification of statelessness. The causal force of ideologies works to determine the direction of the discourse, thereby removing the rhetor as the sole party deciding on matters.<sup>216</sup> They are akin to headwinds, tailwinds, and sidewinds changing or pushing the direction of discourse. At least two ideologies do that: what I have termed *formalism*—form over substance of protection—and *discretionism*—that State discretion in nationality ascription necessarily leads to State discretion in statelessness determinations. I posit that these two ideologies affect stateless status determinations.

### 1. Formalism in Stateless Determinations

In many stateless status determinations, from the pretense of the State as the giver of rights, the existence of citizenship on its own is sufficient 'to protect' the otherwise unprotected. As a case in point, the UK Home Office asserts that the possession of nationality (or even the possibility of acquiring a nationality) already ensures "full participation in society and [functions as] a prerequisite for the enjoyment of the full range of human rights."<sup>217</sup> UNHCR's guidelines likewise reinforce this notion. Despite encouraging States to examine a person's position vis-à-vis the law in practice and to veer away from a purely formalistic analysis, UNHCR merely engages States to consider whether another State's law as applied regards the person in question as a citizen.<sup>218</sup> And, that is enough to satisfy international standards. The non-enjoyment or absence of any entitlements that flow from citizenship is immaterial or irrelevant. People's sufferings are rendered invisible.

Formalism has deep foundations, rooted in the formulation and initial conceptualization of the definition. Hannah Arendt, a stateless person and political theorist, wrote in her seminal work *The Origins of Totalitarianism* that the most basic of rights flowed through one's citizenship.<sup>219</sup> She drew the distinction

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213. Scott, *supra* note 133, at 319.

214. *Id.* at 319. Scott, however, emphasized the realist paradigm's inability to adequately account for the dynamics between international law and the support of less powerful states. *Id.* at 324.

215. Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L. L. J. 81, 99–100 (1991).

216. See McKerrow, *supra* note 143, at 236.

217. U.K. BORDER AGENCY, *Home Office Instruction*, *supra* note 175, at 5.

218. UNHCR, *HANDBOOK*, *supra* note 79, at 13.

219. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 277 (1951).

between human rights that flowed from the dignity of the person and civil rights that are derived from belonging to a distinct political community willing to enforce rights.<sup>220</sup> Stateless persons generally lose all rights.<sup>221</sup> For Arendt, who made the argument that there is a link between the State and rights, belonging to a community as a citizen constituted "the right to have rights."<sup>222</sup> Arendt explained, "[t]he question was not, as for Hamlet, to be or not to be, but to belong or not to belong."<sup>223</sup> Aristotle's idea that humans are political animals and that political rights are the door to other rights proved central to Arendt's philosophy.<sup>224</sup> US Chief Justice Earl Warren's famous dissent in *Perez v. Brownell* neatly captured Arendtian philosophy. Chief Justice Warren described the right to citizenship as "man's basic right for it is nothing less than the right to have rights."<sup>225</sup> States are, in the words of Brad K. Blitz and Maureen Lynch, "the principal guarantor[s] of human rights."<sup>226</sup> While Arendt's framework distinguished between human rights and the right to citizenship, both rights exist within States.<sup>227</sup> States have rights and responsibilities under international law as primary actors.<sup>228</sup> Oppenheim's famous statement in the first half of the twentieth century was that States were the only subjects of the law of nations.<sup>229</sup>

Arendt's thinking on the "right to have rights" is now, however, challenged.<sup>230</sup> Arendt's notion of the "right to have rights" could be viewed as a moral claim or a performative right in the linguistic sense.<sup>231</sup> The former sense means that States bear the deontological duty to protect humans by providing the right to nationality and opening the door for full human rights protection.<sup>232</sup> The latter means that the 'right to have rights' could be interpreted as "a right brought into

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220. *Id.*

221. *Id.* at 290–302.

222. *See generally* ARENDT, *supra* note 219.

223. *Id.* at 84.

224. Meghna Kajla, *Nation-State and its Production of Statelessness: A Study of Chin Refugees*, in *DETERRITORIALISED IDENTITY AND TRANSBORDER MOVEMENT IN SOUTH ASIA* 91, 101 (Nasir Uddin & Nasreen Chowdhury eds., 2019).

225. *Perez v. Brownell*, 356 U.S. 44, 64 (1958).

226. *See* Brad Blitz & Maureen Lynch, *Statelessness and the Deprivation of Nationality*, in *STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY* 1, 4 (Brad K. Blitz & Maureen Lynch eds., 2011).

227. Kajla, *supra* note 224, at 101.

228. *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 197 (6th ed. 2008).

229. *See generally* HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950).

230. *See* SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004). Benhabib extended Arendt's idea to the "rights of others"—the right of an outsider of a State to political membership. She questioned the idea of the State as the sole authority in denying (and giving) rights to outsiders.

231. Stephanie DeGooyer, *The Right....*, in *THE RIGHT TO HAVE RIGHTS* 18, 21–24 (Stephanie DeGooyer et al. eds., 2018).

232. *Id.* (citing Seyla Benhabib, *Human Rights and the Critique of "Humanitarian Reason"* (2004), <https://www.resetdoc.org/story/human-rights-and-the-critique-of-humanitarian-reason/> (last visited May 2, 2019)).

being through the very statement of articulating it."<sup>233</sup> As Judith Butler, a scholar on performativity, nonetheless admitted, there is no ground to the claim outside the claim.<sup>234</sup> The implication is that people could not simply lay very strong entitlements to rights via citizenship.

Another critique is that Arendt rendered an overly simplistic consideration of the situation of statelessness.<sup>235</sup> To be a stateless person is to be unprotected by any specific law of a State.<sup>236</sup> Arendt's analysis assumed that human rights are empty and hollow, and that they are made concrete when connected with a political institution—the State.<sup>237</sup> Arendtian philosophy was conceived at a time when human rights were cheap talk, and Arendt presented a sharp critique to the abstract Rights of Man discussed in the first half of the twentieth century.<sup>238</sup>

Formalism has emerged from Arendtian philosophy as applied by States. It is a fallacy that mere membership in a political community (formal nationality) *ipso facto* is full human rights protection. The substantive is reduced into the formal. States choose not to inquire into the substance of human rights protection, and perfunctorily consider a person fully protected once determined to have formal citizenship.<sup>239</sup> The *ex ante* assumption is that if individuals have citizenship, they have and enjoy human rights. Human rights are fetishized and essentialized into citizenship rights.<sup>240</sup> True, without citizenship, humans are in a Hobbesian state of nature. Those left outside the State are vulnerable to human rights violations.<sup>241</sup> It is a fallacy, however, to contend that human rights protection necessarily follows from mere political membership. Neither human rights nor citizenship practically guarantees the rights afforded by the other.

The very formalistic nature of the present definition of statelessness aids the rise of this ideological fallacy. The definition does not presently require States to inquire into the substantive nature or quality of one's citizenship. After struggling to define statelessness in the 1954 Statelessness Convention, States ultimately

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233. *Id.* at 23. For a good introduction to J. L. Austin and Judith Butler's performativity, see Stephen Young, *Judith Butler: Performativity*, CRITICAL LEGAL THINKING (2016), <http://criticallegalthinking.com/2016/11/14/judith-butlers-performativity/> (last visited May 2, 2019).

234. DeGooyer, *supra* note 231.

235. Richard Bernstein, *Hannah Arendt on the Stateless*, 11(1) PARALLAX 46, 51 (2005).

236. *Id.*

237. *Id.* at 57.

238. Richard Bernstein, *Are Arendt's Reflections on Evil Still Relevant?*, 70 REV. POL. 64, 70 (2008).

239. See, e.g. *AS (Guinea) Appellant - and - Secretary of State for the Home Department Respondent - and - United Nations High Commissioner for Refugees Intervener*, (2018) E.W.C.A. Civ. 2234, United Kingdom: Court of Appeal (England and Wales) (Oct. 12, 2018) [hereinafter, "*AS (Guinea)*"].

240. See generally Amir Biparva & Sayed Qasem Zamani, *The Convergence of Human and Citizenship Rights in the Globalization Era*, 10 MOD. APPLIED SCI. 94 (2016).

241. See Blitz & Lynch, *supra* note 226; see also GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1998). Giorgio Agamben furthered Arendt's arguments in his conceptualization of bare life's inexistence before the law.

decided on an abstract definition that considers only formal links to nationality.<sup>242</sup> As UNHCR explained in its guidance to States, the word "national" in the 1954 Statelessness Convention only reflects "a formal link, of a political and legal character, between the individual and a particular State."<sup>243</sup> Once the link is determined to exist, thin, brittle, and anxious as the link is, the determining State willingly chooses not to inquire and is prevented from inquiring into the nature of the protection that such link accords the individual.<sup>244</sup> States rely on this formalistic definition in making statelessness determinations, instead of individually looking into whether the individual is able to exercise the rights associated with citizenship because they are a citizen of at least one State in the world.

*AS (Guinea)* exemplifies that States merely ascertain the existence (or absence) of a legal bond in statelessness determinations.<sup>245</sup> The case maintains that determinations are about *de jure* statelessness.<sup>246</sup> When the applicant argued in *AS (Guinea)* that the 1954 Statelessness Convention "must be interpreted in light of its human rights and humanitarian objectives,"<sup>247</sup> Lord Kitchin distinguished the nature of the issue to an application for refugee status.<sup>248</sup> Lord Kitchen reasoned that, unlike a refugee, stateless persons could gather evidence at no risk to themselves,<sup>249</sup> implying that they could themselves also secure rights protection on their own if they wanted to. In this framework, the protection of the applicant's human rights becomes irrelevant and is not investigated.

Formalism also manifests in the so-called presumption against statelessness.<sup>250</sup> Many States impliedly assume citizenship so that a person does not become an alien in their own country.<sup>251</sup> If citizenship is presumed, then there would be no need to inquire into whether the individual is able to exercise rights tied to citizenship to account for the presence of citizenship. States just assume the formal presence of citizenship based on the facts and no longer look for its manifestations. For example, relying on a presumption of citizenship, the Philippine Supreme Court upheld a political candidate's natural-born Filipino

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242. Per this definition, nationality refers only to the formal link to a State and not the quality of citizenship protection. Cf. *Nottebohm Case*, *supra* note 114, at 23 (requiring a genuine link as a test in cases of citizenship determination).

243. UNHCR, HANDBOOK, *supra* note 79, at 21.

244. See, e.g. *AS (Guinea)*, *supra* note 239.

245. *Id.*, ¶¶ 45–46.

246. *Id.*

247. *Id.*

248. *Id.* ¶ 46.

249. *Id.*

250. See Brownlie, *supra* note 44.

251. See, e.g., Kenya Citizenship and Immigration Act (2011) Cap. 9 (Kenya); The Citizenship of Zambia Act No. 33, Cap. 16 (2016) § 5–6 (Zam.).

citizenship, enabling her to run for public office as a Senator.<sup>252</sup> The court enthused over a "disputable presumption that things have happened according to the ordinary course of nature and the ordinary habits of life."<sup>253</sup> The Supreme Court was willing to assume citizenship based on the fact that things happen the way they do ordinarily, for example a baby with Filipino features who was abandoned in a province in the Philippines likely had Filipino parents, and therefore, birth-right citizenship.<sup>254</sup> States view citizenship as the normal and statelessness as the abnormal.<sup>255</sup>

States do not afford complete rights to all people.<sup>256</sup> In its intervention in *AS (Guinea)* before the UK Court of Appeal, the UNHCR admitted that the assumption of the binary of statelessness and citizenship in international law leaves individuals in limbo, deprived of substantive nation-State protection.<sup>257</sup> For one, States may choose not to accord citizenship-related rights to persons possessing formal citizenship.<sup>258</sup> In the Introduction of this Article, I demonstrated that States chose not to protect Hoda Muthana and Shamima Begum and treat them as citizens based on national security interests.<sup>259</sup> States can deliberately provide citizens with access to only a subset of citizenship-related rights, or even grant certain citizens no political rights at all.<sup>260</sup>

Further, according to Laura van Waas and Sangita Jaghai, not everyone admitted as a citizen enjoys the full package of attached rights; citizens may still suffer from insecure citizenship status.<sup>261</sup> For example, citizenship by birth is typically more secure than acquired citizenship.<sup>262</sup> Withdrawal of citizenship occurs more frequently for naturalized citizens.<sup>263</sup> In the United States, a recent

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252. *Poe-Llamanzares v. COMELEC*, G.R. Nos. 221697 & 221698-700, Republic of the Philippines: Supreme Court, Mar. 8 2016, [https://www.lawphil.net/judjuris/juri2016/mar2016/gr\\_221697\\_2016.html](https://www.lawphil.net/judjuris/juri2016/mar2016/gr_221697_2016.html) (last visited May 2, 2019). I am not arguing that this case was wrongly decided on a point of domestic law. I reference this case merely to illustrate the premise of States' assumptions of citizenship. Though such a presumption may enable citizenship rights to be honored and attenuates a person's burden of proof to prove citizenship, it works against an applicant trying to prove statelessness.

253. *Id.*

254. *Id.*

255. See Rudolf Graupner, *Statelessness as a Consequence of the Change of Sovereignty over Territory after the Last War*, in *THE PROBLEM OF STATELESSNESS* 27, 29 (World Jewish Congress ed., 1944).

256. See David Weissbrodt & Michael Divine, *Unequal Access to Human Rights: The Categories of Noncitizenship*, 19(8) *CITIZENSHIP STUD.* 870 (2015).

257. UNHCR Submission in *AS (Guinea)*, *supra* note 206, ¶ 16.

258. For an illustration, see Leti Volpp, *Citizenship Undone*, 75 *FORDHAM L. REV.* 2579 (2007).

259. See *supra* note 12 and accompanying text.

260. ELIZABETH COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* 6 (2009).

261. See Laura van Waas & Sangita Jaghai, *All Citizens are Created Equal, but Some are More Equal Than Others*, 65 *NETH. INT'L L. REV.* 413 (2018).

262. *Id.*

263. *Id.*



study ascertained trends in the denaturalization of naturalized US citizens, denial and revocation of passports, and political attacks on citizenship by birth of children born in the United States to non-citizens.<sup>264</sup> While it is not possible to conclusively state that passport denials and revocations have increased recently,<sup>265</sup> in comparison with previous administrations, denaturalization rose in the first two years of the Trump administration.<sup>266</sup> Nearly three times as many civil denaturalization cases (29.5 per year) were filed than the average of the eight previous administrations (12 per year). Criminal denaturalization cases have also increased in 2017 and 2018.<sup>267</sup> It is believed that a significant portion of the denaturalizations "have or will result in statelessness,"<sup>268</sup> and suggests a "selective targeting based on national origin, as a proxy for race, ethnicity, and religion, and contributes to the overall charge that the administration is seeking to exclude immigrants and citizens because of its nativist ideology."<sup>269</sup> Efforts to redefine *jus soli* citizenship may also be considered as a practice that threatens the security of citizenship by birth.<sup>270</sup> New analyses of citizenship laws in Europe, the Americas, and Asia also reveal discrimination and inequalities between and among different kinds of citizens.<sup>271</sup>

The cases and examples provided above show that while it is possible for States to uphold a person's citizenship to avoid statelessness based on the letter of the law, such is not always the case and inequality still persists within States when dealing with issues of citizenship and statelessness. Significantly, the formalism of the law is used as a subterfuge.

#### *The Ideology of Discretionism*

In Part I.D.2, I discussed that through State privilege and gaze, the State could constitute polities—create and uncreate the status of people. The State has the primary privilege to grant and revoke citizenship. The definition of statelessness retains the partiality towards State gaze predominant in the early half of the

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264. See generally LAURA BINGHAM & NATASHA ARNPRIESTER, UNMAKING AMERICANS: INSECURE CITIZENSHIP IN THE UNITED STATES (2019).

265. *Id.* at 12.

266. *Id.* at 10.

267. *Id.*

268. *Id.* at 11.

269. *Id.*

270. *Id.* at 13.

271. Olivier Vonk et al., "Benchmarking" Legal Protection against Statelessness, in SOLVING STATELESSNESS 163, 187 (Laura van Waas & Melanie Khanna eds., 2017). This study concluded many nationality laws in the Americas discriminate between categories of nationals. This type of discrimination is less pronounced, but is also present in Europe. The study looked at seventy-six countries. For a study of the laws in Asia, see Olivier Vonk, *Comparative Report: Citizenship in Asia* (2017), <http://cadmus.eui.eu/handle/1814/50047> (last visited May 2, 2019).

twentieth century. Even though the State sets out to objectively define statelessness, State gaze becomes central regardless of its supposed objectivity.<sup>272</sup>

I further claim in this subsection that discretionism is present in statelessness determinations. The absence of concrete parameters for determining statelessness breeds State discretion.<sup>273</sup> The reader of a text has a natural tendency to emphasize what is present, but absence "may be more important, more potent, as a source of information than mere presence."<sup>274</sup> In critical rhetoric, "[t]erms are not 'unconnected'; in the formation of a text, out of fragments of what is said, the resulting 'picture' needs to be checked against 'what is absent' as well as what is present."<sup>275</sup>

Discretionism operates at a practical level in statelessness determinations. In evidentiary terms, since the 1954 Statelessness Convention is silent on matters of proof and evaluation, it has left these matters for a determining State to decide.<sup>276</sup> This is where, so to speak, the rubber hits the road. The conspicuous silence of international law on these matters opens up discretion.<sup>277</sup> Proof and evaluation are matters crucial to the conduct of statelessness determinations. As discussed above, statelessness precariously requires proving and establishing a negative (that is, the absence of citizenship) and in many States—like the United States—citizenship is sometimes defined in constitutions and statutes "although most of the time it [is] not."<sup>278</sup> Despite the crucial role of evidence, there is no clear international rule on whether an individual applicant for stateless status should bear the burden to prove the negative, and associated with that, what evidentiary standards are adequate to prove the negative.

One matter that had been particularly challenging for applicants in proving statelessness is documentation. The variety of documents that could prove citizenship (and the lack of it) is just enormous and reflective of the complexity of

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272. By objectivity, I refer to the twin criteria of concreteness and normativity. Concreteness means that the law (in this case, the definition) is verifiable, or justifiable, independently of what anyone might think that the law *should be*. Normativity means that the definition is applicable even against a State or other legal subject which *opposed* its application to itself. See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 25, 513 (2006).

273. See S.S. *Lotus* (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at ¶ 87 (Sept. 7) [hereinafter *Lotus Case*].

274. McKerrow, *supra* note 143, at 236.

275. McKerrow, *supra* note 18, at 107.

276. See *infra* note 291.

277. See *Lotus Case*, *supra* note 273, ¶ 87 (ruling that the absence of principles in international law gives the State discretion on how to act).

278. MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 10 (2018).

citizenship.<sup>279</sup> More so, not all documents grant rights.<sup>280</sup> In the *Semeda Case*, while Justice McCloskey held that the UK's definition of statelessness aligns with the international law definition,<sup>281</sup> he admitted that the question of statelessness frequently turns on other things, in particular possession of or access to documents "which denote[] that the individual is recognized by one of the [S]tates of the world as one of its nationals."<sup>282</sup> The problem is that although individuals are charged with the burden of proof of statelessness, many stateless persons are without identity documentation or the means to obtain it.<sup>283</sup>

Another case in point is *RRT Case No. 1218580*, where Australia's Refugee Review Tribunal leaned on the non-submission of documents to surmise that an applicant was not stateless.<sup>284</sup> Instead of providing the required multiple documents to prove citizenship (not actually to prove the lack of citizenship), the applicant submitted an identity card.<sup>285</sup> The tribunal stated "[e]ven if three separate documents were required, the Tribunal considers that the fact that the applicant has not submitted the registration certificate or the PDS or ration card does not necessarily mean that he was never issued with these documents."<sup>286</sup> Such pronouncement is problematic because it impliedly assumed that the applicant was issued citizenship documents, yet just did not submit them to the tribunal. The inference drew the presence of citizenship from the non-submission of documents. But it could simply be that the applicant was not issued those documents in the first place.

Apart from evidentiary concerns, it becomes problematic when States are afforded wide latitude to include and exclude considerations they deem relevant in an analysis. State discretion results in an assessment that incorporates other

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279. See, e.g., Laurie Parsons & Sabina Lawreniuk, *Seeing Like the Stateless: Documentation and the Mobilities of Liminal Citizenship in Cambodia*, 62 POL. GEOG. 1, 4 (demonstrating that, for example in Cambodia, four documents prove citizenship: birth certificate, ID card, voting card, family book, and a letter of immigration; entitlement to certain documents is predicated on the possession of others).

280. *Id.*

281. *Semeda Case*, *supra* note 117, ¶ 13.

282. *Id.* ¶ 16. While documents are important for identity determination, danger inheres where they become solely determinative in the State's exercise of discretion.

283. BRONWEN MANDY, IDENTIFICATION IN THE CONTEXT OF FORCED DISPLACEMENT 7 (2016). See generally Samantha Balaton-Chrimes, *Statelessness, Identity Cards and Citizenship as Status in the Case of the Nubians of Kenya*, 18 CITIZENSHIP STUD. 15 (2014); Council of Europe, *Legal status / Identity documents / Statelessness*, <https://www.coe.int/en/web/roma-and-travellers/legal-status/-/id-documents> (last visited May 2, 2019); see also Jay Milbrandt, *Stateless*, 20 CARDOZO J. INT'L & COMP. L. 75 (2011).

284. *RRT Case No. 1218580*, (2013) RRTA 279, Australia: Refugee Review Tribunal ¶ 35 (Apr. 2).

285. *Id.* at ¶ 32.

286. *Id.* at ¶ 35. Although this case focused primarily on refugee status, it nonetheless illustrates the role of documents in statelessness determination.

elements and factors that States broadly find relevant.<sup>287</sup> State agents incorporate other elements and factors beyond the statelessness definition when weighing statelessness claims, including the applicant's residence and actions. For example, Hungarian law<sup>288</sup> requires applicants to be residing in Hungary before their stateless status is determined, implicitly including legal residence as an indispensable condition of statelessness. States also look into an applicant's actions. In *Fedorovski, Re Judicial Review*, the UK's High Court (Northern Ireland) said that since statelessness is "not a condition that can be wished upon one's self," a person cannot claim to be stateless if they had refused to apply for citizenship in the State or States that they are most closely connected with.<sup>289</sup> Similarly, in *Z.L. c. Procureur Général près de la Cour d'appel de Bruxelles*, a determination officer in Belgium denied stateless status to an applicant who had renounced his nationality.<sup>290</sup> A State could also decide based on whether an applicant fits the "other," as a judgment of someone who is different from oneself.<sup>291</sup>

Thus, States have resorted to differing ways in the exercise of their discretion to include or exclude the individual in polity. International law's definition of statelessness has linked the general discretion of States in granting and revoking citizenship to determining statelessness. While international law has shifted to a rights perspective on nationality matters and limited discretion on citizenship matters, the 1954 Statelessness Convention's definition anachronistically retains a remnant of a State-centric era that breeds discretionism.<sup>292</sup> States consider vital interests in the determination of statelessness, such as the prevention of

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287. UNHCR Submission in *AS (Guinea)*, *supra* note 206, ¶ 23 (citing the U.K. case of *Hesham Ali (Iraq) v. Secretary of State for the Home Department*, (2016) U.K.S.C. 60 (Nov. 16)).

288. Hungary's Act II of 2007, *supra* note 197, sec. 76(1); see UNHCR, *Observations of the Office of the United Nations High Commissioner for Refugees in the Case of X v Office of Immigration and Nationality (17.K.32.297/2013) before the Constitutional Court of Hungary* (2014), <https://www.refworld.org/docid/547c69434.htm> (last visited May 2, 2019) (arguing that the law is incompatible with the 1954 Convention).

289. *Fedorovski, Re Judicial Review*, (2007) N.I.Q.B. 119, United Kingdom: High Court (Northern Ireland), ¶¶ 12–13 (Nov. 23); see also *R v. Secretary of State for The Home Department, ex p Valentina Bradshaw*, (1994) Imm.A.R.359 (asserting that upon the withdrawal of her residence).

290. See *Z.L. c. Procureur Général près de la Cour d'appel de Bruxelles*, 5–6, C.07.0385.F, Belgium: Cour de cassation (Jun. 6, 2008). The first chamber of the Belgian Court of Cassation overruled the denial of status, reasoning that the judgment added a condition to the 1954 Statelessness Convention that it does not contain.

291. See Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L. L. J. 445, 499 (1993) (citing EDWARD SAID, *ORIENTALISM* (1978)). Orientalism views the Other as "inferior, incapable, and disorganized and therefore a suitable object for conquest and control." *Id.* Studies show that political procedures even use quantities of time to confer and deny citizenship rights. See ELIZABETH COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* (2018).

292. Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 694–95 (2011).

terrorism,<sup>293</sup> the maintenance of international security,<sup>294</sup> and sovereignty that often leads to discrimination.<sup>295</sup> States consider such interests in the determination of statelessness.

*Statelessness in the Resulting Rhetoric of Naming and Categorizations*

The ideographic character of statelessness and the underlying ideologies of statelessness identification have several consequences. Firstly, statelessness has become a naming device of international law; States exercise a naming function in statelessness determinations through the "stateless" label. In critical rhetoric, naming plays an interpretive role in assessing what is perceived to be true at the moment. Through naming, one fixes and asserts a relationship to that which is named.<sup>296</sup>

Labelling, in the words of Geof Wood, refers to "a relationship of power in that the labels of some are more easily imposed on people and situations than those of others . . . [and] is therefore an act of politics involving conflict as well as authority."<sup>297</sup> Labels proliferate with the development of the international migration regime. Governments form, transform, and politicize labels.<sup>298</sup> In the arguments around statelessness, competing policy discourses are evident in how States use available means of persuasion (mainly grounded in law and within the wide discretion that international law's definition allows) to declare or constitute stateless status. States appear more willing to use domestic law to make stateless status determinations in the absence of prescribed rules of international law. States also incorporate policy-determined factors for inclusion or exclusion, such as lawful stay, actions of the applicant, and other links to the determining State.

293. See Shiva Jayaraman, *International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters* 17(1) CHI. J. INT'L L. 178 (2016).

294. For a discussion of statelessness in the context of international security in the Security Council, see Valeria Bello, *Is the Discussion of 'Statelessness' in the UN Security Council a Question of Human Security or International Security?* (2014), <https://gcm.unu.edu/publications/policy-reports/is-the-discussion-of-statelessness-in-the-un-security-council-a-question-of-human-security-or-international-security.html> (last visited May 6, 2019).

295. See van Waas & Jaghai, *supra* note 261, at 413 ("As nationality revocation gains new attention from states as a tool to counter terrorism . . . the reality that this measure often applies only to particular sub-groups of citizens demands closer scrutiny."). See also J. M. Spectar, *To Ban or Not to Ban an American Taliban - Revocation of Citizenship & (and) Statelessness in a Statecentric System*, 39 CAL. W. L. REV. 263 (2003); Volpp, *supra* note 258. International law does allow the exclusion of the benefits of the 1954 Statelessness Convention on certain grounds in Article 1(2). However, the current definition of statelessness lends to constructivist critiques. Some States are also anticipating new loss of territory due to the impending effects of climate change and its impact of statelessness. See Abhimanyu George Jain, *The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory*, 50 STAN. J. INT'L L. 1 (2014).

296. McKerrow, *supra* note 143, at 236.

297. Geof Wood, *The Politics of Development Policy Labelling*, 16 DEV. & CHANGE 347 (1985).

298. See generally Roger Zetter, *More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization*, 20(2) J. REFUGEE STUD. 172 (2007).

Secondly, statelessness has become a category, with the consequences associated with categorizing people. The term "stateless" is a category of people in State vocabulary. Categorization is important for knowledge formation and action.<sup>299</sup> At the intersection of anthropology and migration studies, "the national order of things" refers to the view that nation-States are the "natural" organizing parts of the world.<sup>300</sup> Categories structure things and people.<sup>301</sup> As language ordains people and things to belong to a category,<sup>302</sup> categories make it possible to create groups of phenomena for a branch of knowledge.<sup>303</sup> Yet, analytical categories such as "stateless" are also policy-related labels designed to meet policy ends.<sup>304</sup> Through categories, States attempt to regulate and control people. Categories are contingent constructs corresponding to State policies.<sup>305</sup>

More than an issue of semantics, categories have consequences—firstly entitling "some to protection, rights and resources whilst simultaneously disentitling others."<sup>306</sup> For instance, we have seen in this Article how identification procedures impact the rights to which a person is entitled, whether as "stateless" or "citizen" of a State.<sup>307</sup> A stateless person is entitled to a minimum set of rights under the 1954 Statelessness Convention. A citizen is theoretically entitled to the entire gamut of rights under their State's constitution and laws.

But, secondly, categories create epistemological blind spots: the plight of those people excluded from the category is made invisible to the State.<sup>308</sup> The formalism of the definition and the ideology of discretionism offer an opportunity for States to look away when claims of human rights violations are presented during determinations. While these States appeal to reason or intellect in reaching a decision on statelessness, the human rights condition of the applicant, which is often argued before statelessness determinations, does not appear that relevant to status determinations.<sup>309</sup> When the applicant's human rights condition is raised,

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299. For a discussion of categories and categorization in the social sciences, see Richard Jenkins, *Categorization: Identity, Social Process and Epistemology*, 48 *CURRENT SOCIO.* 7 (2000).

300. See Liisa H. Malkki, *Refugees and Exile: From "Refugee Studies" to the National Order of Things*, 24 *ANNU. REV. ANTHROPO.* 495, 516 (1995).

301. MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* 417 (1970).

302. *Id.* at xvi–xvii.

303. *Id.* at 389.

304. Claire Beaugrand, *Framing Nationality in the Migratory Context: The Elusive Category of Biduns in Kuwait*, 6 *MIDDLE E. L. & GOVERNANCE* 173, 176 (2014).

305. *Id.* at 176–77.

306. Heaven Crawley & Dimitris Skleparis, *Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's 'Migration Crisis'*, 44(1) *J. ETHNIC & MIGRATION STUD.* 48, 59 (2018).

307. See *supra* notes 124–26 and accompanying text.

308. See Tara Polzer, *Invisible Integration: How Bureaucratic, Academic and Social Categories Obscure Integrated Refugees*, 21(4) *J. REFUGEE STUD.* 476, 477 (2008).

309. See Part II.C.1

the rhetor counters with the formal definition of statelessness, returning to a reasoned analysis of the law and other policy concerns of the State.<sup>310</sup>

This leads to a third point. The other danger of categorization is that it can take on "a blurry, circular shape" as humans do not form categories in clean boxes and on objective processes.<sup>311</sup> Categories tend to follow or develop ahead of a particular policy concern.<sup>312</sup> At the time of the 1954 Statelessness Convention, the category of "stateless person" followed from the international community's policy concern about protecting people who did not enjoy State human rights protection.<sup>313</sup> However, as I have argued, the resulting definition is deficient and lacks a protection-oriented focus. International law enables States to decide on statelessness on their own accord<sup>314</sup> and to incorporate countering ideologies. The rightless (a stateless person in the Arendtian sense)<sup>315</sup> has become a referent in the rhetorical discourse. In sum, the policy choices of States become evident through statelessness determinations, and operate alongside ideologies that animate the law and the decisions of State agents.

#### IV.

##### A CALL: REVISIONING STATELESSNESS IN INTERNATIONAL LAW

The international community should and could revision statelessness in international law. This revisioning should address the inherent limitations and embedded ideologies in the definition of statelessness. The goal of the 1954 Statelessness Convention is to protect the people who would otherwise be unprotected. For States to further that goal, international law's definition of statelessness needs to be revisioned. I offer a framework introducing some possibilities, though I note that this framework does not solve all problems related to statelessness and has tentative moving parts. However, my hope is that this will further the conversation about the inadequacy of the concept of statelessness in international law and begin the process of revisioning statelessness in our statist world, inviting the reader to debate and identify alternative ways of looking at statelessness.

Notably, my approach is to 'revision' the statelessness definition. It is not merely to revise the definition, neither a total re-envisioning that so violently

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310. *Id.*

311. See Lucille Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC: JAWLD 39, 44 (2016).

312. See Oliver Bakewell, *Research Beyond the Categories: The Importance of Policy Irrelevant Research into Forced Migration*, 21 J. REFUGEE STUD. 432, 436 (2008).

313. See 1954 Statelessness Convention, *supra* note 16, at preamble; UNHCR, Expert Meeting, *supra* note 100, at 2.

314. Cf. Tamas Molnar, *Remembering the Forgotten: International Legal Regime Protecting the Stateless Persons - Stocktaking and New Tendencies*, 11 US-CHINA L. REV. 822, 847 (2014). While Molnar accepts that international law's definition is a categorization, he asserts that it is a "coherent, logically closed legal architecture."

315. This is also reminiscent of Giorgio Agamben's take on stateless persons as having bare life. For Agamben, a stateless person exists in a state of exception. See AGAMBEN, *supra* note 241, at 9.

departs from the statelessness regime's policy intent. Revisioning entails having a calibrated protection-oriented vision or outlook to statelessness. At the same time, it works within the bounds of the 1954 Statelessness Convention, importantly acknowledging that international law's approach should not be discarded, despite the vision, because international law still does accord rights and aims to protect people. Furthermore, such a mechanism already exists in treaty law, which States embarked on after a tumultuous world war. Despite the prohibition of any reservations to the definition, the 1954 Statelessness Convention contains a revision procedure in Article 41.<sup>316</sup> That procedure commences when a State party requests to 'revision' the treaty.<sup>317</sup> The General Assembly must then recommend what steps, if any, should be taken.<sup>318</sup> As the treaty prescribes nothing more, the General Assembly possesses discretion on how to best proceed.

In this regard, I submit that the General Assembly could initiate the proper steps in changing the terms of the 1954 Statelessness Convention. Other steps may include: amending a treaty on nationality or human rights; creating a more precise definition of statelessness in future treaties; and even initiating or advocating for a change in the practice of States and other treaty bodies dealing with the concept of statelessness. Those initiatory steps could be started at the level of the UN General Assembly or at the level of any of the organs and specialized bodies of the UN or through any treaty body.

The point is that changing the definition of statelessness is possible. While I admit that we are in a precarious moment in which the international community is besieged with strong sentiments that would likely resist international lawmaking efforts that seek to address the status of persons on the move across borders of States, implicating reasons that prove the elusiveness of high-level reform,<sup>319</sup> some factors below point to why the statelessness question could be an exception to this broader trend. These factors relate to the recent, but inadequate, attempts to change the statelessness definition and could draw in a more progressive consensus through a lawmaking process. I point to why some steps can be taken to at least begin or move towards revisioning statelessness.

In this section, I first revisit those existing attempts to change the definition of statelessness, arguing their inadequacy and showing that they reveal a growing consensus on the impetus and need to 'revision' the statelessness definition. States can build on these movements in the future. At the initiation of a party to the 1954 Statelessness Convention, as stated, the UN General Assembly could jumpstart the revisioning process as the 1954 Statelessness Convention itself allows. Some

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316. 1954 Statelessness Convention, *supra* note 16, at arts. 38, 41. A state may initiate this through a request for the revision of the treaty through a notification addressed to the UN Secretary-General.

317. *Id.* at art. 41(1). The Secretary-General then informs all UN members and nonmembers (those invited to the conference that led to the treaty and those invited to sign or accede to the treaty). In practice, this notification should be to all States. *Id.*, at art. 42(f).

318. *Id.* at art. 41(2).

319. Thanks to David Michael Hughes for this point.



other steps were enumerated earlier. An alternative way is for individual States to directly contest the definition by adopting definitions in their respective domestic laws that have a protection-oriented focus.<sup>320</sup>

I then identify some elements of a protection-oriented approach that could inform an agenda for reforming the definition and creating better statelessness determinations either by States collectively, as parties to the 1954 Statelessness Convention, or as States in their individual capacities in a customary lawmaking effort. I present these as options legally available to States, and build a framework that avoids one final, finite definition of statelessness. A one-size-fits-all approach would further lead to dogmatism and finality that cannot address changed and changing protection issues. Within the critical rhetoric tradition, even if change occurs, that change is subject to reflection and critique for further improvement.<sup>321</sup> The solution suggested is not the only possible approach, but it responds to the widely-accepted deficits of the current definition.

*A. Inadequacy of Existing Attempts to Change the Statelessness Definition*

In recent years, States and the international community have expressed heightened interest in addressing the issue of statelessness. UN bodies, such as the General Assembly, the Economic and Social Council, the Human Rights Council, and even the Security Council, regard statelessness as an issue of international and human security, reflecting a change in the use of the concept. Before 2000, UN bodies discussed statelessness in only 87 published documents, but from 2001 to 2013, statelessness appeared in more than 2,950 documents.<sup>322</sup> In 2011, UN Secretary-General Ban Ki-moon urged the UN to address statelessness from multiple perspectives, outlining guiding principles and policy frameworks for action.<sup>323</sup> Ban described identifying stateless persons as a prerequisite for any response strategy.<sup>324</sup> In 2014, the UNHCR, which is the UN body with the "statutory function of providing international protection [to stateless persons] and of seeking preventive action,"<sup>325</sup> launched the *#iBelong* Campaign with the

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320. For instance, Mexico's laws provide for equal treatment of persons who have a nationality that is not effective. Mexico's *Ley de Migracion*, art. 3(IV), (last visited May 6, 2019).

321. LITTLEJOHN, FOSS & OETZEL, *supra* note 154, at 452–53.

322. *Id.*

323. See UNITED NATIONS, *Guidance Note*, *supra* note 88, at 6, 9; see also UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII)* (2006), <https://www.unhcr.org/excom/exconcl/453497302/conclusion-identification-prevention-reduction-statelessness-protection.html> (last visited Apr. 15, 2019); see also UNHCR, *UNHCR Action to Address Statelessness: A Strategy Note* (2010), <https://www.unhcr.org/protection/statelessness/4b960ae99/unhcr-action-address-statelessness-strategy-note.html> (last visited Apr. 15, 2019).

324. UNITED NATIONS, *Guidance Note*, *supra* note 88, at 6, 9.

325. G.A. Res. 50/152, ¶ 14, U.N. Doc. A/RES/50/152 (Feb. 9, 1996). UNHCR's mandates are usually traced to G.A. Res. 3274 (XXIV) (Dec. 10, 1974) and G.A. Res. 31/36 (Nov. 30, 1976). States assigned this role to UNHCR pursuant to Article 11 of the 1961 Convention on the Reduction of

ambitious goal of ending statelessness in ten years (by 2024).<sup>326</sup> UNHCR's Global Action Plan called on States to take action to "better identify and protect stateless persons."<sup>327</sup> In 2017, UNHCR described statelessness as a concern within the scope of the Sustainable Development Goals. For example, UNHCR linked statelessness to Sustainable Development Goal 16, which calls on States to promote "peaceful and inclusive societies for sustainable development."<sup>328</sup> At the domestic level, States have begun to engage more with international law's statelessness definition apart from determining statelessness. In the United States, for example, the relationship between statelessness and issues such as national security and terrorism<sup>329</sup> and the status of "dreamers"<sup>330</sup> continues to be debated. The Trump administration has proposed restrictions on birthright citizenship—which could have implications on statelessness—as a solution to US immigration issues.<sup>331</sup>

The recent, renewed attention on statelessness reveals the beginnings and continuation of debates towards a more normative and goal-oriented approach to the definition. States, UN bodies and specialized agencies, working with academics and experts, have largely driven these attempts to change the definition. These attempts at changing the concept of statelessness could be grouped into three movements.

The first concerns an approach to interpretation. As explained in Part I.C.2, scholars recommend a fuller interpretation of the existing definition, putting an emphasis on the "operation of the law" clause as a way of gauging the status of a potentially stateless person. Under this approach, the focus is not simply on the

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Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175. Secretary-General Ban Ki-Moon's note regarded statelessness as a collective responsibility of the UN system, with UNHCR having the lead mandate. See UNITED NATIONS, *Guidance Note*, *supra* note 88, at 14–15.

326. UNHCR, *Global Action Plan to End Statelessness 2014-2024 2* (2017) <https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html> (last visited Apr. 15, 2019).

327. See UNITED NATIONS, *Guidance Note*, *supra* note 88, at 2, 4.

328. Sustainable Development Goals, G.A. Res. 70/1, Goal 16, U.N. Doc. A/RES/70/1 (Oct. 21, 2015); see UNHCR, *The Sustainable Development Goals and Addressing Statelessness: A Briefing Note 4* <https://www.refworld.org/pdfid/58b6e3364.pdf> (last visited Apr. 15, 2019); see also Katy Long et al., *Citizenship, Migration and the 2030 Agenda for Sustainable Development* 8–9 (2017), OVERSEAS DEV. INST., <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11744.pdf> (last visited Apr. 15, 2019).

329. See Jayaraman, *supra* note 293.

330. See Jamilah Sabur, *Let 'Dreamers' Live in the US – Their Home*, SUN SENTINEL (2017), <http://www.sun-sentinel.com/opinion/commentary/fl-op-viewpoint-sabur-dreamers-20170905-story.html> (last visited Apr. 16, 2019).

331. See Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html>. For an early examination of birthright citizenship in the US as it relates to statelessness, see Polly Price, *Stateless in the United States: Current Reality and a Future Prediction*, 46 VAND. J. TRANSNAT'L L. 443 (2013) (arguing that confusion over national identity would increase exponentially if birthright citizenship were amended to exclude the children of undocumented persons).

letter of the law.<sup>332</sup> Scholars argue that *de facto* statelessness is legally ambiguous, and so a more robust interpretation of the definition in the treaty would protect more people.<sup>333</sup> But this approach remains inadequate because it still does not take away the ideographic character of the definition, as well as the ideologies entrenched in statelessness determinations, which is embedded in the definition, and merely urges States to be more diligent in determining stateless status.<sup>334</sup> To reiterate, this interpretation-oriented approach accepts as a given, and thus promotes, the conflation of citizen rights with the whole braid of human rights.<sup>335</sup> Importantly, following this approach, State adjudicators have expressed reservations about departing too much from the letter of the law in applying the strictly legal definition.<sup>336</sup>

The second protection-oriented movement is found in the varying but inter-related positions arguing for the broadening of the concept of statelessness to include *de facto* statelessness. Some scholars regard the incorporation of aspects of *de facto* statelessness as an opening to include individuals who might have a legal claim to the benefits of nationality, but do not enjoy the protection of nationality for a variety of reasons.<sup>337</sup> Yet reforming the accepted international definition to include dimensions of *de facto* statelessness may still be inadequate due to the capacious and ambiguous underpinnings of *de facto* statelessness.<sup>338</sup> A vague denotation will be replaced with a more opaque one. Moreover, States explicitly decided not to commit to binding obligations that relate to *de facto* statelessness

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332. See UNHCR, *Expert Meeting*, *supra* note 100.

333. See Laura van Waas, *The UN Statelessness Conventions*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 64, 79–81 (Alice Edwards & Laura van Waas eds., 2014). See also Hugh Massey, *UNHCR and De Facto Statelessness*, LEGAL AND PROTECTION POLICY RESEARCH SERIES 61 (2010) (proposing a definition of 'de facto stateless persons' as follows: "*De facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Persons who have more than one nationality are *de facto* stateless only if they are outside *all* the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of *any* of those countries.").

334. See *supra* Part I.C.3.

335. *But see* de Chickera & van Waas, *supra* note 40, at 60 (noting that UNHCR's approach has "broadened [collective] understanding of statelessness and . . . shown that many people previously envisaged to be *de facto* stateless are actually stateless, or at risk of statelessness.").

336. See *Pham v. Secretary of State for the Home Department*, (2015) U.K.S.C. 19, United Kingdom: Supreme Court, ¶ 25 (Mar. 25). ("If this wording was intended to imply that there is something in the word 'operation' which justifies departure from the letter of the law, it is not to my mind an accurate reflection of the passage in the UNHCR text. That passage . . . is suggesting, not that the law of the country is irrelevant, but rather that, having regard to the purpose of the article, the term 'law' should be interpreted broadly as encompassing other forms of quasi-legal process, such as ministerial decrees and 'customary practice.'").

337. See Weissbrodt & Collins, *supra* note 29, at 251–53.

338. For a study on the different notions and contradictory meanings of *de facto* statelessness, see Massey, *supra* note 333.

when they drafted the 1954 Convention,<sup>339</sup> and it is unlikely that they will commit to one concrete meaning of de facto statelessness in the near future. This is because the concept has not yet crystallized and is extremely fuzzy, more than legal statelessness. It may unrealistically demand too little or too much of States, and States did not want that uncertainty in the obligation when they drafted the 1954 Convention. More so now. This approach is not, therefore, politically viable and workable. It will be one step forward but two steps back.

The third movement relates to various efforts instituting new terms (but still related to de facto statelessness), such as "undetermined nationality," and "risk of statelessness,"<sup>340</sup> as well as "ineffective nationality."<sup>341</sup> Exemplarily, the Inter-American Court of Human Rights in *Expelled Dominicans and Haitians* declared Dominican-born children of Haitian descent, whom the Dominican Republic refused to register as citizens, to be at "risk of statelessness."<sup>342</sup> The Court held that the Dominican Republic had an obligation to resolve their "risk of statelessness,"<sup>343</sup> triggering an obligation to guarantee citizenship to the Dominican-born children.<sup>344</sup> While a novel analytical approach extending protection under the law of statelessness to individuals who face a "risk of statelessness,"<sup>345</sup> the Court failed to specify what "risk of statelessness" meant. Risk is a matter of degree and is relative to a baseline. I posit that the term still needs conceptual precision and does not solve the ontological challenge to statelessness. Otherwise, this ambiguous term, together with "ineffective nationality" and "undetermined nationality," could help maintain statelessness' ideographic status and foster continued interplays of ideologies in statelessness identification.

Although I concede that one cannot completely insulate determinations of statelessness from the vestiges of politics, a clearer conceptual framework of statelessness could reduce room for uncertainty and promote legitimacy. Rather than misreading the language of the definition to expand it and end up with formalistic results, or incorporating the explicitly excluded notion of de facto statelessness into a strictly legal definition, or substituting it with other imprecise

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339. Convention on the Reduction of Statelessness, Dec. 13, 1975, 989 U.N.T.S. 175. In fact, States opposed the inclusion of de facto stateless persons in the definition in the 1954 Statelessness Convention. See Weis, *supra* note 53, at 261.

340. See generally UNHCR, *Global Trends: Forced Displacement in 2018* (Jun. 19, 2019), <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> (including persons of undetermined nationality and those at risk of statelessness in UNHCR's reports on statelessness).

341. See e.g., DAVID WEISSBRODT, *THE HUMAN RIGHTS OF NON-CITIZENS* 84 (2008) (arguing that the definition should be broadened since persons with 'no effective nationality' are, for all practical purposes, stateless, and should be labeled and treated as such).

342. *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 298 (Aug. 28, 2014).

343. *Id.*

344. *Id.* ¶ 458.

345. David C. Baluarte, *The Risk of Statelessness: Reasserting a Rule for the Protection of the Right to Nationality*, 19 *YALE HUM. RTS. & DEV. L.J.* 47, 52 (2017).

terms, States should 'revision' statelessness in light of the 1954 Statelessness Convention's aim to protect the unprotected. As emphasized, it is provided for in the treaty, and there is a momentum to reconsider approaches to the definition.

The next subsection presents a tentative framework that works as a middle ground to the de facto and de jure debate by suggesting a change in the de jure definition of statelessness. I suggest this change not by incorporating vague and undefined concepts relating to de facto statelessness, but by looking at what I term are "badges of protection" in a substantive analysis and by assigning greater responsibilities to the international community (not one State only) in stateless status determinations and the identification of statelessness more broadly. Indeed, definitions are meaningless on their own. A good concept aligns well with its purpose.<sup>346</sup> As previously argued, the ultimate goal of the statelessness regime is the protection of unprotected persons who are not refugees.

### *B. Components of a Proposed Protection-Oriented Framework Agenda*

#### *1. From Formalism to Functionalism*

One of the greatest challenges to statelessness is conceptualizing what it truly means. I have contended here that the conceptualization of citizenship varies from one State to another, and so does statelessness. In developing a framework which 'revisions' the definition of statelessness, States ought to advance the goal of the statelessness regime. Any revision should be premised on the 1954 Statelessness Convention as a protective human rights instrument.<sup>347</sup> Rights should be the baseline. Under basic social contract theory, the guarantor and protector of all rights is one's State.<sup>348</sup> In the classic formulation of Henry Shue, with every basic right, three types of State duties correlate: duties to avoid depriving rights, duties to protect from deprivation, and duties to aid the deprived.<sup>349</sup> Even if States are the duty-bearers to all living within their territories,<sup>350</sup> and States are obligated to ensure the rights of all persons within their territories or all persons subject to their

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346. A concept is good if the following aligns well: (a) the events or phenomena to be defined, (b) the properties or attributes that define them, and (c) the term covering both the event or phenomena and the properties or attributes. John Gerring, *What Makes a Concept Good? A Criterial Framework for Understanding Concept Formation in the Social Sciences*, 31(3) *POLITY* 357, 357–58 (1999).

347. For the human rights dimensions of statelessness, see, e.g., Michelle Foster & Hélène Lambert, *Statelessness as a Human Rights Issue: A Concept Whose Time Has Come*, 28(4) *INT'L J. REFUGEE L.* 564 (2016).

348. Human rights instruments also assert State responsibility. For instance, the Universal Declaration of Human Rights proclaims that States pledge themselves for the promotion of universal respect for and observance of human rights. Universal Declaration of Human Rights, G.A. Res. 217 A(III), Preamble, U.N. Doc. A/RES/3/217A (Dec. 10, 1948).

349. HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 52 (1980).

350. See Andrea Cornwall & Celestine Nyamu-Musembi, *Putting the 'Rights-Based Approach' to Development into Perspective*, 25(8) *THIRD WORLD Q.* 1415, 1417.

control (including stateless people),<sup>351</sup> citizens can make stronger claims on their States and hold their States accountable for duties, but not the stateless. Citizens are those who can demand and receive rights protection from the State; the stateless cannot do so meaningfully. This means that a substantive comparison between people or groups of people in terms of human rights protection is inevitable in an analysis.

To note, the greatest deficit of the current definition—aside from discretionism—is its formalistic nature, not incorporating the rationale that the 1954 Statelessness Convention is a protective instrument. It only allows one to look at whether an individual belongs to the polity of a State or not through State gaze. The statelessness definition is currently structured to serve a gatekeeping function, making available a limited number of rights enumerated in the 1954 Statelessness Convention.<sup>352</sup> While this is not an obscure point, it had been obfuscated because the current definition centers statelessness claims on the presence or absence of mere formal political membership. Thereby, the materiality of the human condition is almost always ignored as, to a much larger extent, is also the treaty's rights protective role.

To address this, the first prong of my proposed framework suggests that the definition of statelessness should be *functional*, that is, it should highlight what statelessness does to people. While we could be at a loss as to what statelessness means, we are clear with what statelessness does: it deprives people of the right to nationality. States should look for the material condition as to the right to nationality—not the other way around—to deduce statelessness. States could develop a definition from the viewpoint of the right to nationality. When the right to nationality is enjoyed, then the person is not stateless. When the right to nationality is not enjoyed, then the person is stateless.

Pragmatically, during stateless status determinations, I propose that the starting point should still be the law and the perceived or reported status of the person. However, the perceived or reported status of the person should be pierced in appropriate cases to inquire into substantial nationality protection.

*a. Focusing on the Right to Nationality*

States should look at concrete manifestations of the right to nationality to determine whether its inverse—statelessness—exists or not. States could comparatively define and determine statelessness from the viewpoint of the right to nationality. The focus on the right to nationality has the advantage of addressing the abstract and ideographic elements of the statelessness definition as it is presently conceived in the 1954 Statelessness Convention.<sup>353</sup> Previously, I unpacked how the definition reifies the stateless person due to its abstract elements. Here, the

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351. Human Rights Committee, General Comment No. 31, p. 4.

352. See 1954 Statelessness Convention, *supra* note 16, at arts. 3–32.

353. See *id.*, at art. 1(1).

abstractness of the statelessness concept is turned on its head to enable States to resort to a meaningful examination of the right to nationality. It counters the rhetoric of the definition of statelessness as the convenient naming and labelling device of the State. While policy interests are part of decision making and cannot be done away with, focusing on the right to nationality takes unbridled discretion away from the State.

At first blush, this approach appears counterintuitive. Since nationality is indeed the opposite of statelessness, it does not seem logical to analyze a person's enjoyment of the right to nationality to determine whether that person is stateless. Why do we need to focus on the right to nationality, as lived experience, when the issue under consideration is a condition that is the opposite of nationality? Will that not take the focus away from statelessness?

I argue that it is not counterintuitive. Nationality and statelessness are jural opposites. These concepts operate on the same axis of State discretion, rights, and inclusion or exclusion from a political community. Both are related legal concepts that form opposite sides of the same coin. In legal theory, Wesley Hohfeld advanced the position that the presence of a jural concept implies the absence of its opposite.<sup>354</sup> Simply put, when one of the factors under consideration applies to a person, that person cannot be constrained by a disability posed by the opposite concept. If a person has the right to nationality, therefore, statelessness cannot at the same time disable them.

Unlike the limited law on statelessness, international law has broadly developed to articulate what the right to nationality means.<sup>355</sup> Recognizing the right to nationality—that every individual is entitled to have at least one citizenship—means that its corollary of statelessness is a human rights violation that increases vulnerability to even more human rights violations.<sup>356</sup> Statelessness causes harm. Under political theory, scholars have argued that the condition of rightlessness within the Arendtian concept of statelessness should be recognized as causing harm,<sup>357</sup> including an inability to claim other fundamental rights and alienation from a political community.<sup>358</sup> The law has the potential to extricate people from

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354. See generally Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied to Judicial Reasoning*, 23 YALE L.J. 16, at 32 (1913). For an application to the ICCPR, see Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, 5 J. INT'L LEGAL STUD. 57 (1999).

355. See Mirna Adjami & Julia Harrington, *The Scope and Content of Article 15 of the Universal Declaration of Human Rights*, 27(3) REFUGEE SURV. Q. 93, at 93–100 (chronicling the substance of the right to nationality indicated in international instruments).

356. *Id.* at 94.

357. Jo Shaw, *Citizenship and Constitutional Law: An Introduction* 6 (Edinburgh School of Law Research Paper No. 2017/21), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3075862](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075862) (last visited May 6, 2019).

358. For an exploration of the distinctive harms of statelessness, see James Draper, *Climate Change and Statelessness: Informing a Response to Statelessness due to Sea Level Rise in Dialogue with Hannah Arendt* (2016) (Master's Thesis, Utrecht University).

conditions of harm and from intrusions on individual liberties.<sup>359</sup> International law's concept of an obligation to protect is part of a broader trend that seeks to suppress human rights abuses by reference to associated international responsibility.<sup>360</sup>

International law also provides the right to nationality with a dynamic meaning that can inform an analysis of the more ambiguous, intractable concept of statelessness. Since the adoption of the UDHR in 1948, States have elaborated on the concept of the right to nationality. Previously, the question of nationality was completely within the *domaine réservé* of States.<sup>361</sup> However, in the *Nottebohm Case*, which the ICJ decided in 1955 (about a year after the Statelessness Convention), the court viewed nationality as a juridical expression of a social fact that connects the individual to a State, and that such a link should be genuine and effective.<sup>362</sup> *Nottebohm* transferred the genuine connection principle belonging to the discourse of dual nationality to the field of diplomatic protection, and thereafter, to the field of rights protection.<sup>363</sup>

Nationality, as I have argued elsewhere, is therefore no longer regarded as entirely within the *domaine réservé* of States.<sup>364</sup> Various instruments after the 1954 Statelessness Convention incorporated the right to nationality in adopted treaty texts to strengthen State obligations.<sup>365</sup> For example, Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) states that every child has the right to acquire a nationality.<sup>366</sup> From childhood, all of us thus have the right to nationality. The Human Rights Committee declares that the enjoyment of the rights in the ICCPR is "not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness."<sup>367</sup> This

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359. See, e.g., THOMAS HOBBS, *LEVIATHAN* 153 (Richard Tuck ed.) (1991); JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* §§ 7–13, at 123–30 (3rd ed., 1988); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 25 (1974).

360. See Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 341 (2010).

361. See *Nationality Decrees Case*, *supra* note 114, ¶ 38.

362. See *Nottebohm Case*, *supra* note 114, at 23.

363. Albrecht Randelzhofer, *Nationality*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 502 (1997). Cf. International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, U.N. Doc. A/61/10, at 33 (2006).

364. Francis Tom Temprosa, *Statelessness in Philippine Law: Expanding Horizons of the International Stateless Person Protection Regime*, 58 ATENEO L. J. 29 (2013).

365. See, e.g., Article 24 of the ICCPR; Article 18 of the Convention of the Rights of Persons with Disabilities; Article 25 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Articles 7 and 8 of the Convention on the Rights of the Child; and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

366. International Covenant on Civil and Political Rights art. 24(3), Dec. 19, 1966, 999 U.N.T.S. 171.

367. U.N. Human Rights Committee, General Comment No. 31 Article 10, 2187th Session of the Human Rights Committee, CCPR/C/21/Rev.1/Add.1326 (Mar. 29, 2004).



is itself an incorporation of the right to nationality, including civil and political rights, for stateless people.

Focusing on the right to nationality has the additional advantage of adapting to the changing norms of international law. While nationality is a concept that was created to organize the world under the old conditions of the feudal period, the concept remains dynamic and can acquire other meanings.<sup>368</sup> It has indeed already acquired a different meaning in the last century. By themselves, *Nottebohm* and the ICCPR are demonstrations of the norm-adapting quality of the right to nationality. They point to a normative change in the way that nationality is viewed, that is, it is not just the formal link between a State and the individual. It is a genuine link protecting the individual. Initiatives of international actors have reconceptualized "citizenship status, shifting from an identity to a rights frame."<sup>369</sup> We expect the concept of nationality to change and adapt in the future. A more differentiated and flexible approach should hence be preferred because it could accommodate change.

*b. Piercing the Veil of Citizenship Status*

Pragmatically, as suggested, determining stateless status should necessarily begin with an analysis of the laws and state practices of the States to which a person has links. Applying their laws and practices to the factual circumstances of particular persons should then follow. My proposed functional approach does not stop there, however, but adds that determinations of stateless status should consider what I term "badges of protection."

I posit here that determinations should take into account "badges of protection" or badges of the manifestations of the right to nationality. At our moment in international law's history, the right to nationality relates to and incorporates protection for the exercise of core civil and political rights.<sup>370</sup> Where absent, these badges should compel determinations to pierce the veil of declarations of status—citizenship or statelessness—to exceptionally examine a person's real status. A determining State, entity, or body should resort to piercing when another State disregards its own citizenship law. Additionally, piercing should be resorted to when a State declares one to be its citizen or stateless with fraud, malfeasance, or to otherwise evade an obligation. It is a middle ground between the very strict text-only examination of statelessness and the very loose revalida of de facto statelessness.

In international law, courts and tribunals have pierced the corporate veil to disregard the professed nationality of a corporation. In *Barcelona Traction*,

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368. McDougal et al., *supra* note 68, at 998.

369. Spiro, *supra* note 292, at 694–95. Spiro argued that the existence of a conceptual shift from "nationality" to "citizenship" is a shift away from the formal, traditional and sovereignty perspective on nationality.

370. In the coming years, the right to nationality may have a different articulation. The badges would have to adjust.

Belgium sued Spain on behalf of the Belgian shareholders of Barcelona Traction—a Canadian company.<sup>371</sup> The court found that there was no reason to pierce the corporate veil, but declared that "fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations" are grounds for piercing the veil.<sup>372</sup> In an exceptional circumstance allowing the piercing of the veil, the European Court of Human Rights, in *Agrotexim v. Greece*, where the shareholders complained that the expropriation by a municipality violated their rights, held that it is justified "where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation."<sup>373</sup> In international investment law, the tribunal in *Saluka Investments v. Czech Republic* held that the corporate veil should be pierced in the presence of fraud.<sup>374</sup>

To give an example, when State Y wants to determine A's citizenship status, it has to determine whether State X (assuming X is the only State with a connection to A) considers A a citizen or not upon the operation of its laws. In the course of the determination process, State Y examines the laws and state practice of State X on citizenship as applied to the life events and personal and family histories of A. State Y generates its own perception of State X's circle of citizenship and whether State X considers A as belonging inside or outside of it. Or, State Y could directly ask State X if it considers A a citizen or not. If State X replies in the positive (even if A believes they are not a citizen of State X), A should not be immediately constituted as not a stateless person. If there is a showing that State X does not allow A to vote in disregard of his right to political participation as a citizen of State X in violation of the ICCPR, then a badge of protection is absent. In such a case, the absence of a badge of protection should allow State Y to pierce the veil of the declaration of status of A. State Y could rule that A is stateless and provide them protection upon closer examination of their material condition.

When analyzing "badges of protection," it is imperative that the analysis incorporates concepts in international law that are inherent in nationality rights protection.<sup>375</sup> These concepts include the principle of non-discrimination, and where applicable, State obligations to prevent and reduce statelessness.<sup>376</sup> In explaining the right to nationality, the Human Rights Committee declared that it is a protection "from being afforded less protection by society" because of citizenship

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371. *Barcelona Traction*, Judgment, 1970 ICJ Rep. 3, ¶ 42 (Feb. 5).

372. *Id.* ¶ 56.

373. *Agrotexim and Others v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66 (1995).

374. *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006), <http://www.pca-cpa.org/ENGLISH/RPC/>.

375. See Caia Vlieks et al., *Solving Statelessness: Interpreting the Right to Nationality*, 35 NETH. Q. HUM. RTS. 158, 165 (2017).

376. Brad Blitz, *Statelessness, Protection and Equality* 22 (2009), REFUGEE STUD. CTR., <https://www.rsc.ox.ac.uk/files/files-1/pb3-statelessness-protection-equality-2009.pdf>.

status.<sup>377</sup> In *Yean and Bosico v. Dominican Republic*, the Inter-American Court of Human Rights stressed the limits on States' application of nationality-related rules and regulations.<sup>378</sup> The *Yean and Bosico* court struck down the Dominican Republic's discriminatory application of nationality and birth registration laws and regulations.<sup>379</sup> More recently, the International Court of Justice in *Ukraine v. Russian Federation* allowed the discrimination charge against Russia to proceed to trial, ruling that there would be a violation of the International Convention on the Elimination of All Forms of Racial Discrimination if sufficient evidence exists that Russian citizenship laws were adopted or executed with the purpose or effect of racial discrimination against Crimean Tatars and ethnic Ukrainians in Crimea.<sup>380</sup>

Hence, the determinations should be individuated, and the principle of non-discrimination necessitates that only persons who are similarly situated be compared with each other. It levels off from the premise that human rights protection relates to "a certain conception of the person and its relationship with others."<sup>381</sup> Piercing should also acknowledge aspects of indirect discrimination that occur when a practice, rule, requirement, or condition is facially neutral, but unduly impacts groups disproportionately.<sup>382</sup>

The most distinct benefit of piercing lies in its ability to remove the anachronistic vision of bare citizenship as human rights protection. Piercing lifts the false veil of protection that a status purports to grant an individual for a closer look at the human condition. Since both inequality and discrimination are the common threads tying all forms of rightlessness in the context of nationality and statelessness,<sup>383</sup> piercing could also reveal interpositionality and intersectionality. Due to complex and layered vulnerabilities, different groups of people are

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377. U.N. Human Rights Committee, General Comment No. 17: Article 24 (Rights of the Child), ¶ 8, 35<sup>th</sup> Session of the Human Rights Committee, U.N. Doc. HRI/GEN/Rev.9 (vol. I) (Apr. 7, 1989).

378. *Yean and Bosico v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R., No. 12.189, ¶¶ 191–192 (Sept. 8, 2005); see also Baluarte, *supra* note 345, at 51–52.

379. *Yean & Bosico*, *supra* note 378.

380. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*) (Prelim. Obj.), Judgment, 2019 I.C.J. 166 Nov. 8, 2019.

381. See Jacques Lenoble, *The Implicit Ideology of Human Rights and Its Legal Expression*, 8 LIVERP. L. REV. 153, 166 (1986).

382. For an analysis of indirect discrimination in statelessness, see James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS INT. AFF. 321, 328 (2006).

383. For an analysis of the elements of discrimination and inequality in statelessness literature, see generally Blitz, *supra* note 376.

especially prone to statelessness, such as women,<sup>384</sup> children,<sup>385</sup> indigenous peoples and racial minorities,<sup>386</sup> and persons reported of engaging in terrorism.<sup>387</sup>

*c. Other Related Considerations*

In view of functionalism, the following should also be considered. First, refugees should be demarcated from the definition of statelessness because the purpose of the statelessness regime is the protection of the unprotected who are not refugees.<sup>388</sup> Second, when looking into foreign law and practice, statelessness should always be approached from the perspectives of international comparative law and private international law. Otherwise, the analysis will be fragmented because statelessness relates to an examination of various domestic laws. States do not know, and are presumed not to know, the laws of every State in the world and how those laws are operationalized.<sup>389</sup> While public international law is highly relevant to statelessness, States ultimately regulate citizenship through domestic laws and regulations.<sup>390</sup> State legal policies can be liberating or discriminating. Approaching the question of statelessness from these lenses also takes care of the problems of law determination and operationalization.

The international community can build on the existing obligation in Article 33 of the 1954 Statelessness Convention to inform the Secretary-General about laws and regulations adopted to fulfill treaty obligations.<sup>391</sup> This obligation stems from each State party's right to be informed about the application of the 1954 Statelessness Convention.<sup>392</sup> Constructing a database of nationality legislation is

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384. For a good overview, see Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523, 531 (2001) (arguing that women's inequality in nationality law can be seen within the prism of three generations of issues of inequality). See also Francis Tom Temprosa, *Falling Between the Cracks: Statelessness, Nationality and Migration*, 2 QUILTED SIGHTINGS: A WOMEN AND GENDER STUDIES READER 11 (2012).

385. See Jacqueline Bhabha, *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights*, 31 HUM. RTS. Q. 410 (2009); Jo Boyden & Jason Hart, *The Statelessness of the World's Children*, 21 CHILD. & SOC. 237 (2007).

386. For an interesting position on minority culture and secular criticism, see Aamir R. Mufti, *Auerbach in Istanbul: Edward Said, Secular Criticism, and the Question of Minority Culture*, 25 CRITICAL INQUIRY 95 (1998).

387. See other parts of this article for the discussion on the nexus with terrorism.

388. See WEIS, *supra* note 36, at 44, 164 (outlining the categories of unprotected persons).

389. See note 410–11 and accompanying text.

390. See Gerard-René de Groot, *Towards a Toolbox for Nationality Legislation Text of the Val-edictory Lecture as Professor of Comparative Law and Private International Law at Maastricht University* 9–10 (Oct. 14, 2016), [https://cris.maastrichtuniversity.nl/portal/en/publications/towards-a-toolbox-for-nationality-legislation\(6ed2896f-097e-4d08-b922-aff47b71a41a\).html](https://cris.maastrichtuniversity.nl/portal/en/publications/towards-a-toolbox-for-nationality-legislation(6ed2896f-097e-4d08-b922-aff47b71a41a).html).

391. 1954 Statelessness Convention, *supra* note 16, at art. 33.

392. ROBINSON, *supra* note 48.

a laudable initial step,<sup>393</sup> but it is an incomplete one. As I shall argue later, an institutional approach would complement this effort.

Third, other areas of international law can also shed light on the issue of nationality protection. Although the 1954 Statelessness Convention is a human rights instrument, issues of statelessness extend far beyond human rights law and affect other aspects of a person's life and other branches of law. Within international investment law, for example, a framework of diplomatic protection serves as the source of traditional obligations toward foreign nationals; claims for violations of these standards may only be made at the interstate level by the State of nationality.<sup>394</sup> Stateless persons are thus entitled to no protection under this framework.<sup>395</sup>

However, in pursuit of the progressive development of international law, the ILC adopted a provision in the Articles on Diplomatic Protection allowing States to exercise diplomatic protection in respect of stateless persons who are lawful and habitual residents of a claimant State.<sup>396</sup> That person must be a resident of the claimant State at the date of the injury and when the claim is officially presented.<sup>397</sup> The ILC asserted that international law reflects a concern for stateless persons in treaty law.<sup>398</sup> We should anticipate and incorporate normative changes, such as this change in international investment law, in any analysis.

Fourth, since any determination of stateless status affects the life and liberty of people, the assessments should be fair and equitable. States must observe the imperatives of procedural justice, due process, and other substantive and procedural guarantees in international law and applicable domestic law. Questions of proof and evidence should be answered through these lenses. Administrative and/or judicial review processes must further be in place. States also need to think about the imperatives of global administrative law as it intersects with statelessness. Otherwise, the legitimacy of the procedures and the resulting status determinations could be called into question.

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393. See Vonk et al., *supra* note 271 (for comparative law efforts); see also U.S. OFF. OF PERS. MGMT., *Citizenship Laws of the World*, <https://www.multiplecitizenship.com/worldsummary.html> (last visited May 3, 2019).

394. Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT'L L. 187, 216 (2014).

395. *Id.*

396. John Dugard, *Articles on Diplomatic Protection* (2006), [http://legal.un.org/avl/pdf/ha/adp/adp\\_e.pdf](http://legal.un.org/avl/pdf/ha/adp/adp_e.pdf).

397. International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, art. 8, at 36, U.N. Doc. A/61/10 (2006).

398. *Id.* at 35–36.

*From State Discretionism to Greater Responsibilities for the International Community*

The 1954 Statelessness Convention was designed as a concrete expression of the international community's responsibility to protect the unprotected. Yet a lacuna in the present framework persists: the lack of an international institutional approach to follow through on this commitment at the level of the international community. Conceptually, the UN General Assembly assigned UNHCR with the global mandate of identifying stateless persons while providing "relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation."<sup>399</sup> Article 34 of the 1954 Statelessness Convention also allows issues surrounding the definition of statelessness to be brought before the ICJ under certain circumstances.<sup>400</sup> The UN wants a system-wide approach to statelessness.<sup>401</sup> But, by and large, States engage in a horizontally dispersed practice of interpretation and application of the definition of statelessness, while UNHCR plays only a supportive role. A State has not yet brought another State to the ICJ on an explicit question of statelessness. This current arrangement is no longer tenable.

*a. International Institutional Statelessness Identification and Determination*

Assigning greater vertically-oriented responsibilities to a treaty body that has the power to review determinations of statelessness offers a way forward. Under the revision process, States could form and organize a treaty-body for the 1954 Statelessness Convention, composed of an odd number of experts on rights and citizenship law. This would shift the axis from the State to the international community. It would also complement the horizontal enforcement of the 1954 Statelessness Convention and better guide the interpretation of a functional definition of statelessness. UN treaty bodies have a record of success in human rights protection.<sup>402</sup> Most core human rights treaties have expert and independent treaty bodies with developed methods of considering reports. The treaty bodies have the ability to issue general comments or recommendations to improve compliance with international human rights obligations, coordinate with other similar bodies, and work with States, human rights institutions, and non-governmental

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399. G.A. Res. 50/152, ¶ 14, U.N. Doc. A/RES/50/152 (Feb. 9, 1996). This is actually weird because the present definition seems to only allow determination to be done by States. To recall, part of the definition reads that a person is stateless when not considered a national "by a State".

400. 1954 Statelessness Convention, *supra* note 16, art. 34 (allowing disputes on interpretation or application to be brought before the International Court of Justice at the request of a party to dispute).

401. See generally United Nations, Guidance Note, *supra* note 88.

402. James Crawford, *The UN Human Rights Treaty System: A System in Crisis, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 1, 3 (Philip Alston & James Crawford eds., 2000).

organizations.<sup>403</sup> More importantly, a supervisory mechanism such as a treaty body could pin down factors that States manipulate through policy interventions.<sup>404</sup>

Crucially, a treaty body for the 1954 Statelessness Convention could hear subaltern voices on statelessness concerns. The treaty body could serve a bridging function between an individual and States in the determination process, providing a forum where stateless persons—often on the fringes of society—could express concerns and raise issues relating to determinations and the exercise of the right to nationality. The treaty body for the 1954 Statelessness Convention could also authorize non-governmental organizations to provide routine information and incoming shadow reports for consideration.<sup>405</sup>

Early scholarship on statelessness underscored the importance of institutions to statelessness issues, but those scholars remain largely unheeded. Returning to these and similar prescriptions, a treaty body could be established and organized for statelessness. For example, Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen all advocated for "some centralization, or organized internationalization of the protection function on the global level,"<sup>406</sup> specifically advocating for a more organized institution to be positioned within the UN framework.<sup>407</sup> Although the treaty body would operate independently, the UN General Assembly should provide the treaty body with adequate resources, manpower, and enforcement powers. The UN Secretary-General has also expressed the need for international cooperation and for treaty bodies to ensure the full implementation of the 1954 Statelessness Convention.<sup>408</sup> It is high time to follow through on such prescriptions.

A dedicated treaty body that works with other treaty bodies is desirable. Since the 1980s, while different treaty bodies have made pronouncements on the condition of statelessness,<sup>409</sup> they have not really considered the concerns that are

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403. *Id.*

404. Philip Alston, *Between 'Them' and 'Us': Putting Treaty Body Reform into Perspective*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 501, 523 (Philip Alston & James Crawford eds., 2000).

405. See Felice D. Gaer, *Implementing International Human Rights Norms: UN Human Rights Treaty Bodies and NGOs*, 2(3) *J. HUM. RTS.* 339, 350 (2003).

406. McDougal et al., *supra* note 68, at 996–97.

407. *Id.*

408. See UNITED NATIONS, *Guidance Note*, *supra* note 88, at 4.

409. See UNHRC, *General Comment No. 27: Freedom of Movement*, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), p. 5, para. 20; UNHRC, *General Comment No. 15: The Position of Aliens Under the Covenant*, U.N. Doc. HRI/GEN/1/Rev.1, at 18 (1986), p. 1, para. 1; United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations* (1994), Comment No. 6, <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>; United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non-Citizens*, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (2004), para. 16; United Nations Committee on the Rights

unique to or within the specific ambit of the 1954 Statelessness Convention, such as the definition of statelessness. Creating a treaty body for the 1954 Statelessness Convention does not undercut their work. The plurality of treaty bodies ensures different approaches to human rights and may highlight neglected concerns.<sup>410</sup> However, in a discourse that is intimately tied with the interests of States, I do admit that it will require a lot of political will on the part of States for such a treaty body to gain support.

Several cornerstone principles should apply to the workings of the proposed treaty body. Among others:

First, due to the complex nature of the world's citizenship laws and their varied applications, the treaty body should be organized with panels grouped according to regions or specializations aligning with different legal traditions. Since statelessness results from negative conflicts between national laws, or when no law trumps other laws to grant citizenship to an individual,<sup>411</sup> the treaty body should be composed of highly specialized comparative law experts. This will solve the fragmentation of approaches in discharging stateless status determination obligations and remove the unrealistic burden on States to know the nationality legislation of all other States. As the literature on citizenship shows, citizenship regimes do not work in isolation, and constellations arise through different types of transnational and supranational venues.<sup>412</sup> The treaty body should create and continuously update a compendium of citizenship laws and regulations based on the different legal traditions of the world to guide the panels in their work.

Second, the treaty body should understand trends, policies, and movements in citizenship rights around the world. Because statelessness is an area of law that implicates State discretion, the treaty body should be able to untangle power and political dynamics. By analyzing trends, policies, and movements in citizenship rights in the international arena, the body could understand the dynamism of citizenship and statelessness. This is vital in accomplishing its objectives. As such, the body should have broad powers to compel States to submit laws, as well as reports describing the application of those laws. The treaty body must also develop a sense of duty from the States to do this, as explained in the next subsection.

Third, the UN and represented States should be able to hold the treaty body and its members accountable through a system of checks and balances. Under the 1954 Statelessness Convention, the ICJ is empowered to take on cases dealing with the interpretation or application of the provisions of the treaty.<sup>413</sup> It is

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of the Child, *General Comment No. 11: Indigenous children and their rights under the Convention*, U.N. Doc. CRC/C/GC/11 (2009), para. 41; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/GC/20 (2009), paras. 5, 26 & 30.

410. See Alston, *supra* note 404.

411. See Spiro, *supra* note 292, at 694.

412. See Shaw, *supra* note 357, at 15.

413. 1954 Statelessness Convention, *supra* note 16, art. 34.



possible to arrange that once the definition in the treaty is revised, questions arising out of the treaty body's interpretation or application of the new definition could be submitted to the ICJ for judicial review. Aside from installing a watchdog to the treaty body, this arrangement would ensure the continued development of the jurisprudence on statelessness and citizenship rights. Different regional human rights courts may also become oversight judicial bodies.

One may argue that the creation of the treaty body takes away the primacy of citizenship issues from the States. However, this view reflects an antiquated vision of citizenship issues as exclusively within the province of States. Rather than seeing the international body as encroaching on the prerogative of States in dealing with citizenship issues, it should be regarded as a monitoring and enforcement body that encourages States to comply with international law obligations. In addition, this body should not take away the State's right to promulgate laws and regulations on aspects of citizenship, although it could accumulate evidence of emerging State practices.

*b. State Duties of Inquiry and Cooperation*

As the international community bears greater responsibility towards stateless persons, States should also take on additional ethical duties, drawn from public law, which will help promote better status determinations. I identify two of such duties that must fall unto States. First, the treaty body should develop a duty of inquiry on the part of determining States. It is not enough for States to determine statelessness; they must conduct these determinations out of a sense of legal obligation. Encouraging States to do so will hasten the emergence of status determinations as part of customary law, and as an obligation, States will be bound to perform determinations in good faith. States that identify stateless persons under the functional definition of statelessness will be better positioned to protect them.

Several individual State level decisions have started moving into this direction. For example, in the *Semeda Case*, the UK Court conceived of a duty of inquiry as part and parcel of stateless status determinations.<sup>414</sup> In that case, the determination officer failed to make sufficient inquiries into the applicant's status.<sup>415</sup> The court, therefore, invalidated the Secretary of State's initial status determination.<sup>416</sup> In determinations, the UK Court warned that status adjudicators must ascertain whether the initial determining officer asked the right questions and took reasonable steps to acquaint themselves with the information needed to make proper determinations.<sup>417</sup> Whether the steps taken were reasonable depends on the factual circumstances of the case, so it is an obligation of conduct and not

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414. *See Semeda Case, supra* note 117, ¶ 17.

415. *See id.* at ¶ 22.

416. *See id.* at ¶ 26.

417. *See id.* at ¶ 17 (citing *Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside*, (1976) U.K.H.L. 6, (1977) A.C. 1014, United Kingdom: House of Lords (Oct. 21, 1976)).

an obligation of result that is rigid. It does not fetter the reasonable discretion of decision makers.<sup>418</sup> Likewise, because it is an obligation of conduct on the part of the State, the burden of ascertaining status is shifted to the State, which has more resources at its disposal than a potential stateless person. Moreover, it serves as a safeguard against arbitrary and capricious decision-making. Reasonable steps necessarily include a reason-based interpretation of law as applied to the facts of the case. In the event that a treaty body for the 1954 Statelessness Convention is not created, the duty is especially useful in raising the quality and credibility, as well as the legitimacy, of the results of domestic determinations.

Second, States must also bear the duty of cooperating with one another and with the proposed treaty body on statelessness determinations. Without this duty, States will continue to talk past each other and avoid dealing with the ontological issue. The definition of statelessness will either remain a siloed-off, strange cipher that no State understands, or it will become an empty vessel that privileges State discretion. Determinations will continue to be a monologue, rather than a dialogue between and among concerned States for the protection of the individual. A duty to cooperate will help yield sound determinations and promote candor between and among States in citizenship matters. Eventually, if the treaty-body on statelessness is created, States could come before the treaty body in dialogue with one another. They may also be persuaded to comply with existing commitments on statelessness matters because a duty to cooperate with the treaty body exists. The treaty body will not be as effective if States bear no duty to cooperate with it. States will not heed its general comments and views and respond to its call for reports, meetings, and conferences. In the end, inasmuch as the regulation of nationality is no longer within the exclusive *domaine réservé* of States, a duty of cooperation will also further the development of norms of international law on citizenship-related issues.

#### CONCLUSION

The Article's proposed framework revises the definition of statelessness, not in line with how this term was originally conceived by the framers of the 1954 Statelessness Convention, but in accordance with the purpose of the 1954 Statelessness Convention. This Article further suggests additional possibilities for reforming the definition of statelessness and the way that stateless status determinations are conducted.

Up to this point, statelessness has assumed a rhetoric-like discourse in international law. The existing definition, a product of the first half of the twentieth century, has become an ideograph that accommodates State-privileging ideologies. States have so far used this definition as a naming and labelling device of

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418. *Id.* at ¶ 18 (citing *British Oxygen Co Ltd. v. Minister of Technology*, (1970) U.K.H.L., (1971) A.C. 610, United Kingdom: House of Lords (Jul. 15, 1970)).

international law in the midst of competing policy concerns during statelessness determinations. Aside from these concerns, the definition has stressed formalism and entrenched the absence of rights protection in the discourse of status determinations. Instead of only protecting the unprotected, as originally envisioned, the definition of statelessness can and has been used in other, often competing, ways. It may be argued that the description of rhetoric does not fit statelessness because international law is indeterminate in general and it is only a matter of interpretation and application. However, I respond to this by stressing that not all concepts in international law assume a rhetoric-like discourse. The definition is an ideograph contributing to a discourse around the ideologies of formalism and discretionism. As I have emphasized, the paradox of statelessness is that States decide on statelessness, based on laws that States themselves create and choose to implement.

Statelessness, therefore, should be revised. While arguing that the current definition of statelessness should not be entirely discarded but reformed, I have laid down a two-pronged framework. First, this framework makes the definition of statelessness more functional and substantive, allowing the piercing of State declarations of status. Second, it limits State discretionism through the creation of a treaty body on statelessness, the ethical development of the State duty to properly inquire on statelessness, and the State duty to cooperate with each other and the proposed treaty body on statelessness matters. I admit that this proposed framework will not completely insulate determinations of statelessness from the vestiges of the politics between and among States. But any reform agenda—for that matter—will not fully insulate law from politics. It is just impossible—politics is a fact of life. However, a clearer conceptual framework of statelessness will reduce room for uncertainty and promote the legitimacy and credibility of the process of identifying statelessness.

Inevitably, the revisioning process is a multi-actor effort. It will be a long and arduous process, although some components of the framework could be carried out more easily ahead of others and may even be done outside of a formal revisioning process. But if the formal revisioning process is engaged, at least one State party to the 1954 Statelessness Convention is required to start it by revisioning to the current treaty. Once a State suggests to revision the concept of statelessness, the UN General Assembly is needed to carry it into motion. The UNHCR and other UN bodies and specialized UN agencies have a role to play in supporting and providing technical support to the process. Stateless persons are a boundless source of information for States and other actors as the process unfolds. NGOs could triangulate information and provide pressure points for advocacy. But while no State initiates the process, these other actors could promote and advocate for the revisioning process. In the meantime, States could also change domestic laws to customarily form a more functional and protection-oriented definition of statelessness.