

# SCHRÖDINGER’S CITIZENSHIP: FRAMING PERSPECTIVES FOR THE RESOLUTION OF STATELESSNESS

BRONWEN MANBY\*

*International law and scholarship lack an agreed vocabulary to refer to the status of people who do not have a recognised citizenship (‘citizenship’ is used here as a synonym for nationality, the term usually used in international law) and yet are also not recognised as stateless. There have been important efforts by the United Nations High Commissioner for Refugees (‘UNHCR’) to clarify and extend the interpretation of the definition of ‘stateless person’. There is, however, a continued lack of settled vocabulary for those who are in ‘stateless-adjacent’ situations, whose status as a national of any particular country or as a stateless person is not (yet) clear. This article considers the use of terminology in two contexts: litigation on behalf of affected people and the collection of statistics about the size of stateless populations. The article emphasises the importance of framing and choice of terminology and proposes a preferred lexicon for use in relation to statelessness, undetermined nationality and risks of statelessness. It puts forward the term ‘presumptive nationality’ to refer to the status of people whose closest connections are to their state of residence but who have no recognised nationality.*

## TABLE OF CONTENTS

I	Introduction.....	5
II	Statelessness in International Law .....	7
III	The Shadow of Statelessness: A Presumed Foreign Nationality .....	10
IV	The Definition of Statelessness and The Different Lives of ‘De Facto’ Statelessness .....	12
V	The Evolution of UNHCR’s Interpretation of the Definition of ‘Stateless Person’ .....	15
VI	A Continued Lack of Settled Vocabulary .....	18
VII	The Importance of Framing .....	19
	A Litigation and Other Advocacy: Naming the Problem .....	20
	B Who is Stateless for Statistics.....	24
VIII	Conclusion: Framing for Solutions .....	32

## I INTRODUCTION

How should we describe the situation of people who appear in law to be entitled to the citizenship of a particular country, but who are not in practice recognised as citizens of that country — even if it is also the country in which they and their parents were born and the only country they have ever known? What is the status of a child born in a country that is not one where either parent holds nationality and the recognition of the child’s nationality — by the country of either parent — depends on consular registration of the birth, but there is no consulate? Do such

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cases have anything in common with a person who has been living as an irregular migrant for decades and has come to the attention of the authorities, but cannot be deported because their country of origin will not issue a travel document?

Although it is often the presumption that, ‘legally speaking, you are a citizen or you are not, you are either a legally authorized migrant or an unauthorized one’,<sup>1</sup> in practice, there is no such clarity — even in law. The lack of certainty is not only a result of the difficulty of producing legally accepted proof of the facts to determine citizenship, but also because the interpretation of the different laws relevant to citizenship status is so often a complex and specialist task. The lack of certainty around legal status as a citizen then also impacts the interpretation of the definition of ‘stateless person’ in international law: ‘[A] person who is not considered as a national by any State under the operation of its law.’<sup>2</sup> To borrow from the problem of Schrödinger’s cat: it may only be when an observer (in particular, a state) opens the ‘box’ in which a person is living and assesses the evidence from its own perspective that we find out if the citizenship of a particular individual is ‘alive’ or ‘dead’.<sup>3</sup>

The varied terminology used to describe those who are in the grey zone between citizen and stateless person reflects this complexity: ‘de facto’ stateless (by contrast to the concept of ‘de jure’ stateless); ‘effectively stateless’; lacking an ‘effective nationality’ or with an ‘ineffective nationality’; of ‘undetermined’, ‘unknown’ or ‘unrecognised’ nationality’; or ‘at risk of statelessness’. Different authors and institutions use these terms to mean different, or even contradictory, things in different contexts, creating substantial confusion over the nature of the problem being addressed and the solutions to be prescribed.

This article considers the implications of different ways of naming these — and similar — scenarios; in particular, the choice of whether to use the language of statelessness, or rather to emphasise the person’s potential citizenship. The article accepts the territorial nature of states as a given starting point in international law and considers lack of recognition of membership to be a significant problem for individuals and the communities to which they belong. The focus is on citizenship as a legal status that links a person to a particular state and gives the right to enter and reside in that state without restrictions — usually termed ‘nationality’ in international law — recognising this legal status as the foundation for the much broader set of rights and claims that is often connoted by the term ‘citizenship’.

The article sets out the developments in use of terminology used to refer to statelessness and stateless-adjacent statuses in international law and policy. It then examines the legal and political implications of different framings in two particular contexts: litigation to resolve the status of those whose nationality or stateless status is not clear, and the collection of statistics about stateless persons. It concludes by suggesting the most useful (or least problematic) vocabulary to

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<sup>1</sup> Rhoda Howard-Hassmann, ‘Introduction’ in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 1, 17.

<sup>2</sup> *Convention relating to the Status of Stateless Persons* (opened for signature 28 September 1954) 360 UNTS 117 (entered into force 6 June 1960) art 1(1) (‘1954 Convention’).

<sup>3</sup> This analogy refers to Erwin Schrödinger’s 1935 thought experiment that sought to demonstrate the paradox of the ‘conscious observer’ in quantum mechanics by imagining a cat placed inside a container into which poison is being leaked. While the container is unopened, the ‘dead’ and ‘alive’ cat states are ‘mixed or smeared together’ even though the cat will definitely be found to be either dead or alive when an experimenter opens the system: see C N Villars, ‘The Paradox of Schrödinger’s Cat’ (1986) 21 *Physics Education* 232, 233.

capture the situation of those categories of people whose situation defies the frequently alleged legal binary between citizen and non-citizen. A three part lexicon of concentric circles is proposed: a core of stateless persons, a wider circle of those at risk of statelessness and an even wider group of those with undetermined nationality (based simply on the factual lack of documents recognising any nationality). Finally, the article puts forward the term 'presumptive nationality' to refer to the status of people in any of these categories whose closest connections are to their state of residence, turning on its head the too frequent presumption of foreignness of those who have even the faintest connection with another country. The ambition is thus not only analytical, but also normative. I aim, not only to promote clarity, but also to propose language that helps to challenge the monopoly of the state both to set the rules on citizenship and to adjudicate the application of those rules in any particular case.

## II STATELESSNESS IN INTERNATIONAL LAW

Statelessness first came to international legal attention in the aftermath of World War I, with the defeat of the German State, the breakup of the Austro-Hungarian, Russian and Ottoman Empires and the establishment of the League of Nations.<sup>4</sup> In Eastern Europe, this period involved the creation of new states with borders intended to respect a principle of national self-determination (defined by ethno-cultural criteria).<sup>5</sup> In the Middle East and Africa, the former Ottoman and German territories were allocated to Britain and France as 'mandate territories', with a view towards an ultimate (but still far off) independence and with far less attention to prior political demands for nationhood.<sup>6</sup> Multilateral treaties established rules for attribution of nationality of those resident in both the new states and the mandate territories.

Almost immediately, the status of those who were not recognised as nationals by the new sovereigns became apparent. The first regime of international protection through the issue of 'Nansen passports' was devised for the Russian and Armenian refugees deprived of citizenship by the new Soviet State which acquired sovereignty over most of the former Russian Empire.<sup>7</sup> In 1930, the League of Nations convened a conference in The Hague to address the most pressing questions of international law. On the agenda was the law of the sea (a project which finally achieved a treaty only in 1982),<sup>8</sup> state responsibility (an even

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<sup>4</sup> Mira L Siegelberg, *Statelessness: A Modern History* (Harvard University Press 2020).

<sup>5</sup> Mark Mazower, 'Minorities and the League of Nations in Interwar Europe' (1997) 126 *Daedalus* 47, 49–55.

<sup>6</sup> Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015); Malak Benslama-Dabdoub, 'Colonial Legacies in Syrian Nationality Law and the Risk of Statelessness' (2021) 3(1) *Statelessness & Citizenship Review* 6.

<sup>7</sup> Otto Hieronymi, 'The Nansen Passport: A Tool of Freedom of Movement and of Protection' (2003) 22(1) *Refugee Survey Quarterly* 36; Kacey Bengel, 'Understanding the Nansen Passport: A System of Manipulation' (2022) 29(1) *Indiana Journal of Global Legal Studies* 217.

<sup>8</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 398 (entered into force 16 November 1994).

more protracted debate completed only in 2001)<sup>9</sup> and *nationality* — which resulted in the adoption of the *Convention on Certain Questions relating to the Conflict of Nationality Laws* (*The Hague Convention of 1930*).<sup>10</sup> While the first article of *The Hague Convention of 1930* stated that '[i]t is for each State to determine under its own law who are its nationals', it also established the first limits to this discretion. Article 1 went on to say that national law 'shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'. The concern, however, was not the rights of the individuals, but clarity on the rights and obligations of states.<sup>11</sup>

The problems of nationality and statelessness were even more acute with the massive displacement and remodelling of borders in the wake of World War II. One of the first actions of the newly created United Nations Commission on Human Rights was to establish a working group on stateless persons. The Commission resolved that the United Nations ('UN') should both 'make recommendations to Member States with a view to concluding conventions on nationality' and give 'early consideration' to the 'legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality'.<sup>12</sup> In 1949, the Commission published a *Study of Statelessness*, which distinguished between *de jure* and *de facto* stateless persons, proposing that the former were persons 'who are not nationals of any State', whereas the latter were 'persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities'.<sup>13</sup> Three years later, Manley Hudson, member and special rapporteur of the International Law Commission (and former judge at the League of Nations' Permanent Court of International Justice), dismissed this distinction, proposing that '[s]tateless persons in the legal sense of the term are persons who are not considered as nationals by any State according to its law'; those described by the *Study of Statelessness* as *de facto* stateless should rather be regarded simply as 'unprotected persons'.<sup>14</sup>

The distinction between refugees and stateless persons and the definition of each term remained vexed questions throughout the drafting process for what was initially planned as a single treaty, but ultimately was split into two: the 1951

<sup>9</sup> International Law Commission ('ILC'), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' in *Document A/56/10: Report of the ILC on the Work of Its 53rd Session (23 April–1 June and 2 July–10 August 2001)* (vol II, Yearbook of the International Law Commission 2001). The *Articles on Responsibility of States for Internationally Wrongful Acts* were adopted by the ILC at its 53rd session and noted by the United Nations ('UN') General Assembly in 'Responsibility of States for Internationally Wrongful Acts', GA Res 58/83 (12 December 2001) in *Resolutions Adopted by the General Assembly*, UN Doc A/RES/56/83 (28 January 2002).

<sup>10</sup> *Convention on Certain Questions Relating to the Conflict of Nationality Law*, opened for signature 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937) 179 LNTS 89 (*The Hague Convention of 1930*).

<sup>11</sup> Ian Brownlie, 'The Relations of Nationality in Public International Law' (1963) 39 *British Yearbook of International Law* 284.

<sup>12</sup> *Report on the of the Commission on Human Rights: Second Session*, UN Doc E/600 (17 December 1947) [46].

<sup>13</sup> Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, UN Doc E/1112; E/1112/Add.1 (1 August 1949) pt III.

<sup>14</sup> Manley O Hudson, *Report on Nationality, Including Statelessness* (vol II, Yearbook of the International Law Commission 1952) 17.

*Convention relating to the Status of Refugees*<sup>15</sup> and the 1954 *Convention relating to the Status of Stateless Persons* ('1954 Convention').<sup>16</sup> The 1954 *Convention* provided a definition of 'stateless person', apparently adapted from the report of Manley Hudson: '[A] person who is not considered as a national of any state under the operation of its law.'<sup>17</sup> This definition includes those who are not displaced from their country of habitual residence. Nonetheless, despite their consequent separation into two texts, both conventions were envisaged as primarily providing international protection for people unable to return to a country of previous residence and in need of protection by a new country.<sup>18</sup> Early drafts of the 1954 *Convention* had proposed options for a second paragraph of the definition that would extend the concept of stateless person to those who were outside the country of their nationality and had renounced or were refused the protection of that state.<sup>19</sup> However, neither the 1954 *Convention*, nor the *Convention on the Reduction of Statelessness* of 1961 ('1961 Convention')<sup>20</sup> referred to the concept of 'de facto' statelessness — although the Final Act that adopted the 1961 *Convention* kept the concept alive by adopting a resolution recommending that 'persons who are stateless de facto should as far as possible be treated as stateless de jure'.<sup>21</sup> There was no elucidation of the difference between the two concepts.

Article 15 of the *Universal Declaration of Human Rights*<sup>22</sup> established the right to nationality — without any clarity on which particular country should recognise a person's nationality.<sup>23</sup> This commitment was then incorporated into human rights treaties adopted by the UN from the mid-1960s<sup>24</sup> and into regional treaties

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<sup>15</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

<sup>16</sup> 1954 *Convention* (n 2); Nehemiah Robinson, *Convention relating to the Status of Stateless Persons: Its History and Interpretation* (Commentary Institute of Jewish Affairs 1955); Carol A Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 *International Journal of Refugee Law* 232 ('Some Gaps in International Protection'); Guy S Goodwin-Gill, *Convention relating to the Status of Stateless Persons* (UN Audiovisual Library of International Law 2010).

<sup>17</sup> 1954 *Convention* (n 2) art 1.

<sup>18</sup> Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(1–2) *International Journal of Refugee Law* 156.

<sup>19</sup> Paul Weis, 'The Convention relating to the Status of Stateless Persons' (1961) 10(2) *International and Comparative Law Quarterly* 255.

<sup>20</sup> *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('1961 Convention').

<sup>21</sup> *Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness*, UN Doc A/CONF.9/14 (29 August 1961).

<sup>22</sup> *Universal Declaration of Human Rights*, UN Doc A/810 (10 December 1948) art 15.

<sup>23</sup> Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27(3) *Refugee Survey Quarterly* 93.

<sup>24</sup> See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(3); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 666 UNTS 195 (entered into force 4 January 1969) art 5; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 113 (entered into force 3 September 1981) art 19; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 29; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 18.

of the Americas, Africa and Europe.<sup>25</sup> The respective treaty bodies were soon called on to interpret these provisions. But there is no oversight body for the two statelessness conventions able to evaluate state compliance with their provisions on the particular state obliged to respect the right. In 1974, the UN General Assembly designated the United Nations High Commissioner for Refugees ('UNHCR') as the agency responsible to consider claims for assistance by stateless persons (under art 11 of the *1954 Convention*), but it was only in 1995 that the General Assembly gave UNHCR a broad global mandate to address statelessness.<sup>26</sup> It was only early in the 21<sup>st</sup> century that a serious effort was made to put this mandate into effect, reinforced by a UNHCR Executive Committee ('ExCom') resolution in 2006 that called for strengthened efforts on statelessness, including the identification of 'stateless populations and populations with undetermined nationality'.<sup>27</sup> The agency stepped up its efforts for the protection of stateless persons, the prevention and reduction of statelessness, and the provision of guidance on interpretation of state obligations.<sup>28</sup> In 2014, UNHCR launched a ten year campaign to end statelessness.<sup>29</sup>

### III THE SHADOW OF STATELESSNESS: A PRESUMED FOREIGN NATIONALITY

The vast majority of stateless persons are asserted by the authorities of their state of residence to have the nationality of another state based on presumptions about a person's origins or ancestry.

These presumptions are applied to deny nationality of the state where a person was born and has the strongest connections on the grounds that the community into which the person was born was originally of migrant origins, or is mainly found in a neighbouring state — to which it is asserted they can relocate to claim a nationality (which in reality is not available). The vast majority of stateless persons in the world fall into this category, including the best known groups, such

<sup>25</sup> See, eg, *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 20; *African Charter on the Rights and Welfare of the Child*, opened for signature 11 July 1990, OAU Doc CAB/LG/153/Rev.2 (entered into force 29 November 1999) arts 6(3), 6(4); *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000) art 4.

<sup>26</sup> *Question of the Establishment, in Accordance with the Convention on the Reduction of Statelessness, of a Body to which Persons Claiming the Benefit of the Convention may Apply*, GA Res 3274 (XXIX), UN Doc A/RES/3274(XXIX) (10 December 1974); GA Res 50/152, UN Doc A/RES/50/152 (21 December 1995).

<sup>27</sup> United Nations High Commissioner for Refugees ('UNHCR') Executive Committee, 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons', Conclusion No 106 (LVI) — 2006 in *Report of the Fifty-seventh Session of the Executive Committee of the High Commissioner's Programme*, UN Doc A/AC.96/1035 (10 October 2006) [18].

<sup>28</sup> Mark Manly, 'UNHCR's Mandate and Activities to Address Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 88; Matthew Seet, 'The Origins of UNHCR's Global Mandate on Statelessness' (2016) 28(1) *International Journal of Refugee Law* 7.

<sup>29</sup> UNHCR, 'Global Action Plan to End Statelessness: 2014–2024' (Report, 2014) ('*Global Action Plan to End Statelessness*').

as the Rohingya of Myanmar,<sup>30</sup> the Roma of the former Yugoslavia,<sup>31</sup> the Dominicans of Haitian descent<sup>32</sup> or the many communities in Africa split by colonial borders or descended from pre-independence migrants.<sup>33</sup> Alternatively, it is presumed that a child born in the country can acquire nationality from one or both foreign parents, even if an alternative nationality is not accessible in law or fact. However, these presumptions are also applied when a state wishes to deport a person not born in the country — an irregular migrant or failed asylum seeker — to another state where it asserts that the person holds nationality on the basis of birth and residence, even if the other state does not recognise the person as its own.<sup>34</sup> More rarely, states deprive individuals of nationality on national security grounds, alleging them to be dual nationals who can therefore take up their presumed other nationality.<sup>35</sup>

Such presumptions also create statelessness in the administrative processes to register the birth of a child in the state of birth. The nationality of the parents or the child may be recorded by the civil registration official based on an assumption — without sight of any identity documents — that the parents have a different nationality from the state of birth of the child on the basis of family name, religion, language or appearance.<sup>36</sup> The registration of parental nationality on a birth certificate based only on such presumptions paradoxically exposes the child to greater risk of statelessness because the authorities of the states(s) of the parents'

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<sup>30</sup> Natalie Brinham, “‘We Are Not Stateless! You Can Call Us What You Like, but We Are Citizens of Myanmar!’: Rohingya Resistance and the Stateless Label” in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance, and the Problem of Citizenship* (Manchester University Press 2021) 342 (‘We Are Not Stateless!’).

<sup>31</sup> Helen O’Nions, ‘How Citizenship Laws Leave the Roma in Europe’s Hinterland’ in Rhoda E Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 148.

<sup>32</sup> Eve Hayes de Kalaf, *Legal Identity, Race and Belonging in the Dominican Republic: From Citizen to Foreigner* (Anthem Press 2021).

<sup>33</sup> Bronwen Manby, *Citizenship in Africa: The Law of Belonging* (Hart Publishing 2018).

<sup>34</sup> Sergio Carrera, ‘Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights’ (Research Paper, Centre for European Policy Studies, 29 August 2016) <<https://www.ceps.eu/ceps-publications/implementation-eu-readmission-agreements-identity-determination-dilemmas-and-blurring>>, archived at <[perma.cc/7WMP-GYH7](https://perma.cc/7WMP-GYH7)>; Eric Fripp, ‘Nationality, Protection, and “the Country of His Nationality” as the Country of Reference for the Purposes of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees’ (2021) 33(2) *International Journal of Refugee Law* 300.

<sup>35</sup> Kim Rubenstein and Niamh Lenagh-Maguire, ‘More or Less Secure? Nationality Questions, Deportation and Dual Nationality’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014); Audrey Macklin, ‘Sticky Citizenship’ in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015); Laura van Waas and Sangita Jaghai, ‘All Citizens Are Created Equal, but Some Are More Equal than Others’ (2018) 65(3) *Netherlands International Law Review* 413; Rayner Thwaites, ‘Proof of Foreign Nationality and Citizenship Deprivation: *Pham* and Competing Approaches to Proof in the British Courts’ (2022) 85(6) *Modern Law Review* 1301.

<sup>36</sup> Sari K Ishii, ‘Access to Citizenship for Abandoned Children: How Migrants’ Children Become “Stateless” in Japanese Orphanages’ (2021) 47(5) *Journal of Ethnic and Migration Studies* 970, 978; UNHCR, ‘Child Protection Issue Brief: Birth Registration’ (Issue Brief, August 2013) <<https://www.refworld.org/policy/opguidance/unhcr/2013/en/94148>>, archived at <[perma.cc/MN3E-LLZV](https://perma.cc/MN3E-LLZV)>; UNHCR, *Good Practices Paper – Action 7: Ensuring Birth Registration for the Prevention of Statelessness* (Report, November 2017) <<https://www.refworld.org/pdfid/5a0ac8f94.pdf>>, archived at <[perma.cc/4MBT-U2BJ](https://perma.cc/4MBT-U2BJ)>.

presumed origin are under no obligation to recognise the views of the state registering the birth of the child.<sup>37</sup>

The family history of those who are stateless and those who are dual nationals is, indeed, often similar. A person born in one country, but with parents who have origins in a different country (or what is now a different country, but previously was one territory), may appear to be entitled to two or more nationalities from birth, if all the facts were established to the satisfaction of the competent authorities. However, although there are situations when the law seems clear that the person does or does not hold the other nationality, the interpretation of the law is often not obvious. Moreover, in the absence of officially accepted proof of the relevant facts, an apparent legal entitlement may not be real.

It may, in practice, take years for a person to find out if they are in fact ‘considered as a national’ by a state or not. There are very many people whose status is simply not clear.<sup>38</sup> Despite statements that ‘an individual either possesses a nationality or does not’,<sup>39</sup> the alleged binary division between national and non-national is sometimes impossible to draw.<sup>40</sup>

#### IV THE DEFINITION OF STATELESSNESS AND THE DIFFERENT LIVES OF ‘DE FACTO’ STATELESSNESS

As the problem of statelessness gained increasing attention, the scope of the definition of ‘stateless person’ in the *1954 Convention* was in constant debate in both policy and scholarly circles. Would those who appeared to be entitled to a nationality in law but could not gain recognition of that nationality through the issue of identity documents (whether of their state of residence or of another state) be considered ‘stateless’ or not?

In the 1990s, Carol Batchelor, drawing on work for UNHCR, noted that ‘[a] problem arises’ in relation to the definition of stateless person because ‘the definition itself precludes full realization of an effective nationality because it is a technical, legal definition which can address only technical, legal problems’.<sup>41</sup> Helen O’Nions is among many others who followed this analysis to regret ‘international law’s narrow interpretation of de jure statelessness’,<sup>42</sup> and reach for the term ‘de facto’ statelessness to describe the situation for those whose nationality is contested or ineffective.

<sup>37</sup> Bronwen Manby, ‘“Legal Identity for All” and Statelessness: Opportunity and Threat at the Junction of Public and Private International Law’ (2020) 2(2) *Statelessness & Citizenship Review* 248 (‘Legal Identity for All’).

<sup>38</sup> See Wendy Hunter, *Undocumented Nationals: Between Statelessness and Citizenship* (Cambridge University Press 2019).

<sup>39</sup> Taken here from Benedikt Buechel, ‘A Typology of Statelessness’ (2022) 4(2) *Statelessness & Citizenship Review* 237, 239. See also Howard-Hassmann (n 1) 17; Margaret Walton-Roberts, ‘Conclusion: Slippery Citizenship and Retrenching Rights’ in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 243.

<sup>40</sup> Among many other examples, see Sujata Ramachandran, ‘Capricious Citizenship: Identity, Identification, and Banglo-Indians’ in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015).

<sup>41</sup> Batchelor, ‘Some Gaps in International Protection’ (n 16) 232.

<sup>42</sup> Helen O’Nions, ‘How Citizenship Laws Leave the Roma in Europe’s Hinterland’ in Rhoda E Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 148.



Writing in 2006, Brad Blitz used 'de facto statelessness' to cover individuals who cannot seek assistance from the state to which they may be formally attached by nationality, following the 1949 *Study of Statelessness*, but extending the meaning also to cover those who 'are unable to obtain proof of their nationality, residency or other means of qualifying for citizenship'.<sup>43</sup> He also called for the definition of statelessness in international law to be broadened to encompass this category, those who are 'effectively stateless or de facto stateless persons'.<sup>44</sup> Margaret Walton-Roberts refers to 'de facto statelessness' as including 'those who lack any "effective" citizenship, such as the Roma'.<sup>45</sup> Refugees International, based in Washington, DC, issued a report in 2009 referring to 'de facto stateless' as '[p]ersons who have legitimate claims to citizenship, but who cannot prove their citizenship, or whose governments refuse to give effect to their nationality'.<sup>46</sup> The situation of failed asylum seekers who cannot be deported has similarly often been described as 'de facto' statelessness.<sup>47</sup> Refugees, especially very long-term refugees and their children, may also be considered 'de facto stateless', above all, if they lack valid identity documents recognising them as refugees.<sup>48</sup>

Jacqueline Bhabha, meanwhile, has defined 'de facto stateless' to encompass those in an irregular migration status, whether or not another country has recognised their nationality: '[P]eople who have a nationality but whose status where they reside is not legal because they are illegal, irregular, or undocumented migrants in their current location'.<sup>49</sup> Bhabha also deploys the term 'effective statelessness' (although with a somewhat different meaning to Blitz) to mean people who are citizens of the state where they live, but who 'lack the documents necessary to assert their legitimate claim to state services'.<sup>50</sup> Wendy Hunter follows Bhabha in making a distinction between the 'effectively stateless', that is, 'people who are in principle citizens of a country — either by birthplace (*jus soli*) or blood (*jus sanguinis*) — but who cannot prove they are because they lack identity documents' and those 'who have an irregular immigration status' (the de

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<sup>43</sup> Brad K Blitz, 'Statelessness and the Social (De)Construction of Citizenship: Political Restructuring and Ethnic Discrimination in Slovenia' (2006) 5(4) *Journal of Human Rights* 453, 455.

<sup>44</sup> Brad Blitz, *Statelessness, Protection and Equality* (Policy Briefing, Refugee Studies Centre September 2009) 7 <<https://www.rsc.ox.ac.uk/publications/statelessness-protection-and-equality>>, archived at <[perma.cc/Y28L-THNH](https://perma.cc/Y28L-THNH)>.

<sup>45</sup> Margaret Walton-Roberts, 'Conclusion: Slippery Citizenship and Retrenching Rights' in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 240, 243.

<sup>46</sup> Katherine Southwick and Maureen Lynch, *Nationality Rights for All: Global Survey on Statelessness* (Report, Refugees International, 2009) 1.

<sup>47</sup> Sharita Gruberg, 'De Facto Statelessness among Undocumented Migrants in Greece' (2011) 18(3) *Georgetown Journal on Poverty Law and Policy* 533; Amal de Chickera, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons* (Equal Rights Trust 2010).

<sup>48</sup> See Jason Tucker, 'The Statelessness of Refugees' in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance, and the Problem of Citizenship* (Manchester University Press 2021) 61.

<sup>49</sup> Jacqueline Bhabha, 'From Citizen to Migrant: The Scope of Child Statelessness in the Twenty-First Century' in Jacqueline Bhabha (ed), *Children Without a State* (MIT Press 2011) 1 ('From Citizen to Migrant').

<sup>50</sup> *ibid.* See also, Jacqueline Bhabha and Margareta Matache, 'Are Children's Rights to Citizenship Slippery or Slimy?' in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 130.

facto stateless) or no nationality at all (the de jure or legally stateless)'.<sup>51</sup> Jay Millbrandt draws on a UNHCR discussion document to provide an even broader set of categories, including not only those who do not enjoy the rights attached to their nationality, but also those who are unable to establish their nationality or who are of undetermined nationality, and those who, in the context of state succession, are attributed the nationality of a state other than the state of their habitual residence.<sup>52</sup> Jamie Liew uses a complex configuration of terms in the context of Malaysia, referring to 'a stateless person and de facto stateless synonymously as a person ... who ha[s] no legal recognition as a citizen in any state' and to 'de jure stateless, "administratively" stateless persons and de facto citizens, synonymously as persons ... who are entitled on the face of the law but due to various administrative or legal barriers, are unable to obtain the legal proof of citizenship'.<sup>53</sup>

More recently, de facto statelessness has sometimes been used as a synonym for a lack of identity documents. The Council of Europe has described the Roma and others 'without proper identification documents' as 'essentially not people before the law [who] are de facto stateless and legally and administratively invisible'.<sup>54</sup> Solutions proposed for statelessness include a new international identification document similar to the Nansen passport,<sup>55</sup> or even a digital identity, since '[w]ithout a digital identity people are at risk of being unable to access critical public services and commercial services, including purchasing property, owning land, buying a car, being able to vote and reducing the risk of becoming homeless or stateless'.<sup>56</sup> It is, however, not always the case that stateless people lack identity documents; indeed, in some contexts stateless people are hyper-identified, repeatedly enrolled in different registers of state and other agencies, but always with the status of non-citizens.<sup>57</sup>

In summary, as Kristy Belton notes: 'No agreed upon definition of de facto statelessness exists. ... It is sometimes described as the condition of being unable to prove one's nationality. In other cases, it is used to refer to a lack of "effective" citizenship, which can refer to a lack of government protection or the inability to enjoy rights.'<sup>58</sup> Nor is it surprising that, writing in 2010, James Goldston listed 'de

<sup>51</sup> Wendy Hunter, 'Identity Documents, Welfare Enhancement, and Group Empowerment in the Global South' (2019) 55(3) *Journal of Development Studies* 366, 368, citing Bhabha, 'From Citizen to Migrant' (n 49) 13 (emphasis added).

<sup>52</sup> Jay Millbrandt, 'Stateless' (2011) 20(1) *Cardozo Journal of International and Comparative Law* 75, 82, citing Hugh Massey, *UNHCR and De Facto Statelessness* (Legal and Protection Policy Research Series, UNHCR, April 2010).

<sup>53</sup> Jamie Chai Yun Liew, 'Homegrown Statelessness in Malaysia: The Administratively Stateless and the Promise of the Principle of Genuine and Effective Links' (2019) 1 *Statelessness and Citizenship Review* 96, 98. It seems likely that 'de jure stateless' and 'de facto stateless' are accidentally reversed here.

<sup>54</sup> 'Legal Status/Identity Documents/Statelessness', *Council of Europe* (Web Page, 23 December 2018) <<https://www.coe.int/en/web/roma-and-travellers/legal-status/-/id-documents>>, archived at <[perma.cc/EM34-L88S](https://perma.cc/EM34-L88S)>.

<sup>55</sup> Millbrandt, 'Stateless' (n 52).

<sup>56</sup> Digital Identity Toolkit, 'Section 3: Digital Identity Explained', *Yoti* (Web Page, 2020) <<https://www.yoti.com/social-purpose/digital-identity-toolkit>>, archived at <[perma.cc/M8CX-ZYTE](https://perma.cc/M8CX-ZYTE)>. See also World Bank Group, 'ID4D Practitioner's Guide: Version 1.0' (October 2019) 136–9 (on eligibility); World Economic Forum, 'Identity in a Digital World: A New Chapter in the Social Contract' (Report, September 2018).

<sup>57</sup> Natalie Brinham, 'Looking Beyond Invisibility: Rohingyas' Dangerous Encounters with Papers and Cards' (2019) 24(2) *Tilburg Law Review* 156.

<sup>58</sup> Kristy Belton, 'Statelessness: A Matter of Human Rights' in Rhoda E Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 32.

facto statelessness' as the first priority for clarification in a set of concepts relating to the right to a nationality.<sup>59</sup>

Thus, despite calls for the term to be used more sparingly<sup>60</sup> — in line with UNHCR's evolving interpretation, discussed later — 'de facto statelessness' remains in use as a term in both scholarly and policy works, but with varied meanings. Today, in my experience, 'de facto' statelessness is most commonly used to refer to those who are excluded from recognition of nationality in practice, even if they are entitled to it in law (whether in their state of residence or another state). However, it is also used to refer to people who are refused access to a wide range of rights regardless of legal status, invoking the broader meaning of citizenship as a participatory and republican idea.<sup>61</sup> In other contexts, people without a regular immigration status are described as 'de facto stateless', even when they hold valid documents recognising them as nationals of another country. The blurriness of the definitions encourages a blurriness in proposals for solutions.

## V THE EVOLUTION OF UNHCR'S INTERPRETATION OF THE DEFINITION OF 'STATELESS PERSON'

As UNHCR stepped up its work on statelessness from 2006, it had of necessity to clarify which populations fell within its mandate. Who would count as 'stateless' within the definition of the *1954 Convention*: 'a person who is not considered as a national by any state under the operation of its law'?

For some years into this effort, the agency continued to use a distinction between 'de jure' and 'de facto' statelessness, accepting the view that there is a sharp distinction between a person who has a nationality and one who does not, even if some of those with a nationality cannot benefit from the rights that should ensue. Thus, in guidance to parliamentarians published in 2005, UNHCR referred to de jure stateless persons as those 'who are stateless with reference to applicable law', but added that:

sometimes the States with which an individual might have a genuine link cannot agree as to which of them is the State that has granted citizenship to that person. The individual is thus unable to demonstrate that he/she is de jure stateless, yet he/she has no effective nationality and does not enjoy national protection. He/She is considered to be de facto stateless.<sup>62</sup>

In its 2008 'analytical framework' for work on statelessness, UNHCR referred to de jure statelessness as 'the formal, legal lack of a nationality', while noting that 'the problem of statelessness is broader in scope and also extends to persons who formally hold a nationality but are nonetheless in a situation similar to statelessness because that nationality is ineffective. Such individuals are

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<sup>59</sup> James A Goldston, 'Epilogue' in Brad K Blitz and Maureen Lynch (eds), *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Edward Elgar Publishing 2011) 209.

<sup>60</sup> Amal de Chickera and Laura Van Waas, 'Unpacking Statelessness' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 53.

<sup>61</sup> Margaret Somers refers to United States citizens displaced by Hurricane Katrina and unassisted by the federal authorities as 'stateless': see Margaret R Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge University Press 2008) ch 1.

<sup>62</sup> Carol Batchelor and Philippe LeClerc, *Nationality and Statelessness: A Handbook for Parliamentarians* (UNHCR 2005) 11.

commonly referred to as de facto stateless.’<sup>63</sup> In the 2008 *Global Trends* report, however, UNHCR moved towards an amalgamation of the terms: ‘Stateless persons are individuals not considered as nationals by any State under national laws or who formally possess a nationality but where it is ineffective.’<sup>64</sup>

In 2010, the agency convened an expert meeting to discuss the interpretation of ‘stateless person’ in the 1954 *Convention*, commissioning a report on the origins of the term ‘de facto statelessness’ within the UN system.<sup>65</sup> While noting a lack of consensus among participants, the report of the meeting maintained a distinction between de jure and de facto statelessness and put forward a definition of ‘de facto stateless person’ broadly in line with the definition in the 1949 *Study of Statelessness*, focused on those who have left a country of (presumed) nationality: ‘[P]ersons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.’<sup>66</sup> The report noted, however, that:

in assessing the State’s view it is necessary to identify which of its authorities are competent to establish/confirm nationality. ... This should be assessed on the basis of national law as well as practice in that State. In this context, a broad reading of ‘law’ is justified, including for example customary rules and practices.<sup>67</sup>

Accordingly, ‘some categories of persons hitherto regarded as de facto stateless are actually de jure stateless, and therefore particular care should be taken before concluding that a person is de facto stateless rather than de jure stateless’.<sup>68</sup>

This evolution in understanding of the definition of ‘stateless person’ progressed further in UNHCR’s *Guidelines on Statelessness No 1* (‘the *Guidelines*’) adopted in 2012.<sup>69</sup> In its official guidance, the agency moved to a position that statelessness should be seen as a ‘mixed question of fact and law’.<sup>70</sup> Reflecting the concerns noted in the report of the 2010 expert meeting, the *Guidelines* warn against use of the term ‘de facto stateless’ because of the danger that those who in fact qualify as stateless may fail to receive the protection guaranteed under the 1954 *Convention*.<sup>71</sup> The *Guidelines*, now part of the *Handbook on Protection of Stateless Persons*, thus expand the definition of ‘stateless person’ to include those who cannot prove their status to the satisfaction of the competent authorities. A finding by a state that a person is stateless is

<sup>63</sup> UNHCR, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection* (White Paper, 2008) iv.

<sup>64</sup> UNHCR, *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (Report, 16 June 2009) 6 <<https://www.unhcr.org/statistics/country/4a375c426/2008-global-trends-refugees-asylum-seekers-returnees-internally-displaced.html>>, archived at <[perma.cc/6QA4-2ACV](https://perma.cc/6QA4-2ACV)>.

<sup>65</sup> Hugh Massey, *UNHCR and De Facto Statelessness* (Background Paper, Legal and Protection Policy Research Series, UNHCR, April 2010).

<sup>66</sup> UNHCR, *Expert Meeting: The Concept of Stateless Persons under International Law* (Summary Conclusions, 2010) pt IIA [2] <<https://www.refworld.org/docid/4ca1ae002.html>>, archived at <[perma.cc/6RL6-3B33](https://perma.cc/6RL6-3B33)> (‘Prato Conclusions’).

<sup>67</sup> *ibid* part IB [13].

<sup>68</sup> *ibid* part II ‘De facto Stateless Persons’, chapeau.

<sup>69</sup> UNHCR, *Guidelines on Statelessness No 1: The Definition of ‘Stateless Person’ in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, UN Doc HCR/GS/12/01 (20 February 2012).

<sup>70</sup> *ibid* [16].

<sup>71</sup> UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (UNHCR 2014) [23], [7] (‘*Handbook on Protection of Stateless Persons*’).

declaratory rather than constitutive of this status.<sup>72</sup> UNHCR does still use the term 'de facto stateless', but in much more limited contexts.<sup>73</sup>

The key realisation in this evolution is that a theoretical claim to a nationality is empty if the person concerned cannot prove that claim to the satisfaction of the competent authorities. Indeed, the question of proof of status is very often just as much a matter of law as the rules provided in the principal nationality law on attribution of nationality at birth or acquisition thereafter. States establish in law — through primary legislation, subsidiary regulations and policies<sup>74</sup> — the documents and procedures that are necessary to prove nationality: the legal requirements to establish place of birth and identity of parents through birth certificates or other civil registration certificates (adoption, marriage, divorce, death and change of name) or alternative means of proof through other documents or witness testimony; the rules on proof of parentage for a child born out of wedlock or the establishment of the legal identity of children of unknown parents; the requirement to be issued a national identity card or passport; and the procedures for consular registration of a birth taking place abroad, or the means to legally validate documents issued by another country.<sup>75</sup> Thus, *even taking a strictly legal approach*, questions of proof of status cannot be ignored in deciding whether a person is stateless.

Moreover, in practice, a state may disregard its own law or create ever more elaborate and discriminatory administrative procedures to exclude members of particular minorities from recognition as nationals.<sup>76</sup> As a consequence, statelessness is not a status that can be determined only by examining the substantive law on nationality (though of course this is the starting point) but may take months or years to establish, as available avenues and appeals in relation to the legal establishment of the facts of place of birth and parentage that would result in recognition or grant of nationality are exhausted. The interpretation in the *Handbook* draws a welcome line under the use of qualifying adjectives in relation to statelessness for the purposes of UNHCR, and therefore for interpretation of the 1954 and 1961 Conventions more generally.

This broader interpretation has begun to gain traction in national courts. In Hungary, for example, the Supreme Court has affirmed in the context of determination of statelessness in immigration cases that 'statelessness that is

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<sup>72</sup> *ibid* [16].

<sup>73</sup> UNHCR may use 'de facto stateless' to refer to refugees (unless they are also simply 'stateless' under the definition of stateless person in the 1954 *Convention*, as interpreted by the *Handbook on Protection of Stateless Persons*), especially if there is no recognised refugee status in the state where they are resident, because they are outside their country of nationality and cannot avail themselves of protection of that state. The *Handbook* uses the term 'de facto' stateless persons in Part 3 in relation to migrants who cannot return to a country of nationality, for example, because of a (temporary) lack of consular assistance: *ibid* [166]–[167].

<sup>74</sup> The status of policy documents or internal departmental directives as 'law' will not always be clear, but in general, the concept of 'legitimate expectations' has evolved in many jurisdictions to establish (among other things) the obligation of public servants to follow established policy. In the context of the United Kingdom ('UK'), see *R (on the application of A (Appellant) v Secretary of State for the Home Department (Respondent)* [2021] UKSC 37, in which the Supreme Court of the United Kingdom also cites European Court of Human Rights jurisprudence, including *Sunday Times v United Kingdom* (1979-1980) 2 EHRR 245 at [51], and other cases.

<sup>75</sup> Manby, 'Legal Identity for All' (n 37).

<sup>76</sup> Neha Jain, 'Manufacturing Statelessness' (2022) 116(3) *American Journal of International Law* 237.

rooted in practice also corresponds to the definition of statelessness'.<sup>77</sup> The Italian courts have also followed the line that statelessness is in part a factual question.<sup>78</sup> The United Kingdom Court of Appeal, in a decision generally regarded with disfavour by advocates for departing from the UNHCR *Handbook on Protection of Stateless Persons* in relation to the standard of proof for statelessness in immigration proceedings, nonetheless confirmed — in line with the *Handbook* — that proof of statelessness depends in part on factual evidence, including denial of nationality by the relevant consular authorities.<sup>79</sup>

## VI A CONTINUED LACK OF SETTLED VOCABULARY

The *Guidelines on Statelessness No 1* thus broadened the concept of 'stateless person' in international law to include those whom the state has refused to recognise as its nationals, even if they appear to be entitled to its nationality were the facts upon which the claim is based to be established. Nonetheless, the *Guidelines* do not completely resolve the question of the vocabulary used to describe those whose nationality is currently unknown and who may be stateless, or nationals of the country of residence or of another country, but none of the relevant states has put in place a procedure to determine what the person's status may be. To cover this group, UNHCR has moved rather towards the term 'undetermined nationality', drawing on the terminology used in the 2006 ExCom resolution that revived the agency's mandate in relation to statelessness.<sup>80</sup> In some documents, 'undetermined nationality' is used interchangeably with 'unknown nationality'.<sup>81</sup> The phrase 'undetermined nationality' has the great merit of appearing to be a factual assessment, rather than requiring both legal interpretation and factual investigation. It also carries the implication that most people in this category in fact have a nationality, even if it is yet to be established, rather than presuming that they are stateless.

UNHCR has, however, complicated this apparently clear term by proposing a 'working definition' of 'undetermined nationality' that encompasses not simply those whose nationality is unknown, in that they have not been issued documents recognising a nationality, but only a subgroup of that category, who also: 'either A) have links to more than one State (on the basis of birth, descent, marriage or habitual residence); or B) are perceived and treated by authorities in the State of residence as possessing such links to other States.'<sup>82</sup>

This working definition is evidently intended as a guide to focus the agency's attention on the subset of all the people in the world who lack identity documents

<sup>77</sup> Supreme Court of Hungary (the Curia), Kfv.II.37.715/2021/6, 25 May 2022, [37]. The translation of this quote was obtained from 'ENS Statelessness Index Survey 2022: Hungary', *European Network on Statelessness* (Web Page, March 2023) available at <<https://index.statelessness.eu/country/hungary>>, archived at <[perma.cc/GBQ2-7BUF](https://perma.cc/GBQ2-7BUF)>.

<sup>78</sup> Simone Marinai, 'Stateless Status and Expulsion from Italian Territory: Some Remarks on the Recent Case Law of the Corte Di Cassazione' (2022) 2(1) *Italian Review of International and Comparative Law* 154.

<sup>79</sup> *AS (Guinea) v Secretary of State for the Home Department* [2018] EWCA Civ 2234, [46]; Judith Carter, 'Case Note: *AS (Guinea) v Secretary of State for the Home Department* [2018] EWCA Civ 2234' (2019) 1(2) *Statelessness & Citizenship Review* 336.

<sup>80</sup> UNHCR Executive Committee (n 27).

<sup>81</sup> Lily Chen, Petra Nahamias and Sebastian Steinmueller, 'UNHCR Statistical Reporting on Statelessness' (UNHCR Statistics Technical Series 2019/1, October 2019) <<https://www.unhcr.org/statistics/unhcrstats/5d9e182e7/unhcr-statistical-reporting-statelessness.html>>, archived at <[perma.cc/HJA8-F37S](https://perma.cc/HJA8-F37S)>.

<sup>82</sup> UNHCR, *Quick Guides: Researching Statelessness* (Quick Guide, March 2021) 53.

who are most likely to be stateless. It was possibly also developed out of concern that the category 'undetermined nationality' should not be too broad, risking resistance from states. The 'working definition' is very close to an idea of 'at risk of statelessness' that is also often used — including by UNHCR — to refer to 'those who could be vulnerable to statelessness'.<sup>83</sup> UNHCR does not recommend use of the term 'at risk of statelessness' for quantitative research on statelessness because of the lack of a clear definition, the danger that the term may be 'applied in a manner that is overly inclusive' and a consequent lack of comparability of data.<sup>84</sup> However, the same criticisms could be made of the term 'undetermined nationality', although the working definition is stated to be designed for the purposes of collecting statistical data. It is not clear from the wording itself if 'undetermined nationality' is intended to be broader than the concept of 'at risk of statelessness' or narrower.<sup>85</sup> Moreover, the criteria proposed — 'perceived and treated by the authorities as possessing ... links to other states' — are very subjective. Although the definition of 'stateless person' is now on firmer ground, confusion still lingers over the terminology for the broader category of people whose nationality status is in doubt.

## VII THE IMPORTANCE OF FRAMING

These apparently theological debates over the definition and scope of statelessness are of far broader importance than the fine distinctions may suggest. The term used for people who are not recognised as nationals of any country matters enormously for advocacy on their behalf. Is the problem one of statelessness or of unrecognised nationality? Are the people concerned foreigners or nationals? Is the solution administrative or legal or political? Is their nationality alive or dead?

The literature on framing is helpful as we consider these terms: '[T]o frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described.'<sup>86</sup> The terminology we use tells us what the problem is that needs to be solved; in particular, is the problem a lack of recognition of nationality or the need for protection of stateless persons?

States are already cognisant of these questions in choosing the names for populations they do not wish to recognise as nationals but deny are therefore stateless. The terminology deployed ranges widely, from the 'Latvian non-citizens' with historical connections to Russia and other former Soviet states, who are recognised as non-voting permanent residents,<sup>87</sup> to the 'illegal residents' of Kuwait and the United Arab Emirates, for many of whom Comorian passports

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<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> In practice, however, UNHCR uses 'undetermined nationality' to be a narrower concept than 'at risk of statelessness'.

<sup>86</sup> Robert M Entman, 'Framing: Toward Clarification of a Fractured Paradigm' (1993) 43(4) *Journal of Communication* 51.

<sup>87</sup> Dimitry Kochenov and Aleksejs Dimitrovs, 'EU Citizenship for Latvian "Non-Citizens": A Concrete Proposal' (2016) 38(1) *Houston Journal of International Law* 55.

were bought with the promise — not fulfilled — that on this basis their status could finally be resolved.<sup>88</sup>

The issues at stake for affected populations can be illustrated by two contexts in which framing is important: litigation on behalf of affected individuals or populations and the collection of statistics about the number of stateless persons. In the case of litigation, we see lawyers for complainants affected by lack of recognition of citizenship making strategic choices about framing and deploying a range of arguments according to context. In the case of collection of statistics, we see governments seeking to maintain control over the terms used to describe and record those who are not recognised as citizens, and thus the numbers officially counted, while advocates and scholars are somewhat divided on the best terminology to use and on the objectives of such efforts.

#### A Litigation and Other Advocacy: Naming the Problem

The choice of framing in the context of litigation and other advocacy on behalf of people without a recognised nationality depends not only on the legal arguments that are available at the national and international level, but also on the political context of that country and the solution desired by the client.<sup>89</sup>

The advantage of framing a situation of contested nationality as statelessness is — in some contexts — the more elaborated normative framework in international law.<sup>90</sup> If an individual or group of people are not recognised as nationals of any state, naming their situation as ‘statelessness’ engages a set of legal obligations and potentially more political urgency, both for their protection as stateless persons and for the grant or recognition of a nationality. This may be the case whether those affected are what is sometimes referred to as ‘in situ’ stateless persons, living in their ‘own country’,<sup>91</sup> or whether they are ‘in a migratory context’, currently resident in a country to which they do not have strong ties over a long period.<sup>92</sup>

The establishment or framing of statelessness is useful for litigation in three main contexts: firstly, and most importantly (as this affects the most people), the grant of nationality to a person born on the territory who would ‘otherwise be

<sup>88</sup> Claire Beaugrand, ‘Statelessness & Administrative Violence: *Bidūns*’ Survival Strategies in Kuwait’ (2011) 101(1) *The Muslim World* 228; Yoana Kuzmova, ‘Statelessness Elimination through Legal Fiction: The United Arab Emirates’ Comorian Minority’ in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance, and the Problem of Citizenship* (Manchester University Press 2021) 276.

<sup>89</sup> These issues will be discussed at greater length in Bronwen Manby, *Litigating Citizenship, Identity Documents and Statelessness: A Guide for Practitioners* (UNHCR and Open Society Justice Initiative, forthcoming, provisional title).

<sup>90</sup> Michelle Foster and Hélène Lambert, ‘Statelessness as a Human Rights Issue: A Concept Whose Time Has Come’ (2016) 28(4) *International Journal of Refugee Law* 564.

<sup>91</sup> The term ‘own country’ is used in art 12 of the *International Covenant on Civil and Political Rights* (n 24) and interpreted by the Human Rights Committee in a General Comment to have a wider meaning than country of nationality, so that it ‘embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien’: Human Rights Committee, ‘General Comment No 27: Freedom of Movement (Article 12)’ in *General Comments Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/21/Rev1/Add.9 (1 November 1999) [20] (‘*General Comment No 27: Freedom of Movement (Article 12)*’).

<sup>92</sup> Caia Vlieks, ‘Contexts of Statelessness: The Concepts “Statelessness *in Situ*” and “Statelessness in the Migratory Context”’ in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 35.



stateless'; secondly, for the resolution of the status of irregular migrants or failed asylum seekers who cannot be deported; and, finally, the avoidance of statelessness in case of deprivation of nationality, whether on grounds of fraud or national security.

International law — dating back to *The Hague Convention of 1930*, reinforced by the *1961 Convention* — requires that a child who does not acquire any other nationality at birth should acquire the nationality of the state of birth.<sup>93</sup> The African Committee of Experts on the Rights and Welfare of the Child, the Inter-American Court on Human Rights and the UN Human Rights Committee have all emphasised the primary responsibility of the state of birth to end the statelessness of a child born in the territory who cannot acquire another nationality.<sup>94</sup> The core principles on the obligation of states to avoid statelessness among children are increasingly asserted to have entered international customary law, amongst other things, on the basis of their acceptance even by many (though certainly not all) states that are not parties to the relevant treaties.<sup>95</sup>

The formal determination that a person is stateless may also be the first step towards protection of an irregular migrant not born in the country whose nationality is not accepted by a country of alleged origin and who lives in immigration limbo, at constant risk of arrest and detention. The same applies in the case of an asylum seeker whose claim for refugee status has been rejected. In this migratory context, recognition and registration as a stateless person in need of protection under the *1954 Convention* is likely to be a necessary step on a pathway towards legal residence and acquisition of a nationality.<sup>96</sup> The assertion that a person would become stateless if deprived of nationality is also likely to be the strongest argument to prevent or reverse deprivation of nationality — especially in national security cases.<sup>97</sup>

In other contexts, however, it may be counterproductive to refer to a person or group denied recognition of nationality as 'stateless'. If a state has arbitrarily deprived or denied recognition of the nationality of an individual or group, describing those affected as stateless may risk 'encouraging the notion that by treating a person badly enough a State can rid itself of responsibility for that

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<sup>93</sup> *The Hague Convention of 1930* (n 10) arts 14–5; *1961 Convention* (n 20) art 1.

<sup>94</sup> *Yean and Bosico v Dominican Republic* (Judgment) (Inter-American Court of Human Rights, Series C No 130, 8 September 2005); *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v Kenya* (2011) AHRLR 181; Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 2918/2016*, UN Doc CCPR/C/130/D/2918 (20 January 2021) ('*DZ v Netherlands*').

<sup>95</sup> Johannes MM Chan, 'The Right to a Nationality as a Human Right: The Current Trend Towards Recognition' (1991) 12 *Human Rights Law Journal* 1; William Thomas Worster, 'Customary International Law Requiring States to Grant Nationality to Stateless Children Born in Their Territory' (2022) 4(1) *Statelessness & Citizenship Review* 113.

<sup>96</sup> *Handbook on Protection of Stateless Persons* (n 71) pt 3. On the relationship of statelessness to refugee status, see generally Hélène Lambert, 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64(1) *International and Comparative Law Quarterly* 1; Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016); Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press 2019).

<sup>97</sup> Macklin, 'Sticky Citizenship' (n 35); Sandra Mantu, 'Citizenship Deprivation in the United Kingdom: Statelessness and Terrorism' (2014) 19(1–2) *Tilburg Law Review* 163; Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights' (2016) 18 *European Journal of Migration and Law* 222.

person'.<sup>98</sup> The denial of nationality is thus a cover for discrimination that would otherwise be impermissible in international law.<sup>99</sup> For this reason, many Rohingya have rejected the label 'stateless', insisting that they are Myanmar nationals and should be recognised as such.<sup>100</sup>

Where this is the case, litigation (where it is possible) and other advocacy may more successfully focus on questions of discrimination, administrative failures in relation to birth registration or due process, rather than of statelessness. Discrimination based on sex in transmission of nationality is by now almost universally condemned — even by the League of Arab States (at least in relation to transmission to children), the inter-governmental body in the region where such discrimination is most common.<sup>101</sup> Discrimination in relation to race, religion or ethnicity has been more difficult to contest, given the nature of descent-based laws and some weaknesses in the international legal regime.<sup>102</sup> There has nonetheless been success in shifting the interpretation of state obligations. The vast majority of national constitutions establish a norm of non-discrimination (even if it is qualified in relation to nationality), which also provides a basis for argument at a national level.<sup>103</sup> A non-discrimination angle may be especially important in challenging indirect discrimination leading to statelessness based on administrative exclusion.<sup>104</sup>

In a very large number of cases, one starting point to resolve a person's lack of documents and recognition of citizenship will be to remedy the lack of timely birth

<sup>98</sup> Alison Harvey, 'The "De Facto" Statelessness Debate' (2010) 24(3) *Immigration, Asylum and Nationality Law* 257.

<sup>99</sup> Joanne Mariner, 'Racism, Citizenship and National Identity' (2003) 46(3) *Development* 64; James A Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens' (2006) 20 *Ethics & International Affairs* 321.

<sup>100</sup> Brinham, 'We Are Not Stateless!' (n 42) 342; Nyi Nyi Kyaw, 'Unpacking the Presumed Statelessness of Rohingyas' (2017) 15(3) *Journal of Immigrant & Refugee Studies* 269; Rebecca L Root, 'Why Aid Groups, and Rohingya Themselves, Should Stop Using the Term "Stateless"' *The New Humanitarian* (online, 10 November 2022) <<https://www.thenewhumanitarian.org/interview/2022/11/10/Rohingya-Coxs-Bazar-Myanmar-citizenship-stateless>>, archived at <[perma.cc/RXR7-56KE](https://perma.cc/RXR7-56KE)>.

<sup>101</sup> Lisa C Stratton, 'The Right to Have Rights: Gender Discrimination in Nationality Laws' (1992) 77(4) *Minnesota Law Review* 195; Karen Knop and Christine Chinkin, 'Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law' (2001) 22 *Michigan Journal of International Law* 523; UNHCR and Global Campaign for Equal Nationality Rights, 'Equal Citizens, Thriving Families, Stronger Societies: Realizing Gender-Equal Nationality Rights in the Middle East-North Africa Region' (United Nations 2018); UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness 2023' (UNHCR 2023) <<https://www.refworld.org/docid/640751284.html>>, archived at <[perma.cc/4SNM-AKVH](https://perma.cc/4SNM-AKVH)>. See also UN Committee on the Elimination of Discrimination Against Women ('CEDAW'), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations* [6] (1994); UN Human Rights Committee's *General Comment No 19: The Family (Art 23)* [7] (1990); *General Comment No 28: Article 3 (The Equality of Rights between Men and Women)* [25] (2000); *CERD General Recommendation No 21: Equality in Marriage and Family Relations* (1994); League of Arab States, *The First Arab Conference on Good Practices & Regional Opportunities to Strengthen Women's Nationality Rights* (Final Declaration, 1–2 October 2017); League of Arab States, *Arab Declaration on Belonging and Legal Identity* (Declaration, 28 February 2018).

<sup>102</sup> Michelle Foster and Timnah Rachel Baker, 'Racial Discrimination in Nationality Laws' (2021) 11(1) *Columbia Journal of Race and Law* 83.

<sup>103</sup> See Zachary Elkins and Tom Ginsburg, 'Characteristics of National Constitutions, Version 4.0' (Dataset, Comparative Constitutions Project, 24 October 2022) <<https://comparativeconstitutionsproject.org>>, archived at <[perma.cc/6WFC-VMXG](https://perma.cc/6WFC-VMXG)>.

<sup>104</sup> Peter J Spiro, 'A New International Law of Citizenship' (2011) 105(4) *American Journal of International Law* 694; Amal de Chickera and Joanna Whiteman, 'Addressing Statelessness through the Rights to Equality and Non-Discrimination' in Laura van Waas and Melanie Khanna (eds), *Solving Statelessness* (Wolf Legal Publishers 2017) 99.

registration. The advantage of this framing is that the remedy sought can be argued to be administrative and does not challenge the top-level legal framework for nationality. It may therefore also be less politically controversial and so, easier to achieve. Leading cases before the Inter-American Court of Human Rights, the European Court of Human Rights and the different African human rights treaty bodies and courts — as well as numerous documents from the UN — have all endorsed birth registration as foundational to recognition of juridical personality, legal identity and recognition as a person before the law (the terminology varies by jurisdiction), as well as the foundation of the right to family life.<sup>105</sup> The disadvantage of this approach, however, is that a focus (solely) on birth registration may reinforce the impression that the victims of state discrimination are themselves responsible for their lack of documents and for failing to ensure that the births of their children are registered.<sup>106</sup>

In the most egregious cases of nonrecognition of nationality, where people who were previously recognised as nationals have simply had that recognition withdrawn, the appropriate framing of litigation and other advocacy is most likely to be about arbitrary deprivation of nationality and the lack of respect for norms of due process and a fair hearing.<sup>107</sup> The prohibition on arbitrary withdrawal applies whether or not a person would become stateless, even though the prohibition is stronger if statelessness would be the result. Arbitrary deprivation of nationality may also be a form of persecution justifying the grant of refugee status.<sup>108</sup> Arguments based on due process are often the strongest where questions of nationality and statelessness are most politicised. In the case of the Dominican Republic, for example, it was the arbitrary deprivation of nationality, rather than the likely statelessness of those affected, that eventually provoked a partial climb-down on the retroactive revocation of nationality of tens of thousands of people of Haitian descent born on the territory.<sup>109</sup>

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<sup>105</sup> Patti Tamara Lenard, 'The Right to Family: Protecting Stateless Children' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017); Laura Bingham and Liliana Gamboa, 'Litigating against Statelessness' in Laura van Waas and Melanie Khanna (eds), *Solving Statelessness* (Wolf Legal Publishers 2017) 129.

<sup>106</sup> See, eg, European Network on Statelessness, European Roma Rights Centre, and Institute on Statelessness and Inclusion, 'Roma Belong: Statelessness, Discrimination and Marginalisation of Roma in the Western Balkans and Ukraine' (2018) 48–50 <<https://www.statelessness.eu/updates/publication/roma-belong-statelessness-discrimination-and-marginalisation-roma-western>>, archived at <[perma.cc/SXG8-JPAL](https://perma.cc/SXG8-JPAL)>.

<sup>107</sup> UNHCR, *Guidelines on Statelessness No 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, UN Doc HCR/GS/20/05 (May 2020) [97]–[108]; Institute on Statelessness and Inclusion, 'Principles on Deprivation of Nationality as a National Security Measure' (Principles, 2020).

<sup>108</sup> Hélène Lambert, 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64(1) *International and Comparative Law Quarterly* 1.

<sup>109</sup> Liliana Gamboa and Laura Bingham, 'Internal Exile: The Plight of Dominicans of Haitian Descent', *World Politics Review* (online, 13 January 2015) <<https://www.worldpoliticsreview.com/articles/14847/internal-exile-the-plight-of-dominicans-of-haitian-descent>>, archived at <[perma.cc/7R9X-4EER](https://perma.cc/7R9X-4EER)>; Patricia Palacios Zuloaga, 'Judging Inter-American Human Rights: The Riddle of Compliance with the Inter-American Court of Human Rights' (2020) 42(2) *Human Rights Quarterly* 392; Bridget Wooding, 'Supra-National Jurisprudence: Necessary but Insufficient to Contest Statelessness in the Dominican Republic' in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance, and the Problem of Citizenship* (Manchester University Press 2021) 292.

B *Who is Stateless for Statistics*

States frequently assert that they cannot act on statelessness unless they know how many stateless people there are in their territory. Data collection can therefore be an important step towards finding solutions. However, just as in the context of litigation or other advocacy on behalf of individuals and communities whose nationality is contested, the choice of label for those being counted may have important implications.

In any country, the political consequences of a survey that reveals large numbers of hitherto unenumerated stateless persons are likely to be unpredictable. On the one hand, such a result could highlight the fact that there is a significant problem that needs to be solved, generating greater political will to address it. On the other, reports of a significant stateless population could generate political hostility — especially from those segments of the population likely to lose out in electoral contests if the formerly unrecognised became documented as citizens, or where those affected are members of a despised minority.<sup>110</sup> Censuses have sometimes been the turning point for the designation of certain groups as non-nationals, and thus the establishment of long-term stateless populations.<sup>111</sup> The definition of ‘stateless person’ for the purpose of collecting statistics on statelessness is thus both a methodological and a political minefield.<sup>112</sup> The difference from litigation and advocacy, however, is that the most comprehensive collection of statistics on statelessness is likely to be conducted by the state itself (in some contexts supported by development agencies), even as surveys by other actors may complement this data.

The first time UNHCR reported country statistical data on statelessness was in its 2004 report on global refugee trends, when it indicated that for the 30 countries where data had been collected, the total number of stateless persons was estimated to be 1.5 million (excluding Palestinians).<sup>113</sup> Efforts to strengthen data collection were stepped up after the adoption of the 2006 ExCom Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, which mandated UNHCR to ‘work with interested Governments to engage in or to renew efforts to identify stateless populations and populations with undetermined nationality residing in their territory’.<sup>114</sup> By 2011, the agency referred to there being ‘up to 12 million’ stateless people in the world,

<sup>110</sup> Compare the discussion of ethnic enumeration in Samantha Balaton-Chrimes and Laurence Cooley, ‘To Count or Not to Count? Insights from Kenya for Global Debates about Enumerating Ethnicity in National Censuses’ (2022) 22(3) *Ethnicities* 404.

<sup>111</sup> Rania Maktabi, ‘The Lebanese Census of 1932 Revisited. Who Are the Lebanese?’ (1999) 26(2) *British Journal of Middle Eastern Studies* 219.

<sup>112</sup> Heather Alexander, ‘The Ethics of Quantifying Statelessness’ in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance, and the Problem of Citizenship* (Manchester University Press 2021) 238; Brad Blitz, ‘Protection through Revisionism? UNHCR, Statistical Reporting, and the Representation of Stateless People’ in Molly Katrina Land, Kathryn Rae Libal and Jillian Robin Chambers (eds), *Beyond Borders: The Human Rights of Non-Citizens at Home and Abroad* (Cambridge University Press 2021) 71 (‘Protection through Revisionism?’). More generally on the risk that numerical knowledge leads to ‘oversimplification, homogenization, and the neglect of the surrounding social structure’: see Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press 2016) 1.

<sup>113</sup> UNHCR, *2004 Global Refugee Trends* (Report, 17 June 2005) [46] <<https://www.unhcr.org/statistics/unhcrstats/42b283744/2004-global-refugee-trends-overview-refugee-populations-new-arrivals-durable.html>>, archived at <[perma.cc/466T-WN84](https://perma.cc/466T-WN84)>.

<sup>114</sup> UNHCR Executive Committee (n 27).

the core of which was made up of 3.5 million people reported in 64 countries.<sup>115</sup> When the #IBelong Campaign was launched three years later, the figure used was 'at least 10 million'.<sup>116</sup> Action 10 of the *Global Action Plan to End Statelessness* accompanying the #IBelong Campaign was indeed to 'improve quantitative and qualitative data on stateless populations'.<sup>117</sup> In recognition of the poor quality of existing statistics, the total figure was replaced from 2019 with the more general reference to 'millions' of people globally, retaining a 'core' figure of 4.2 million from data reported for 76 countries, together with an acknowledgment that this represents a significant undercount.<sup>118</sup>

For the first time, the 2019 report included some stateless refugees (mainly the Rohingya of Myanmar). Since then, the figure recorded for countries where data is reported has increased somewhat, to 4.4 million by 2022.<sup>119</sup> The numbers for some countries, however, have been revised down or deleted. The figure of 210,000 stateless persons reported for the Dominican Republic in 2014, for example, was reduced to 133,770 in 2015, and from 2016 replaced with an asterisk and a note that UNHCR was 'working with the authorities and other actors to determine the size of the population that found an effective nationality solution'.<sup>120</sup> Moreover, the figure of 4.4 million is itself based on very inconsistent methodologies and many other countries are recorded with an asterisk in the tables, meaning that they are known to have a population of stateless persons, but the size is unknown. At the same time, others that might be thought to deserve an asterisk do not have one, for example, Sudan or India.<sup>121</sup>

These statistics are widely recognised — including by UNHCR itself<sup>122</sup> — to be extremely approximate, verging on guesswork. The agency has made significant efforts to address the problems in quantitative data and make its methodology more systematic, starting from a 2011 report on measuring stateless populations.<sup>123</sup> UNHCR's 2013 statistical yearbook included a chapter on the

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<sup>115</sup> UNHCR, *A Year of Crises: Global Trends 2011* (Report, 18 June 2012) <<https://www.unhcr.org/statistics/country/4fd6f87f9/unhcr-global-trends-2011.html>>, archived at <perma.cc/DP2Y-XAJ4>.

<sup>116</sup> *Global Action Plan to End Statelessness* (n 29) 4.

<sup>117</sup> *ibid* 5.

<sup>118</sup> UNHCR, *Global Trends: Forced Displacement in 2019* (Report, 18 June 2020) <<https://www.unhcr.org/media/unhcr-global-trends-2019>>, archived at <perma.cc/ME5F-U5QY>.

<sup>119</sup> UNHCR, *Global Trends: Forced Displacement in 2022* (Report, 14 June 2023) <<https://www.unhcr.org/global-trends-report-2022>>, archived at <perma.cc/6FMZ-S34N>.

<sup>120</sup> This phrase has been used in tables annexed to UNHCR's annual Global Trends reports, which can be accessed at 'Data and Statistics: Global Trends', *UNHCR* (Web Page, 2024) <<https://www.unhcr.org/global-trends>>, archived at <perma.cc/2CL2-WENA>. See also UNHCR, *Global Trends: Forced Displacement in 2014* (Report, 18 June 2015) 45 <<https://www.unhcr.org/media/unhcr-global-trends-2014>>, archived at <perma.cc/D2TH-JYRT>; UNHCR, *Global Trends: Forced Displacement in 2015* (Report, 20 June 2016) 57 <<https://www.unhcr.org/media/unhcr-global-trends-2015>>, archived at <perma.cc/HKD6-NTEF>; UNHCR, *Global Trends: Forced Displacement in 2016* (Report, 19 June 2017) 65 <<https://www.unhcr.org/media/global-trends-forced-displacement-2016>>, archived at <perma.cc/A46K-QYE8>.

<sup>121</sup> UNHCR, *Global Trends: Forced Displacement in 2020* (Report, 18 June 2021) <<https://www.unhcr.org/60b638e37/unhcr-global-trends-2020>>, archived at <perma.cc/68D8-CLLW>.

<sup>122</sup> Chen, Nahamias and Steinmueller (n 81).

<sup>123</sup> UNHCR, *Guidance Document on Measuring Stateless Populations* (Report, May 2011) <<https://www.refworld.org/docid/4f6887672.html>>, archived at <perma.cc/W7F4-FU82>.

challenges of reporting numbers for stateless populations.<sup>124</sup> A 2019 discussion document regarding UNHCR statistical reporting on statelessness noted, in relation to measurement of stateless populations, that: ‘[M]ethodological changes across countries have been haphazard and heterogeneous’, meaning that ‘[e]ven where there is information, records can be inaccurate, contradictory, and disorganized’.<sup>125</sup> The document also noted ‘conceptual ambiguities’ such that, from countries reporting statelessness, ‘[e]numerated populations in 2018 include 21 stateless, 18 de facto stateless, 17 undetermined, and 22 combinations thereof’.<sup>126</sup> In 2021, UNHCR continued the discussion of methods and concepts for qualitative and quantitative research in a set of ‘quick guides’ on researching statelessness.<sup>127</sup> A UN Interagency Group on Statelessness Estimates was also established to improve the reliability of estimates of numbers of stateless persons using statistical and demographic techniques.<sup>128</sup>

The most important process for the improvement of statistics on statelessness has not been managed by UNHCR but by the UN Statistical Commission, a body made up of chief statisticians from UN Member States.<sup>129</sup> In 2016, the Commission established an Expert Group on Refugee and Internally Displaced Persons Statistics (‘EGRIS’), made up mainly of representatives of national statistical offices (but also including UN agencies, among them UNHCR). EGRIS was tasked with developing guidelines for national statistical offices on the collection of statistics about forcibly displaced persons, with the aim of informing national policy responses as well as increasing the reliability and international comparability of statistics.<sup>130</sup> This process led to the adoption of ‘International Recommendations on Refugee Statistics’ (‘IRRS’) in 2018,<sup>131</sup> and on ‘Internally Displaced Persons Statistics’ (‘IRIS’) in 2020.<sup>132</sup> The group added the development of ‘International Recommendations on Statelessness Statistics’ (‘IROSS’) to its remit in 2020, and in November 2021, the title of the Expert Group became ‘EGRISS’, adding statelessness to the list of topics on which it was deemed expert.<sup>133</sup>

<sup>124</sup> UNHCR, *Statistical Yearbook 2013* (UNHCR 2014) 39–47 <<https://www.unhcr.org/statistics/country/54cf9bd69/unhcr-statistical-yearbook-2013-13th-edition.html>>, archived at <[perma.cc/DF8Y-3UQ8](https://perma.cc/DF8Y-3UQ8)>.

<sup>125</sup> Chen, Nahamias and Steinmueller (n 81) 10–11.

<sup>126</sup> *ibid* 11.

<sup>127</sup> UNHCR, *Quick Guides: Researching Statelessness* (n 82).

<sup>128</sup> Mary Strode and Melanie Khanna, ‘Improving Official Statistics on Stateless People: Challenges, Solutions, and the Road Ahead’ (2021) 37(4) *Statistical Journal of the IAOS* 1087. The results of this process have not been reported publicly.

<sup>129</sup> ‘United Nations Statistical Commission’, *United Nations* (Web Page, 2024) <<https://unstats.un.org/UNSDWebsite/statcom>>, archived at <[perma.cc/43GR-T6M9](https://perma.cc/43GR-T6M9)>.

<sup>130</sup> ‘Refugee Statistics’ (Res 47/111) in Statistical Commission, *Report to the Economic and Social Council on the 47th Session (8–11 March 2016)*, UN Doc E/2016/24-E/CN.3/2016/34 (23 March 2016) [c], [f].

<sup>131</sup> Expert Group on Refugee and IDP Statistics (‘EGRIS’), *International Recommendations on Refugee Statistics* (Report, March 2018) <<https://egrisstats.org/recommendations/international-recommendations-on-refugee-statistics-irrs>>, archived at <[perma.cc/T32H-QGXN](https://perma.cc/T32H-QGXN)>.

<sup>132</sup> EGRIS, *International Recommendations on Internally Displaced Persons Statistics* (Report, March 2020) <<https://egrisstats.org/recommendations/international-recommendations-on-idp-statistics-iris>>, archived at <[perma.cc/RG6L-RSQT](https://perma.cc/RG6L-RSQT)>.

<sup>133</sup> Expert Group on Refugee, Internally Displaced Persons and Statelessness Statistics (‘EGRISS’), *International Recommendations on Statelessness Statistics* (Report, 20 January 2023) <<https://egrisstats.org/recommendations/international-recommendations-on-statelessness-statistics-iross>>, archived at <[perma.cc/A45V-UCEW](https://perma.cc/A45V-UCEW)> (‘IROSS’).

A paper on ‘challenges and opportunities’ on statelessness statistics was presented at a side event of the UN Statistical Commission meeting in February 2021, proposing that the recommendations encompass stateless people, people with undetermined nationality and stateless-related people (a concept borrowed from the category of ‘refugee-related people’ established in the IRRS).<sup>134</sup> A progress report on IROSS was presented to the meeting of the UN Statistical Commission in March 2022,<sup>135</sup> with a background paper on country examples of data collection on statelessness statistics.<sup>136</sup> A follow up meeting was convened by EGRISS in June 2022 to address feedback received from the Commission.<sup>137</sup> Following this meeting, substantial additional work was carried out in consultation with EGRISS members and the first full draft version of the IROSS was published for public comment in October 2022.<sup>138</sup> The final draft of the IROSS was submitted for consideration at the March 2023 meeting of the UN Statistical Commission and endorsed for use by national statistical offices.<sup>139</sup> The 125 page document sets out a comprehensive outline of international law in relation to statelessness (including developments in the interpretation of the definition of stateless person), establishes a statistical framework and categories to use in collection of statistics, recommends possible data sources and concludes with points on the importance of statistical coordination.<sup>140</sup>

During the IROSS drafting process, EGRISS developed a new term, ‘without a recognised nationality status’, rather than using the definition of ‘undetermined nationality’ developed by UNHCR. The final version proposes the collection of statistics under the aggregate category ‘stateless persons and those without a recognised nationality status’ (category A). This top level heading is then divided

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<sup>134</sup> EGRISS, *International Recommendations on Statelessness Statistics (IROSS): IROSS Challenges, Opportunities and Progress Paper* (Paper, 16 February 2021). This paper was circulated in advance of the meeting.

<sup>135</sup> EGRISS, *Report of the Expert Group on Refugee, Internally Displaced Persons and Statelessness Statistics on Statelessness Statistics*, UN Doc E/CN.3/2022/10 (8 December 2021).

<sup>136</sup> EGRISS, *Country Examples of Data Collection on Statelessness Statistics* (Background Paper, January 2022) <<https://egrisstats.org/resource/country-examples-of-data-collection-on-statelessness-statistics>>, archived at <[perma.cc/9A9Q-HWH2](https://perma.cc/9A9Q-HWH2)>. The most comprehensive efforts at data collection on access to nationality documentation and statelessness have been carried out in Thailand, Nepal and Côte d’Ivoire: see Sabin Shrestha and Bishnu Das Singh Dangol, ‘Acquisition of Citizenship Certificate in Nepal: Estimating Prevalence’ (Report, Forum For Women, Law and Development, April 2013) <<https://fwld.org/publications/acquisition-citizenship-certificate-nepal-estimating-prevalence>>, archived at <[perma.cc/95TC-MDWM](https://perma.cc/95TC-MDWM)>; Sabin Shrestha, Sabin Mulmi and Bishnu Das Singh Dangol, ‘Acquisition of Citizenship Certificate in Nepal: Estimation and Projection’ (Report, Forum For Women, Law and Development, December 2015) <<https://fwld.org/publications/acquisition-citizenship-certificate-nepal-estimation-projection>>, archived at <[perma.cc/YWL4-WNXY](https://perma.cc/YWL4-WNXY)>; Institut National de la Statistique and UNHCR, ‘Cartographie des Personnes à Risque d’Apatridie en Côte d’Ivoire’ (April 2019); Amanda Flaim et al, ‘The UNESCO Highland Peoples Surveys: Tracing Inequalities in Health Care Access and Provision in Northern Thailand’ (2021) 3(2) *Journal of Health Science and Alternative Medicine* 3042. Neither the Nepal nor Thailand examples were considered by EGRISS.

<sup>137</sup> EGRISS, *EGRISS Subgroup Meeting to Finalize the International Recommendations on Statelessness Statistics (IROSS)* (Meeting Report, July 2022) <<https://egrisstats.org/resource/iross-meeting-report>>, archived at <[perma.cc/S5BQ-SVLP](https://perma.cc/S5BQ-SVLP)>.

<sup>138</sup> EGRISS, *International Recommendations on Statelessness Statistics (IROSS): Draft 6.0 for Review through Global Consultation* (Report, 24 October 2022).

<sup>139</sup> EGRISS, *Report of the Expert Group on Refugee, Internally Displaced Persons and Statelessness Statistics on Statelessness Statistics: Note by the Secretary-General*, UN Doc E/CN.3/2022/10 (8 December 2021); EGRISS, *Refugee Internally-Displaced Persons and Statelessness Statistics*, ESC Res 54/121, UN Doc E/2023/24-E/CN.3/2023/37 (2023).

<sup>140</sup> IROSS (n 133).

into two subcategories: ‘persons with a recognised statelessness status’ (category B), including both those who have been through an individual statelessness determination process and groups recognised as stateless by the competent authorities, and ‘persons without a recognised nationality status — including stateless persons *without* a recognised stateless status’ (category C). The final version deleted the category ‘stateless-related person’ because of ‘statistical challenges’ in deploying the term due to a lack of mutual exclusivity among the different populations.

Persons without a recognised nationality status are defined to include ‘individuals who lack proof or recognition of any citizenship/nationality status but who may possess an entitlement to nationality, and if so, could be assisted to obtain proof of nationality by the relevant authorities’.<sup>141</sup> This group is further divided into those ‘with one or more link(s) to another country/ies, that are real or perceived by authorities’ and those without such links. Links to another country are stated to include birth in another country, habitual residence abroad or links through descent, marriage or adoption and, collectively, ‘certain minority groups, border-dwelling and/or nomadic communities, historical migrants and their descendants, refugees in protracted exile, groups living in countries formed as a result of State succession, and undocumented migrants’.<sup>142</sup>

No further criteria are provided to determine which people would fall within these categories: for example, which particular groups in the very many ‘countries formed as a result of state succession’ are intended; or whether ‘undocumented migrants’ includes all those without a regular migration status or only those migrants without any identity documents of any kind. Those defined as being without links to another country include children of parents who are stateless or lack a recognised nationality status, abandoned children of unknown parents in countries where there are no legal safeguards to provide such children with nationality of the state of birth or residence, children unable to acquire a nationality from a parent because of sex discrimination in national laws and ‘those who have lost, or been stripped of, their nationality, for reasons other than real or perceived links to another country’.<sup>143</sup>

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<sup>141</sup> *ibid* [64].

<sup>142</sup> *ibid* [66]–[67].

<sup>143</sup> *ibid* [68].



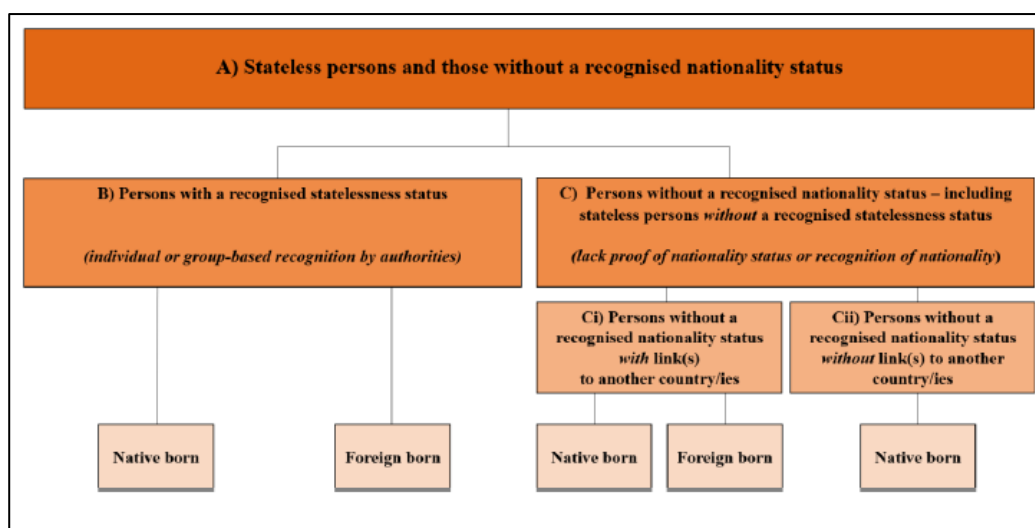


Figure 1. IROSS Statistical Framework, endorsed by the 54th session of the UN Statistical Commission, March 2023

The category ‘without a recognised nationality status’ is based on UNHCR’s working definition of ‘undetermined nationality’, but is slightly different. The category ‘without a recognised nationality status’ includes both those who would be considered by the UNHCR definition to be of ‘undetermined nationality’, with real or perceived links to another country (category C(i)) and those born in the territory whom UNHCR would previously have categorised as simply ‘stateless’, about whom there is no doubt that they lack an entitlement to nationality in any country, but IROSS rather describes as being without a link to another country (category C(ii)). Confusingly, however, the overall category ‘without a recognised nationality status’ is also stated to relate to people who may possess an entitlement to nationality (which would exclude this group).<sup>144</sup>

Although the discussion of the statistical framework does make clear that category C includes people who are stateless, the decision was made to place only those with officially recognised stateless status — a very small proportion of the total number of stateless people in the world — within category B. The rationale for this choice is provided by the clarity of official recognition in an otherwise often blurred picture, but the impact on data reporting is unclear. Much will depend on operationalisation in practice. The IROSS indeed recommend that the top level category, category A, ‘represents the first tier of the framework that countries are encouraged to use for the production of official statistics’.<sup>145</sup> Moreover, and unusually for statistical recommendations, the IROSS also recommends throughout that national statistical offices should consult with relevant experts, including UNHCR and civil society groups, to identify the causes of statelessness and elaborate on the proposed statistical categories in the national context.<sup>146</sup>

The Institute on Statelessness and Inclusion (‘ISI’) coordinated a civil society submission to EGRISS on the draft IROSS, in which it expressed some disquiet at the level of subjectivity in deciding which individuals and groups would fit in

<sup>144</sup> *ibid* [64(b)].

<sup>145</sup> *ibid* [63], [102], [154].

<sup>146</sup> *ibid* [62], [141], [144], [179], [365], [367].

which category of the statistical framework and called for further consultation on the categories proposed. For statistics, ISI argued, the ‘links’ considered should be factual and related to nationality law, rather than based on perceptions. The submission also called for a longer period of consultation before the recommendations were finalised.<sup>147</sup> However, although the final version of IROSS adopted by the Statistical Commission included some adjustments, the framework remained substantially the same.

The existence of ‘perceived links’ to another country is surely central to risks of statelessness but not easy to operationalise for quantitative data that are comparable across countries. Not least, the formulation in IROSS immediately raises the question: *perceived from whose point of view?* Although the IROSS category ‘without a recognised nationality status’ starts from a factual determination that a person lacks ‘proof or recognition of any nationality’, the additional criteria based on membership of a group with links to another country do not suggest that these are the sort of links that would necessarily establish entitlement to nationality in that other country.<sup>148</sup> This is most acutely apparent in the IROSS decision to exclude a person who has lost or been stripped of nationality on the grounds of ‘real or perceived links to another country’ from the category of persons without a link to another country. That is, the perception here is that of the country doing the counting, which is also the country doing the stripping of nationality. However, the country to which links are perceived to exist may equally consider the person not to have the sort of links that would create an entitlement to nationality. This is precisely the question of statelessness that has been litigated in many cases of deprivation of nationality on national security grounds.<sup>149</sup> The formulation of the definition allows for significant manipulation of the numbers.

On the other hand, as the IROSS highlight (following the recommendation of the ISI-coordinated civil society submission), the exploration of solutions to statelessness could be assisted by making much more effort to gain information about the perceptions of the state of residence (through the eyes of its officials at front desk level) by the collection of administrative data on refused applications for identity documents and the reasons for refusal (‘including the question of “real” or “perceived” links to another country/ies, and what other nationality it is believed that the person may hold’).<sup>150</sup> The IROSS also emphasise the potential use of data generated by non-state actors, including civil society organisations as well as citizen-generated data.<sup>151</sup>

Writing before the IROSS process was underway, Brad Blitz urged UNHCR ‘to take the bold step of affirming the status of certain groups as stateless persons, rather than bracket them off as people of “indeterminate nationality”’.<sup>152</sup> It is not clear, however, that this would be the best approach in all cases for those affected. As in the case of litigation on behalf of individuals and groups in stateless-adjacent

<sup>147</sup> Institute on Statelessness and Inclusion et al, ‘Joint Civil Society Submission to the Global Consultation on the International Recommendations on Statelessness Statistics (IROSS)’ (Submission, 21 November 2022) (‘Joint Submission’).

<sup>148</sup> IROSS (n 140) [68].

<sup>149</sup> See Ishii, ‘Access to Citizenship for Abandoned Children: How Migrants’ (n 36) 978; UNHCR, ‘Child Protection Issue Brief: Birth Registration’ (n 36); UNHCR, *Good Practices Paper – Action 7: Ensuring Birth Registration for the Prevention of Statelessness* (n 36).

<sup>150</sup> IROSS (n 140) [225].

<sup>151</sup> *ibid* [269]–[286].

<sup>152</sup> Blitz, ‘Protection through Revisionism?’ (n 112) 92.

situations, the framing of their situation involves strategic choices for advocacy on their behalf.

My own proposal would be for efforts to collect better statistics in order to differentiate risks of statelessness among those lacking nationality documents through a set of factual questions about the possession, by individual respondents and their parents, of official identity documents recognising nationality or other elements of legal identity (including civil registration certificates).<sup>153</sup> This could be the approach either in a national census or in a more geographically limited survey.<sup>154</sup>

Statistics collection should, moreover, focus as much on identifying categories of people without a recognised nationality whose status it might be possible to resolve (if the relevant 'links' could be legally established through a separate process), as on identifying those who are stateless. That is, on collecting information about the place of birth of the person concerned (as proposed by the IROSS) and also of the parents (and grandparents, if known), and other facts that could be grounds for acquisition of nationality, such as the length of time lived in the country or marriage to a person who is a recognised national. There can be no question of individual status determination in this counting process, but rather of categorisation based on probabilities in relation to the likely status of a person whose nationality is not known and the impacts of lack of recognised nationality. If statistical categories highlight that those who do not have a recognised nationality have closer links to the state that is collecting those numbers than to any other state, and yet face significant disadvantage in that society, this may well be a more useful presentation of data than expanding the reported figure for stateless persons, since it highlights the logical (and perhaps also the legal) responsibility of that particular state to ensure that nationality is recognised or granted.

It is also the case, however, that the collection of statistics may not always be the most useful expenditure of effort when it comes to addressing statelessness.<sup>155</sup> The populations at risk of statelessness and the reasons why they are at risk are often very well known, especially in the countries or regions where the largest numbers are affected. In some contexts, the effort to estimate — or count — stateless persons may be an important spur to action. However, the question of numbers also risks becoming a political football to be kicked about among those resisting action to resolve the situation; it may be better to devote energy and resources to identifying (through qualitative research) and filling the specific legal

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<sup>153</sup> In a UNHCR study of risks of statelessness in Serbia, for example, a person at risk of statelessness was deemed in the national context to be anyone lacking at least one element of recognised legal identity, including birth registration, confirmed citizenship, registered permanent residence or personal identity card: CeSID, *Persons at Risk of Statelessness in Serbia: Overview of Current Situation and the Way Forward* (UNHCR, 2020) 11. In other contexts, relevant documents could also include voter registration cards or other forms of identity document that carry at least the suggestion that the person may have the nationality of a state.

<sup>154</sup> IROSS n (133) ch 5 considers in detail the potential of different data sources and the considerations to take into account in exploiting them, providing guidance on population and housing censuses (heading 'A'), sample surveys (heading 'B') and administrative data (heading 'C').

<sup>155</sup> Bronwen Manby, 'Statelessness Statistics and IROSS: The UN Statistical Commission Grapples with Definitions', *Critical Statelessness Studies* (Blog Post, Peter McMullin Centre on Statelessness, Melbourne Law School, February 2022) <<https://law.unimelb.edu.au/centres/statelessness/resources/critical-statelessness-studies-blog/statelessness-statistics-and-iross-the-un-statistical-commission-grapples-with-definitions>>, archived at <[perma.cc/LKG6-AVXU](https://perma.cc/LKG6-AVXU)>.

and procedural gaps that cause statelessness in that country. If there is no chance of filling those gaps because there is no political will to resolve statelessness, then the chances are that improved statistics may also not be attainable — or that data collection may be used for harmful purposes<sup>156</sup> — whatever labels are applied.

### VIII CONCLUSION: FRAMING FOR SOLUTIONS

When seeking to resolve the situation of those denied recognition of nationality, a failure to identify exactly what the problem is makes it difficult to advocate for the remedies required. This is true both in litigation and other advocacy on behalf of particular individuals and in scholarship. At the same time, the process of categorisation itself creates new risks. This article has focused in particular on the choice to describe the problem of lack of recognised nationality as ‘statelessness’.

It is easy to appreciate the reason why people may seek the weight of the term ‘stateless’ for advocacy purposes on behalf of those who struggle to gain recognition of nationality, and in some contexts the language of statelessness may indeed be the most powerful and appropriate terminology, enabling access to a remedy. However, it is not always in the interests of the affected groups to apply this term. The too free deployment of the term ‘stateless’ (for example, to include a broad spectrum of irregular migrants) may be counterproductive by playing into the fears of the authorities that recognising one individual as stateless opens the floodgates to others. Use of the term ‘stateless’ may also hinder the resolution of the status of those who appear to be entitled to nationality in law but cannot legally establish the facts, by suggesting they need a special grant of nationality, rather than assistance in navigating administrative barriers to recognition of an existing nationality and reforms to laws and procedures to prevent others falling into the same traps. As Jason Tucker has argued in a discussion of the term ‘de facto statelessness’, it can be questioned whether the situation of those placed in this category ‘is an issue of “statelessness”, rather than an issue of ineffective citizenship itself’.<sup>157</sup>

One reason for moving away from the term ‘de facto statelessness’ is indeed that it risks creating the worst of both worlds for advocacy and analytical purposes. On the one hand, it may enable the argument that a person is not *really* stateless, and so not in need of international protection; and on the other, it may seem to confirm a view that those concerned are *really* foreigners and thus should not be recognised as nationals in the place where in fact they have the closest connections. Rather, the legal establishment of factual connections to a country of residence (or, in some contexts, another country) should be emphasised as the basis for solutions.

It is challenging to try to establish consistency in terminology across different national contexts. And there are already too many competing terms in use. Nonetheless, I risk putting forward a suggested lexicon to discuss the status of those whose nationality is in doubt, disputed or denied. I end up with three concentric circles to sort the stateless and stateless-adjacent groups — but in each case, the need for further investigation to determine final status.

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<sup>156</sup> See, eg, International Crisis Group, ‘Counting the Costs: Myanmar’s Problematic Census’ (2014) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/counting-costs-myanmar-s-problematic-census>>, archived at <[perma.cc/RHV9-D3WK](https://perma.cc/RHV9-D3WK)>.

<sup>157</sup> Jason Tucker, ‘Questioning de Facto Statelessness by Looking at de Facto Citizenship’ (2014) 19(1–2) *Tilburg Law Review* 276, 277–8.

'*Undetermined nationality*' (derived from the 2006 UNHCR ExCom resolution reviving UNHCR's mandate on statelessness)<sup>158</sup> refers, in line with the natural meaning of the words, to those who do not have a document that recognises nationality issued by the competent authorities of any state.<sup>159</sup> The definition does not involve any analysis of the law and is simply a question of fact. Undetermined nationality is not the same thing as lack of identity documents; it is the specific lack of an official identity document recognising nationality. Nonetheless, there are always complexities. For example, those who have an expired document that has not been renewed (but there is no reason to believe it could not be renewed) would not be considered to have undetermined nationality but rather presumed to be nationals of the state concerned. Although the nationality status of many of those lacking documents confirming nationality may be uncontroversial — especially in countries where there has historically been no requirement to hold a national identity card — the ever-increasing requirements to prove identity mean that lack of such a document in the 21<sup>st</sup> century does suggest at least some risk that the person has no nationality. This category will thus include individuals who on closer investigation might be determined to have the nationality of the country of residence, or of another country, or to be stateless.

'*At risk of statelessness*' refers, in line with the natural meaning of the words, to a subset of those whose nationality is undetermined, who in addition fulfil a number of other conditions that mean that they are more vulnerable to statelessness, with a view to prioritising interventions to resolve the status of those concerned. The category would include those who lack the 'feeder' documents on which issue of a document recognising nationality is based. In most contexts this would refer to birth and other civil registration certificates, as well as identity documents held by parents; but, depending on national context, could also encompass access to other forms of identity document, such as voter registration cards, or certificates issued by local authorities or customary or religious institutions. The risk of statelessness is obviously greater the fewer relevant documents are held. In addition, the question of 'perceived links' to another country does obviously increase vulnerability to statelessness. However, there is a need for clearer definitions and boundaries than provided by the group categories proposed by the UNHCR working definition of 'undetermined nationality' or the IROSS category of 'without a recognised nationality status'.<sup>160</sup> Although these categories are to some extent necessarily context-specific, the focus should rather be on the type of factual 'links to another country' that are generally relevant for determination of nationality and statelessness, including place and date of birth of the person concerned and their parents and grandparents, length of residence in a country and nationality of spouse and wider family.<sup>161</sup>

'*Statelessness*' is used in accordance with the interpretation of the *Handbook on Protection of Stateless Persons* and is 'a mixed question of fact and law'. Stateless persons include: people officially recognised as stateless persons; those who have no entitlement to any nationality because of problems with the

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<sup>158</sup> UNHCR Executive Committee (n 27).

<sup>159</sup> It may seem perverse to reverse UNHCR's usage of 'undetermined nationality' and 'at risk of statelessness', however, the aim is to provide definitions that are closer to the way that a person who is not immersed in these debates might naturally interpret these terms.

<sup>160</sup> See above Part VI.

<sup>161</sup> As proposed in the joint civil society submission to the IROSS process: see Institute on Statelessness and Inclusion, 'Joint Submission' (n 147) 4–5.

substantive law of the relevant states (such as discrimination based on sex or other characteristics, or lack of provision for children of unknown parents and place of birth); those who have not fulfilled administrative procedures for recognition or acquisition of a nationality within the legally required time limits; and people who have been unable, after exhausting the administrative and judicial remedies that are practically available to them, to establish entitlement to nationality (confirmed by issue of relevant identity documents) to the satisfaction of the competent authorities in any country to which they have a connection. Stateless persons also include people who have the same profile (for example, in relation to ethnic, racial, religious or national origin, place of birth and parentage) as others who have exhausted such remedies, where it is known that people with that profile are systematically not recognised as nationals by the state concerned.

Among both those of ‘undetermined nationality’ and the subgroup, ‘at risk of statelessness’, there will be some who, on further inquiry, are found to be nationals of their state of residence, some who are nationals of another state and some who are stateless. That is, even people who are not ‘at risk of statelessness’ — in that they have birth certificates and perhaps some other identity documents and do not appear to belong to a vulnerable group — may still turn out to be stateless, if an application for recognition of nationality is rejected in every country in which there is a potential claim.

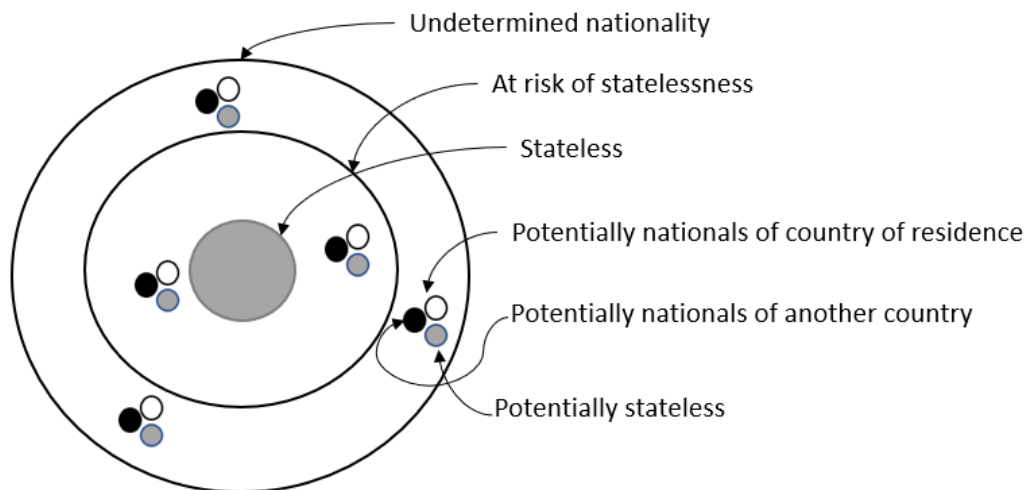


Figure 2. Visualisation of concentric circles of stateless-adjacent groups

Finally, I propose the term ‘*presumptive nationality*’ to cover those among any of the categories above — stateless, at risk of statelessness, of undetermined nationality — who have *such strong ties to the country of residence that the nationality of that country should be recognised or granted*. This part of the lexicon thus goes beyond the factual and into a normative proposition. The term overturns the frequent presumption of *foreign* nationality to substitute a presumption in favour of the country of residence, where that is the country of strongest connection.

In this, I return — as others have done — to the argument made by Manley Hudson in 1952 that:

[a]ny attempt to eliminate statelessness can only be considered as fruitful if it results not only in the attribution of a nationality to

individuals, but also in an improvement of their status. As a rule, such an improvement will be achieved only if the nationality of the individual is the nationality of that State with which he is, in fact, most closely connected, his 'effective nationality', if it ensures for the national the enjoyment of those rights which are attributed to nationality under international law, and the enjoyment of that status which results from nationality under municipal law.<sup>162</sup>

'Presumptive nationality' is intended to take up the idea of 'effective nationality' employed by Hudson, but in a more easily understood way, since so often the problem in practice is precisely that such a nationality is *ineffective*, because it is unrecognised.

The concept of 'presumptive nationality' nonetheless draws on the jurisprudence from which Hudson derived the term 'effective nationality'. That is, the principle — developed by international tribunals in the era when dual nationality was disfavoured — that if there is a conflict of law in relation to a person's nationality, the nationality of the country of domicile should prevail.<sup>163</sup> The principle that 'the conduct of the individual furnishes the only solid juridical foundation for recognition of single nationality'.<sup>164</sup> The term thus applies to those who are living in their country of presumptive nationality; it is not applied to those who have left that country and are now living elsewhere. The history of the idea of 'effective nationality' is particularly relevant in case of statelessness since — as this discussion has highlighted — it is so often the case that stateless persons are considered by the authorities of their state of residence to be nationals of another country. In the *Nottebohm* case of 1955, the International Court of Justice used the term 'real and effective nationality' to establish limits to the obligations of other states to recognise a nationality granted in the absence of a 'genuine connection' with that state (even if dual nationality was not in issue).<sup>165</sup> The judgment has been heavily criticised on those grounds.<sup>166</sup> Nonetheless, the idea of positive rights based on such 'genuine connections' has gained traction as international law has evolved in recent decades. For example, the International Law Commission's Articles on the Nationality of Natural Persons in relation to the Succession of States deploy the concept of 'appropriate connection' to assert the obligation of a particular state to grant nationality in some contexts.<sup>167</sup> The

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<sup>162</sup> Hudson (n 12) 20.

<sup>163</sup> Paul Weis, *Nationality and Statelessness in International Law* (2<sup>nd</sup> edn, Brill 1979) 169–97.

<sup>164</sup> William L Griffin, 'The Right to a Single Nationality' (1966) 40(1) *Temple Law Quarterly* 57, 64.

<sup>165</sup> *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Reports 4, 22–3.

<sup>166</sup> Robert D Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50(1) *Harvard International Law Journal* 1; Audrey Macklin, 'Is It Time to Retire *Nottebohm*?' (2017) 111 *AJIL Unbound* 492; Rayner Thwaites, 'The Life and Times of the Genuine Link' (2018) 49 *Victoria University of Wellington Law Review* 645.

<sup>167</sup> ILC, 'Draft Articles on Nationality of Natural Persons in Relation to the Succession of States' in *Report of the Work of its 51st Session (3 May–23 July 1999)*, Supp No 10, UN Doc A/54/10 (3 September 1999) art 11(2).

African human rights institutions have specifically referenced *Nottebohm* to come to similar views.<sup>168</sup>

Presumptive nationality is put forward as a term that both captures existing international legal norms in relation to the obligations of the state of residence and implies the need to strengthen those norms. At a minimum threshold, the term should apply if the person would have acquired the nationality of the state of residence if minimum international standards were respected, but those standards are not enacted or applied in national law. At this threshold, therefore, international law already establishes a presumption: for example, on the grant of nationality to otherwise stateless children born or found on the territory.

Presumptive nationality could also be defined more broadly to include principles for acquisition of nationality already present in many national laws, such as birth and residence in the country until majority, or the second generation born in the country, or residence for a very long time. Here, the term enters into advocacy for stronger norms. Similar arguments — adding *jus nexi* to the traditional rules of *jus soli* and *jus sanguinis* for grant of nationality — are also deployed by scholars of political theory, notably Ayelet Shachar.<sup>169</sup> The normative ambition here is less broad, restricted to the case of those who are of undetermined nationality (as defined above); the presumption would be rebuttable if another nationality is confirmed. Nonetheless, the framing of presumptive nationality, even at the minimum threshold proposed, would highlight the primary responsibility of the state of residence to resolve the status of those who must be considered to be living in their ‘own country’ (as interpreted by the Human Rights Committee in its General Comment on art 12 of *the International Covenant on Civil and Political Rights*).<sup>170</sup> As, indeed, UNHCR has noted, ‘resources should not be dedicated to a formal determination of statelessness where a realistic, immediate goal is the acquisition, reacquisition or confirmation of nationality ... This will usually be the case for those protracted situations in which an entire population has significant ties only with the State in which they are resident.’<sup>171</sup>

The processes of developing UNHCR’s *Guidelines on Statelessness No 1* and *No 2* (now in the *Handbook on Protection of Stateless Persons*) and the IROSS have revealed the difficulty, but also the possibility, of arriving at a consensus on definitions in these contexts. The extended process of consultation with practitioners before the *Guidelines* were adopted enabled an important clarification and expansion of the boundaries of statelessness to include those unable in practice to establish the legal connections necessary to gain recognition or grant of nationality in any country. The development of UNHCR’s somewhat confusing working definition of ‘undetermined nationality’ by contrast, was

<sup>168</sup> *Open Society Justice Initiative v Côte d’Ivoire* (African Commission on Human and People’s Rights, Comm 318/06, 28 February 2015) [100]; *African Centre of Justice and Peace Studies (ACJPS) and People’s Legal Aid Centre (PLACE) (on behalf of Iman Benjamin) v Republic of Sudan* [2018] African Committee of Experts on the Rights and Welfare of the Child 02/2018, African Committee of Experts on the Rights and Welfare of the Child; *Anudo Ochieng Anudo v United Republic of Tanzania* (Merits) [2018] African Court on Human and Peoples’ Rights Case No 012/2015, 2 African Court Law Reports 248 [95].

<sup>169</sup> Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009).

<sup>170</sup> UN Human Rights Committee, *General Comment No 27: Freedom of Movement (Article 12)* (n 91) [20].

<sup>171</sup> UNHCR Action to Address Statelessness: A Strategy Note, (March 2010) [50] <<http://www.unhcr.org/refworld/docid/4b9e0c3d.html>>, archived at <[perma.cc/862F-F7L9](https://perma.cc/862F-F7L9)>. See also UNHCR, *Handbook on Protection of Stateless Persons* (n 71) [58].



internal to the agency. The adoption of the IROSS, after only a very short open consultation window (albeit a longer period of consultation with states), resolved nothing with the reformulation of the category as being 'without a recognised nationality status' and continued to rely on perceptions as the basis for determining if a person has 'links to another country'.<sup>172</sup> As this article has argued, there is a strong case for reopening this discussion for wider consultation and consensus-building on the boundaries and labels of the categories to be used.

In general, the terminology used in this field would benefit from greater consistency in usage, consideration for the views of those affected by statelessness and denial of nationality on the best framing for their situation, and care in identifying the specific problems to be solved. In the end, however, clarity will not be completely attainable. Contexts of migration and forced displacement across borders are likely to require different approaches and categories from contexts where those of undetermined nationality are living in the country of their 'presumptive nationality'; that is, their country of birth and long-term residence. There are, moreover, very many situations in which it will not be possible to know if a person's citizenship is alive or dead until an investigation has opened the legal and factual 'box' by which it is circumscribed.

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<sup>172</sup> IROSS (n 140) [68].