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Ghosts in America: Working Towards Building a Legal Framework for Stateless Individuals in the United States

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GHOSTS IN AMERICA: WORKING TOWARDS BUILDING A LEGAL FRAMEWORK FOR STATELESS INDIVIDUALS IN THE UNITED STATES

*Asako Ejima**

ABSTRACT

There are “ghosts” living in the United States. These “ghosts” are stateless individuals who have no nationality and live without the protections of any State. These individuals pose an intractable problem for the countries where they live and the international community. While these individuals are not entitled to live in a country under that country’s immigration laws, they cannot be removed from that country because other countries are unwilling to take them. This presents both a political problem for the country where they live and a human problem for the stateless individual. On one hand, countries waste time and resources trying to remove stateless individuals. On the other hand, without a country willing to take them in, these stateless individuals are left in “limbo” and without basic access to health care, civil rights, welfare, and housing. Consequently, they are incredibly vulnerable to exploitation. It is crucial to protect these communities and facilitate their access to the basic necessities that most of us take for granted. Policy recommendations that accommodate their most immediate needs will be the most effective in providing them with that relief.

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INTRODUCTION

There are “ghosts” living in the United States.¹ And they present an intractable problem for both the international community and the United States. “Ghosts” are refugees in a foreign country who have no country to call home.² “Ghosts” is an appropriate name for these individuals because they and their needs are invisible to the States they live in and the international community as a whole.

Tatianna Lesnikova is one of these ghosts.³ In 1992, Tatianna and her son David fled Ukraine because she feared for her son’s safety under

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1. See U.N. High Comm’r for Refugees (UNHCR), *Helping the World’s Stateless People*, at 2 (Sept. 2011) [hereinafter *Helping the World’s Stateless People*].
 2. See *id.* at 4.
 3. U.N. High Comm’r For Refugees Wash., *Statelessness in the United States: Searching for Citizenship*, YOUTUBE (Oct. 10, 2016), https://www.youtube.com/watch?time_continue=37&v=ILO78hivXZ8 [<https://perma.cc/6WK7-588Q>] [hereinafter *Statelessness in the United States*]; Shaminder Dulai & Moises Mendoza, *Stateless: The Ultimate Legal Limbo*, NEWSWEEK (Apr. 10, 2015, 6:36 AM), <https://www.newsweek.com/stateless-ultimate-legal-limbo-319461> [<https://perma.cc/A8QN-NXW5>]; U.N. High Comm’r for Refugees & Open Soc’y Just. Initiative, *Citizens of Nowhere Solutions for the Stateless in the U.S.*, at 1 (Dec. 2012) [hereinafter *Citizens of Nowhere*].

the new Ukrainian government.⁴ Soviet officials had taken and institutionalized Tatianna's eldest son for speaking out against the government and although the Soviet Union had collapsed, the new Ukrainian government was controlled by many of the same people who had been in charge under the Soviets.⁵ When Tatianna arrived in the United States, she filed for asylum but was denied by United States immigration authorities who did not find her fears of oppression credible.⁶ After an appeal process that lasted a decade, her final appeal was denied in 2002.⁷ During that decade, Tatianna established a life in Springfield, Massachusetts where she made a living as a piano teacher and certified nurse thanks to a special work permit that was renewed once a year.⁸

One morning, Tatianna and her son were handcuffed, shoved in a van, and detained for nearly three months by the Department of Homeland Security (DHS).⁹ She had not committed a crime.¹⁰ She was just simply without legal status.¹¹ United States immigration officials tried to deport Tatianna and her son, but they found that she was not given citizenship by Ukraine because she and her family left Ukraine before they fulfilled the residency requirements necessary for citizenship.¹² Because she does not have legal status in any country, she was deemed non-deportable and released after months of detainment.¹³ This experience left her traumatized and left the country with an alien who was not entitled to be here but had nowhere to go.¹⁴

4. Dulai & Mendoza, *supra* note 3.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. U.N. High Comm'r for Refugees & Open Soc'y Just. Initiative, *supra* note 3, at 1; see *Stateless People: Protection of the Rights*, ANTI-DISCRIMINATION CTR. (Jan. 7, 2020), https://adcmemorial.org/en/strategy_cases/stateless-people-protection-of-the-rights/ [<https://perma.cc/B4CK-Z94M>] ("Detention of stateless persons . . . in Russian Federation can not be considered legitimate as deportation is not feasible in such cases.").

11. U.N. High Comm'r for Refugees & Open Soc'y Just. Initiative, *supra* note 3, at 1.

12. *Id.*

13. *Id.*

14. *Statelessness in the United States*, *supra* note 3.

People like Tatianna are called “legal ghosts.”¹⁵ These individuals, who are sometimes also referred to as “nonindividuals” and “nowhere individuals,” are stateless.¹⁶ Today, an estimated 12 million individuals around the world are stateless, which means that they are not considered nationals by any State.¹⁷ Although solid statistics are unavailable, their numbers could range anywhere from several hundreds to four million in the United States.¹⁸ Stateless individuals present a challenge to international and state law because countries that want to deport them have no place to send them, and yet they are reluctant to confer upon them a path to citizenship or permanent residence if they are not eligible for such relief under their own country’s immigration law.¹⁹ Despite this tension, it is in the best interest of the United States to establish a legal framework that protects stateless individuals. The gap in humanitarian protections for stateless individuals unnecessarily taxes the United States immigration system.²⁰ Removing a person who has nowhere else to go is taxing on immigration resources, court resources, and detention facilities.²¹

Not only does this present a legal problem for both domestic and international law, it also presents a human problem for the stateless individual.²² Because stateless individuals are not considered legal residents of where they live, they have limited access to birth registration, identity documentation, education, health care, legal employment, property ownership, political participation, and freedom

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15. *Helping the World’s Stateless People*, *supra* note 1, at 2.
 16. *Id.*; see also TEDX TALKS, *Nowhere People: Exposing a Portrait of the World’s Stateless*, YOUTUBE (Feb. 24, 2016), <https://www.youtube.com/watch?v=u9DD6MZj5Z4&list=WL&index=3&t=0s> [<https://perma.cc/RJ5L-XLXZ>].
 17. U.N. High Comm’r for Refugees (UNHCR), *UNHCR Action to Address Statelessness: A Strategy Note*, at 4 (Mar. 2010) [hereinafter *UNHCR Action to Address Statelessness*].
 18. See John Corgan, *The Stateless in the United States*, CTR. FOR MIGRATION STUD., <https://cmsny.org/the-stateless-in-the-united-states/> [<https://perma.cc/2J8Q-SJBM>]; Nick Keppler, *Trump’s Agents are Trying to Deport a Stateless Man with Nowhere to Go*, VICE (Aug. 28, 2017, 5:30 PM), https://www.vice.com/en_us/article/nee99z/trumps-agents-are-trying-to-deport-a-stateless-man-with-nowhere-to-go [<https://perma.cc/MR6V-K5FZ>].
 19. See Keppler, *supra* note 18.
 20. David C. Baluarte, *Life After Limbo: Stateless Persons in the United States and the Role of International Protection in Achieving a Legal Solution*, 29 GEO. IMMIGR. L. J. 351, 359 (2015).
 21. *Id.*
 22. *UNHCR Action to Address Statelessness*, *supra* note 17, at 4.

of movement.²³ They may also face other barriers including travel restrictions and social exclusion.²⁴ As a result, they experience increased vulnerability to sexual and physical violence, human trafficking, exploitation, and forcible displacement.²⁵

The tragedy of statelessness is that it is a man-made problem.²⁶ And so far, neither the international community nor the national authorities have adequately addressed it. On an international scale, a collective action problem hinders global cooperation towards reducing the number of stateless individuals as individual countries hesitate to confer their nationality onto stateless individuals, hoping that another country will instead.²⁷ On a domestic scale, the current immigration framework used by United States immigration authorities is deaf to the specific political and economic needs of stateless individuals.²⁸ Unfortunately, the problem of statelessness is intractable without an international agreement on state responsibility for stateless individuals.²⁹

In Part One, I explain the causes of stateless persons. First, I summarize the political determinants of statelessness; including, state succession, arbitrary discrimination, and technical causes. Then, I will put a human face on statelessness by talking about the consequences of statelessness. In Part Two, I describe the international legal framework that has proven to be ineffective at providing an international solution. International cooperation to improve the status of stateless individuals and reduce or eliminate statelessness has enjoyed limited success for several reasons.³⁰ First, the biggest obstacle to an international solution is a collective action problem resulting from the tension between

23. *Id.*

24. Anna Roberts, *No Place to Run: The Forgotten Vulnerabilities of the Stateless*, O'NEILL INST. (Oct. 3, 2016), <https://oneill.law.georgetown.edu/no-place-to-run-the-forgotten-vulnerabilities-of-the-stateless/>.

25. *Id.*

26. U.N. High Comm'r for Refugees (UNHCR), *Ending Statelessness Within 10 Years*, at 2 (Nov. 2010) [hereinafter *Ending Statelessness Within 10 Years*].

27. *See id.* at 5–6.

28. Corgan, *supra* note 18, at 6.

29. Benjamin Boudreaux, *Statelessness, Sovereignty, and International Law: Promoting the "Right to Have Rights,"* in HUMAN DIGNITY AND THE FUTURE OF GLOBAL INSTITUTIONS 207, 211 (Mark P. Lagon & Anthony Clark Arend eds., 2014).

30. Michelle Foster & Hélène Lambert, *Statelessness as a Human Rights Issue: A Concept Whose Time Has Come*, 28 INT'L J. REFUGEE L. 564, 565.

international law and individual State sovereignty.³¹ Many countries would identify statelessness as a problem, but no country alone is ready to be a part of the solution or take on burdens unless other countries do as well.³² Although there is a basic international humanitarian concern for other humans,³³ States retain (and want to retain) the right to determine nationality as part of State sovereignty.³⁴ In other words, while individual States have an interest in diminishing the problem of statelessness, they would rather not be the ones to grant a particular stateless group citizenship.³⁵ Instead, they would rather avoid the political costs of welcoming stateless individuals and would prefer to have other States take on the responsibility of nationalizing new groups of individuals.³⁶ As a result, while international legal frameworks currently exist to prevent statelessness, their weaknesses and historically low rate of commitment to implementation and enforcement have made them largely ineffective in solving the plight of stateless individuals.³⁷ The international community has also considered protections for refugees and the statelessness separately despite their similarities with the prioritized focus on refugees.³⁸ As a result, the development of protections for stateless individuals has lagged behind protections for refugee populations.³⁹ Additionally, stateless individuals who should have qualified for refugee protections have been denied those protections because the two categories are being considered separately.⁴⁰ In practice, however, there is substantial intersectionality between being *stateless* and being a *refugee*.⁴¹ And fourth, statelessness

31. See Boudreaux, *supra* note 29, at 209–11.

32. *Id.* at 211.

33. *Id.* at 209.

34. *Id.* (“The principle asserting that states determine their own citizens has been enshrined and advanced by international law, from at least the 1930 Hague Convention on Nationality onward and has been further developed and applied in judicial cases, such as the *Nottebohm* case adjudicated in 1955 by the International Court of Justice, which claims that ‘nationality is within the domestic jurisdiction of the State.’”).

35. *Id.* at 211.

36. *Id.*

37. Laura van Waas, *Statelessness: A 21st century challenge for Europe*, 20 SEC. & HUM. RTS. 133, 140 (2009); Foster & Lambert, *supra* note 30, at 567.

38. Guy Goodwin-Gill, *Statelessness is Back (Not That it Ever Went Away...)*, EJIL: TALK! (Sept. 12, 2019), <https://www.ejiltalk.org/statelessness-is-back-not-that-it-ever-went-away/> [https://perma.cc/57S5-2SCV].

39. *Id.*

40. *Id.*

41. *Id.*

has been largely perceived as a “technical problem” that can be solved by remedies involving the “harmonization of laws and co-ordination [of] rules” by many scholars rather than a human rights issue.⁴² Consequently, international solutions that solely focus on technical solutions while ignoring the human rights implications of statelessness have been largely unproductive.⁴³

Although the United Nations High Commissioner for Refugees (UNHCR) has been dedicating itself to ending statelessness by 2024,⁴⁴ individual countries should put a more active effort into establishing domestic legal frameworks to alleviate statelessness. Currently, individual State responses to statelessness have been inconsistent and often contradictory to the UNHCR’s efforts to end statelessness.⁴⁵ While countries like Spain and France have established residency permit programs to confer legal residence to stateless individuals,⁴⁶ other countries like Australia have been placing stateless individuals in indefinite detention.⁴⁷

In Part Three, I start to explore options for the United States in the face of international inaction. Currently, the United States lacks a consistent legal framework for recognizing stateless individuals and have largely ignored their political and economic needs.⁴⁸ Stateless individuals are currently not recognized or protected under United States immigration legal framework.⁴⁹ Furthermore, despite being a recipient of a substantial number of stateless individuals, the United States has mostly adopted unwelcoming approaches to stateless individuals.⁵⁰ Stateless individuals unable to obtain legal status through the existing immigration legal framework often find themselves subjected to a life living in limbo.⁵¹ Although they are unable to obtain

42. Foster & Lambert, *supra* note 30, at 565 (quoting GS Goodwin-Gill, *The Rights of Refugees and Stateless Persons*, in HUMAN RIGHTS PERSPECTIVE AND CHALLENGES (IN 1990 AND BEYOND) 378, 389 (1994)).

43. *Id.*

44. U.N. High Comm’r for Refugees (UNHCR), *Global Action Plan to End Statelessness 2014–2024*, at 4 (2013).

45. *See* Corgan, *supra* note 18, at 3.

46. *Id.*

47. Ben Doherty, *Stateless in Australia: New Centre to Shine Light on Those Incarcerated without Hope*, THE GUARDIAN (Mar. 26, 2018), <https://www.theguardian.com/australia-news/2018/mar/27/stateless-in-australia-new-centre-to-shine-light-on-those-incarcerated-without-hope> [<https://perma.cc/7RH5-7ZAH>].

48. Corgan, *supra* note 18, at 6.

49. Baluarte, *supra* note 20, at 352.

50. *See id.* at 352–53.

51. *Id.*

legal status in the United States, they are non-deportable because they lack citizenship papers needed to enter any country.⁵² Working towards a solution for stateless individuals that would take them out of legal limbo in the United States is important because the longer they remain stateless, the longer they lack the protections afforded to them by an effective nationality or a country that is prepared to exercise protection and consular services on their behalf.⁵³ Because they are invisible, they are dangerously at risk of slavery, child trafficking, prostitution, police harassment, recruitment into the armed forces, forced labor, and other forms of abuse.⁵⁴

In Part Four, I will discuss policy options that the United States can employ while it waits for an international solution. Those options include: 1) the creation of a new state for the stateless; 2) the placement of stateless individuals in indefinite detention; 3) the creation of a residency permit system specifically designed for stateless individuals; and 4) the adoption of legislative amendments to the Immigration and Nationality Act (INA) that incorporates protections for stateless individuals. It is important to note however that in the absence of an international approach, there is no perfect solution for the United States—only the least objectionable solution.

PART ONE: UNDERSTANDING STATELESSNESS

A) *Causes of Statelessness*

Statelessness can be caused by several factors.⁵⁵ These factors typically fall into three categories: 1) State succession; 2) discrimination and arbitrary denial or deprivation of nationality; and 3) technical causes.⁵⁶ This Section will introduce and explain each of the three principle categories.

52. *Id.* at 361.

53. *See Invisible and Vulnerable, World's Stateless Face Bleak Future*, DW, <https://www.dw.com/en/invisible-and-vulnerable-worlds-stateless-face-bleak-future/a-15350795-0> [<https://perma.cc/48KE-VGML>].

54. *Id.*

55. U.N. High Comm'r for Refugees (UNHCR), *What is Statelessness?*, at 1 [hereinafter *What is Statelessness?*].

56. *Citizens of Nowhere*, *supra* note 3, at 13.

1) State succession

State succession can cause statelessness.⁵⁷ State succession occurs when an existing State splits into two or more states, when part of a State secedes to form a new State, when territory is transferred from one State to another, or when two or more States unite to form a new state.⁵⁸ Statelessness happens in this context when an individual fails or is unable to secure citizenship in the successor states.⁵⁹ For example, the dissolution of the Soviet Union and the Yugoslav Federation left millions stateless throughout Eastern Europe and Asia.⁶⁰ More than 20 years later, hundreds of thousands of individuals in that region are still stateless or at risk of statelessness.⁶¹ Expectations that the succeeding State will ensure that all individuals receive the new State's citizenship are complicated by lingering animosity and discrimination between various populations within the original state.⁶²

2) Arbitrary denial or deprivation of nationality

Statelessness is sometimes caused by ethnic or religious discrimination,⁶³ like in the case of one million Rohingya in Myanmar,⁶⁴ 700,000 Burkinabe in Cote d'Ivoire,⁶⁵ over 100,000 Dominicans of Haitian descent,⁶⁶ and some 300,000 Urdu-speaking Biharis.⁶⁷ Statelessness is also often caused by discrimination against gender.⁶⁸ In 26 countries, including Kuwait, Lebanon, and Qatar, mothers are unable to pass their nationality to their children due to gender-

57. *Id.*

58. *Id.*

59. *Id.*

60. U.N. High Comm'r for Refugees (UNHCR), *Mapping Statelessness in the U.K.*, at 23 (Nov. 2011) [hereinafter *Mapping Statelessness in the U.K.*].

61. *Id.*

62. *Citizens of Nowhere*, *supra* note 3, at 13.

63. Lorena Rios, *Stateless People in the US Have Begun to Unite for the First Time*, TRT WORLD (June 29, 2018), <https://www.trtworld.com/magazine/stateless-people-in-the-us-have-begun-to-unite-for-the-first-time-18541> [<https://perma.cc/A4PW-P54D>].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Citizens of Nowhere.*, *supra* note 3, at 14.

discriminatory legislation.⁶⁹ For example, in Senegal, male nationals can always pass on Senegalese nationality to their children but female nationals whose children are born out of wedlock, or with a foreigner, must jump through administrative hoops to confer nationality to her children.⁷⁰

3) Technical causes

“Technical causes” refers to situations where statelessness is accidentally caused by gaps in a country’s nationality laws and conflicts between different countries’ citizenship laws.⁷¹ The most common technical way that can cause statelessness is incompatibilities between countries’ nationality laws.⁷² Countries most often grant nationalities through either blood relationship (*jus sanguinis*) or through birth in the country (*jus soli*).⁷³ When a child is born to nationals of a country that grants nationality based on *jus soli*, a country that only confers nationality based on *jus sanguinis* may not be able to acquire any nationality at birth.⁷⁴ Other “technicalities” include: denying nationality to abandoned children, automatic loss of nationality of individuals who reside abroad without registering with a consulate after a specified period of time, and marriage practices of certain countries, under which a non-national loses their citizenship when they marry of a national.⁷⁵ Finally, statelessness can also occur when individuals are unable to prove nationality.⁷⁶ For example, parents from migrant, displaced, or nomadic communities may have a hard time getting birth certificates for their children in countries with cumbersome requirements for birth registration, such as unreasonable deadlines, excessive fees, or burdensome document requirements.⁷⁷

69. *Id.*

70. *Mapping Statelessness in the U.K.*, *supra* note 60, at 24.

71. *Citizens of Nowhere.*, *supra* note 3, at 14.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

B) *Consequences of Statelessness*

The consequences of a lack or loss of nationality are devastating socially, politically, and economically.⁷⁸ Research has shown that the stateless are among the world's most vulnerable populations.⁷⁹ Statelessness affects a myriad of rights; such as: education, employment, social welfare, housing, healthcare, freedom of movement, freedom from arbitrary detention and political participation.⁸⁰ Stateless individuals are also more likely to encounter travel restrictions, social exclusion, and are more vulnerable to sexual and physical violence, exploitation, trafficking in individuals, forcible displacement, and are at an increased risk of radicalization.⁸¹

Stateless individuals are also frequently subjected to or at risk of prolonged or indefinite arbitrary detention.⁸² Unlike foreign nationals with some form of nationality, stateless individuals can be subject to lengthy detention while they attempt to prove that they are not a national of any State.⁸³ Also unlike foreign nationals, a stateless individual who cannot acquire asylum status often cannot be returned because they have no State of nationality to return to or their country of origin or habitual residence will not take them back.⁸⁴ Consequently, stateless individuals in countries that have no limit on detention face long-term or indefinite detainment.⁸⁵ Stateless individuals in countries with a limit on detention face a lifetime of worrying about when or if officials might try to deport them again.⁸⁶ For example, in Australia, non-citizens who do not have a valid visa must be detained until they

78. *See generally* *What is Statelessness?*, *supra* note 55 (outlining negative effects of statelessness on individuals).

79. van Waas, *supra* note 37, at 133.

80. *What is Statelessness?*, *supra* note 55.

81. Jeri L. Dible, *The Social and Political Consequences of Another Stateless Generation in the Middle East*, (Feb. 23, 2016) (Monograph, Command and General Staff College) (released to public) <https://apps.dtic.mil/dtic/tr/fulltext/u2/1039168.pdf>. [<https://perma.cc/2BW8-C84H>].

82. Katherine Perks & Jarlath Clifford, *The Legal Limbo of Detention*, 32 FORCED MIGRATION REV. 2, 42 (2009).

83. *Id.*

84. *See, e.g., id.*

85. *Id.*; *see, e.g.,* Kelly Burke, *Immigration Deadlock as 50 Asylum Seekers Detained Indefinitely for Being Stateless*, 7 NEWS (Sept. 3, 2019), <https://7news.com.au/politics/immigration-policy/immigration-deadlock-as-50-asylum-seekers-detained-indefinitely-for-being-stateless-c-433296> [<http://perma.cc/LK8T-SAUU>].

86. Corgan, *supra* note 18, at 6–7.

are either granted a visa or leave the country.⁸⁷ Since there is no limit on immigration detention under Australian law,⁸⁸ individuals can be held in detention for very long periods of time (theoretically for their entire lives).⁸⁹

C) International legal framework protecting stateless individuals

There are several legal instruments that address statelessness; including, Article 15 of the Universal Declaration of Human Rights (UDHR), which affirms that “everyone has the right to a nationality” and “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”⁹⁰ Additionally, there are two statelessness-specific legal instruments.⁹¹

The two main statelessness-specific legal instruments are the 1954 Convention relating to the Status of Stateless individuals⁹² (1954 Convention) and the 1961 Convention on the Reduction of Statelessness⁹³ (1961 Convention). The 1954 Convention’s most significant contribution to international law is its recognition of the international legal status of “stateless individuals.”⁹⁴ It established the definition of a stateless individual as someone “who is not considered a national by any State under the operations of its law.”⁹⁵ This definition is now recognized as customary international law.⁹⁶ The 1954

87. REFUGEE COUNCIL OF AUSTRALIA, STATELESSNESS IN AUSTRALIA 15 (2015), <https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/1508-Statelessness.pdf> [<https://perma.cc/E2Z2-SKU7>].

88. *Id.*

89. *Id.*

90. G.A. Res. 217 (III) A, art. 15, Universal Declaration of Human Rights (Dec. 10, 1948); see *What is Statelessness?*, *supra* note 55.

91. *Id.*

92. See Convention Relating to the Status of Stateless Persons, Sep. 28, 1954, 360 U.N.T.S., 117 [hereinafter 1954 Convention].

93. See Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter 1961 Convention].

94. See U.N. High Comm’r for Refugees (UNHCR), *Protecting the Rights of Stateless Persons: The 1954 Convention Relating to the Status of Stateless Persons* at 4 (Jan. 2014) [hereinafter *Protecting the Rights of Stateless Persons*].

95. 1954 Convention, *supra* note 92, at art. 1.

96. See generally *id.*; See also Tamás Molnár, *Remembering the Forgotten: International Law Regime Protecting the Stateless Persons—Stocktaking and New Tendancies*, 11 U.S.-CHINA L. REV. 822, 831 (2014).

Convention guarantees stateless individuals access to courts (Article 16),⁹⁷ a right to employment (Article 17),⁹⁸ a right to housing (Article 21),⁹⁹ a right to administrative assistance (Article 25),¹⁰⁰ and a right to identity and travel documents (Article 27 and 28) among others.¹⁰¹

The 1954 Convention was seen as a temporary measure while States continued to devise solutions to prevent statelessness.¹⁰² In comparison, the 1961 Convention gave States tools to avoid and solve statelessness.¹⁰³ The 1961 Convention lists safeguards in four main areas to be implemented by States to prevent and reduce statelessness. These include measures to avoid statelessness among children (Article 1 to 4),¹⁰⁴ measures to avoid statelessness due to loss or renunciation of nationality (Article 5 to 7),¹⁰⁵ measures to avoid statelessness due to deprivation of nationality (Articles 8 and 9),¹⁰⁶ and measures to avoid statelessness in the context of State succession.¹⁰⁷ These legal instruments do not constitute an exhaustive list.¹⁰⁸ Protections against statelessness are also embedded in several human rights treaties and regional treaties.¹⁰⁹

Despite the efforts of their well-intentioned drafters, the two statelessness-specific conventions have inherent weaknesses that have impeded a successful international resolution to statelessness.¹¹⁰ The main issue is that the two conventions have not gained widespread

97. 1954 Convention, *supra* note 92, at art. 16.

98. *Id.* at art. 17.

99. *Id.* at art. 21.

100. *Id.* at art. 25.

101. *Id.* at arts. 27–28.

102. *Protecting the Rights of Stateless Persons*, *supra* note 94, at 9.

103. *Id.*

104. *See generally* 1961 Convention, *supra* note 93, at art. 1–4 (setting guidelines for assigning nationalities at birth to persons who would otherwise be stateless).

105. *Id.* at arts. 5–7.

106. *Id.* at arts. 8–9.

107. *See generally id.* at art. 10 (securing nationalities for persons as a result of transfer).

108. *See* U.N. High Comm’r for Refugees (UNHCR), *Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness*, at 6 (Mar. 2014).

109. David Weissbrodt & Clary Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 246 (2006) (listing human rights treaties that have statelessness provisions).

110. *See* van Waas, *supra* note 37, at 137.

acceptance.¹¹¹ Only 94 countries are contracting parties to the 1954 Convention,¹¹² and only 75 countries are contracting parties to the 1961 Convention.¹¹³ Increased ratification efforts of relevant instruments will contribute to a more overall effective international legal framework.¹¹⁴

There are also problems with the conventions' normative content.¹¹⁵ The 1954 Convention only requires that Contracting States "shall as far as possible facilitate the assimilation and naturalization of stateless individuals" (Article 32).¹¹⁶ In other words, the Convention does not impose an obligation on States to confer nationality on stateless individuals.¹¹⁷ Without a conferral of nationality, a stateless individual remains stateless and at risk of all the consequences discussed above.¹¹⁸ Furthermore, the 1954 Convention only applies to stateless individuals who are lawfully present or lawfully staying in the Contracting State.¹¹⁹ The 1961 Convention fails to oblige States to bestow or retain nationality.¹²⁰ Therefore, an individual can still become or remain stateless in that State.¹²¹ Furthermore, neither Conventions, nor the international legal framework as a whole, guarantees an individual a "home state" to which he or she can always return and from which he or she cannot be expelled.¹²²

PART TWO: INTERNATIONAL RESPONSES TO STATELESSNESS

In Part Two, we will look at the UNHCR's and other countries' approaches towards statelessness. While some countries have made concerted efforts to cooperate with the UNHCR's efforts to end statelessness, other countries' treatment of stateless individuals are inconsistent and often contradictory to the UNHCR's efforts to end

111. *Id.*

112. *See* 1954 Convention, *supra* note 92.

113. *See* 1961 Convention, *supra* note 93, at art. 1–4.

114. van Waas, *supra* note 37, at 138.

115. *Id.*

116. *See* 1954 Convention, *supra* note 92, at art. 32.

117. *See id.*

118. *Protecting the Rights of Stateless Persons*, *supra* note 94, at 5.

119. van Waas, *supra* note 37, at 138.

120. *Id.*

121. *See generally id.*

122. *Id.*

statelessness.¹²³ These incongruent approaches to statelessness have hindered the overall international effort to end statelessness.

A) *The UNHCR's #IBelong Campaign*

The UNHCR is the United Nations (UN) agency that is responsible for responding to the needs of stateless persons.¹²⁴ However, the UNHCR's responsibility for stateless persons was largely overshadowed by its work with refugees and internal displacement issues.¹²⁵ Overtime, the UNHCR's responsibilities regarding stateless individuals has expanded.¹²⁶ Statelessness has now become one of the UNHCR's core budget activities.¹²⁷

On November 4, 2014, the UNHCR launched its #IBelong Campaign, which aims to end statelessness by 2024.¹²⁸ The goals of this UNHCR initiative includes resolving major situations of statelessness and preventing new cases from emerging.¹²⁹ The UNHCR has focused its efforts on persuading and supporting states to take key actions to sever the vicious cycle of statelessness.¹³⁰ Those key actions include: 1) ensuring that every birth is registered to help establish legal proof of parentage and place of birth, 2) ensuring that all children are granted nationality if they would otherwise be stateless, 3) removing gender discrimination from nationality laws so that women can pass on their nationality to their children on an equal basis as men, 4) resolving current situations of statelessness through changes to legislation or government policy, and 5) eliminating discrimination because of race, ethnicity, religion, gender, or disability.¹³¹

Since the UNHCR's campaign began, more than 166,000 stateless people have acquired or had their nationality confirmed, twenty states have acceded to the Statelessness Conventions, nine states have established or improved statelessness determination procedures, six states reformed their nationality laws, and another two have eliminated

123. *See, e.g., id.* at 139 (discussing Myanmar's open violation of international norms by granting status based on national race).

124. Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States* 11 INT'L REFUGEE L. SERIES 59, 63 (2018).

125. *Id.*

126. *Id.*

127. *Id.* at 65.

128. *What is Statelessness?*, *supra* note 55.

129. *Id.*

130. *Ending Statelessness Within 10 Years*, *supra* note 26, at 21.

131. *Id.* at 21–22.

gender discrimination preventing women from passing on their nationality to their children.¹³² However, millions remain stateless,¹³³ showing that much more still needs to be done. The UNHCR's efforts have been met with varied levels of support from countries around the world.¹³⁴ While countries such as Madagascar and Sierra Leone have reformed their nationality laws and now allow mothers, as well as fathers, to confer citizenship on their children,¹³⁵ 25 countries still make it impossible for mothers to confer their citizenship to their children.¹³⁶

B) Countries that have adopted Statelessness Determination Procedures

Many countries have made substantial progress towards conferring status to stateless individuals in their country. About a dozen States worldwide have established Statelessness Determination Procedures (SDP).¹³⁷ SDP are mechanisms by which stateless persons are identified and granted a legal status in the country in which they are found in.¹³⁸ France has the oldest mechanism for recognizing and protecting stateless persons.¹³⁹ Italy, Hungary, Latvia, and Spain followed suit some decades later.¹⁴⁰ Moldova, Georgia, the Philippines, Costa Rica, the U.K., Kosovo, and Turkey have also established SDP in the last

132. U.N. High Comm'r for Refugees, *Four Years into Its #IBelong Campaign to End Statelessness*, UNHCR Calls for More Action by States, UNHCR.ORG (Nov. 13, 2018), <https://www.unhcr.org/en-us/news/press/2018/11/5be95d7c4/four-years-its-ibelong-campaign-end-statelessness-unhcr-calls-resolute.html>. [<https://perma.cc/WG3V-J8SC>].

133. *Id.*

134. *See id.*

135. U.N. High Comm'r for Refugees, *High-Level Segment on Statelessness: Results and Highlights*, at 25 (May 2020).

136. Lisa Schlein, *UNHCR: Anti-Refugee and Migrant Sentiment Threaten Battle to End Statelessness*, VOA (Oct. 7, 2019 5:35 PM), <https://www.voanews.com/europe/unhcr-anti-refugee-and-migrant-sentiment-threaten-battle-end-statelessness> [<https://perma.cc/9E6J-QPW9>].

137. U.N. High Comm'r for Refugees, *Good Practices Paper — Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons 2* (July 11, 2016) [hereinafter *Good Practices Paper*].

138. *See* U.N. High Comm'r for Refugees, *Statelessness Determination Procedures: Identifying and Protecting Stateless Persons*, 1–3 (Aug. 2014) [hereinafter *Stateless Determination Procedures*].

139. *Good Practices Paper*, *supra* note 137, at 2.

140. *Id.*

decade.¹⁴¹ Although States have broad discretion in the design and operation of their SDP, SDP are commonly formalized in law and include protections such as residency permits, the right to work, access to healthcare and social assistance, and the issue of identity papers and a travel documents.¹⁴² Although their numbers are still relatively few, countries that have adopted SDP are greatly contributing to the reduction of global statelessness. Happily, there is a growing interest around the world for introducing similar procedures.¹⁴³

C) *Countries That Could Do More*

There are many other countries who could do more to contribute to global efforts to reduce statelessness. Their reluctance towards providing more protections for stateless individuals has hindered the eradication of statelessness on a global scale.¹⁴⁴ For example, the Swiss office of the UNHCR published a study slamming Switzerland for its conservative approach when it comes to protecting the rights of stateless individuals.¹⁴⁵ The UNHCR found that Switzerland has been applying a particularly restrictive practice of recognizing statelessness and has instead put its own sovereignty over the needs of protecting stateless individuals.¹⁴⁶ Further, Swiss law does not currently guarantee hearings, legal representation, translation or interpretation, or a formal residency permit to individuals applying for recognition of statelessness.¹⁴⁷ Europe, Germany, Greece, the Netherlands, the Czech Republic, and Sweden also lack legal frameworks to identify stateless

141. *Id.*

142. *Id.* at 7–8.

143. *See Statelessness Determination Procedures, supra* note 138, at 1–3.

144. *See, e.g.,* William Thomas Worster, *European Union Citizenship and the Unlawful Denial of Member State Nationality*, 43 *FORDHAM INT'L L.J.* 767 (2020).

145. *Switzerland Could Do More for the Stateless, UN Body Finds*, SWISSINFO.CH (Nov. 13, 2018 5:27 PM), https://www.swissinfo.ch/eng/without-rights-_switzerland-could-do-more-for-the-stateless--finds-un-body/44542630.
[<https://perma.cc/KN8F-GNHC>].

146. *Id.*

147. U.N. HIGH COMM'R FOR REFUGEES (UNHCR), *Étude sur L'apatridie en Suisse*, UNHCR SUISSE, <https://www.unhcr.org/dach/ch-fr/en-bref/quinous-aidons/mettre-fin-a-lapatridie/lapatridie-en-suisse-et-a-liechtenstein/etude-sur-lapatridie-en-suisse> (last visited on Sep. 19, 2020) [<https://perma.cc/AM56-JEZH>].

persons.¹⁴⁸ These States force stateless individuals into refugee determination procedures.¹⁴⁹ These procedures often treat stateless persons as other irregular migrants; as a result, their vulnerabilities and need for special protection are ignored.¹⁵⁰ For example, in the Netherlands, applicants are required to show official evidence to support their claim that they cannot return to the country, which is difficult when an applicant is unable to obtain official evidence.¹⁵¹ In Sweden, officials take a strict approach on proving identity, which is an even greater burden on stateless individuals who often do not have access to birth certificates or government identification.¹⁵² Greece appears to provide the least protection of all States, as it refuses to grant permits to persons who are unable to leave the country.¹⁵³

Another country with a terrible reputation regarding their treatment of stateless individuals is Australia.¹⁵⁴ When Australia was asked by the UNHCR how many stateless people were within its borders, Australia answered there were zero.¹⁵⁵ However, after some investigating, information emerged that there were 37 stateless people being held by the Australian government in immigration detention, on average for more than two-and-a-half years.¹⁵⁶ Some people, like Said Imasi, have been in immigration detention for over nine years.¹⁵⁷ Under Australia's current legal framework, he could—theoretically—be incarcerated for the rest of his life because the Australian government refuses to release him from detention or grant him a protection visa.¹⁵⁸ Many other stateless individuals have been detained indefinitely in immigration detention as well as in offshore centers on Nauru and Manus Islands.¹⁵⁹ Further, Australia does not have a procedure for

148. Katia Bianchini, *Not a Level Playing Field — Statelessness Determination in the EU*, EUROPEAN NETWORK ON STATELESSNESS (July 20, 2017), <https://www.statelessness.eu/blog/not-level-playing-field-statelessness-determination-eu> [<https://perma.cc/QKV3-R6VY>].

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. U.N. High Comm'r for Refugees, *Inquiry into the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019*, ¶ 3 (Oct. 14, 2019).

155. Doherty, *supra* note 47.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

determining statelessness within its legislative framework.¹⁶⁰ Nor does it have a specific visa for stateless individuals despite a public pledge in 2011 “committed to minimising the incidence of statelessness and to ensuring that stateless person are treated no less favourably than people with an identified nationality.”¹⁶¹ Such a promise rings hollow if not supported by concrete reform.

PART THREE: STATELESSNESS IN THE UNITED STATES

In Part Three, we will discuss how statelessness fits under the United States’ current immigration legal framework and the United States’ current approaches to statelessness.

A) *Statelessness under United States Immigration Law*

Individuals who are already living in the United States when they apply for protection from persecution are referred to as “asylum seekers” or “asylum applicants.”¹⁶² In order to be granted asylum, the applicant must meet the definition of “refugee” under the Immigration and Nationality Act (INA).¹⁶³ To meet the definition of “refugee,” an asylum applicant must demonstrate that he or she is “outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided,” that he or she is “unwilling or unwilling to return to” and is “unable or unwilling to avail himself or herself of the protection of that country” because of “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁶⁴ The second reference to the term “nationality” in the refugee definition specifically allows for protection of stateless individuals.¹⁶⁵ Because they have no nationality or cannot establish nationality, stateless individuals must demonstrate that he or she is “outside any country in which such person last

160. Michelle Foster, Jane McAdam, & Davina Wadley, *Part One: The Protection of Stateless Persons in Australian Law —The Rationale for a Statelessness Determination Procedure*, 40 MELBOURNE UNIV. L. REV. 401, 421 (2016).

161. Doherty, *supra* note 47.

162. DREE K. COLLOPY, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 52 (Am. Immigr. Law. Ass’n 8th ed. 2019).

163. *Id.*

164. 8 U.S.C. § 1101(a)(42).

165. *Id.*

habitually resided.”¹⁶⁶ They must also establish persecution or a well-founded fear of persecution in such country of last habitual residence.¹⁶⁷

While a stateless individual may be recognized as a refugee under United States law,¹⁶⁸ they encounter a myriad of challenges because of their stateless status.¹⁶⁹ First, while United States courts have recognized that statelessness may be a *contributing* factor for establishing asylum eligibility, United States courts have generally held that statelessness alone is not an *independent* ground for establishing asylum eligibility.¹⁷⁰ For example, in *Fedosseeva v. Gonzales*, the court rejected a Latvian applicant’s asylum application deeming the fact that she was rendered stateless due to the fall of the Soviet Union irrelevant.¹⁷¹ Therefore, they also have to meet the burden of demonstrating a well-founded fear of persecution on account of a protected ground in the country of their “last habitual residence” rather than in their country of nationality.¹⁷² This can prove difficult given that many adjudicators do not understand the nature of their suffering as individuals without a nationality, and fail to grasp the nature of the harm that they have suffered or that they will likely suffer in the future.¹⁷³ Furthermore, the novelty of adjudicating asylum claims of stateless individuals can lead to prejudicial errors in findings of fact and law.¹⁷⁴ As a result, many do not qualify for asylum and are left without legal status.¹⁷⁵ And so they fall into a loophole in United States immigration law that treats the stateless as if they were in the country illegally and offers no clear way of adjudicating their claims to stay if their asylum claims are rejected.¹⁷⁶

166. *Id.*; see also U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶¶ 89, 101–105 HCR/1P/4/enG/Rev. 3 (2011) [hereinafter UNHCR Handbook].

167. UNHCR Handbook, *supra* note 166, ¶¶ 90, 102 at 19–20

168. *Citizens of Nowhere*, *supra* note 3, at 18.

169. Baluarte, *supra* note 20, at 366.

170. *Citizens of Nowhere*, *supra* note 3, at 18; see, e.g., Faddoul v. Immigr. & Naturalization Serv., 37 F.3d 185 (5th Cir. 1994); Al Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001); Fedosseeva v. Gonzales, 492 F.3d 840 (7th Cir. 2007); Pavlovich v. Gonzales, 476 F.3d 613 (8th Cir. 2007).

171. See *Fedosseeva*, 492 F.3d at 845.

172. *Citizens of Nowhere*, *supra* note 3, at 18.

173. Baluarte, *supra* note 20, at 366–67.

174. *Id.* at 366.

175. *Id.* at 353.

176. Dulai & Mendoza, *supra* note 3.

Stateless individuals who have failed to obtain asylum often find themselves in removal proceedings.¹⁷⁷ The majority of stateless individuals encountered by UNHCR in the United States have a final order of removal issued against them and have therefore spent some time in immigration detention awaiting removal from the United States.¹⁷⁸ Most of these individuals have experienced tremendous emotional trauma during detention; including the stress of detention itself, the removal from their daily life, transfers to different immigration detention facilities away from their homes and communities, the uncertainty of how long they will be detained since no country recognizes them, and fears about being sent to a country with which they have no connection.¹⁷⁹ Furthermore, the burden is on the stateless individual to pursue release from detention because there is no right to counsel provided by the government.¹⁸⁰ Even if a stateless individual is released, they can be subsequently detained again, even though nothing in their situation had changed.¹⁸¹

The United States is not a signatory to either the 1954 Convention or the 1961 Convention.¹⁸² However, there is room in the United States' immigration and refugee legal framework for conferring stateless individuals a path to citizenship.¹⁸³ The United States definition of "refugee" is more expansive than the "refugee" definition provided by the 1951 Convention and Protocol Relating to the Status of Refugees (1951 Convention) in ways that are especially pertinent to stateless individuals.¹⁸⁴ First, unlike the definition of "refugee" in the 1951 Convention, the definition of "refugee" in the INA encompasses those who suffered persecution in the past but no longer face a threat of future persecution.¹⁸⁵ Therefore, a stateless individual who has suffered

177. See *Citizens of Nowhere*, *supra* note 3, at 20.

178. *Id.* at 25.

179. *Id.*

180. Polly J. Price, *Stateless in the United States: Current Reality and a Future Prediction*, 46 VAND. J. TRANSNAT'L L. 443, 482 (2013).

181. *Citizens of Nowhere*, *supra* note 3, at 20.

182. Corgan, *supra* note 18.

183. See DONALD KERWIN ET AL., STATELESSNESS IN THE UNITED STATES: A STUDY TO ESTIMATE AND PROFILE THE US STATELESS POPULATION 14 (2020).

184. Maryellen Fullerton, *The Intersection of Statelessness and Refugee Protection in US Asylum Policy*, 2 J. MIGRATION & HUM. SEC. 144, 149 (2014). See 8 U.S.C. § 1101(a)(42); Convention Relating to the Status of Refugees art. 1(A), July 28, 1951, 189 U.N.T.S. at 137 [hereinafter 1951 Convention].

185. Fullerton, *supra* note 184. See also 8 U.S.C. § 1101(a)(42); 1951 Convention, *supra* note 184.

severe past persecution may be able to receive protection in the United States even if they lack evidence of current or future persecutory threats.¹⁸⁶ Second, the United States definition requires that the persecution be linked to either race, religion, nationality, membership in a particular social group, or political opinion,¹⁸⁷ which are frequently the basis for hostility directed against groups that are stateless.¹⁸⁸ Lastly, under the 1951 Convention, remaining in the country where they reside precludes an individual from refugee protection.¹⁸⁹ This is problematic for stateless individuals who frequently lack access to the travel documents needed to cross international borders and have no choice but to remain in the country where they are being persecuted.¹⁹⁰ However, under the United States refugee definition, individuals who have not left their country of nationality of residence may still receive protection.¹⁹¹

Despite the ways in which the United States' refugee definition could be used to increase the likelihood of conferring asylum to stateless individuals, case law is sparse. There are two federal court opinions, in 2010 and 2011, that address claims for protection raised by stateless individuals.¹⁹² In 2010, in *Haile v. Holder*, the 7th Circuit Court of Appeals examined an asylum claim of Temesgen Woldu Haile, a young man born in Ethiopia to parents of Eritrean background who fled Ethiopia when war broke out in 1998 between Ethiopia and Eritrea over territorial boundaries.¹⁹³ Both countries conducted mass deportations of thousands of citizens and residents of the “wrong” background.¹⁹⁴ For example, Ethiopia expelled more than 75,000 Ethiopian citizens of Eritrean descent, rendering them stateless.¹⁹⁵ The Court ruled that in some circumstances, forced denaturalization could constitute persecution.¹⁹⁶ The Court held that “to be deported to the

186. Fullerton, *supra* note 184.

187. See 8 U.S.C. § 1101(a)(42).

188. See *Citizens of Nowhere*, *supra* note 3, at 13.

189. 1951 Convention, *supra* note 184, at art. 1(C).

190. Fullerton, *supra* note 184, at 150.

191. See 8 U.S.C. § 1101(a)(42) (“in the case of a person having no nationality, within the country in which such person is habitually residing, and is persecuted or has a well-founded fear of persecution...”)

192. Fullerton, *supra* note 184, at 150.

193. *Haile v. Holder*, 591 F.3d 572, 573 (7th Cir. 2010).

194. *Id.*

195. Fullerton, *supra* note 184, at 160.

196. *Citizens of Nowhere*, *supra* note 3, at 19 (citing *Haile v. Holder*, 591 F.3d 572, 574 (7th Cir. 2010)).

country that made you stateless and continues to consider you stateless is to be subjected to persecution.”¹⁹⁷

In 2011, in *Stserba v. Holder*, the 6th Circuit Court of Appeals addressed the asylum claim of Lilia Stserba, a woman born in Estonia to an ethnically Russian family.¹⁹⁸ Stserba received her medical training in Russia but practiced medicine in Estonia.¹⁹⁹ After Estonia achieved independence from the Soviet Union, Stserba and her husband did not qualify for citizenship under the new Estonian law, presumably because they did not speak Estonian.²⁰⁰ Consequently, they became stateless.²⁰¹ Two years later, due to an electoral change, Stserba and her husband received Estonian citizenship.²⁰² Five years after that, Estonia stopped recognizing scientific degrees issued by Russian institutions.²⁰³ Due to its retroactive effect, Stserba claimed that she became unable to practice medicine in Estonia.²⁰⁴ Stserba claimed that the two years that she was stateless constituted persecution by the Estonian government.²⁰⁵ The immigration judge denied her asylum on the grounds that Stserba regained citizenship relatively quickly and had not suffered “any adverse consequences” during the time she was stateless.²⁰⁶ The BIA affirmed.²⁰⁷ However, the 6th Circuit took a more nuanced approach, stating that “a person who is made stateless due to his or her membership in a protected group may have demonstrated persecution, even without proving that he or she has suffered collateral damage from the act of denationalization.”²⁰⁸

The decisions in *Haile* and *Stserba* are significant in the context of statelessness in the United States legal framework because they recognize that statelessness itself can constitute severe harm, the vulnerability that accompanies being stateless, and that when the government takes actions to render an individual stateless, it should give rise to a presumption of persecution.²⁰⁹ Further, these decisions

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

198. *Stserba v. Holder*, 646 F.3d 964, 968–69 (6th Cir. 2011).

199. *Id.* at 969.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 968–969.

206. *Id.* at 971.

207. *Id.* at 978–979.

208. *Id.* at 974 (citing *Haile v. Holder*, 591 F.3d 572, 574 (7th Cir. 2010)).

209. *Id.*

conform to the idea that when individuals cannot rely on their home states to protect them from persecution, they should be able to turn to other states for protection.²¹⁰

B) Current approaches to statelessness

The primary concern guiding the United States' approach to stateless individuals is that stateless individuals cannot be lawfully deported because, unlike regular foreign nationals, they have no state to return to.²¹¹ To provide context, there are two ways to apply for asylum under the current United States immigration framework: affirmative asylum and defensive asylum.²¹² An applicant applies for asylum affirmatively if they are physically present in the United States and they file within one year after their arrival in the United States.²¹³ Applicants apply for asylum affirmatively with the United States Citizenship and Immigration Services (USCIS).²¹⁴ If an affirmative asylum applicant's request for asylum is denied or if the applicant was apprehended by Immigration and Customs Enforcement (ICE), the applicant applies for asylum defensively in front of an Immigration Judge (IJ).²¹⁵ One of the first steps in the United States' defensive asylum process is the designation of a country of removal.²¹⁶ The problem is that an applicant who is stateless has no country of removal to designate or even if a stateless applicant designates a country of removal, that designated country may not accept that applicant's return.²¹⁷ This complication makes hosting stateless individuals undesirable for the United States because the United States does not want to become a "dumping ground" for other countries' unwanted minorities.²¹⁸ Consequently, most of the United States' current

210. *Id.* at 973; *Citizens of Nowhere*, *supra* note 3, at 18–9 (citing Haile v. Holder, 591 F.3d 572, 574 (7th Cir. 2010)).

211. Kelly Staples, *How to Eliminate Statelessness*, WORLD ECONOMIC FORUM (Nov. 13, 2014), <https://www.weforum.org/agenda/2014/11/how-to-eliminate-statelessness/> [<https://perma.cc/A55P-77RN>].

212. *Fact Sheet: U.S. Asylum Process*, NATIONAL IMMIGRATION FORUM (Jan. 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/> [<https://perma.cc/H67G-U6AF>].

213. *Id.*

214. *Id.*

215. *Id.*

216. 8 U.S.C. §§ 1231(b)(1)–(2); *Citizens of Nowhere*, *supra* note 3, at 19.

217. Adam L. Fleming, *Around the World in the INA: Designating a Country of Removal in Immigration Proceedings* 7 IMMIGR. L. ADVISOR 4, 10 (2013).

218. Staples, *supra* note 211.

approaches to statelessness has been geared towards declining to permanently host stateless individuals.²¹⁹ This section will discuss three main United States responses to statelessness: 1) “recalcitrant” country designations and visa sanctions; 2) orders of supervision; and 3) repatriation agreements.²²⁰ Two of these policies, “recalcitrant” country designations and repatriation agreements, compel countries to accept stateless individuals removed from the United States.²²¹ Order of supervision is the method by which stateless individuals are able to remain in the United States but without legal status.²²²

1) “Recalcitrant” countries and visa sanctions

When Congress implemented the Immigration and Nationalization Act (INA) in 1952, it gave broad authority to the DHS and the Department of Justice (DOJ) to remove certain foreign nationals from the United States.²²³ One provision in the INA that contributes to this broad authority is Section 243(d), which provides for the “discontinuance” of visa issuances as a penalty for countries that refuse to take back their “citizens, subjects, nationals, and residents” who have been ordered deported from the United States.²²⁴ In other words, the United States can impose visa sanctions to try to compel cooperation with its removal decisions.²²⁵ Since the INA’s implementation in 1952, the United States used Section 243(d) during the Cold War to restrict visa issuances to certain Soviet bloc nationals.²²⁶ Between the Cold War and 2016, the provision was used only once, against Guyana in 2001 to remove 113 criminally convicted

219. See Baluarte, *supra* note 20, at 352–53.

220. See *Immigration: “Recalcitrant” Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, CONG. RSCH. SERV. (Jan. 23, 2020), <https://fas.org/sgp/crs/homesec/IF11025.pdf> [<https://perma.cc/42RF-QZU9>] [hereinafter *Recalcitrant*] (defining “recalcitrant” as “countries that systematically refuse or delay the repatriation of their citizens”).

221. *Id.*

222. Corgan, *supra* note 18.

223. *Recalcitrant*, *supra* note 220.

224. Immigration and Nationality Act of 1952 §243(d), 8 U.S.C. § 1253(d); *Discontinuance of Visa Issuance Under INA 243(d)*, NAFSA (Apr. 13, 2020), <https://www.nafsa.org/professional-resources/browse-by-interest/discontinuance-visa-issuance-under-ina-243d> [<https://perma.cc/9SMG-AEGU>].

225. *Recalcitrant*, *supra* note 220.

226. *Id.*

Guyanese nationals in United States custody that the DOJ deemed dangerous.²²⁷ The next time the provision was used was in October 2016 against The Gambia, when it resisted pressure from the United States to cooperate with the repatriation of its nationals.²²⁸ This decision came right after a July 2016 House Committee on Oversight and Government Reform hearing in which ICE and the Department of State (DOS) discussed various measures used to persuade recalcitrant countries to cooperate.²²⁹

In January 2017,²³⁰ shortly after he took office, President Donald Trump issued Executive Order 13748, “Enhancing Public Safety in the Interior of the United States.”²³¹ Section 12 of the Executive Order, “Recalcitrant Countries,” directs DHS and the DOS to utilize INA Section 243(d) to impose visa sanctions on countries designated as “recalcitrant.”²³² It also requires the Secretary of State to “ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.”²³³ As of September 8, 2018, the DHS’s Immigration and Customs Enforcement (ICE) has designated ten countries (including Cuba, Eritrea, Iran, Pakistan, Bhutan, China, Laos, Vietnam, and Cambodia) as recalcitrant.²³⁴ An additional 24 are considered “at risk of non-compliance” (ARON).²³⁵

The problem with this unilateral use of a diplomatic “stick” is that it may impede friendly bilateral relationships between the United States and other countries.²³⁶ Some countries may retaliate in ways detrimental to bilateral trade, tourism, law enforcement, or other forms of cooperation.²³⁷ It would also isolate the United States from the rest

227. *Id.*

228. *Id.*

229. *Id.*; see generally *Recalcitrant Countries: Denying Visas to Countries that Refuse to Take Back Their Deported Nationals Before the Comm. on Oversight and Gov’t Reform*, 114th Cong. (2016).

230. Matthew Sussis, *Getting Even Tougher on Recalcitrant Countries*, CENTER FOR IMMIGRATION STUDIES (Apr. 15, 2019), <https://cis.org/Sussis/Getting-Even-Tougher-Recalcitrant-Countries>.

231. *Recalcitrant*, *supra* note 220, at 2.

232. See *id.*

233. *Id.*

234. *Id.* at 1.

235. *Id.* (currently, countries designated as “recalcitrant” include; Cuba, Eritrea, Iran, China, Burma, Laos, Cambodia, Thailand, and Hong Kong).

236. *Id.* at 2.

237. *Id.* at 2–3.

of world and could have negative impacts on economic cooperation between the United States and other countries.²³⁸ Furthermore, visa sanctions are not the only tool available to the United States government to encourage cooperation.²³⁹ Examples of such alternative measures include the issuance of a demarche (i.e., a formal diplomatic request); holding a joint meeting with the country's ambassador to the United States, DOS, and ICE; providing notice of the United States government's intent to exercise visa sanctions to gain compliance; and calling for inter-agency meetings to pursue withholding of aid other funding.²⁴⁰

2) Order of supervision

If a stateless individual is unable to obtain legal status in the United States, they cannot be lawfully deported from the United States.²⁴¹ In these cases, an immigration judge has the discretion to release a stateless individual under order of supervision.²⁴² Orders of supervision are authorized under INA §241 and the regulatory authority is provided in 8 C.F.R. 241.5.²⁴³ Under this program, if a detained noncitizen cannot be removed within a reasonable time after receiving an order of removal, the noncitizen must be released from detention.²⁴⁴ Many stateless individuals are released under an order of supervision.²⁴⁵ To comply with orders of supervision, they must check in regularly with immigration officials, obtain advanced approval to travel beyond specified times and distances, provide notices of change of address, and continue to try to obtain travel documents, which most likely ends up

238. *Recalcitrant Countries: Denying Visas to Countries that Refuse to Take Back Their Deported Nationals Before the Comm. on Oversight and Government Reform*, *supra* note 229.

239. *Recalcitrant*, *supra* note 220.

240. *Recalcitrant Countries: Denying Visas to Countries that Refuse to Take Back Their Deported Nationals Before the Comm. on Oversight and Gov't Reform*, *supra* note 229.

241. *See Citizens of Nowhere*, *supra* note 3, at 20.

242. Corgan, *supra* note 18.

243. *See* RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 5 (2012) [hereinafter FREED BUT NOT FREE]; Immigration and Nationality Act §241; 8 U.S.C §1231 (2018); 8 C.F.R 241.5.

244. *See* Immigration and Nationality Act §241; 8 U.S.C §1231(a)(3) (2018).

245. FREED BUT NOT FREE, *supra* note 243, at 19.

a futile endeavor.²⁴⁶ In the meantime, a stateless individual is eligible for work authorization and able to legally work in the United States—provided that they complete the yearly application and pay the annual processing fee.²⁴⁷ Orders of supervision are also cost effective alternatives to detention. Whereas detention costs an average of \$122 per day per detainee, alternatives to detention range in cost from \$0.30 to \$14 per day per individual.²⁴⁸

Although stateless individuals under order of supervision may seem more fortunate than others who are not under order of supervision, order of supervision is nowhere near a perfect solution and is fraught with problems.²⁴⁹ First, there is no cognizable end date to orders of supervision.²⁵⁰ For stateless individuals with no means to gain lawful status, order of supervision could last their entire lifetime.²⁵¹ Stateless individuals have challenged these conditions under a variety of constitutional theories but have been unsuccessful.²⁵² Second, the regular reporting requirements impose psychological and emotional hardships on stateless individuals.²⁵³ Many stateless individuals fear they may be taken into immigration custody each time they report to the immigration office for having inadvertently failed to comply with the terms of the order, for having run out of consulates or embassies to contact in order to request travel documents, or in some cases for no apparent reason at all.²⁵⁴ Other psychological effects of check-in requirements include insomnia, loss of appetite, anxiety, stress, paranoia, and general lack of willpower to continue with one's immigration proceedings.²⁵⁵ Further, there are extra psychological burdens placed on families with mixed immigration status because there is a threat of family separation due to removal every time an individual goes for a check-in.²⁵⁶ Third, travel restrictions under order of

246. Corgan, *supra* note 18; Baluarte, *supra* note 20, at 364–365.

247. Corgan, *supra* note 18.

248. FREED BUT NOT FREE, *supra* note 243, at 10.

249. Corgan, *supra* note 18.

250. See Baluarte, *supra* note 20, at 365.

251. *Citizens of Nowhere*, *supra* note 3, at 26.

252. Baluarte, *supra* note 20, at 365 (citing *Berry v. Adducci*, No. 10-10969, 2010 WL 2105130 (E.D. Mich. May 25, 2010); *Abusheikh v. Attorney General of United States*, 225 F. App'x 56 (3rd Cir. 2007)).

253. *Citizens of Nowhere*, *supra* note 3, at 26.

254. *Id.*

255. FREED BUT NOT FREE, *supra* note 243, at 17.

256. *Id.*

supervision negatively affect family unity.²⁵⁷ Stateless individuals under order of supervision cannot obtain United States passports or international travel documents.²⁵⁸ This means that they are permanently separated from loved ones.²⁵⁹ Many stateless individuals express a great sense of sadness and loss at the thought of never being able to see their parents, siblings, or children again or to attend funerals, weddings, or births of loved ones.²⁶⁰ Fourth, monitoring stateless individuals in perpetuity is both unnecessary and a waste of scarce immigration resources.²⁶¹ And fifth, the opportunity cost of keeping otherwise productive individuals in a constant state of economic instability is detrimental to an efficient society.²⁶² The frequency and duration of check-ins negatively impacts an individual's ability to work.²⁶³ Due to the long wait times associated with check-ins, individuals often miss a half or even a full day of work in order to comply with the check-in requirements.²⁶⁴

3) Repatriation agreements

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).²⁶⁵ IIRIRA amended the INA to subject a broader category of aliens to mandatory detention during removal proceedings until they can be repatriated to their home country.²⁶⁶ The INA, as amended by IIRIRA, allows the government 90 days to remove an alien following the issuance of a final order of removal.²⁶⁷ However, stateless individuals cannot be removed within this period because their home countries are unwilling to accept them or because their home countries do not have a repatriation agreement with the United States.²⁶⁸ These individuals who have nowhere to go

257. *Citizens of Nowhere*, *supra* note 3, at 27.

258. *Id.*

259. *Id.*

260. *Id.*

261. Baluarte, *supra* note 20, at 366.

262. *Id.*

263. FREED BUT NOT FREE, *supra* note 243, at 16.

264. *Id.*

265. *Plight of the Tempest-Tost: Indefinite Detention of Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1920 (2002).

266. *Id.*

267. *Id.*

268. *Id.*

were detained indefinitely by the INS under IIRIRA.²⁶⁹ Legal challenges to this indefinite detention were consolidated into the case *Zadvydas v. Davis*.²⁷⁰ The Court in *Zadvydas* concluded that where deportation is not “reasonably foreseeable,” the INA does not authorize continued detention.²⁷¹ The Court concluded that the INA had a presumptive post-removal detention period of 6 months, after which, if the alien provides “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence...to rebut [the alien’s] showing.”²⁷² Therefore, unless the government can show that there is significant likelihood of removing the alien, the alien must be released.²⁷³

Repatriation agreements are a mechanism used by the United States to deport otherwise non-deportable individuals such as stateless individuals.²⁷⁴ Repatriation is defined as “the act or process of restoring or returning someone of something to the country of origin, allegiance, or citizenship.”²⁷⁵ In the context of United States immigration policy, repatriation agreements are diplomatic agreements between the United States and a country that previously refused to accept deportees from the U.S, in which noncitizens in the United States with an order of removal against them are forcibly returned to their country of origin.²⁷⁶ Countries may not deport an individual to their country of origin unless there is a repatriation agreement in place between the repatriating country and the receiving country.²⁷⁷

Repatriation agreements are nothing new and their effectiveness is questionable. In 2008, the United States entered into an agreement with

269. Megan Peitzke, *The Fate of “Unremovable” Aliens Before and After September 11, 2001: The Supreme Court’s Presumptive Six-Month Limit to Post-Removal-Period Detention*, 30 PEPP. L. REV. ISS. 4 769, 771 (2003).

270. *Id.*

271. *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001)).

272. *Id.* at 771–772.

273. *Id.* at 772.

274. *See Price*, *supra* note 180, at 481.

275. *Repatriation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/repatriation?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [<https://perma.cc/U4CS-H86R>].

276. *See Price*, *supra* note 180, at 481.

277. *See* U.N. High Commissioner for Refugees, Note on Voluntary Repatriation, Note Submitted by U.N. High Commissioner for Refugees, EC/SCP/13 (Aug. 27, 1980), <https://www.unhcr.org/excom/scip/3ae68cce8/note-voluntary-repatriation.html> [<https://perma.cc/CAB5-NM8Q>].

Vietnam to deport Vietnamese nationals.²⁷⁸ Under the agreement, the United States government pays the cost of repatriation under the agreement and the Vietnamese government issues travel documents authorizing return, once the deportee is determined to be a national of Vietnam.²⁷⁹ Article 2, Section 2 of the agreement exempted Vietnamese citizens “who arrived in the United States before July 12, 1995, the date on which diplomatic relations were re-established between the United States Government and the Vietnamese Government.”²⁸⁰ In 2017, the Trump administration unilaterally determined this exemption did not apply to convicted criminals.²⁸¹ The Vietnamese government stopped issuing the required travel documents and the United States government had to suspend the repatriation program.²⁸² The United States also entered into a similar agreement with Cambodia in 2001.²⁸³

Not only is the effectiveness of these types of agreements questionable, they also impose substantial emotional and mental burdens on the individuals they affect.²⁸⁴ Individuals with final orders of removal who are not deportable live day-to-day not knowing if or when they would be deported. This imposes a toll on an individual’s mental health.²⁸⁵ Further, many stateless individuals have been here since they were children and now many of them have partners, United States citizen-children, and steady jobs.²⁸⁶ Forcing them to leave the United States and return to an unfamiliar country would be devastating for them given that their entire lives are rooted in the United States.

278. Price, *supra* note 180, at 481.

279. *Id.*

280. Ellen K. Boegel, *Donald Trump and the Complicated Diplomacy of Deportation*, AMERICA THE JESUIT REVIEW (July 28, 2019), <https://www.americamagazine.org/politics-society/2019/01/28/donald-trump-and-complicated-diplomacy-deportation> [<https://perma.cc/Z767-RNK9>].

281. *Id.*

282. *Id.*

283. Price, *supra* note 180, at 481–2.

284. See generally NAT’L ASIAN PAC. AMERICAN WOMEN’S F. & SE. ASIA RES. ACTION CTR., DREAMS DETAINED, IN HER WORDS: THE EFFECTS OF DETENTION AND DEPORTATION ON SOUTHEAST ASIAN AMERICAN WOMEN AND FAMILIES 4–20 (2008).

285. Southeast Asia Resource Action Center, *The Devastating Impact of Deportation on Southeast Asian Americans*, <https://www.searac.org/wp-content/uploads/2018/04/The-Devastating-Impact-of-Deportation-on-Southeast-Asian-Americans-1.pdf> [<https://perma.cc/6224-82YB>].

286. See Shannon Dooling, *40 Years After the Vietnam War, Some Refugees Face Deportation Under Trump*, NPR (Mar. 4, 2019, 9:00 AM), <https://www.npr.org/2019/03/04/699177071/40-years-after-the-vietnam-war-some-refugees-face-deportation-under-trump> [<https://perma.cc/P6DA-TKCL>].

It would also be financially devastating on the family they leave behind in the United States.

PART FOUR: POLICY RECOMMENDATIONS FOR THE UNITED STATES

Part Four explores the possible policy recommendations for the United States, starting with the least desirable solutions and ending with the most desirable. This Section will conclude that the best recommendation is a needs-based solution that synthesizes what stateless individuals need most with what is practically possible in the current political climate. This Note does not claim that the most desirable solution is the perfect solution. However, because of the intense vulnerability that stateless individuals endure,²⁸⁷ it is imperative that there be a meaningful effort to find the best solution for them. For this discussion, we will not consider “recalcitrant” countries and visa sanctions, indefinite orders of supervision, and repatriation programs as possible solutions because their downsides have been discussed at length earlier in this Note.

As a threshold issue, the United States should accede to the 1954 Convention and the 1961 Convention.²⁸⁸ First, due to increased global migration and intermarriages between citizens of different States, more individuals have to deal with complicated legal and procedural requirements to establish their citizenship.²⁸⁹ By acceding to both statelessness conventions, there will be increased legal transparency and predictability with respect to other States, as more States accept the rules contained in these treaties.²⁹⁰ Second, if more States accede to the statelessness conventions, there will be greater international cooperation to prevent statelessness.²⁹¹ Third, in acceding to the statelessness, States undertake to identify potential stateless populations and take measures to prevent and reduce statelessness

287. Eric Schwartz, *Civil Society Can Move Forward on Statelessness in the United States*, REFUGEES INT’L (Nov. 13, 2018), <https://www.refugeesinternational.org/reports/2018/11/13/civil-society-can-move-forward-on-statelessness-in-the-united-states> [<https://perma.cc/4G2R-RBX7>].

288. *Id.*

289. U.N. High Comm’r for Refugees (UNHCR), *The Statelessness Conventions Campaign Why States Should Accede to the 1954 and 1961 Statelessness Conventions* (Oct. 2010), <https://www.refworld.org/docid/4cb6b2052.html> [<https://perma.cc/4AKN-96TQ>].

290. *Id.*

291. *Id.*

within their borders.²⁹² Identifying and addressing the risks of statelessness could have a positive impact in allowing for larger parts of society to participate fully in a country's economic and social development.²⁹³ And finally, by acceding to the statelessness conventions, the United States demonstrates a commitment to human rights and its cooperation with the international community to reduce and eliminate statelessness and respect the dignity of all individuals in need of protection.²⁹⁴

But ascension by itself is not enough. More should be done to meet the needs of stateless individuals and it is more feasible that one may think. First, unlike other migration issues, the challenge is not as overwhelming²⁹⁵ because the population is relatively small.²⁹⁶ The number of stateless persons, although hard to determine,²⁹⁷ is unlikely to be in the hundreds, or even tens of thousands.²⁹⁸ Second, stateless individuals are vulnerable in ways that both political parties have been concerned about in recent years.²⁹⁹ Stateless individuals, especially women without access to status, employment, or education are more susceptible to trafficking.³⁰⁰ Third, causes of statelessness are often linked to human rights violations that resonate with both political parties.³⁰¹ Lastly, the need for a legal framework for stateless individuals has previously come up in Congress.³⁰² The first legislative proposal that would provide a pathway for stateless individuals in the United States to obtain legal status was introduced in 2010 and again in 2011 as part of a larger bill known as the Refugee Protection Act (RPA).³⁰³ The provisions pertaining to statelessness authorized the Secretary of DHS and the United States Attorney General to provide conditional lawful status to certain stateless individuals who are otherwise inadmissible or deportable from the United States.³⁰⁴ The proposal would have also made stateless applicants eligible for work

292. *Id.*

293. *Id.*

294. *See id.*

295. Schwartz, *supra* note 287.

296. Baluarte, *supra* note 20, at 357.

297. *See* Corgan, *supra* note 18.

298. Schwartz, *supra* note 287.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Citizens of Nowhere*, *supra* note 3, at 28–29.

303. *Id.*

304. *Id.* at 29.

authorization and the spouse or child of a recipient of conditional lawful status could also qualify for conditional lawful status if they met certain criteria.³⁰⁵ Then in 2013, the bipartisan Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) was introduced in Congress, which included provisions that would have incorporated stateless individuals into United States immigration law.³⁰⁶ The proposal included: a legal definition of stateless person that would be incorporated into the Immigration and Nationality Act (INA); an application procedure, which includes eligibility criteria, exclusions and waivers, rules for employment authorization, and derivative beneficiaries; considerations for stateless persons to adjust status to Lawful Permanent Resident (LPR); some information about evidentiary considerations; and provisions establishing rules for administrative review, reopening proceedings, and judicial review.³⁰⁷

A) *A New State for the Stateless*

The first recommendation is the creation and addition of a new state (with a lower case “s”) in the United States for the stateless. This “51st” state would accept all stateless individuals who were not granted asylum and provide them with shelter and means of living.³⁰⁸ The state would be governed by a local state government and be part of the federal United States government, the same as our current 50 states.³⁰⁹

The United States Constitution grants general state-creation powers to Congress in Article IV, Section 3, under the Admissions Clause.³¹⁰ The clause states, “New States may be admitted by the Congress into this Union; but no new State shall be forced or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”³¹¹ While the creation of a new state in the United States is

305. *Id.*

306. Corgan, *supra* note 18; Baluarte, *supra* note 20, at 353.

307. Baluarte, *supra* note 20, at 372.

308. See VIK SASI, WORLD REFUGEE AGENCY, FEASIBILITY STUDY: SACROSANCTUARY, A STATE FOR THE STATELESS PRELIMINARY REPORT 3 (2019).

309. See *Admission of and the Rights of New States: Doctrine and Practice*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C1-1-1-2/ALDE_00001171/ [https://perma.cc/Q7WD-GHRB].

310. U.S. CONST. art. IV, §3.

311. *Id.*

theoretically possible based on this clause,³¹² there is simply not enough unclaimed land in the North American continent to build a new state large enough to hold enough people to solve the statelessness problem.³¹³ Consequently, the only way for a new state to be created and added to the United States is if one or some of the current 50 states gave up part of their land for the creation of a new state of stateless individuals.³¹⁴ That would require consent from the legislatures of those states as well as Congress.³¹⁵

This proposal is the least desirable solution because of its unlikelihood due to the logistical complexity of implementation and the low possibility of popular and political support. Even if there was enough state cooperation to free up enough land to create a “51st” state for stateless individuals, there are substantial logistical considerations that would make this project difficult to actuate. The stateless population in the United States is ethnically diverse and geographically spread out.³¹⁶ Stateless individuals in the United States range from former Soviet citizens, ethnic Armenians and Azerbaijanis, Romas, Syrians, Palestinians, Nepalis, Rohingyas, Hmongs, and many other ethnic groups from all over the world.³¹⁷ These stateless individuals live in states all across the country including California, New York, Texas, Ohio, Minnesota, Illinois, Pennsylvania, Wisconsin, Georgia, and Virginia.³¹⁸ This creates two concerns. The first concern is how to identify the stateless individuals that would make up the new state. The stateless population is difficult to identify in United States government data and more broadly in United States society because no government entity makes statelessness determinations or systematically collects information on stateless populations.³¹⁹ Additionally, the United States lacks a path for stateless persons to register or secure

312. *The Annenberg Guide to the United States Constitution: Article IV, Section 3*, ANNENBURG CLASSROOM, <https://www.annenbergclassroom.org/article-iv-section-3/> [https://perma.cc/AB53-5J93].

313. *See generally Bureau of Population, Refugees, and Migration, Statelessness*, U.S. DEP'T OF STATE, <https://www.state.gov/other-policy-issues/statelessness/#:~:text=How%20Many%20Stateless%20People%20Are,10%20million%20due%20to%20underreporting> [https://perma.cc/925N-KFWX].

314. *See Sasi, supra* note 308, at 6.

315. *The Annenberg Guide to the United States Constitution, supra* note 312.

316. *See KERWIN ET AL., supra* note 183 at 40–54.

317. *See id.*

318. *See id.* at 54.

319. *Id.* at 6.

legal status, which makes stateless persons less likely to disclose their status.³²⁰ Therefore, it is currently impossible to determine statelessness without exhaustive, individual screening.³²¹ Even if we were able to identify stateless populations, they live and are settled in many different parts of the country.³²² Many stateless individuals report having United States citizen-children and grandchildren.³²³ Several of them own their own businesses and homes.³²⁴ Many attended schools in the United States and are active members of their community.³²⁵ Displacing them and moving them to a new state would uproot their lives and create substantial burdens on them and their families.³²⁶

The second concern is whether individuals from different countries, speaking different languages and adhering to different customs, would be able to communicate and co-exist.³²⁷ Most successful (and unsuccessful) attempts to create a new state in the United States were prompted by groups of individuals with a common interest living in the same region.³²⁸ For example, Utah's addition as a state was spurred by the Mormon exodus to the Salt Lake basin in the mid-1840s.³²⁹ In the early twentieth century, 46 counties in Texas and 23 counties in Oklahoma tried to form their own state called Texlahoma because people in rural areas of northern Texas and western Oklahoma were in desperate need of roads but felt ignored and "forgotten" by their state legislatures.³³⁰ These examples show the large role that a group of likeminded individuals play in the development of a new state. In contrast, the stateless population is far less homogenous in their ethnic, religious, and cultural background and interests.³³¹ It will be difficult to locate a region in this country with enough stateless individuals to support the formation of a new state for stateless individuals in that location.

320. *See id.*

321. *Id.* at 14.

322. *See id.* at 53–54.

323. *Id.* at 69.

324. *Id.*

325. *Id.*

326. *See id.*

327. Sasi, *supra* note 308.

328. *See Beyond 50: American States That Might Have Been*, NPR (Apr. 2, 2010 12:15 PM), <https://www.npr.org/templates/story/story.php?storyId=125142955> [<https://perma.cc/XB8S-UMTJ>].

329. *Id.*

330. *Id.*

331. *See Corgan, supra* note 18.

B) *Indefinite Detention*

The second recommendation would be to indefinitely detain all stateless individuals in the United States who were not granted asylum status. This is one of the least desirable solutions for several reasons. First, indefinite detention is a violation of due process.³³² Courts have found that the Constitution prohibits pre-trial mandatory detention unless there is proof of danger or a flight risk.³³³ Federal courts in New York, Massachusetts, Illinois, Michigan, Minnesota, Colorado, Oregon, and California found that the same is true for immigration cases.³³⁴ Second, indefinite detention is prohibited by the Supreme Court's rulings in *Zadvydas v. Davis* in 2001 and *Clark v. Martinez* in 2005.³³⁵ As a result of these cases, after six months of detention, the burden shifts to the United States government to prove that the removal of a noncitizen in deportation proceedings is possible in the reasonably foreseeable future.³³⁶ This standard prevents stateless persons from becoming "lifers" – held indefinitely in detention facilities.³³⁷ Third, keeping stateless individuals indefinitely in detention will be a wasteful financial endeavor.³³⁸ Detaining individuals in immigration detention is costly to the taxpayer.³³⁹ It costs the Immigration and Naturalization Service (INS) on average \$58 a day per detainee and \$500,000 per day cumulatively to detain aliens in state and local jails.³⁴⁰ Detaining individuals indefinitely also carries social and economic costs.³⁴¹ Many of those detained are longtime residents of the United States with U.S. citizen family members who depend on them for economic and

332. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

333. *Analysis of Immigration Detention Policies*, ACLU, <https://www.aclu.org/other/analysis-immigration-detention-policies> [<https://perma.cc/EXN6-Z8G8>].

334. *Id.*

335. Corgan, *supra* note 18; *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that non-U.S. citizens admitted to the U.S. but subsequently ordered removed cannot be detained beyond the 90-day removal period for any longer than "reasonably necessary" to effectuate their removal from the country); *Clark v. Suarez Martinez*, 543 U.S. 371 (2005) (holding that *Zadvydas* was also applicable to inadmissible immigrants).

336. Corgan, *supra* note 18.

337. *Id.*

338. *See* Baluarte, *supra* note 20, at 366.

339. *Analysis of Immigration Detention Policies*, *supra* note 333.

340. *Id.*

341. *See id.*

emotional support.³⁴² Indefinite detention interferes with their ability to work and support their families, resulting in additional costs to the government, which often must step in and provide for these families.³⁴³ Fourth, the cost of time spent by detention and removal officers on follow-up with countries that will not claim stateless individuals is wasteful spending.³⁴⁴ For example, Keyse Jama was a Somalian national who argued that Somalia would never issue him travel documents because it did not have a functioning government.³⁴⁵ The United States Supreme Court held that the immigration officials did not need the target country's consent for removal.³⁴⁶ Given the high-profile nature of his case, Immigration officials promptly flew Jama to Somalia on a private jet and hired private escorts to take him through the airport.³⁴⁷ However, because Jama did not have travel documents, he was denied entry into Somalia and sent back to the United States.³⁴⁸ This failed attempt to remove Keyse Jama cost taxpayers an estimated two hundred thousand dollars.³⁴⁹ While this is not a common occurrence, it demonstrates the potential excessive cost to the taxpayer from an unsuccessful deportation attempt.

C) A Legislative Solution

The fourth recommendation would be the implementation of a legislative solution modelled after the 2013 S. 744 bill (S. 744 2.0),³⁵⁰ which would incorporate stateless individuals into the United States immigration legal framework. S. 744 proposed a legal definition of stateless person that would be incorporated into the Immigration and Nationality Act (INA); an application procedure, which includes eligibility criteria, exclusions and waivers, and rules for employment authorization and derivative beneficiaries; considerations for stateless persons to adjust status to Lawful Permanent Resident (LPR); some information about evidentiary considerations; and provisions

342. *Id.*

343. *Id.*

344. Baluarte, *supra* note 20, at 366.

345. *Id.* at 362.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *See generally* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) [hereinafter Border Security].

establishing rules for administrative review, reopening proceedings, and judicial review.³⁵¹

There are many attractive aspects of S. 744. First, and most importantly, it would create a pathway for a stateless person who does not qualify as a refugee to submit to a very similar process and acquire rights very similar to that of a refugee.³⁵² Next, it also makes stateless individuals that apply for stateless status eligible for work authorization as soon as they are determined to be *prima facie* eligible.³⁵³ The bill provides an opportunity for a stateless person to become eligible for travel documents, which would allow stateless individuals reunify with their families.³⁵⁴ Finally, it provides a path to citizenship by providing the opportunity to a stateless individual to adjust their status to Lawful Permanent Resident (LPR) and obtain their green card after one year.³⁵⁵

S. 744 2.0 would include necessary improvements to S. 744 so that it is even more effective at providing legal protections to stateless individuals in the United States. First, S. 744 fails to specify the standard of proof for establishing that one is a “stateless person” under the law.³⁵⁶ Ambiguity regarding a standard of proof leaves room for the courts and the BIA to set a high standard of proof.³⁵⁷ A high standard of proof would place a heavy burden on the stateless individual to prove a negative (that they do not have legal status in any country) and put them in a situation where they may be unable to obtain the required documentation from their originating country that shows they are not citizens of that country.³⁵⁸

S. 744 2.0 is a politically desirable option for the United States to adopt while it waits for an international solution to statelessness. It works within the realm of the United States’ existing immigration legal framework while also harmonizing with the international legal framework, the Statelessness Convention, and the recent guidance published by UNHCR in the Statelessness Handbook.³⁵⁹ Unfortunately, it is arguably not a politically viable option. S. 744 was a bipartisan

351. Baluarte, *supra* note 20, at 372.

352. *Id.* at 373.

353. *Id.* at 376; Border Security, *supra* note 350.

354. *See* Baluarte, *supra* note 20, at 377.

355. *See generally* Border Security, *supra* note 350; Baluarte, *supra* note 20, at 377.

356. Baluarte, *supra* note 20, at 380.

357. *Id.* at 385.

358. *Id.*; *see also* Bianchini, *supra* note 124.

359. Baluarte, *supra* note 20, at 378.

bill when it was first introduced to Congress in 2013.³⁶⁰ However, the political attitude towards immigrants and immigration has changed dramatically for the worse since 2013.³⁶¹ The current administration is unabashedly hostile towards immigrants.³⁶² They have sharply cut legal immigration, tried to build a “wall” across the entire U.S.-Mexico border, increased arrests and removals of unauthorized immigrants, banned nationals from eight countries from entering the U.S., tried to cancel the Deferred Action for Childhood Arrivals (DACA) program, and reduced refugee admissions to the lowest number since the statute guiding refugee resettlement was enacted in 1980.³⁶³ Additionally, political anti-immigrant and anti-immigration rhetoric has strongly impacted how many Americans view immigrants.³⁶⁴ Nearly a quarter of Americans call immigration a “problem.”³⁶⁵ That is “more than double the percentage who characterized it that way in 2015, and the highest share since Gallup began asking that question a quarter-century ago.”³⁶⁶ The sharp decline in immigration’s popularity makes it unlikely that we will see comprehensive legislation that *expands* the United States’ legal immigration framework.

D) A Needs-Focused Solution

Stateless individuals have immediate needs, which legislative solutions will not work quickly enough to meet. Therefore, the most desirable policy recommendation is one that is cognizant of the immediate needs of stateless individuals that is practical and capable

360. Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS (June 24, 2015, 9:05 AM), <https://www.americanprogress.org/issues/immigration/news/2015/06/24/115835/2-years-later-immigrants-are-still-waiting-on-immigration-reform/> [<https://perma.cc/CM8Y-JYNT>].

361. See generally SARAH PIERCE & ANDREW SELEE, *MIGRATION INST., IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY IN THE YEAR SINCE THE ELECTION 1* (2017).

362. *Id.*

363. *Id.*

364. Tyler Anbinder, *Trump has Spread More Hatred of Immigrants than any American in History*, THE WASH. POST (Nov. 7, 2019 10:03 AM), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html [<https://perma.cc/Z2EK-B2BL>].

365. *Id.*

366. *Id.*

of quick implementation. In other words, the most desirable policy recommendation is not a legislative solution. The first thing to do is identify a stateless individual's needs and what, if anything, is impeding that need. This Section will address the following needs of stateless individuals: 1) legal status; 2) release from psychological, emotional, and mental insecurity; 3) economic stability; and 4) freedom to travel.

1) Legal status

Arguably, the biggest need of stateless individuals is legal status. Without legal status, they live in limbo without knowing whether they will be permitted to stay or face deportation to their countries of origin.³⁶⁷ Their best hope for legal status in the United States is a grant of asylum. However, United States courts have consistently found that statelessness is not an independent ground for asylum.³⁶⁸ Therefore, a stateless individual whose application for asylum is denied by USCIS is at the mercy of an Immigration Judge's discretion and the Immigration Judge may not have a [wholistic or accurate] understanding of what it means to be stateless.³⁶⁹ To combat this impediment, the DOJ should provide training to immigration judges and clerks on the determination of statelessness and its legal implications to hopefully increase the likelihood that a stateless individual may be granted asylum. This recommendation is practical because it does not require the passage of legislation and it works within the United States' current immigration legal framework.

2) A release from psychological, emotional, and mental insecurity

Stateless individuals are constantly under psychological, emotional, and mental pressures because of uncertainties in the future due to the lack of legal status and constant threat of deportation.³⁷⁰ Many report feelings of depression, anxiety, and hopelessness.³⁷¹ Some feel powerless regarding their situation.³⁷² Some stateless individuals have to face these psychological challenges while coping with trauma resulting from persecution or violence in their home countries.³⁷³ In these

367. KERWIN ET AL., *supra* note 183, at 70.

368. *Citizens of Nowhere*, *supra* note 3, at 18.

369. KERWIN ET AL., *supra* note 183, at 159.

370. *Id.*

371. *Id.* at 74.

372. *Id.*

373. *Id.*

circumstances, the prospect of deportation exacerbates feelings of anxiety and despair.³⁷⁴

The need for release from these psychological, emotional, and mental pressures are impeded by the perpetual check-in requirements associated with order of supervision requirements and time spent in detention while waiting for the United States government to exhaust its attempts to deport.³⁷⁵ One practical change that the United States can implement is reducing the need for order of supervision check-ins from once every few months to once a year. This change is practical in two ways. One, there is no need for new legislation. INA Section 241(a)(3), gives DHS the discretion to release an alien under orders of supervision.³⁷⁶ Further, there are already regulations in place that give the DHS the discretion to determine how often the alien must report to an immigration officer.³⁷⁷ Two, this reduction complies with existing ICE policy, which requires all aliens released from ICE custody into the United States to report to ICE at least *once* a year; so, there is no need to wait for changes in ICE policy.³⁷⁸ The second practical change that the United States can implement is releasing all stateless detainees. This recommendation is practical because it also does not require new law. The INA authorizes DHS to arrest, detain, remove, or release foreign nationals subject to removal.³⁷⁹

3) Economic Stability

Due to their lack of identifying documents, many stateless persons cannot obtain loans, credit cards, or basic bank accounts.³⁸⁰ To financially support themselves, they need to work. To work as a foreign national, they need work authorization.³⁸¹ INA Section 241.5(b) states that the immigration officer may, in his or her discretion, grant employment authorization to the alien if the alien cannot be removed in a timely manner (e.g., because of the refusal of the country of removal to accept the alien), or the alien's removal is "impracticable or

374. *Id.*

375. *See id.* at 72.

376. HILLEL R. SMITH, CONG. RSCH. SERV., IMMIGRATION DETENTION: A LEGAL OVERVIEW (2019). *See* Immigration and Nationality Act §241(a), 8 U.S.C. 1231 (2020).

377. *See* SMITH, *supra* note 376.

378. AUDREY SINGER, CONG. RSCH. SERV., IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 5 (2019).

379. *Id.* at 7.

380. KERWIN ET AL., *supra* note 183, at 71.

381. *Id.* at 200.

contrary to the public interest.”³⁸² The words to focus on here are “may” and “in his or her discretion.” This discretionary authority means that while some stateless individuals released from detention may work, others may not. There is a need to combat this inconsistency and ensure that stateless individuals can financially support themselves and participate fully in the United States’ economy. This need can be met by DHS’s automatic provision of fee-exempt identity and work authorization documents that does not require annual renewal to individuals determined to be stateless. This recommendation is practical because DHS has provided limited administrative measures for stateless individuals on a case-by-case basis.³⁸³ DHS can expand these administrative measures to make them more accessible to a greater number of stateless individuals.

4) Freedom to Travel

Stateless individuals in the United States are restricted from international travel and those under orders of supervision cannot travel outside of their state of residence or region.³⁸⁴ These travel restrictions make it difficult for them to see family abroad and domestically.³⁸⁵ They can also impede a stateless individual’s career by making it difficult for them to attend business trips and travel for conferences.³⁸⁶ This impediment can be solved by DHS eliminating domestic travel restrictions for stateless persons and allowing them to move and settle where they want in the United States. DHS and DOS should also offer documentation that allows stateless persons to return to the United States after international travel. Further, state and local governments should provide stateless residents with identification cards so that they can travel within the United States.

CONCLUSION

Statelessness is an intractable problem for the United States and the international community. They have no country to call home and no country wants to welcome them. Without the protection of a country, they are essentially “ghosts” and their needs are invisible. Their invisibility makes them vulnerable to exploitation, slavery, child

382. 8 U.S.C § 1231(a)(7)(A); 8 C.F.R. § 241.5(c)(2).

383. *Citizens of Nowhere*, *supra* note 3, at 28.

384. KERWIN ET AL., *supra* note 183, at 71.

385. *Id.*

386. *Id.* at 200.

trafficking, prostitution, police harassment, recruitment into the armed forces, forced labor, and other abuse.³⁸⁷ The world is taking steps to mitigate this problem,³⁸⁸ and the United States urgently needs to take part. While there is no perfect solution to solving statelessness in the United States, we can meet their immediate needs while we wait for a comprehensive international solution and the passage of domestic legislation that fully incorporates stateless individuals into the United States' immigration legal framework. Through better training from the DOJ regarding the determination and legal consequences of statelessness, immigration judges and clerks will be able to make more informed asylum decisions and we can prevent more stateless individuals from ending up in legal limbo. Through reducing the frequency of check-ins with immigration officials under orders of supervision and timely releases from detainment, we can alleviate the daily psychological struggles of stateless individuals. Through the provision of work authorizations, we can give stateless individuals the opportunity to support themselves and meaningfully contribute to their local community and the United States' economy. And finally, through the provision of travel documents, we can promote family unity and encourage their career aspirations.

387. *Invisible and Vulnerable, World's Stateless Face Bleak Future*, *supra* note 53.

388. *Id.*