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The Stateless Person as Political ‘Non-Subject’

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Abstract

This paper does not take statelessness *per se* as its focus; rather it centres on the international framework from which stateless persons are excluded in praxis. Beginning with the definition of statelessness under international law, the paper seeks to demonstrate that stateless migrants are a distinctive and illuminating consequence of the international praxis of community and membership. This group is distinctive because its existence threatens the fragile contract of reciprocity that governs migration within international praxis. Furthermore it is illuminating, as the paper will argue, because it highlights a contradiction between the ideal of distinctly ‘human’ rights and the equation of order – domestic and international – with territory and life.

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The Stateless Person as Political ‘Non-Subject’

My research has tried to demonstrate that theory concerned with the plight of stateless persons must engage explicitly with the international dimension of theory and politics. The international is, I maintain, vital for two reasons, both of which I have explored elsewhere.¹ Firstly, it is crucial because the current definition of statelessness originates in *international* deliberations at the behest of the United Nations.² Secondly, and most importantly, it is crucial because, as the paper seeks to demonstrate, restricted conceptions of community and membership underpin the current minimal theorisation of statelessness. My PhD thesis claims that normative theorists have been insufficiently critical of the ways in which the theory and practice of community and membership in international politics structure the subject, to the necessary exclusion of a minority. The international is examined following this rationale throughout the thesis, which hence takes a two pronged approach to the international: it interrogates the present definition of statelessness; and it interrogates the underpinnings of community and membership in normative theory concerned with personhood or subjectivity.³

My research makes the claim that despite some (limited) attention to the special case of stateless persons, they remain anomalous to articulations of subjectivity. This claim is put forward by way of an examination of the place of conceptions of community and membership in accounts of subjectivity. My research hence seeks to demonstrate the significance of the international in theory and practice, through an examination of the means by which community and membership relate to the definition and theorisation of statelessness and the stateless person. Attention to the international is necessary as proper analysis of the reality of statelessness cannot stop at state borders; the horrible truth is as Arendt perceived it – that stateless persons are in practice a special group of individuals:

Once they left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth.⁴

¹ Kelly Staples, ‘Revisiting Statelessness in International Political Theory’. Unpublished manuscript for submission towards PhD at the University of Manchester.

² The Commission on Human Rights encouraged attention to statelessness in 1947. See UN Document E/600, paragraph 46.

³ In particular, the normative theory of Onora O’Neill, Richard Rorty, and Michael Walzer.

⁴ Hannah Arendt, *Origins of Totalitarianism* (New York: Harcourt, Brace & World, 1966) 267.

Her epithet remains largely valid, despite the existence of a small and disparate bunch of individuals who may benefit positively from statefreeness.⁵ This paper aims to demonstrate some of the problems in the international definition of statelessness, beginning with international law.

This paper recognises that international law, like much normative theory, articulates subjectivity in terms of individual persons,⁶ faced with which the stateless person is ‘an anomaly’.⁷ In its multiple sources, international law has sought to differentiate between forms of legal personality. The thesis of the paper, however, is that the stateless person is inevitably precluded from attaining any form of full subjectivity. The paper also puts forward an argument that the fault in the definition of legal personality lies in its underpinnings in specific and unquestioned conceptions of community and membership.

1.1. Foundations of the Definition of Statelessness

The UN Charter bodies turned their attention to statelessness in 1948, some thirty years after its first diagnosis.⁸ The Commission on Human Rights requested consideration for ‘the legal status of persons who do not enjoy the protection of any government’.⁹ The Economic and Social Council accepted the need, articulated by the Commission, to adopt interim measures to afford protection to stateless persons as well as the need to take action to fulfil article 15(2) of the Universal Declaration of Human Rights:¹⁰ ‘No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality’.¹¹ ECOSOC in turn requested that the Secretary General undertake a study of statelessness and consider the case for a further convention on the subject. The final study claims to offer ‘a general picture of the law governing *nationality*, including the main systems in force’.¹² Nevertheless, its focus is statelessness. The study includes sections on statelessness past and present, *de jure* and *de*

⁵ This term was suggested to the author by Jens Bartelson, during discussion of an earlier paper in the workshop on *The Future of Political Community* at the ECPR Joint Sessions of Workshops, held at Intercollege, Nicosia on 27th April 2006.

⁶ ‘Under modern law in civilized countries every individual is recognized as having a legal personality’. “A Study of Statelessness,” (Lake Success: Economic and Social Council of the United Nations, 1949), Section I.

⁷ Ibid.

⁸ The Report of the Secretary General explicitly recognised that until the early twentieth century, statelessness ‘was a limited phenomenon and consequently did not greatly disturb international life’. Ibid., II(1).

⁹ UN Document E/600, paragraph 46

¹⁰ UN Publication 1949, XIV 2.

¹¹ With reference to the political theory of rights, this right is most clearly a right grounded in negative liberty, which duly limits certain actions by States. In the classic legal schema set down by Wesley Hohfeld, it is most clearly an *immunity*, implying a corollary ‘disability’ with reference to States. Wesley Newcombe Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919).

¹² “A Study of Statelessness,” I(3).

facto stateless persons,¹³ the relationship between the stateless person and the refugee, and the difficulties resulting from, and problems raised by statelessness. It concludes with recommendations for improving the status of stateless persons and for eliminating statelessness. The study is of prime importance in examining the definition of statelessness articulated by the mechanisms and instruments of international law. It recognises that: ‘Statelessness is a phenomenon as old as the concept of nationality’,¹⁴ formulating an initial conception of statelessness as not only the absence of nationality; but somehow its shadow. It is possible at this stage to infer that statelessness as it is currently understood would not have made sense before the identification of status with nationality.¹⁵

A Study of Statelessness reports the ‘permanent source of statelessness’ to be ‘the absence of general rules for the attribution of nationality and the discrepancies between the various national legislations’.¹⁶ This is of direct interest to the question of the international at the heart of the thesis, and hence of this paper. The absence of general rules, as well as legislative discrepancies, are contributing factors in the lack of legal status embodied in statelessness. The UN study acknowledges here the international dimension of statelessness, inasmuch as its source is reported to be the plurality of legal jurisdiction in the sphere of nationality that exists in a world of sovereign States. Now as then: ‘It is the sovereign right and responsibility of each State to determine, through the operation of national law, who are its citizens’.¹⁷ As my thesis in its entirety seeks to demonstrate, legal and normative accounts of what it is to be a person are tied inextricably to conceptions of community and membership which are largely static, and which misapprehend or misunderstand the significance of international forces. The international universalisation of States’ sovereign right regarding membership is what permits statelessness to emerge as the shadow of membership. Statelessness is clearly a distinctly international problem. However, it is equally clear that legal responses to this international problem are constrained by the universalisation of a particular vision of community, and of membership in community (that is, respectively, the State and nationality).¹⁸ The United Nations recognised that any move to correlate specific

¹³ Examined in chapter 2 of the thesis.

¹⁴ “A Study of Statelessness,” II(1).

¹⁵ The UN recognised that: ‘During the long period of peace and social stability at the end of the nineteenth century, stateless persons were few and their situation was tolerable. Life was not highly organized as it is today and foreigners, whatever their status, enjoyed considerable freedom’. *Ibid.*, V(3).

¹⁶ *Ibid.*, II(1).

¹⁷ UNHCR, *Resettlement Handbook* (Geneva: UNHCR, 2004) VIII/2.

¹⁸ Nationality and citizenship are used interchangeably in this paper, in line with the practice of international law, which makes no normative or practical distinction.

duties to the right to nationality set down in the Universal Declaration of Human Rights¹⁹ would undermine the sovereign right of States to draw the boundaries of communal membership and radically transform the geo-politics of community and membership; beyond its institutional remit, and its scope.

In its attempt to provide a ‘general historical survey’ of statelessness, the UN study notes that ‘the territorial reshuffling and the political and social crises following The First World War’ were precipitating factors in the creation of statelessness.²⁰ The political act of drawing (and redrawing) the territorial borders of territory extensive with political community tends to have a knock-on effect on the borders of membership. In Russia and Armenia, statelessness was in part the result of State attempts at territorial expansion. With Mussolini’s victory in Italy in 1922 and the victory of Franco in the Spanish Civil War in 1939, mass exodus – and statelessness – spread throughout Europe. In such cases the borders of community remained stable; the stability garnered through contractions in the borders of membership. In the first half of the twentieth century, so-called totalitarianism²¹ in Europe thus became a factor in the (re)construction of political community and the (re)definition of memberships, and thus in the creation of stateless persons.²² One can observe that the sovereign right of States over the criteria for membership was a particular threat to individuals where political order became monolithic. However, statelessness was also the result of fissures in monolithic orders worldwide during the last half of the century, which saw the decline of empire and decolonisation become factors in the creation of many thousands more stateless persons. Attention to the relationship between the stateless exile, political community, and membership is therefore essential to understanding its location in international politics. As such, the paper now turns to close analysis of this relationship.

An obvious characteristic of this relationship is its specificity; the stateless exile has a special relationship with the State in which she finds herself; a relationship which is, I will argue, outside of the framework that governs the relationships between States, nationals, and aliens. State nationals in international transit (i.e. away from home) are *legally* guaranteed at least minimal status by virtue of their *membership* in their ‘home’ State. This legal guarantee is derived from the obligations States have to each other according to the principle of

¹⁹ According to Article 15(1) ‘Everyone has the right to a nationality’ and Article 15(2) ‘No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality’ of the Universal Declaration of Human Rights. The limitations on this obligation as they result from the two Statelessness Conventions are explored in chapter 2.

²⁰ “A Study of Statelessness,” II(1).

²¹ Hanna Arendt’s ideas on the political dynamics of totalitarian States are examined in Chapter 3.

²² For attention to the nexus between statelessness and totalitarianism, see Arendt, *Origins of Totalitarianism*.

reciprocity that is part of the framework of international relations. This principle governs the recognition States afford to each others' nationals, which is premised on the reciprocal requirement for States to readmit their own nationals.²³ The principle of reciprocity is multilateral, and allows for a degree of international stability and cooperation. It has been an important dimension of international relations between sovereign States in the twentieth century, and forms the basis of an extremely limited contract.²⁴ The arrival of the stateless refugee ruptures the norm on which this contract is predicated, which is to say that the relationship between the stateless exile and the State in which she seeks refuge is unmediated by reciprocity. It is this breach that the UN sought to bridge in 1949.²⁵ And it is this breach that frames statelessness as a 'problem' rather than the breach in the universality of the Declaration of Human Rights.

For Weis, what is internationally significant about statelessness is that 'it affects the right of other states to demand from the state of nationality the readmission of its nationals'.²⁶ Outside of the paradigm of reciprocity, the stateless refugee is not readily deportable,²⁷ and this is the prime disadvantage for 'the country on whose territory he happens to be'.²⁸ The stateless person can only cross international borders (the borders of political community) illegally,²⁹ and yet it is also illegal for the receiving State to reverse her border crossing. With the arrival of the stateless exile, the State's ordinary 'desire to guarantee order and security [through the universally recognized measures of expulsion and reconduction]'³⁰ engenders international conflict contrary to customary international law. No country is legally 'bound to receive a stateless person in respect of whom an expulsion order has been issued',³¹ an immunity which derives from the contract (grounded in reciprocity) between States. Thus while the stateless persons envisaged here are clearly outlaws,³² States also must avoid acting outside of law, if the contract – already incompatible with universal international personhood – is to be upheld. The stateless person is not party to the reciprocal contract, though the State is. The fact that the arrival of the stateless exile on State territory engenders international obligations on the State would appear to make control of physical borders (at least to the

²³ Imke Kruse, "The Eu's Policy on Readmission of Illegal Migrants," 10.

²⁴ And, some might say, of a fragile peace between States.

²⁵ Recall that the Commission on Human Rights defined stateless persons as persons 'who do not enjoy the protection of any government'. Supra. This statement notes apparent recognition of the distinctly *political* dimension of statelessness. The stateless person is subject to the Weberian monopoly of force in a given territory, without any stake whatsoever in the membership of that territorial order.

²⁶ Paul Weis, *Nationality and Statelessness in International Law* (Andover: Stevens and Sons, 1956) 128.

²⁷ Arendt, *Origins of Totalitarianism* 283.

²⁸ "A Study of Statelessness," Chapter 1(2).

²⁹ In fact, this applies most clearly to the *de jure* stateless person, analysed in chapter 2.

³⁰ "A Study of Statelessness," Chapter 1(2).

³¹ *Ibid.*, Chapter 1(2).

³² *Ibid.*, Chapter 1(2).

exclusion of clandestine entrants) a unilaterally rational act of Statecraft.³³ The costs to all States of policing borders are, however, enormous. Therefore the particular issues around the arrival of the stateless exile have caused States to grasp at multilateral international solutions; to build on the fragile reciprocal contract. I hope to demonstrate that the current praxis of political community leaves any strong multilateral solution of this kind inevitably out of reach. Thus, the contingent necessity of border control in the case of illegal entrants – though pathological on some readings – is, I will argue, likely to endure. As, consequently, is the present scope and spread of statelessness, despite the best efforts of the UN.³⁴ Many have sought to demonstrate, with focuses other than statelessness, the dialectical nature of territorial borders.³⁵

Furthermore, the multilateral principle of reciprocity is, as I have said, a supremely fragile contract. There is also an apparent zero-sum counter to international cooperation which arises in the case of denationalisation and statelessness, which I aim to explore here. The logic of international law as it confronts statelessness is that, in effect, successful expulsion on the part of the country of former habitual residence, though illegal, confers no unambiguous legal obligation of readmission on that State.³⁶ As Lynch has noted, naturalisation is subsequently an impossible dream for the stateless person, as ‘statelessness and disputed nationality can only be addressed by the very governments that regularly breach protection and citizenship norms’.³⁷ No other government may be compelled to restrict their sovereign rights to the benefit of the stateless, status-less person. Denationalisation and subsequent expulsion obtain therefore of a measure of unilateral rationality in cases where reciprocity is politically undesirable. As such they have historically been used as tools for disposing of persons who are politically undesirable, in deviation from the collective rationality in the reciprocal regulation of international travel and migration. Purposeful denationalisation is not the sole cause of statelessness, though it has in recent years affected groups such as the Biharis and Rohingya. Denationalisation and expulsion have also been historically significant instruments, particularly in the hands of totalitarian and/or monolithic governments³⁸ and/or

³³ A position which much of the postwar Security Studies literature either assumes or defends.

³⁴ In 2000 the Executive Committee of the UN encourage States to ‘cooperate with UNHCR in identifying measures to reduce statelessness and in devising appropriate solutions for stateless persons who are refugees, as well as for stateless persons who are not’. “Executive Committee Conclusion No.90 (Lii),” (2001).

³⁵ R. J. B. Walker, has, for example considered the dialectic of the inside/outside in the State. See R. B. J. Walker, *Inside/Outside: International Relations as Political Theory*, Cambridge Studies in International Relations (Cambridge: Cambridge University Press, 1993).

³⁶ Though it may, of course, confer a *moral* right to return.

³⁷ Maureen Lynch, “Lives on Hold: The Human Cost of Statelessness,” (Washington, DC: Refugees International, 2005), 1.

³⁸ Witness the denationalisation and expulsion of European Jews between up to 1945.

in times of conflict³⁹ or State-building. In such cases, the benefits of deviation from the norm (for example, consolidation of the borders of community or membership might outweigh the associated costs (chiefly the opprobrium of border-States).

I have said that the arrival of the Stateless exile throws up legal problems for the State due to the contract (such as it is) which in part constrains international relations. Of course, problems also confront the stateless person herself. The paper has also suggested that the ‘special’ relationship between the State and stateless person is unmediated. The implication is that while States are legally prohibited from expelling the stateless person, the scope of their legitimate actions remains extensive. Let us now consider in more depth the particularities of this ‘special’ relationship. The UN study of 1949 acknowledged that the legal impermissibility of lawful border crossing renders the existence of the stateless person largely clandestine. Any such person must ‘lead an illegal existence, avoiding all contact with the authorities and living under the constant threat of discovery and expulsion. The disadvantages, both for himself and for the country on whose territory he happens to be, are obvious’.⁴⁰ On my interpretation of the legal situation, the disadvantages weigh more heavily on the stateless person, despite the prohibition on the State of expulsion. The basis of this claim is relatively simple, and encapsulated in the next legal instrument of interest, the 1954 Convention Relating to the Status of Stateless Persons. The convention holds that: ‘Every stateless person has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order’.⁴¹ The duties of the stateless person are equal to (or even greater than) those of the State national, while the protections she enjoys are significantly narrower. Support for this claim follows later in this paper.

The claim that the disadvantages arising out of the arrival of the stateless exile are more burdensome to the individual does not imply that the only legal obligation States have is towards other States on the matter of expulsion. The legal impermissibility of expelling a stateless exile in turn creates other obligations binding on State authorities. The 1954 Conference of Plenipotentiaries hence sought to clarify the legal obligations of States arising out of the arrival of such persons, which were previously unclear.⁴² It is clear that the stateless person has a direct effect on the host country: unmediated by membership, her

³⁹ For example, in the conflict between Eritrea and Ethiopia between 1998 and 2000, in which persons of Eritrean origin were expelled from Ethiopia.

⁴⁰ "A Study of Statelessness," Chapter 1(1).

⁴¹ *Convention Relating to the Status of Stateless Persons*, United Nations Conference of Plenipotentiaries convened by Economic and Social Council resolution 26 April 1954 526 A (XVII), adopted on 28 September 1954, Article 2.

⁴² Nehemiah Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation" (paper presented at the World Jewish Conference, 1997 1955), 1.

presence is potentially permanent as lawful expulsion is contrary to the customary legal prohibition against burdening other States. The ambiguous status of the stateless exile seemed to call for the adoption of some general norm at the international level, which could address the problems for States that the stateless exile posed. And the first, and perhaps greatest problem to address was just how the relationship between the State and stateless refugee could be mediated.⁴³ The lack of mediation is also, of course, problematic for the stateless individual, given that *membership* in the political community of the State is the ordinary and routine source of access to the fulfilment of rights. Clearly membership does not entail the fulfilment of rights; it is, however, a necessary precondition of a vast array of rights and protections. The stateless refugee therefore experiences difficulty in the act of *claiming* her rights, not merely in having them fulfilled.

Conflicts between the emerging institutional discourse of human rights at the UN and the sources of international law which structure international relations were clearly perceived by the Conference of Plenipotentiaries. In an attempt to give meaning to the ‘Universal’ in the Declaration of Human Rights, both the Study of Statelessness and the Conference of Plenipotentiaries were mandated with solving not only a practical – but also moral – dilemma. To summarise at this point; the relationship between the State and the stateless exile deviates from and undermines international norms, as well as problematising the link between rights and citizenship. The relationship at hand is also likely to be long-term (if not permanent), and unmediated by the ‘normal’ nexus between community and membership (the national/alien dichotomy). The next section of the paper turns to the way that this difficult relationship has been articulated in the two multilateral treaties on the subject of statelessness.

1.2. The definition of Statelessness

The practical and moral exigencies of statelessness that were recognised by the UN Study were subject to further debate by the delegates of the 1954 Conference of Plenipotentiaries. The UN’s solution to the bind it encountered in statelessness was to concern itself with the *status* of stateless persons, and a conference was thus convened with the objective of drafting a protocol or convention on the matter. The culmination of the conference was the 1954 UN Convention relating to the Status of Stateless Persons.⁴⁴ This section of the paper seeks to interrogate the articulation of statelessness in international law, with particular reference to the conceptions of community and membership at stake in the definition of statelessness. The ‘internationally recognized definition’ views the stateless person as one ‘who is not

⁴³ Note 1 re. Article 7 Ibid. See Part 1, Section 1 "A Study of Statelessness."

⁴⁴ *Convention Relating to the Status of Stateless Persons*.

considered as a national by any state under the operation of its law',⁴⁵ and has proved to be the starting point for dialogue'.⁴⁶ It immediately locates the stateless person *outside* of membership in the form of political community at the heart of international relations; namely the State. We should also immediately locate the stateless person within international relations. The relevant sub-category of stateless person from 1949 onwards was the stateless 'refugee'. Movement across the borders between political communities was seen to be a general characteristic of stateless persons, making the stateless person a cause for international concern. In considering how far the scope of the definition extended in practice, the following boundaries were constructed:

First, the total number of individuals who formed the various waves of refugees who fled from their country of origin, and who have thus become stateless *de jure* and *de facto* must be accounted for. To these should be added the descendants of these refugees who did not acquire a nationality at birth.⁴⁷ Then, from this total number should be deducted the number of those who have died since their expatriation, and those who were repatriated or nationalized. The balance would represent the number of those who would be entitled to international protection. But even this group might, as has been said, include a number of re-established refugees who would probably not require international protection.⁴⁸

The stateless refugee as constructed here, was potentially entitled to protection only, or both aid and protection; with 1,280,912 included in the first category, and 1,562,812 in the second.⁴⁹ The small disparity between the categories in terms of size would appear to support an interpretation of life for the stateless refugee as a state in which civil and political rights as well as socio-economic rights, at least as they are constructed in praxis, are generally at stake. They are at stake, as I have noted, because membership in the State is the normal source of access to the act of claiming rights, and also the fulfilment of rights.

⁴⁵ Ibid. Article 1(1).

⁴⁶ Carol Batchelor, "Contribution," in *European Seminar on the Content and Scope of International Protection: Panel 1 - Legal Basis of International Protection* (Madrid: UNHCR, 2002), 6.

⁴⁷ Of which the first group would be stateless in 'relative' terms, and the latter stateless in 'absolute' terms. The meaning of these two categories is analysed along with that of *de jure* and *de facto* in chapter two. Recent essays on the subject retain a similar focus. See, e.g. Ezekiel Simperingham, "The International Protection of Stateless Individuals: A Call for Change" (Dissertation, University of Auckland, 2003).

⁴⁸ "A Study of Statelessness," II(2).

⁴⁹ Ibid., Chapter 1.2(A). Chapter 2 argues that international law has tended in the definition of statelessness to assume that the fullest *protection* correlates with *de jure* statelessness, which is not obviously the case on closer investigation.

The emphasis on the stateless ‘refugee’ is directly connected to the remit of the United Nations on the matter of statelessness, which was to clarify the scope and content of the particular burdens placed on states by the arrival of such persons.⁵⁰ The substance of the deliberations demonstrates that the unclear (or unprovable) origin of the stateless refugees complicated both their legal and personal status, as well as their recognition by their host States.⁵¹ This paper aims, however, to problematise the relationship between the stateless person and the refugee articulated by international law, analysed in the following paragraph. The paper as a whole also seeks to put forward the claim that while the category of stateless person has been constructed on qualitatively different lines to that of refugee, she is even more figuratively independent than the definition of statelessness in fact assumes. At this stage it is worthy of note that stateless persons who are neither refugees nor even *exiles* have no place in the finished convention. This must be relevant, for while it has been argued that ‘all refugees are stateless’,⁵² it is not true that all stateless persons are refugees, or even exiles. This paper considers the stateless person *not* in exile in due course.

Let us return for now to the relationship between the ‘ordinary’ refugee and the stateless ‘refugee’ as it was articulated in international law prior to the drafting of the 1954 convention. It is clear that differences and similarities were assumed by the framers of the convention, for while the starting point of deliberation was the existing 1951 Refugee Convention, the content of the debate centred on developing some measure of protection for the stateless exile who does not hold (or has ceased to hold) refugee status. The 1954 convention therefore maps closely onto the 1951 Refugee Convention, in form if not in content (although the provisions for reservation by States parties allowed in 1951 are significantly reproduced in the 1954 convention). Another objective was to consciously minimise conflicts with national legislation in the home countries of the delegates.⁵³ Given that any requirement of naturalisation would undermine the sovereign right of States to set membership criteria,⁵⁴ the

⁵⁰ Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation".

⁵¹ Ibid., 20.

⁵² Maitre J. L. Rubinstein, "The Refugee Problem," *International Affairs* 15, no. 5 (1936): 721.. This claim is dependent on the distinction between *de jure* and *de facto* statelessness, which is examined elsewhere. See Staples, ‘Revisiting Statelessness in International Theory’, Chapter 2.

⁵³ Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation". In cases where compatibility was not possible, the potential for reservation by States parties was inscribed in the wording of the drafted convention, in line with normal practice. The governments of the following States were represented by delegates: Australia, Belgium, Brazil, Cambodia, Colombia, Costa Rica, Denmark, Ecuador, El Salvador, France, Federal Republic of Germany, Guatemala, Holy See, Honduras, Iran, Israel, Liechtenstein, Monaco, Netherlands, Norway, Philippines, Sweden, Switzerland, Turkey, United Kingdom, Yemen, and Yugoslavia.

⁵⁴ UNHCR, *Resettlement Handbook* VIII/2.

protection accorded stateless persons by the convention combines international and domestic forms of protection. Protections were clearly necessary, given that: ‘the stateless person is in a position of inferiority which prevents his settlement and delays his assimilation’.⁵⁵ Nevertheless, nothing which would equate to full diplomatic protection (a right only of State nationals) could be conceived. The minimal protections put in place for the stateless exile thus stand in stark contrast to the optimal form of protection of the individual;⁵⁶ juridico-political subjectivity, and to the refugee, who *formally* holds the diplomatic protection of the State of which they are a national.⁵⁷

Returning to a substantive consideration of the relationship between the ‘ordinary’ refugee and the stateless ‘refugee’, two main differences can be viewed as significant in the context of the conference of plenipotentiaries. Firstly, it was recognised (accurately) that the stateless exile is always an illegal entrant at the time of flight, where the ‘ordinary’ refugee is not. One seeking refuge can at the same time hold membership of the State from which she is fleeing. Secondly, the refugee (as opposed to the asylum-seeker) has always demonstrated, to the satisfaction of State authorities, ‘a well-founded fear of persecution’.⁵⁸ It is here that the picture becomes more complicated. While a stateless person cannot enter a State legally, demonstrating a well-founded fear of persecution is not impossible.⁵⁹ In so doing, she would appear to become a ‘real’ refugee. However, as the delegates knew, the first difference undermined the basis of the definition of refugee status outlined in the 1951 convention, according to which, cessation of refugee status legally permits ‘orderly repatriation’.⁶⁰ The impermissibility of repatriation, and the prohibition on expulsion of the stateless person who did not qualify for refugee status therefore threatened to undermine the limits inscribed in the 1951 Refugee Convention. Hence, while the 1954 Convention forbids contracting States from the expulsion of a stateless person ‘save on grounds of national security or public order’,⁶¹ this should be interpreted as confirmation of an existing prohibition under international law. At the same time, this legal clarification confirmed that the stateless

⁵⁵ "A Study of Statelessness," Chapter 1(4)(B).

⁵⁶ In 1961, it was the case that: ‘International protection of unprotected persons is [...] limited to refugees in the sense in which this term is used in the Statute of the United Nations High Commissioner for Refugees’. Paul Weis, “The Convention Relating to the Status of Stateless Persons,” *The International and Comparative Law Quarterly* 10, no. 2 (1961): 260. While no new agency was created, the mandate of UNHCR has been expanded to include the protection of stateless persons.

⁵⁷ The UN has considered the possibility of *de facto* statelessness more explicitly than the possibility of *de facto* nationality.

⁵⁸ *Convention Relating to the Status of Refugees*, United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, adopted on 28 July 1951, Article 1(2).

⁵⁹ It may, in fact, be extremely problematic in practice; legally it is not impossible.

⁶⁰ UNHCR, “Note on the Cessation Clauses,” (1997), II(10)).

⁶¹ *Convention Relating to the Status of Stateless Persons*, Art.31.1.

refugee was potentially a permanent, yet illegal addition to the host State. This causes a problem for States, especially given that cessation of refugee status ends *international* protection for stateless exiles under the provisions of the 1951 Refugee Convention.⁶²

In this light, the repeated reference of the 1949 UN study and the 1954 convention to ‘stateless refugees’ is problematic. It is problematic in particular as it imputes refugee status to a group more accurately termed stateless *exiles*. The constitutive non-deportability of the stateless person – refugee or no – significantly distances the stateless exile from the prior articulation of refugee status. The authentic stateless refugee is always qualitatively distinct from the ‘ordinary’ refugee, by virtue of her permanent non-deportability. Refugee status is always potentially temporary; the non-deportability of the stateless exile is always potentially permanent.⁶³ The international principle of reciprocity outlined previously in the paper meant that the latter was not up for grabs in the convention. The former fact of law could feasibly have been undermined, in requiring States to accord *permanent* refugee status to all stateless exiles on their territory. However, to do so would have regularised the status of the stateless exile to an inconceivable extent. It would have lowered the costs of free-riding on the multilateral principle of reciprocity to an untenable level. If the status of stateless exiles was normalised, States seeking to consolidate the boundaries of community and membership at times of conflict would likely view mass expulsion as a desirable method of so doing. Such acts would not only constitute a free-ride on the multilateral reciprocity of other States, but might – given time – fatally undermine its fragile existence as the basis for limited international cooperation. This interpretation contributes to a nuanced understanding of the conference deliberations and the convention which was their result. Nowhere does the convention take seriously the possibility that the very fact of being a stateless exile demonstrates a well-founded fear of persecution, despite its clearly prejudicial reality. It begs the question as to whether 11 million stateless persons are a relatively small price to pay (within the international framework) for a degree of stability. It would be one explanation for the unimaginative responses so far put forward. This paper contends that the argument

⁶² Yet while States are legally prohibited from expulsion, UNHCR encourages voluntary return. International protection will be withheld from any stateless person who ‘can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist and he is able to return to the country of his former habitual residence, claim grounds other than those of personal convenience for continuing to refuse to return to that country’. *Statute of the Office of the United Nations High Commissioner for Refugees*, General Assembly Resolution 428 (v) 325th plenary meeting, 14 December 1950, Chapter 2 Art.6(A) (e) and (f). This is mirrored in The Convention relating to the Status of Refugees, Chapter I Art.1 (C)(6)

⁶³ Delegates recognised this fact, and the final draft of the 1954 convention saw no need to further prohibit *refoulement* (forcible return of refugees). *Convention Relating to the Status of Stateless Persons*, Preamble, IV.

outlined above demonstrates the extent to which statelessness – as it emerged in the juridico-political context of the twentieth century – is a condition apart.

As such, the paper set out to examine the place of the refugee in the legal definition of statelessness. I want to suggest that the refugee, properly understood, is a qualitatively distinct legal subject than the stateless person. This claim is not affected by the fact that a stateless exile may, under certain circumstances, be protected by the Refugee Convention.⁶⁴ It suggests instead that the categories of legal subjectivity are grounded in factors external to individual persons, including political motivations and the frameworks of international law and international relations, in which community and membership are flashpoints. Person X, made stateless and forced to flee their country of former habitual residence could be protected as a refugee for a time, then effectively reclassified as a ‘mere’ stateless person subsequently. Statelessness is always statelessness in the international definition at hand, which remains the enduring international definition. While international law accepts that statelessness *per se* can be a legitimate source of voluntary and involuntary displacement, the convention can plausibly be interpreted as an exercise in clarification and crystallisation of the rights of States. This is not to deny that it offers limited protection to stateless exiles, but rather to remind the reader at this stage of the framework constraining both convention and delegates.

The 1954 convention is a multilateral treaty, which binds States parties together in a net of reciprocal rights and obligations.⁶⁵ As such, certain provisions have the potential to lead to ‘extra-territorial’ effects, which is to say that the actions of one State party in interpreting the convention affect other States parties. Given the sensitivity of States to their existing sovereign rights in the sphere of nationality, attempts were made by the delegates to limit extra-territorial effects.⁶⁶ A case in point is the provision of travel documents, which permit exit from one State, and subsequently permit entry into another. While an extra-territorial (or international) dimension is therefore inescapable, it was, in the convention, circumscribed in two ways. Firstly, the conference delegates devoted significant energy to ensuring that the binding definition of statelessness (on which the provisions hinge) was thin enough to be acceptable to all.⁶⁷ Secondly, any State that a stateless person might seek to enter subsequent

⁶⁴ Though this is itself problematic, and is dependent on the definition of ‘country of former habitual residence’ applied by States to asylum seekers. Where the view that a country does not qualify unless the claimant has a right to return there, the finding might be that the individual did not require protection; that ‘a stateless person cannot qualify as a refugee if they are not returnable to a country of former habitual residence’. Simperingham, “The International Protection of Stateless Individuals: A Call for Change”.

⁶⁵ Manfred Lachs, *Multilateral Treaties: A Study in Treaty Law* (Warsaw: State Scientific Publishing House, 1958) 18.

⁶⁶ Weis, “The Convention Relating to the Status of Stateless Persons,” 261-62.

⁶⁷ Ibid.: 260-62.

to her initial illegal admission would, under the convention, retain special rights against that first State. Any State issuing travel documents could legally be required to readmit the bearer, as it would a national.⁶⁸ Nevertheless, the travel documents envisaged by the conference do not confer other core attributes of membership. As such, this measure has been interpreted as born out of a concern to make the stateless exile at last deportable,⁶⁹ and to uphold existing international rights and obligations.⁷⁰

The effective permanence of illegal entrants within the territory of the State of arrival is hence inescapable after the 1954 Convention came into effect. States have often demonstrated reluctance when faced with calls to confer convention status on stateless persons resident on their territory, as I have argued elsewhere.⁷¹ One interpretation of this tendency will suggest in this section that it may be more rational for States to withhold convention status in the hope that the stateless exile will manage to clandestinely enter the territory of another.⁷² Borders would hence benefit from a unidirectional fluidity that might have practical costs: strong at the point of entry; weak at the point of exit, emphasising again the dialectical nature of State borders. At this stage the State previously host to the stateless population can deny being the point of origin, and such claims will prove difficult to verify legally.⁷³ Some ‘massive irregular movements’ are invisible and unacknowledged,⁷⁴ but others are visible and are well-explained by this rationale.⁷⁵ This interpretation must centre on the claim for readmission enshrined in the travel documents for stateless exiles, on which logic States must either accord them the status of something like sub-members, or ignore them. The first option inevitably restricts the scope of the sovereign right of the State to determine the borders of its permanent membership out of a multilateral obligation to border-States. The rational choice would be for a ‘rogue’ State to free-ride on the collective responsibility of States parties to the convention, and ignore (if not expel) resident stateless

⁶⁸ Ibid.: 258-59.. Weis notes the contrast to the provisions of the 1951 Refugee Convention, by which all travel documents issued to refugees must include the right of re-entry to the issuing State.

⁶⁹ Arendt, *Origins of Totalitarianism* 283.

⁷⁰ Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation".

⁷¹ Staples, ‘Revisiting Statelessness in International Political Theory’, Section 1.3

⁷² ‘Many statelessness problems could easily be resolved if governments had the political will to do it’.

⁷³ As was the case for the stateless from Burma: ‘it is a rubbish thing that people have left Myanmar. These people who are in refugee camps in Bangladesh are perhaps from Dhaka, but not one single person has left Burma’.

⁷⁴ Chris Lewa, “The Rohingya: Forced Migration and Statelessness,” in *Forced Migration in South Asian Region*, ed. Omprakash Mishra (Calcutta: Centre for Refugee Studies Jadavpur University, 2001).

⁷⁵ Good examples of such movements continue to take place on the Indo-Bangladesh border. These are considered in section 1.2 of this chapter.

exiles.⁷⁶ And this choice has apparently been exercised *in extremis* by several States – parties and no to the convention – and taken to its logical conclusion in the form of involuntary returns.⁷⁷ There is, at this stage, no reason to expect one kind of State (new; ‘weak’; totalitarian, say) to dominate this logic or practice. Given the limited scope of international cooperation; itself constituted by the juxtaposition of the sovereign rights of States and the existence of stateless migrants, the practice, though contingent on all manner of variables, is always potentially rational where the borders of community or membership are at stake.⁷⁸ Given that *order* – of status and of territory if not material order – remains a precondition of the sovereign State, the State in crisis has little to lose, and much to gain from consolidating control over their borders.

With reference to the provision of the convention for travel documents, it is at least clear that the enduring political community in the definition and protection of the stateless person is the State. And that the State cannot be isolated from its international context of rights and responsibilities in attempts to address statelessness. Multilateralism in international relations played an important role in the background to the definition of statelessness, and yet the appearance in the twentieth century of great stateless populations caused States and international institutions to reaffirm this multilateral dimension to the exclusion of its monstrous creation. To draw the analysis of multilateralism in the 1954 Convention relating to the Status of Stateless Persons to a close, I would like to reiterate two points. Firstly, that multilateralism between States parties necessarily limited the rights laid out for the stateless exile, and secondly that the lack of attention to the case of non-exiled stateless persons limited the convention’s scope. The next section of the paper seeks to demonstrate that this latter point cannot be detached from the international dimension of statelessness any more than the first point.

⁷⁶ Reports dealing with the forcible return of refugees (though not specifically stateless persons) have been drafted, and include threats of forcible return of stateless Rohingyas in exile from Burma. Maureen Lynch, "Forced Back: International Refugee Protection in Theory and Practice," (Washington DC: Refugees International, 2004), 17. Refugees International is highly critical of the decisions made by a great many States in contravention of international law.

⁷⁷ In 2001 in Estonia, Amnesty reports that at least 18,000 persons were ‘erased’, and many of these were served forcible removal orders and forced to leave the country. "Amnesty International's Concerns" (paper presented at the 57th session of the Executive Committee of the United Nations High Commissioner for Refugees, September 2006).. Se also Maureen Lynch and Thatcher Cook, "Stateless Biharis in Bangladesh: A Humanitarian Nightmare," (Washington, DC: Refugees International, 2004).

⁷⁸ An emerging literature supports the assumption here that the conventional wisdom on borders and globalisation needs rethinking. See, for example Peter Andreas, *Border Games: Policing the U.S - Mexico Divide* (Ithaca NY: Cornell University Press, 2001).

Attention to the definition of statelessness is further complicated by the fact that, as this paper seeks to demonstrate, not all stateless persons (even under the legal definition) are refugees, or even exiles. The 1949 study acknowledged this fact, yet reported that non-exiled stateless persons were limited in number, and furthermore that their position was in certain respects more favourable than that of their refugee counterparts.⁷⁹ For this reason no survey was mandated, and as such it is now impossible to verify these claims, or to assess whether their number has increased in the interim. The stateless exile, in contrast to the ‘invisible’ stateless person; s/he who is unwilling or unable to cross political borders, thus becomes the relevant holder of ‘the status of stateless person’. The visible stateless exile – problem for State governments – therefore becomes international during the process of defining statelessness. And yet the difficulties for stateless persons outlined in the 1949 study are largely applicable to all stateless persons. The principal difficulties associated with exile are said to be the barriers erected against stateless exiles;⁸⁰ and yet these same barriers in many cases prevent exile through restrictions on the freedom of movement. By contrast, the stated difficulties for the countries of reception,⁸¹ which have already been discussed in this paper, only acknowledge those stateless persons that are displaced. These persons cause visible difficulties; the non-exiled stateless person is by contrast invisible within international relations. The stateless exile is thus differentiated from the stateless person despite the fact that the most fundamental characteristic – the lack of membership and inability to migrate legally, and all the knock-on effects – are shared by all stateless persons as I understand them.

The non-exiled stateless person imposes no burden on third-party States; s/he remains in the country of habitual residence, and as such the relation to the international is unspoken. The question as to whether the non-refugee stateless person is an international problem is interrogated in each chapter of my thesis. What is immediately troubling to this paper is the lack of attention to her plight is that she too lacks nationality, is deprived of her rights, and yet is largely unprotected by international law. The number of non-exiled stateless person has (on the best available data) increased by around 7 million since the 1940s. It is reasonable also to conjecture that their number might decrease (and the number of stateless exiles increase) if the sovereign right of States that underpins reciprocity were ever to be displaced. The internationally visible dimension would of course subsequently expand; another rationale for control of borders and maintenance of the contract. For any and all of the large number of non-exiled stateless person presently alive, the structure is hugely prejudicial. For as long as ‘habitual residence’ is equated internationally with home, and her freedom of movement is

⁷⁹ "A Study of Statelessness," II(2).

⁸⁰ Ibid., V(3).

⁸¹ Ibid., V(1).

restricted, s/he is a permanent stranger in her own home. As such, a case has been made in this paper for separating out the refugee and the stateless person, whose base vulnerability is their ‘outlaw’⁸² status. By contrast, it has been demonstrated that the 1954 Convention provides principally for non-refugee, *exiled* stateless persons, separating these out from non-exiled stateless persons. Contemporary observer Paul Weis was clear on this point that there remained a category of unprotected persons ‘neither enjoying an international legal status nor international protection: stateless persons in States which will not become parties to the 1954 Convention’.⁸³ What is more, neither empirical studies of statelessness nor the testimony of stateless persons confirms a qualitative difference between the experiences of exiled and non-exiled stateless persons.⁸⁴ For this reason, the thesis will assume that *all* stateless persons – for as long as they are stateless – are effective outlaws,⁸⁵ and anomalous to the normal legal forms of subjectivity.

It is clear that the appropriate solutions for stateless persons will be dependent on their circumstances; to lump stateless persons together would be to muddy the waters further. But to attempt a more adequate theorisation of statelessness *per se* might help to overcome some of the paradoxes in the current definition. A response must be articulated to counter the assumption that ‘the basic human rights of stateless persons are, *in principle*, to be respected in the country of habitual residence. Such persons are not, therefore, assumed to be in acute need of international protection unless they are also refugees’.⁸⁶ The perpetual conflation of protection and international displacement obscures the truth that important features of international relations construct the existence of *all* stateless persons. Stateless persons in, Burma, Bangladesh or elsewhere suffer in important ways because of the international dimensions this paper has interrogated, not merely because of the acts of one (or even two) State(s).

To sum up the consequences of the definition of stateless set out in the 1954 Statelessness Convention and its later more expansive interpretations three points are crucial. One: the realities of geopolitics since 1918 have made statelessness a fact of life for large but uncertain

⁸² Ibid., Chapter 1(2).

⁸³ Weis, “The Convention Relating to the Status of Stateless Persons,” 264.

⁸⁴ This is in spite of the claim that ‘the stateless person who is not a refugee can obtain documents establishing his civil status from the authorities of the countries where these documents were originally issued, because these authorities have no reason to refuse them to him’. “A Study of Statelessness,” IV. In fact, these documents may never have been issued, and are often refused. The thesis attempts to interrogate the reasons for such acts.

⁸⁵ With the exception of those ‘statefree’ persons who do not suffer as a result of their status.

⁸⁶ Executive Committee of the High Commissioner’s Programme, Sub-Committee of the Whole on International Protection, *Note on Unhcr and Stateless Persons*, 26th meeting, 2 June 1995, paragraph IV(19). Italics mine.

(due to the reality that States retain the most accurate data on local populations⁸⁷) numbers of people. Two: that international conventions have demonstrably proved ineffective in reducing these numbers, due in part to the limited scope of the definition of statelessness within them, in part to the nature of state accession to treaty law, and in part to the nature of international relations. Three: that there has been little or no analysis of what the existence of the non-exiled stateless person tells us about political community and membership since the First World War, or about the impact of these on individual lives, despite widespread recognition that statelessness is a characteristically international problem. It is an international problem partly by virtue of its permanent source in the theory and practice of nationality, the global lack of general rules, and the plurality of systems of authoritative (because sovereign) rules. The argument thus far is intended to show that statelessness is a difficult problem for international law and international institutions to face. It has not yet said much about why this difficulty has proved so enduring. The underlying causes of the ambiguity surrounding statelessness are examined further, again through the definition of statelessness, elsewhere.⁸⁸

The paper has aimed to establish grounds for critiquing the definition of statelessness which has dominated international theory and practice, and to suggest in particular that there has been an unhelpful conflation of the figure of the refugee with that of the stateless person. This conflation has obscured the singularity of the relationship between State and stateless person, which is unmediated by membership, which in turn hinders recognition of the stateless person. The stateless person that is represented by the ‘internationally recognized definition’,⁸⁹ has of course been cast as an anomaly.⁹⁰ In addition the project of definition recognised that the genesis of statelessness was tied to the concept of nationality.⁹¹ This paper has attempted clarification through an exploration of statelessness, and tried also to make explicit that the nationality ‘problem’ is in fact a problem arising from the community/membership nexus that grounds States’ sovereign right to determine the borders of their citizenry. Statelessness is problematised further once it becomes apparent that this sovereign right grounds the fragile reciprocity on which the present order of territory and life depends. The dilemma is this: statelessness is almost impossible to prevent in the present framework of international relations; it is also almost impossible to rectify once it occurs.

⁸⁷ Note the number of responses (seventy-four) to the 2004 Questionnaire on Statelessness. UNHCR, “Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection,” (Geneva: UNHCR, 2004).

⁸⁸ Staples, ‘Revisiting Statelessness in International Political Theory’ Chapter 2.

⁸⁹ *Convention Relating to the Status of Stateless Persons*. Article 1(1).

⁹⁰ “A Study of Statelessness,” Section I.

⁹¹ Ibid., II(1).

The stateless person is a creation of the international, yet must remain either invisible to international law and politics, or endure in a tense relationship with the State whose presence s/he troubles. The coextensive relationship that has developed between the Weberian State and an institutionalised form of membership as status in the twentieth century renders unilateral State action on statelessness implausible; and multilateral action impossible. To conclude is to recall the title of this paper: the stateless person cannot attain the legal personality promised all individuals.⁹² Examination of the enduring difficulties that have grown from the soil of this definition must be the subject of another paper. So too must examination of the potential for normative theory to remedy the mismatch in law between, on the one hand, the ideal of distinctly ‘human’ rights, and on the other, the equation of order – domestic and international – with territory and life.

⁹² Ibid., Section I.

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