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# A Typology of Statelessness

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# Abstract

To this day, legal statelessness is surprisingly undertheorised in political theory. While there has recently been a resurgence of scholarship on the topic, no one has yet offered a formal typology of statelessness. This dissertation attempts to offer a formal typology. In international law, stateless people fall under two general categories. They are either *de facto* or *de jure* stateless – that much is recognised. The first, second, and third chapter of this dissertation interrogate the status quo legal framework by assessing international agreements and the proposals that relevant experts have made for reform. Chapters four, five, six, and seven then examine how stateless people have been treated, at different times and in different places, by governments and the courts around the world. Based on various examples I argue that there are significantly distinct types of statelessness. They are individual statelessness and collective statelessness, as well as three subtypes: voluntary, structural, and denigrative statelessness. These subtypes derive from three distinct sources of nationality deprivation: for voluntary statelessness individuals themselves, for structural statelessness international law, and for denigrative statelessness the country of origin. Having established this typology, I go on to contend that the rights owed to stateless people differ depending on the type of statelessness they suffer from.

# Lay Summary

To this day, the issue of legal statelessness has not often been addressed in political theory. This dissertation does so by asking several questions: What exactly is statelessness? Is it a unified concept or are there different types? Should all stateless people possess the same rights? The first, second, and third chapter of this dissertation interrogate the current legal framework by assessing international agreements and the proposals that relevant experts have made for reform. Chapters four, five, six, and seven then examine how stateless people have been treated, at different times and in different places, by governments and the courts around the world. Based on various examples I argue that there are significantly distinct types of statelessness. They are individual statelessness and collective statelessness, as well as three subtypes: voluntary, structural, and denigrative statelessness. These subtypes derive from three distinct sources of nationality deprivation: for voluntary statelessness individuals themselves, for structural statelessness international law, and for denigrative statelessness the country of origin. Having established these types, I go on to contend that the rights owed to stateless people also differ depending on the type of statelessness they suffer from.

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Parts of this dissertation are due to be published elsewhere. In particular, large parts of chapters 1 and 4 set to appear in Benedikt Buechel, "A Typology of Statelessness" in *The Statelessness & Citizenship Review* (forthcoming).

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<sup>1</sup> Peanut Press: Thomas Johnson, Edward Meltzer; Bertie Gleave; Roddy Lamont; and Murid Laly. <https://www.peanutpress.co.uk/>. 'DJ Elise's Vibetown', Tiana Elise Douglas. <https://www.twitch.tv/dj1elise> :D

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# Introduction

After I had renounced my US nationality in France in 1948,<sup>2</sup> “Prince Philip first heard from me in 1953, when fate brought me to England on my way to India. Hungry for wisdom, I had decided to study with Guru Nataraja, head of the Gurukula Movement. The day before I set sail, however, I had learned that ‘Stalag 17’ was about to be staged in England, and the producers were desperate for someone to play the 2<sup>nd</sup> comedy lead, ‘Harry Shapiro.’ [...] By the time I landed the job, I was crossing the Atlantic, however, with only a three-day transit visa to enter the country. The American producer, Sam Bird, met me at the dock and helped extend my stay to three months on a Labour Permit. The show went on tour.”<sup>3</sup>

-- *Garry Davis, US air force veteran and Broadway actor*

“At first, I didn’t want to agitate the public about something they could not affect, but now we have to prepare the public. Not to be refugees – because that’s a word we don’t like – but for relocation with dignity.<sup>4</sup> Our status is not at our initiation and our churches are now involved [in preparing people for the future]. All of our islands are now involved looking at possible options. We have examples as recently as last week in Parliament of requests for sea walls to be constructed and we’ve been doing surveys. In one village it will cost hundreds of thousands of dollars, and for another island with one village, the cost is closer to two million. We don’t have the money. But still we try to attend to the most urgent issues, and the people all say, ‘But we are in an urgent situation.’ You have the erosion and flooding at high tides and [saltwater] intrusion into food crops, but we don’t have the money to respond.”<sup>5</sup>

-- *Anote Tong, President of Kiribati from 2003 to 2016*

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<sup>2</sup> See Garry Davis, *Dear World, A Global Odyssey* (Xlibris Corporation, 2000), 15.

<sup>3</sup> Davis, 141.

<sup>4</sup> The original says “world” instead of “word” but this seems to be a typo.

<sup>5</sup> David Helvarg, ‘Interview with a Drowning President, Kiribati’s Anote Tong’, *The Nation*, 1 October 2010, Accessed 12 December 2020. <https://www.thenation.com/article/archive/interview-drowning-president-kiribatis-anote-tong/>.

“I had children who needed to eat. It was prohibited to work. Hence, we had no other choice than to leave again. We thought it was necessary to indirectly immigrate to Germany – via another country. That’s why we first traveled to Finland. There, they immediately arrested, interrogated, and forced us to seek asylum. We were detained in the airport prison for eight hours. Afterwards, we were transferred to a shelter in the city centre. We were treated badly there – the security guards were frightening.”<sup>6</sup>

-- *Nour, single parent from Syria*

I begin my dissertation with these quotes from three individuals whose lives could not be more different. Yet they share one important commonality: in terms of their legal status, they are all stateless or threatened by statelessness.

“Statelessness” is one of those technical terms that rarely appears in public discourse. As of 2022, a google search provides only 3,360,000 results for the term “statelessness.” By contrast, the related term “refuge” provides 1,150,000,000 results. This huge difference in numbers may have etymological reasons. While the term “statelessness” is relatively modern, the term “refuge” can already be found in the bible.

In its most common use as a legal concept, “statelessness” is not meant to signify an antithesis to the State but instead describes the lack of political membership within the modern state system. This lack only became an issue after the First World War when states re-established passport controls and began to regulate all aspects of social life because the stateless have ever since been completely enclosed by the modern state system without being recognised members of any state.<sup>7</sup>

In *The Invention of the Passport: Surveillance, Citizenship and the State*, John Torpey shows how identity documents have been essential in this enclosure. From a practical point of view it would be impossible to maintain the legal category of nationality without them.<sup>8</sup> Besides, there is also an instrumental reason why states have monopolised the legitimate means of movement through passports controls: distinguishing between non-members and members, from whom necessary resources can be extracted,

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<sup>6</sup> Kollektiv Polylog, *Das ist meine Geschichte: Frauen im Gespräch über Flucht und Ankommen* (Unrast Verlag, 2019), 36 (My translation from German).

<sup>7</sup> United Nations, ‘A Study of Statelessness’, E/1112;E/1112/Add.1 (Lake Success, New York, 1949), 8f.

<sup>8</sup> John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2018), 2.

facilitates their reproduction.<sup>9</sup> The two major resources for the advancement of the State are *wealth* through taxes and labour as well as *security* through conscription, surveillance, and exclusion.<sup>10</sup> This resource of security and the fact that passports also marked a turning point in the understanding of “[...] the legal concept of the ‘foreigner’ [in that it] shifted from the local to the “national” level [...]” is particularly relevant to this study.<sup>11</sup>

The monopolization of the legitimate means of movement via passports did not proceed without critique at the time. While the League of Nations remained divided on whether passport controls should be re-established,<sup>12</sup> Egidio Reale argued that they were first and foremost a means to punish political opponents.<sup>13</sup> Developing a similar understanding of how identity documents affect our lives, many scholars seem to agree that “[t]he stateless are the most vulnerable people in our world [...]”.<sup>14</sup> In this dissertation, I hope to show that this statement is valid because there are indeed many stateless individuals and collectives who are incredibly vulnerable to violence. Yet I argue that it is an oversimplification. Statelessness is an extremely complex phenomenon.

## The Argument

This dissertation attempts to offer a new language more equipped to untangle the complexities of statelessness. To this day, legal statelessness is surprisingly undertheorised in political theory.<sup>15</sup> While there has recently been a resurgence of scholarship on the topic,<sup>16</sup> no one has yet offered a formal typology of statelessness.

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<sup>9</sup> Torpey, 2.

<sup>10</sup> See Torpey, 8, 18, 23f.

<sup>11</sup> Torpey, 24.

<sup>12</sup> Egidio Reale, ‘The Passport Question’, *Foreign Affairs (New York, N.Y.)* 9, no. 3 (1931): 506, <https://doi.org/10.2307/20030376>.

<sup>13</sup> Reale, 509.

<sup>14</sup> Jay Milbrandt, ‘Stateless’, Legal Studies Research Paper Series (California: Pepperdine University School of Law, 2012), 1; See also Indira Goris, Julia Harrington, and Sebastian Köhn, ‘Statelessness: What It Is and Why It Matters’, 2009, 4.

<sup>15</sup> See Kristy A. Belton, ‘The Neglected Non-Citizen: Statelessness and Liberal Political Theory’, *Journal of Global Ethics* 7, no. 1 (1 April 2011): 59–71, <https://doi.org/10.1080/17449626.2011.558733>.

<sup>16</sup> See for example Alice Edwards and Laura van Waas, eds., *Nationality and Statelessness under International Law* (Cambridge: Cambridge University Press, 2014), <https://doi.org/10.1017/CBO9781139506007>; Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, eds., *Understanding Statelessness*, First edition, vol. 1 (London: London: Routledge, 2017), <https://doi.org/10.4324/9781315200460>; Mira L. Siegelberg, *Statelessness: A Modern History* (Harvard University Press, 2020); Jane Anna Gordon, *Statelessness and Contemporary Enslavement* (New York, NY: Routledge, 2020). Besides these publications, the Peter McMullin Centre on Statelessness at Melbourne Law School and the Institute on Statelessness and Inclusion started to publish *the Statelessness & Citizenship Review* in 2019.

Several political theorists have only occasionally introduced such concepts as collective statelessness, structural statelessness, strategic statelessness and normatively stateless.<sup>17</sup>

In this dissertation, I will build on their work and offer a more formal typology of statelessness. I deem this to be an important project as a solid understanding of legal statelessness is needed before any nuanced remedy can be developed. Thus, the dissertation first and foremost asks an ontological question: what exactly is legal statelessness; is it a unified concept or are there different types? Only after having taken a significant effort to seek an answer to this question will I examine whether all stateless people should possess the same moral rights.

I want to be very explicit about what this dissertation is and is not. It is a critique written from within the modern state system that fails most stateless people. Taking “statelessness” to signify the antithesis to the state, as anarchists do,<sup>18</sup> is a different yet closely-related project – it is one that I am increasingly drawn to after having studied legal statelessness within the modern state system for the last four years.

Throughout the dissertation, I contend that there are different types of statelessness. The argument is divided into four parts. The first part (chapters 1, 2 and 3) interrogates two general legal categories of statelessness: *de facto* or *de jure*. I make two major proposals on the basis of consistency. First, under the current UN human rights framework, every individual should count as *de facto* stateless if the country of nationality denies them or is not willing to work towards the implementation of their minimum core human rights. Second, I also suggest that *de facto* statelessness may be a better legal framework to address the problem of refuge. The reasons for this are twofold: the legal framework of *de facto* statelessness does not only prevent the use of a negatively loaded refugee identity but also synchronises human rights law.

The second part of the argument (chapters 4 and 5) confronts the idea that there may be different subtypes of statelessness. I argue in favour of three: voluntary, structural,

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<sup>17</sup> For ‘collective statelessness’ see Kelly Staples, *Rethorising Statelessness: A Background Theory of Membership in World Politics* (Edinburgh: Edinburgh University Press, 2012), 2; For ‘structural statelessness’ see Phillip Cole, ‘Insider Theory and the Construction of Statelessness’, in *Understanding Statelessness*, ed. Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, First edition, vol. 1 (London: London: Routledge, 2017), 257f., <https://doi.org/10.4324/9781315200460>; For ‘strategic statelessness’ see Neha Jain, ‘Manufacturing Statelessness’, *American Journal of International Law* 116, no. 2 (April 2022): 237–88, <https://doi.org/10.1017/ajil.2022.2>; For ‘normatively stateless’ see Matthew J Gibney, ‘Statelessness and Citizenship in Ethical and Political Perspective’, in *Nationality and Statelessness under International Law*, ed. Alice Edwards and Laura van Waas, 2014, 47.

<sup>18</sup> See for example David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Farrar, Straus and Giroux, 2021).

and denigrative statelessness. They derive from the source of deprivation: for voluntary statelessness individuals themselves, for structural statelessness international law, and for denigrative statelessness the country of origin. Besides the sources of deprivation, I also examine the underlying structure of those three subtypes. I suggest that, in the case of voluntary statelessness and structural statelessness, legal non-recognition and social non-recognition by the country of origin do not necessarily coincide. This is not true with respect to denigrative statelessness; here the deprivation of legal recognition and social recognition by the country of origin seem closely intertwined. The connection between the two is particularly visible when an individual is denationalised. In the case of denationalisation, the deprived do not only lack a legal status but also suffer from the denial of moral equality.

The third part of the argument (chapters 6 and 7) concerns a further distinction. I moreover divide the stateless into those who suffer from individual statelessness and those who suffer from collective statelessness. “Individual statelessness” describes a type of statelessness as experienced by individuals such as Garry Davis, Friedrich Nottebohm, or Shamima Begum who are all without a nationality but do not share an affiliation. “Collective statelessness,” on the other hand, describes a type of statelessness as experienced by entire collectives such as Palestinians, Kurds, or the Rohingya with a shared history of denationalisation.

The following chart illuminates the multiple distinctions I have made:

De Jure						De Facto					
Individual			Collective			Individual			Collective		
V	S	D	V	S	D	V	S	D	V	S	D
								R			

(“v” = voluntary, “s” = structural, “d” = denigrative, “r” = refugee)

Finally, the last part of the argument (chapter 8) involves asking the question of whether all stateless people should possess the same moral rights. I contend that they do not. Following the multiple distinctions expressed in the previous chart, I claim that they ought to be granted different moral rights instead.

## Structure of the Dissertation

This section offers a more detailed outline of each chapter. Chapter 1 lays the groundwork for this dissertation by examining the two general legal categories of statelessness: *de facto* and *de jure*. Having addressed the question of what status stateless individuals hold in international law, I argue that the concept of responsibility facilitates a better understanding of what it means to be legally stateless.

Chapter 2 then provides a more specific critique of the international legal protection regime against statelessness. I contend that the “traditional” working definition of *de facto* statelessness runs into contradictions when read against the UN’s human rights framework, and more precisely, that someone should count as *de facto* stateless (a) if their country of nationality has the capacity to implement the minimum core human rights but refuses to do so, or (b) if their country of nationality lacks the capacity to implement the minimum core human rights and refuses to seek international assistance for this purpose.

Chapter 3 goes even further. It interrogates a subclass of *de facto* statelessness, namely the legal category of a refugee. I argue that refugee should not be framed through the *refugee* identity but instead be seen as a condition of *de facto* statelessness. The main reason behind this proposal is based on a genealogy of the refugee identity which shows that the refugee label has always been negatively connotated.

Chapter 4 develops a formal typology of statelessness beyond the two legal categories, *de jure* and *de facto*, which are already codified in international law. I distinguish three subtypes based on the source of nationality deprivation. They are voluntary statelessness, structural statelessness, and denigrative statelessness. Besides these distinctions, I also make the argument that denigrative statelessness is the most harmful subtype.

Chapter 5 takes a closer look at denationalisation as one of the major causes of denigrative statelessness. Exposing a historical connection to vilification, I contend that denationalisation is much more difficult to justify than generally thought. Unlike most contemporary proponents of denationalisation, I draw on just war theory, where the concept of vilification already exists, to examine under what conditions denationalisation may be justified.

Chapter 6 addresses the problem of how to conceptualise individual statelessness. The chapter deepens our understanding of the experience of stateless individuals by comparing it to that of slaves. Having discussed two paradigmatic definitions of slavery, a legal definition that takes slaves to be property, and a sociological definition that considers total domination, natal alienation, and denigration as constitutive elements, I argue that these definitions offer a useful analytic framework to conceptualise individual statelessness. The reasons are twofold. First, both definitions of slavery facilitate a more nuanced understanding of the various ways stateless individuals are harmed. Second, the sociological definition also helps us identify cases of individual statelessness that are not captured by the mere legal conception presented in chapter two.

Chapter 7, by contrast, turns to collective statelessness. Following Hannah Arendt's work, I identify four wrongs a collectively stateless people suffer. They are home(land)lessness, chronicity, public silencing, and rightlessness. Having conceptualised those four wrongs, I then offer a new interpretation of Arendt's famously coined "right to have rights." I argue that the *right to have rights* should not be read as an individual right to membership but as a collective *right to a polity*.

Chapter 8 draws the previous chapters together. It asks whether all stateless people should be granted the same rights. Taking the here developed typology as a basis, I argue that different types of statelessness justify distinct moral rights. Put precisely, under the human rights framework, the voluntary stateless have a right to immigrate but they need not be given the absolute right to asylum, the right not to be displaced and the right not to be permanently alienated. The country of origin is not obliged to grant them those rights if their renunciation of nationality is motivated by the shirking of responsibilities towards fellow citizens. The structural and denigrated stateless, by contrast, must be granted the right to asylum, the right to immigrate, the right not to be permanently alienated, and the right not to be displaced. From the latter two rights, one can moreover derive specific demands if the structural and denigrated stateless are a collective. Drawing on chapter 7, I contend that they should then also be granted a right to a polity.

## Methodological Commitments

As other major studies in political theory on the topic of statelessness, I have chosen to take an interdisciplinary perspective.<sup>19</sup> My dissertation spans from legal to political theory broadly construed. Acknowledging my own limitations, I have greatly benefitted from other scholars' empirical studies. Without them, I would not have been able to develop any of my arguments on how legal statelessness can better be understood conceptually.

These arguments depend to a great extent on a simple assumption: it makes a difference what concepts we use in defining statelessness. Mathias Thaler offers a defence of a more general assumption. He argues not only that concepts are contestable even when they are enshrined in municipal or international law,<sup>20</sup> but also that we need to conceptualise the right way as it largely affects mitigation.<sup>21</sup>

For Thaler, ideal and non-ideal theory are not the best approaches. While ideal theory – usually understood as the establishment of universal principles through abstraction – is problematic because it disregards circumstances and context, non-ideal theory is lacking because it avoids normative judgements categorically.<sup>22</sup> To overcome these limits, Thaler therefore develops “sober realism.” It builds a middle ground between ideal and non-ideal theory. This is to say that sober realism puts normative judgements on an equal footing with contextualisation.<sup>23</sup> I take his approach to guide this dissertation.

Genealogy is a particular method that helps us to conceptualise the way Thaler proposes. It was first developed by Friedrich Nietzsche in *On the Genealogy of Morality* which encapsulates the study of “[...] the conditions and circumstances under which [moral values] grew up, developed and changed.”<sup>24</sup> In this book, Nietzsche was not interested in judging what is good and bad but in the history of morality itself.<sup>25</sup> For

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<sup>19</sup> See also Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, ‘Introduction: Providing a Framework for Understanding Statelessness’, in *Understanding Statelessness*, ed. Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, First edition, vol. 1 (London: London: Routledge, 2017), 5, <https://doi.org/10.4324/9781315200460>.

<sup>20</sup> Mathias Thaler, *Naming Violence: A Critical Theory of Genocide, Torture, and Terrorism* (Columbia University Press, 2018), 2.

<sup>21</sup> Thaler, 1.

<sup>22</sup> Thaler, 2f.

<sup>23</sup> Thaler, 6.

<sup>24</sup> Friedrich Nietzsche, *Nietzsche: ‘On the Genealogy of Morality’*, Revised Student Edition (Cambridge University Press, 2006), 7f.

<sup>25</sup> Nietzsche, 8, 39.

him, it is only through the study of history that one becomes aware that “[...] the judgment ‘good’ does not emanate from those to whom goodness is shown! Instead, it has been ‘the good’ themselves, meaning the noble, the mighty, the high-placed and the high-minded, who saw and judged themselves and their actions as good.”<sup>26</sup>

As Nietzsche shows with this example, the context is arguably as important as normative judgement. In chapters 2, 3, and 5, I thus heavily draw on the genealogical method. For example, in chapter 2, I trace back the history of the *de facto* statelessness definition to contend that it runs into contradictions when read against the UN’s human rights framework. In chapter 3, I examine the beginnings of the refugee label and its uses today to show that it always had negative connotations. In chapter 5, the genealogical method helps me to reveal a historical link between denationalisation and vilification. Having exposed this link, I then argue that it becomes much harder to justify the deprivation of nationality. Thus, in all these cases my conceptualisation of statelessness depends largely on the historical context and circumstances.

In other chapters, I rely on a variety of examples to develop my arguments. In doing so, I follow three principles. First, I choose examples that are archived in much detail. Chapter 4, for instance, examines the well-documented cases of Garry Davis, Friedrich Nottebohm, and Shamima Begum to sketch voluntary, structural, and denigrative statelessness of individuals. Davis voluntarily renounced his U.S. nationality, Nottebohm was not recognised as a national of Lichtenstein by the International Court of Justice, and Begum was forcefully deprived of her British nationality by the UK Home Office. Chapter 7 draws on Palestinians’ and Rohingyas’ staggering history of denationalisation to conceptualise collective statelessness.

Second, if not in contradiction with the first principle, I draw on representative examples that speak to today’s circumstances. The short-lived statelessness of Albert Einstein, for instance, tells us arguably less about this condition than that of Garry Davis who was without a nationality for most of his life. The statelessness of political communities before the establishment of the modern state system, by contrast, is not relevant for this study at all.

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<sup>26</sup> Nietzsche, 39.

Third, whenever possible, I make use of counterexamples that push against key assumptions. This is most visible in chapter 4; here, I discuss the experience of Garry Davis and sinking islanders to suggest that the deprivation of legal and social recognition do not necessarily coincide in all cases of statelessness. Unlike those who fall under denigrative statelessness, the voluntary and structural stateless have continuously been offered protection by their governments.

Despite this principled selection, there is one major limitation: the examples of stateless individuals are mostly taken from a small number of countries with relatively few cases of statelessness. Take that of Shamima Begum, for instance. *The Statelessness Index* reports 5,236 applications for the statelessness determination procedure in the United Kingdom between April 2013 and September 2019.<sup>27</sup> Even under conservative estimations, this is low compared to countries like India or Myanmar where a great number of Muslims have been deprived of their nationality. Although the situation of former British national Shamima Begum and Jamalida Begum, a stateless Rohingya woman,<sup>28</sup> are in many ways similar, I thus avoid drawing a strong positive conclusion. The formal typology that I have developed in this dissertation should be seen as a hypothesis itself. Rather than offering a final answer to what statelessness is, I hope that my research will help others to ask the question more precisely in the future.

At last, I want to bring awareness to some of the ideas that Deirdre Brennan and Thomas McGee have assembled under the name of “Critical Approaches to Statelessness.”<sup>29</sup> They identify several questions that are of particular importance for any scholar of statelessness. First, does the study go beyond the historically dominant legal framework? Second, does the research “[...] decentre the power dynamics of knowledge production[,]” and avoid the ‘Othering’ of stateless people?<sup>30</sup> Third, does the study recognise that the unqualified use of legal language can be paternalistic and dehumanising. Before starting the writing process, I have reflected on all of these questions. They are addressed in different parts of this dissertation. While most

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<sup>27</sup> European Network on Statelessness, ‘United Kingdom’, *Statelessness Index*, 17 January 2018, Accessed 10 November 2020. <https://index.statelessness.eu/country/united-kingdom>.

<sup>28</sup> Geneva International Centre for Justice, ‘Jamalida Begum – Rohingya Survivor Escapes Horror’, accessed 10 November 2021, <https://www.gicj.org/lest-we-forget/887-jamalida-begum-rohingya-survivor-escapes-horror>.

<sup>29</sup> Deirdre Brennan and Thomas McGee, ‘Introductory Blog: Taking a “Critical” Approach to Statelessness’, Melbourne Law School, July 2020, Accessed 22 May 2021. <https://law.unimelb.edu.au/centres/statelessness/resources/critical-statelessness-studies-blog/introductory-blog-taking-a-critical-approach-to-statelessness>.

<sup>30</sup> Brennan and McGee.

chapters combine legal and political theory, chapter 3, 4, and 5 attempt to expose some of the ways in which stateless people are othered. Moreover, chapter 3 offers an explicit critique of the refugee label.

# Chapter I: Statelessness as a Legal Concept

## Introduction

Ever since the end of the Second World War, international law has become more cosmopolitan. The codification of *The International Declaration of Human Rights* is arguably the most significant development in this direction. In this first introductory chapter, I ask whether this turn towards a cosmopolitan legal framework has had any implications for stateless individuals. In other words, I am interested in what the primary meaning of legal statelessness is today. Discussing different pillars of the human rights framework, I argue that the situation of stateless people has hardly been improved with respect to their position in international law. Put precisely, most of them are still less than objects and thereby at the mercy of the country of residence. The chapter is divided into two parts. The first shorter part discusses the two general categories of stateless individuals: *de jure* and *de facto*. The second part then examines two things: first, how the legal concept of nationality, which is central to the *de jure* and *de facto* statelessness definition, is commonly understood in international law, and second, what implication this has for the stateless.

## De jure vis-à-vis De facto Statelessness

Since its 1946 Memorandum *Statelessness and Some of its Causes: An Outline*, the United Nations (UN) has distinguished two general categories of stateless individuals: *de jure* and *de facto*.<sup>31</sup> In the 1954 Statelessness Convention, a *de jure* stateless individual is defined as someone “[...] who is not considered as a national by any State under the operation of its law.”<sup>32</sup> The phrase “under the operation of its law” is

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<sup>31</sup> The 1949 Study also distinguishes between stateless individuals and refugees, pointing out that the latter is a subtype of the former. United Nations, ‘A Study of Statelessness’, 3, 6.

<sup>32</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).

interpreted as a requirement for states to determine nationality based on nationality law as well as state practice such as civil registration.<sup>33</sup>

While the merits of the *de jure* statelessness definition are that it is concise and quantifiable – an individual either possess a nationality or not – it falls short in failing to consider attributes and quality of nationality.<sup>34</sup> The *de facto* statelessness definition addresses this failure.<sup>35</sup> In the 1949 *Study on Statelessness*, the UN defines *de facto* stateless individuals as those “[...] who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.”<sup>36</sup>

## Statelessness as Lack of Responsibility for Protection

### *Nationality as a Legal Concept*

As shown by its UN working definition, the concept of *de facto* statelessness concerns the scope of protection that comes with the possession of nationality. To understand what this means one must turn to nationality as a legal concept.

There are two ways in which nationality is understood.<sup>37</sup> First, individuals who are in possession of a nationality are seen as citizens of a country.<sup>38</sup> This view is “[...]” adopted by many international human rights law scholars “[...]” who focus on the close

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<sup>33</sup> See Betsy L. Fisher, “The Operation of Law” in Statelessness Determinations Under the 1954 Statelessness Convention’, *Wisconsin International Law Journal* 33, no. 2 (Fall 2015): 254–89; Laura Van Waas and Amal De Chickera, ‘Unpacking Statelessness’, in *Understanding Statelessness*, ed. Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, First edition, vol. 1 (London: London: Routledge, 2017), 60, <https://doi.org/10.4324/9781315200460>.

<sup>34</sup> See Carol A. Batchelor, ‘Stateless Persons: Some Gaps in International Protection’, *International Journal of Refugee Law* 7, no. 2 (1995): 232, <https://doi.org/10.1093/ijrl/7.2.232>.

<sup>35</sup> Batchelor, 232.

<sup>36</sup> United Nations, ‘A Study of Statelessness’, (n 6) 6.

<sup>37</sup> The term “nationality” is also used to describe belonging to a national group. See for example Katherine Tonkiss, ‘Statelessness and the Performance of Citizenship- as-Nationality’, in *Understanding Statelessness*, ed. Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, First edition, vol. 1 (London: London: Routledge, 2017), 241, <https://doi.org/10.4324/9781315200460>.

<sup>38</sup> In this case “nationality” and to “citizenship” are often treated as synonymous. See Kelly Staples, ‘The Ethics of Statelessness’, in *The Routledge Handbook to Rethinking Ethics in International Relations*, by Birgit Schippers, First edition. (Routledge, 2020), 149, <https://doi.org/10.4324/9781315613529-14>; David S Weissbrodt and Clay Collins, ‘The Human Rights of Stateless Persons’, *Human Rights Quarterly* 28, no. 1 (2006): 246, <https://doi.org/10.1353/hrq.2006.0013>.

relationship between nationality and citizenship.<sup>39</sup> For them, nationality and citizenship can mostly be used interchangeably.

However, it is not clear whether the concept of statelessness is meant to address this connection, as the denial of citizenship rights is not considered to render someone stateless by the current legal framework. In law, nationality can function independently of citizenship and vice versa.<sup>40</sup> Georg Schwarzenberger, for instance, contends that “[f]or the purposes of his own municipal law, a [state] may deny to groups of inhabitants [...] all or most rights of citizenship, yet still consider himself entitled to protect them in relation to other subjects of international law.”<sup>41</sup> Referring to Sigismund Gargas early enquiry “The Stateless” in 1928, Paul Weis makes the same point. He argues that: “[c]onceptually and linguistically, the terms ‘nationality’ and ‘citizenship’ emphasize two different aspects of the same notion: State membership. ‘Nationality’ stresses the international, ‘citizenship’ the national, municipal, aspect.”<sup>42</sup>

Hence, the second understanding of nationality implies that individuals have a position in international law through their attachment to the country of nationality.<sup>43</sup> As seen in the previous paragraph, the concept of statelessness has historically described this lack thereof. More precisely, the stateless are either *de jure* or *de facto* without such a position in international law. Yet even if someone possesses a nationality and thereby a position, it has not been clear what that entails. In the following section, I examine the most recent research and argue that stateless individuals remain less than objects of international law.

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<sup>39</sup> Alice Edwards, ‘The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects’, in *Nationality and Statelessness under International Law*, ed. Laura van Waas and Alice Edwards, 2014, 14.

<sup>40</sup> Some states such as Honduras, Bolivia, Mexico, and Latvia therefore clearly distinguish nationality and citizenship. Delia Rudan, ‘Nationality and Political Rights’, in *The Changing Role of Nationality in International Law*, ed. Alessandra Annoni and Serena Forlati (Routledge, 2013), 117.

<sup>41</sup> Georg Schwarzenberger, *A Manual of International Law*, Sixth edition (Professional Books Ltd, 1976), 141f.

<sup>42</sup> Paul Weis, *Nationality and Statelessness in International Law*, Second edition. (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff International Publishers B.V., 1979), 4f.

<sup>43</sup> Lassa Francis L. Oppenheim, *International Law - A Treatise, Volume 1: Peace*, Second edition (London: Longmans, Green and Co., 1912), § 291, (26.42) ebook. Throughout the dissertation, I have referenced some ebooks because the hardcopies were not available to me due to lockdowns during the pandemic. To do so, I have used the open-source calibre ebook viewer’s reference function.

## *Subject versus Object Theory*

Tracing back to the 18<sup>th</sup> century and Emer de Vattel's work "The Law of Nations,"<sup>44</sup> the so-called "object theory" holds that individuals, unlike states, cannot be subjects of international law. The theory instead claims that they are mere objects, comparable to ships and territory,<sup>45</sup> ostensibly worthy of protection by the country of nationality against other countries.<sup>46</sup>

The object theory is based on the following disjunctive syllogism:

Binary premise: Individuals must either be a subject or an object of international law.

Elimination premise: Individuals cannot be a subject of international law.

Conclusion: Therefore, individuals must be an object of international law.

While the binary premise is assumed, various claims have been made in support of the elimination premise.<sup>47</sup> It is said that individuals have neither rights nor duties in international law. Secondly, they cannot invoke international law for protection. Thirdly, they cannot commit violations of international law. Fourthly, they are impaired by or benefit from international law if and only if there "[...] is a right or duty on the state to protect their interests."<sup>48</sup>

However, the object theory has increasingly been questioned.<sup>49</sup> Its opponents contend that it is (1) based on a false binary, (2) immoral in treating individuals as objects, (3) detrimental to the democratic conception of the state, and (4) not reconcilable with current practice.<sup>50</sup> Thus, they suggest that individuals must be subjects or at least hold an in-between position.<sup>51</sup>

Given its appeal to facts rather than ideals, the last objection seems to pose the greatest challenge to a positivist defence of the object theory. It contends that the position of all individuals has in fact been improved with the emergence of the United

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<sup>44</sup> Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press, 2011), 10.

<sup>45</sup> George Manner, 'The Object Theory of the Individual in International Law', *American Journal of International Law* 46, no. 3 (July 1952): 429, <https://doi.org/10.2307/2194499>.

<sup>46</sup> Manner, 428f.

<sup>47</sup> Manner, 444; Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law' 4, no. 1 (1978): 5.

<sup>48</sup> Manner, 'The Object Theory of the Individual in International Law', 428.

<sup>49</sup> See for example Hersch Lauterpacht, 'The Subjects of the Laws of Nations', *Law Quarterly Review* 64, no. 1 (January 1948): 97–119; Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium. Second Revised Edition* (Leiden, Netherlands, The Brill, 2013).

<sup>50</sup> Manner, 'The Object Theory of the Individual in International Law', 430f.

<sup>51</sup> Manner, 447; Higgins, 'Conceptual Thinking about the Individual in International Law', 5.

Nations. This improvement manifest itself in international criminal law, international humanitarian law, international human rights law and with respect to international claims.

In terms of international criminal law, individuals arguably became a subject of international law in 1945, when it was decided that anyone can be assigned individual criminal responsibility.<sup>52</sup> The Nuremberg Tribunal is probably the most well-known example where individuals were put on trial for having committed specified crimes, including crimes against peace and crimes against humanity.<sup>53</sup>

International humanitarian law uplifts individuals' status to subjects of international law conceivably by creating several safeguards for those who find themselves in the middle of an armed conflict.<sup>54</sup> For instance, the *Geneva Convention III* – which addresses the situation of prisoners of war – says under Article 13 that “[p]risoners of war must at all times be humanely treated.”<sup>55</sup> Moreover, in Article 78, it more explicitly uses the language of rights by declaring that “[p]risoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected.”<sup>56</sup> The same is the case with respect to Article 48 of the *Geneva Convention IV* which says “[p]rotected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory [...]”<sup>57</sup>

There are several ways in which the position of individuals has been improved with respect to international claims. Firstly, after 1945, individuals have been granted the right to directly access diplomatic protection; they can, for instance, “[...] prosecute their own claims before international tribunals, and in their own right, provided that states consent.”<sup>58</sup> Secondly, since the establishment of the International Centre for Settlement of Investment Disputes (ICSID), individuals also have a right to ask for

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<sup>52</sup> Parlett, *The Individual in the International Legal System*, 229.

<sup>53</sup> Parlett, 274.

<sup>54</sup> Parlett, 225.

<sup>55</sup> United Nations, 'Convention (III) Relative to the Treatment of Prisoners of War', IHL Databases, 12 August 1949, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/77CB9983BE01D004C12563CD002D6B3E/FULLTEXT/GC-III-EN.002.pdf>.

<sup>56</sup> United Nations; Parlett, *The Individual in the International Legal System*, 183.

<sup>57</sup> United Nations, 'Convention (IV) Relative to the Protection of Civilian Persons in Time of War', IHL Databases, 12 August 1949, <https://ihl-databases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>.

<sup>58</sup> Parlett, *The Individual in the International Legal System*, 122.

arbitration in investment disputes if their country of nationality is a party to the ICISD.<sup>59</sup> Thirdly, today, individuals whose country of nationality is a member of the World Intellectual Property Organisation (WIPO) are also granted intellectual property rights to enjoy the full worth of their inventions.<sup>60</sup>

Since the mid-1960s, international human rights law seems to have improved the position of individuals in international law the most. For instance, the *International Covenant on Civil and Political Rights* (ICCPR) declares in Article 9 that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>61</sup> Article 41, moreover, permits all countries that have ratified the covenant to make complaints on behalf of anyone independent of nationality.<sup>62</sup> With the establishment of the first Optional Protocol to the ICCPR in 1976, individuals were also given the opportunity to file violation complaints against contracting states themselves.<sup>63</sup>

Despite these improvements, legal positivists continue to defend the object theory. In regard to human rights law, they argue that the protection of individuals is constrained to the extent that countries must give their consent to the UN’s international legal protection regime.<sup>64</sup> In other words, the process does “[...] not result in binding judgments.”<sup>65</sup> Whether individuals are successful in invoking Article 41 and petitioning the *UN Commission on Human Rights* depends on states’ commitment to the *UN Commission on Human Rights* and the *ICCPR*. When British nationals’ human rights are violated by the French state, for example, they can apply for redress at the *European Court of Human Rights* if the French state is committed to this court.<sup>66</sup> However, British nationals are without such a possibility if the perpetrator is the United States since the country “[...] does not recognize the competence of international

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<sup>59</sup> Solomon E. Salako, ‘The Individual in International Law: “Object” versus ‘Subject’, *International Law Research* 8, no. 1 (21 July 2019): 135, <https://doi.org/10.5539/ilr.v8n1p132>.

<sup>60</sup> Salako, 135.

<sup>61</sup> OHCHR, ‘International Covenant on Civil and Political Rights’, 1966, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>62</sup> Higgins, ‘Conceptual Thinking about the Individual in International Law’, 6.

<sup>63</sup> See Parlett, *The Individual in the International Legal System*, 316.

<sup>64</sup> Alexander Orakhelashvili, ‘The Position of the Individual in International Law’, *California Western International Law Journal* 31 (2001): 254.

<sup>65</sup> Parlett, *The Individual in the International Legal System*, 320.

<sup>66</sup> See Orakhelashvili, ‘The Position of the Individual in International Law’, 255.

human rights bodies.”<sup>67</sup> In this case, the provision of protection is strictly limited to state action.

The changes in humanitarian law and criminal law, by contrast, do not actually grant any rights to individuals. While humanitarian law “[...] establishes standards of treatment [...]”<sup>68</sup> rather than rights, criminal law merely imposes obligations on individuals. Although this is not the case with respect to international claims, stateless people do not benefit from the improvements here either. Whether it is investment rights, property rights, or diplomatic protection, individuals can only invoke the corresponding rights if their country of nationality allows them to do so. Despite all the improvements after 1945, stateless people therefore remain less than objects in international law without a country of nationality.

How does this conceptualisation of individuals’ position in international law help us to understand what it means to possess or not possess a nationality? At first, it must be acknowledged that under international law nationality does not in itself guarantee any protection. It rather determines who is responsible to grant such protection.<sup>69</sup> Hence, statelessness can be best understood as the lack of responsibility. On the one hand, *de jure* stateless individuals have no country that is responsible for their protection from other countries. They are less than objects of international law. In fact, the *de jure* stateless have no position in international law at all. On the other hand, *de facto* stateless individuals have a country that is responsible for their protection from other countries, but it is not willing or capable to provide this protection. They are objects of international law, yet not treated as such.

Through the concept of responsibility, it becomes much clearer that statelessness is a central issue of international politics. This is to say that the possession of nationality and thereby a position in international law is at best a safeguard against violence inflicted by countries other than one’s own. It does not guarantee this protection, nor does it offer any protection from violence inflicted by the country of origin itself. Nationality first and foremost indicates who is responsible and blameworthy if no protection is provided.

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<sup>67</sup> Orakhelashvili, 255.

<sup>68</sup> Parlett, *The Individual in the International Legal System*, 224.

<sup>69</sup> See Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, 2004), 211.

## Conclusion

In this introductory chapter, I have first shown how the two general categories of statelessness, *de jure* and *de facto*, that focus on individuals, are currently defined in UN conventions and supplementary documents. Given the importance of the legal concept of nationality within those definitions, I have then examined how nationality is commonly understood in international law. Following a discussion of the traditional object theory and its more recent challenger, the subject theory, I have argued that stateless people are still less than objects in international law. This is to say that they have no one who effectively grants them any rights. Put precisely, *de jure* stateless individuals have no country that is responsible for their protection from other countries, whereas *de facto* stateless individuals have a country that is responsible for their protection from other countries, but it is not willing or capable to provide this protection. Thus, nationality is at best a marker for who is responsible in international law.

# Chapter II: De Facto Statelessness: The Human Rights Conception

## Introduction

In the second chapter, I argue that the “traditional” working definition of *de facto* statelessness runs into contradictions when read against the UN’s human rights framework. Offering an immanent critique from within the legal system, the argument is divided into two steps. First, I will reconstruct two developments with respect to the international legal protection regime against statelessness: the UN’s shifts in defining who counts as stateless and its attempts to reckon with the shortcomings of previous definitions. Second, I will examine different types of arguments by the UN Refugee Agency’s (UNHCR) legal advisor Hugh Massey against a broadening of the “traditional” working definition of *de facto* statelessness. In the second part, I will then try to resolve these contradictions by turning to John Tasioulas’ work. More precisely, I suggest that someone should count as *de facto* stateless if the country of nationality denies them or is not willing to work towards the implementation of their minimum core human rights. Finally, I will address two pragmatic objections against the entire concept of *de facto* statelessness.

## A Turbulent History

### *The “Traditional” Working Definition of De Facto Statelessness*

Since the Second World War, the UN has gradually established an international legal protection regime against statelessness. In 1946, the Intergovernmental Committee on Refugees, for the first time, distinguished two general categories of statelessness in the Memorandum *Statelessness and Some of its Causes: An Outline*. A *de jure* stateless individual was defined as someone who possesses no nationality and thereby lacks the benefits from international law. On the other hand, a *de facto*

stateless individual was defined as someone who lacks consular and diplomatic protection even though they possess a nationality.<sup>70</sup>

The Memorandum also separated *de facto* stateless individuals from those in lack of temporary protection.<sup>71</sup> While the definition of *de facto* statelessness focused on a government's unwillingness to provide consular and diplomatic protection to its nationals, a *lack of temporary protection* was conceptualised as a government's incapacity to provide these two safeguards, due to military occupation or the absence of diplomatic recognition by foreign countries. To put it in another way, *de facto* statelessness was tied to cases where the responsibility for the lack of consular and diplomatic protection lay with the country of nationality, whereas the lack of temporary protection was tied to cases where this responsibility lay with foreign states.

In 1949, the UN Secretary General broadened the concept of statelessness.<sup>72</sup> Compared to the Memorandum, his *Study on Statelessness* "[...] which marked the first real step towards the creation of an international regime for protecting the 'unprotected' [...]" added a subject-focused component to the working definition of *de facto* statelessness.<sup>73</sup> It included as a cause the renunciation of consular and diplomatic protection by individuals themselves.<sup>74</sup> In the words of the *1949 Study*, *de facto* stateless individuals were then defined as:

"[...] persons who, having left the country of which they were nationals, no longer enjoy the [consular and diplomatic] protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals."<sup>75</sup>

In terms of *de jure* statelessness, the *Study* merely changed the wording but not the content of the definition. *De jure* stateless individuals were defined as those:

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<sup>70</sup> Hugh Massey, 'UNHCR and De Facto Statelessness' (Legal and Protection Policy Research Series, 2010), 2f.

<sup>71</sup> Massey, 3.

<sup>72</sup> Massey, 5.

<sup>73</sup> Laura van Waas, 'The UN Statelessness Conventions', in *Nationality and Statelessness under International Law*, ed. Alice Edwards and Laura van Waas (Cambridge: Cambridge University Press, 2014), 66, <https://doi.org/10.1017/CBO9781139506007>.

<sup>74</sup> Massey, 'UNHCR and De Facto Statelessness', 6.

<sup>75</sup> United Nations, 'A Study of Statelessness', 6.

“[...] who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one.”<sup>76</sup>

In preparation of the *1954 Convention relating to the Status of Stateless Persons*, this framework was however entirely questioned, when UNHCR Special Rapporteur Manley Hudson advocated for a narrower concept of statelessness. His report recommended that individuals who lack diplomatic and consular protection should be considered as “*de facto* unprotected persons” and not as “*de facto* stateless persons.”<sup>77</sup>

But his suggestions were not implemented.<sup>78</sup> Succeeding Hudson, Roberto Cordova confirmed the “traditional” working definition. Unlike Hudson, he argued that the concept of *de facto* statelessness was in fact more important than that of *de jure* statelessness because it not only affected a much larger number of individuals but those affected were also unable to obtain any legal remedy.<sup>79</sup>

Yet, Cordova’s arguments could not fully convince. When the UN Commission had to decide on a legal framework for the protection of stateless people, it voted against the inclusion of *de facto* statelessness into the 1954 Statelessness Convention. The drafters merely recommended each contracting state to consider the possibility of treating *de facto* stateless individuals like *de jure* stateless individuals.<sup>80</sup> The decision was based on pragmatic concerns that have constantly been raised by those who do not want *de facto* statelessness to be a legal category: it is very difficult to define the attributes and quality of nationality.<sup>81</sup>

In terms of *de jure* statelessness, the UN Commission was much more in favour of Cordova’s arguments. There was broad agreement that *de jure* stateless individuals needed a legal pathway to naturalisation.<sup>82</sup> Following these developments, the 1954 and the 1961 Statelessness Convention only protect *de jure* stateless individuals. *De facto* stateless individuals are not covered by any of the two statelessness conventions.

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<sup>76</sup> United Nations, 6.

<sup>77</sup> Massey, ‘UNHCR and De Facto Statelessness’, 12.

<sup>78</sup> Massey, 12.

<sup>79</sup> Massey, 13.

<sup>80</sup> Massey, 17.

<sup>81</sup> Massey, 14.

<sup>82</sup> Massey, 14.

This constitutes an essential gap in the international legal protection regime against statelessness.<sup>83</sup>

The *1961 Convention on the Reduction of Statelessness* added nothing to undo the absence of *de facto* statelessness from international law. It was merely an attempt to eliminate future statelessness by establishing several rules for the acquisition of nationality.<sup>84</sup>

### *A New Interpretation of De Facto Statelessness*

After some time without any changes to the international legal protection regime, *de facto* statelessness reappeared at the centre of attention with the breakdown of the Soviet Union, Czechoslovakia, and the Federal Republic of Yugoslavia.<sup>85</sup> Since then, “[t]he ‘grey zone’ of *de facto* statelessness has grown substantially.”<sup>86</sup> In her 1998 paper *Statelessness and the Problem of Resolving Nationality Status*, Carol Batchelor identifies several types of individuals who may be included. For instance, those who cannot establish their nationality due to bureaucratic hurdles or have it disputed because the state (a) insists that they have the right to another nationality elsewhere or (b) is a successor “[...] with which they have no genuine or effective connection.”<sup>87</sup> She seems to define the term “genuine or effective connection” negatively as the lack of a right to work, to own property, to healthcare, and to education.<sup>88</sup>

Two decades after Batchelor had identified these shortcomings of the “traditional” working definition of *de facto* statelessness, UNHCR seemed to briefly recognise them when it established “undetermined nationality” as an official category.<sup>89</sup> Yet this change had no lasting effect. A few months later, the *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, drew

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<sup>83</sup> Batchelor, ‘Stateless Persons’, 233.

<sup>84</sup> Massey, ‘UNHCR and De Facto Statelessness’, 23.

<sup>85</sup> Massey, 27.

<sup>86</sup> Carol A. Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’, *International Journal of Refugee Law* 10, no. 1 & 2 (1998): 156–83: 173.

<sup>87</sup> Batchelor, 173.

<sup>88</sup> Batchelor, 173.

<sup>89</sup> Massey, ‘UNHCR and De Facto Statelessness’, 31 (quoted from Massey because I have no access to the original document).

again a sharp line between “[...] stateless persons and persons with undetermined nationality.”<sup>90</sup>

Notwithstanding, at the 50th anniversary of the 1961 Statelessness Convention, the issue was re-examined by UNHCR. In its most recent report on *de facto* statelessness, legal advisor Hugh Massey echoes Batchelor’s work by discussing three types of individuals that should potentially be included to the traditional working definition of *de facto* statelessness.<sup>91</sup>

First, those who do not enjoy the rights attached to nationality, including citizenship rights. From the European settlement in 1834 well into the 1960s, Aboriginal Australians, for example, had been systematically denied citizenship rights.<sup>92</sup> In 1948, they still lacked the right to vote, the right to move freely, and the right to work in vast parts of Australia.<sup>93</sup> Hence, they would have been called *de facto* stateless under a broadened definition. Second, those who have an undetermined nationality. For instance, Bidoons in Kuwait or traveller people in Europe are classified as having undetermined nationality because they lack birth certificates, or their nationality has never been tested. Third, those who permanently live in a successor state but possess a nationality elsewhere. After the breakdown of the Soviet Union, some Russian speakers in Estonia, for example, decided to gain Russian nationality.<sup>94</sup>

An inclusion of the first type – those who do not enjoy rights to nationality, including citizenship rights – would by far be the most extensive broadening of the “traditional” working definition of *de facto* statelessness as it is not only concerned with quantity but also quality of nationality and thus the question of what rights nationality should entail.

For Massey, a broadening along the qualitative dimension should not however be supported. He provides various arguments in defence of this claim. One seems to be

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<sup>90</sup> See <https://www.unhcr.org/41b4607c4.pdf>. The European Union seems to undermine the *de facto* statelessness definition even further. In the Recommendation CM/Rec(2009)13 on the Nationality of Children, the Committee of Ministers of the Council of Europe declared that “it is up to the states to determine what *de facto* statelessness is and thus which persons are to be covered by this principle.” Refworld, ‘Refworld | Recommendation CM/Rec(2009)13 and Explanatory Memorandum of the Committee of Ministers to Member States on the Nationality of Children’, Refworld, 2009, 54, <https://www.refworld.org/docid/4dc7bf1c2.html>.

<sup>91</sup> Massey, ‘UNHCR and De Facto Statelessness’, 2010: 32.

<sup>92</sup> See John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

<sup>93</sup> Chesterman and Galligan, 165.

<sup>94</sup> See Alena Pfoser, ‘Between Security and Mobility: Negotiating a Hardening Border Regime in the Russian-Estonian Borderland’, *Journal of Ethnic & Migration Studies* 41, no. 10 (September 2015): 1684–1702, <https://doi.org/10.1080/1369183X.2015.1015408>.

an argument from classification. Arguments from classification support a claim by appealing to the distinctiveness of mutually exclusive classes: by being classified as a mammal, a dolphin cannot be defined as a fish at the same time. Thus, conclusions made about the class of fish must not apply to dolphins.

Massey contends that the right to nationality and citizenship rights belong to two mutually exclusive classes as “[...] the violation of one does not necessarily entail a violation of the other.”<sup>95</sup> This is to say that nationality can function independently of citizenship: a state may, in the form of diplomatic protection, shield nationals from violence inflicted by other countries but nevertheless deny them most or all citizenship rights at home.<sup>96</sup>

Besides this argument from classification, Massey also makes an argument by illustration. Arguments by illustration provide examples in support of a claim. Without much elaboration, he gives three examples against the inclusion of individuals whose citizenship rights are violated. For him, it firstly seems strange to define someone as *de facto* stateless who is denied a passport to travel abroad but granted the right to vote in elections.<sup>97</sup> Second, “[...] until 1971 women were denied the right to vote in federal elections in Switzerland, but neither they nor anybody else considered that they were therefore *de facto* stateless.”<sup>98</sup> Third, even in cases where most of the population is “[...] denied the right to a passport, the right to vote, the right to take part in public affairs and the right of access to public service, it is still not clear why such second-class nationals should be considered *de facto* stateless.”<sup>99</sup>

Massey also offers two arguments from consequences to refute the inclusion of individuals whose citizenship rights are violated to the “traditional” working definition of *de facto* statelessness. An argument from consequences points to the predictable negative outcomes of an action, inferring that the action is therefore wrongful.<sup>100</sup> For instance, smoking near children is arguably wrong because it negatively affects their health.

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<sup>95</sup> Massey, ‘UNHCR and De Facto Statelessness’, 38.

<sup>96</sup> Given the lack of institutional access, taken from google books in Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Bloomsbury Publishing, 2016). Originally in Schwarzenberger, *A Manual of International Law*, 141f.

<sup>97</sup> Massey, ‘UNHCR and De Facto Statelessness’, 37.

<sup>98</sup> Massey, 37.

<sup>99</sup> Massey, 37.

<sup>100</sup> Douglas Walton, *Fundamentals of Critical Argumentation*, First edition. (Cambridge University Press, 2005), 104, <https://doi.org/10.1017/CBO9780511807039>.

The first of Massey's two arguments from consequences is a slippery slope argument. He claims that a broader definition would be over-inclusive, thereby leading to a breakdown of the entire concept of *de facto* statelessness.<sup>101</sup>

The second argument is based on the sanctity of national sovereignty in international law. Massey contends that an inclusion of citizenship rights violations in the "traditional" working definition of *de facto* statelessness is practically impossible. The reason for this is that the international community is unable to protect individuals whose citizenship rights are withheld without violating the sovereignty of the country of origin that withholds them.<sup>102</sup>

Although the inclusion of those individuals with undetermined nationality would not necessarily pose these problems, Massey nevertheless rejects it as well. For him, they are already covered by status quo protection regimes. Massey contends that UNHCR should treat someone as *de jure* stateless if they are inside the country whose nationality is at issue and that country does not recognize them as their national.<sup>103</sup>

Finally, Massey rejects the inclusion of those who permanently live in a successor state but possess a nationality elsewhere to the "traditional" working definition of *de facto* statelessness.<sup>104</sup> To support this claim, he again appeals an argument by illustration: no one considers children *de facto* stateless who are born and live in Switzerland but have a nationality elsewhere because there is no reason why their country of nationality should refuse diplomatic protection.<sup>105</sup>

Despite his rejection of a broader working definition of *de facto* statelessness along the discussed lines, Massey still offers a slightly amended wording in the conclusion of his report. It is a hybrid between the 1949 *Study* and the refugee definition in the 1951 *Convention Relating to the Status of Refugees*:<sup>106</sup>

"[d]e facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that

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<sup>101</sup> Massey, 'UNHCR and De Facto Statelessness', 39.

<sup>102</sup> Massey, 39.

<sup>103</sup> However, Massey contends again that UNHCR's hands are mostly tied as "[t]he scope of what the Office could actually set out to achieve in any given country situation would [...] depend on how any concerns about possible perceived interference with national sovereignty are resolved." Massey, 53.

<sup>104</sup> Massey emphasises that they can still be considered as "[...] refugees within the meaning of the 1951 Refugee Convention are an exception." Massey, 60.

<sup>105</sup> Massey, 58.

<sup>106</sup> Hereafter 1951 Refugee Convention.

country. Persons who have more than one nationality are *de facto* stateless only if they are outside *all* the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of *any* of those countries.”<sup>107</sup>

Massey’s biggest revision does not concern the wording of the definition itself but its interpretation. Unlike other UNHCR documents, he acknowledges some additional reasons for someone to be considered *de facto* stateless. Appealing to three regional refugee protection instruments, Massey ties the *de facto* statelessness definition closer to the refugee definition.

From the 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Massey adopts the idea that individuals are *de facto* stateless if they are forced to leave their country of nationality due to external aggression, occupation, foreign domination or events seriously disturbing the public order.<sup>108</sup> From the *Cartagena Declaration on Refugees* by the Organization of American States, Massey borrows the thought that individuals are *de facto* stateless if their life, safety, and freedom is threatened by internal conflicts and generalized violence.<sup>109</sup> From the *Council Directive 2004/83/EC*, he moreover concludes that someone is *de facto* stateless if they “[...] would face a real risk of suffering serious harm [...]” when returning to their country of nationality.<sup>110</sup>

Apart from those valid reasons for why someone may be unwilling to avail themselves of the protection of the country of nationality, Massey also offers some reasons for why someone may be unable to receive protection.<sup>111</sup> Referencing the *Handbook on Procedures and Criteria for Determining Refugee Status*, he claims that individuals are *de facto* stateless if their country of nationality cannot provide protection due to civil war or other grave disturbance.<sup>112</sup>

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<sup>107</sup> Massey, ‘UNHCR and De Facto Statelessness’, 61.

<sup>108</sup> Massey, 63; See Article 1, paragraph 2 UNHCR, ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’, 1969, <https://www.unhcr.org/4963237311.pdf>.

<sup>109</sup> Massey, ‘UNHCR and De Facto Statelessness’, 63; See Article 3, paragraph 3 UNHCR, ‘Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984’, UNHCR, 1984, <https://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>.

<sup>110</sup> European Union, ‘Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted’, 304 OJ L § (2004), 14, Accessed 3 April 2020. <http://data.europa.eu/eli/dir/2004/83/oj/eng>.

<sup>111</sup> Massey, ‘UNHCR and De Facto Statelessness’, 64f.

<sup>112</sup> UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating...’, 1992 paragraph 98; Massey, ‘UNHCR and De Facto Statelessness’, 11; 64. However, the *Handbook* also declares under paragraph 164 that “[p]ersons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol.” They must only be considered as refugees in cases of foreign invasion or occupation that leads to persecution.

## Examining Massey's Arguments Against a Broader Definition

### *Arguments by Illustration*

In this second part of the chapter, I discuss the three types of arguments that legal advisor Hugh Massey makes against a broader working definition of *de facto* statelessness.

There are two questions a person should ask themselves when making an argument by illustration. First, are there any counterexamples? Compared to any number of examples in support of a normative claim, a single counterexample is much more convincing. This is to say that the method of induction does not allow one to draw a definite conclusion, whereas a single counterexample can deductively prove a claim invalid.<sup>113</sup>

The second important question one needs to ask when making an argument by illustration is whether the examples are representative? Examples of refuge in Europe in the 17<sup>th</sup> century may tell us little about refuge in the 20<sup>th</sup> century. To make a convincing argument about refuge in the 20<sup>th</sup> century, one needs to consider a great variety of contemporary examples from all parts of the world. Examples should not only include refugees who have been fleeing all the way through the Central Mediterranean, Eastern Europe, or Turkey but also those who have found refuge in close vicinity to their country of nationality. Moreover, they should pay attention to such individual characteristics as age, gender and class that can significantly affect the experience of refuge. In other words, examples should be based on the “[...] most accurate cross-section [one] can find of the population being generalized about.”<sup>114</sup>

After this general analysis of arguments from illustration, let me examine Massey's examples.<sup>115</sup> The first seems to indicate that a partial violation of citizenship rights does not justify a broadening of the “traditional” definition of *de facto* statelessness. Interestingly, Massey thinks that the denial of a passport to travel abroad is less

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<sup>113</sup> See Karl R. Popper, David W. Miller, and Sir Karl Raimund Popper, *Popper Selections* (Princeton University Press, 1985), 84; 102.

<sup>114</sup> David R. Morrow and Anthony Weston, *A Workbook for Arguments: A Complete Course in Critical Thinking* (Cambridge, United States: Hackett Publishing Company, Incorporated, 2019), 45, <http://ebookcentral.proquest.com/lib/ed/detail.action?docID=5979922>.

<sup>115</sup> These examples can be seen as counterexamples to the reverse principle: an individual who is denied citizenship rights should be considered as *de facto* stateless.

relevant than the right to vote in elections. This is surprising because passports are usually seen “[...] as the primary document of national identification.”<sup>116</sup> They are not only necessary to enter other countries but also to return to the country of origin. Given that the right to return to the country of origin is the most essential element of diplomatic protection which if not granted renders someone *de facto* stateless under the “traditional” working definition,<sup>117</sup> Massey’s first example seems even contradictory. Massey’s second example suffers from another problem: referring to the situation in Switzerland before 1971 where women were denied the right to vote but not considered *de facto* stateless, makes it unrepresentative. Massey should instead explain why a social norm held back 40 years ago but is no longer accepted by most people ought to have any moral and legal significance today. In other words, the right question to ask is whether we would call women stateless if Switzerland was denying them the vote today?

Despite this problem, Massey goes on to offer a similar example in support of his argument against the inclusion of those who, in the context of state succession, are granted a nationality other than that of the country of habitual residence. He compares their situation to second generation children born in Switzerland who are not considered to be *de facto* stateless. Yet Massey does again not justify why these children should not be seen as *de facto* stateless. Thus, without giving reasons in support of the status quo, his arguments by illustration remain highly unconvincing.

### *Arguments from Classification*

In its formal structure Massey’s argument from classification reads as the following:

- P1: The right to nationality and citizenship rights are qualitatively distinct.
- P2: Individuals are *de facto* stateless, if and only if their right to nationality is violated.
- C: Therefore, individuals whose citizenship rights are violated are not *de facto* stateless.

To understand Massey’s first premise, one must examine the ways nationality is defined in law. By possessing a nationality, an individual has a position in municipal

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<sup>116</sup> Mark B. Salter, ‘Passports, Mobility, and Security: How Smart Can the Border Be?’, *International Studies Perspectives* 5, no. 1 (1 February 2004): 72, <https://doi.org/10.1111/j.1528-3577.2004.00158.x>.

<sup>117</sup> Massey, ‘UNHCR and De Facto Statelessness’, 65.

law as well as in international law. However, these legal positions have different implications. While the former signifies that individuals have an entitlement to citizenship,<sup>118</sup> the latter indicates that they are at best a quasi-subject to international treaties. To put it another way, as citizens, individuals have citizenship rights such as the right to vote, whereas as nationals they have international rights and duties. These international rights and duties are, for example, found in the Geneva Convention and include among others the right to accommodation, food, clothing, hygiene, and medical care for prisoners of war.

Yet despite these qualitative differences between nationality and citizenship there is no reason to believe that *de facto* statelessness should not be broadened to include violations of citizenship rights in principle. The reason for this is that one can find many international rights in international human rights law that closely resemble citizenship rights. *The International Covenant on Civil and Political Rights*, for example, declares in article 22 that

“[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>119</sup>

Given that many citizenship rights such as the right to freedom of association are enshrined in international human rights law,<sup>120</sup> Massey’s argument from classification against a broader working definition of *de facto* statelessness seems to aim at the wrong target.

Massey indirectly acknowledges this himself when offering a new interpretation of *de facto* statelessness that contradicts a strict distinction between the domestic sphere (citizenship) and the international sphere (nationality). Internal conflict, generalised violence, and civil war are all conditions that describe the breakdown of municipal law rather than international law and thereby the legal relationship between a state and its citizens. In other words, Massey indirectly accepts that the scope of *de facto* statelessness should include citizenship rights violations.

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<sup>118</sup> See Matthew J. Gibney, ‘Foreword’, in *Understanding Statelessness*, ed. Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, First edition, vol. 1 (London: London: Routledge, 2017), xx, <https://doi.org/10.4324/9781315200460>.

<sup>119</sup> OHCHR, ‘International Covenant on Civil and Political Rights’.

<sup>120</sup> The two do not always align. While the International Covenant on Civil and Political Rights to which the United States is a signatory declares in article 25(b) that every citizens should be allowed to vote without reasonable restrictions, incarcerated citizens only fully enjoy this right in the District of Columbia, Maine, and Vermont. NCSL, ‘Felon Voting Rights’, 2021, Accessed 1 January 2022. <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

## *Arguments from Consequences*

### *The Sanctity of National Sovereignty*

Massey also makes two arguments from consequences against a broader working definition of *de facto* statelessness. One is based on the sanctity of national sovereignty. He argues that the broadening of the definition would require UNHCR to violate the national sovereignty of those states that are home to individuals who suffer from *de facto* statelessness.

To examine this argument, one first needs to know what national sovereignty entails. The meaning Massey invokes is often named “territorial integrity.” It is enshrined in Article 2, paragraph 4 of the UN Charter:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>121</sup>

Taking national sovereignty to mean territorial integrity, Massey seems to link his first argument from consequences to the difficult problem of non-compliance and justiciability in international law. In other words, he examines what the international community can do if a state does not honour international law. Massey’s point is entirely pragmatic. It is not concerned with the definition itself but its application. His argument seems to assume that a broader working definition of *de facto* statelessness would offer a new justification for violating states’ territorial integrity through foreign intervention.

While this problem must be taken seriously, let me make two points in response. Firstly, since the “traditional” working definition of *de facto* statelessness as well as a potentially broader definition are not covered by any international legal instruments, foreign intervention seems hard to justify in any case. Second, national sovereignty has also other meanings than territorial integrity, and a potentially broader working definition of *de facto* statelessness is not irreconcilable with those.

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<sup>121</sup> United Nations, ‘Repertory of Practice of United Nations Organs — Charter of the United Nations’, accessed 17 June 2021, <https://legal.un.org/repertory/art2.shtml>.

Charles Manning identifies three meanings of national sovereignty.<sup>122</sup> The first refers to the national sovereignty within a state. Manning gives the example of Great Britain where the sovereignty “[...] lies with the monarch, the lords and the electorate [...]”<sup>123</sup> The same meaning is, arguably, invoked by Jean Bodin who is viewed as the founding father of the concept of sovereignty. He contends that the prerogatives of sovereignty include powers such as the passing of general laws, the declaring of war and peace, the assignment of public office, the final judgments in court cases, the granting of pardons, the imposing of tax, and the regulation of money.<sup>124</sup> Unlike territorial integrity, none of these elements of sovereignty within a state would be obstructed by a broader working definition of *de facto* statelessness as they describe powers within municipal law.

The second meaning of national sovereignty refers to constitutional independence. It describes a condition where a state’s constitution is not “[...] subject to rules set by another state or organisation.”<sup>125</sup> For instance, India was regarded as a so-called “international person” and an original member of the United Nations but not a sovereign state as long as it was colonized by the British Empire and thereby subject to its rules.

The third meaning of national sovereignty refers to the total sum “[...] of a state’s existing legal liberties.”<sup>126</sup> This is to say that the national sovereignty of a state suffers each time that a state accepts new obligations through the ratification of international treaties. Under such a view, Great Britain retains more national sovereignty than Australia and Burkina Faso with respect to the 1961 Statelessness Convention, for instance, because it has expressed some reservations to the convention that the latter two countries have not. Accordingly, the United States retains more sovereignty than Great Britain because it has not ratified the convention and is therefore not bound by the obligations that derive from it.

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<sup>122</sup> Charles A. W. Manning, ‘The Legal Framework in a World of Change’, in *The Aberystwyth Papers: International Politics 1919-1969*, ed. Brian Porter (London: Oxford University Press, 1972), 301–35, <https://cawmanning.files.wordpress.com/2020/08/legal-framework.pdf>.

<sup>123</sup> Manning, 308.

<sup>124</sup> Jean Bodin, *Bodin: On Sovereignty*, ed. Julian Franklin (Cambridge University Press, 1992), 58f.

<sup>125</sup> John Laughland and The Hegeler Institute, ‘The Crooked Timber of Reality: Sovereignty, Jurisdiction, and the Confusions of Human Rights’, ed. Sherwood J. B. Sugden, *Monist* 90, no. 1 (2007): 3, <https://doi.org/10.5840/monist20079011>.

<sup>126</sup> Manning, ‘The Legal Framework in a World of Change’, 308.

For Manning, the second and the third meaning share an essential characteristic: they are not “[...] in any way incompatible with the technical subordination of the state to international law.”<sup>127</sup> In other words, a state does not lose its national sovereignty if it voluntarily decides to ratify an international convention thereby binding itself to its obligations. National sovereignty would only be lost if a state has no choice but to act in accordance with another state’s will. The voluntary acceptance of a broader working definition of *de facto* statelessness would therefore not be in contradiction with a state’s national sovereignty. Moreover, it would also not obstruct constitutional independence. The reason for this is that international conventions such as the 1961 Statelessness Convention only become fully operational if states voluntarily enshrine its obligations into their national constitution.

### *De Facto Statelessness: A Slippery Slope*

Massey’s second argument from consequences is a slippery slope argument. He claims that “[t]he broader the range of rights that are considered to attach to nationality [...], the ever more problematic it would be to conclude that individuals who do not enjoy [citizenship rights] are *de facto* stateless.”<sup>128</sup>

A slippery slope argument is a special subtype of arguments from consequences. It is one where someone contends that the acceptance of a claim “[...] is a first step in a sequence [...] that will lead to some horrible outcome.”<sup>129</sup> One can think of it as a domino effect. Slippery slopes are often made with respect to drug-taking.<sup>130</sup> One may argue, for example, that the acceptance of marijuana consumption would necessarily imply the acceptance of other drug consumption as there is no significant difference between the former and the latter. When evaluating slippery slope arguments, it is therefore important to examine these differences.<sup>131</sup>

Massey’s slippery slope argument focuses on the way a broader working definition would lead to a situation in which it becomes increasingly difficult to distinguish *de*

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<sup>127</sup> Manning, 308.

<sup>128</sup> Massey, ‘UNHCR and De Facto Statelessness’, 39.

<sup>129</sup> Walton, *Fundamentals of Critical Argumentation*, 107.

<sup>130</sup> Walton, 108.

<sup>131</sup> Walton, 110.

*facto* statelessness from other conditions.<sup>132</sup> Yet such a slippery slope is not necessarily given. It depends to a great extent on whether there is a well-defined set of rights which allows for a clear delineation of a broader working definition of *de facto* statelessness.

## A Human Rights Conception

### *The Minimum Core Concept of Human Rights*

When thinking about such a well-defined set of rights, one is quickly drawn to the concept of human rights.<sup>133</sup> The International Bill of Human Rights consists of three legal documents that are quite different in character. They are *The Universal Declaration of Human Rights* (1948), *The International Covenant on Civil and Political Rights* (CCPR) (1966) and *The International Covenant on Economic, Social and Cultural Rights* (CESCR) (1966).

Building on these documents, John Tasioulas concept of a minimum core of human rights seems to offer a useful analytic framework to delineate a broader working definition of *de facto* statelessness. Following his work, I suggest that everyone whose *minimum core human rights* are not protected should be considered *de facto* stateless.

According to Tasioulas the *minimum core human rights* include a sub-set of social, cultural, and economic rights that every single state can enforce immediately no matter its level of economic wealth.<sup>134</sup> He derives this idea from the *CESCR General Comment No. 3: The Nature of States Parties' Obligations*, paragraph 10:

“On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any

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<sup>132</sup> Massey, ‘UNHCR and De Facto Statelessness’, 39.

<sup>133</sup> See Michelle Foster and Hélène Lambert, ‘Statelessness as a Human Rights Issue: A Concept Whose Time Has Come’, *International Journal of Refugee Law* 28, no. 4 (December 2016): 567, <https://doi.org/10.1093/ijrl/eew044>.

<sup>134</sup> John Tasioulas, ‘Minimum Core Obligations: Human Rights in the Here and Now’, *Commissioned by the Nordic Trust Fund The World Bank*, 2017, v; See also in an interview given by Tasioulas Dylan Brethour, ‘Minimum Core Obligations: Philosopher John Tasioulas on a Contested Idea’, *EachOther*, 20 March 2018, Accessed 10 February 2020. <https://eachother.org.uk/minimum-core-obligations-philosopher-john-tasioulas-contested-idea/>.

significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. [...] By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.”<sup>135</sup>

While Tasioulas and other scholars take this paragraph as a proof for the existence of the minimum core concept in the human rights legislation, there is disagreement over its exact definition.<sup>136</sup> For Tasioulas, there are four ways in which the minimum core human rights can be defined conceptually. The first definition focuses on *immediacy*, meaning that the minimum core refers to all human rights that must fully be granted immediately by all states. The second appeals to *special values*, meaning that the minimum core refers to all human rights that are grounded in a special value such as freedom. The third focuses on *non-derogability*, meaning that the minimum core refers to all human rights that must be granted no matter the circumstances, even in an emergency. Finally, the fourth appeals to *justiciability*, meaning that the minimum core refers to all human rights that can in any case be enforced by a municipal or international court.

Tasioulas makes two further points about these four ways to define the minimum core human rights. First, all four ways of defining them are logically compatible. In other words, the minimum core can be based on *immediacy*, *special values*, *non-derogability*, and on *justiciability* at the same time. Second, they also work independently from each other. Put differently, the minimum core can be grounded in any one of these four ways.<sup>137</sup>

Notwithstanding, Tasioulas rejects all definitions other than the one that focuses on immediacy. For him, the minimum core should not be defined by an appeal to *special values*. This is first and foremost the case because all human rights seem to be grounded in the same value, namely human dignity.<sup>138</sup> On the other hand, *non-derogability* lacks support in practice because it seems detrimental to the well-being

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<sup>135</sup> Office of the High Commissioner of Human Rights, ‘CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990.

<sup>136</sup> Tasioulas, ‘Minimum Core Obligations: Human Rights in the Here and Now’, 9.

<sup>137</sup> Tasioulas, 11.

<sup>138</sup> Tasioulas, 16.

of individuals to insist on a human right to education, for instance, in emergencies such as natural disasters.<sup>139</sup> Finally, Tasioulas rejects a definition based on the concept of *justiciability* since it is not clear whether domestic courts have the capacity to enforce economic, social, and cultural human rights.<sup>140</sup>

This leaves *immediacy* as the central pillar of the minimum core. Having established the minimum core concept in relation to the specification of *immediacy*, there remains the question of how exactly it should be interpreted. For Tasioulas, there are two different interpretations. The first holds that immediacy is a component of progressive realization.<sup>141</sup> In other words, the immediacy specification determines what rights must be realised at first. The second interpretation, on the other hand, is much more extensive and the one Tasioulas supports. It draws a sharp line between immediacy and progressive realization, rejecting the idea that the minimum core concept is primarily about the hierarchisation of human rights.<sup>142</sup> According to this interpretation, the minimum core refers to all human rights that must literally be realised immediately and not sequentially before any other.

Having reconstructed Tasioulas' conceptual definition of the minimum core human rights, let me now turn to the practical question of which specific social, cultural, and economic rights are to be included. Tasioulas remains rather vague here for two reasons. First, he views himself as lacking expertise and second, he does not want others to invalidate the minimum core human rights concept because there is no agreement over a concrete list.<sup>143</sup> The right to work (CESCR Article 6), the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (CESCR Article 11), and the right to the enjoyment of the highest attainable standard of physical and mental health (CESCR Article 12) are mentioned only occasionally in his work.<sup>144</sup>

But how can even the most basic versions of these rights be implemented independently of the country's level of economic wealth? To answer this question, it is

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<sup>139</sup> Tasioulas, 17.

<sup>140</sup> Tasioulas, 18.

<sup>141</sup> Tasioulas, 14.

<sup>142</sup> Tasioulas, 14.

<sup>143</sup> See Brethour, 'Minimum Core Obligations'.

<sup>144</sup> See John Tasioulas, 'Saving Human Rights from Human Rights Law Keynote Articles', *Vanderbilt Journal of Transnational Law* 52, no. 5 (2019): 1167–1208; and more precisely in an Interview with 'Each Other.' Brethour, 'Minimum Core Obligations'.

helpful to introduce a further distinction between two classes of rights: first, those that require an effective legal framework – “effective” in the sense that these rights are not only enshrined in law but also accessible without discrimination – and second, those rights that are only implemented if the state provides some material benefit to its citizens.

For most of the social, cultural, and economic rights in the covenant this distinction seems clear. The right of everyone to the opportunity to gain his living by work which he freely chooses or accepts (CESCR Article 6), the right of everyone to the enjoyment of just and favourable conditions of work (CESCR Article 7), the right of everyone to form and be active in trade unions (CESCR Article 8), the right of everyone to enter marriage with free consent (CESCR Article 10[1]), the right of children and young persons to be free from economic and social exploitation (CESCR Article 10[3]), the right of everyone to take part in cultural life (CESCR Article 15[a]), and the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (CESCR Article 15[c]) fall under the first category: what is required for them to be implemented is an effective legal framework. The same cannot be said from the right of everyone to social security (CESCR Article 9), the right of working mothers to be accorded paid leave or leave with adequate social security benefits after childbirth (CESCR Article 10[2]), the right of everyone to an adequate standard of living (CESCR Article 11), the right to the enjoyment of the highest attainable standard of physical and mental health (CESCR Article 12), the right of everyone to education (CESCR Article 13), and the right to enjoy the benefits of scientific progress and its applications (CESCR Article 15[b]). In the case of these rights, implementation also requires the state to provide material benefits to its citizens.

Yet some states do not only lack this capacity but are also unable to create social conditions for their citizens to access the law. Taking this problem into account, Tasioulas therefore proposes a proviso for the implementation of the minimum core human rights. He contends that non-compliance is justified if a state generally lacks capacity or is affected by an emergency such as the outbreak of war.<sup>145</sup> Here, mere secondary obligations arise: the affected state needs to seek international assistance.

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<sup>145</sup> Tasioulas, ‘Minimum Core Obligations: Human Rights in the Here and Now’, 24.

This clear delineation allows for the following conclusion: under the human rights conception, someone should count as *de facto* stateless (a) if their country of nationality has the capacity to implement the minimum core human rights but refuses to do so, or (b) if their country of nationality lacks the capacity to implement the minimum core human rights and refuses to seek international assistance for this purpose.

Let me give three examples to illustrate these two principles. First, condition (a) is satisfied if the country of nationality has the economic means to provide education to every citizen (CESCR Article 13) but refuses to do so. Second, condition (b) is satisfied if the country of nationality does not have the economic means to share the benefits of scientific progress (CESCR Article 15[b]) and refuses to seek international assistance for this purpose. Third, and most radically, condition (b) is also satisfied if the country of nationality does not have the resources to create social conditions where all citizens can access the minimum core human rights – for instance, when poverty forces individuals into child labour (CESCR Article 10[3]) – but nevertheless refuses to seek international assistance that help remedying those conditions.

This clear delineation of a minimum core set of human rights has both practical and theoretical value. Its practical value lies in the fact that states are given a compass by which they know what human right ought to be prioritised.<sup>146</sup> There is also a theoretical value in the minimum core concept: it offers a rebuttal against slippery slope arguments – the claim that countries can always justify the non-compliance with a particular human right, by invoking the need to comply with another one, no longer works.<sup>147</sup>

Massey's arguments against a broadening of the "traditional" working definition of *de facto* statelessness seem insufficient when read against this extended framework of human rights protection. As mentioned before, the primacy of national sovereignty in international law does nothing to defeat a broader working definition of *de facto* statelessness. A broadening that includes the minimum core human rights is no violation of national sovereignty if states have already committed themselves to the *International Bill of Human Rights*. Moreover, a broadening along the lines of the minimum core is also practically valuable because it allows the international

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<sup>146</sup> Tasioulas, 14.

<sup>147</sup> Tasioulas, 15.

community to address the problem of statelessness in a way that reinforces international responsibility and peer-review among states.<sup>148</sup>

## Pragmatic Objections Against De Facto Statelessness

Aside from Massey's arguments against a broader working definition of *de facto* statelessness, one can also find pragmatic objections to the entire concept. One pragmatic objection is raised by Alison Harvey. Resembling a line of thought that UNHCR Special Rapporteur Hudson had pursued in preparation of the 1954 Statelessness Convention, she contends "[...] that the decision to use the term 'de facto stateless' to describe persons who are not [de jure] stateless, rather than find some other way of describing their plight, is a decision prompted by considerations of advocacy rather than logic."<sup>149</sup>

Although her understanding of logic remains undefined throughout the research paper in which she develops this argument, Harvey seems to mean by it that something is reconcilable with the actual legal framework as a matter of fact. In other words, the use of the concept of *de facto* statelessness is illogical for her because the 1954 and the 1961 Statelessness Conventions merely define *de jure* statelessness as a legal category.<sup>150</sup>

Emphasizing that "[...] questions of language are of great sensitivity" in the domain of nationality law, Harvey derives two prescriptions from this conclusion.<sup>151</sup> First, the term "*de facto* statelessness," used in the UNHCR Global Report 2008, for example, should be abandoned.<sup>152</sup> Second, individuals who fall under the UN's "traditional" working definition of *de facto* statelessness should be treated "[...] as a free-standing category, rather than a subset of the stateless."<sup>153</sup>

Nonetheless, Harvey also admits that there are good reasons to appeal to the language of statelessness in such cases as it is a useful term to express international

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<sup>148</sup> See Manning, 'The Legal Framework in a World of Change', 322f.

<sup>149</sup> Alison Harvey, 'Statelessness: The "de Facto" Statelessness Debate', *Journal of Immigration Asylum and Nationality Law* 24, no. 3 (2010): 257.

<sup>150</sup> Laura van Waas and Amal de Chickera make a similar point Van Waas and De Chickera, 'Unpacking Statelessness', 61.

<sup>151</sup> Harvey, 'Statelessness: The "de Facto" Statelessness Debate', 260.

<sup>152</sup> Harvey, 260.

<sup>153</sup> Harvey, 260.

condemnation.<sup>154</sup> This is even more the case if international law is understood as a system of peer-review where international condemnation is one of very few means, aside from economic sanctions and war, towards the efficacy of conventions.<sup>155</sup>

One finds this understanding of international law in Max Weber's distinction between convention and law.<sup>156</sup> While a convention tries to prevent the infringement of a norm solely by expressing disapproval, the law is over and above enforceable by a body of people. What form this body takes is not essential, nor are the means of coercion.<sup>157</sup> The infringement of a norm could, for example, be enforced by a clan rather than a judicial body and through "brotherly admonishment" or psychic coercion rather than legal decision.<sup>158</sup>

Harvey does not discuss the problem of non-compliance and justiciability in international law. Instead, she suggests that the advantage of calling on the language of statelessness is outweighed by the bad incentives which would follow from the recognition of *de facto* statelessness as a legal category. Put precisely, the depriving state may be encouraged by the fact that other states will need to take care of the deprived if they are officially recognised as *de facto* stateless. In her own words: "[t]he work of a State that has denied a group within its borders entitlements given to other nationals might be facilitated if everyone accepts that the persons in question are not nationals, and charges of discrimination averted."<sup>159</sup>

Let me make two points in response to Harvey's claim. First, Harvey only offers a hypothetical but does not provide any empirical evidence in support of it. In the absence of empirical evidence, there is no reason to believe that her objection is sound. Second, she assumes that the depriving state has a moral consciousness from which it needs to unburden itself. Yet it is not clear why a state that causes *de facto* statelessness would need any encouragement to do so. Moreover, it is also not a given that a remedy – in the form of other states taking care of the deprived – will make the causing of *de facto* statelessness any more justifiable. The link between remedy and

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<sup>154</sup> Harvey, 263.

<sup>155</sup> For the concept of peer-review see Manning, 'The Legal Framework in a World of Change', 326; Alexander Somek, *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014), 17f. Manning, for instance, argues that, in international law, "[...] the judgement of the relevant reference group is a potent sanction for the efficacy of the legal rule."

<sup>156</sup> Max Weber, *Wirtschaft Und Gesellschaft*. (Tübingen: Mohr, 1922), 18; Max Weber, *Economy and Society: A New Translation* (Harvard University Press, 2019), 112f.

<sup>157</sup> Weber, *Wirtschaft Und Gesellschaft*., 18; Weber, *Economy and Society*, 113.

<sup>158</sup> Weber, *Wirtschaft Und Gesellschaft*., 18; Weber, *Economy and Society*, 113.

<sup>159</sup> Harvey, 'Statelessness: The "de Facto" Statelessness Debate', 5f. (Reuters).

justification is both found in moral theory as well as in legal practice. In cases of robbery, for example, courts make their judgement independent of whether an insurance has covered the victim's loss. In other words, the insurance coverage does not justify the robbery. Thus, Harvey's only argument against using the language of *de facto* statelessness seems weaker than her emphasis on the power of verbal condemnation.

However, she is not the only scholar who thinks in these terms. Jason Tucker also claims that the concept of *de facto* statelessness should be abandoned. Unlike Harvey's, his argument is based on the claim that states will see no need in naturalizing those individuals who already enjoy all the rights that are usually attached to nationality despite being *de jure* stateless, once *de facto* statelessness is legally recognized.<sup>160</sup>

To support his argument, Tucker provides the example of Estonians of Russian origin who "[...] enjoy many rights on par with Estonian citizens [...]" despite being *de jure* stateless.<sup>161</sup> Although their case seems to be the least bad, he offers three reasons for why it proves that the entire concept of the *de facto* statelessness should be abandoned. First, Estonians of Russian origin are granted citizenship rights based on goodwill alone. This means that these rights can be removed easily at any time.<sup>162</sup> Being only *de facto* recognised but not *de jure*, there is no guarantee that their citizenship rights will be respected in the future. If the Estonians of Russian origin would be protected by the Estonian law in the form of *de jure* nationality instead, their citizenship rights would not anymore depend on who holds political power. Second, it seems to be the case that the idea of *de facto* nationality prevents the Estonian state from addressing the problem of *de jure* statelessness.<sup>163</sup> This is to say that, by invoking *de facto* nationality, states are given an excuse to not reduce *de jure* statelessness. Third, by including *de facto* statelessness in the 1954 and 1961 Statelessness Conventions, "[...] there is a greater danger than just negating the importance of the legal bond of [nationality]."<sup>164</sup> As Harvey before, Tucker not only contends that *de facto* statelessness is illogical because it is not a legal concept, but also that it rejects the

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<sup>160</sup> Jason Tucker, 'Questioning de Facto Statelessness: By Looking at de Facto Citizenship', *Tilburg Law Review* 19, no. 1–2 (1 January 2014): 276–84, <https://doi.org/10.1163/22112596-01902026>.

<sup>161</sup> Tucker, 280.

<sup>162</sup> Tucker, 281.

<sup>163</sup> Tucker, 281.

<sup>164</sup> Tucker, 282.

“[...] key defining factor of a stateless person, [...]” namely not having a nationality of any state at all.<sup>165</sup>

While I fully agree with Tucker that having a *de jure* nationality is a necessary safeguard everyone must be granted, I think that his argument against the recognition of *de facto* statelessness is problematic. It seems unjustified to play one concept off against another when the two concepts can both help to address two distinct harmful conditions.

As in the case of Massey’s arguments before, Tucker’s also depends on a non-representative example. By only appealing to the case of Estonians of Russian origin, he ignores the lived experiences of many individuals who profit from the category of *de facto* statelessness. Put precisely, the category of *de facto* statelessness can provide some protection to either of two groups: under the “traditional” working definition those who are not granted diplomatic protection and – as I have argued here – under a broadened working definition those whose minimum core human rights are violated.

Moreover, Tucker is wrong in identifying the lack of nationality as the only key defining factor of statelessness. Instead, there seem to be two key defining factors: the deprivation of legal recognition as well as the deprivation of social recognition. This is to say that some stateless people do not only suffer from not having a position in law but also from the denial of moral equality.

What must follow from Tucker’s important intervention is therefore not to abandon the concept of *de facto* statelessness altogether but to recognize that both categories, *de jure* and *de facto* statelessness, are valuable for different reasons. While *de jure* statelessness reminds us of the importance of legal recognition, the concept of *de facto* statelessness offers us a language to condemn the violation of the rights that ought to be attached to nationality.

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<sup>165</sup> Tucker, 282.

## Conclusion

In this second chapter, I have argued that the narrow language of the UN's traditional working definition of *de facto* statelessness runs into serious contradictions when read against the gradually extending framework of human rights protection. To resolve these contradictions, I have suggested that it should be broadened based on Tasioulas' conceptualisation of the minimum core of human rights. According to Tasioulas, the "minimum core" is defined as those human rights which must be immediately realised without any qualification. The advantage of broadening the working definition of *de facto* statelessness along these lines is that it gives the international community a language that reinforces responsibility and peer-review among states towards the compliance with human rights. Finally, I have refuted two pragmatic objections against the entire concept of *de facto* statelessness. Their conservatism is not only informed by insufficient empirical evidence but also ignores the important differences between *de jure* and *de facto* statelessness.

# Chapter III: Changing the Framework: From Refugees to De Facto Stateless Persons

## Introduction

Although refugees are a subclass of *de facto* stateless persons,<sup>166</sup> they are treated as an independent legal category by international law. Unlike anyone else, they fall under the safeguards of the 1951 Refugee Convention. Despite this, refugee is often an identity people want to avoid. Hannah Arendt, for instance, noted that Jewish people “[...] don’t like to be called refugees. [They] call each other ‘newcomers’ or ‘immigrants.’”<sup>167</sup> In other words, they feel constrained by the refugee label and want to define themselves on their own terms.<sup>168</sup>

Regardless of Arendt’s critical intervention, political theorists have rarely addressed the question of why the assignment of the “refugee” identity may be problematic even though it provides international legal safeguards.<sup>169</sup> Most scholars focus instead on whether the international legal definition of a refugee should be broadened to include, for example, those who suffer from climate change.<sup>170</sup>

This third chapter goes a different route. It challenges the international protection regime by making three related claims. The first is a negative one: I show that the refugee identity has picked up many negative associations. The second claim is an injustice claim: I consider the idea that calling someone a refugee can be a form of injustice. The final claim is a positive one: I will ask whether there is a solution to this injustice. Given the conceptual proximity of refugees and *de facto* stateless persons and building on the previous chapter, I suggest that *de facto* statelessness may be the

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<sup>166</sup> The term ‘stateless person’ is a misnomer since “[...] in Roman law *persona* was somebody who possessed civil rights.” Hannah Arendt, *Responsibility and Judgment* (Schocken Books, 2003), 12.

<sup>167</sup> Hannah Arendt, ‘We Refugees’, in *Altogether Elsewhere: Writers on Exile*, ed. Marc Robinson (Faber and Faber, 1994), 110.

<sup>168</sup> See also Anote Tong, President of Kiribati from 2003 to 2016 Helvarg, ‘Interview with a Drowning President, Kiribati’s Anote Tong’.

<sup>169</sup> A work that tackles the background conditions of analysis is Sarah Fine, ‘Refugees and the Limits of Political Philosophy’, *Ethics & Global Politics* 13, no. 1 (1 January 2020): 6–20, <https://doi.org/10.1080/16544951.2020.1735017>.

<sup>170</sup> Andrew E. Shacknove, ‘Who Is a Refugee?’, *Ethics* 95, no. 2 (1985): 274–84, <https://doi.org/10.1086/292626>; See for example David Owen, ‘In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibilities for Refugees’, in *Migration in Political Theory: The Ethics of Movement and Membership*, ed. Sarah Fine and Lea Ypi (Oxford Scholarship Online, 2016); Chandran Kukathas, ‘Are Refugees Special?’, in *Migration in Political Theory: The Ethics of Movement and Membership*, ed. Sarah Fine and Lea Ypi (Oxford Scholarship Online, 2016); Kieran Oberman, ‘Refugee Discrimination – The Good, the Bad, and the Pragmatic’, *Journal of Applied Philosophy*, 21 July 2020, <https://doi.org/10.1111/japp.12448>.

better legal framework to address the problem of refuge. This is because it offers an answer to the injustice claim and synchronises human rights law.

The chapter is divided into three parts. In the first part, I will outline a genealogy of the refugee identity to substantiate the negative claim. In the second part, I will examine Katharine Jenkins' concept of ontic injustice and develop three complementing arguments to lay out the injustice claim. Finally, I will discuss the conceptual proximity of refugees and *de facto* stateless persons in consideration of the positive claim.

## On Misnaming Those Seeking Refuge

In this first part of the second chapter, I outline a genealogy that explores how the refugee identity has picked up many negative associations. The genealogy focuses on two important conjunctures: the establishment of the refugee identity and the contemporary moment.

Those who seek refuge have not always been identified as refugees. The concept of refuge has a long history in Judeo-Christian thought. In the bible, God is often described as protection, shelter and 'refuge in days of troubles.'<sup>171</sup> Moreover, the Old Testament speaks repeatedly of 'cities of refuge' or 'places of asylum;' the Hebrew term 'miqlat' refers more specifically to asylum for manslaughter.<sup>172</sup> In this regard, "[t]he notion of asylum is rooted in the experience of Israel's early legal circumstances[,] which constrained blood revenge in cases where someone killed another individual accidentally without malicious intent."<sup>173</sup>

Today, asylum is widely accepted as an international legal duty of states.<sup>174</sup> Its modern concept first emerged in the seventeenth century during the war of religion in Europe.<sup>175</sup> The refugee label is innately related to the history of religious

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<sup>171</sup> Helmer Ringgren, G. Johannes. Botterweck, and Heinz-Josef. Fabry, *Theological Dictionary of the Old Testament Vol. VIII* (Grand Rapids: Eerdmans, 1974), 445f.

<sup>172</sup> Ringgren, Botterweck, and Fabry, 552.

<sup>173</sup> Ringgren, Botterweck, and Fabry, 552f.

<sup>174</sup> In academic literature, Hugo Grotius' work is often seen as foundational. However, Marc de Wilde contends that Grotius was more concerned about exile – understood as permanent residence for religiously persecuted groups in particular – rather than asylum – understood as temporary residence for persecuted individuals in general." See Marc de Wilde, 'Seeking Refuge: Grotius on Exile, Expulsion and Asylum', *Journal of the History of International Law / Revue d'histoire Du Droit International* 20, no. 4 (19 February 2019): 473, 491, <https://doi.org/10.1163/15718050-12340094>.

<sup>175</sup> Wilde, 472f.

persecution.<sup>176</sup> As specified by the Merriam-Webster dictionary, it originates from the French 'réfugié' which was exclusively used to describe Huguenots who escaped France after the Edict of Nantes – a law which guaranteed their religious liberty and civil rights – had been revoked in 1685.<sup>177</sup>

The religious persecution of Huguenots not only established the refugee identity, but it also shaped its meaning. In the 17<sup>th</sup> century, thousands of Huguenots were granted refuge in the Dutch and British empire. Instead of being treated as allies or objects of charity,<sup>178</sup> they became 'pawns' in imperial competition.<sup>179</sup> Hundreds of Huguenots were relocated to overseas colonies.<sup>180</sup> While political representation and patronage helped them to flee persecution,<sup>181</sup> they were only granted refuge if willing to (a) defend the distant frontiers of the Dutch and British empire and (b) make the occupied lands productive.<sup>182</sup> Thus, already the first so-called refugees were forced to prove some sort of surplus value to the reception country.<sup>183</sup>

According to historian Owen Stanwood, there seem to be four principles by which Huguenots were judged as deserving of refuge. The first is whiteness.<sup>184</sup> Oppressing indigenous people and upholding plantation slavery, the Dutch and British colonisers wanted white immigrants who could work as militias and protect them in the case of a slave uprising.<sup>185</sup> Given their need for refuge, Huguenots were the ideal targets, as it was difficult to attract other white settlers for such a precarious job.<sup>186</sup>

Second, the Dutch and British viewed Huguenot refugees as deserving of refuge because they were a strategic asset in the military rivalries in Europe.<sup>187</sup> Huguenots not only strengthened the borders of the empires but could also infiltrate enemy lines

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<sup>176</sup> See Aristide R. Zolberg, Astri Suhrke, and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press, 1989), 5–8.

<sup>177</sup> Merriam-Webster, 'The Origin of "Refugee"', accessed 10 September 2021, <https://www.merriam-webster.com/words-at-play/origin-and-meaning-of-refugee>; See also Oxford Dictionary, 'Refugee, n.', in *OED Online* (Oxford University Press), accessed 10 November 2021, <https://www.oed.com/view/Entry/161121>.

<sup>178</sup> See Owen Stanwood, *The Global Refugee: Huguenots in an Age of Empire* (Oxford University Press, 2020), 219, <https://doi.org/10.1093/oso/9780190264741.001.0001>.

<sup>179</sup> Stanwood, 135.

<sup>180</sup> Stanwood, 97.

<sup>181</sup> See Stanwood, 36, 65, 110f.

<sup>182</sup> Stanwood, 236.

<sup>183</sup> See Stanwood, 69, 121.

<sup>184</sup> See Stanwood, 48, 51, 107, 108.

<sup>185</sup> Stanwood, 107.

<sup>186</sup> See Stanwood, 48, 49.

<sup>187</sup> See Stanwood, 104, 181, 182.

due to their French identity.<sup>188</sup> To put it in Stanwood words: “[i]n an age of war with France, ‘refugees’ both symbolized what the British were fighting for and provided important cultural competencies that would help them win the fight.”<sup>189</sup>

Third, Huguenots seeking refuge were seen as an important instrument for expanding the economy:<sup>190</sup> French intellectuals such as Voltaire, for instance, who argued for religious tolerance, used economic language to emphasize the bad effects of losing a productive workforce.<sup>191</sup> At the same time, Dutch and British economists were worried about the demise of their empires due to a skewed balance of trade.<sup>192</sup> There was a general consensus among them that immigrants were required as “[...] laborers, winemakers, gardeners [...]”<sup>193</sup> Moreover, the Dutch and British favoured Huguenot refugees for having all the necessary skills and the reputation as productive Protestants.<sup>194</sup> Stanwood therefore contends that “[t]he logic of political economy pushed the Huguenots into the arms of state planners, and then in the direction of overseas colonies, since these were the only places where they could realize their patrons’ economic ambitions.”<sup>195</sup>

Fourth, apart from fostering their economic ambitions in the colonies, the Dutch and British imperialists also needed Huguenots to spread global Protestantism.<sup>196</sup> Being known to sacrifice everything for their beliefs,<sup>197</sup> Huguenot refugees proved to be the perfect allies in this endeavour.<sup>198</sup>

Living up to these four principles and bringing success to the Dutch and British imperial projects, they became exemplary immigrants.<sup>199</sup> For Stanwood, the Huguenots thus set a normative standard.<sup>200</sup> In other words, they marked a historical precedent against which every future refugee could be judged.<sup>201</sup>

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<sup>188</sup> See Stanwood, 105, 113.

<sup>189</sup> Stanwood, 191.

<sup>190</sup> Stanwood, 92.

<sup>191</sup> Stanwood, 205.

<sup>192</sup> Stanwood, 209.

<sup>193</sup> Stanwood, 92.

<sup>194</sup> See Stanwood, 69, 72, 209.

<sup>195</sup> Stanwood, 73.

<sup>196</sup> Stanwood, 81f.

<sup>197</sup> Stanwood, 232.

<sup>198</sup> Stanwood, 168.

<sup>199</sup> Stanwood, 234.

<sup>200</sup> Stanwood, 234.

<sup>201</sup> See German, Swish, Irish who also joined colonial projects overseas Stanwood, 199.

As the classification of exemplary immigrants worked out in their favour, the Huguenot refugees did not do anything to oppose such an idealised and generally problematic view.<sup>202</sup> Instead, they learned to use the classification to gain advantages.<sup>203</sup> For example, it was a common practise to portray oneself as a master in the production of wine and silk,<sup>204</sup> or alternatively as a military asset.<sup>205</sup>

Being considered as a surplus value did not necessarily win Huguenots legal or social recognition beyond refugee status, however.<sup>206</sup> While the legal proceedings towards naturalisation were vague, there was an ongoing debate whether an increasing number of Huguenot refugees would stimulate the economy or have negative impacts on society.<sup>207</sup>

The Huguenot refugees were accepted as long as the reception countries benefitted from their presence. In 1697, when resources became scarce, however, they were first and foremost poor French agriculturalists who could not be trusted.<sup>208</sup> Under such circumstances, the Huguenot refugees were quickly seen as a liability.<sup>209</sup>

This change of public opinion had several consequences. At first, Huguenots were denied political and religious freedoms in the form of the right to vote and to run for office.<sup>210</sup> Secondly, they were also deprived of economic and inheritance rights.<sup>211</sup> Eventually, the discourse turned aggressively Francophobe describing them as 'lazy,' 'devells' and 'traitors.'<sup>212</sup>

It is important to recuperate this history to understand that the refugee identity has encapsulated all these negative associations since its emergence in the 17<sup>th</sup> century. At best refugees are individuals who deserve refuge because they benefit the reception country. At worst they are undeserving 'Others' who must be excluded.

Although the refugee identity has become an international legal category with the 1951 *Convention Relating to the Status of Refugees*, the coordinates of this discourse are

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<sup>202</sup> Stanwood, 72.

<sup>203</sup> Stanwood, 73.

<sup>204</sup> See Stanwood, 82, 85, 154.

<sup>205</sup> Stanwood, 113.

<sup>206</sup> Stanwood, 158.

<sup>207</sup> Stanwood, 157.

<sup>208</sup> Stanwood, 126.

<sup>209</sup> See Stanwood, 127, 132.

<sup>210</sup> Stanwood, 155.

<sup>211</sup> Stanwood, 155.

<sup>212</sup> Stanwood, 156, 224.

still the same.<sup>213</sup> Today's admission policies generally follow a discourse of deservingness. This can be seen through governments' emphasis on the need to attract 'high-skilled' migrants and their purposeful conflation between 'economic migrants' and refugees. The 1997 to 2010 UK Government, for example, has encouraged individuals to immigrate if they benefit society, and at the same time removed asylum seekers that are considered to be 'bogus applicants.'<sup>214</sup>

Accusations of economic migration seem especially prevalent in 'public domain media texts' such as news, articles, and televised political debates.<sup>215</sup> There are several derogative terms that are used for refugees to associate them with criminality and illegality "[...] thereby undermining their right to enter or to remain in a host country."<sup>216</sup> They include "[...] 'illegal asylum-seekers,' 'bogus asylum-seekers,' 'economic refugee' and 'illegal migrant.'"<sup>217</sup> As Kirkwood et al. argue, these categories do not simply specify distinct processes within the immigration policy framework, but they instead work as moral justification for policies that restrict asylum opportunities.<sup>218</sup>

The language of deservingness often conceals the underlying racism of such discursive practices.<sup>219</sup> David Goldberg dates this pattern back to John Stuart Mill's rebuttal of Thomas Carlyle's naturalistic racism.<sup>220</sup> In his rebuttal, Mill offered a cultural and moral progressivist explanation of white supremacy rather than justifying it on the grounds of biological qualities.<sup>221</sup> Although he was committed to the principle of equality, Mill simply ignored the fact that a call for present equality only reproduces historical inequities due to colonialism.<sup>222</sup>

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<sup>213</sup> For instance, several scholars argue that not even the 1951 Refugee Convention was primarily motivated by altruistic concerns. Like in the case of Huguenots, the granting of refuge has been interest-based: when giving it to those who fled the Soviet Union, Western states used the Refugee Convention to show the superiority of the capitalist system. Steve Kirkwood et al., *The Language of Asylum: Refugees and Discourse* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2016), 9; See Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World* (Oxford University Press, 2017), 38.

<sup>214</sup> Jock Young, 'To These Wet and Windy Shores: Recent Immigration Policy in the UK', *Punishment & Society* 5, no. 4 (1 October 2003): 452f., <https://doi.org/10.1177/14624745030054005>.

<sup>215</sup> Simon Goodman and Susana Speer, 'Category Use in the Construction of Asylum Seekers', *Critical Discourse Studies* 4, no. 2 (August 2007): 168f., <https://doi.org/10.1080/17405900701464832>.

<sup>216</sup> Simon Goodman et al., *The Language of Asylum: Refugees and Discourse* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2016): 14.

<sup>217</sup> Kirkwood et al., 14.

<sup>218</sup> Kirkwood et al., 14; See also Goodman and Speer, 'Category Use in the Construction of Asylum Seekers', 179.

<sup>219</sup> See for example Lisa Marie Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (NYU Press, 2012), 30, <https://www.jstor.org/stable/j.ctt9qfhgv>; Kirkwood et al., *The Language of Asylum: Refugees and Discourse*, 16.

<sup>220</sup> See David Theo Goldberg, *The Racial State* (Wiley, 2002), 58f.

<sup>221</sup> Goldberg, 70.

<sup>222</sup> Goldberg, 65.

Today, racism expresses itself in an even more subtle manner.<sup>223</sup> Rather than being based on the proclaimed cultural and moral superiority of white people, it is framed in the language of liberalism.<sup>224</sup> The labelling of refugees as ‘economic migrants’ to associate them with free riders who want to take advantage of the reception country’s welfare system is just one of many examples. The stereotypical identity of a bogus asylum seeker is another. It is meant to show that the individual in question seeks refuge merely to make financial gains.<sup>225</sup> Appealing to consideration of fairness, the term is also used to draw a clear distinction with so-called genuine and deserving refugees.<sup>226</sup> The strategy of separation thereby suggests that ‘bogus asylum seekers’ not only take away from the reception country, but also from those genuine and deserving refugees. What is thereby never explicitly stated is the problematic assumption on which the argument is based, namely that space and capacity to offer refuge are strictly limited to only very few individuals.

To recap: by outlining this genealogy, it becomes apparent that the refugee identity has picked up many negative associations since it was first used in the 17<sup>th</sup> century. Thus, there are good reasons to replace it. Otherwise, one willingly accepts that those who seek refuge are confronted with the toxicity which is encapsulated by the refugee identity.

## Ontic Injustice

In this second part of the chapter, I first examine Katharine Jenkins’ concept of ontic injustice as it builds the foundation of the three arguments that follow.

The concept of *ontic injustice* describes cases in which it is unjust to assign individuals a particular identity.<sup>227</sup> It is based on the idea that identities entail social constraints and enablements.<sup>228</sup> This is to say that they allow or prohibit certain social practices.<sup>229</sup>

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<sup>223</sup> Eduardo Bonilla-Silva terms this type of racism “colour-blind racism.” Eduardo Bonilla-Silva, *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States* (Rowman & Littlefield Publishers, 2006), 25.

<sup>224</sup> Bonilla-Silva, 26.

<sup>225</sup> See Kirkwood et al., *The Language of Asylum: Refugees and Discourse*, 79, 92.

<sup>226</sup> Kirkwood et al., 79.

<sup>227</sup> Katharine Jenkins, ‘Ontic Injustice’, *Journal of the American Philosophical Association* 6, no. 2 (ed 2020): 2, <https://doi.org/10.1017/apa.2019.27>. Jenkins uses the term “social kinds” rather than “identities.”

<sup>228</sup> Jenkins, 4.

<sup>229</sup> Searle, for example, calls these constraints and enablements ‘deontic power’ John R. Searle, ‘Social Ontology: Some Basic Principles’, *Anthropological Theory* 6, no. 1 (2006): 9, <https://doi.org/10.1177/1463499606061731>.

By being assigned the identity of a Doctor of Philosophy, for instance, one is not only enabled to speak on certain topics with authority but also afforded some social recognition.

Notwithstanding, Jenkins contends that there are cases where the attachment of an identity is wrongful because it violates the moral entitlements of the individual in question.<sup>230</sup> She gives the example of *wife* as it is an identity which has prevented women from controlling sexual access to their body.<sup>231</sup> A *wife* could, for instance, be raped by her husband without legal consequences in Wales and England prior to 1991.<sup>232</sup>

Using this example, Jenkins contends that ontic injustice is not the harm which can occur from the constraints and enablements attached to identities (such as rape in the case of wife). Instead, it is the assignment of the identity itself that makes someone subject to wrongful constraints and enablements.<sup>233</sup> Hence, ontic injustice affects everyone who is assigned a particular identity such as *wife*, independently of whether they are actually harmed or not. In the words of Jenkins:

“[...] an individual suffers ontic injustice if and only if they are socially constructed as a member of a certain social kind where that construction consists, at least in part, of their being subjected to a set of social constraints and enablements that is wrongful to them.”<sup>234</sup>

But what makes the constraints and enablements that are attached to identities wrongful? The first wrong is the risk of harm that they entail.<sup>235</sup> The second wrong can be termed ‘moral injury.’ Following Jean Hampton, Jenkins defines a moral injury as an affront to someone’s dignity.<sup>236</sup> To put it in another way, by assigning someone a particular identity such as *wife*, they are not only at risk of harm but also denied social recognition and no longer seen as moral equals.

Jenkins adapts Hampton’s conceptualisation of moral injury in two important ways. First, she shifts the focus from individual behaviour to collective treatment.<sup>237</sup> This is to

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<sup>230</sup> Jenkins, ‘Ontic Injustice’, 4.

<sup>231</sup> Jenkins, 4.

<sup>232</sup> Jenkins, 4.

<sup>233</sup> Jenkins, 5.

<sup>234</sup> Jenkins, 5.

<sup>235</sup> Jenkins, 7.

<sup>236</sup> Jenkins, 7.

<sup>237</sup> Jenkins, 9.

say that identities require a system of formal and informal institutions such as schools, the media, and government agencies which attach constraints and enablements to them. Racist identities such as *bogus asylum-seeker*, for instance, are embedded into the broader institutional framework of white supremacy. Second, Jenkins also broadens moral injury to include non-human animals.<sup>238</sup> Taking these two adaptations into account, she concludes that the level of ontic injustice depends on the seriousness of the moral injury it involves.<sup>239</sup> Put precisely, the more an individual is deprived of their moral dignity, the more they suffer from ontic injustice.

There are three reasons for why ontic injustice is a useful concept to understand why those seeking refuge have been misnamed. First, it generally problematises the assignment of identities, which is commonly seen as an inevitability.<sup>240</sup> This is to say that identities such as *refugee*, no matter how established, must always be questioned. Second, the concept ontic injustice moreover reveals that the assignment of an identity can be wrongful by itself.<sup>241</sup> Naming someone a refugee is, in other words, not wrong because of the consequences it entails – they may rather be good as the identification of refugee status is a precondition for asylum – but because of the moral injury it involves. Third, the concept of ontic injustice thereby improves our understanding of systemic oppression.<sup>242</sup>

### *Complementing Ontic Injustice*

In the following sections, I develop three arguments that not only complement Jenkins' account of *ontic injustice* but also consider the idea that calling someone a refugee is a form of injustice.<sup>243</sup> The arguments are presented in the following order: first, the assignment of an identity offers an unfavourably reductive image of the individual to

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<sup>238</sup> Jenkins, 10.

<sup>239</sup> Jenkins, 11. [emphasis added]

<sup>240</sup> Jenkins, 15.

<sup>241</sup> Jenkins, 16.

<sup>242</sup> Jenkins, 18. [emphasis added]

<sup>243</sup> My arguments do not question self-definitions. I agree with Patricia Hill Collins that the creation of independent self-definitions is essential to that survival of oppressed groups. See Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge, 2002), 112. Collins also offers a strong answer to the dilemma of rejecting assigned identities by an identity of one's own. She contends: "[i]dentity is not the goal but rather the point of departure in the process of self-definition [...]. When Black women define ourselves, we clearly reject the assumption that those in positions granting them the authority to interpret our reality are entitled to do so. Regardless of the actual content of Black women's self-definitions, the act of insisting on Black female self-definition validates Black women's power as human subjects. Collins, 113f.

whom it is assigned. Second, the assignment of an identity helps to control the individual to whom it is assigned. Third, identities facilitate the individualisation of problems.

### *Creating Reductive Images*

My first argument against the assignment of the refugee identity focuses on identity and difference as categories of knowledge. I contend that the assignment of the refugee identity creates an unfavourably reductive image of the individual to whom it is assigned.

To understand this argument, we first need to examine how identity and difference became categories of knowledge. Recounting this history also offers a possible explanation why the refugee identity first appeared in the 17<sup>th</sup> century in relation to the Huguenots.

Until the end of the 16<sup>th</sup> century, the interpretation of texts and science more generally was not yet guided by identity and difference as categories of knowledge but by resemblance.<sup>244</sup> For instance, society was often said to resemble the human body.<sup>245</sup> Paul Archambault gives the example of John Fortescue, who in his treatise *De Laudibus Legum Anglie* writes that “[...] just as in natural bodies, what is left over after decapitation is not a body, but what we call a trunk, so in bodies politic a community without a head is not by any means a body.”<sup>246</sup>

However, seventeenth century scholars such as Francis Bacon and René Descartes began to criticise such knowledge production; their critiques contributed to a change in episteme which is meant to describe the underlying structural relations on which the production of knowledge is based.<sup>247</sup> From then on, identity and difference replaced resemblance as the primary category of knowledge.

While Bacon offered an empiricist critique of resemblance – the human mind easily supposes much greater resemblance between things than there actually is –

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<sup>244</sup> Michel Foucault, *The Order of Things* (Routledge, 2005), 19.

<sup>245</sup> See Paul Archambault, ‘The Analogy of the “Body” in Renaissance Political Literature’, *Bibliothèque d’Humanisme et Renaissance* 29, no. 1 (1967): 21–53.

<sup>246</sup> Quoted from Archambault, 35.

<sup>247</sup> Michel Foucault, *Archaeology of Knowledge* (Psychology Press, 2002), 211; See for this interpretation also Mark Bevir, ‘Foucault, Power, and Institutions’, *Political Studies* 47, no. 2 (June 1999): 347, <https://doi.org/10.1111/1467-9248.00204>.

Descartes argued for the extension of rational thought by the means of universalising comparisons.<sup>248</sup> There are two types of comparison that fulfil Descartes' claim for universalism: one is comparison of measurement, the other is comparison of order.<sup>249</sup> The first requires a common unit from which one derives relations of equality or inequality.<sup>250</sup> For instance, animals can be classified by the number of legs they have. A comparison of order, on the other hand, does not require a common unit.<sup>251</sup> Comparing turns into the act of arranging "[...] differences according to the smallest possible degrees."<sup>252</sup> It becomes the means by which a universal order is established (e.g., one that includes human beings at the top, followed by animals, and plants at the bottom).

In his analysis of knowledge production, Michel Foucault concludes from Descartes critique of resemblance that we will no longer seek commonalities and kinship but instead start to differentiate by establishing identities.<sup>253</sup> For him, the verb to know therefore takes on the meaning of to discriminate.<sup>254</sup>

According to Foucault, this change had immense consequences for Western thought.<sup>255</sup> From the so-called Classical Age the world became to be ordered by classifications, taxonomies, and tables.<sup>256</sup> Every known object was meant to have its fixed place. Following this shift in episteme, scholars began not only to assign identities, but also to construct 'universal orders' under the pretence of science.<sup>257</sup> The most notorious identity being race. In 1684, the *Journal des Sçavans* published, for instance, the first system of human classification.<sup>258</sup> In the included essay *A New Division of the Earth and the Different Species or Races Living There*, its author François Bernier classifies four races by a comparison of order.<sup>259</sup> From the most superior to the most inferior race, he discriminates between, first, the Europeans and

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<sup>248</sup> Foucault, *The Order of Things*, 57f.

<sup>249</sup> Foucault, 58.

<sup>250</sup> Foucault, 59.

<sup>251</sup> Foucault, 59.

<sup>252</sup> Foucault, 59.

<sup>253</sup> Foucault, 61.

<sup>254</sup> Foucault, 61.

<sup>255</sup> Foucault, 60.

<sup>256</sup> See Foucault, 60, 82.

<sup>257</sup> See Foucault, 61.

<sup>258</sup> Nell Irvin Painter, *The History of White People* (W. W. Norton & Company, 2011), 43.

<sup>259</sup> Painter, 44.

American Indians, second, the people in sub-Saharan Africa, third, those living in southeast Asia, China and Russia, and fourth, the Lapps.<sup>260</sup>

Despite yet another shift in episteme at the beginning of the 19<sup>th</sup> century, identity and difference as categories of knowledge are still relevant today.<sup>261</sup> The reason for this is that the novelty of the new episteme does not lie in the method of producing of knowledge but in the appearance of human beings as its primary subject matter.<sup>262</sup> Since the dawn of the Modern Age, scholars have, for instance, studied and defined who counts as a refugee.

Yet such knowledge production by the means of identity and difference does not tell us much about the individuals that are defined. This is especially so if they hold a variety of identities – a condition certainly true with respect to all human beings. For instance, a refugee may be a woman, a mother, a daughter, a sister, a friend, a doctor, a musician, an intellectual, and so on. What one gets to know by the means of the 1951 Refugee Convention, which uses identity and difference as categories of knowledge, is far removed from capturing these complex intersections.

The legal definition of a refugee that frames public discourse reduces those who seek refuge to the condition of persecution and displacement from the country of origin. It thereby creates a reductive image that dehumanises and contributes to their ‘Othering.’ If those who seek refuge were not primarily defined by the means of identity and difference, it would become apparent that they are in many respects like everyone else. What they want, at the most basic level, is to live peacefully. Such an emphasis on commonalities rather than on differences would in no way take away from the definition’s core message: we ought to grant refuge to those who wish to live peacefully but cannot because they are persecuted and displaced.

David Turton makes this point with respect to the places of asylum. He contends that refugees are most often associated with the horror and pain of losing their home; while this creates the impression of flawed human beings and passive victims, there is barely any emphasis on the hard work refugees do to build new homes in refugee

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<sup>260</sup> Painter, 44.

<sup>261</sup> Foucault, *The Order of Things*, xxiv.

<sup>262</sup> Foucault, xxv; See also Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (University of Chicago Press, 1983).

camps, detention centres, or in cities.<sup>263</sup> Turton therefore contends that such a reductive image of refugees makes it less likely that residents see them as persons like anyone else and thereby as potential neighbours in their neighbourhoods.<sup>264</sup>

The collective Polylog which consist of women from Syria, Iran, Iraq, and Azerbaijan who sought refuge in Germany, students from the Free University of Berlin, as well as members of “International Women Space,” moreover gives another important example of how the refugee identity creates a reductive image. For them, its unpersonal and genderless nature leads to a situation where those who seek refuge are often either portrayed as a homogeneous group or as mostly men and victimised women.<sup>265</sup>

### *Controlling Images*

The concept of controlling images offers another lens through which the assignment of an identity can be critically examined. Controlling images are stereotypical identities, that portray someone as the ‘Other,’ to justify race, gender, and class oppression.<sup>266</sup> They are not only helpful in controlling those who are seen as a threat to the moral and social order, but also necessary to draw society’s boundaries itself.<sup>267</sup>

Taking the example of African-American women, Patricia Hill Collins, who has coined the term, identifies several controlling images. These are the ‘mammy,’ the ‘Black matriarch,’ the ‘welfare mother,’ and the ‘Jezebel.’ Before examining how these stereotypical identities help to control those to whom they are assigned, let me first highlight two ways that distinguish them from identities such as *wife* or *refugee*. The first difference is that the latter identities are also legal categories. This is to say that the enablements and constraints, which are attached to them, are much more directly enforced. The second difference is closely related to the first. Unlike ‘wife’ or ‘refugee,’ ‘mammy,’ ‘Black matriarch,’ ‘welfare mother,’ and ‘Jezebel’ are rarely used to name the individuals to whom they are assigned. In other words, these controlling images exist primarily in the public consciousness.

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<sup>263</sup> David Turton, ‘The Meaning of Place in a World of Movement: Lessons from Long-Term Field Research in Southern Ethiopia’, *Journal of Refugee Studies* 18, no. 3 (1 September 2005): 278, <https://doi.org/10.1093/refuge/fei031>.

<sup>264</sup> Turton, 278.

<sup>265</sup> Kollektiv Polylog, *Das ist meine Geschichte*, 26.

<sup>266</sup> See Collins, *Black Feminist Thought*, 69f.

<sup>267</sup> Collins, 70.

To show how control is exercised through such images, I turn to Collins' example of the mammy. The controlling image of the mammy portrays African-American women as obedient domestic servants.<sup>268</sup> There are several ways in which it helps to exercise control over them. Being forced to prioritize the nurturing of white children over self-care, the mammy controlling image captures "[...] the dominant group's perceptions of the ideal Black female relationship to elite White male power [...]," namely one of subordination.<sup>269</sup> At the same time, it is used to encourage African-American women to teach their own children to be submissive.<sup>270</sup>

Employment in 'mammified' jobs moreover reinforces white supremacy.<sup>271</sup> By becoming domestic servants, Black women are seen as less capable human beings. Besides, the 'mammy' controlling image is also used as a tool to divide the working class as it clearly separates Black women from White women who also economically exploited.<sup>272</sup> In other words, it obstructs solidarity between two closely connected groups that both suffer from the patriarchy.

Finally, the mammy controlling image "[...] also serves a symbolic function in maintaining oppressions of gender and sexuality."<sup>273</sup> Following Barbara Christian, Collins contends that it reinforces the patriarchal ideology of 'true womanhood' by portraying the mammy as an asexual woman who is fully devoted to the household.<sup>274</sup>

The assignment of the *refugee* identity serves the same function as the mammy. It is also used to exercise strict control over those who seek refuge. There seem to be two ways by which this can be done. First, in the form of a paternalistic 'humanitarianism.'<sup>275</sup> This is to say that refugees are often portrayed as needy individuals and thereby denied any agency themselves.<sup>276</sup> The second way of controlling those who seek refuge is by criminalising them. When refugees are

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<sup>268</sup> Collins, 72.

<sup>269</sup> Collins, 72.

<sup>270</sup> Collins, 73.

<sup>271</sup> Collins, 73.

<sup>272</sup> See Collins, 73f.

<sup>273</sup> Collins, 73.

<sup>274</sup> Collins, 74.

<sup>275</sup> See Lucy Mayblin, *Impoverishment and Asylum: Social Policy as Slow Violence* (London: Routledge, 2019), 125, <https://doi.org/10.4324/9780367823450>.

<sup>276</sup> See Alastair Nightingale, Michael Quayle, and Orla Muldoon, "'It's Just Heart Breaking": Doing Inclusive Political Solidarity or Ambivalent Paternalism through Sympathetic Discourse within the "Refugee Crisis" Debate', *Journal of Community & Applied Social Psychology* 27, no. 2 (2017): 137–46, <https://doi.org/10.1002/casp.2303>.

associated with ideas of illegality, criminality, and free-riding, they can be accused as perpetrators of injustice and thereby underserving of any compassion.<sup>277</sup>

### *Individualising the Responsibility for Suffering*

Collin's concept of controlling images reveals yet another way in which the assignment of an identity may be unjust: it can be used to individualise the responsibility for suffering. The image of the welfare mother, for instance, portrays African-American women first and foremost as poor working-class citizens "[...] who make use of social welfare benefits to which they are entitled by law."<sup>278</sup> Instead of highlighting structural explanations for their poverty such as ghettoization and undereducation,<sup>279</sup> African-American women are blamed as lazy individuals who are without a work ethic.<sup>280</sup> In other words, the controlling image of the welfare mother is used to stigmatise them as the source of their own plight.<sup>281</sup>

The assigned identity of a *refugee* is used in the same way. Like welfare mothers, some refugees are also blamed for exploiting the resources of the reception country.<sup>282</sup> Despite the lack of empirical evidence,<sup>283</sup> this narrative is so widespread that it is even captured by controlling images of its own, namely that of the economic migrant or the bogus asylum seeker.<sup>284</sup>

Notwithstanding of whether the narrative is applied in a particular case or not, those seeking refuge are generally viewed with suspicion.<sup>285</sup> Critically analysing the case of France, Didier Fassin argues that the French Office for Immigration and Integration has shifted its stance to consider all candidates for asylum "[...] to be undocumented immigrants seeking to take advantage of the generosity of the European nations[,]"

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<sup>277</sup> See Mayblin, *Impoverishment and Asylum*, 5f., 37.

<sup>278</sup> Collins, *Black Feminist Thought*, 78.

<sup>279</sup> See Collins, 78.

<sup>280</sup> Collins, 79.

<sup>281</sup> Collins, 79.

<sup>282</sup> Michael Pugh, 'Drowning Not Waving: Boat People and Humanitarianism at Sea', *Journal of Refugee Studies* 17, no. 1 (2004): 55; See Charlotte Taylor, 'Investigating the Representation of Migrants in the UK and Italian Press: A Cross-Linguistic Corpus-Assisted Discourse Analysis', *International Journal of Corpus Linguistics* 19, no. 3 (1 January 2014): 391, <https://doi.org/10.1075/ijcl.19.3.03tay>; Karolina Szmagalska-Follis, 'What Is an Economic Migrant? Europe's New Borders and the Politics of Classification', in *Citizenship, Borders, and Human Needs*, ed. Rogers M. Smith (University of Pennsylvania Press, 2011), 117, <https://doi.org/10.9783/9780812204667.115>.

<sup>283</sup> See Benedikt Buechel, 'Beyond the State: The Moral Nexus between Corporations and Refugees', *Critical Review of International Social and Political Philosophy*, 14 May 2020, 1–23, <https://doi.org/10.1080/13698230.2020.1764785>.

<sup>284</sup> See Szmagalska-Follis, 'What Is an Economic Migrant?', 116.

<sup>285</sup> See Mayblin, *Impoverishment and Asylum*, 125.

until they can show evidence that proves otherwise.<sup>286</sup> Looking at the case of Sweden, Ulrika Wernesjö contends that even minors have to fight the narrative of exploiting the reception country's resources.<sup>287</sup>

Naming the increasing number of individuals who have recently sought refuge in Europe a 'Refugee Crisis' rather than an 'A Crisis of Economic Inequality' is by itself an example of the individualisation of the responsibility for suffering. Instead of examining the vital role states play in causing the displacement of people from their country of origin, the crisis is associated with individual human failure. The question of how the reception country may contribute to economic inequalities that force individuals to cross its border is rarely asked in public discourse.

That said, the term 'stateless person' captures the suffering of those who seek refuge much better than the *refugee* identity. The reason for this is that the concept of statelessness is more indicative of the causes of displacement and refuge as it shifts the public discourse from the individual to states as the primary problem. This is to say that those who seek refuge do so not because of their individual human failure but because the country of origin does not take responsibility for their protection.

## **Refugees and De Facto Stateless Persons Intertwined**

In this final part of the chapter, I discuss the conceptual proximity of the refugee and the *de facto* statelessness definition in consideration of the positive claim that latter may be the better legal framework to address the problem of refuge. The reasons are twofold: it addresses the injustice claim and synchronises human rights law.

While refugees and stateless persons are treated as two distinct categories today, this distinction has not always been made. The problem of statelessness was for the first time politically recognised after the end of the First World War, when ten million displaced people turned into refugees due to the breakdown of three empires: the

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<sup>286</sup> Didier Fassin, 'Compassion and Repression: The Moral Economy of Immigration Policies in France', *Cultural Anthropology* 20, no. 3 (August 2005): 369, <https://doi.org/10.1525/can.2005.20.3.362>.

<sup>287</sup> See Ulrika Wernesjö, 'Across the Threshold: Negotiations of Deservingness among Unaccompanied Young Refugees in Sweden', *Journal of Ethnic and Migration Studies* 46, no. 2 (25 January 2020): 389–404, <https://doi.org/10.1080/1369183X.2019.1584701>.

Austro-Hungarian, the Russian, and the Ottoman.<sup>288</sup> In 1926, it found its way into popular culture. B. Traven's novel *The Death Ship* tells the story of merchant seamen who are effectively stateless because they lack identification documents.

Despite the recognition of the problem, there was however no international legal framework to remedy statelessness. Until the end of the Second World War, the League of Nations only established different refugee mandates: a High Commissioner's Office for Russian and Armenian Refugees (1921 – 1930), the Nansen International Office (1930 – 1938); the Office of the High Commissioner for Refugees coming from Germany (1933), and a High Commissioner's Office for 'Nansen refugees' and refugees coming from Germany (1938 – 1946).<sup>289</sup>

In 1946, the Intergovernmental Committee on Refugees dismantled the practical link between refugees and *de facto* stateless persons in its report *Statelessness and Some of its Causes: An Outline*. From then on, refugees were defined separately in relation to the cause of their flight.<sup>290</sup> This new framework eventually led to the first international legal instrument for their protection.<sup>291</sup> The 1951 *Convention Relating to the Status of Refugees* defines a refugee as someone who:

"[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."<sup>292</sup>

*A Study on Statelessness* delineates *de facto* stateless persons, on the other hand, as those:

"[...] who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals."<sup>293</sup>

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<sup>288</sup> Bruno Cabanes, *The Great War and the Origins of Humanitarianism, 1918–1924*, *The Great War & the Origins of Humanitarianism, 1918–1924* (Cambridge: Cambridge University Press, 2014), 135.

<sup>289</sup> Hugh Massey, 'UNHCR and De Facto Statelessness' (Legal and Protection Policy Research Series, 2010): 1f.

<sup>290</sup> Batchelor, 'Stateless Persons', 241.

<sup>291</sup> Batchelor, 241ff.

<sup>292</sup> Convention and Protocol Relating to the Status of Refugees. 1951: 14.

<sup>293</sup> United Nations, 'A Study of Statelessness', 6.

For instance, illegal Cuban immigrants in the United States are *de facto* stateless as long as the U.S. and Cuba have no foreign relations because they cannot be granted diplomatic protection under those circumstances.<sup>294</sup> Moreover, Somalis abroad are in an even worse position than Cubans: they are *de facto* stateless and without diplomatic protection in most foreign countries because their country of nationality is not recognised there. At the same time, both Cubans and Somalis do not count as refugees in international law if they do not also suffer from persecution in the country of origin. By contrast, the UN Refugee Agency (UNHCR) considers all refugees to be either *de jure* or *de facto* stateless.<sup>295</sup>

Although refugees and *de facto* stateless persons are treated as two distinct categories under international law – not every *de facto* stateless person being a refugee – both definitions retain two central aspects that tie them conceptually together. The first is the so-called ‘alienage requirement.’<sup>296</sup> It says that *de facto* stateless individuals as well as refugees must be outside their country of nationality.<sup>297</sup> The second central aspect is the so-called ‘lack of protection.’<sup>298</sup>

While the alienage requirement is identical in both the refugee and the *de facto* stateless person definition, the lack of protection is differently interpreted in international documents. In terms of *de facto* statelessness, it “[...] has traditionally been linked to the notion of effective nationality.”<sup>299</sup> According to UN legal advisor Hugh Massey, the concept of effective nationality includes at least three safeguards that a *de facto* stateless individual may be deprived of when outside the country of nationality: diplomatic protection, consular assistance, and the right to return to the country of origin.<sup>300</sup> In the case of refugees, the lack of protection is bound to a well-founded fear of persecution.

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<sup>294</sup> See Equal Rights Trust. 2010. ‘Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons’: 65.

<sup>295</sup> Massey, ‘UNHCR and De Facto Statelessness’, 10.

<sup>296</sup> See James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2014), 17.

<sup>297</sup> Individuals with dual nationality must be outside both countries of nationality. In a situation in which individuals may establish a nationality but it cannot exactly be determined of which country, they must be outside all putative countries of nationality to count as *de facto* stateless. Massey, ‘UNHCR and De Facto Statelessness’, 61.

<sup>298</sup> See Guy S. Goodwin-Gill, ‘The Language of Protection’, *International Journal of Refugee Law* 1, no. 1 (1989): 6–19, <https://doi.org/10.1093/ijrl/1.1.6>; Antonio Fortin, ‘The Meaning of Protection in the Refugee Definition’, *International Journal of Refugee Law* 12, no. 4 (2000): 548–76; Hugo Storey, ‘The Meaning of “Protection” within the Refugee Definition’, *Refugee Survey Quarterly* 35, no. 3 (September 2016): 1–34, <https://doi.org/10.1093/rsq/hdw012>.

<sup>299</sup> Expert Meeting, ‘The Concept of Stateless Persons under International Law Summary Conclusions’ (Prato, Italy, 2010), 6.

<sup>300</sup> Massey, Hugh. 2010: 61f.

Yet the meaning of persecution has never been explicitly defined in international law.<sup>301</sup> The drafting history of the 1951 Refugee Convention merely reveals a bifurcated understanding of who counts as refugee.<sup>302</sup> While it is recognised that the interpretation of persecution should be “sufficiently inclusive,” the drafters only considered a harm to be persecution if it coincided with the country of nationality’s unwillingness or incapacity to offer protection.<sup>303</sup>

Given the absence of an explicit definition of persecution in international law, refugee status can and has been grounded in human rights.<sup>304</sup> The same applies to *de facto* stateless status. While I have previously argued that there are good reasons to adopt a definition of *de facto* statelessness which includes everyone whose country of nationality denies them or is not willing to work towards the implementation of their minimum core human rights, a similar argument can be made with respect to the refugee definition of persecution and thereby the lack of protection requirement.

Examining a great number of legal cases, Michelle Foster and James Hathaway develop such an argument in two parts. Firstly, they reject two common interpretations of persecution: the subjective and the dictionary. By subjective they mean an approach where [...] the question of whether harm is sufficiently “intense,” “offensive,” “oppressive,” or “unjustified” [to count as persecution] is based on a given decision-maker’s personal assessment of the severity of the harm [...]” experienced by an asylum seeker.<sup>305</sup> The reason for their rejection is that such an approach does not allow for consistency across cases.<sup>306</sup> Furthermore, they also reject a dictionary interpretation of persecution as most dictionaries offer a definition that stands in opposition to the primary rule of interpretation of any treaty, namely that it “[...] shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>307</sup>

Secondly, Foster and Hathaway defend an interpretation of persecution that is grounded in human rights law. They take human rights law to be the best foundation

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<sup>301</sup> Hathaway and Foster, *The Law of Refugee Status*, 182.

<sup>302</sup> Hathaway and Foster, 183.

<sup>303</sup> Hathaway and Foster, 184.

<sup>304</sup> See Van Waas and De Chickera, ‘Unpacking Statelessness’, 54, 65.

<sup>305</sup> Hathaway and Foster, *The Law of Refugee Status*, 187.

<sup>306</sup> Hathaway and Foster, 189.

<sup>307</sup> Hathaway and Foster, 191.

since it is “principled and practical.”<sup>308</sup> It is principled because it offers the most just response to persecution and it is practical because it ensures some objective standards across cases.<sup>309</sup> The human rights conception of *de facto* statelessness that I have developed in the previous chapter clearly delineates these standards. It is thereby possible to frame refugee status through the concept of *de facto* statelessness. In this section, I have shown that the drafting history and ongoing scholarly debates reveal a close conceptual proximity of the refugee and *de facto* statelessness definition in terms of both the alienage as well as the lack of protection requirement. Given this conceptual proximity *de facto* statelessness may therefore be the better legal framework as it not only addresses the injustice claim, which I have outlaid in the previous parts of the chapter, but also synchronises human rights law.

## Conclusion

In this third chapter, I have challenged the current refugee framework in its entirety by making three related claims. Firstly, I have made a negative claim, namely that the refugee identity has picked up many negative associations. I have shown this through outlining a genealogy that focuses on the establishment of the refugee identity and the contemporary moment. In the second part, I have considered the claim that calling someone a refugee can be a form of injustice. This injustice claim is based on Katharine Jenkins’ concept of ontic injustice and three complementing arguments. First, the assignment of an identity offers an unfavourably reductive image of the individual to whom it is assigned. Second, the assignment of an identity helps to control the individual to whom it is assigned. Third, identities facilitate the individualisation of problems. In the final part, I have then made a positive claim. Discussing the conceptual proximity of the refugee and *de facto* statelessness definition, I have suggested that the latter may be a better legal framework to address the problem of refuge. This is because it offers an answer to the injustice claim and synchronises human rights law.

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<sup>308</sup> Hathaway and Foster, 206.

<sup>309</sup> Hathaway and Foster, 207.

# Chapter IV: Three Subtypes of Statelessness

## Introduction

In 2014, marking the 60th anniversary of the *1954 Convention relating to the Status of Stateless Persons*,<sup>310</sup> the UNHCR launched the global “I belong” campaign to end statelessness within the modern state system.<sup>311</sup> In its press release, the UNHCR describes various characteristics it associates with this condition. Some are the consequences that people suffer as a result of statelessness: having no legal identity, no passport, no vote and no opportunity to get an education. Some of these are reasons why people are made stateless: ethnic, religious or gender discrimination and regional instability. The press release also draws a distinction between nationality and citizenship. One does not have to look any further to realize that statelessness is complex.

Despite the complexity of statelessness, theorists have not yet worked out a formal typology.<sup>312</sup> When conceptualizing statelessness in singular terms, they miss something important.<sup>313</sup> They fail to capture the full moral scope of the problem. This fourth chapter addresses this shortcoming. It is divided into three parts. In the first part, I will turn to legal and social theory to argue that the causes of statelessness can be best understood through the concept of recognition. In the second part, I will distinguish three subtypes to suggest that statelessness is not a unified concept. These subtypes derive from the source of nationality deprivation and are voluntary statelessness, structural statelessness, and denigrative statelessness. In the final part, I will develop an argument for why denigrative statelessness is the most harmful type.

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<sup>310</sup> In the following referred to as 1954 Statelessness Convention.

<sup>311</sup> UNHCR, November, 24, 2014, <https://www.unhcr.org/news/latest/2014/11/545797f06/unhcr-launches-10-year-global-campaign-end-statelessness.html>

<sup>312</sup> Brad Blitz has developed a typology of the causes of statelessness but not statelessness itself. See Brad Blitz, ‘Statelessness, Protection and Equality’, Forced Migration Policy Briefing 3 (Refugee Studies Centre: University of Oxford, 2009).

<sup>313</sup> Laura van Waas and Amal de Chickera highlight that statelessness can usually be embraced in a variety of ways Van Waas and De Chickera, ‘Unpacking Statelessness’, 54.

# Statelessness as the Deprivation of Recognition

## *Legal Recognition and Social Recognition Intertwined*

In the first chapter of this dissertation, I have shown how the concept of responsibility helps us to understand what it means to be stateless. But how does statelessness come about? In the 1949 *Study on Statelessness*, the UN identifies five causes of statelessness. They are (1) gaps and conflicts of national legislation, (2) state succession (3) denationalization, (4) persecution, and (5) mass emigration caused by the transformation of the political and social system of the country of origin.<sup>314</sup> The first three causes result in *de jure* statelessness at birth or later in life whereas the last two causes lead to *de facto* statelessness if the affected individual is not also denationalized. One may ask if they share a commonality. I think they do; they are arguably connected through the concept of recognition.<sup>315</sup>

Recognition has two elements: one legal, the other social.<sup>316</sup> I define legal recognition as having a position in law and social recognition more broadly as being seen as a moral equal that deserves to be treated with dignity.<sup>317</sup> These two types of recognition are tightly connected. Put precisely, individuals' legal recognition often depends on whether they are socially recognised.

Immigration admission seems to be a good example for how tightly connected legal and social recognition are. Most countries only grant immigrants the right to immigrate if they see them as morally deserving in the first place. In many cases, this is done on the basis of a points-based admission system which includes several discriminatory categories such as age, language proficiency, financial situation, skills, and previous experiences.

There are numerous historical examples. One is that of Czech Social Democrat Bohumil Laušman who intended to seek asylum in West Germany after the Communist takeover of Yugoslavia.<sup>318</sup> After an interview in which he suggested that

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<sup>314</sup> United Nations, 'A Study of Statelessness', 112f.

<sup>315</sup> For a similar thought see Margaret R. Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge: Cambridge University Press, 2008), 6.

<sup>316</sup> See Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, Mass.: MIT Press, 1995); Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights*.

<sup>317</sup> Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, 110f.; Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights*, 6.

<sup>318</sup> Patrice Poutrus, *Umkämpftes Asyl: Vom Nachkriegsdeutschland Bis in Die Gegenwart* (Christoph Links Verlag, 2019), 27.

there was no possibility for the Sudeten Germans to return to their homes in Czechoslovakia this plan got crushed, however.<sup>319</sup> His message made the Sudeten Germans so furious that they asked President Theodor Heuss for the banishment of Laušman, although this was in stark contradiction with the refugee protection article in the German constitution.<sup>320</sup> Eventually, the denial of social recognition made Laušman remain in Austria where he was captured by the Czechoslovakian secret service in 1953.<sup>321</sup>

The tight connection between legal and social recognition could also be seen when thousands of people sought asylum in West Germany due to the Hungarian Revolution of 1956. The Hungarian refugees were met with a lot of sympathy.<sup>322</sup> Pro-refugee demonstrations took place in many cities. Even though the German Ministry of Interior tried to stick to its policy of not admitting non-German refugees at the time, the popular pressure was overwhelming.<sup>323</sup> Consequently, 10,000 Hungarians were eventually granted asylum in November 1956.<sup>324</sup>

At the same time, the German Government did not feel any legal responsibility to admit non-European refugees who were fleeing the Nigerian Civil War.<sup>325</sup> In 1972, racist exclusion was broadened after a group of Palestinians had killed several Israeli athletes at the Munich Olympics. In response, West Germany restricted asylum not only to all individuals from Palestine but also from Israel's Arab neighbours and the Maghreb states.<sup>326</sup>

Today, the same pattern is repeating itself with respect to European countries willingness to admit Ukrainian rather than Syrian or North African refugees. Due to the different perception of both groups' religious affiliation and strong anti-Muslim sentiment in Europe, the latter face much stronger discrimination in the admission

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<sup>319</sup> Poutrus, 27.

<sup>320</sup> Poutrus, 28.

<sup>321</sup> Poutrus, 28.

<sup>322</sup> Poutrus, 44.

<sup>323</sup> Poutrus, 45f.

<sup>324</sup> Poutrus, 46.

<sup>325</sup> Poutrus, 59.

<sup>326</sup> Poutrus, 63f.

process.<sup>327</sup> In other words, Syrian and North African refugees are denied the social recognition that is granted to Ukrainians.

Besides immigration admission, naturalization is another case that shows how closely legal recognition and social recognition are intertwined. Today, citizenship is mostly framed not as a basic right but a privilege that must be earned.<sup>328</sup> The United Kingdom's naturalization process is paradigmatic for this wider praxis. It requires temporary residence for five years to be eligible for "probationary citizenship," followed by "evidence of continuing economic contribution and successful completion of the 'Knowledge of Life in the UK' and English language tests [...]" as well as another year of additional examinations.<sup>329</sup>

As with asylum, there seems to be a similar pattern of discrimination in terms of who is granted nationality and who is not. Switzerland is an illustrative case since, for many years, several of its municipalities have used referendums to decide on naturalisations. Drawing on a large data set of votes from 1970 to 2003, Jens Hainmueller and Dominik Hangartner show that the "[c]ountry of origin is by far the most important determinant of naturalization success. The average proportion voting 'no' in the naturalization referendums is about 13-15 percentage points higher for applicants from (the former) Yugoslavia and Turkey compared to observably similar applicants from richer northern and western European countries who apply in the same municipality at the same time."<sup>330</sup> While economic status and length of residency also have a positive yet much smaller correlation, language skills and integration status do not seem to matter at all.<sup>331</sup> Hence, their findings also suggest that social recognition is less tied to merits than to an essentialist image of the "Other."

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<sup>327</sup> See Kirk Bansak, Jens Hainmueller, and Dominik Hangartner, 'How Economic, Humanitarian, and Religious Concerns Shape European Attitudes toward Asylum Seekers', *Science* 354, no. 6309 (14 October 2016): 217–22, <https://doi.org/10.1126/science.aag2147>; Melissa De Witte, 'Ukrainian Refugees Face a More Accommodating Europe, Says Stanford Scholar', *Stanford News* (blog), 24 March 2022, Accessed 5 March 2020. <https://news.stanford.edu/2022/03/24/ukrainian-refugees-face-accommodating-europe-says-stanford-scholar/>.

<sup>328</sup> Nisha Kapoor, *Deport, Deprive, Extradite: 21st Century State Extremism* (Verso Books, 2018), 104–11; See also Margaret Somers who calls this 'the contractualization of citizenship.' Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights*, 2f.

<sup>329</sup> Kapoor, *Deport, Deprive, Extradite*, 93.

<sup>330</sup> Jens Hainmueller and Dominik Hangartner, 'Who Gets a Swiss Passport? A Natural Experiment in Immigrant Discrimination', *American Political Science Review* 107, no. 1 (February 2013): 160, <https://doi.org/10.1017/S0003055412000494>.

<sup>331</sup> Hainmueller and Hangartner, 161.

## Classifying Statelessness

A theoretical framework which focuses on this tight connection between legal and social recognition as well as on the source of deprivation allows me to distinguish three subtypes of statelessness. First, voluntary statelessness where (a) the stateless are the source of legal non-recognition themselves and (b) legal non-recognition and social non-recognition by the country of origin do not necessarily coincide. Second, structural statelessness where (a) international law is the source of legal non-recognition and (b) legal non-recognition and social non-recognition by the country of origin do not necessarily coincide. Finally, denigrative statelessness where (a) the country of origin is the source of legal non-recognition and (b) legal non-recognition and social non-recognition by the country of origin seem closely intertwined.

### *Voluntary Statelessness*

Voluntary statelessness describes cases where the source of statelessness is individuals themselves.<sup>332</sup> If individuals or collectives renounce nationality voluntarily, they are *de jure* stateless.<sup>333</sup> I understand “voluntary” to mean simply not to be forced.<sup>334</sup> Force can take at least two forms. First, it can be direct: individuals are forced to do something if not doing so is punished. Second, it can also be structural: individuals are forced to do something if the natural or social circumstances do not allow them to do otherwise. For instance, someone is forced to sell their beloved pet if they do no longer have the financial means to pay for its well-being due to losing their job.

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<sup>332</sup> For a more positive definition by its motivation and consequences see Jocelyn Kane, ‘Voluntary Statelessness: Reflections on Implications for International Relations and Political Theory’, Newsletter, Newsletter of the American Political Science Association’s Organized Section on Migration and Citizenship (Washington, DC: American Political Science Association, 2018).

<sup>333</sup> Most countries only allow the renunciation of nationality if the individual in question is granted another nationality. See for example Germany BMI, ‘Loss of German Citizenship’, Federal Ministry of the Interior and Community, accessed 10 August 2022,

[https://www.bmi.bund.de/SharedDocs/faqs/EN/topics/migration/staatsang/Verlust\\_der\\_deutschen\\_Staatsangehoerigkeit\\_en.html?nn=9386226](https://www.bmi.bund.de/SharedDocs/faqs/EN/topics/migration/staatsang/Verlust_der_deutschen_Staatsangehoerigkeit_en.html?nn=9386226). The United States is one of the countries that allows renunciation in any case. Some other countries do not allow it at all. These are Argentina, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Morocco, Nicaragua, Niger, Panama, Qatar, Tonga, Uruguay, Vatican, Yemen. See Best Citizeships, ‘These Countries Do Not Allow Renouncing Citizenship - Best Citizeships’, 9 December 2018, Accessed 3 September 2020. <https://best-citizenships.com/2018/12/09/these-countries-does-not-allow-renouncing-citizenship/>.

<sup>334</sup> See Serena Olsaretti, ‘Freedom, Force and Choice: Against the Rights-Based Definition of Voluntariness’, *Journal of Political Philosophy* 6, no. 1 (1998): 54, <https://doi.org/10.1111/1467-9760.00046>.

A topical counterexample concerns Palestinians who are *de jure* stateless but offered a non-Palestinian nationality. When they refuse to naturalise, they cannot be said to do this voluntarily because they understand naturalisation as the erasure of their Palestinian identity.<sup>335</sup> This is to say that the social circumstances prevent them from having a real choice. The same is the case when colonised people reject the colonial nationality or refugees destroy their identity documents so that they cannot be deported. In both cases, they cannot be considered as voluntary stateless.

Given this definition of “voluntary” that focuses on the absence of force, may it be natural or social, former U.S. national “Garry” Davis has arguably been the most visible and outspoken individual who voluntarily renounced nationality. His case is a good example not only because of the breadth with which it is documented but also because it suggests that legal non-recognition and social non-recognition by the country of origin do not necessarily coincide.

Despite renouncing his US nationality and thereby legal recognition in Paris in 1948, Davis always retained some social recognition. Once a *de jure* stateless individual, he publicly advocated for world citizenship. His political activism received a lot of media attention.<sup>336</sup> In the press, Davis was often portrayed as an idealist.<sup>337</sup> The detailed coverage of his case brought him the support of many French intellectuals and thousands of ordinary people throughout Europe.<sup>338</sup>

Herbert Evatt, President of the UN General Assembly at the time, invited him to make his case for world citizenship. In response, Davis spoke to a crowd of 2000 admirers in Paris. The public address was followed up by a mass rally of 12,000 people and a reception by the French President.<sup>339</sup> Given the overwhelming public support and the considerable amount of social recognition Davis enjoyed, it was therefore not a surprise that French Government granted him a three-month residence permit despite his statelessness.

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<sup>335</sup> Hind Ghandour, 'Naturalised Palestinians in Lebanon: Experiences of Belonging, Identity And' (Swinburne University of Technology, 2017), 102ff.

<sup>336</sup> Joseph Preston Baratta, *The Politics of World Federation: From World Federalism to Global Governance* (Greenwood Publishing Group, 2004), 401.

<sup>337</sup> Baratta, 403.

<sup>338</sup> Baratta, 399. They included public figures like the resistance hero Robert Sarrazac-Soulage and the writer Albert Camus.

<sup>339</sup> Davis would later also be received by the Indian Prime Minister. See Garry Davis, *My Country Is the World* (World Government House, 1984), 122–28.

In the coming years, Davis would travel many countries including the United States, the United Kingdom, the Netherlands, Germany, Italy, India, Pakistan, Iran, and Japan. Entry into these countries was always difficult but never impossible. When leaving France for the United States, for example, Davis “[...] was classified as a ‘French non-quota immigrant’ who was to become a resident alien.”<sup>340</sup>

Apart from the United States, most countries were not sure what to do with him, however. Davis was after all a diplomatic affair since deportation always meant that he was turned into some other country’s business. The UK Government’s helplessness was demonstrated when Davis was forcefully sent to a mental hospital after he had petitioned the Queen at Buckingham Palace.<sup>341</sup>

Although the United States was no longer supposed to take responsibility for his protection from other countries, it did so nevertheless.<sup>342</sup> When deported back from the United Kingdom, a U.S. immigration official welcomed him cheerfully telling him that they were just “trying to play ball with [him].”<sup>343</sup> It was a clear indication that Davis had not lost the social recognition of his former country of origin.<sup>344</sup> In his case, social recognition was also granted by foreign countries. The governments of Ecuador, Laos, Yemen, and Saudi-Arabia even accepted his world citizen passport on a *de facto* basis.<sup>345</sup> When in custody in the Netherlands, the Dutch Government argued that Davis was not a refugee thereby indirectly suggesting that his attachment to the United States was not broken.<sup>346</sup>

All this shows that Davis’ U.S. nationality was never really disputed by anyone other than himself. While no country was supposed to take responsibility for his protection from other countries, he was always indirectly taken care of by the U.S. Government.<sup>347</sup> This is to say that Davis continued to remain a *de facto* U.S. national.

Born into extremely favourable conditions and always being well-treated by his country of origin and other countries, Davis’ case moreover suggests that voluntarily renouncing one’s nationality may not lead to repercussions if one comes from a

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<sup>340</sup> Davis, 80.

<sup>341</sup> Davis, 99.

<sup>342</sup> Davis, 115.

<sup>343</sup> Davis, 104.

<sup>344</sup> Davis, 106.

<sup>345</sup> Davis, 110, 113.

<sup>346</sup> Davis, 161.

<sup>347</sup> Davis, 161, 210f.

position of privilege.<sup>348</sup> Remarking in an interview that he has not faced any serious problems from being *de jure* stateless, Mike Gogulski, another former U.S. national who has renounced his nationality, makes this point equally clear. When asked about *de jure* statelessness in general, he emphasizes that “[e]verybody’s situation is very different and what is relatively easy for me to do could cause huge disruption in somebody’s life if they didn’t really ponder it very carefully and understand all the implications before doing it.”<sup>349</sup>

In this section, I have shown that someone can be legally stateless by renouncing their nationality themselves. In this case of voluntary statelessness, legal non-recognition does not necessarily coincide with social non-recognition. Thus, the concept of statelessness does not always describe a condition where someone is at risk of violence by the country of origin. In a literal but not legal sense, the individual in question may not even be thought of as a “stateless person” but rather an “anarchist” or “hermit” depending on the reasons for renunciation.

### *Structural Statelessness*

Unlike voluntary statelessness, structural statelessness describes cases where the source of statelessness is international law.<sup>350</sup> Resulting from social circumstances, it stands in direct opposition to voluntary statelessness. Structural statelessness can be *de facto* or *de jure*.

The case of Friedrich Nottebohm is a historical precedent of *de facto* structural statelessness. Nottebohm was initially a German national who resided in Guatemala for over 35 years. In 1939, he acquired the nationality of Lichtenstein to avoid any negative consequences from being associated with belligerent Germany at the

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<sup>348</sup> Davis’ father, a New York Orchestra leader, had great social and economic capital. He himself was an army air force veteran and on the way of becoming a Broadway star. See Margalit Fox, ‘Garry Davis, Man of No Nation Who Saw One World of No War, Dies at 91’, *The New York Times*, 29 July 2013, sec. U.S., Accessed 10 July 2020. <https://www.nytimes.com/2013/07/29/us/garry-davis-man-of-no-nation-dies-at-91.html>.

<sup>349</sup> Sophie McBain, ‘Will the Wealthy Burn Their Passports? The Pros and Cons of Modern Statelessness | Spear’s WMS’, 30 June 2013, Accessed 23 October 2020. <https://web.archive.org/web/20130630071737/http://www.spearswms.com/spears-world/article-of-the-week/47957/will-the-wealthy-burn-their-passports-the-pros-and-cons-of-modern-statelessness.html>.

<sup>350</sup> Philipp Cole uses the term “structural statelessness” in a much wider sense. He argues that “[t]he stateless can be understood [...] in relation to the global political order. We can see them as a leftover residue lying outside of the international system of sovereign states, either nothing to do with that system or because of some minor inefficiency of that system that can be tweaked. Or we see them as a structural failure, a product of that order, such that finding a solution to statelessness means asking radical questions about the international political order.” Cole, ‘Insider Theory and the Construction of Statelessness’, 258.

outbreak of the Second World War. Although Nottebohm no longer had German nationality, the Guatemalan Government nevertheless expelled him to the United States where he was detained as an enemy alien for three years.

Not neglecting its responsibility to protect Nottebohm, Lichtenstein responded with an appeal to the International Court of Justice (ICJ). It argued that Guatemala's confiscation of Nottebohm's property was illegal. But the ICJ did not accept this appeal. Instead, the court argued that Lichtenstein had no right to provide diplomatic protection to Nottebohm despite his naturalization to become a Lichtenstein national. The judges justified this verdict by drawing on the concept of *effective nationality* which takes nationality to be "[...] a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties."<sup>351</sup> Moreover, they argued that:

"[n]aturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations – other than fiscal obligations – and exercising the rights pertaining to the status thus acquired."<sup>352</sup>

The verdict marked the first time in which "[...] under international law the objective legal status of nationality, *by itself*, no longer conferred sufficient title on which a state can exercise diplomatic protection regarding its nationals."<sup>353</sup> In other words, Nottebohm was without legal recognition whenever abroad.<sup>354</sup> Yet in Lichtenstein he had a country of nationality that continued to grant him legal as well as social recognition at home and was willing to take responsibility for his protection. Given these circumstances, Nottebohm's case suggests therefore that legal non-recognition

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<sup>351</sup> ICJ, *Liechtenstein v. Guatemala*; Second Phase (International Court of Justice (ICJ) 6 April 1955). The concept of effective nationality is, arguably, formulated in a language that conflates legal and social recognition. Nationalists continually invoke the idea of genuine attachment to divide between the "We" and the "Other." Only in 2006 did the International Law Commission greatly limit the implications of the Nottebohm verdict, thereby protecting all naturalized persons against such an application. United Nations, *Yearbook of the International Law Commission*, vol. II, 2 vols, 2006, <https://www.refworld.org/pdfid/525e7929d.pdf>.

<sup>352</sup> Case (*Liechtenstein v. Guatemala*).

<sup>353</sup> Jeffrey L Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law', *Michigan Journal of International Law* 19, no. 4 (1998): 1155.

<sup>354</sup> Only in 2006 did the International Law Commission greatly limit the implications of the Nottebohm verdict, thereby protecting all naturalized persons against such an application. United Nations, *Yearbook of the International Law Commission*, II:32f.

and social non-recognition do not necessarily coincide if someone is rendered structural stateless.

Having considered the *Nottebohm* case as an example of structural statelessness, let me turn to a second example. Sinking islanders are prone to be a historical precedent of *de jure* structural statelessness. To understand why sinking island states may soon be incapable of guaranteeing the legal recognition of their nationals, one must keep in mind that the legal concept of nationality derives from the existence of statehood. A region without a state cannot have nationals. Despite this foundational link, there is no formal definition of statehood in international law. There is only a tacit agreement among the international community in favour of the *Montevideo Convention on Rights and Duties of States*.<sup>355</sup> Article 1 of the convention stipulates that a “[...] state as an international person should possess [as a matter of fact] the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with other states.”<sup>356</sup> Article 3 defines the rights of states and their scope according to international law. It declares that:

“[t]he political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.”<sup>357</sup>

Additionally, *Opinion No. 1 of The Arbitration Commission of the European Conference on Yugoslavia* confirms this legal definition of statehood. It recommends that:

“[...] the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority.”<sup>358</sup>

Following these definitions, states lose statehood if they no longer have (a) a permanent population, (b) defined territory, (c) government, or (d) capacity to enter

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<sup>355</sup> See Thomas D. Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’, *Columbia Journal of Transnational Law* 37, no. 2 (1999): 403–58.

<sup>356</sup> League of Nations, *Treaty Series Treaties and International Engagements Registered with the Secretariat of the League of Nations*, vol. CLXV, Nos. 3801-3824 (Secretariat of the League of Nations, 1936), <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf>.

<sup>357</sup> League of Nations, CLXV:25.

<sup>358</sup> Malcolm N. Shaw, ‘Peoples, Territorialism and Boundaries’, *European Journal of International Law* 8, no. 3 (1997): 492.

relations with other states. In the future, sinking island states may lack all these qualities due to climate change and rising sea levels.

Studies on climate change predict that Kiribati, Tuvalu, the Marshall Islands, the Maldives, and the Seychelles are likely to become uninhabitable.<sup>359</sup> Hence, their governments would be forced into exile where they depend on the resources and the goodwill of foreign countries.<sup>360</sup> Since exile would mean a lack of sovereignty, it can result in the loss of statehood even before the disappearance of territory.<sup>361</sup>

Although sinking island states may lose statehood in one way or the other,<sup>362</sup> they neither deprive their nationals of social recognition nor intend to shirk any responsibilities for protection. Kiribati is a good example. In 2014, the Kiribati Government adapted the “Migration with Dignity” policy to mitigate the effects of future statelessness. This policy had two main pillars: an “Education for Migration” programme and the purchase of 6000 acres of land on one of Fiji’s islands.<sup>363</sup> When some nationals emigrated to that land, former Kiribati President Anote Tong remarked: “[t]hese people now live in Fiji but have their own seat in the parliament of Kiribati [...]. The spirit of the people of Kiribati will not be extinguished. It will live on somewhere else because a nation isn’t only a physical place. A nation – and the sense of belonging that comes with it – exists in the hearts and the minds of its citizens wherever they may be[.]”<sup>364</sup> Tong’s successor Taneti Maamau has gone a different route. Bolstering the economy through sustainable tourism and international aid as well as raising parts of the island, he wants Kiribati’s population to stay as long as possible.<sup>365</sup>

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<sup>359</sup> See Jon Barnett and W. Neil Adger, ‘Climate Dangers and Atoll Countries’, *Climatic Change* 61, no. 3 (1 December 2003): 321–37, <https://doi.org/10.1023/B:CLIM.0000004559.08755.88>; Jane McAdam, “Disappearing States”, *Statelessness and the Boundaries of International Law*, in *Climate Change and Displacement: Multidisciplinary Perspectives*, ed. Jane McAdam (Bloomsbury Publishing, 2010), 105–30.

<sup>360</sup> Susin Park, ‘Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States’, *Legal and Protection Policy Research Series* (UNHCR, 2011), 13.

<sup>361</sup> See Park, 14; UNHCR, ‘CLIMATE CHANGE AND STATELESSNESS: AN OVERVIEW’, Ad Hoc Working Group on Long-Term Cooperative Action (Bonn, Germany: United Nations High Commissioner for Refugees (UNHCR), 2009), 2.

<sup>362</sup> Derek Wong questions this conclusion. For him, sinking islands states may continue to be granted statehood for the global order to be maintained. Derek Wong, ‘Sovereignty Sunk - The Position of Sinking States at International Law’, *Melbourne Journal of International Law* 14, no. 2 (2013): 362 Yet it is not clear how their continued de jure existence may contribute to the maintenance of the global order when entire populations need to be resettled.

<sup>363</sup> See United Nations High Commissioner for Refugees, ‘Universal Periodic Review: The Republic of Kiribati’ (Human Rights Liaison Unit Division of International Protection UNHCR, June 2014); Climate Government Kiribati, ‘Relocation | Climate Change’, 11 February 2014, <http://www.climate.gov.ki/category/action/relocation/>.

<sup>364</sup> Climate Government Kiribati, ‘Relocation | Climate Change’.

<sup>365</sup> See Ben Walker, ‘An Island Nation Turns Away from Climate Migration, Despite Rising Seas’, *Inside Climate News*, 20 November 2017, Accessed 20 November 2020. <https://insideclimatenews.org/news/20112017/kiribati-climate-change-refugees-migration-pacific-islands-sea-level-rise-coconuts-tourism/>; Ministry of Finance & Economic Development Kiribati, ‘KIRIBATI 20-YEAR VISION 2016-2036’ (Ministry of Finance & Economic Development Kiribati, 2015), <https://www.mfed.gov.ki/sites/default/files/KIRIBATI%2020-YEAR%20VISION%202016-2036%20.pdf>.

Apart from Kiribati, other sinking island states have made similar plans to protect their nationals. While the Marshall Islands have also purchased patches of land elsewhere,<sup>366</sup> the Maldives have built an entirely new landmass for their populations to be resettled.<sup>367</sup>

In this section, I have presented two examples of structural statelessness where the source of legal non-recognition is international law. They suggest that the structural stateless are not necessarily deprived of legal non-recognition and social non-recognition at the same time. In both cases the country of origin continues to adhere to its responsibility to protect them.

### *Denigrative Statelessness*

Unlike the other two subtypes, denigrative statelessness describes cases where the source of statelessness is the country of origin. It can be *de facto* as well as *de jure*. Like structural statelessness, denigrative statelessness also stands in direct opposition to voluntary statelessness as it results from physical force.

There are different tools that the country of origin might use to render someone *de facto* or *de jure* stateless. They all suggest that legal non-recognition and social non-recognition are closely intertwined.<sup>368</sup> The first tool is discriminatory nationality laws. In countries that ground nationality exclusively on the *jus sanguinis* principle (by descent), children may become *de jure* stateless if their parents are unknown or stateless themselves.<sup>369</sup> Another common type of discriminatory nationality concerns the legal

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<sup>366</sup> See Laurence Caramel, 'Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji', *The Guardian*, 1 July 2014, sec. Environment, Accessed 3 March 2020. <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>; RNZ, 'Bikini Atoll Govt Buys Climate Change Bolthole Land in Hawaii', RNZ, 17 May 2019, Accessed 14 June 2020. <https://www.rnz.co.nz/international/pacific-news/389416/bikini-atoll-govt-buys-climate-change-bolthole-land-in-hawaii>.

<sup>367</sup> See Norman Miller, 'A New Island of Hope Rising from the Indian Ocean', *BBC News*, 2020, Accessed 13 January 2021. <https://www.bbc.com/travel/article/20200909-a-new-island-of-hope-rising-from-the-indian-ocean>.

<sup>368</sup> This double deprivation of legal and social recognition is also captured by the concept of social death. See See Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, Mass.: Harvard University Press, 1982); Cacho, *Social Death*; In his seminal work, Orlando Patterson describes social death as "the permanent, violent domination of natively alienated and generally dishonored persons." Patterson, *Slavery and Social Death: A Comparative Study*, 13. Slavery goes even further than denigrative statelessness. Slaves are not only denied legal recognition and social recognition but also private recognition. They have no "[...] meaning and value as an uncle, a grandchild, a cousin, a son-of-the-tribal-chief, a wife-of-a-tradesman. Instead the slave's only tie to any social group is as the possession of the master." Grace Kyungwon Hong, *Death beyond Disavowal: The Impossible Politics of Difference* (U of Minnesota Press, 2015), 102.

<sup>369</sup> See Radha Govil and Alice Edwards, 'Women, Nationality and Statelessness the Problem of Unequal Rights', in *Nationality and Statelessness under International Law*, ed. Alice Edwards and Laura van Waas (Cambridge: Cambridge University Press, 2014), 176, <https://doi.org/10.1017/CBO9781139506007.005>.

discrimination of women.<sup>370</sup> In 27 countries, women and men do not have an equal right to transmit nationality to their children. This means that children can end up *de jure* stateless there if they are born to a single mother.<sup>371</sup> Besides, there have been many cases where nationality laws have a racially or ethnically discriminatory basis.<sup>372</sup> For instance, Rohingya cannot acquire Myanmar's nationality because they are not recognised as one of its national races.<sup>373</sup>

As Neha Jain contends, such discriminatory nationality laws are however a relatively rare tool to manufacture statelessness; states have instead found much more subtle ways to deprive nationals of legal recognition.<sup>374</sup> Jain distinguishes three. The first is time. It includes unreasonable application deadlines and durational residency requirements.<sup>375</sup> While countries like Latvia, Estonia, the United Arab Emirates or Myanmar have, for instance, tied nationality to a certain date to which one must be able to trace ancestry,<sup>376</sup> Slovenia and the Dominican Republic have legally counted residential time in a way that renders some individuals stateless.<sup>377</sup>

According to Jain, the second subtle way in which states manufacture statelessness is spatial. For example, Kuwait or Malaysia have delineated their territorial borders so that some groups, Bidoons in the case of the former and the Bajau Laut in the case of the latter, are excluded from nationality.<sup>378</sup> Others, like India, Bangladesh or Thailand have created stateless enclaves in their borderlands.<sup>379</sup>

The third tool involves a number of administrative practices. One of them is archival erasure. After Slovenian independence from former Yugoslavia, immigrants who forgot to apply for nationality within the given six-month period or whose application was rejected were erased from all registries and thereby rendered permanently

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<sup>370</sup> See Govil and Edwards, 'Women, Nationality and Statelessness the Problem of Unequal Rights'.

<sup>371</sup> Angelina Theodorou, '27 Countries Limit a Woman's Ability to Pass Citizenship to Her Child or Spouse', *Pew Research Center*, 2014, Accessed 14 October 2020. <https://www.pewresearch.org/fact-tank/2014/08/05/27-countries-limit-a-womans-ability-to-pass-citizenship-to-her-child-or-spouse/>.

<sup>372</sup> See Michelle Foster and Timnah Rachel Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?', *Columbia Journal of Race and Law* 11, no. 1 (2021): 94–97; Shourideh C Molavi, 'Stateless Citizenship and the Palestinian-Arabs in Israel', *Refuge: Canada's Journal on Refugees* 26, no. 2 (21 April 2011): 23f., <https://doi.org/10.25071/1920-7336.32075>.

<sup>373</sup> Nurul Islam, 'Rohingya and Nationality Status in Myanmar', in *Citizenship in Myanmar: Ways of Being in and from Burma*, ed. Ashley South and Marie Lall (ISEAS-Yusof Ishak Institute, 2017), 269.

<sup>374</sup> Jain, 'Manufacturing Statelessness', 249.

<sup>375</sup> See Jain, act 250ff.; 'Soy Dominicano - The Status of Haitian Descendants Born in the Dominican Republic and Measures to Protect Their Right to a Nationality Note', *Vanderbilt Journal of Transnational Law* 47, no. 4 (2014): 1142f.

<sup>376</sup> See Jain, 'Manufacturing Statelessness', 251ff.

<sup>377</sup> See Jain, 55–58.

<sup>378</sup> Jain, 265.

<sup>379</sup> Jain, 262f.

stateless.<sup>380</sup> India's amendment of the National Register of Citizens (NRC) is arguably the most notorious case where documentation or the lack thereof has been used as a weapon.<sup>381</sup> To this day, the NRC has deprived about 1.9 million individuals who reside in the State of Assam of their nationality.<sup>382</sup>

Denationalisation is an even more explicit tool to render nationals *de jure* stateless. A good example here, and one worth going into in some detail, is that of Shamima Begum. Given the UK Government's need to give justification for her denationalisation, it strongly indicates that legal non-recognition and social non-recognition are closely intertwined in the case of denigrative statelessness.

Begum, who grew up in London, joined the Islamic State in February 2015. Four years later, she was encountered by a newspaper war correspondent in the Al-Hawl refugee camp in Northern Syria. In what has become known as the "Bring me Home" interview with the correspondent, Begum expressed her intention to return home because she was afraid that her third yet unborn baby may die in the camp.<sup>383</sup>

A day later, the UK Security Minister responded to Begum's intentions in a radio show. He made clear that the UK Government would not facilitate Begum's return despite her British nationality. His argument was that he would not put "[...] at risk British people's lives to go looking for terrorists or former terrorists in a failed state."<sup>384</sup> Additionally, the official spokesman of the UK Prime Minister added that "[a]ny British citizen who does return from taking part in the conflict must be in no doubt they will be questioned investigated and potentially prosecuted. [...]. Whatever the circumstances of an individual case we have to and we will protect the public."<sup>385</sup> It should be noted that the two statements convey contradictory messages. While the UK Security Minister indicated that Begum may no longer be granted legal recognition by the United Kingdom, the official spokesman, in fact, confirmed her nationality when emphasising her domestic legal liability.

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<sup>380</sup> Jain, 258.

<sup>381</sup> Jain, 271.

<sup>382</sup> Talha Abdul Rahman, 'Identifying the "Outsider"', *The Statelessness & Citizenship Review* 2, no. 1 (29 June 2020): 118.

<sup>383</sup> Begum's worries were not unfounded, having already lost two babies due to illness and malnutrition before. Aamna Mohdin and Martin Chulov, 'Shamima Begum Baby Death "a Stain on Conscience of UK Government"', *The Guardian*, 2019, Accessed 23 May 2020. <https://www.theguardian.com/uk-news/2019/mar/09/sajid-avid-denounced-shamima-begums-baby-dies-syria>.

<sup>384</sup> Amy Walker and Patrick Wintour, 'UK Will Not Put Officials at Risk to Rescue Isis Britons, Says Minister', *The Guardian*, 2019, Accessed 14 May 2020. <https://www.theguardian.com/uk-news/2019/feb/14/uk-isis-britons-officials-risk-syria-schoolgirl-shamima-begum>.

<sup>385</sup> Walker and Wintour.

The government's incoherent handling of the case changed four days later, however, when Begum gave a second interview. The media confronted her with a similar line of argument that had been used by the UK Security Minister before. She was accused of having endorsed and helped the enemy of Britain by joining the Islamic State. The media moreover demanded her to condemn and apologize for the Manchester Arena bombing in 2017 that was claimed by the Islamic State, where an extremist suicide bomber killed 23 people during a concert.<sup>386</sup> Begum replied, however, that this attack was somehow a justified act of retaliation for the murder of innocent women and children in Baghuz, although she also felt that it was generally wrong to kill innocent people.

In response, the UK Home Secretary publicly announced that the Home Office intended to denationalise Begum. He argued, in accordance with the 1961 Statelessness Convention, that the denationalisation of Begum was permissible because under Bangladeshi law the 19 years old girl would have a right to Bangladeshi nationality for being born to a Bangladeshi parent. Since then, Bangladeshi officials have contested this argument, however. Despite this contestation, the UK Supreme Court dismissed Begum's appeal in February 2021, thereby rendering her *de jure* stateless.

The Supreme Court offered four reasons for its dismissal. At least two of them offer another strong indication that legal non-recognition and social non-recognition are closely intertwined. First, the judges argued that "[...] there was no evidence before the Court as to whether the national security concerns about Ms Begum could be addressed and managed by her being arrested and charged upon her arrival in the UK."<sup>387</sup> Second, they confirmed that the Secretary of State was rightly "[...] not satisfied that depriving Ms Begum of British citizenship would expose her to a real risk of mistreatment within the meaning of his policy."<sup>388</sup> Both justifications create a public image of Begum which makes her seem like a pathologically dangerous monster that

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<sup>386</sup> On the topic of the media asking Muslims to condemn terrorism as a tool of dehumanization see Asim Qureshi, *I Refuse to Condemn: Resisting Racism in Times of National Security* (Manchester University Press, 2020).

<sup>387</sup> The Supreme Court, R (on the application of Begum) (Appellant) v Special Immigration Appeals Commission (Respondent) R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant) Begum (Respondent) v Secretary of State for the Home Department (Appellant) [2021] UKSC 7 (The Supreme Court of the United Kingdom 26 February 2021).

<sup>388</sup> The Supreme Court.

cannot be prosecuted legally and is not worthy of any rights. Hence, they suggest that she is not only without legal but also social recognition.

The media has arguably played a key role in constructing this image.<sup>389</sup> All along, Begum was racialised by being portrayed as a remorseless Muslim terrorist.<sup>390</sup> For instance, “[t]he “Bring me Home” Loyd/Begum interview occupied media reports for several weeks, where Begum was always represented across all media reports as extremely dangerous.”<sup>391</sup> During this time, Begum was also on the front page of *The Times* with a cover story that aimed to dehumanise her by focusing on the following remark she had made: “When I saw my first severed head it didn’t faze me at all.”<sup>392</sup> On February 7<sup>th</sup> 2020, the media moreover accused her with little evidence of stitching suicide bomber vests for the Islamic State (ISIS).<sup>393</sup>

The denationalisation and killing of Anwar Al-Aulaqi by the United States is another example that indicates the close connection between legal and social recognition. When the U.S. government was sued for its course of action, Abraham Kannof argued, in defence, that it may have not broken any law because Al-Aulaqi’s U.S. nationality was ineffective. Following the ICJ definition of effective nationality,<sup>394</sup> Kannof’s reasons are twofold and based on the denial of social recognition. Firstly, he suggests that Al-Aulaqi may not be deserving of U.S. nationality because he “[...] culturally identified himself mainly with the religion of Islam and its people, wherever they may be located.”<sup>395</sup> Secondly, Kannof takes his day-to-day use of Arabic at home as “[...] evidence of his attachment to Yemen more than to the United States.”<sup>396</sup>

Besides denationalisation, persecution is another tool, by which the country of origin may render someone stateless, that is as indicative of the close connection between

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<sup>389</sup> For the media’s key role in vilifying and the denial of social recognition see Kapoor, *Deport, Deprive, Extradite*, 11; Susan S. M. Edwards, ‘Muslim Racialised Tropes: “Orientalism”, Past and Present’, in *The Political Appropriation of the Muslim Body: Islamophobia, Counter-Terrorism Law and Gender*, ed. Susan S.M. Edwards (Cham: Springer International Publishing, 2021), 50–53, [https://doi.org/10.1007/978-3-030-68896-7\\_2](https://doi.org/10.1007/978-3-030-68896-7_2).

<sup>390</sup> For another example, see Joumanah El-Matrah and Kamalle Dabboussy, ‘Guilty When Innocent. Australian Government’s Resistance to Bringing Home Wives and Children of Islamic State Fighters’, *Social Sciences* 10, no. 6 (June 2021): 202, <https://doi.org/10.3390/socsci10060202>.

<sup>391</sup> Edwards, ‘Muslim Racialised Tropes’, 51.

<sup>392</sup> Edwards, 51.

<sup>393</sup> Edwards, 52.

<sup>394</sup> While the 7th Report of the ILC on Diplomatic Protection offers safeguards against the application of effective nationality in the case of naturalised persons, it does not explicitly do so with respect to dual nationals. In such a case one country can make a claim against the other. Malcolm N. (Malcolm Nathan) Shaw, *International Law*, Sixth edition. (Cambridge: Cambridge University Press, 2008), 815.

<sup>395</sup> Abraham U. Kannof, ‘Dueling Nationalities: Dual Citizenship, Dominant and Effective Nationality, and the Case of Anwar al-Aulaqi’, *Emory International Law Review* 25, no. 1 (2011): 1424.

<sup>396</sup> Kannof, 1426.

legal and social non-recognition. The case of the Rohingya is exemplary and also worth discussing in more detail. From 1948 to 1962, they have been legally recognized as nationals of Burma Proper by the Union of Burma Government. Their legal status was reinforced in several public statements by leading politicians. Sao Shwe Thaik, the first President of Burma and a member of the Shan ethnicity, for example, argued that the “Muslims of Arakan certainly belong to the indigenous races of Burma. If they do not belong to the indigenous races, we also cannot be taken as indigenous races.”<sup>397</sup> In 1954, this multi-ethnic vision of Burma was also supported by U Nu, the second President saying that “[t]he people living in Buthidaung and Maungdaw Townships are Rohingya, ethnic of Burma”<sup>398</sup> and in 1958, by Prime Minister U Ba Swe who contended that “[t]he Rohingya has the equal status of nationality with Kachin, Kayah, Karen, Mon, Rakhine and Shan.”<sup>399</sup>

This understanding was challenged, however, with the military coup d'état in 1962. The military government began not only to restrict the Rohingya's freedom of movement but also to confiscate their identity cards. During *Operation Dragon King* in March and August 1978, which was euphemistically announced as an attempt to register nationals in northern Arakan and to deport foreigners prior to the national census,<sup>400</sup> 250,000 Rohingya were forced to escape to Bangladesh.<sup>401</sup> In 1982, the Rohingya's situation worsened drastically when the *Union Citizenship Act* was repealed by the Burma Citizenship Law. In its aftermath, a large number of Rohingya were coercively denationalised and expelled from the territory by the military government which thereby denied its legal obligation to take responsibility for their protection.

Although Burma (today's Myanmar) was not a signatory to the 1961 Statelessness Convention, the military government justified the denationalisation of the Rohingya in a way that resonates with Article 8 paragraph 3. In arguing that the rapid population growth of the Muslim population would be a threat to the vital interests of the country,

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<sup>397</sup> Nay San Lwin, 'Making Rohingya Statelessness', *New Mandala*, 2012, Accessed 15 February 2020. <https://www.newmandala.org/making-rohingya-statelessness/>.

<sup>398</sup> Lwin.

<sup>399</sup> Lwin.

<sup>400</sup> See Elahi Maudood, 'The Rohingya Refugees in Bangladesh: Historical Perspectives and Consequences', in *Refugees: A Third World Dilemma*, ed. John Rogge (New Jersey: Rowman & Littlefield Publishers, 1987), 231.

<sup>401</sup> Md. Mahbubul Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma', *Journal of Muslim Minority Affairs* 37, no. 4 (2 October 2017): 458f., <https://doi.org/10.1080/13602004.2017.1399600>.

Burmese and Rakhine leaders appealed to its central provision while denigrating the Rohingya.<sup>402</sup> Yet, as in the case of Shamima Begum, the denationalisation of Rohingya was clearly based on their racialisation.

The violence that has been inflicted on individuals who belong to the Kurdish ethnicity follows the same racist logic. They can be considered as *de facto* denigrative stateless if one applies the human rights framework that I have defended in the second chapter. Kurds with Turkish nationality are systemically denied several minimum core human rights. Above all, they are forced to break with their own cultural heritage from which one is protected in Article 15 of *The International Covenant on Economic, Social and Cultural Rights* (CESCR). Mustafa Kemal Atatürk<sup>403</sup> and his followers have early on pursued the idea that Turkey can only become a modern and “civilised” nation-state if there is a homogenous nation of Turkish speakers.<sup>404</sup> The violent extinction of the Kurdish language has therefore become the core Turkish state policy towards Kurds.<sup>405</sup> The state has implemented this policy by the means of various measures. Kurdish religious schools were closed, Kurdish could neither be used in public nor be taught in schools, Kurdish publications were disallowed, and Kurdish surnames, names of villages, and names of local places were all prohibited and replaced by Turkish names.<sup>406</sup> According to Tove Skutnabb-Kangas and Robert Phillipson, it is clearly a case of linguistic genocide;<sup>407</sup> one that has been continuous until the present day despite some symbolic easing due to Turkey’s EU bid.<sup>408</sup> In such an environment the mere production of Kurdish art – be it music, novels, or poetry – is regarded as an expression of separatism and thereby criminalised.<sup>409</sup>

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<sup>402</sup> Haque, 456.

<sup>403</sup> Until 1924, Atatürk recognised “[...] the problem of Kurdish freedom [...]” and the need to find a solution. Abdullah Öcalan, *Beyond State, Power, and Violence* (PM Press, 2022), 17.167 (ebook); See also Mesut Yegen, ‘The Kurdish Question in Turkey’, in *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue*, ed. Marlies Casier and Joost Jongerden (Taylor & Francis Group, 2010), 68. His stance only changed in 1925; one reason was immense political pressure from the United Kingdom; the British government forced the Kemalists to give up the cities of Mosul and Kirkuk in Iraq in the Lausanne negotiations or it would otherwise support Kurdish uprisings for a return of the Ottoman sultanate and thereby cause a severe threat to the newly established republic. Öcalan, *Beyond State, Power, and Violence*, 17.165 (ebook).

<sup>404</sup> Welat Zeydanlıoğlu, ‘Turkey’s Kurdish Language Policy’, *International Journal of the Sociology of Language* 2012, no. 217 (13 September 2012): 99–125, <https://doi.org/10.1515/ijsl-2012-0051>; See Desmond Fernandes, ‘Modernity and the Linguistic Genocide of Kurds in Turkey’, *International Journal of the Sociology of Language* 2012, no. 217 (13 September 2012): 75–98, <https://doi.org/10.1515/ijsl-2012-0050>; Welat Zeydanlıoğlu, ‘Turkey’s Kurdish Language Policy’.

<sup>405</sup> Welat Zeydanlıoğlu, ‘Turkey’s Kurdish Language Policy’, 101.

<sup>406</sup> Yegen, ‘The Kurdish Question in Turkey’, 73.

<sup>407</sup> See Tove Skutnabb-Kangas and Sertaç Bucak, ‘Killing a Mother Tongue – How the Kurds Are Deprived of Linguistic Human Rights’, in *Killing a Mother Tongue – How the Kurds Are Deprived of Linguistic Human Rights* (De Gruyter Mouton, 2010), 347–70, <https://doi.org/10.1515/9783110866391.347>.

<sup>408</sup> Welat Zeydanlıoğlu, ‘Turkey’s Kurdish Language Policy’, 113.

<sup>409</sup> Öcalan, *Beyond State, Power, and Violence*, 16.97 (ebook).

While the linguistic genocide is sufficient to consider Kurdish individuals with Turkish nationality as *de facto* denigrative stateless, it is by no means the only minimum core human right which they are denied. They also suffer, for instance, from unjust and unfavourable conditions of work (CESCR Article 7),<sup>410</sup> or are only granted the right to an adequate standard of living and welfare (CESCR Article 11) if they show passive obedience to the Turkish state.<sup>411</sup>

The history of economic discrimination and political oppression of Kurds in Turkey has a long history. While the country has experienced a steady transformation of the agricultural and industrial sectors at the beginning of the 20<sup>th</sup> century, the same was not true for Turkey's Kurdish region in the southeast – named Bakur in the Kurdish Kurmancî dialect – where agriculture remained at subsistence level.<sup>412</sup> (White, 1998, p. 141) At the end of 1930s, only seven of about 414 large Turkish manufacturing businesses were in Bakur.<sup>413</sup> In 1968, the average household income there was moreover merely 74.8%, while households in Istanbul and Ankara earned 259.4% and 162.0%.<sup>414</sup> With the beginning of the Kurdish armed resistance in 1984, the economic situation of Kurdish people only worsened. Quoting from CIA Report, Michael Gunter writes that the Kurdish regions had received merely 10% of state industrial investment and 2% of all commercial investments, hospitals and educational facilities were few, unemployment was much higher than the national average, illiteracy in Turkish stood at 80%, and electricity, running water, and proper roads were absent not in most Kurdish villages.<sup>415</sup> Economic discrimination against Kurds often continuous even after they have emigrated from Turkey. When opening a shop abroad, Kurdish individuals usually have to conceal their ethnic identity to be able to properly operate in the market.<sup>416</sup>

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<sup>410</sup> See Mehmet Rauf Kesici, 'Labour Market Segmentation within Ethnic Economies: The Ethnic Penalty for Invisible Kurdish Migrants in the United Kingdom', *Work, Employment and Society* 36, no. 2 (1 April 2022): 338, <https://doi.org/10.1177/09500170211034761>; Zeynep Başer and Ayşe Betül Çelik, 'Imagining Peace in a Conflict Environment: Kurdish Youths' Framing of the Kurdish Issue in Turkey', *Patterns of Prejudice* 48, no. 3 (27 May 2014): 279, <https://doi.org/10.1080/0031322X.2014.925197>; Anna Secor, "'There Is an Istanbul That Belongs to Me": Citizenship, Space, and Identity in the City', *Annals of the Association of American Geographers* 94, no. 2 (1 June 2004): 362, <https://doi.org/10.1111/j.1467-8306.2004.09402012.x>.

<sup>411</sup> See Çağrı Yoltar, 'Making the Indebted Citizen: An Inquiry into State Benevolence in Turkey', *PoLAR: Political and Legal Anthropology Review* 43, no. 1 (2020): 153–71, <https://doi.org/10.1111/plar.12347>.

<sup>412</sup> Paul J. White, 'Economic Marginalization of Turkey's Kurds: The Failed Promise of Modernization and Reform', *Journal of Muslim Minority Affairs* 18, no. 1 (April 1998): 141, <https://doi.org/10.1080/13602009808716398>.

<sup>413</sup> White, 143.

<sup>414</sup> White, 145.

<sup>415</sup> Michael M. Gunter, *The Kurds in Turkey: A Political Dilemma* (Taylor & Francis Group, 1990), 125.

<sup>416</sup> Kesici, 'Labour Market Segmentation within Ethnic Economies', 338f.

The political oppression of Kurds has come in many forms. In the 1990s, massive displacements took place across Bakur. The Turkish state burned down hundreds of Kurdish villages and forcibly evacuated its inhabitants for 'national security' reasons.<sup>417</sup> Referring to the *Institut Kurde de Paris, Information and Liaison Bulletin*, Paul White reports that Turkish security forces, at the same time, bombarded and destroyed a great number of Kurdish cities.<sup>418</sup> While thousands of Kurdish militants and civilians lost their lives during this period, many human rights activists and politicians were imprisoned, and pro-Kurdish parties outlawed.<sup>419</sup> Since the early 2000s, the Turkish state officials have also used the language of 'pseudo-citizens' for Kurdish people.<sup>420</sup> Along these lines, the Turkish Prime Minister has repeatedly threatened Kurds with deportation.<sup>421</sup> Besides, the state has also used more direct action. A few examples include low altitude passes of warplanes over the Kurdish towns or public demonstrations, the prevention of Kurdish seasonal workers freedom of movement, and the denial of medical care and financial aid for those who participate in Kurdish demonstrations.<sup>422</sup>

In this section, I have presented several examples of denigrative statelessness where the source of legal deprivation is the country of origin. Moreover, I have suggested that denigrative statelessness involves the deprivation of legal as well as social recognition. This becomes especially visible in the cases of denationalisation and persecution. Shamima Begum, Al-Aulaqi, the Rohingya, and Kurdish people have not only been rendered stateless, but they have also been denied the status of moral equals who deserve to be treated with dignity.

## **The Most Harmful Subtype of Statelessness**

In this final part, I ask myself which subtype of statelessness is the most harmful. Following Hannah Arendt's analysis of the wrongs of statelessness, I approach this

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<sup>417</sup> Yegen, 'The Kurdish Question in Turkey', 73.

<sup>418</sup> White, 'Economic Marginalization of Turkey's Kurds', 149.

<sup>419</sup> Yegen, 'The Kurdish Question in Turkey', 74f.

<sup>420</sup> Yegen, 76.

<sup>421</sup> Yegen, 77.

<sup>422</sup> Yegen, 77.

question here from two perspectives – that of the individual that suffers from statelessness and that of the law more generally. In doing so, I develop an argument for why denigrative statelessness is the most harmful subtype.

In *The Origins of Totalitarianism*, Hannah Arendt famously contends that the wrong of statelessness is not to be denied some specific rights but to be expelled from a community that can guarantee any rights in the first place.<sup>423</sup> Put differently, the stateless are no longer part of an institutional legal framework in which they have a stake. Given the “legal void” they find themselves in, Arendt therefore equates this expulsion with a loss of one’s dignity altogether.<sup>424</sup>

When reading Arendt’s argument against the here developed three subtypes, it is not difficult to see that it does not apply to all the stateless. As I have shown, there are voluntary and structural stateless persons who are not necessarily deprived of both legal as well as social recognition. In their cases, the country of origin seems to be willing to grant them protection. While voluntarily stateless, Davis could always count on the United States’ diplomatic protection. Nottebohm was also given access to legal protection. Treating him as a *de facto* as well as *de jure* national, the government of Lichtenstein made every effort to defend him against Guatemala’s confiscation of his property.

Yet this does not hold true for the denigrative stateless. The examples of those who are denationalised and persecuted suggest that they are not only rendered stateless but also deprived of their status as moral equals. This double deprivation of legal and social recognition is even more harmful if it is based on the categories of race, ethnicity, or religion as it increases the likelihood with which everyone who falls under this category may also be deprived of their status as moral equals.

Besides the loss of dignity, Arendt also argues that statelessness undermines the essence of the law.<sup>425</sup> Her reasons for this claim are threefold. First, the stateless are forced to break the law constantly because they lack the right to residency and the right to work.<sup>426</sup> Second, they also ridicule the value system on which the law is based

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<sup>423</sup> Hannah Arendt, *The Origins of Totalitarianism* (Orlando, Florida: Harcourt Brace & Company, 1979), 297.

<sup>424</sup> Arendt, 297.

<sup>425</sup> Following Carl Schmitt, Giorgio Agamben conceptualises this condition as the ‘state of exception.’ He writes: ‘[t]he state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law’s threshold or limit concept.’ Giorgio Agamben, *State of Exception, State of Exception* (University of Chicago Press, 2021), 4, <https://doi.org/10.7208/9780226009261>.

<sup>426</sup> Arendt, *The Origins of Totalitarianism*, 286.

by being incentivized to become criminals because only criminals are entitled to a fair legal process, whereas the stateless will always be without access to any means of legal protection.<sup>427</sup> Third, with an increasing number of stateless persons to whom no law applies, the depriving country will gradually turn into a police state.<sup>428</sup>

Contrary to Arendt's argument, the here developed typology shows that not all subtypes of statelessness are a threat to the essence of the law. Voluntary stateless persons neither lack the right to residency nor the right to work. Davis, for instance, spent most of his life in the United States without any state interference and was even given the opportunity to work abroad.<sup>429</sup> Besides being granted the right to residency and the right to work, the United States also continued to treat him as a *de facto* national, thereby upholding its international legal responsibilities.

The same pattern can be observed in the case of structural statelessness. After Nottebohm was freed from internment in the United States in 1946, he was permitted to reside in Lichtenstein for the rest of his life. Sinking island states also show a strong commitment to uphold their nationals' rights. Some Kiribati nationals, for instance, have been granted a seat in parliament despite their emigration to Fiji. Moreover, most sinking island states' governments have negotiated and successfully started a program with New Zealand that guarantees their nationals the right to work there.<sup>430</sup>

However, the situation is entirely different with respect to denigrative statelessness, especially when its cause is denationalisation and persecution. The denigrative stateless depend first and foremost on the charity of others.<sup>431</sup> Today, more than a million Rohingyas live in refugee camps in Bangladesh.<sup>432</sup> They are not only denied the right to residency and the right to work but also lack access to basic education.<sup>433</sup> Furthermore, almost 90 percent of the refugees in the camp who were interviewed by the Burma Human Rights Network reported that they do not even receive enough food.<sup>434</sup> The camp is in many ways a lawless space.

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<sup>427</sup> Arendt, 286.

<sup>428</sup> Arendt, 287.

<sup>429</sup> See Davis, *Dear World, A Global Odyssey*, 141.

<sup>430</sup> See John Gibson and David McKenzie, 'The Development Impact of a best Practice Seasonal Worker Policy', *The Review of Economics and Statistics* 96, no. 2 (2014): 229–43.

<sup>431</sup> Arendt, *The Origins of Totalitarianism*, 296.

<sup>432</sup> Burma Human Rights Network, 'We Also Have Dreams: Ongoing Safety and Quality of Life Issues for Rohingya Refugees in Bangladesh', 8 February 2022, 8.

<sup>433</sup> See Burma Human Rights Network, 9.

<sup>434</sup> Burma Human Rights Network, 11.

Al-Hawl camp in Northern Syria is another place where the law has no longer any meaning.<sup>435</sup> From the 70,000 people (94 per cent women and children) who struggle to survive there about 11,000 are foreigners from up to 62 countries of which plenty have been denationalised and left behind by their country of origin.<sup>436</sup> Only some states, including the United States, Germany, Finland, Russia, Malaysia, Kazakhstan, Uzbekistan and Tajikistan have agreed to take their nationals back and put them on trial at home.<sup>437</sup> Given these circumstances, the International Crisis Group, a European think tank, suggests that al-Hawl cannot be considered a refugee camp or war time detention facility at all; “[...] there are no guaranteed rights and services afforded to the residents.”<sup>438</sup>

That the al-Hawl camp is outside the realm of legality also reverberates in the words of Peter Maurer the President of the International Committee of the Red Cross. In a newspaper interview he notes that “[f]ood, basic medical services, everything is complicated, [...] [and] kids who grow older and older [...] don’t have a perspective for the future.”<sup>439</sup> When hundreds of children moreover die from preventable causes every year, even human rights seem just a moral ideal.<sup>440</sup>

Given those examples, I therefore suggest that denigrative statelessness does not only lead to extreme violence but also undermines the entire conception of the law. Thus, it is arguably the most harmful subtype.

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<sup>435</sup> See Debbie Bookchin, ‘Report from Rojava: What the West Owes Its Best Ally Against ISIS | Debbie Bookchin’, *The New York Review of Books* (blog), 2019, Accessed 5 May 2021. <https://www.nybooks.com/daily/2019/04/04/report-from-rojava-what-the-west-owes-its-best-ally-against-isis/>.

<sup>436</sup> See Christian Vianna de Azevedo, ‘ISIS Resurgence in Al Hawl Camp and Human Smuggling Enterprises in Syria: Crime and Terror Convergence?’, *Perspectives on Terrorism* 14, no. 4 (2020): 43; UN Security Council, ‘Implementation of Security Council Resolutions 2139 (2014), 2165 (2014), 2191 (2014), 2258 (2015), 2332 (2016), 2393 (2017), 2401 (2018) and 2449 (2018)’, 16 December 2019, 2, [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2019\\_949.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2019_949.pdf).

<sup>437</sup> See El-Matrah and Dabboussy, ‘Guilty When Innocent. Australian Government’s Resistance to Bringing Home Wives and Children of Islamic State Fighters’, 4; Lila Hassan, ‘Repatriating ISIS Foreign Fighters Is Key to Stemming Radicalization, Experts Say, but Many Countries Don’t Want Their Citizens Back’, *FRONTLINE*, 6 April 2021, 15 September 2021 <https://www.pbs.org/wgbh/frontline/article/repatriating-isis-foreign-fighters-key-to-stemming-radicalization-experts-say-but-many-countries-dont-want-citizens-back/>.

<sup>438</sup> El-Matrah and Dabboussy, ‘Guilty When Innocent. Australian Government’s Resistance to Bringing Home Wives and Children of Islamic State Fighters’, 8.

<sup>439</sup> Dan Sabbagh, ‘Kurdish Forces Enter Detention Camp in Syria to Eliminate Isis Cells’, *The Guardian*, 28 March 2021, sec. World news, Accessed 7 April 2022. <https://www.theguardian.com/world/2021/mar/28/kurdish-forces-enter-refugee-camp-in-syria-to-eliminate-isis-cells>.

<sup>440</sup> Nick Cumming-Bruce, ‘Horrid Conditions in Syria Camp Where ISIS Families Fled Risk Fostering Extremism’, *The New York Times*, 11 September 2019, sec. World, Accessed 24 April 2020. <https://www.nytimes.com/2019/09/11/world/middleeast/syria-camp-isis-families-islamic-state-extremism.html>.

## Conclusion

In this fourth chapter, I have made three claims. First, I have argued that statelessness can best be understood through the concept of recognition. Put precisely, some stateless persons are not only deprived of legal but also of social recognition. Second, I have distinguished three subtypes of statelessness. They derive from the source of nationality deprivation and are voluntary statelessness, structural statelessness, and denigrative statelessness. In the final part, I have asked myself which of three is the most harmful subtype. Approaching this question from two perspectives, that of the individual suffering from statelessness and that of the law more generally, I came to conclude that it is denigrative statelessness. This is because the denigrative stateless are not only without legal recognition but also deprived of their status as moral equals. Furthermore, I have also suggested that their situation undermines the entire conception of the law. A comprehensive response to statelessness must address these problems. I hope that the here developed three subtypes of statelessness can offer a helpful analytic framework for such an endeavour.

# Chapter V: Denationalisation and Vilification

## Introduction

In the fifth chapter, I take a closer look at denationalisation. I deem this to be an important contribution to overall argument of the dissertation because denationalisation has not only been used in many cases of denigrative statelessness in the past but is also gradually normalised. The case of US-Yemeni national Anwar Al-Aulaqi who was accused of membership in al-Qa'ida, facilitation of terrorist training camps, recruitment of terrorists, and planning of terrorist attacks is one the most extreme examples. The defendants of the U.S. Government claimed that Al-Aulaqi's killing by an American military drone was not unlawful due to his ineffective U.S. nationality.<sup>441</sup> In 2010, Nasser Al-Aulaqi, Anwar's father nevertheless filed a legal complaint. The judges rejected it, arguing that the potential killing of his son was a political question for which the courts were generally ill-equipped.<sup>442</sup> Given this interpretation of Al-Aulaqi's legal status as *de facto* stateless, the law could therefore not prevent the killing of Al-Aulaqi.

This fifth chapter exposes the underlying rationale that makes such a course of action possible. It is divided into two parts. In the first part, I will examine the link between denationalisation and vilification in international and domestic law. In the second part, I will argue that denationalisation and vilification have long gone hand in hand in political theory, and that several contemporary proponents fail to justify denationalisation because they do not pay sufficient attention to this history. In response, I will discuss the strongest possible version of their argument: it is based on three principles taken from just war theory under which the denationalisation and vilification of individuals may be justified. They are the principle of proportionality, the principle of existential threat, and the principle of last resort.

Before developing these two parts of the chapter, let me begin by addressing three preliminary questions. First, what do I mean by "vilification?" For the sake of my

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<sup>441</sup> See Kannof, 'Dueling Nationalities: Dual Citizenship, Dominant and Effective Nationality, and the Case of Anwar al-Aulaqi'.

<sup>442</sup> ICD, ICD - Al-Aulaqi v. Obama et al. - Asser Institute (United States District Court for the District of Columbia, United States 7 December 2010).

argument, I describe it as the act of turning someone into an enemy and thereby making them liable to attack. The concept of vilification already exists in just war theory: combatants who pose a threat can legitimately be vilified and attacked.<sup>443</sup> Under traditional just war theory, it does not matter whether they fight a just war or an unjust one; whoever engages in fighting can be vilified and attacked.<sup>444</sup>

Second, why have states turned to denationalisation? What is it about denationalisation that conventional criminal law or international criminal law cannot secure? To answer this question, one needs to take a closer look at its objective, namely counterterrorism – especially protection from “Islamic” terrorism.<sup>445</sup> Since the United States and its allies have proclaimed the “War on Terror,” they take terrorism to be ubiquitous; war has become a constant feature of daily life.<sup>446</sup> Effective protection therefore necessitates exceptional instruments of power. Denationalisation is seen as such an instrument because it allows *a priori* criminalisation.<sup>447</sup> This is to say that states no longer need to wait until someone who is rendered a terrorist has committed a crime, denationalisation is a way to fight them immediately.

This contextualisation helps us to answer a third question: what are the implications in the very few cases in which the conditions I propose as justification of denationalisation might actually obtain? The answer is simple: if the conditions were met, states would be justified to transcend conventional criminal law to protect their citizens by the means of denationalisation. Yet the point of my theoretical exercise is not to legitimise denationalisation. I rather introduce conditions in the form of three principles to offer a critique of the latest justifications that neglect the connection between denationalisation and vilification. Put differently, my primary goal is to show that denationalisation is much harder to justify than currently thought.

Besides, I also want to emphasise that a mere justification of denationalisation does

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<sup>443</sup> See Jeff McMahan, ‘The Ethics of Killing in War’, *Ethics* 114, no. 4 (July 2004): 695, <https://doi.org/10.1086/422400>.

<sup>444</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Fourth edition (New York: Basic Books, 2006), 136.

<sup>445</sup> See David Miller, ‘Democracy, Exile, and Revocation’, *Ethics & International Affairs* 30, no. 2 (2016): 265–70, <https://doi.org/10.1017/S0892679416000137>; Christian Joppke, ‘Terror and the Loss of Citizenship’, *Citizenship Studies* 20, no. 6–7 (2 October 2016): 728–48, <https://doi.org/10.1080/13621025.2016.1191435>.

<sup>446</sup> See Neta C. Crawford, ‘Just War Theory and the U.S. Counterterrorism War’, *Perspective on Politics* 1, no. 1 (March 2003): 16, <https://doi.org/10.1017/S1537592703000021>; David Luban, ‘Liberalism, Torture, and the Ticking Bomb Essay’, *Virginia Law Review* 91, no. 6 (2005): 1461; J. Tom Farer, ‘Humanitarian Intervention before and after 9/11: Legality and Legitimacy’, in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J. L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003), 80.

<sup>447</sup> Torture is another. For a discussion see Luban, ‘Liberalism, Torture, and the Ticking Bomb Essay’.

not mean it is also prudent. Chrisitan Joppke offers four arguments in support of this claim. The two most convincing are closely intertwined. First, denationalisation may not be prudent because it increases state power arbitrarily.<sup>448</sup> By making use of this instrument, liberal states undermine the law and thereby their own foundation. Second, denationalisation, moreover, contributes to social divisiveness. As shown in the previous chapter, this is particularly so if the deprivation of nationality is based on a specific identity as there is a high probability that everyone else with the same identity will also be stigmatised and discriminated. Dual nationals are particularly threatened by the normalisation of denationalisation because international conventions against statelessness only protect those with a single nationality. Under such circumstances, liberal states end up creating a two-classed citizenship regime.<sup>449</sup>

## Denationalisation in International and Domestic Law

### *Article 8 of the 1961 Statelessness Convention*

After these preliminary remarks, let me begin this first part of chapter five by examining how the denationalisation of individuals is made possible in international and domestic law despite the 1961 Statelessness Convention that aims to prevent statelessness.

When states denationalise individuals, they usually invoke Article 8 of the 1961 Statelessness Convention. This article protects national sovereignty and permits denationalisation in some cases, even if the deprived individual is thereby rendered stateless.

Paragraph 2 of Article 8, for instance, declares that contracting states do not break international law if they denationalise an individual who has acquired nationality by fraud. Moreover, paragraph 3 makes even broader concessions. It contains two additional provisions under which contracting states retain their sovereignty to denationalise if they have specified retentions at the time of signing, ratifying, or assessing the convention. The two provisions include cases where nationals “(a)(i)”

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<sup>448</sup> Joppke, ‘Terror and the Loss of Citizenship’, 744.

<sup>449</sup> See BBC, ‘Shamima Begum: What Is Her Legal Status?’, *BBC News*, 21 February 2019, sec. UK, Accessed 26 September 2020. <https://www.bbc.com/news/uk-47310206>; Christopher Bertram, ‘The UK Takes a Step toward Tyranny’, *Crooked Timber*, 20 February 2019, Accessed 29 September 2020. <https://crookedtimber.org/2019/02/20/the-uk-takes-a-step-toward-tyranny/>.

render their service to foreign states and thereby breach allegiance or “(a)(ii)” pose a threat to the vital interests of the state.

In the aftermath of the 9/11 attacks, several states have formulated their retentions in a manner close to the provisions in Article 8 paragraph 3. They are New Zealand in 2006, Jamaica and Lithuania in 2013, Belgium and Georgia in 2014, Italy in 2015 as well as Spain in 2018.<sup>450</sup> Provision “(a)(ii),” is most relevant in this respect. In the 2014 *Tunis Conclusion*, the UN Expert Meeting further clarified the meaning of “vital interest of states” to potentially include “[...] acts of treason, espionage and – depending on their interpretation in domestic law – “terrorist acts” [...].”<sup>451</sup>

Following this definition in the *Tunis Conclusion*, the United Kingdom, Israel, and the United States have debated and, in the case of the former two, also passed legislation that facilitates denationalisation along the lines of paragraph 3.<sup>452</sup> Given these changes, the UK Home Secretary admitted in 2019, for instance, that the Home Office had used this power “[...] about 150 times for people linked to terrorism or serious crimes.”<sup>453</sup>

Ever since the “War on Terror” has become an essential security policy in many countries, there has been a turn away from breach of allegiance as the main justification for denationalisation.<sup>454</sup> It has been rejected as neither suitable for prevention nor for effective enforcement.<sup>455</sup> While appeals to public security, social

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<sup>450</sup> Luca Bücken and René de Groot, ‘Deprivation of Nationality under Article 8 (3) of the 1961 Convention on the Reduction of Statelessness’, *Maastricht Journal of European and Comparative Law* 25, no. 1 (February 2018): 44, <https://doi.org/10.1177/1023263X17754036>.

<sup>451</sup> UN High Commissioner for Refugees, ‘Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”)’, March 2014, 14, <https://www.refworld.org/docid/533a754b4.html>.

<sup>452</sup> Shai Lavi, ‘Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel’, *New Criminal Law Review; Berkeley* 13, no. 2 (Spring 2010): 404f., <http://dx.doi.org.ezproxy.is.ed.ac.uk/10.1525/nclr.2010.13.2.404>. See also Foster and Lambert, ‘Statelessness as a Human Rights Issue’.

<sup>453</sup> Deprivation of Citizenship Status – in the House of Commons on 20th February 2019, <https://www.theyworkforyou.com/debates/?id=2019-02-20c.1484.6>

The British Government has passed 1207 pages of anti-terrorism legislation from 2000 to 2019. This legislation includes the Terrorism Act 2000 (160 pages), the Anti-terrorism, Crime and Security Act 2001 (124 pages), the Criminal Justice Act 2003 (476 pages), the Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2003, the Prevention of Terrorism Act 2005 (29 pages), The Terrorism Act 2006 (48 pages), the Terrorism (United Nations Measures) Order 2006 (16 pages), the Counter-Terrorism Act 2008 (119 pages), the Coroners and Justice Act 2009 (274 pages), the Terrorism (United Nations Measures) Order 2009 (18 pages), the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 (3 pages), the Justice and Security Act 2013 (32 pages), the Counter-Terrorism and Security Act 2015 (80 pages), the Counter-Terrorism and Border Security Act 2019 (102 pages).

<sup>454</sup> Lavi, ‘Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel’, 409.

<sup>455</sup> Lavi, 408.

contract theory, and ethnonationality seem to have replaced it instead,<sup>456</sup> they arguably boil down to the idea that some nationals are enemies of the state.

In the case of Israel, this new line of justification manifests itself as follows: the law clearly distinguishes between Jewish and Arab Israelis and justifies denationalisation if a national resides “[...] in an enemy land.”<sup>457</sup> The United States has also turned to the language of vilification. Although denationalisation has continuously been problematized and prohibited by the U.S. Supreme Court in reference to social contract theory,<sup>458</sup> the government has managed to enforce it nevertheless by vilifying the person in question. For instance, when Taliban soldier Yaser Esam Hamdi’s U.S. nationality became known to officials, he was classified as “enemy combatant,” denied a proper criminal trial and deported to Saudi-Arabia.<sup>459</sup> As shown in the previous chapter, the UK Government has also made use of the language of vilification. Shamima Begum’s construction as an enemy of the state is just one of a few examples.<sup>460</sup> Mahdi Hashi, a Somalian-born UK national, who was denationalised and extradited to the United States is another. In 2012, he disappeared in Somalia where he had stayed for some time to care for his grandmother. His family only heard from him again when Hashi was put on trial in New York. While it was never disclosed to anyone on what evidence he was accused,<sup>461</sup> “[t]he low threshold for criminalising [him] on suspicion of engagement in terrorism [was] upheld through a cultural discourse around who and what we consider a terrorism suspect to be.”<sup>462</sup>

### *The Criminal Law of the Enemy*

Over the course of 25 years, Günther Jakobs has developed a legal framework that uses the language of vilification to justify denationalisation in the domestic context. In this section, I outline his so-called *Feindstrafrecht* (criminal law of the enemy) which

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<sup>456</sup> Lavi, 409.

<sup>457</sup> Lavi, 418.

<sup>458</sup> Lavi, 416.

<sup>459</sup> Lavi, 416.

<sup>460</sup> For more examples see Kapoor, *Deport, Deprive, Extradite*.

<sup>461</sup> Kamila Shamsie, ‘Exiled: The Disturbing Story of a Citizen Made UnBritish’, *The Guardian*, 17 November 2018, sec. Books, Accessed 23 November 2020. <https://www.theguardian.com/books/2018/nov/17/unbecoming-british-kamila-shamsie-citizens-exile>.

<sup>462</sup> Kapoor, *Deport, Deprive, Extradite*, 31.

resembles Article 8 paragraph 3 of the 1961 Statelessness Convention.

Taking the case of Germany as exemplary, Jakobs develops *the criminal law of the enemy* by first examining cases where the criminal code permits criminalisation prior to the violation of another person's rights. They include conducts where there is a high probability with which a violation occurs, for example, false testimony, false oath, drunken driving, the stockpiling of guns, or the founding of a terrorist group.<sup>463</sup>

For Jakobs, not every conduct that can potentially violate other persons' rights must however be defined as a crime *per se*. For instance, a person must not be criminalised for the mere possession of a poisonous substance; this is because there is no strong correlation between the possession and the violation of another person's rights in that case.<sup>464</sup> If potential would be the only factor, *a priori* criminalisation would have no reasonable limits; even the criminalisation of a person's thoughts would then be permissible.<sup>465</sup>

To set reasonable limits on *a priori* criminalization and to prevent the violation of liberal principles such as freedom of thought, Jakobs therefore argues that the criminal code must necessarily distinguish between citizens and enemies.<sup>466</sup> Once individuals are no longer considered as citizens who can be rehabilitated if they commit a crime but as enemies, they lose their legal personhood and return to the state of nature where only the laws of war exist.<sup>467</sup> In their case, *a priori criminalisation* is legitimate, and states are justified in denationalising individuals.

## Moral Justifications for Denationalisation

### *Outlining A Genealogy*

Justifications that create a link between denationalisation and vilification are by no means new. They have a long history in political theory. Social contract theorists seem

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<sup>463</sup> See Günther Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung', *Zeitschrift für die gesamte Strafrechtswissenschaft* 97, no. 4 (1 January 1985): 769, 771, <https://doi.org/10.1515/zstw.1985.97.4.751>.

<sup>464</sup> Jakobs, 762.

<sup>465</sup> Jakobs, 753.

<sup>466</sup> Jakobs, 781f.

<sup>467</sup> Günther Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', *Onlinezeitschrift für Höchstrichterlicher Rechtssprechung im Strafrecht*, 2004, 92f.

to offer several justifications for denationalisation that also make use of the language of vilification.<sup>468</sup> This is most evident in the social contract theories of Thomas Hobbes and Immanuel Kant.

There are several passages in the *Leviathan* where Hobbes talks about the banishment of individuals from the commonwealth.<sup>469</sup> The first is in chapter 15 “Of other Laws of Nature.” For Hobbes, the laws of nature are general rules that prohibit anything that destroys human life; they derive purely from reason.<sup>470</sup> The fifth law of nature, for instance, says “[...] *that every man strive to accommodate himself to the rest.*”<sup>471</sup> Acknowledging that individuals have different character traits, Hobbes contends that those who acquire things in abundance which others need to survive must be banished from the commonwealth if they are not willing to share.<sup>472</sup> This is because they are guilty of starting a war for resources. For example, if individuals stockpile wheat grain while their neighbours starve, they must be exiled and thereby turned into enemies. “For a banished man, is a lawful enemy of the commonwealth that banished him; as being no more a member of the same.”<sup>473</sup>

Yet, for Hobbes, such laws of nature remain merely words if there is no sovereign that can enforce violations.<sup>474</sup> When describing sovereign powers, he implicitly gives another justification for the banishment of individuals from the commonwealth. Hobbes writes:

“[...] because the end of [sovereignty] is the peace and defence of [all citizens]; and whosoever has a right to the end, has a right to the means; it belongeth of right, to whatsoever man, or assembly that hath sovereignty, to be judge both of the means of peace and defence; and also the hindrances, and disturbances of the same; and to do whatsoever he shall think necessary to be done, both beforehand, for the preserving of peace and security, by prevention of discord at home, and hostility from abroad; and,

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<sup>468</sup> Since the legal concept of nationality only became an institution much later, Hobbes and Kant do not use the term “denationalisation” but rather “banishment or exile.”

<sup>469</sup> Hobbes uses the term “commonwealth” synonymously to “political community” or “state.”

<sup>470</sup> Thomas Hobbes, ‘Leviathan (1651)’, in *Modern Political Thought: Readings from Machiavelli to Nietzsche*, ed. David Wootton (Hackett Publishing, 1996), 172.

<sup>471</sup> Hobbes, 181.

<sup>472</sup> For Stephen Holmes, Hobbes takes the fifth natural law as the foundation of vilification. Stephen Holmes, ‘Does Hobbes Have a Concept of the Enemy?’, *Critical Review of International Social and Political Philosophy* 13, no. 2–3 (June 2010): 385, <https://doi.org/10.1080/13698231003787802>.

<sup>473</sup> Hobbes, ‘Leviathan (1651)’, 247.

<sup>474</sup> Hobbes, 187.

when peace and security are lost, for the recovery of the same.”<sup>475</sup>

Put differently, whenever states think that the security of their citizens is at risk, they can denationalise individuals to guarantee peace.

A third justification can be found in chapter 28, “Of Punishments and Rewards.” In the first paragraph, Hobbes defines punishment as an evil that the sovereign inflicts upon those who have transgressed the civil laws of the commonwealth.<sup>476</sup> Following from this definition, he then goes on to claim that any evil inflicted on individuals who are declared enemies is not a punishment because they do not fall under any civil law. Hobbes gives the example of rebels; for him, all infliction of evil is permissible, including denationalisation and even killing, if individuals deny the authority of the sovereign.<sup>477</sup>

In *Perpetual Peace*, Kant draws a similar connection between banishment and vilification. In Section Two of *Perpetual Peace*, he contends that peace between neighbours can only be established if everyone agrees to live under the civil laws of government, as those who remain in a lawless state pose a constant threat to others; to guarantee peace, anyone must therefore either be forced to become a citizen or be banished and treated as an enemy.<sup>478</sup> Applied to today’s context, everyone who does not obey the institution of the law can consequently be denationalised.

While Kant rejects the idea of an “unjust enemy” in *Perpetual Peace*, he seems to change his opinion in *The Metaphysics of Morals*. In paragraph 60, Kant defines “unjust enemies” as those “[...] whose publicly expressed will (whether by word or deed) reveals a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible [...]”.<sup>479</sup> Put differently, an unjust enemy is that individual that disregards the laws that uphold a peaceful global order, for instance, by constantly threatening to use chemical or nuclear weapons. Thus, in *The Metaphysics of Morals*, he offers an even more general principle for denationalisation. Whenever a state thinks someone is a risk to peace among nations, it can legitimately

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<sup>475</sup> Hobbes, 190.

<sup>476</sup> Hobbes, 244. Hobbes explicitly uses the term “evil” to describe a punishment which is not to be confused with his conception of justice and injustice. In other sections, he contends that the sovereign can never do injustice.

<sup>477</sup> Hobbes, 246.

<sup>478</sup> Immanuel Kant, *Perpetual Peace. A Philosophical Essay*, Translated with Introduction and Notes by M. Campbell Smith, M.A. With a Preface by Professor Latta (London, 1903), 119.

<sup>479</sup> Immanuel Kant, *Kant: The Metaphysics of Morals*, ed. Lara Denis, trans. Mary Gregor (Cambridge University Press, 2017), 129.

denationalise that individual.

Besides the bifurcation of the category of the enemy into a just and an unjust one, Kant also discusses how the latter should be treated once denationalised. He contends that injured states are justified in using any means necessary, not in quality but in quantity, to fight the unjust enemy.<sup>480</sup> They can, for example, deploy the whole range of legalised weapons as often as they deem required to re-establish peace. Hence, the principle of proportionality – which as an essential element of just war theory renders an attack justified if and only if the harm is proportional to the good it causes – is subverted.<sup>481</sup> Here, the good is always greater. Unjust enemies have been expelled from humanity altogether; they are not only vilified but turned into monsters.<sup>482</sup>

Carl Schmitt, who arguably offers the most developed theory of the enemy, strongly disagrees with Kant on this point. For him, the moralisation of the enemy is dangerous because it shifts the emphasis away from facts such as aggression.<sup>483</sup> With the introduction of the unjust enemy, war is not only personified but also emotionally charged with hatred.

Schmitt, by contrast, takes the enemy-friend binary to delineate the political sphere.<sup>484</sup> It is independent of such qualities as good and evil which delineate the moral sphere.<sup>485</sup> In other words, enemies need not be evil persons. Instead, they are so different in their way of life – negating other political communities' existence – that war is always possible.<sup>486</sup> Because of this possibility, enemies must be “[...] repulsed or fought in order to preserve one's own form of existence.”<sup>487</sup>

Unlike Hobbes and Kant, Schmitt moreover distinguishes between individuals and collectives.<sup>488</sup> For him, an individual cannot even be an enemy but merely an adversary: enemies “[...] exists only when, at least potentially, one fighting collectivity of people

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<sup>480</sup> Kant, 129.

<sup>481</sup> See Thomas Hurka, 'Proportionality in the Morality of War', *Philosophy & Public Affairs* 33, no. 1 (2005): 34.

<sup>482</sup> Daniel Heller-Roazen interprets Kant's conceptualisation of unjust enemies as an inversion of his proposal for perpetual peace. For him, it is rather “[...] a project for the perpetual preparation for peace through war.” Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books, 2009), 188.

<sup>483</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. Gary Ulmen (Telos Press, 2006), 170.

<sup>484</sup> Carl Schmitt, *The Concept of the Political: Expanded Edition* (University of Chicago Press, 2007), 8.19 (ebook).

<sup>485</sup> Schmitt, 8.18, 8.19 (ebook).

<sup>486</sup> Schmitt, 8.19 (ebook).

<sup>487</sup> Schmitt, 8.20 (ebook).

<sup>488</sup> He does so in reference to the Latin distinction between *hostis* (public enemy) and *inimicus* (private adversary) as well as to passages in the bible. Schmitt, 8.23 (ebook).

confronts a similar collectivity[,]” for example, nations or religious groups.<sup>489</sup> Consequently, the vilification no less “monsterfication” of individuals is not warranted under Schmitt’s conception of the enemy.

### *Contemporary Justifications*

Against the backdrop of the “War on Terror,” there has been new interest in moral justifications for denationalisation.<sup>490</sup> Christian Barry and Luara Ferracioli, for instance, contend that a state is justified in denationalising individuals if they commit crimes which intentionally violate “[...] the most basic rights of civilians (i.e. rights to life, liberty, freedom from torture and degrading treatment, etc.) in order to achieve political goals or communicate political messages.”<sup>491</sup> Joppke goes a similar route. He argues that denationalisation is, in theory, warranted as a punitive measure against terrorism.<sup>492</sup> While David Miller makes the same point, his reasoning is closest to that of Kant. Miller claims that individuals can be stripped of their membership in a political community if they violate the community’s most fundamental principles.<sup>493</sup>

Unlike their theoretical predecessor Hobbes and Kant, none of the contemporary proponents seems to draw a connection between denationalisation and vilification, however. Consequently, they do not problematise that the deprived individuals may become liable to an attack by the state which renders them stateless – as happened in the case of Al-Aulaqi.<sup>494</sup> Once this connection is acknowledged, it is arguably much more difficult to justify denationalisation.

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<sup>489</sup> Schmitt, 8.23 (ebook).

<sup>490</sup> For arguments against the justification of coercive denationalisation see Matthew J. Gibney, ‘Should Citizenship Be Conditional? The Ethics of Denationalization’, *The Journal of Politics* 75, no. 3 (July 2013): 646–58, <https://doi.org/10.1017/S0022381613000352>; Patti Tamara Lenard, ‘Democracies and the Power to Revoke Citizenship’, *Ethics & International Affairs* 30, no. 1 (2016): 73–91, <https://doi.org/10.1017/S0892679415000635>; Brian Carey, ‘Against the Right to Revoke Citizenship’, *Citizenship Studies* 22, no. 8 (17 November 2018): 897–911, <https://doi.org/10.1080/13621025.2018.1538319>.

<sup>491</sup> Christian Barry and Luara Ferracioli, ‘Can Withdrawing Citizenship Be Justified?’, *Political Studies* 64, no. 4 (December 2016): 1065, <https://doi.org/10.1177/0032321715606569>.

<sup>492</sup> See Joppke, ‘Terror and the Loss of Citizenship’.

<sup>493</sup> Miller, ‘Democracy, Exile, and Revocation’. The argument is not entirely clear with respect to the fundamental principles of democracy. It seems to suggest that they are paying tax, performing in jury service and voting, Miller, 267.

<sup>494</sup> In the case of Barry, Ferracioli, and Miller, this may be due to the proviso they provide. For them, denationalisation is only justified if the individual in question is an immigrant and thereby not actually rendered stateless because there is a foreign state which must grant nationality.

In the following section, I discuss three principles that pay attention to the connection between denationalisation and vilification. Given that the condition of denationalised and vilified individuals is like that of enemy combatants in war – both are potentially made liable to attack – I derive those three principles from just war theory. They are the principle of proportionality, the principle of existential threat, and the principle of last resort.

Firstly, the denationalisation and vilification of individuals may be justified if it does not expose the individual in question to unreasonable levels of violence. I call this the *principle of proportionality*. According to just war theory, an attack is proportional if and only if the harm is proportional to the good it causes.<sup>495</sup> Applied to cases of denationalisation, a state would therefore be justified in denationalising and vilifying an individual if it is necessary to save a greater number of lives than those harmed in the process.

While such a crude utilitarian calculus may in theory be appealing, it is nevertheless problematic because such framing entirely neglects the political structures that facilitate denationalisation and vilification. By denationalising and vilifying individuals, states do not only set a daunting precedent but also put everyone at risk of violence who share the same social identity with them. This is probably most visible in cases such as Myanmar, India, or Israel where denationalisation and vilification are based on ethnicity and religion. But it can also be observed in the United Kingdom where the government has passed legislation concerning denationalisation that exclusively targets racialised Muslim communities.<sup>496</sup> Under such circumstances it is reckless to argue that denationalisation and vilification produce more good than harm.

Denationalisation and vilification seem instead to be warranted if someone poses an existential threat to a state. I call this second principle the *principle of existential threat*. Whether an individual can pose an existential threat to a state does not only depend on the conceptualisation of the state but also on the factual characteristics of specific states. In international law the conventional definition of the state is based on four constitutive pillars. A state needs to have a government, a population, a territory, and

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<sup>495</sup> Hurka, 'Proportionality in the Morality of War', 34.

<sup>496</sup> See Imran Awan, "I Am a Muslim Not an Extremist": How the Prevent Strategy Has Constructed a "Suspect" Community', *Politics & Policy* 40, no. 6 (2012): 1158–85, <https://doi.org/10.1111/j.1747-1346.2012.00397.x>; Fahid Qurashi, 'The Prevent Strategy and the UK "War on Terror": Embedding Infrastructures of Surveillance in Muslim Communities', *Palgrave Communications* 4, no. 1 (13 February 2018): 1–13, <https://doi.org/10.1057/s41599-017-0061-9>.

the capacity to enter relations with other states.<sup>497</sup> For this reason it would cease to exist if any of these four pillars breaks down. When reframing the initial principle accordingly, one arrives at a more falsifiable proposition: individuals may rightly be denationalised and vilified if they pose an existential threat to the state by attacking one of its four constitutive pillars.

What about a state's population? An answer to this question seems to be largely dependent on the factual characteristics of specific states. To put it another way, an individual's potential to existentially threaten the population of Vatican City seems much greater than their potential to existentially threaten the population of China. Yet even in the case of Vatican City, it is only possible if the individual in question can cause some considerable harm by themselves, for example, with weapons of mass destruction.

The same holds true with respect to territory, another constitutive pillar of statehood. If an individual tried to destroy a state's territory, that state would be justified in denationalising and vilifying them under the principle of existential threat. One can imagine, for instance, a scenario where a head of state dictates a policy that threatens the environment to such a great extent that continued survival on the territory seems impossible.

Intuitively, the likelihood of individuals posing an existential threat to a state's government appear the highest. For instance, when an individual acquires so much power that they can overthrow the government by force. But no tyrant overthrows a government by themselves. Some gain their power through a party, others through the military or a militant group. Under the principle of existential threat, it is therefore the party, the military, or the militant group that can rightly be vilified but not any individual who is a member therein.

Thirdly, the denationalisation and vilification of individuals may be justified if and only if the existentially threatened state does not have any other means to protect itself. Following again just war theory – where most scholars seem to agree that states need to prove that war is the last resort before they engage in self-defensive warfare – I call

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<sup>497</sup> League of Nations, *Treaty Series Treaties and International Engagements Registered with the Secretariat of the League of Nations*.

this the *principle of last resort*.<sup>498</sup>

There are several reasonable standards for determining whether an extreme measure such as the use of armed force is indeed the last possible option to protect the state and its citizens. The first reasonable standard is clear and convincing evidence; it must be obvious that the individual in question poses an existential threat to the state.<sup>499</sup> Put concretely, the state should at least have access to plans or documents that express such intention. Given the high unlikelihood with which individuals can pose an existential threat to a state in the first place, it is however not apparent how this condition can ever be satisfied.

Another reasonable standard is the feasibility of alternatives.<sup>500</sup> This is to ask whether the threatened state can protect itself and its citizens by making use of the conventional means that the criminal justice system provides. According to Jakobs, liberal states do not always have this capacity. This is because effective protection may require a priori criminalisation.<sup>501</sup> If someone prepares an existential threat in secrecy, denationalisation and vilification seem necessary for the effective protection of others.<sup>502</sup>

Yet there are cases of denationalisation and vilification where the state could have also used conventional means. Developing the criminal law of the enemy, Jakobs points out that, in many countries, criminal law already recognises several conducts which allow a priori criminalisation without breaking liberal principles.<sup>503</sup> Like in the case of false testimony and drunken driving, where it is doubtful if individuals have the ability to prevent harm, propagation of terrorist intentions and the joining of a terrorist group can, for example, both be defined as crimes per se and thereby be conventionally prosecuted.

In this section, I have shown that the denationalisation of individuals seems much harder to justify if one draws the connection to vilification. This is because, under such circumstances, individuals in question are potentially made liable to attack by the state

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<sup>498</sup> See John Lango, 'The Just War Principle of Last Resort', *Asteriskos: Journal of International and Peace Studies*, 1 January 2006, 10.

<sup>499</sup> Lango, 14.

<sup>500</sup> See Lango, 14f.

<sup>501</sup> Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung', 782.

<sup>502</sup> For Jakobs, this is not a sign of state power but instead a lack thereof. Jakobs, 782..

<sup>503</sup> Jakobs, 767.

that has deprived them of their nationality. Given that their condition may be like enemy combatants, just war theory offers a more robust framework to morally judge whether denationalisation and vilification are warranted. They are only warranted:

- (a) if proportional to the harm caused by the individual in question
- (b) if the individual in question poses an existential threat to the state
- (c) if and only if denationalisation and vilification are the last resort

Yet the discussion has also shown that it is by no means clear that these conditions can ever be satisfied.

## **Conclusion**

In the first part of the fifth chapter, I have examined how the denationalisation of individuals has been justified in international and domestic law. Firstly, international law offers some loopholes for states to retain their sovereignty to denationalise. Article 8 of the 1961 Statelessness Convention permits the denationalisation of individuals if they (a) acquire nationality by fraud, (b) render their service to foreign states and thereby breach allegiance or (c) pose a threat to the vital interests of the state. Secondly, in the domestic context, it is argued that denationalisation does not go against any liberal principle if the state distinguishes between citizens and enemies. In the second part of chapter five, I have then outlined a genealogy that shows a historical link between denationalisation and vilification. It can, for instance, be found in both Hobbes' and Kant's theory of the state. Paying attention to this link, I have finally argued that several proponents of denationalisation fail to properly justify it. Given that the condition of denationalised and vilified individuals is like that of enemy combatants, I have turned to just war theory to examine three principles which may offer a sufficient moral justification. Discussing those principles, I made two claims. First, that the denationalisation and vilification of individuals is warranted (a) if proportional to the harm caused, (b) as response to an existential threat (condition "a" is satisfied in this case), and (c) if and only if it is the last resort. Second, that it is by no means clear that these conditions can ever be satisfied.

# Chapter VI: A Comparison: Individual Statelessness and Slavery

## Introduction

In this sixth chapter, I want to deepen our understanding of individual statelessness by comparing it to slavery. The link between the two is widely acknowledged. On *Slavery Abolition Day* in 2015, Secretary-General of the United Nations Ban Ki-Moon warned the public of the risk of enslavement and trafficking for *de facto* stateless persons.<sup>504</sup> A year later, UN Special Adviser on Prevention of Genocide Adama Dieng alerted the General Assembly that “[d]uring their journey to Europe and other locations, many migrants and refugees have witnessed or been victims of crimes and human rights violations, including murder and enforced disappearance, slavery and extortion, sexual violence, torture and other forms of cruel, inhumane and degrading treatment.”<sup>505</sup> Yet individual statelessness and slavery are not only two closely intertwined conditions but they also share an essential characteristic: both stateless persons as well as slaves lack the protection of their country of origin.

Despite this similarity, there has not been much comparative research. Jane Anna Gordon’s book *Statelessness and Contemporary Enslavement*, in which she argues that the two conditions are the result of comparable processes of the racialized denigration of citizenship, marks one of few exceptions.<sup>506</sup> This chapter contributes to the comparative literature. It is divided into two parts. First, I will discuss two paradigmatic definitions of slavery: a legal definition that considers slaves to be property as well as a sociological definition that rejects such a delineation and instead takes total domination, natal alienation, and denigration as the three constitutive elements of slavery. Second, I will suggest that these two definitions of slavery offer a useful analytic framework to conceptualise individual statelessness. This is because

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<sup>504</sup> UN News, ‘On Slavery Abolition Day, Ban Warns of Enslavement, Trafficking Risks for Refugees, Migrants’, UN News, 2 December 2015, Accessed 3 December 2020. <https://news.un.org/en/story/2015/12/517052-slavery-abolition-day-ban-warns-enslavement-trafficking-risks-refugees-migrants>.

<sup>505</sup> UN News, ‘Senior UN Officials Seek Accountability for Human Trafficking Crimes in Forced Migration’, UN News, 23 September 2016, Accessed 3 December 2020. <https://news.un.org/en/story/2016/09/540652-senior-un-officials-seek-accountability-human-trafficking-crimes-forced>.

<sup>506</sup> Gordon, *Statelessness and Contemporary Enslavement*, 1. Another example of comparative literature is: Davina P Durgana, ‘Lessons Learned from Modern Slavery: Addressing Shared Challenges in Measurement for Statelessness Researchers’, *Statelessness & Citizenship Review* 2, no. 1 (29 June 2020): 141–47, <https://doi.org/10.35715/SCR2001.119>.

they facilitate a nuanced understanding of the various ways in which stateless persons are harmed. Moreover, the sociological definition also helps us to identify cases of individual statelessness not captured by the mere legal conception presented in chapter two. In other words, there are some individuals that should be considered *de facto* stateless outside the legal framework of human rights, they are stateless not because they are denied a specific right embedded in an international convention but because they suffer from total domination, natal alienation, and denigration. As I attempt to show in final part of the chapter, such stateless persons are most likely to be found within the subtype of denigrative statelessness where the country of origin is the source of deprivation.

Before comparing individual statelessness and slavery, let me first address two preliminary questions. First, what exactly do I mean by “individual statelessness?” I define “individual statelessness” as a type of statelessness that is experienced by individuals such as Garry Davis, Friedrich Nottebohm, or Shamima Begum who are all without a nationality but do not share an affiliation. “Collective statelessness,” on the other hand, describes statelessness as experienced by entire collectives such as Palestinians, Kurds, or the Rohingya with a shared history of denationalisation. While someone may suffer from both individual as well as collective statelessness, others fall merely under one of these two categories. Gary Davis, for instance, was individually stateless but did not belong to any collective with a shared history of denationalisation, whereas many Kurds either have Turkish, Syrian, Iraqi, or Iranian nationality but must be considered collectively stateless since they nevertheless share a history of denationalisation.

Second, what is the value of comparisons? In a recent collection, *Liberating Comparisons: Reconsidering Comparative Approaches*, Sarah Cooper-Knock and Duduzile Ndlovu contend that a comparison can reveal characteristics of a phenomenon that would otherwise be overlooked.<sup>507</sup> In this essay, I will follow their vision. Put precisely, my comparison between individual statelessness and slavery aims to conceptualise some of the harms that both stateless persons and slaves suffer.

The contributors to *Liberating Comparisons* outline a framework wherein such an endeavour becomes possible. They focus on the importance of self-reflexivity when

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<sup>507</sup> Sarah Jane Cooper-Knock and Duduzile S. Ndlovu, eds., *Liberating Comparisons: Reconsidering Comparative Approaches* (York Tree Publications, n.d.), 2.

comparing two harmful conditions such as slavery and individual statelessness. For Hazel Gray, those who compare must constantly question their assumptions, definitions, and used categories; only when doing so can one find challenges that would not have been found otherwise.<sup>508</sup>

Yet such an approach must not be confused with a call for objectivity. To the contrary, authors must not be distanced from their research.<sup>509</sup> For a comprehensive understanding of individual statelessness, one must necessarily listen to the voices of the stateless themselves. To put it in the words of B Camminga and Kamau Wairuri:

“[t]o our minds, the idea of liberating comparisons suggests the need to go beyond academic analysis to consider the lived realities of the people whose lives are impacted – sometimes in incredibly violent ways – by the discursive categories created by distant experts and imposed on their lives through actions of the knowledgepower elite.”<sup>510</sup>

I have tried to do justice to this important methodological proposal by engaging with sources by the “The European Network on Statelessness” whose reports are directly based on interviews with stateless individuals.

## Two Definitions of Slavery

### *Slavery as Property*

For a long time, slavery has been legally defined through the concept of property.<sup>511</sup> Property is delineated as anything that is owned by persons or institutions.<sup>512</sup> Ownership, in turn, is commonly understood as a set of rights over the object that is owned, be it intangible like ideas or tangible like land.<sup>513</sup> Applied to the institution of slavery, slaves are therefore objects over which the slaveholder has absolute rights.

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<sup>508</sup> Cooper-Knock and Ndlovu, 4.

<sup>509</sup> Cooper-Knock and Ndlovu, 4.

<sup>510</sup> Cooper-Knock and Ndlovu, 98.

<sup>511</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 17. For J. K. Ingram, H. J. Nieboer, James L. Watson

<sup>512</sup> Patterson, 20.

<sup>513</sup> Patterson, 20.

This property-based legal definition of slavery has been used by political and legal theorists and abolitionists alike.<sup>514</sup> George Bourne, one of the founders of the *American Anti-Slavery Society*, for example, defined slavery as the reduction of individuals to property of the same quality as other goods and merchandise.<sup>515</sup>

Today, slavery is still mostly defined through the concept of property. The 1926 *Slavery Convention* marks a central point of reference. Although the convention offers a vague definition that carries the political interests of the contracting states,<sup>516</sup> many contemporary scholars of slavery nevertheless advocate for the way it delineates slavery as ownership.<sup>517</sup> In several exchanges from 2010 to 2012, they have argued that the convention provides the greatest clarity in terms of defining modern slavery as the “[...] status or condition of a person over whom any or all of the powers attaining to the right of ownership are exercised.”<sup>518</sup> The powers include the right to possess (exclusive control), the right to use (enjoying the benefits of the possession), the right to manage (making decision about how the possession is used), the right to income (generating profit from the possession) and the right to capital (disposing or transferring the possession).<sup>519</sup>

Unlike those scholars of slavery, Orlando Patterson rejects ownership as the essential element of slavery.<sup>520</sup> He offers two arguments for why this is the case.<sup>521</sup> First, from a sociological and economic perspective relations, ownership does not define a relation between a person and a thing, but between persons.<sup>522</sup> Ownership of land is a good example. A landowner does not have rights vis-à-vis the land itself but against other beings who come to interact with it. Those rights may, for instance, include protection against entry and damage.

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<sup>514</sup> Julia O’Connell Davidson, *Modern Slavery: The Margins of Freedom* (Palgrave Macmillan UK, 2015), 32, <https://doi.org/10.1057/9781137297297>.

<sup>515</sup> Cited in Davidson, 31.

<sup>516</sup> Davidson, 34.

<sup>517</sup> Davidson, 36.

<sup>518</sup> Kevin Bales, ‘Slavery in Its Contemporary Manifestations’, in *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. Jean Allain (Oxford University Press, 2012), 282f. To refer to slaves as persons seems contradictory given that the term stems from the Latin *persona* that designated that someone had civil rights.

<sup>519</sup> See Bales, 283.

<sup>520</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 17.

<sup>521</sup> Patterson, 21. Davidson cites a range of other scholars who agree with Patterson “that modern legalistic definitions of slavery fail to grasp the complexity, diversity and distinctiveness of the systems of slavery that have historically existed.” Davidson, *Modern Slavery*, 46.

<sup>522</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 21. Patterson refers to the work of W. B. Friedmann, E. Adamson Hoebel, and most prominently Wesley Hohfeld. See Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning Note’, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 1964, 23–114.

When ownership is understood in sociological and economic terms as a relation between individuals, so Patterson argues, one realises that the treatment of slaves as property does not inevitably make them distinct from other categories of individuals.<sup>523</sup> For him, athletes are an example. Like slaves, they are as such also traded on the market.<sup>524</sup>

According to Patterson, it needs two common tropes to uphold the belief that the buying and selling of individuals is limited to slavery. The first trope is that slaveholders own their slaves' body, whereas sport clubs solely purchase the services of their athletes.<sup>525</sup> When taking a closer look, one realises, however, that sports clubs invest as much in the bodies of players as in their services. In other words, in many sports the individual's body and the service athletes provide are as much intertwined as in the case of slavery. Second, it is also a common trope to believe that slaves are alone in having no say who owns them. There are multiple cases of athletes being sold against their will.<sup>526</sup> For Patterson, this does not make them slaves but indicates that ownership cannot be the constitutive element of slavery.

Patterson's second argument for why the property-based legal definition does not represent the complexities of slavery is that slaves have been held morally and legally responsible for violating the law in all slaveholding societies.<sup>527</sup> Hence, it is misleading to think of them merely as objects without a legal personality at all.<sup>528</sup> They are instead like corporations which can be seen as property and legal personalities at the same time.

### *Slavery as Total Domination, Natal Alienation, and Denigration*

Unlike the property-based legal definition, which considers ownership over slaves to be the central element of slavery, Pattersons' sociological definition is much broader

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<sup>523</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 21.

<sup>524</sup> Patterson, 23.

<sup>525</sup> Patterson, 24.

<sup>526</sup> Sean McIndoe, '8 Times an NHL Star Got Traded against His Will - Sportsnet.Ca', *SPORTSNET*, 2018, Accessed 25 October 2020. <https://www.sportsnet.ca/hockey/nhl/8-stars-traded-will-wendel-clark-wayne-gretzky/>.

<sup>527</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 22.

<sup>528</sup> Ibid.

in taking total domination, natal alienation, and denigration as the three constitutive elements of slavery.<sup>529</sup>

### *Total Domination of Slaves*

According to Patterson, the total domination of slaves has three characteristics. The first is extreme violence. Extreme violence is necessary to uphold slavery because slaves must continuously be reminded of their subordination.<sup>530</sup> In the post-bellum American South, they were “literally whipped into shape.”<sup>531</sup> Patterson quotes historian George P. Rawick to show the significance of extreme violence for the system of slavery that existed there. Rawick writes: “[w]hipping was not only a method of punishment. It was a conscious device to impress upon the slaves that they were slaves: it was a crucial form of social control particularly if we remember that it was very difficult for slaves to run away successfully.”<sup>532</sup> While whipping occupied a prominent position in that system of slavery, it was hardly the only form of extreme violence inflicted on slaves more generally, other forms included sexual exploitation, rape, and even murder.<sup>533</sup>

The second characteristic of the total domination of slaves is the individualised condition they are forced to live in. Slaves are usually powerless and just an extension of their slaveholders’ power.<sup>534</sup> This becomes most apparent when examining how past slaveholding societies dealt with harm to slaves by third parties. Firstly, such cases were never considered as harm against the slave but always against their slaveholder.<sup>535</sup> Secondly, slaves could not give any evidence of harm inflicted on them.

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<sup>529</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 1.

<sup>530</sup> Patterson, 3. In reference to Elisabeth Charlotte Welskopf, *Die Produktionsverhältnisse im alten Orient und in der griechisch-römischen Antike: ein Diskussionsbeitrag* (Akademie-Verlag, 1957). See also Orlando Patterson, ‘The Constituent Elements of Slavery’, in *Caribbean Slavery in the Atlantic World: A Student Reader*, ed. Hilary M. Beckles and Verene Shepherd, Second edition (Oxford: Ian Randle Publishers Limited, 2000), 33.

<sup>531</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 302f. Patterson calls this “functional domination” at some point. See Patterson, 333.

<sup>532</sup> Taken from Patterson, *Slavery and Social Death: A Comparative Study*, 3.

<sup>533</sup> Patterson, 50, 190, 191, 193, 205, 206.

<sup>534</sup> Patterson, 4; Patterson, ‘The Constituent Elements of Slavery’, 34. There are some exceptional cases, for example, the *familia Caesaris* where slaves were quite powerful in relation to other individuals because their slaveholder had a high social status in society. See Patterson, *Slavery and Social Death: A Comparative Study*, 306.

<sup>535</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 193.

They depended on their slaveholders to take legal action.<sup>536</sup> This is to say that the slaveholders' and the slaves' legal interests were forcefully aligned.<sup>537</sup>

The third characteristic of the total domination of slaves is that slavery has often been a substitute for killing. Historically, there are a variety of situations in which individuals were enslaved instead of killed. They include, for example, war and capital offence. Yet enslavement did never absolve the possibility of killing in those cases.<sup>538</sup> It was merely a conditional gesture of mercy. Executions were merely suspended as long as the slave accepted their domination.<sup>539</sup>

### *Natal Alienation of Slaves*

Patterson identifies natal alienation as the second constitutive element of slavery. It describes the process by which the historical and cultural bond that makes individuals a people is systematically destroyed. In other words, natal alienation prevents individuals from developing a collective identity.

According to Patterson natal alienation has three characteristics. First, slaves are denied all rights and claims of birth.<sup>540</sup> This is to say that they were not only excluded from the body politics but also "[...] culturally isolated from the social heritage of [their] ancestors."<sup>541</sup> As slaves neither belong to the body politics nor constitute a people, their existence is entirely mediated through the slaveholder.<sup>542</sup>

The second characteristic of natal alienation is the denial of a right to family. Although American and Greco-Roman slaves could, for instance, engage with each other illegally, their social ties were never formally recognised in public.<sup>543</sup> Apart from the inability to have marital status, there was also no slaveholding society in which cohabitation between slaves entailed "[...] custodial powers over children."<sup>544</sup> Thus,

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<sup>536</sup> Patterson, 194.

<sup>537</sup> Patterson, 304.

<sup>538</sup> Patterson, 5.

<sup>539</sup> Patterson, 5.

<sup>540</sup> Patterson, 5.

<sup>541</sup> Patterson, 5. See also Orlando Patterson, 'Trafficking, Gender and Slavery: Past and Present\*', in *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. Jean Allain (Oxford University Press, 2012), 324.

<sup>542</sup> Patterson, 'Trafficking, Gender and Slavery: Past and Present\*', 324.

<sup>543</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 6.

<sup>544</sup> Patterson, 187.

slaves were neither able to stop slaveholders from selling their children nor protected from being forced into sexual submission by their slaveholders.<sup>545</sup>

The third characteristic of natal alienation is that enslavement can be inherited.<sup>546</sup> In the absence of any legitimate rights and claims of birth, the children of slaves are immediately treated as the property of the slaveholder.<sup>547</sup>

In addition to these three characteristics, Patterson distinguishes two different types of natal alienation “[...] depending on the dominant early mode of recruiting slaves.”<sup>548</sup> The first is *intrusive* natal alienation. It applies to enslaved foreigners who were, for instance, taken as prisoners of war. Since foreign slaves came from an alien culture they were always treated as enemies within the slaveholding society.<sup>549</sup> The second type is *extrusive* natal alienation. It applies to individuals who were enslaved despite being an official member of the slaveholding society because they failed to satisfy the society’s legal and social norms.<sup>550</sup> Like denigrative stateless individuals, they were turned into an enemies.

### *Denigration of Slaves*

The third constitutive element of slavery is the denigration of slaves.<sup>551</sup> This is to say that slaves are without any social recognition and therefore not seen as moral equals.<sup>552</sup> For Patterson, the denigration of slaves seems to have three characteristics as well.

The first characteristic is the slave’s powerlessness.<sup>553</sup> Citing such diverse sources as Thomas Hobbes and Frederick Douglass, Patterson contends that slaves are denigrated because they have no name of their own, no independent social existence,

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<sup>545</sup> Patterson, 188.

<sup>546</sup> Patterson, 9.

<sup>547</sup> Patterson, 9.

<sup>548</sup> Patterson, 39.

<sup>549</sup> Patterson, 39.

<sup>550</sup> Patterson, 41. For Patterson, Western scholars’ insistence on intrusive natal alienation explains the common belief that slavery was “[...] abolished in the northern part of Western Europe by the late Middle Ages” when, in fact, it continued to be present in the form of penal slavery. Patterson, 44.

<sup>551</sup> Etymologically, “[t]he word comes from the Latin *nigrare*, meaning ‘to make black’.” It suggests “the associations of blackness with tainting or degradation.” Kaitlin Anne O’Neil, ‘Shedding Light on Denigration: Its Etymology and Uses’, *Lingua Frankly* 2 (19 August 2014): 1, <https://doi.org/10.6017/lf.v2i1.5456>.

<sup>552</sup> Patterson, ‘Trafficking, Gender and Slavery: Past and Present\*’, 325.

<sup>553</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 10.

and no capacity to defend themselves.<sup>554</sup> Instead, they are a mere extension of their slaveholders' power.<sup>555</sup> The more slaves slaveholders owned, the greater was their power and thereby status within the slaveholding society; this was often the only reason to turn others into slaves in the first place.<sup>556</sup>

The second characteristic of the denigration of slaves is that it is grounded in a racialised construction of the 'Other.' Patterson develops this point by examining the granting of honour. For him, honour is never solely based on acting honourably; instead, it is seen to derive from physical characteristics and the person's identity.<sup>557</sup> Thus, two individuals can act in the same way without being accorded the same amount of social esteem.<sup>558</sup> While someone can be awarded honour without acting at all – for instance, a king – another may equally be denigrated for their identity.

The third characteristic of the denigration of slaves is the way it intersects with the social status of non-slaves. This is to say that the social status of non-slaves is to a great extent conditioned on the denigration of slaves; non-slaves derive much of their value in comparison to the denigrated slaves.<sup>559</sup> In many societies this dialectic of recognition was much more important than the material gains slaveholders made.<sup>560</sup> It also extended to poor and disadvantaged individuals who defined their self-worth in contradistinction to the denigration of slaves.<sup>561</sup>

## Two Definitions of Individual Statelessness

In the final part of this chapter, I suggest that these two definitions of slavery offer a useful analytic framework to conceptualise individual statelessness because they facilitate a more nuanced understanding of the various ways stateless individuals are harmed. Moreover, the sociological definition also helps us to identify cases of

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<sup>554</sup> See Patterson, 10, 13, 79f.

<sup>555</sup> Patterson, 4.

<sup>556</sup> See Patterson, 83.

<sup>557</sup> Patterson, 80.

<sup>558</sup> Patterson, 80.

<sup>559</sup> Patterson, 11.

<sup>560</sup> Patterson, 11.

<sup>561</sup> Patterson, 'Trafficking, Gender and Slavery: Past and Present\*', 325. For instance this dialectic seems to be at play between the working class and refugees. See Jamie Gough, 'Brexit, Xenophobia and Left Strategy Now', *Capital & Class* 41, no. 2 (1 June 2017): 366, <https://doi.org/10.1177/0309816817711558e>.

individual statelessness not captured by the traditional legal conception. In sociological terms, individual statelessness can be defined through the three concepts of total domination, natal alienation, and denigration.

### *Individual Statelessness as Property*

If statelessness is taken to mean the lack of legal nationality and thereby a position in international law it can, like slavery, be theorised in relation to the concept of property. According to the so-called object theory, the possession of a nationality makes an individual a mere object of the country of nationality, comparable to ships and territory.<sup>562</sup> As objects, individuals do not themselves have any rights and duties under international law.<sup>563</sup> This is to say that harm to them by other countries is seen as harm to the country of nationality. When the country of nationality therefore steps in to protect its nationals, it is first and foremost for the protection of its own interests.

Under the property-centred legal definition, slaves also lack rights and duties themselves. Like individuals under international law, they are nothing but objects. This is to say that harm to them is always seen as harm to their slaveholder.<sup>564</sup> Under such a framework, they are only protected from harm by others if their protection is in the interest of the slaveholder. Thus, in legal terms, the condition of slaves is not much different from that of individuals in international law: both are only offered safeguards against violence if their “masters” take responsibility for them or if someone else intervenes on their behalf.

That said, stateless individuals do not even have a position in international law; they are less than objects and in a legal sense worse off than slaves. This is to say that there is no country that is responsible to protect them. Hannah Arendt describes this condition as one where human beings have become superfluous, meaning that no one has the slightest interest in them, not even for political or economic gains.<sup>565</sup>

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<sup>562</sup> Manner, ‘The Object Theory of the Individual in International Law’, 429.

<sup>563</sup> Manner, 428.

<sup>564</sup> Patterson, *Slavery and Social Death: A Comparative Study*, 193.

<sup>565</sup> Arendt, *The Origins of Totalitarianism*, 296.

Although Arendt's theoretical framework captures an important element of individual statelessness, it does not seem to apply to all subtypes. Her description of stateless individuals as superfluous fits arguably only the most excluded denigrative stateless persons. Besides the numerous refugee camps and detention centres all around the world, the Mediterranean seems to be a paradigmatic example for superfluousness. In only a few years, over 22,500 asylum seekers have been denied rescue and died there.<sup>566</sup>

Theorising statelessness in relation to the concept of property may also tell us something about why states denationalise individuals in the first place. Arguably, they are not interested in attaining legal powers over them. Put in the language of property rights, they do not even see a need for claiming a right to use, a right to manage, and a right to income over coercively denationalised or persecuted people since nothing of value can be gained from them. Moreover, the right to possess – or in other words, exclusive control – is also not deemed to be necessary since there is no one else that lays claim. Yet the exclusion from the realm of legality is not in itself what is so harmful – it may sometimes rather be beneficial, for instance, when someone's status of statelessness prevents their deportation. As I have explored in the previous chapter, it is instead the ways in which denationalisation enables states to include those rendered superfluous into the realm of arbitrary power and violence.

However, not all stateless individuals suffer from this predicament. Voluntary and structural stateless individuals are not likely to be treated as superfluous. Their former countries of origin often recognise them as *de facto* nationals because they see some value in attaining *de facto* legal powers. Garry Davis, for instance, was even allowed to travel around the world to advocate for world citizenship, whereas Friedrich Nottebohm's legal interests to his confiscated property were at least defended by his country of nationality.

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<sup>566</sup> UNHCR, 'Situation Mediterranean Situation', 2022, Accessed 17 December 2022. <https://data2.unhcr.org/en/situations/mediterranean>.

## *Individual Statelessness as Total Domination, Natal Alienation, and Denigration*

### *Total Domination of Stateless Individuals*

While a legal definition offers a basic framework for understanding individual statelessness, a sociological definition helps us to identify the actual harms stateless individuals face. They can be conceptualised as total domination, natal alienation, and denigration. As seen in the previous part of the chapter, the total domination of slaves has three aspects. For Patterson, it is comprised of extreme violence, individualisation, and enslavement as a substitute for killing.

Unlike slaves, voluntary statelessness individuals do not seem to be affected by all three aspects of total domination. Firstly, as seen in the examples discussed in chapter four, voluntary statelessness does not necessarily lead to extreme violence. This seems quite intuitive since one can hardly imagine that any individual would freely choose to make themselves knowingly susceptible to extreme violence unless the alternative is even greater violence.<sup>567</sup> Secondly, voluntary statelessness is also not a substitute for killing; voluntarily stateless individuals do not renounce their nationality because they are threatened by the country of origin – refugees who make themselves stateless so that they cannot be deported must not be seen as doing this voluntarily.

Despite these two differences, there is a commonality between Patterson's definition of slavery and voluntary statelessness in terms of total domination. They both align in with respect to the third aspect, namely as an individualised condition. While slaves depend entirely on their slaveholders to take legal action when they are harmed by a third party, the same is true for voluntarily stateless individuals: they are also dependent on a state for legal protection. As their statelessness originates from their free choice, however, it would be far stretched and no longer meaningful to consider them as totally dominated in that sense.

What about structurally stateless individuals? Are they totally dominated? Firstly, like slaves, they seem to be exposed to an indirect form of extreme violence. For instance, sinking islanders are likely to experience much suffering from climate change.

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<sup>567</sup> Persecuted persons often destroy their papers while fleeing, thereby rendering themselves *de jure* stateless. See Shahram Khosravi, 'The "Illegal" Traveller: An Auto-Ethnography of Borders\*', *Social Anthropology* 15, no. 3 (28 June 2008): 331, <https://doi.org/10.1111/j.0964-0282.2007.00019.x>. Since they do so to prevent potential deportation by the reception country one cannot say that this is done voluntarily, however.

However, this type of violence is distinct from that inflicted on slaves as it does not have a source that is antagonistic towards the person harmed.

Secondly, there are some cases where individual structural statelessness can be seen as the only available option to avoid death. This is to say that an appeal to statelessness may be necessary for sinking islanders to prevent drowning because natural disasters are not yet accepted as a valid reason for asylum under the 1951 Refugee Convention. However, not all structural stateless individuals suffer from this aspect of total domination. Friedrich Nottebohm, for instance, was not threatened by death but imprisonment as an enemy alien.

Thirdly, there is no commonality between Patterson's definition of slavery as an individualised condition and individual structural statelessness. For example, sinking islanders are not entirely powerless. As their country of nationality is not necessarily antagonistic towards them, they remain part of a collective and a body politics that can offer some protection.

The greatest conceptual overlap with Patterson's definition of slavery in terms of total domination is given in the case of individual denigrative statelessness. Firstly, those who fall under this category are very likely to experience extreme violence in the form of torture,<sup>568</sup> sexual exploitation or rape.<sup>569</sup> While Davin, a Kurdish born stateless individual from Syria was several times arrested and severely beaten by Syrian authorities,<sup>570</sup> Rohingya women, for instance, have been brutally raped by the Myanmar military.<sup>571</sup>

Many denigrative stateless individuals, like Ivan, an Uzbek born in the former Soviet Union,<sup>572</sup> moreover suffer from "[...] extremely high symptom levels of anxiety, depression and post-traumatic stress disorder (PTSD)."<sup>573</sup> Although extreme violence is more likely experienced while fleeing persecution, being granted asylum does also

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<sup>568</sup> See Khosravi, 326; Anne Kalt et al., 'Asylum Seekers, Violence and Health: A Systematic Review of Research in High-Income Host Countries', *American Journal of Public Health* 103, no. 3 (March 2013): E40.

<sup>569</sup> See Khosravi, 'The "Illegal" Traveller', 324; Sharon Pickering, *Women, Borders, and Violence* (New York, NY: Springer New York, 2011), 22, <https://doi.org/10.1007/978-1-4419-0271-9>.

<sup>570</sup> European Network on Statelessness, 'Protecting Stateless Persons from Arbitrary Detention', 2020, 3, Accessed 1 August 2021. [https://www.statelessness.eu/sites/default/files/2020-09/ENS\\_LockInLimbo\\_Detention\\_Agenda\\_online.pdf](https://www.statelessness.eu/sites/default/files/2020-09/ENS_LockInLimbo_Detention_Agenda_online.pdf).

<sup>571</sup> Djaouida Siaci, 'The Mass Rape of Rohingya Muslim Women: An All-Out War Against All Women', *Middle East Institute*, 2019, <https://www.mei.edu/publications/mass-rape-rohingya-muslim-women-all-out-war-against-all-women>.

<sup>572</sup> See European Network on Statelessness, 'Protecting Stateless Persons from Arbitrary Detention', 5.

<sup>573</sup> Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers: A Report* (Boston.; New York City: Physicians for Human Rights; Bellevue/NYU Program for Survivors of Torture, 2003), 1.

not necessarily mean that they are protected.<sup>574</sup> Even where countries seem to have followed a moral approach towards denigrated stateless individuals,<sup>575</sup> violent attacks on them have increased over the years.<sup>576</sup>

Aside from extreme violence, there is also a close connection between Patterson's definition of slavery and individual denigrative statelessness in terms of total domination as a substitute for killing. Many denigrative stateless individuals who are persecuted must seek asylum to avoid being killed in the country of origin. Moreover, they are also forced into an individualised condition. Like slaves, denigrated stateless individuals depend on other states as much as slaves depend on the legal protection of their slaveholders. At worst, they are an extension of the reception country's power. This is to say that refugees, for example, have been used as a bargaining power by reception countries to achieve their political interests.<sup>577</sup>

In this section, I have shown that many denigrative stateless individuals suffer from total domination as conceptualised by Patterson, whereas the same is not the case with respect to voluntary and structural stateless individuals.

### *Natal Alienation of Stateless Individuals*

As in the case of total domination, there are three ways in which natal alienation, the second constitutive element of slavery, expresses itself.<sup>578</sup> First, slaves are denied all rights and claims of birth, leading to legal and cultural isolation as well as to a loss of community. Second, they have no right to family. Third, the denial of all rights and claims of birth is inheritable.

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<sup>574</sup> See Annette A. M. Gerritsen et al., 'Physical and Mental Health of Afghan, Iranian and Somali Asylum Seekers and Refugees Living in the Netherlands', *Social Psychiatry and Psychiatric Epidemiology* 41, no. 1 (1 January 2006): 18–26, <https://doi.org/10.1007/s00127-005-0003-5>.

<sup>575</sup> Betts and Collier, *Refugee*, 94.

<sup>576</sup> See Deutsche Welle, 'Federal Criminal Police Office Warns of Xenophobic Violence', *DW.COM*, 2015, Accessed 27 August 2020. <https://www.dw.com/en/federal-criminal-police-office-warns-of-xenophobic-violence/a-18798780>; Deutsche Welle, 'Anti-Refugee Attacks Rise Four-Fold in Germany', *DW.COM*, 2015, Accessed 16 August 2020. <https://www.dw.com/en/anti-refugee-attacks-rise-four-fold-in-germany/a-18907776>; David Benček and Julia Strasheim, 'Refugees Welcome? A Dataset on Anti-Refugee Violence in Germany', *Research & Politics* 3, no. 4 (1 October 2016).

<sup>577</sup> See Bill Frelick, 'Refugees Are Not Bargaining Chips', *Human Rights Watch* (blog), 6 January 2010, Accessed 1 August 2020. <https://www.hrw.org/news/2010/01/06/refugees-are-not-bargaining-chips>; Ali Bilgic, 'Turkey Is Using Syrian Refugees as Bargaining Chips as It Moves against the Kurds', *The Conversation*, 2018, Accessed 1 October 2020. <http://theconversation.com/turkey-is-using-syrian-refugees-as-bargaining-chips-as-it-moves-against-the-kurds-90904>.

<sup>578</sup> In a paper that was published after "Slavery and Social Death," Patterson contends that "the closest approximation to traditional natal alienation are persons who find themselves illegally transported to foreign countries where they are fearful of seeking the protection of law enforcement and other state authorities and are isolated from familial and social ties." Patterson, 'Trafficking, Gender and Slavery: Past and Present\*', 324.

Other than in the case of slavery, natal alienation is not necessarily an inherent characteristic of voluntary statelessness; individuals who have voluntarily withdrawn their nationality may not suffer from it. Firstly, there are cases where they are only formally excluded from their former country of origin but not *de facto*. This is to say that many individuals who fall under the category of voluntary statelessness continue to be closely integrated into society. U.S. national Garry Davis is a prominent example. After he had become voluntarily stateless and advocated for world citizenship, Davis was lauded by the American public.<sup>579</sup> The San Francisco Chronicle even proclaimed that the “[...] country will be the weaker when such ‘romantic’ and ‘futile’ urges have ceased to work among our young.”<sup>580</sup> Given the broad social recognition he received despite having renounced his nationality, Davis had no difficulties to return and reside in the United States.<sup>581</sup>

Secondly, voluntarily stateless individuals are also not necessarily denied the right to family. Although Davis was residing in the United States as a stateless individual, the state never really intervened in his privacy, whereas American slaveholders constantly undermined the familial ties of their slaves. For instance, Davis was formally married two times as a stateless person.<sup>582</sup>

Thirdly, voluntary statelessness is also not inheritable. Davis’ children were all granted U.S. nationality. In other words, the state showed no hostility in accepting their status as nationals.

Compared to voluntary statelessness, the link between slaves and structural stateless individuals is less straightforward with respect to natal alienation. Firstly, structural stateless individuals may be deprived of their rights and claims of birth. Nottebohm, for example, was not culturally excluded by his new country of nationality but alienated internationally. Sinking islanders, on the other hand, are likely to suffer from a much more substantial denial of the birthrights. As they will be forced to seek asylum once their country of nationality is physically gone, they are prone to gradually lose their community and shared identity. In their case, natal alienation is particularly likely

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<sup>579</sup> Baratta, *The Politics of World Federation*, 403.

<sup>580</sup> Baratta, 401.

<sup>581</sup> See for example Davis, *My Country Is the World*, 115.

<sup>582</sup> Fox, ‘Garry Davis, Man of No Nation Who Saw One World of No War, Dies at 91’.

because there are not many places where a sinking island state's cultural heritage and way of life can be preserved in practice.<sup>583</sup>

Secondly, compared to slaves, structural stateless individuals are, however, not necessarily denied the right to family. Although family planning is greatly affected by climate change and the likely disappearance of their homeland, there are some legal mechanisms that protect sinking islanders' families, even when they are forced to seek asylum abroad. This is because the right to family is, at least in theory, a well-established human right.<sup>584</sup>

Thirdly, structural statelessness and slavery both affect the nationality status of future generations. Yet in the former case, it may do so in a rather positive way. While children of structural stateless individuals are generally likely to inherit their parents' nationality status, the disappearance of their homeland may legally put sinking islanders in an unambiguous situation. This is because no other country can deny that they are stateless. The questioning of nationality status has been a serious problem: many children have found themselves in a legal limbo because the reception country has assigned them an undetermined status for not being able to provide conclusive proof of not having a nationality.<sup>585</sup>

In comparison with the other two types, denigrative statelessness and slavery show many commonalities. Like slaves, denigrative stateless individuals are most harmed by natal alienation and thus the systematic destruction of the historical and cultural bond that makes one belong to a people. Firstly, they are denied all rights and claims of birth. This may not only be the case in the former country of nationality but also in the reception country.<sup>586</sup> As shown in chapter four, many Kurdish individuals, for

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<sup>583</sup> Kim Angell therefore argues that other countries have a collective duty to change their way of life and downsize their attachments to the state territory. See Kim Angell, 'New Territorial Rights for Sinking Island States', *European Journal of Political Theory* 20, no. 1 (2021): 95–115, <https://doi.org/10.1177/1474885117741748>.

<sup>584</sup> Mark Rohan, 'Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence Comment', *Chicago Journal of International Law* 15, no. 1 (2014): 350.

<sup>585</sup> The landmark case *Zhao v. the Netherlands* may protect children from such legal limbos in the future. For the first time, the UN Human Rights Committee has decided that a country has violated a child's right to nationality by assigning them undetermined nationality status. See OHCHR, 'The Netherlands Violated Child's Right to Acquire a Nationality, UN Committee Finds', 2020, Accessed 3 April 2021

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26631&LangID=E>; Laura Bingham, 'A Victory for Human Rights in *Zhao v. the Netherlands* (the "Denny Case"): Nationality from Birth, without Exceptions', *European Network on Statelessness*, 2021, Accessed 19 November 2020. <https://www.statelessness.eu/updates/blog/victory-human-rights-zhao-v-netherlands-denny-case-nationality-birth-without>.

<sup>586</sup> See Hannah Arendt, 'We Refugees', in *Altogether Elsewhere: Writers on Exile*, ed. Marc Robinson (Faber and Faber, 1994), 117.

instance, suffer from linguistic genocide in their countries of origin.<sup>587</sup> Not being able to speak or read their ancestral language, they are denied access to the written and oral archives that constitute the Kurdish heritage.

In the case of Kurds, cultural isolation and loss of community extends as far as the erasure from common speech. The Turkish has continuously denied the Kurdish identity by replacing the words “Kurds” and “Kurdistan” with “Mountain Turks” and “the East.”<sup>588</sup> The same is the case for Palestinians. Rhoda Ann Kanaaneh contends that “[t]he state of Israel has historically chosen not to use the term “Palestinian” because its use would imply recognition of Palestinians as a national group that has rights. Its preference is for ‘Arab,’ which identifies these people with Arabs in other countries, whom they are welcome to go and join.”<sup>589</sup>

Secondly, denigrative stateless individuals also suffer from numerous violations of the right to family. They range from discriminatory policies regarding family reunification to outright denial in the form of criminalisation and birth control. Although article 12 of the Declaration of Human Rights declares that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence [...],” many recipient countries have policies in place that infringe the right to family reunification.<sup>590</sup> Those restrictive policies aim at controlling cultural integration, targeting particular groups, often Muslims, for their ethnicity and religion.<sup>591</sup> Having been implemented all over the world, they go as far as to require DNA tests to identify whether someone is legally a family member or not.<sup>592</sup>

Some denigrated stateless individuals are even criminalised for having a family as their “[...] procreation, and reproduction remain sources of anxiety in immigration politics.”<sup>593</sup> In the United States, authorities have created numerous family detention

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<sup>587</sup> See Skutnabb-Kangas and Bucak, ‘Killing a Mother Tongue – How the Kurds Are Deprived of Linguistic Human Rights’; Welat Zeydanlıoğlu, ‘Turkey’s Kurdish Language Policy’.

<sup>588</sup> Welat Zeydanlıoğlu, ‘Turkey’s Kurdish Language Policy’, 105 For this point, Zeydanlıoğlu refers to Mesut Yeğre’s ‘Devlet söyleminde Kürt sorunu’ [The Kurdish question in state discourse] to which I had no access.

<sup>589</sup> Rhoda Ann Kanaaneh, *Birthing the Nation: Strategies of Palestinian Women in Israel*, California Series in Public Anthropology (University of California Press, 2002), 11, <https://www.ucpress.edu/book/9780520229440/birthing-the-nation>.

<sup>590</sup> Danièle Bélanger and Guillermo Candiz, ‘The Politics of “Waiting” for Care: Immigration Policy and Family Reunification in Canada’, *Journal of Ethnic and Migration Studies* 46, no. 16 (30 September 2020): 3474, <https://doi.org/10.1080/1369183X.2019.1592399>.

<sup>591</sup> Galya Benarieh Ruffer, ‘Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU’, *Journal of Ethnic & Migration Studies* 37, no. 6 (July 2011): 936, <https://doi.org/10.1080/1369183X.2011.576196>.

<sup>592</sup> See Ruffer: 937; Karen Fog Olwig, ‘The Right to a Family Life and the Biometric “Truth” of Family Reunification: Somali Refugees in Denmark’, *Ethnos* 0, no. 0 (24 March 2020): 1–15.

<sup>593</sup> Lauren L. Martin, ‘Governing through the Family: Struggles over US Noncitizen Family Detention Policy’, *Environment and Planning A: Economy and Space* 44, no. 4 (1 April 2012): 870, <https://doi.org/10.1068/a4477a>.

centres to police border-crossing pregnant women and so-called “anchor-babies” (children that facilitate the future immigration of their parents through family sponsorships).<sup>594</sup> Moreover, Burmese and Israeli leaders have argued that the rapid population growth of the Muslim population would be a threat to the vital interests of the country.<sup>595</sup>

Birth control has been the most violent means to deny the right to family in the case of denigrative statelessness. It can take different degrees from unequal access to health care to outright sterilisation.<sup>596</sup> Since the 1930s, sterilisation has been a continuous practice throughout many parts of the world.<sup>597</sup> In Europe, stateless Roma women have been particularly targeted.<sup>598</sup> More recently, there have been several reports that the sterilisation of stateless women is still practised in U.S. immigration detention.<sup>599</sup>

Thirdly, denigrative stateless individuals are also most likely to transfer their statelessness onto future generations. This is most obvious in the case of discriminatory nationality laws. The denial of nationality in the case of children who are born to single mothers in countries where nationality status is only passed on by males is one of the notorious examples. Another one is that of denigrated stateless individuals who are kept in a legal limbo. There are many instances where state authorities keep questioning whether they are truly without any nationality.<sup>600</sup> This strategy of waiting has not only been used to prevent the passing on of nationality status but also naturalisation in the first place.<sup>601</sup>

The case of Shamima Begum reveals the most horrifying form of natal alienation with respect to denigrative statelessness. When she intended to return to the United Kingdom to be able to access health care for her third yet unborn baby, the Home Office denied their return. Following reports of the death of Begum’s third son, Home

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<sup>594</sup> Martin, 872f.

<sup>595</sup> See Haque, ‘Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma’, 456; Kanaaneh, *Birthing the Nation: Strategies of Palestinian Women in Israel*, 61.

<sup>596</sup> For discriminatory health care see Kanaaneh, *Birthing the Nation: Strategies of Palestinian Women in Israel*, 18, 47, 75.

<sup>597</sup> See Robin D. G. Kelley, *Freedom Dreams: The Black Radical Imagination* (Beacon Press, 2002), 145; Christina Zampas and Adriana Lamačková, ‘Forced and Coerced Sterilization of Women in Europe’, *International Journal of Gynecology & Obstetrics* 114, no. 2 (2011): 164, <https://doi.org/10.1016/j.ijgo.2011.05.002>.

<sup>598</sup> Zampas and Lamačková, ‘Forced and Coerced Sterilization of Women in Europe’, 164f.

<sup>599</sup> Jerry Flores, ‘ICE Detainees’ Alleged Hysterectomies Recall a Long History of Forced Sterilizations’, *The Conversation*, accessed 23 April 2021, <http://theconversation.com/ice-detainees-alleged-hysterectomies-recall-a-long-history-of-forced-sterilizations-146820>.

<sup>600</sup> OHCHR, ‘The Netherlands Violated Child’s Right to Acquire a Nationality, UN Committee Finds’.

<sup>601</sup> See for example BBC, ‘Shamima Begum Will Not Be Allowed Here, Bangladesh Says’, *BBC News*, 21 February 2019, sec. UK, Accessed 4 October 2020. <https://www.bbc.com/news/uk-47312207>.

Secretary Sajid Javid only told the press that “[...] sadly there are probably many children, obviously perfectly innocent, who have been born in this war zone. [...] I have nothing but sympathy for the children that have been dragged into this.”<sup>602</sup> He thereby revealed two consequences of denigrative statelessness: children not only inherit their parent’s status but are also denied the status of moral equals.

The Rohingya are another horrifying example of denigrative statelessness where natal alienation is inherited. Myanmar, the country of origin, has effectively denationalised about half a million Rohingya children.<sup>603</sup> While many of them have found refuge in other countries, their natal alienation continues there. Bangladeshi state authorities, for instance, have prohibited children to learn their local language in an attempt to assimilate them into the host culture.<sup>604</sup> But without learning and knowing their own language, they are denied an important means to preserve their ancestral heritage that makes them a people.

In this section, I have shown that denigrative stateless individuals are most affected by the harm of natal alienation. They are denied all rights and claims of birth, have no right to family, and inherit their rightlessness to future generations. On the other hand, case studies indicate that voluntary and structural stateless individuals do not necessarily suffer from these conditions.

### *Denigration of Stateless Individuals*

According to Patterson, the denigration of slaves also has three characteristics: first, the powerlessness of slaves, second the racialisation of their identities, and third, the way it intersects with the freedoms of non-slaves. Unlike in the case of slavery, individual statelessness does not necessarily result in denigration.

This becomes most apparent when examining voluntary statelessness. Firstly, voluntarily stateless individuals are not necessarily without any power. Garry Davis,

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<sup>602</sup> BBC, ‘Shamima Begum: IS Teenager’s Baby Son Has Died, SDF Confirms’, *BBC News*, 8 March 2019, sec. UK, Accessed 22 September 2020. <https://www.bbc.com/news/uk-47500387>.

<sup>603</sup> Nina Strohlic, ‘In Bangladesh, Rohingya Refugees Are Born into a Legal Limbo with Nowhere to Call Home’, *Culture*, 28 December 2018, sec. Culture, Accessed 3 July 2020. <https://www.nationalgeographic.com/culture/article/see-rohingya-babies-born-without-home>.

<sup>604</sup> Sunaina Kumar, ‘How Rohingya Refugee Children Are Torn Between Languages’, *Refugees*, 1 April 2019, Accessed 10 April 2020. <https://deeply.thenewhumanitarian.org/refugees/articles/2019/04/01/how-rohingya-refugee-children-are-torn-between-languages>.

for example, had the power to travel around the world to influence the discourse on citizenship as he was not only directly supported by a great number of intellectuals, the media, and thousands of followers but also indirectly by his former country of nationality.

Secondly, voluntarily stateless individuals are also not necessarily denigrated based on their identity. Instead, it may work in their favour. Garry Davis' case is again emphatic. As an air force veteran at 26 and born to white parents who not only had US nationality but also a name in the highest circles of society, he was always seen as a moral equal.

Thirdly, voluntary stateless individuals are usually not a source of worth for poor or disadvantaged citizens since they are unlikely to be racialised as the "Other." In most cases, they are rather privileged individuals who exist in a space far removed from the poor and disadvantaged.

By contrast, there are more commonalities between structural statelessness and the denigration of slaves. Firstly, unlike slaves, sinking islanders still hold some power. Being part of a political community, they have been able to advocate for their cause. To this day, sinking islanders receive a lot of support from a variety of institutions such as the African, Caribbean and Pacific Secretariat, the European Union, the United Nations Office for Disaster Risk Reduction, and the World Bank Group.<sup>605</sup> One explanation for this may be that their structural statelessness is due to unfavourable circumstances and not the hostility of the country of nationality.

However, the general support towards the collective should not deflect from cases where individuals who face structural statelessness have been denigrated and denied refuge.<sup>606</sup> For example, Nottebohm the first and most well-known structural stateless person was detained by the United States as an enemy alien for three years although Lichtenstein socially and legally recognised him as a national. A more recent example is that of Ioane Teitiota, a Kiribatian who had sought asylum as a "climate refugee" in New Zealand. Despite him and his wife living in the country for three years and all their

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<sup>605</sup> See GFDRR, 'Funding Structure & Partnerships | GFDRR', Accessed 23 April 2021, <https://www.gfdr.org/en/funding-structure-partnerships>; Christopher Pala, 'Kiribati and China to Develop Former Climate-Refuge Land in Fiji', *The Guardian*, 23 February 2021, sec. World news, Accessed 14 July 2021. <http://www.theguardian.com/world/2021/feb/24/kiribati-and-china-to-develop-former-climate-refuge-land-in-fiji>.

<sup>606</sup> Shabnam Dastgheib, 'Kiribati Climate Change Refugee Told He Must Leave New Zealand', *Stuff*, 21 September 2015, sec. national, Accessed 16 June 2021. <https://www.stuff.co.nz/national/72276281/kiribati-climate-change-refugee-told-he-must-leave-new-zealand>.

three children being born there, they were arrested for deportation.<sup>607</sup> Sinking islanders who suffer from structural statelessness are more than anyone else under threat of climate change. Given the scope of the threat, there is no way for them to defend themselves without the cooperation of other countries.

Secondly, structural stateless individuals do not seem to be denigrated based on their identity. In the case of *Nottebohm*, the International Court of Justice justified his ineffective nationality rather based on opportunism. In other words, *Nottebohm* suffered from structural statelessness because his naturalisation was seen as serving an instrumental purpose, he was not denied Lichtenstein nationality on racial or cultural grounds.

When compared to the other two types, there is a clear commonality between denigrated stateless individuals and denigrated slaves. Firstly, they are both powerless. Like slaves denigrated stateless individuals have no name, no independent social existence, and no capacity to defend themselves as they face the violence of an entire state apparatus that is hostile towards them.

Secondly, denigrated stateless individuals are usually denigrated for their identity. Their denigration can be based on gender as in the case of discriminatory nationality laws. It can also be based on ethnicity and religion. This is often the case with respect to persecuted or coercively denationalised individuals. The Rohingya are a paradigmatic example. They are racialised and deprived of their nationality because Burmese and Rakhine leaders view their Muslim identity as a threat to the vital interests of the country.<sup>608</sup>

Thirdly, like slaves, denigrated stateless individuals are also often taken to be a source of worth and freedom for the poor and disadvantaged citizens. For Lisa Marie Cacho, this becomes visible in George W. Bush's response to Hurricane Katrina.<sup>609</sup> By highlighting that the victims of the hurricane were not refugees and therefore worthy of compassion, he gave the impression that "[t]he source of one racial group's social value (African Americans' Americanness and citizenship) was contingent upon and made legible through the devaluation of an/other (refugees' un-Americanness and

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<sup>607</sup> Dastgheib.

<sup>608</sup> Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma', 456.

<sup>609</sup> See Cacho, *Social Death*, 14.

noncitizenship).”<sup>610</sup> The same dialectic is prevalent in the case of coercively denationalised individuals. Their construction as enemies of the state provides liberal countries with a justification to use draconian surveillance measures against them without thereby infringing the freedoms of citizens.<sup>611</sup>

In this section, I have shown – as the name suggests – that denigrative stateless individuals other than voluntary or structural stateless individuals often suffer from denigration. They are powerless in the face of a hostile state apparatus, systematically discriminated for their identity, and taken to be source from which other citizens derive their personal value.

## Conclusion

In chapter six, I have compared the two conditions of individual statelessness and slavery to renders some characteristics visible that would otherwise remain hidden. In the first part, I have discussed two paradigmatic definitions of slavery: a legal definition that focuses on slavery as property and a sociological definition that identifies total domination, natal alienation, and denigration as the constitutive elements of slavery. In the second part, I have suggested that these two definitions of slavery offer a useful analytic framework to conceptualise individual statelessness because they facilitate a more nuanced understanding of the various ways stateless individuals are harmed. Moreover, the sociological definition also helps us identify cases of individual statelessness that are not captured by the abstract and narrow legal conception. In sociological terms, individual statelessness can be defined through the three concepts of total domination, natal alienation, and denigration. First, the concept of total domination describes the use of physical terror. Second, the concept of natal alienation describes the deprivation of social ties with one’s family as well as ancestry. Lastly, the concept of denigration describes the psychological terror that is used to facilitate subordination.

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<sup>610</sup> Cacho, 15.

<sup>611</sup> See Jakobs, ‘Kriminalisierung im Vorfeld einer Rechtsgutsverletzung’, 784.

# Chapter VII: Collective Statelessness

## Introduction

In the sixth chapter, I turn to collective statelessness. The vulnerability of collectively stateless people all over the world cannot be denied. The expulsion of Palestinians by the State of Israel, for instance, is prominent in Hannah Arendt's thinking, who has arguably offered the most comprehensive study of statelessness within the Western academic canon.

In *The Origins of Totalitarianism*, she writes:

“[a]fter the [Second World] war it turned out that the Jewish question, which was considered the only insoluble one, was indeed solved – namely, by means of a colonized and then conquered territory – but this solved neither the problem of [ethnic] minorities nor the stateless. On the contrary, like virtually all other events of our century, the solution of the Jewish question merely produced a new category of refugees, the Arabs, thereby increasing the number of the stateless by another 700,000 to 800,000 people.”<sup>612</sup>

The current international legal protection regime offers two remedies for this and other cases of statelessness within the modern nation-state system.<sup>613</sup> Stateless individuals who are recognised as refugees in accordance with the 1951 Refugee Convention should be granted asylum.<sup>614</sup> Those without any nationality ought to be naturalized under the 1961 Statelessness Convention.<sup>615</sup>

But these two solutions miss something important: the first recognised cases of statelessness related to collectives rather than individuals. This becomes apparent when looking back at the League of Nation's initial international mandate to protect

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<sup>612</sup> Arendt, *The Origins of Totalitarianism*, 290.

<sup>613</sup> See Alice Edwards, and Laura van Waas, ed., *Nationality and Statelessness under International Law*. (Cambridge: Cambridge University Press, 2014): 84.

<sup>614</sup> The individual granting of asylum is only suspended if there is a great number of asylum seekers. In this case, all asylum seekers are considered as prima facie refugees until the authorities have the capacity to evaluate each individual's claim. In 2012, the UNHCR proposed some significant changes with respect to the procedures for determining statelessness. While the then published Guidelines on Statelessness No. 2 reaffirms that “[g]iven the nature of statelessness, individualised procedures are the norm as these allow for the exploration of the applicant's personal circumstances” it also highlights that a stateless individual can be granted their status on a prima facie basis by belonging to a particular group if there is enough evidence that this group lacks nationality. (2012: §55-57).

<sup>615</sup> In municipal law, naturalization is usually limited to individuals and mostly requires some years of prior residency in most countries. One rare exception was the 2002 Law on Citizenship of the Russian Federation which aimed to naturalize a group of stateless individuals who were former citizens of the USSR (See Manly 2014: 110).

Russian and Armenian refugees,<sup>616</sup> and the early development of the United Nations (UN) thereafter.<sup>617</sup>

Today, collective statelessness is, however, no longer receiving the same attention from the human rights regime. Given the vulnerability of a great number of collectively stateless people, this is quite alarming. Following Arendt, I therefore urge for a recalibration towards collective statelessness. This is to say that the problem of statelessness cannot be solved by focusing on individuals alone.<sup>618</sup> One also needs to ask what is owed to stateless collectives.

This sixth chapter is concerned with this question. It is divided into two parts. First, I will discuss four wrongs that Arendt seems to identify with collective statelessness: those I name home(land)lessness, chronicity, public silencing, and rightlessness. Second, I will offer a new interpretation of Arendt's famously coined "right to have rights." I argue that it should be read as a collectively stateless people's right to a polity.

Before conceptualising collective statelessness, let me make three caveats. First, Arendt, whose account of collective statelessness is the topic of this chapter, focuses on what I have called "denigrative statelessness." Denigrative statelessness describes cases where a stateless people (a) are forcefully deprived of their nationality by the country of origin and (b) their legal non-recognition is closely intertwined with their social non-recognition.

Second, individual statelessness and collective statelessness are connected. As mentioned in the previous chapter, I define "collective statelessness" as a type of statelessness that is experienced by entire collectives such as Palestinians, Kurds, or the Rohingya with a shared history of denationalisation. Those who are collectively

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<sup>616</sup> Tragic events in the Ottoman Empire resulted in the displacement of a number of ethno-religious communities besides the Armenians, namely "Assyrians (Nestorians), Chaldeans (Uniate Nestorians) and Jacobite Syrians, Turks, Kurds and other Muslim groups." Gilbert Jaeger, 'On the History of the International Protection of Refugees', *Revue Internationale de La Croix-Rouge/International Review of the Red Cross* 83, no. 843 (September 2001): 727–38, 729.

<sup>617</sup> The early development of the United Nations has long been understood as a direct reaction to the collective statelessness of the Jewish people. Steven Wheatley, *The Idea of International Human Rights Law* (Oxford University Press, 2019): 17f. William I. Hitchcock, 'The Rise and Fall of Human Rights? Searching for a Narrative from the Cold War to the 9/11 Era', *Human Rights Quarterly* 37, no. 1 (February 2015): 80-106, 87. as example in support of this viewpoint and Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010): 82; Daniel Cohen, 'The Holocaust and the "Human Rights Revolution" - A Reassessment', in *The Human Rights Revolution An International History*, ed. William I. Hitchcock et al. (New York, NY: Oxford University Press, 2012), 53–71: 53f. as example in its contestation.

<sup>618</sup> For examples of authors who read Arendt's right to have rights in relation to individuals and the question of membership see Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004); Staples, *Re-theorising Statelessness: A Background Theory of Membership in World Politics*; Gibney, 'Statelessness and Citizenship in Ethical and Political Perspective'; Brad Blitz, 'The State and the Stateless: The Legacy of Hannah Arendt Reconsidered', in *Understanding Statelessness*, ed. Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, First edition, vol. 1 (London: London: Routledge, 2017), <https://doi.org/10.4324/9781315200460>; Alastair Hunt, '(The Rights) of Whom?', in *The Right to Have Rights*, ed. Stephanie DeGooyer et al. (Verso Books, 2018), 75–102.

stateless also suffer the harms inherent to sociological definition of individual statelessness (total domination, natal alienation, and denigration) but they may not legally be stateless. At the same time, not every stateless individual, irrespective of whether they belong to the category of voluntary statelessness, structural statelessness, or denigrative statelessness, suffers from collective statelessness. For instance, a structural stateless individual such as Friedrich Nottebohm did not belong to a collective with a shared history of denationalisation. The same is not true for sinking islanders who may suffer from structural statelessness; they would be individually as well as collectively stateless.

Third, in the sections on home(land)lessness, I use a relatively large number of direct quotes of narrated Palestinian history as I consider paraphrasing an act of public silencing in this case.

## The Four Wrongs of Collective Statelessness

The term “collective statelessness” is not new but has been used in academic debates before.<sup>619</sup> Kelly Staples and Patrick Balazo define collective statelessness as a condition where national minorities are denied membership in a state.<sup>620</sup> Elena Fiddian-Qasmiyeh, on the other hand, expands on this definition normatively. In reference to Arendt’s work, she recuperates stateless people’s agency as a collective by arguing that stateless people demand “[...] not only individual but collective and, indeed, national rights [...]”<sup>621</sup> In this first part of the chapter, I aim to develop her argument. Unlike Fiddian-Qasmiyeh, I propose four rather than three wrongs that seem to follow from Arendt’s conceptualisation of collective statelessness.

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<sup>619</sup> See Staples, *Rethorising Statelessness: A Background Theory of Membership in World Politics*; Patrick Balazo, ‘Truth & Rights: Statelessness, Human Rights, and the Rohingya’, *Undercurrent* 11, no. 1 (Fall/Winter 2015): 6–15; Elena Fiddian-Qasmiyeh, ‘On the Threshold of Statelessness: Palestinian Narratives of Loss and Erasure’, *Ethnic and Racial Studies* 39, no. 2 (26 January 2016): 301–21, <https://doi.org/10.1080/01419870.2016.1105997>.

<sup>620</sup> See Staples, *Rethorising Statelessness: A Background Theory of Membership in World Politics*, 2; Balazo, ‘Truth & Rights’, 11.

<sup>621</sup> See Fiddian-Qasmiyeh, ‘On the Threshold of Statelessness’, 303.

## *Home(land)lessness*

The first wrong can be expressed through the notion of home(land)lessness.<sup>622</sup> For Arendt, stateless people are not only physically expelled from their homes but also deprived of “[...] the entire social texture into which they were born and in which they established for themselves a distinct place in the world.”<sup>623</sup> This is to say that the destruction of home means much more than just the forceful demolishing of buildings.<sup>624</sup> Instead, it includes the erasure of “[...] economic, social and cultural networks that constitute and are constituted by people.”<sup>625</sup>

The violent dispossession and demolition of buildings goes hand in hand with the scattering of community and the destruction of the relationships that they shelter. In *The Last Earth: A Palestinian Story*, Ramzy Baroud has collected several personal stories about the continuous expulsion of Palestinians from their homes that offer testimony to the wrong of home(land)lessness. There is, for example, Ahmad al-Haaj, a Palestinian born in Gaza in 1933, who was violently separated from his family during the siege of Al-Faluja by Israeli Defense Forces; or Ali Abumghasib, a Palestinian stateless person in Jordan, whose daughter has gone missing in Syria.

Besides the scattering of community and the destruction of relationships, home(land)lessness also has a severe impact on people’s identity and self-esteem.<sup>626</sup> This becomes painfully visible in Baroud’s recollection of two other stateless Palestinians’ personal stories: Khaled Abdul Ghani al-Lubani and Sara Saba. Khaled was born to a Palestinian refugee family in Yarmouk, Syria. While fleeing the war, he always speaks of “[...] Palestine as if she were a woman; a beloved mother that was lost somewhere on the dusty trail of an unending journey.”<sup>627</sup> Throughout his expulsion, Khaled keeps asking himself “[h]ow could any place in God’s unwelcoming universe be a home for him as a Palestinian first and foremost, and nothing else [...], especially

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<sup>622</sup> See for this term Fiddian-Qasmiyeh, 307.

<sup>623</sup> Arendt, *The Origins of Totalitarianism*, 293.

<sup>624</sup> Christopher Harker, ‘Spacing Palestine through the Home’, *Transactions of the Institute of British Geographers* 34, no. 3 (1 July 2009): 326, <https://doi.org/10.1111/j.1475-5661.2009.00352.x>.

<sup>625</sup> Harker, 326.

<sup>626</sup> J. Douglas Porteous and Sandra Eileen Smith, *Domicide: The Global Destruction of Home* (Montréal; Ithaca: McGill-Queen’s University Press, 2001), 5.

<sup>627</sup> Ramzy Baroud, *The Last Earth: A Palestinian Story* (Pluto Press, 2018), 10.4 (ebook).

when the [...] Palestine he knew existed only in books, or as the tattered map in his family's living room, and in old fables conveyed by long-dead grandparents."<sup>628</sup>

Sara, on the other hand, was born to Palestinian refugees in Melbourne, Australia. Everyone in her family suffers from the loss of their home(land). There is Uncle George whose "[...] pain in his heart over the loss of his homeland had shattered his sense of belonging to anywhere else[,]"<sup>629</sup> or her parents, Iyad and Linda, for whom Australia is "[...] an impossible, frightening, and alien place."<sup>630</sup> Their loss of home(land) cannot even be overcome by being part of an organisation for Palestinians who have been expelled as "[...] no matter how authentic, [...] a true sense of home could not be recreated."<sup>631</sup> Baroud captures all the gravity of home(land)lessness in a single sentence: "[f]or Sara Palestine had to exist, because without it Sara was lost, neither here nor there, trapped in the margins of many cultures and homelands, never home."<sup>632</sup>

For a collectively stateless people, home(land)lessness is just as devastating from a legal point of view. The reason for this is that a defined homeland or, in legal terms, "a defined territory" seems to hold an outstanding position among the four constitutive elements of statehood – the others being a permanent population, a government, and the capacity to enter into relations with other states.<sup>633</sup> Put precisely, under international law, a collectively stateless people cannot realise their right to statehood if (a) they have no control over any territory or (b) their population is scattered. Palestine is only one of many examples. The violent dispossession and demolishing of Palestinian houses by the Israeli state inhibits Palestinian statehood in those two ways: first by taking away Palestinian land and thereby preventing them from controlling a territory, and second, by expelling Palestinian people and thereby scattering their population.

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<sup>628</sup> Baroud, 10.7 (ebook).

<sup>629</sup> Baroud, 14.23 (ebook).

<sup>630</sup> Baroud, 14.27 (ebook).

<sup>631</sup> Baroud, 14.32 (ebook).

<sup>632</sup> Baroud, 14.39 (ebook).

<sup>633</sup> Veronika Bílková, 'A State Without Territory?', in *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law*, ed. Martin Kuijer and Wouter Werner, Netherlands Yearbook of International Law (The Hague: T.M.C. Asser Press, 2017), 20, [https://doi.org/10.1007/978-94-6265-207-1\\_2](https://doi.org/10.1007/978-94-6265-207-1_2). According to international law, not every land is considered territory, however. Referring to several legal cases, Bílková points out that "[a]lthough no minimal size is required, [ranging from Russia to Vatican City,] territory must [in parts] be natural in origin." This is to say that artificial land such as the Palm Islands in the United Arab Emirates cannot itself constitute a territory. Apart from being at least partly natural, territory must neither be contiguous nor uncontested at its borders. Bílková, 24.

## Chronicity

The second wrong that follows from collective statelessness is closely related to the first. Following medical terminology, I name it 'chronicity.' The term best captures Arendt's argument that collective statelessness cannot finally be solved within the modern nation-state system.<sup>634</sup>

Arendt offers three reasons for why this is the case. First, ever since the emergence of the border-controlled nation-state, it has become extremely difficult to create entirely new countries due to the way the world has been politically organised.<sup>635</sup> This is because there remains no non-occupied territory on the earth's surface where a collectively stateless people could establish their own state. Without a restructuring of the status quo borders, collective statelessness can therefore only be overcome at the cost of others. The expulsion of Palestinians in favour of the state of Israel is one paradigmatic example.

Second, the current international legal protection regime does not address the problem of collective statelessness. It offers only two individual remedies. While those stateless individuals who are recognised as refugees in accordance with the 1951 Refugee Convention must be granted asylum,<sup>636</sup> those without any nationality ought to be naturalized under the 1961 Statelessness Convention.<sup>637</sup> In other words, statelessness is merely treated as relating to individuals even if their statelessness is based on a collective criterion such as ethnicity.<sup>638</sup>

Arendt's critique of these individual remedies is most clearly formulated in the following paragraph taken from *The Disenfranchised and Disgraced* published in 1944. There, Arendt writes that:

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<sup>634</sup> Hannah Arendt, *The Jewish Writings* (Knopf Doubleday Publishing Group, 2009), 22.216 (ebook).

<sup>635</sup> Arendt, *The Origins of Totalitarianism*, 294.

<sup>636</sup> Individual assessments are only temporarily suspended if there is a great number of asylum seekers. In this case, all asylum seekers are considered as prima facie refugees until the receiving country's authorities have the capacity to evaluate everyone's claim.

<sup>637</sup> In municipal law, naturalization is usually limited to individuals. In most countries, it requires some years of prior residency. One rare exception was the 2002 Law on Citizenship of the Russian Federation which aimed to naturalize a group of stateless individuals who were former citizens of the USSR. See Mark Manly, 'UNHCR's Mandate and Activities to Address Statelessness', in *Nationality and Statelessness under International Law*, ed. Alice Edwards and Laura van Waas (Cambridge: Cambridge University Press, 2014), 110, <https://doi.org/10.1017/CBO9781139506007.005>.

<sup>638</sup> In 2012, the UNHCR proposed some changes with respect to the procedures for determining statelessness. While the then published Guidelines on Statelessness No. 2 reaffirms that "[g]iven the nature of statelessness, individualised procedures are the norm as these allow for the exploration of the applicant's personal circumstances" it also highlights that stateless individuals can be granted their status on a prima facie basis by belonging to a particular group if there is enough evidence that this group lacks nationality. (2012: §55-57).

“Neither the right of asylum, which was always intended for individuals and cannot easily take into account migrations of whole peoples, nor naturalization, which for countries not founded on immigration can only be offered as a self-limiting exception, [is able to cope with the problem of statelessness].<sup>639</sup> All the solemn invocations of human rights, which are aimed only at protecting individuals from excesses of public force, cannot effectively protect them or create positive rights for them. For they arrive not as individuals but as compact ethnic groups, and they are attacked and persecuted not as individuals but as members of a people or a splinter group of a people lacking the protection of a state.”<sup>640</sup>

To better understand this passage, one needs to look at the historical context that informs her critique. Statelessness became for the first time an issue in international politics after the end of the First World War when ten million displaced people became refugees as a consequence of the breakdown of three empires: the Austro-Hungarian, the Russian, and the Ottoman.<sup>641</sup> The political instability that resulted from those breakdowns led to a complicated and violent process of nation-building in which various ethnicities, formerly part of these fallen empires, fought over territorial control.

Additionally, there were three political developments that had a great impact on stateless people.<sup>642</sup> First, mass denationalizations became a political practice based on ethnicity, religion, class, and political allegiance.<sup>643</sup> In the 1920s and 30s, millions of Russian émigrés, Armenians, Italian anti-fascists, and German Jews were deprived of their citizenship.<sup>644</sup> While citizenship had mostly been based on residency before the First World War,<sup>645</sup> a new membership regime developed after its end.<sup>646</sup> Since then, citizenship has become tied to categories such as race, ethnicity, and language.<sup>647</sup>

The second political development is closely related to the first. It concerns the breakdown of the asylum system when not only persecuted individuals, but entire people like the Armenians, Russians émigrés, Hungarians, Italian anti-fascists, German Jews, Spanish revolutionaries, and civilians tried to make use of it.<sup>648</sup>

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<sup>639</sup> My translation from German.

<sup>640</sup> Arendt, *The Jewish Writings*, 22.121 (ebook).

<sup>641</sup> Cabanes, *The Great War and the Origins of Humanitarianism, 1918–1924*, 135.

<sup>642</sup> Cabanes, 134.

<sup>643</sup> Cabanes, 135.

<sup>644</sup> See Cabanes, 135; Weis, *Nationality and Statelessness in International Law*, 119.

<sup>645</sup> Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection', in *International Journal of Refugee Law* 7, no. 2 (1995): 239.

<sup>646</sup> Bruno Cabanes, *The Great War and the Origins of Humanitarianism, 1918–1924*: 135.

<sup>647</sup> See Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection': 239.

<sup>648</sup> Hannah Arendt, 'The Stateless People', *Contemporary Jewish Record: Periodicals Archive Online* 8, no. 2 (1 April 1945): 137–53: 140.

Moreover, the gradually increasing numbers of asylum seekers did not only complicate the process of naturalisation but “[...] also worsened the position of already naturalized persons of the same origin.”<sup>649</sup> Being confronted with more and more applicants, France and Belgium, for example, passed laws that legalised the denaturalisation of citizens who acted contrary to the state’s interests.<sup>650</sup> Given these changes, and twenty years before the 1961 Statelessness Conventions came into power, Arendt therefore contends that not even naturalization is a sufficient remedy for statelessness. According to her, history has shown repeatedly that a mere change in government is enough to revoke previous naturalisations.<sup>651</sup>

The third political development were the Minority Treaties. They entrusted national majorities with government in the newly created nation-states (Albania, Austria, Bulgaria, Czechoslovakia, Estonia, Greece, Hungary, Iraq, Latvia, Lithuania, Poland, Romania, Turkey, and Yugoslavia) whereas national minorities were promised the protection by the League of Nations.<sup>652</sup> Additionally, the treaties also forced individuals to move to the country whose nationality they had been granted.<sup>653</sup> The Treaty of Lausanne, for example, forced about 1.5 million Christians and Muslims to move from Turkey to Greece and vice versa.<sup>654</sup>

For Arendt, the Minority Treaties were, however, flawed for two reasons. First, the League of Nations only protected some secondary social and cultural rights such as the right to speak one’s own language but did not guarantee any economic and civil rights such as the right to work and the right to residence.<sup>655</sup> Consequently, the national minorities remained dependent on their country of national origin.<sup>656</sup> Second, the Minority Treaties were also problematic because they sent out the harmful message that only individuals of the same nation could enjoy full legal protection while those of

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<sup>649</sup> Hannah Arendt, ‘The Stateless People’: 141.

<sup>650</sup> Ibid. 142.

<sup>651</sup> Arendt, *The Jewish Writings*, 20.27 (ebook). Arendt uses the term “citizenship” to name legal nationality and the term “nationality” to name cultural nationality. In

<sup>652</sup> The national minorities protected by the international community accounted for 30 million inhabitants. See Hannah Arendt, *The Origins of Totalitarianism*: 271.

<sup>653</sup> Cabanes, *The Great War and the Origins of Humanitarianism, 1918–1924*, 134. I exchanged the term “nationality” for “citizenship” to remain consistent.

<sup>654</sup> Renée Hirschon, *Crossing the Aegean: An Appraisal of the 1923 Compulsory Population Exchange between Greece and Turkey* (Berghahn Books, 2003), 3.

<sup>655</sup> Arendt, *The Origins of Totalitarianism*, 276.

<sup>656</sup> Arendt, 292.

different nationality “[...] needed some law of exception until they were completely assimilated and uprooted from their origin.”<sup>657</sup>

For Arendt, assimilation is however not a genuine option either.<sup>658</sup> Throughout her writings, she discusses the dangers of assimilation in much detail. In an essay on antisemitism, Arendt argues that Jewish assimilationists had deceived themselves.<sup>659</sup> Rather than fighting for true emancipation in the form of equal rights,<sup>660</sup> they accept to suppress their national roots in exchange for some conditional privileges.<sup>661</sup> In practical terms, this meant to adjust to everybody and everything,<sup>662</sup> antisemitism included.<sup>663</sup> Yet Arendt contends that it does not matter how big one’s effort to assimilate is, assimilation like naturalisation can always be reversed by those in power.<sup>664</sup> She therefore concludes that the plight of collectively stateless people is first and foremost that they are powerless as individuals.<sup>665</sup>

The third reason that collective statelessness is a chronic condition relates closely to the previous point. For Arendt, the number of collectively stateless people has become far too large for it to be properly addressable by the individual remedies of refuge and naturalisation. The Rohingya are a paradigmatic example. Persecuted by the Burmese military government, over 600,000 Rohingya have since then been trapped in refugee camps in Bangladesh.<sup>666</sup> That they make up merely ten percent of all encamped refugees shows the full scope of the problem.<sup>667</sup> According to UNHCR data, the overall number of stateless people has grown from 2,116,011 in 1951 to 20,676,358 in 2020.<sup>668</sup> In response, reception countries have increasingly turned to encampment and restriction of movement. While the United States, for instance, operated fourteen

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<sup>657</sup> Arendt, 275.

<sup>658</sup> Hannah Arendt, ‘We Refugees’, in *Altogether Elsewhere: Writers on Exile*, ed. Marc Robinson (Faber and Faber, 1994): 117.

<sup>659</sup> See Arendt, *The Jewish Writings*, 17.11; 17.139; 17.140 (ebook).

<sup>660</sup> Arendt, 20.37 (ebook).

<sup>661</sup> Arendt, 27.25 (ebook).

<sup>662</sup> Arendt, 27.28 (ebook).

<sup>663</sup> See Richard J. Bernstein, *Hannah Arendt and the Jewish Question* (MIT Press, 1996), 10.18 (ebook).

<sup>664</sup> Arendt, *The Jewish Writings*, 17.114 (ebook).

<sup>665</sup> Arendt, *The Origins of Totalitarianism*, 294.

<sup>666</sup> Thuhid Noor, Shahidul Islam, and Saha Forid, ‘Rohingya Crisis and The Concerns for Bangladesh’, *International Journal of Scientific & Engineering Research* 8, no. 12 (2017): 1192.

<sup>667</sup> UNHCR, ‘What Is a Refugee Camp? Definition and Statistics | USA for UNHCR’, accessed 28 May 2021, <https://www.unrefugees.org/refugee-facts/camps/>.

<sup>668</sup> UNHCR, ‘UNHCR - Refugee Statistics’, UNHCR, 2020, Accessed 3 September 2022. <https://www.unhcr.org/refugee-statistics/>.

detention centres in 1980, it had more than 200 in 2017.<sup>669</sup> Besides detention centres, there are also more refugee camps than ever before. Out of the ten biggest refugee camps that host over 50,000 refugees, six were established in the early 1990s and two in the early 2010s.<sup>670</sup>

### *Public Silencing*

The third wrong of collective statelessness can be captured by the notion of public silencing. In Arendt's words: "[stateless people] are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion [...]. [T]heir freedom of opinion is a fool's freedom, for nothing they think matters anyhow."<sup>671</sup> To put it in another way, they are publicly silenced. This because a collectively stateless people is given no place through which they can make their opinions heard and their actions effective.<sup>672</sup> For Arendt, the wrong of public silencing was already present in the political thought of Aristotle for whom the slave's condition of rightlessness and exclusion from the principle of humanity "[...] entailed the loss of the relevance of speech."<sup>673</sup>

Fiddian-Qasmiyeh captures the relevance of speech that Arendt is describing in an interview with a Palestinian stateless person named Laith who was born in Nablus. Fiddian-Qasmiyeh reports them saying that statelessness is "[b]eing homeless, in a way. Homeless on a global scale. Not having an obvious place where you can seek your rights. In today's political situation, states provide a voice to people. States are responsible for giving basic rights to people. So [statelessness is] having no place to claim those rights.... On a collective level, people want to have a voice. And having a state, not being stateless, projects that voice."<sup>674</sup>

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<sup>669</sup> See Freedom for Immigrants, 'Immigration Detention Map', Freedom for Immigrants, accessed 9 August 2022, <https://www.freedomforimmigrants.org/map>.

<sup>670</sup> UNHCR, 'Inside the World's Five Largest Refugee Camps', accessed 9 August 2022, <https://www.unrefugees.org/news/inside-the-world-s-five-largest-refugee-camps/>; See UNHCR, 'The World's 10 Largest Refugee Camps', accessed 9 August 2022, <http://storymaps.esri.com/stories/2016/refugee-camps/>.

<sup>671</sup> Arendt, *The Origins of Totalitarianism*, 296.

<sup>672</sup> Arendt, 296.

<sup>673</sup> Arendt, 297.

<sup>674</sup> Fiddian-Qasmiyeh, 'On the Threshold of Statelessness', 308.

Although voicelessness and silencing are often used interchangeably, there is an important difference between the two concepts.<sup>675</sup> Stateless people are voicing their resistance to statelessness in speech and action everywhere. The refugee march from Hungary via Austria to Germany in 2015 is an emphatic example.<sup>676</sup> Palestinian resistance to Israeli apartheid is another. Yet their voices are systematically silenced in public.<sup>677</sup> First, interlocuters such as the United States have rarely been in conversation with the Palestinian civil society on the question of self-determination.<sup>678</sup> Second, Palestinian political forces like Usrat al-Ard, a nationalist movement, have forthrightly been forbidden by Israeli law.<sup>679</sup> Third, Euro-American media has barely included Palestinian voices in public discourse.<sup>680</sup>

In legal terms, the public silencing of a collectively stateless people can best be understood as the lack of national sovereignty. There are two ways in which national sovereignty is commonly interpreted.<sup>681</sup> First, a people is sovereign if they enjoy constitutional independence and have the status of a legal personality in international law.<sup>682</sup> While constitutional independence gives them the capacity to make their own laws without the interference of other states, the status of a legal personality allows them to freely decide whether they want to ratify international conventions.

The second interpretation of national sovereignty entails a qualitative dimension in that its meaning corresponds to the total sum “[...] of a state’s existing legal liberties.”<sup>683</sup> Great Britain, for instance, retains more legal liberties than Australia and Burkina Faso with respect to the 1961 Statelessness Convention as it has expressed some reservations to the convention that the latter two countries have not. Accordingly, the

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<sup>675</sup> See Hannah Arendt, ‘Es gibt nur ein einziges Menschenrecht’, *Die Wandlung* 4 (1949): 760; Arendt, *The Origins of Totalitarianism*, 296.

<sup>676</sup> See Ali Emre Benli, ‘March of Refugees: An Act of Civil Disobedience’, *Journal of Global Ethics* 14, no. 3 (2 September 2018): 315–31, <https://doi.org/10.1080/17449626.2018.1502204>.

<sup>677</sup> For Paul Gilroy, the public silencing of stateless people is not only ingrained in daily resistance but rather systemic to history of human rights more generally. Paul Gilroy, ‘Race and the Right to Be Human’ Inaugural lecture on the occasion of accepting the Treaty of Utrecht Chair at Utrecht University, (2009), 5.

<sup>678</sup> Edward W. Said, *The Question of Palestine* (New York: Vintage Books, 1992), 11.11 (ebook).

<sup>679</sup> Said, 11.20 (ebook).

<sup>680</sup> Malaka Shwaikh, ‘Translation in the War-Zone’, in *The Routledge Handbook of Translation and Activism*, ed. Rebecca Ruth Gould and Kayvan Tahmasebian, First edition. (Routledge, 2020), 130, <https://doi.org/10.4324/9781315149660-8>.

<sup>681</sup> See Manning, ‘The Legal Framework in a World of Change’.

<sup>682</sup> Manning, ‘The Legal Framework in a World of Change’: 308. It is important to note, however, that not every international person is necessarily a sovereign state. India is an example of a country that was an international person – and it this capacity an original member of the United Nations – but not a sovereign state as long it was colonized by the British Empire.

<sup>683</sup> *Ibid.*

United States retains more legal liberties than Great Britain because it has not ratified the convention and is therefore not formally bound by its rules at all.

Under a strict interpretation of national sovereignty, this second understanding seems quite contradictory – how can a people be sovereign if they give up many legal liberties by ratifying international conventions? Not so for Charles Manning. He argues that national sovereignty is not “[...] in any way incompatible with the technical subordination of the state to international law.”<sup>684</sup> What makes a people sovereign is not the number of legal liberties they retain but the ability to voluntarily decide on the level of constraint. Under Manning’s interpretation, national sovereignty would only be lost, and a people thereby be silenced publicly, if they have no choice but to act in accordance with another people’s will.

When examining the practicalities of international institutions such as the United Nations, however, things seem to look more complicated. Within its framework, one can identify at least two types of public silencing that go beyond the question of national sovereignty. The first is related to the category of observer status. Observers are permitted to speak at General Assembly meetings and other bodies of the United Nations, but they do not have the power to vote on resolutions.<sup>685</sup> In theory, the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* provides a legal framework for observers.<sup>686</sup> Practically, the rights of observers are, however, limited to Article 11 paragraph 2 and Article 35 paragraph 2 of the UN Charter. These articles merely declare that observers have the right “[...] to draw attention of – the Security Council – or the General Assembly to matters relating international peace and security.”<sup>687</sup> While Palestine and the Sovereign Military Order of Malta are granted observer status, the Kurds and Rohingya are not even given this power; they are publicly silenced beyond the denial of national sovereignty.

The second type of public silencing is related to the Security Council. Following Article 25 of the UN Charter, it is comprised of permanent and non-permanent members.<sup>688</sup> The former group includes the major victorious powers of the Second World War,

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<sup>684</sup> Manning, ‘The Legal Framework in a World of Change’, 308.

<sup>685</sup> Anne-Kathrin Dippel, ‘Observer Status’, *A Concise Encyclopedia of the United Nations*, 1 January 2010, 511.

<sup>686</sup> Dippel, 512.

<sup>687</sup> Dippel, 512.

<sup>688</sup> Ingo Winkelmann, ‘Security Council’, *A Concise Encyclopedia of the United Nations*, 1 January 2010, 650.

namely the United States, the United Kingdom, Russia, France, and China.<sup>689</sup> Through their heightened position in the council, these five permanent members have four powers that allow them to publicly silence other states. First, they can create laws binding on all member states of the United Nations. Second, they “[...] can block the appointment of a Secretary-General candidate by the General Assembly.”<sup>690</sup> Third, they are able to determine “[w]hether a threat to the peace or breach of the peace justifying measures exists.”<sup>691</sup> Fourth, every of the five permanent members also have a right to veto.<sup>692</sup> It is partly this situation that made Arendt argue that “[m]odern power conditions [...] make national sovereignty a mockery except for giant states [...]”<sup>693</sup>

The imbalances between a people who is heard and one who is publicly silenced, become more apparent when looking at the history of non-permanent members on the Security Council. According to the Green Papers, there have only been sixteen countries that have held a seat ten or more times from 1946 to 2021.<sup>694</sup> They include Japan (22), Brazil (20), Argentina (18), India (15), Colombia (14), Italy (13), Canada (12), Belgium (12), Germany (12), Australia (10), Chile (10), Panama (10), Venezuela (10), Peru (10), Nigeria (10) and Spain (10). While the relative strong appearance of South American compared to African countries is remarkable, there seems to be no correlation with the size of a countries’ population. Bangladesh and Indonesia, for example, have only been non-permanent members four and eight times, respectively.<sup>695</sup>

## *Rightlessness*

The fourth wrong that follows from collective statelessness can be expressed through the notion of rightlessness. From all four wrongs, it is the one that is most often

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<sup>689</sup> Winkelmann, 649.

<sup>690</sup> Winkelmann, 637.

<sup>691</sup> Winkelmann, 650.

<sup>692</sup> Winkelmann, 652. Formal vetos have not been common, however, as all members try to consider a veto in advance. Winkelmann, 653.

<sup>693</sup> Hannah Arendt, *The Origins of Totalitarianism* (Orlando, Florida: Harcourt Brace & Company, 1979): 269.

<sup>694</sup> Richard E. Berg-Andersson, 'The Green Papers Worldwide - The United Nations Security Council', accessed 16 June 2021, <http://www.thegreenpapers.com/ww/UNSecurityCouncil.phtml>.

<sup>695</sup> There have been a lot of voices arguing for reform. See Winkelmann, 'Security Council', 653.

associated with Arendt's writings.<sup>696</sup> In *The Origins of Totalitarianism*, Arendt contends that rightlessness equals the loss of government protection.<sup>697</sup> There are various ways in which this loss materialises: on the one hand, in the form of the denial of civic as well as human rights, on the other hand, in the form of the denial of movement across borders and diplomatic protection.

For Arendt, 'rightlessness' does, however, not mean that one enjoys no rights at all. Instead, it describes a condition where one lacks a legal personhood.<sup>698</sup> In explication of this point, she notes that "[t]he soldier during the war is deprived of his right to life, the criminal of his right to freedom, all citizens during an emergency of their right to the pursuit of happiness, but nobody would ever claim that in any of these instances a loss of human rights has taken place."<sup>699</sup> The reason for this is that soldiers in war, criminals in prison, and citizens in an emergency continue to have legal personhood although they are denied some rights. Not so for stateless people. They may enjoy the right to life, the right to freedom and the right to happiness but nevertheless be rightless.<sup>700</sup> According to Arendt, this is because they live under a condition where none of the rights are guaranteed by a government. Consequently, stateless people depend solely on the arbitrary benevolence and charity of others.<sup>701</sup>

Arendt therefore contends that rightlessness is marked by the constant threat of violence and death. If governments deny legal personhood, perpetrators may no longer care about committing a crime, no less of killing a human being.<sup>702</sup> Two of the most extreme manifestations of this indifference towards suffering are lynching and mob attacks. Inflicted on stateless people, perpetrators do not seem to face the same opposition as would be the case if the target was a citizen. This is because stateless people are considered superfluous and without dignity.<sup>703</sup> They are not even any longer "[...] a liability and an image of shame for the persecutors [...]."<sup>704</sup>

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<sup>696</sup> See Cacho, *Social Death*; Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford University Press, 2015); Patrick Hayden, 'The Relevance of Hannah Arendt's Reflections on Evil: Globalization and Rightlessness', *Human Rights Review* 11, no. 4 (1 December 2010): 451–67, <https://doi.org/10.1007/s12142-010-0157-8>; Serena Parekh, 'A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights', *Journal of Human Rights* 3, no. 1 (March 2004): 41–52, <https://doi.org/10.1080/1475483042000185215>.

<sup>697</sup> Arendt, *The Origins of Totalitarianism*, 294.

<sup>698</sup> Gündoğdu, *Rightlessness in an Age of Rights*, 94.

<sup>699</sup> Arendt, *The Origins of Totalitarianism*, 295.

<sup>700</sup> Arendt, 295.

<sup>701</sup> Arendt, 296.

<sup>702</sup> Arendt, 'Es gibt nur ein einziges Menschenrecht', 765.

<sup>703</sup> Gündoğdu, *Rightlessness in an Age of Rights*, 162; Arendt, *The Origins of Totalitarianism*, 296.

<sup>704</sup> Arendt, *The Origins of Totalitarianism*, 294f.

For Arendt, there are two factors that play an essential part in creating the condition of rightlessness. The first is the mob, crying “death to the stateless” and putting its ideology into practice.<sup>705</sup> In *The Origins of Totalitarianism*, she gives the example of Jews. Arendt writes: “[...] while the mob actually stormed Jewish shops and assailed Jews in the streets, the language of high society made real, passionate violence look like harmless child’s play.”<sup>706</sup> The second factor is a chauvinistic and racist nationalism.<sup>707</sup> Although Arendt’s critique of racism may sometimes be lacking,<sup>708</sup> she warns empathically that under the imperialists’ classification of humanity into inferior and superior races, the mob will eventually unite on the basis of racism.<sup>709</sup>

Arendt’s strong opposition to a chauvinistic and racist nationalism is also central to her critique of the human rights regime. For her, rightlessness does not only entail the loss of civil rights but first and foremost the loss of human rights. Arendt’s critique focuses on the ways in which human rights have been theoretically grounded and practically enshrined in international law.<sup>710</sup> It can be divided into two parts: an argument against the naturalistic justification of human rights and an argument against the idealism that underlies this naturalistic justification.<sup>711</sup>

Let me address each in this order. The central premise of the naturalistic justification of human rights is that all human beings are naturally born as equals. Arendt questions this premise. She contends that equality is a norm rather than a fact. In other words, it is not naturally given but socially constructed. As individuals come into this world under different circumstances and with distinct talents, equality can only exist in a political community where its members agree to grant each other equal rights.<sup>712</sup>

Although the drafters of the ‘Rights of Man’ seemed to recognize that some form of a political community was a prerequisite for equality, they took it in a wrong direction when making the nation the guarantor of human rights.<sup>713</sup> The transformation of the

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<sup>705</sup> As much as anti-Semitic mob cries “Death to the Jews,” the Zionist mob cries “Death to the Arabs.” See Arendt, 82; Amir Ben-Porat, ‘Death to the Arabs: The Right-wing Fan’s Fear’, *Soccer & Society* 9, no. 1 (1 January 2008): 1–13, <https://doi.org/10.1080/14660970701616662>.

<sup>706</sup> Arendt, *The Origins of Totalitarianism*, 107.

<sup>707</sup> See Bernstein, *Hannah Arendt and the Jewish Question*, 14.61; 15.5 (ebook).

<sup>708</sup> See Gilroy, ‘Race and the Right to Be Human’, 18f.

<sup>709</sup> Arendt, *The Origins of Totalitarianism*, 152, 157.

<sup>710</sup> Arendt’s critique of human rights should not be confused with a critique of emancipation.

<sup>711</sup> See Jürgen Förster, ‘Das Recht auf Rechte und das Engagement für eine gemeinsame Welt -- Hannah Arendts Reflexionen über die Menschenrechte’, *HannahArendt.net* 5, no. 1 (15 September 2009): 1; 3, <http://www.hannaharendt.net/index.php/han/article/view/146>.

<sup>712</sup> Arendt, *The Origins of Totalitarianism*, 234; 301; Arendt, ‘Es gibt nur ein einziges Menschenrecht’, 764.

<sup>713</sup> Arendt, *The Origins of Totalitarianism*, 230f; 275.

state into an instrument of the nation rather than an instrument of the law destroyed the universality of the 'Rights of Man' entirely.<sup>714</sup> From then on, "[...] only the emancipated sovereignty [...] of one's own people seemed to be able to insure them."<sup>715</sup> Consequently, the Rights of Man no longer constituted human rights but collapsed into civil rights instead.<sup>716</sup>

As human rights were most needed, however, whenever national minorities fell victim to the extreme violence of the national majority, this transformation was already catastrophic by itself.<sup>717</sup> But the situation became even worse when almost all modern brands of nationalism turned out to be chauvinistic and racist.<sup>718</sup> For Arendt, "[i]t is always the same story: general human qualities, general human tasks are claimed as the monopoly of a particular people by maintaining that this particular people has been exclusively chosen to administer these general values."<sup>719</sup> Given the chauvinistic and racist tendency of nationalism, she therefore contends that the problem of rightlessness cannot be solved within the modern nation-state system.<sup>720</sup>

Her second argument against the human rights regime, on the other hand, focuses on the idealism that underlies the naturalistic justification of human rights. In *The Origins of Totalitarianism*, Arendt argues that the human rights regime is ineffective because national minorities and stateless people can never invoke it themselves.<sup>721</sup> The Minority Treaties proved clearly that they depended on the arbitrary charity of others.

However, this dependency has become weaker since Arendt wrote down her thoughts on rightlessness. Under the current human rights regime, her argument that human rights collapse into civil rights no longer entirely accurate. Over time, the United Nations has established three formal mechanisms that weaken the importance of state membership.<sup>722</sup> First, there are eight human rights treaties that may consider

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<sup>714</sup> Arendt, 230f.

<sup>715</sup> Arendt, 291; 299.

<sup>716</sup> Parekh, 'A Meaningful Place in the World', 45.

<sup>717</sup> Arendt, *The Origins of Totalitarianism*, 291.

<sup>718</sup> See Hannah Arendt, *Essays in Understanding, 1930-1954: Formation, Exile, and Totalitarianism* (Knopf Doubleday Publishing Group, 2011), 27.5 (ebook); *The Jewish Writings*, 36.24; 41.7; 44.11 (ebook); Hannah Arendt, *Thinking Without a Banister: Essays in Understanding, 1953-1975* (Knopf Doubleday Publishing Group, 2018), 21.8 (ebook).

<sup>719</sup> Arendt, *The Jewish Writings*, 22.94 (ebook).

<sup>720</sup> Arendt, 19.8; 20.26; 22.126; 51.6 (ebook).

<sup>721</sup> Arendt, *The Origins of Totalitarianism*, 292.

<sup>722</sup> United Nations, 'OHCHR | Complaints Procedures', accessed 28 July 2021, <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#inquiries>.

complaints directly from individuals or third parties.<sup>723</sup> Second, several human right treaties also allow a State party to complain on behalf of individuals and groups independent of their nationality if they face human rights violations by another State party.<sup>724</sup> Third, a number of committees such as the “Committee against Torture” “[...] may, on their own initiative, initiate inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State party.”<sup>725</sup>

Despite these significant changes, Arendt’s critique has not lost its force. There are three reasons. First, the protective mechanisms of human rights law are only available if the state that is accused of serious violations is committed to international human rights bodies. Second, the above-mentioned changes in the human rights regime have been political rather than moral; they only came about after an alteration in the geopolitical profile of the UN in the 1960s. The changes were primarily initiated by former African and Asian colonies. Throughout the post-war period, the United States and the Soviet Union had both strongly opposed mechanisms that would allow individual complaints. Third, racialisation and exclusion from the principle of humanity have not ended with the weakening of the importance of state membership.<sup>726</sup>

These constraints on the human rights regime are therefore a stark reminder that a people who suffers from collective statelessness remains, in fact, dependent on the arbitrary benevolence and charity of powerful countries as long as they lack their own polity.

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<sup>723</sup> These are the “International Covenant on Civil and Political Rights,” the “Convention on the Elimination of All Forms of Discrimination against Women,” the “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” the “International Convention on the Elimination of All Forms of Racial Discrimination,” the “Convention on the Rights of Persons with Disabilities,” the “International Convention for the Protection of All Persons from Enforced Disappearance,” the “International Covenant on Economic, Social and Cultural Rights, and the “Convention on the Rights of the Child.”

<sup>724</sup> They include almost the same set of treaties as mentioned in the previous footnote. The only exception is the “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.” It replaces the “Convention on the Rights of Persons with Disabilities.”

<sup>725</sup> United Nations, ‘OHCHR | Complaints Procedures’.

<sup>726</sup> See Cacho, *Social Death*; Gündoğdu, *Rightlessness in an Age of Rights*; Kathleen R. Arnold, *Arendt, Agamben and the Issue of Hyper-Legality*, First edition. (New York: Routledge, 2018).

## Conceptualising the Right to a Polity

In this second part, I offer a new interpretation of Arendt's famously coined *right to have rights*. I argue that it should be read as a collectively stateless people's *right to a polity*.

Arendt's *right to have rights* has drawn some significant attention in the literature. While often being understood as catchy term from human rights,<sup>727</sup> Stephanie DeGooyer rather sees in it a paradox.<sup>728</sup> For her, *the right to have rights* is the foundation of human rights, but at the same time only becomes visible when they have already been denied.<sup>729</sup> In *The Rights of Others*, Seyla Benhabib develops a different aspect. She rather focuses on the *right to have rights*' normative quality. Benhabib defines it accordingly as a moral right (a) to membership in a political community as well as (b) to a specific treatment which derives thereof.<sup>730</sup> Frank Michelman, however, rejects such a reading. According to him we should not think of *the right to have rights* as a moral right to membership in a state but rather as a critique of the groundlessness of rights altogether.<sup>731</sup>

Although all these reconstructions have significant differences, they arguably share a commonality in that *the right to have rights* is taken to address the problem of statelessness from the perspective of individuals. My new interpretation seeks to question this understanding. I delineate *the right to have rights* instead as a collective *right to a polity*.

Before conceptualising *the right to polity* in reference to Arendt's rich body of work, let me first examine how Arendt understands the singular right in *the right to have rights*. While DeGooyer reads it as a "[...] powerful historical diagnostic tool [...],"<sup>732</sup> Benhabib, on the other hand, takes Arendt to evoke a moral imperative,<sup>733</sup> namely to consider all

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<sup>727</sup> Stephanie DeGooyer et al., *The Right to Have Rights* (Verso Books, 2018), 7.4 (ebook).

<sup>728</sup> Stephanie DeGooyer, 'The Right...', in *The Right to Have Rights*, by Stephanie DeGooyer et al. (Verso Books, 2018), 8.5 (ebook).

<sup>729</sup> DeGooyer, 8.5 (ebook).

<sup>730</sup> Benhabib, *The Rights of Others*, 56.

<sup>731</sup> Frank I. Michelman, 'Parsing "a Right to Have Rights"', *Constellations* 3, no. 2 (1996): 207, <https://doi.org/10.1111/j.1467-8675.1996.tb00054.x>.

<sup>732</sup> DeGooyer, 'The Right...', 8.8 (ebook).

<sup>733</sup> See DeGooyer, 8.9 (ebook).

human beings to be members of a political community who are entitled to the protection of this community.<sup>734</sup>

But how can this normative language be reconciled with Arendt's critique of human rights? For Arendt, the denial of *the right to have rights* is greatly problematic because it leads to an expulsion from humanity altogether. Hence, the normative language of human rights grounded in the common 'nature' of man – whereby it is irrelevant whether such a common 'nature' derives from natural law or God – cannot offer a justification for membership in a particular community.<sup>735</sup>

Despite her scepticism of any form of natural justification, Arendt nevertheless addresses the problem of moral foundations. In *The Origins of Totalitarianism*, she argues that “[a] conception of law which identifies what is right with the notion of what is good – for the individual, or the family, or the people, or the largest number – becomes inevitable once the absolute and transcendent measurements of religion or the law of nature have lost their authority.”<sup>736</sup>

Given this inevitability, there seem only two options for her: either an appeal to common sense or to political action. Following Butler in her reading of *the right to have rights* as a performative exercise,<sup>737</sup> I take Arendt's writings to suggest the latter option.<sup>738</sup> While her analysis of totalitarianism and evil reveal a general doubt in common sense, *The Jewish Writings* and *The Human Condition* show Arendt's strong conviction in the necessity of political action. Put differently, what Arendt arguably understands under a right in *the right to have rights* is a political imperative: to organise, assemble and protest for rights to become a reality.<sup>739</sup>

Arendt's argument for a Jewish self-defence army as the starting point of a Jewish politics is an empathic example in support of such an interpretation.<sup>740</sup> In her essay *The Jewish War That Isn't Happening*, Arendt contends that Jewish people should have never fought in the Second World War as Englishmen or Frenchmen but as

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<sup>734</sup> Benhabib, *The Rights of Others*, 56.

<sup>735</sup> Arendt, *The Origins of Totalitarianism*, 297.

<sup>736</sup> Arendt, 299.

<sup>737</sup> See Judith Butler, *Notes Toward a Performative Theory of Assembly* (Harvard University Press, 2015), 58f.

<sup>738</sup> See Benhabib, *The Rights of Others*, 59.

<sup>739</sup> See Butler, *Notes Toward a Performative Theory of Assembly*, 59.

<sup>740</sup> 'Militarists and people who find value in battle and war per se have no place in such an army.' Arendt, *The Jewish Writings*, 20.42.

representants of the people who are attacked, namely Jews.<sup>741</sup> For her, an actual Jewish army would have had three positive effects: first, the Jewish people could have truly fought for Jewish liberation,<sup>742</sup> second, Nazi Germany could have been forced by the international community to respect the laws of war and thereby to treat Jewish soldiers as prisoners of war under international law, and third, it would have been impossible to accuse Jews for not having defended themselves at all.<sup>743</sup>

Having explicated Arendt's political understanding of rights, let me now turn to my conceptualisation of *the right to have rights* as a collective *right to a polity*. Arendt expresses the relevance of this right when she writes that:

“[n]ot the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of [stateless] people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity.”<sup>744</sup>

But what characteristics must such a polity have? Arendt's seeks to answer this question throughout *The Jewish Writings* in which she makes several arguments that expose her conceptualisation of a polity. The first focuses on the idea of a homeland. Arendt contends that the goal of Jewish politics must be to build a Jewish homeland rather than a pseudo-sovereign Jewish state.<sup>745</sup> She distinguishes these two competing ideas along two opposing Zionist traditions: one chauvinist and nationalist, associated with Theodor Herzl, the other cultural and socialist, associated with Ahad Haam.<sup>746</sup> While Herzl believed in eternal global antisemitism and therefore in the “[...] absolute necessity of a full-fledged sovereign Jewish state [...]”,<sup>747</sup> Ahad Haam “[...] saw in Palestine the Jewish cultural center which would inspire the spiritual development of all Jews in other countries, but would not need ethnic homogeneity and national sovereignty.”<sup>748</sup>

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<sup>741</sup> Arendt, 20.16.

<sup>742</sup> Arendt, 20.134.

<sup>743</sup> See Arendt, 22.104.

<sup>744</sup> Arendt, *The Origins of Totalitarianism*, 297.

<sup>745</sup> See Arendt, *The Jewish Writings*, 21.42; 37.49 (ebook).

<sup>746</sup> See Arendt, 35.16 (ebook).

<sup>747</sup> Arendt, 44.56 (ebook).

<sup>748</sup> Arendt, 44.56 (ebook).

As shown before, Arendt strongly opposes the first – eventually prevailing – Zionist tradition. She warns Jews of its “plain racist chauvinism” because it pretends, in no way distinct forms of racism that there is a natural division between Jews and all other people.<sup>749</sup> For her, a Jewish homeland must instead guarantee ethnic diversity and equal rights for all inhabitants.<sup>750</sup>

Arendt moreover makes a second argument against Herzl’s proposal of a sovereign Jewish state. She argues that once big nation-states began to conquer foreign lands and then to exclude the conquered people from the body politic, national sovereignty no longer meant merely to defend one’s way of life against intruders.<sup>751</sup> Instead, it turned into the “[...] law of the strongest” – the subjugation of weaker people to the will of the strongest – and thus a tool to uphold absolute liberty for the powerful.<sup>752</sup>

Having experienced the violence of persecution and statelessness that is caused by this interpretation of national sovereignty,<sup>753</sup> Arendt makes freedom of movement and open borders another pillar of a polity. For her, it is vital in preventing the public silencing of a collectively stateless people.<sup>754</sup> In *Men in Dark Times*, she contends:

“[o]f all the specific liberties which may come into our minds when we hear the word “freedom,” freedom of movement is historically the oldest and also the most elementary. Being able to depart for where we will is the prototypal gesture of being free, as limitation of freedom of movement has from time immemorial been the precondition for enslavement. Freedom of movement is also the indispensable condition for [political] action, and it is in [political] action that men primarily experience freedom in the world.”<sup>755</sup>

When thousands of refugees who were trapped in Hungary decided to walk towards Germany, they offered testimony to the importance of freedom of movement for political action.<sup>756</sup>

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<sup>749</sup> Arendt, 37.18 (ebook).

<sup>750</sup> See Arendt, 21.42 (ebook).

<sup>751</sup> See Hannah Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience on Violence, Thoughts on Politics, and Revolution* (Houghton Mifflin Harcourt, 1972), 15.4; 19.100-19.102; 19.110; Arendt, *The Origins of Totalitarianism*, 269; Arendt, *The Jewish Writings*, 20.26; 36.31; 40.4 (ebook).

<sup>752</sup> Arendt, *Crises of the Republic*, 19.100 (ebook).

<sup>753</sup> See Hannah Arendt, *Men in Dark Times* (Houghton Mifflin Harcourt, 1970), 11.33 (ebook).

<sup>754</sup> See also Kieran Oberman, ‘Immigration as a Human Right’, in *Migration in Political Theory: The Ethics of Movement and Membership*, ed. Sarah Fine and Lea Ypi (Oxford University Press, 2016), 49, <https://doi.org/10.1093/acprof:oso/9780199676606.003.0003>.

<sup>755</sup> Arendt, *Men in Dark Times*, 4.16 (ebook).

<sup>756</sup> See Benli, ‘March of Refugees’.

One needs to pay close attention to Arendt's definition of power to understand why she values freedom of movement over all other freedoms. For her, power arises when a group of people are free to organise, assemble and protest together in the streets. It does not grow out of violence.<sup>757</sup> Violence and power are rather polar opposites: while "[...] the extreme form of power is All against One, the extreme form of violence is One against All."<sup>758</sup> Arendt mentions the public opposition to the Vietnam War as a paradigmatic example. The anti-war movement showed that even extremely superior means of violence can become ineffective if opposed by an ill-equipped but well-organised group of people.<sup>759</sup>

Arendt's third argument in conceptualisation of a polity emphasises its collaborative and non-exploitative character.<sup>760</sup> For her, the Kibbutzim is one such example. It brings about a type of economy that centres social living and workers' cooperatives.<sup>761</sup> Besides the mere satisfaction of basic needs, its inhabitants develop entirely new customs and values in opposition to the noxious ideologies that dominate our modern life.<sup>762</sup> According to Arendt they realise the age-old Jewish idea of a society grounded in justice, equality, and indifference to material profit.<sup>763</sup> Hence, such polities are the direct antitheses to the territorial European nation-state and its colonial enterprise, which aims to exploit foreign resources at the expense of indigenous communities.<sup>764</sup>

Arendt's fourth argument in conceptualisation of a polity is directly related to the third one. It focuses on a polity's democratic character. Arendt contends that democracy is, in fact, the only form of organisation that can protect oppressed people.<sup>765</sup> This is because it prevents the atomization of society and encourages individuals to develop a sense of responsibility for each other.<sup>766</sup> Under a dictatorship, on the other hand, the individual has no political subjectivity; politics is replaced by obedience to "higher up"

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<sup>757</sup> Arendt, *Crises of the Republic*, 16.2 (ebook).

<sup>758</sup> Hannah Arendt, *On Violence* (New York: A Harvest Book Harcourt Inc., 1970), 42.

<sup>759</sup> Arendt, *Crises of the Republic*, 16.19 (ebook).

<sup>760</sup> See Arendt, *The Jewish Writings*, 35.17; 44.34 (ebook).

<sup>761</sup> Arendt, 44.57. Arendt enthusiasm about the Kibbutzim seemed to prove unfounded in practice. Edward Said points out that "[...] Arabs were never admitted as members, that cheap (Arab or Oriental Jewish) hired labor is essential to kibbutz functioning, that 'socialist' kibbutzim were and are established on land confiscated from Arabs." Said, *The Question of Palestine*, 9.33 (ebook). For him the Kibbutzim is completely "apartheid." Said, 10.127 (ebook).

<sup>762</sup> Arendt, *The Jewish Writings*, 37.27 (ebook).

<sup>763</sup> Arendt, 44.58 (ebook). The collective settlement movement was indeed the only larger group "[...] who ever actively promoted and preached Jewish-Arab friendship." Arendt, 44.59 (ebook).

<sup>764</sup> Arendt, *The Jewish Writings*, 44.34 (ebook).

<sup>765</sup> Arendt, 23.3 (ebook).

<sup>766</sup> Arendt, 23.5 (ebook).

orders.<sup>767</sup> Arendt is therefore extremely worried about the increasing disdain for democracy at the beginning of the 20<sup>th</sup> century. But this worry does not result in fatalism. She rather works out some concrete plans for what democracy in a Jewish homeland can look like. In her essay *The Innermost Story of the Modern Age: Revolutions and the Council System*, Arendt proposes “[l]ocal self-government and mixed Jewish-Arab municipal and rural councils, on a small scale and as numerous as possible.”<sup>768</sup> For her, this is the only form of political organisation “[...] that can eventually lead to the political emancipation of Palestine.”<sup>769</sup>

Arendt’s final argument in conceptualisation of a polity emphasises its compatibility with federalism. There are three reasons why she has such a strong belief in federations such as the United States, the British Commonwealth (not to be confused with the British empire),<sup>770</sup> Soviet Russia and a United Europe.<sup>771</sup> First, they avoid “minority-majority problem” by allowing people to be part of a common body politic while keeping their nationality.<sup>772</sup> Second, compared to the institution of the nation-state, they are built on proximity and neighbourliness.<sup>773</sup> In other words, daily politics is divided into smaller constituencies. Third, federations ensure the national interest of each nationality and guarantee all nations a set of restricted rights so that none of them is vulnerable to domination.<sup>774</sup>

To recap: Arendt conceptualises the right to polity in relation to five ideas:

- (1) the idea of a homeland as a cultural centre
- (2) the idea of freedom of movement to make sure that everyone has access to their homeland and the opportunity to engage in political action
- (3) the idea of a collaborative and non-exploitative economy
- (4) the idea of democracy to protect oppressed people
- (5) the idea of federalism to prevent the minority-majority problem

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<sup>767</sup> Arendt, 23.5 (ebook).

<sup>768</sup> Arendt, 37.53 (ebook).

<sup>769</sup> Arendt, 37.53 (ebook).

<sup>770</sup> Arendt, 22.24 (ebook).

<sup>771</sup> See Arendt, 21.37; 33.14 (ebook).

<sup>772</sup> Arendt, 19.15; 21.36 (ebook).

<sup>773</sup> Arendt, 37.42 (ebook).

<sup>774</sup> Arendt, 21.42; 33.14 (ebook).

## Conclusion

In the first part of the sixth chapter, I have discussed four wrongs that Arendt seems to identify in relation to collective statelessness: those I name home(land)lessness, chronicity, public silencing, and rightlessness. First, the term “home(land)lessness” does not only capture physical expulsion but also a rupture of identity. Second, the term “chronicity” alludes to the problem that collective statelessness cannot be solved within the modern nation-state system. Third, the term “public silencing” describes a situation where none of the opinions and political actions of a collectively stateless people are taken seriously by anyone. Fourth, the term “rightlessness” is not to be understood as an absence of a particular set of rights but rather as a condition where no right can be enjoyed since there is not a single government that takes responsibility for their realisation. In the second part, I have offered a new interpretation of Arendt’s right to have rights. I have argued that it should be read as a collectively stateless people’s right to a polity. For Arendt, a polity ought to have five characteristics: first, it is based on the concept of a homeland rather than that of a sovereign nation-state, second, it allows for freedom of movement, third, it is collaborative and non-exploitative, fourth, it is democratic, and fifth, it is embedded in a federal system.

# Chapter VIII: The Moral Rights of the Stateless

## Introduction

According to *The Global Action Plan to End Statelessness: 2014-2024*, published by the UN High Commissioner for Refugees (UNHCR), there are “[...] at least 10 million people around the world who live without any nationality.”<sup>775</sup> In other words, they are not a member of any state and therefore live without the protection nationals enjoy. This raises two questions: what moral rights do the stateless have and what is their content?

In the previous chapter, I have reconceptualised Arendt’s right to have rights as a right to a polity for collectively stateless people. In this final chapter, I claim that different types of statelessness justify distinct moral rights. Under the human rights framework, the voluntary stateless have a right to immigrate but they need not be granted the absolute right to asylum, the right not to be displaced and the right not to be permanently alienated as a result of their voluntary statelessness. The structural and denigrated stateless, by contrast, must be granted the right to asylum, the right to immigrate, the right not to be permanently alienated, and the right not to be displaced. From the latter right one can moreover derive specific demands if the structural and denigrated stateless are also a collective. In this case, they should also be granted the right to a polity.

This chapter is divided into two parts. First, I will discuss four essential moral rights: the right to asylum, the right to immigrate, the right not to be displaced, and the right not to be permanently alienated. Second, I will examine the application of these four moral rights in relation to the three subtypes of statelessness: voluntary, structural, and denigrative. My intention is to reveal some morally relevant nuances with respect to these subtypes.

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<sup>775</sup> UNHCR, 2014, *Global Action Plan to End Statelessness*: 4. See <https://www.refworld.org/docid/545b47d64.html>.

## Four Essential Moral Rights

### *The Right to Asylum*

The right to asylum has a long history. It can be traced back to the bible. Asylum is most generally understood as protection by a community other than one's own against threats to life. In international law, the right to asylum is divided into three intertwined rights: "(i) the right of a state to grant asylum; (ii) the right of an individual to seek asylum; and (iii) the right of an individual to be granted asylum."<sup>776</sup> For my discussion of what is owed to the stateless, I focus on the third right and its corresponding obligations.<sup>777</sup>

Regarding the right of an individual to be granted asylum, there seem to be five corresponding obligations for a reception state:

- (i) to admit a person to its territory;
- (ii) to allow the person to sojourn there;
- (iii) to refrain from expelling the person;
- (iv) to refrain from extraditing the person; and
- (v) to refrain from prosecuting, punishing, or otherwise restricting the person's liberty.<sup>778</sup>

In political theory, one can find two contrasting views on who must be granted asylum. The broad view holds that an individual must be granted asylum if (a) their basic rights are not protected by the country of origin,<sup>779</sup> (b) they are so situated that the international community can help them, and (c) they have no other option than asking the international community for assistance.<sup>780</sup> The narrow view, on the other hand, claims that an individual ought to be granted asylum if they are (a) persecuted and (b) outside their country of origin.<sup>781</sup>

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<sup>776</sup> Roman Boed, 'The State of the Right to Asylum in International Law', *Duke Journal of Comparative & International Law* 5 (1994): 1.

<sup>777</sup> Deriving from the principle of sovereignty, the right of a state to grant asylum is undisputed as there seems to be no corresponding obligation. The right of an individual to seek asylum, on the other hand, corresponds to the country of origin's obligation to leave in pursuit of asylum. Boed, 6.

<sup>778</sup> Boed, 3.

<sup>779</sup> Andrew Shacknove, for instance, identifies four categories of basic rights: first, physical security, second, vital subsistence including unpolluted air and water, adequate food, clothing, shelter, and minimal health care, third, freedom to participate politically, and fourth, physical movement. Shacknove, 'Who Is a Refugee?', 281.

<sup>780</sup> Shacknove, 282; Other examples are Owen, 'In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibilities for Refugees'; Kieran Oberman, 'Refugees & Economic Migrants: A Morally Spurious Distinction', *The Critique* (blog), 2016, [https://www.academia.edu/22143287/Refugees\\_and\\_Economic\\_Migrants\\_A\\_Morally\\_Spurious\\_Distinction](https://www.academia.edu/22143287/Refugees_and_Economic_Migrants_A_Morally_Spurious_Distinction).

<sup>781</sup> See Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (United States: Basic Books, 1983), 51; David Miller, 'Immigration and Territorial Rights', in *National Responsibility and Global Justice* (Oxford University Press, 2007), 227, <https://doi.org/10.1093/acprof:oso/9780199235056.001.0001>.

Those who defend the narrow view have also examined two further questions regarding the right of an individual to be granted asylum. They have asked whether this right is limited in scope and whether asylum seekers have a claim against a particular reception state. Answering the first question, the defenders of the narrow view argue that a reception state is no longer obliged to grant asylum if it has already admitted a reasonable number of asylum seekers.<sup>782</sup> Answering the second question, they contend that claims against a particular reception state are justified under two circumstances: (a) if there exists a kinship between the reception state and the asylum seeker or (b) if the reception state is complicit.<sup>783</sup> For example, people of German heritage who were expelled from Poland and Czechoslovakia after the Second World War had the right to be granted asylum in Germany,<sup>784</sup> whereas Vietnamese who fled the Vietnamese War had the right to be granted asylum in the United States.<sup>785</sup>

To treat common kinship as relevant criterion for claims against a particular state seems warranted for two reasons. First, the cultural distinctiveness of asylum seekers is often put forward as an argument for their exclusion because the citizens of the reception state consider them to be a threat to their way of life. Whether this argument is sound or not is irrelevant; what matters is that kinship-based claims prevent such xenophobic arguments for exclusion in the first place. This is to say that the citizens of the reception state can no longer articulate their objection in cultural terms if common kinship is considered as a morally relevant criterion for the asylum seeker's claim. Second, kinship-based claims also facilitate arrival. If asylum seekers speak the language of the reception state, for instance, they find it much easier to make a living and establish social ties.

### *The Right Not to Be Displaced*

As a response to forced migration, some political theorists have also tried to establish a right not to be displaced.<sup>786</sup> Like in the case of the right to asylum, there seem to be

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<sup>782</sup> See Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, 51; Miller, 'Immigration and Territorial Rights', 227.

<sup>783</sup> Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, 42, 49.

<sup>784</sup> Walzer, 42.

<sup>785</sup> Walzer, 49.

<sup>786</sup> See Maria Stavropoulou, 'The Right Not to Be Displaced', *American University Journal of International Law and Policy* 9, no. 3 (1994): 689–750; Margaret Moore, *A Political Theory of Territory* (Oxford New York, NY: Oxford University Press, 2015), 36.

distinct interpretations of what this right entails.<sup>787</sup> One focuses on internal displacement. Under this interpretation, states have an obligation to provide protection from forced resettlement.<sup>788</sup> But to whom is this obligation owed? For Jamie Draper, it is those individuals whose relationship with the country of origin is not broken and who are involuntarily displaced due to sudden events such as natural disasters or conflicts.<sup>789</sup>

Another interpretation of the right not to be displaced includes displacement of any kind.<sup>790</sup> Those who adopt this interpretation claim that states must not remove anyone from their place of residency.<sup>791</sup> For Margaret Moore, this obligation should even be upheld if the place of residency was unjustly taken into possession in the past.<sup>792</sup> Her justification for the right not to be displaced appeals to the value of attachment. Displacement is wrongful for two reasons: first, because everyone develops relationships and life plans that are tightly connected to the place of residency, and second, because these relationships and life plans may only be pursuable under a specific institutional arrangement and in a certain geographical area.<sup>793</sup>

### *The Right to Immigrate*

In political theory, there has also been a debate about whether there is a right to immigrate. The right to immigrate is generally taken to correspond to the obligation on any state to allow non-citizens to cross its border and remain within its territory.<sup>794</sup> Some political theorists argue that non-citizens do not have such a right. One can approximate three justifications for rejecting a right to immigrate: (a) an argument from

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<sup>787</sup> Stavropoulou, 'The Right Not to Be Displaced', 690.

<sup>788</sup> See Jamie Draper, 'Justice and Internal Displacement', *Political Studies*, 29 April 2021, 00323217211007641, <https://doi.org/10.1177/00323217211007641>.

<sup>789</sup> Draper, 2–9.

<sup>790</sup> In the case of asylum seekers, this obligation is already well-established through the principle of non-refoulement in international law. The right not to be displaced may seem uncontroversial but some argue that, under this interpretation, it is an unnecessary duplication of already existing human rights and may endanger the right to asylum. Michèle Morel, Maria Stavropoulou, and Jean-François Durieux, 'The History and Status of the Right Not to Be Displaced', *Forced Migration Review* 1, no. 41 (December 2012): 5.

<sup>791</sup> See Anna Stilz, 'Occupancy Rights and the Wrong of Removal', *Philosophy & Public Affairs* 41, no. 4 (2013): 324–56; Moore, *A Political Theory of Territory* / Margaret Moore.

<sup>792</sup> Moore, *A Political Theory of Territory* / Margaret Moore, 37.

<sup>793</sup> Moore, 38.

<sup>794</sup> See David Miller, 'Is There a Human Right to Immigrate', in *Migration in Political Theory: The Ethics of Movement and Membership*, ed. Sarah Fine and Lea Ypi (Oxford University Press, 2016), 12, <https://doi.org/10.1093/acprof:oso/9780199676606.003.0003>.

obligation, (b) an argument from culture, and (c) an argument from freedom. Firstly, the argument from obligation says that reception states are permitted to prevent non-citizens from immigrating because they impose social security obligations on their citizens.<sup>795</sup> Secondly, the argument from culture claims that the cultural distinctiveness of one's people can only be preserved if the immigration of outsiders is restricted.<sup>796</sup> Thirdly, the argument from freedom says that a people's right to self-determination and an individual's right to freedom of association stand in direct opposition and beyond the right to immigrate.<sup>797</sup>

Yet there are also political theorists who reject such conclusions. They defend the right to immigrate for different reasons. For Joseph Carens, it is warranted under "[...] three contemporary approaches to political theory."<sup>798</sup> Under the Rawlsian theory of justice, the right to immigrate is justified because immigration restrictions violate the priority of individual liberty.<sup>799</sup> Under the Nozickean theory of property rights, it is warranted because states have no legitimate claim over their territory as such.<sup>800</sup> This is to say that individual landowners must decide for themselves who to admit or exclude. Under a utilitarian approach, the right to immigrate is justified because it seems to maximise the overall utility.<sup>801</sup> Put precisely, non-citizens would gain more from being allowed to immigrate than citizens gain from closed borders.

Kieran Oberman, by contrast, grounds the right to immigrate in essential personal and political interests enshrined in the *Universal Declaration of Rights* that everyone must be free to pursue anywhere.<sup>802</sup> For him, individuals ought to be given the opportunity to make life plans across borders under a human rights framework. On a personal level, they should be allowed to pursue any religion, choose any job, and marry any

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<sup>795</sup> See Michael Blake, 'Immigration, Jurisdiction, and Exclusion', *Philosophy & Public Affairs* 41, no. 2 (2013): 103–30, <https://doi.org/10.1111/papa.12012>; Michael Blake, 'The Right to Exclude', *Critical Review of International Social and Political Philosophy* 17, no. 5 (2014): 521–37, <https://doi.org/10.1080/13698230.2014.919056>.

<sup>796</sup> Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*; See David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Harvard University Press, 2016).

<sup>797</sup> See Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*; Christopher Heath Wellman, 'Immigration and Freedom of Association', *Ethics* 119, no. 1 (2008): 109–41, <https://doi.org/10.1086/592311>.

<sup>798</sup> Joseph H. Carens, 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics* 49, no. 2 (1987): 251.

<sup>799</sup> See Carens, 255–62.

<sup>800</sup> See Carens, 252–54.

<sup>801</sup> See Carens, 263–64.

<sup>802</sup> See Oberman, 'Immigration as a Human Right', 33.

person without facing immigration restrictions.<sup>803</sup> On a public level, the same holds true with respect to political organising for a common cause.<sup>804</sup>

### *The Right Not to Be Permanently Alienated*

Unlike the right to immigrate, the right to not be permanently alienated seems to be defended unanimously. It is generally taken to correspond to the obligation that states must grant membership to all non-temporary residents on their territory. Yet the given justifications for this right vary.

Carens offers two justifications for the right not to be permanently alienated. The first is based on the idea of social membership. Non-citizens must not be permanently alienated in the country of residency because they develop important social ties there, for example, by making friends or by acquiring a common identity as well as interests with the citizens.<sup>805</sup> The second justification is based on the idea of democratic legitimacy. For Carens, a democracy is only legitimate if every old-enough individual who is directly affected by the legislation it passes is allowed to participate in the political process.

Michel Walzer also grounds the right not to be permanently alienated in an account of political justice. He contends that non-citizens should not be permanently alienated where they reside because the country of residency could otherwise continuously shape their livelihood against their will.<sup>806</sup> For Walzer, political power is only legitimate if everyone who is directly affected has given consent.<sup>807</sup> Consequently, non-citizens must be granted membership in the country of residency.<sup>808</sup> In Walzer's own words: "the principle of political justice is this: the process of self-determination through which a democratic state shapes its internal life, must be open, and equally open, to all those

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<sup>803</sup> Oberman, 36.

<sup>804</sup> Oberman, 37.

<sup>805</sup> See Joseph H. Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013), 50.

<sup>806</sup> Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, 59.

<sup>807</sup> *Ibid.*, p. 58f. Arash Abizadeh makes this argument from democratic boundaries to question state borders altogether. See Arash Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders', *Political Theory* 36, no. 1 (2008): 37–65.

<sup>808</sup> Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*: 59.

men and woman who live within its territory work in the local economy, and are subjects to local law.”<sup>809</sup>

Christopher Wellman seems to defend the right not to be permanently alienated on grounds of relational equality. He argues that inequality within a society is much more worrisome than inequality between societies.<sup>810</sup> The reason for this is that such inequality in special relationships like the family or the state makes individuals much more liable to oppression.<sup>811</sup> Thus, non-citizens should be given membership in their country of residency for them to be treated as moral equals.<sup>812</sup>

Oberman, on the other hand, contends that permanent alienage is unjustifiable because it violates the principle of equal treatment in general. For him, there is no morally relevant difference between non-citizens who permanently reside in a country and that country’s citizens.<sup>813</sup>

Unlike other political theorists, Helder De Schutter and Lea Ypi take an entirely different perspective. They contend that permanent alienage of non-citizens in the country of residency is unfair to citizens because every permanent non-citizen has a duty to (a) share “the burdens of citizenship,” for example, conscription or jury service (b) to participate in the democratic process, (c) to uphold the ideal of citizenship, and (d) to ensure “stability and cohesion in society.”<sup>814</sup>

## Discussing the Three Subtypes of Statelessness

In this second part of the chapter, I examine the application of the four previously identified moral rights. My intention is to reveal some morally relevant nuances with respect to the three different subtypes of statelessness: voluntary, structural, and denigrative. Let me quickly recap how each of these are defined. The voluntary stateless give up their political membership themselves. By contrast, the structural and

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<sup>809</sup> Ibid, p. 60.

<sup>810</sup> Wellman, ‘Immigration and Freedom of Association’, 122.

<sup>811</sup> Wellman, 124.

<sup>812</sup> Wellman, 134.

<sup>813</sup> Kieran Oberman, ‘Immigration, Citizenship, and Consent: What Is Wrong with Permanent Alienage?’, *Journal of Political Philosophy* 25, no. 1 (2017): 99, <https://doi.org/10.1111/jopp.12093>.

<sup>814</sup> Helder De Schutter and Lea Ypi, ‘The British Academy Brian Barry Prize Essay: Mandatory Citizenship for Immigrants’, *British Journal of Political Science* 45, no. 2 (April 2015): 237, <https://doi.org/10.1017/S0007123414000568>.

denigrated stateless are involuntarily deprived. While the former lack political membership due to gaps in international law, the latter are deprived of it by the country of origin.

### *The Moral Rights of the Voluntary Stateless*

What are the rights of the voluntary stateless? Should they be granted the right to asylum as result of their voluntary statelessness? I do not think they need to be, not even under the broad view on who must be granted asylum. The reasons are threefold. First, the entire international protection regime would be undermined if individuals were granted the right to asylum as a remedy to voluntary statelessness. This is because it would give everyone the opportunity to become an asylum seeker at will. Second, voluntary stateless individuals do not necessarily suffer from the violation of basic rights. For many, the renunciation of their nationality is instead to their benefit, for instance, to evade taxes.<sup>815</sup> Third, if privileged, they also have access to other ways of permanently leaving their country of origin. In some countries, individuals can, for example, just buy a nationality by investing a certain sum of money there.<sup>816</sup>

This problem does not pose itself if one follows Oberman's argument for a human right to immigrate. For him, *everyone* has essential personal and political interests that should not be constrained by border regimes.<sup>817</sup> From a moral point of view, it does not matter whether someone has voluntarily given up their membership in the country of origin. Put differently, the right to immigrate must be granted regardless of one's circumstances.

Things are not as straightforward with respect to the right not to be displaced and the right not to be permanently alienated. In the following paragraphs, I contend that there

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<sup>815</sup> Andrew Mitchel, '2016 Fourth Quarter Published Expatriates – New Annual Record', International Tax Blog, 2017, Accessed 16 March 2021. [https://intltax.typepad.com/intltax\\_blog/2017/02/2016-fourth-quarter-published-expatriates-new-annual-record.html](https://intltax.typepad.com/intltax_blog/2017/02/2016-fourth-quarter-published-expatriates-new-annual-record.html).

<sup>816</sup> See Lea Ypi, 'Borders of Class: Migration and Citizenship in the Capitalist State', *Ethics & International Affairs* 32, no. 2 (2018): 143f., <https://doi.org/10.1017/S0892679418000278>. This development is consistent with the history of Western political thought on citizenship. In ancient Greece, slaves and women were categorically denied citizenship because they did not own any property, not even in themselves. See Desmond S. King and Jeremy Waldron, 'Citizenship, Social Citizenship and the Defence of Welfare Provision', *British Journal of Political Science* 18, no. 4 (1988): 425.

<sup>817</sup> Oberman, 'Immigration as a Human Right', 33.

are some circumstances under which individuals who voluntarily renounce nationality should not be granted these rights.

My argument is based on two premises. First, the country of origin is not obliged to grant voluntary stateless persons the right not to be displaced and the right not to be permanently alienated if their renunciation of nationality is motivated by self-interest and the shirking of responsibilities towards fellow citizens.<sup>818</sup> As mentioned previously, many individuals become voluntary stateless to avoid paying tax.<sup>819</sup> I deem this to be an act of self-interest and the shirking of responsibility towards fellow citizens if the taxes are (a) higher than the costs of public services provided and (b) fair; and I consider taxes fair if required to ensure a redistribution of wealth which guarantees the basic needs and the satisfaction of the minimum core human rights of other members of the political community.

Second, the country of origin is not obliged to grant voluntary stateless persons the right not to be displaced and the right not to be permanently alienated if they can naturalise in another country. Given that some countries offer such an opportunity in exchange for money, the former country of origin need not grant them a right to not be permanently alienated. For the same reasons, the country of origin is also justified in displacing voluntary stateless persons if the land they own is required to satisfy the minimum core human rights of fellow citizens who have been harmed by the voluntary stateless persons' disassociation, for instance, in the form of tax avoidance.

Yet such reasoning is unsound in cases where the country of origin violates the principle of equal treatment in the first place. Individuals who renounce nationality in a totalitarian state that does not respect citizenship rights thereby do not waive the right not to be displaced and the right not to be permanently alienated in that country. In this case, they cannot be said to have given up their political membership voluntarily. Thus, individuals so situated must be allowed to regain their home and nationality at any time and particularly when the country has abandoned its totalitarian regime.

If one follows a human rights framework, voluntary stateless individuals also do not waive the right not to be permanently alienated in other countries. The initial

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<sup>818</sup> Stiliz makes a similar point with respect to distributive duties more generally. Anna Stiliz, 'Is There an Unqualified Right to Leave?', in *Migration in Political Theory: The Ethics of Movement and Membership*, ed. Sarah Fine and Lea Ypi (Oxford University Press, 2016), 73, <https://doi.org/10.1093/acprof:oso/9780199676606.003.0004>.

<sup>819</sup> See Andrew Mitchel, '2013 Expatriations Increase by 221%', International Tax Blog, 2014, Accessed 2 March 2021. [https://intltax.typepad.com/intltax\\_blog/2014/02/2013-expatriations-increase-by-\\_\\_\\_\\_.html](https://intltax.typepad.com/intltax_blog/2014/02/2013-expatriations-increase-by-____.html).

renunciation of nationality in the country of origin may even be necessary as some countries do not allow dual nationality. In this case, they are required to renounce one nationality to be granted another.

### *The Moral Rights of the Structural Stateless*

Structural statelessness stands in opposition to voluntary statelessness in that the former results from indirect force. This is to say that the structural stateless are involuntarily deprived of their nationality by international law. The citizens of sinking islands states are such an example. They are likely to become structural stateless in the future because their territory, a constitutive element of statehood, will likely disappear due to climate change-caused rising sea levels.

Whether such so-called “climate refugees” have the right to asylum depends on which view one supports. Under the narrow view, they do not have such a right. However, they do under the broad view. While one may agree that weather events such as tornadoes or thunderstorms are beyond social control, the same cannot be said for climate change.<sup>820</sup> There is plenty of evidence that gradually rising sea levels are caused by human activity.<sup>821</sup>

From this follows that the first condition for asylum, under the broad view, is satisfied: (a) sinking island states fail to protect the basic rights of their citizens – without a functioning government, they can neither guarantee physical security, vital subsistence, political participation nor physical movement. Given the immense consequences of climate change, it is moreover undeniable that the second condition is also met: (b) the citizens of sinking island states have no other option than asking the international community for assistance. At last, the third condition is also satisfied: (c) they are also so situated that the international community can help them even if they are within the borders of their country. This is because sinking island states do not seem to be hostile towards their citizens. In other words, there is no reason to believe that they oppose the international community’s intervention.

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<sup>820</sup> For an explanation of why some have traditionally objected refugee status for those affected by against natural disasters see Shacknove, ‘Who Is a Refugee?’, 279.

<sup>821</sup> See Hunt Janin and Scott A. Mandia, *Rising Sea Levels: An Introduction to Cause and Impact* (McFarland, 2012), 3.

The same holds true when individuals are rendered structural stateless because their membership is deemed ineffective by international law. In this case, they are not able to leave their country of nationality without being denied protection abroad. For instance, Friedrich Nottebohm who renounced German nationality to avoid being detained by the United States as an enemy alien could not be protected by his newly chosen country of nationality Lichtenstein because the International Court of Justice argued that his connection to it was not genuine.<sup>822</sup>

Given the lack of protection, the first and third condition for asylum are both satisfied under the broad view: (a) the country of origin failed to protect the basic rights of Nottebohm (b) despite showing an intention to help him. Since the reason for failure was international law, the second condition is also met: (c) like the citizens of sinking island states, Nottebohm had no other option than asking the international community for assistance.

For these reasons, all structural stateless individuals ought to be granted asylum under the broad view. That said, there is a separate but nonetheless important question of whether all structural stateless persons moreover have the right to asylum in a particular country. While common kinship stipulates a special claim in their case, the same cannot be said for complicity. When international law renders an individual's nationality ineffective, as in the case of Nottebohm, it is not as clear who is to blame.<sup>823</sup>

The situation is more straightforward in the case of sinking island states. Whether it is production-based CO<sub>2</sub> emissions or consumption-based CO<sub>2</sub> emissions, there are two criteria by which countries' complicity in climate change can be determined.<sup>824</sup> For instance, it seems sound to argue that Germany, with 711 million tonnes in production-based CO<sub>2</sub> emissions and 824 million tonnes consumption-based CO<sub>2</sub> emission in 2019, has a much greater obligation to grant asylum to structural stateless persons from sinking islands than Greece with 65 and 53 million tonnes.<sup>825</sup>

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<sup>822</sup> Case (Liechtenstein v. Guatemala); Second Phase, International Court of Justice (ICJ), 6 April 1955, available at: <https://www.refworld.org/cases,ICJ,3ae6b7248.html>

<sup>823</sup> One may claim that the more decision-making power a country has with respect to international institutions such as the International Court of Justice, the more complicit it is.

<sup>824</sup> The two measurements may come apart significantly. In manufacturing economies such as China's production-based CO<sub>2</sub> emissions are much higher than consumption-based. The opposite is true in the case of the United States. See Hannah Ritchie, 'How Do CO<sub>2</sub> Emissions Compare When We Adjust for Trade?', Our World in Data, 2016, <https://ourworldindata.org/consumption-based-co2>.

<sup>825</sup> For data see Ritchie.

Under a human rights framework, the structural stateless moreover have the right to immigrate. Like everyone else, they have essential personal and political interests enshrined in the *Universal Declaration of Human Rights* which are only realisable if one can freely move across borders. The possibility of immigration seems especially important with respect to the realisation of their political interests. Since structural stateless individuals from sinking island states are dependent on the international community, they need to be granted a general right to immigrate to politically organise in other countries.

Yet the right to immigrate is no sufficient solution to the loss of statehood. In other words, it does not nullify the right not to be displaced. From the latter derives at least a valid moral claim to assistance: the international community is obliged to do everything in its power to prevent the disappearance of a sinking island state's territory. The right to immigrate is relevant if and only if their citizens want to or must immigrate. Under Oberman's argument from equal treatment, individuals from sinking island states should moreover be given nationality once they have immigrated somewhere else.

That said, the right not to be displaced also seems to ground obligations on other countries if the displacement of individuals from sinking island states can no longer be avoided. Appealing to a Lockean argument, which says that land must be redistributed if the status quo threatens someone's existence, several political theorists contend that sinking island states ought to be given a new land to re-establish their own polity.<sup>826</sup>

The Lockean argument is, however, not without problems: it is not automatically clear which country must free their land. Cara Nine turns to the Lockean spoilage proviso for a partial solution to this problem. As no one should possess more land than they can use for it to not go to waste, sinking island states have a strong claim to unused land.<sup>827</sup> Frank Dietrich and Joachim Wündisch, on the other hand, offer an argument

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<sup>826</sup> See Cara Nine, 'Ecological Refugees, States Borders, and the Lockean Proviso: Ecological Refugees, States Borders, and the Lockean Proviso', *Journal of Applied Philosophy* 27, no. 4 (2010): 359–75, <https://doi.org/10.1111/j.1468-5930.2010.00498.x>; Frank Dietrich and Joachim Wündisch, 'Territory Lost – Climate Change and the Violation of Self-Determination Rights', *Moral Philosophy and Politics* 2, no. 1 (2015): 83–105, <https://doi.org/10.1515/mopp-2013-0005>; Angell, 'New Territorial Rights for Sinking Island States'.

<sup>827</sup> Nine, 'Ecological Refugees, States Borders, and the Lockean Proviso', 371. The island of Ulva which is barely populated may be such an example see Xander Richards, 'Scottish Island with Just Six Residents Takes Its First Steps to Regeneration', *The National*, 2021, Accessed 2 February 2022. <https://www.thenational.scot/news/19773857.ulva-scots-island-just-six-residents-takes-first-steps-regeneration/>.

for corrective justice. For them, it is not the countries that occupy unused land but the culprits of climate change that are obliged to surrender parts of their territory.<sup>828</sup> Put precisely, Dietrich and Wündisch seek to determine the redistribution of land based on the “[...] relative contribution to unsustainable non-subsistence emissions after 1990.”<sup>829</sup>

Notwithstanding which proposal for land redistribution one favours, it is an altogether different question what type of land these sinking islands states ought to be granted. Most scholars agree that it cannot just be any land. The most intuitive principle for redistribution is size: the land should at least meet the new inhabitants’ basic needs.<sup>830</sup> Under this principle, sinking island states must not be compensated for land that they did not use before even if it holds some immaterial value.<sup>831</sup> For instance, there is no right to be granted a territory as big in size as the former one if it included a large unused desert. A more demanding but nevertheless reasonable requirement is that the new territory must also allow for the continuation of the sinking island states citizens’ previous way of life.<sup>832</sup> A people whose main economy is fishing, for example, cannot be forced to resettle in a landlocked country.

### *The Moral Rights of the Denigrated Stateless*

Like structural statelessness, denigrative statelessness also stands in opposition to voluntary statelessness in that the former is involuntary. Denigrative statelessness can take several forms. They include discriminatory nationality laws, denationalisation, and persecution.

That said, do all denigrated stateless have the right to asylum? Under the narrow view, it is only those who are persecuted. Under the broad view things are more complex. Those who suffer from denigrative statelessness because the country of origin does not register their nationality nor allows them to return must also be granted asylum. In their case, all three conditions for asylum, under the broad view, are satisfied: (a) they

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<sup>828</sup> Dietrich and Wündisch, ‘Territory Lost – Climate Change and the Violation of Self-Determination Rights’, 92.

<sup>829</sup> Dietrich and Wündisch, 85.

<sup>830</sup> Nine, ‘Ecological Refugees, States Borders, and the Lockean Proviso’, 370.

<sup>831</sup> Dietrich and Wündisch, ‘Territory Lost – Climate Change and the Violation of Self-Determination Rights’, 96.

<sup>832</sup> See Nine, ‘Ecological Refugees, States Borders, and the Lockean Proviso’, 370; Dietrich and Wündisch, ‘Territory Lost – Climate Change and the Violation of Self-Determination Rights’, 96.

suffer from a violation of basic rights including physical security, vital subsistence, political participation, and physical movement,<sup>833</sup> (b) only the international community can help them, and (c) they are so situated that assistance can be provided.

However, the same cannot be said about the denigrated stateless who are discriminated against or forcefully denationalised. While they are certainly denied several basic rights and have no other option than asking the international community for help, they are not necessarily so situated that the international community can help. As the country of origin is hostile towards those it discriminates or forcefully denationalises, some form of intervention seems the only possible option to help them as long as they are not abroad. Yet the spatial condition for asylum does not defeat a combination of the narrow and broad view: all denigrated stateless ought to be granted asylum once they are outside the country of origin. In any case, neighbouring countries must at least open their borders.

Following the kinship-based argument for the distribution of asylum, the denigrated stateless also have a claim against particular countries. As in the case of anyone else, sharing kinship with the reception country not only prevents stigmatisation but also facilitates arrival. That said, a reverse reading of the kinship- and complicity-based argument for asylum distribution seems even more convincing. The denigrated stateless must neither be granted asylum in countries that are hostile to their culture nor complicit in their denigrative statelessness.<sup>834</sup> Those who suffer from discriminatory nationality laws should, for instance, not be granted asylum in countries that perpetuate that discrimination.

Under a human rights framework, the denigrated stateless moreover ought to be granted the right to immigrate and the right not to be permanently alienated: the condition of denigrative statelessness is an obstacle to the realisation of both personal as well as political essential interests enshrined in the *Universal Declaration of Human Rights*. In other words, the denigrated stateless cannot pursue their personal and political life plans as long as they face immigration restrictions.

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<sup>833</sup> See for example Naved Bakali, 'Islamophobia in Myanmar: The Rohingya Genocide and the "War on Terror"', *Race & Class* 62, no. 4 (1 April 2021): 63, <https://doi.org/10.1177/0306396820977753>.

<sup>834</sup> One practical problem, arising from this view, is that countries can deny their responsibility by stigmatising those who seek refuge. However, this does not defeat arguments in response to an already non-ideal condition.

Do all denigrated stateless also have a right not to be displaced? If the right not to be displaced must be granted to everyone who is forcefully expelled, then they certainly do. Yet what are the implications of this right for the denigrated stateless? I contend that those denigrated stateless who are persecuted or coercively denationalised for belonging to an ethnic group should be given land of their own. As in the case of sinking island states, my argument is grounded in Locke's theory of property which implies that land must be redistributed if the status quo threatens someone's existence. Given that collective persecution and denationalisation are tightly connected to the territorial regime and clearly causing such an existential threat, such application seems fit.

Yet there seems to be a difference between those denigrated stateless who are persecuted or coercively denationalised for belonging to ethnic groups and sinking island states: while the latter had a state before they were rendered stateless, the former has never been recognised as a people. This objection seems weak, however, if one compares them with former colonies that have been given land to settle. What morally relevant difference should there be between the two entities? Moore addresses this question in general terms when discussing a justification for territorial rights. For her, there are three political conditions any entity must meet to qualify as a people, and thereby have a legitimate claim to land: first, they must be territorially concentrated, second, they must be united by a political history of mobilization, solidarity, and cooperation, and third, they need to have political aspiration.<sup>835</sup> None of these conditions excludes the denigrated stateless.

## Conclusion

In this final chapter, I have developed two arguments. First, I have contended that different subtypes of statelessness come with a distinct set of moral rights. Put precisely, the voluntary stateless have right to immigrate but no general right to asylum, right not to be displaced, and right not to be permanently alienated. The reason for this is that their former country of origin is not obliged to grant them membership and access to place-related common goods as long as they violate the principle of

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<sup>835</sup> Moore, *A Political Theory of Territory* / Margaret Moore, 51f.

reciprocity in relation to their former fellow citizens. Following a human rights conception, the structural and denigrated stateless, by contrast, must be granted the right to asylum, the right to immigrate, the right not to be permanently alienated, and the right not to be displaced. From the latter right one can moreover derive specific demands if the structural and denigrated stateless are also a collective. In this case they should also be granted a right to a polity.

## Final Remarks

This dissertation has attempted to provide a new language more equipped to untangle the complexities of statelessness. Throughout the eight chapters, I have argued that statelessness is far from being a unified concept; instead, there are different types of statelessness. Those are individual vis-à-vis collective statelessness, *de jure* vis-à-vis *de facto* statelessness, and voluntary, structural as well as denigrative statelessness.

The overall argument was split into four parts. In chapters 1, 2 and 3, I have, at first, examined the two general categories of statelessness which are already recognised in UN conventions and supplementary documents. They are *de jure* and *de facto* statelessness. I made two proposals based on consistency with human rights. First, I argued that someone should count as *de facto* stateless (a) if their country of nationality has the capacity to implement the minimum core human rights but refuses to do so, or (b) if their country of nationality lacks the capacity to implement the minimum core human rights and refuses to seek international assistance for this purpose.

. Second, I suggested that *de facto* statelessness may be a better legal framework to address the problem of refuge. The reasons are twofold. The legal framework of *de facto* statelessness is not only an effective substitute for the negatively loaded refugee label but also synchronises human rights law.

Chapters 4 and 5 made up the second part of the overall argument. In chapter 4, I developed three subtypes of statelessness. They are voluntary, structural, and denigrative statelessness. Those subtypes differ with respect to the source of legal deprivation. In the case of voluntary statelessness, it is individuals who renounce their nationality themselves; in the case of structural statelessness, it is international law that denies legal recognition; and in the case of denigrative statelessness, it is the country of origin that deprives nationality. Besides the sources of deprivation, I also examined the underlying structure of those three subtypes. I suggested that legal non-recognition and social non-recognition by the country of origin do not necessarily coincide when someone is rendered voluntary or structural stateless. This does not apply to denigrative statelessness; here legal non-recognition and social non-

recognition by the country of origin seem closely intertwined. In other words, the deprived are likely to lose their position in law as well as their status as moral equals. This makes them not only incredibly vulnerable to any form of violence but also undermines the essence of the law. Thus, I concluded that denigrative statelessness is arguably the most wrongful subtype. In chapter 5, I then took a closer look at denationalisation as the major cause of denigrative statelessness. I argued that it is much more difficult to justify once its historical link to vilification is exposed.

The third part of the argument was developed in chapters 6 and 7 where a further distinction was introduced. In these two chapters, I divided legal statelessness into an individual as well as a collective type. Both were defined in contradistinction to each other. By “individual statelessness” I meant to give expression to how the lack of legal and potentially social recognition is experienced by individuals such as Garry Davis, Friedrich Nottebohm, or Shamima Begum. “Collective statelessness,” on the other hand, was meant to name the experienced of entire collectives such as Palestinians, Kurds, or the Rohingya with a shared history of denationalisation. In chapter 6, I suggested that there is much to learn about individual statelessness when comparing it to slavery. I offered two reasons. First, the legal definition and the sociological definition of slavery offer a useful analytic framework to facilitate a more nuanced understanding of the various ways in which stateless persons are harmed. Second, the sociological definition also helps us to identify cases of individual statelessness that are not captured by the traditional legal conception. When following it, we can define everyone who suffers from total domination, natal alienation, and denigration as denigrative stateless. In chapter 7, I then discussed Hannah Arendt’s seminal work on the topic to conceptualise four harms of collective statelessness. Those are home(land)lessness, chronicity, public silencing, and rightlessness. Providing a new interpretation of Arendt’s famously coined “right to have rights,” I moreover argued that it should be read as a collective *right to a polity*.

Chapter 8 finally drew all previous ones together. Here, I claimed that the different types of statelessness justify distinct moral rights. Under the human rights framework, voluntary stateless individuals have a right to immigrate but they need not be granted the absolute right to asylum, the right not to be displaced and the right not to be permanently alienated. An absolute right to asylum need not be granted for three reasons. First, it would allow the voluntary stateless to seek asylum at will, thereby

undermining the entire international protection regime. Second, the voluntary stateless do not necessarily suffer from the violation of basic rights, their renunciation is instead likely to benefit them. Third, if privileged, they moreover have access to other means of leaving the country of origin, for instance, by paying for a new nationality or at least a residency.

By contrast, the structural and denigrated stateless must be granted the right to asylum, the right to immigrate, the right not to be permanently alienated, and the right not to be displaced as their condition exposes them to several basic rights violations. In the case of Friedrich Nottebohm, they cannot safely leave their country of nationality, whereas in the case of sinking islanders, they must leave their home to avoid harms. From the right not to be displaced one can moreover derive specific demands if the structural and denigrated stateless are also a collective. In this case, they should also be granted the right to a polity.

Before ending with a short reflection on this final proposal, let me acknowledge three limitations of this dissertation. First, my engagement with the concept of legal statelessness has mostly been of theoretical nature. Throughout the dissertation, I have largely relied on other people's empirical studies to develop the here presented formal typology.

Second, while typologies are analytically useful in that they provide a more nuanced language to entangle complexities, they can also be applied in a harmful manner. This is because categories remain categories even when they are more precise than previous ones; they still tend to reduce someone's experience in the imagination of others. I therefore ask the readers to only use individual, collective, voluntary, structural, and denigrative statelessness when they serve an analytical purpose.

Third, as mentioned in the introduction, no number of examples allows one to draw definite conclusions. With respect to individual statelessness, the examples I have used may not be the most representative. Instead, I deemed them to be helpful due to the richness of qualitative data that is available. Being aware of this limitation, I want to point out again that the here developed formal typology of statelessness should be considered as a hypothesis itself. Rather than providing a final answer to what statelessness is, I hope that my research will benefit others in asking the question more precisely in the future.

That said, let me end this dissertation with a short reflection on the right to a polity. Following Hannah Arendt's thinking and my own research on legal statelessness over the last four years, I am more convinced than ever that the nation-state must be seen as a problem rather than a solution: nation-states cause statelessness but do, at best, only the bare minimum to prevent it. If we are serious about solving the problem of denigrative statelessness, we must overcome all artificial borders and grant everyone a homeland, freedom of movement, access to democratic institutions, and the opportunity to build and be included in a collaborative and non-exploitative economy. Today, Arendt's proposal of a right to a polity is arguably best realised in Rojava, an autonomous region in Northern Syria. The way Kurds, Turkmen, Arabs, Syriacs, Assyrians, Armenians, Yezidis, and many internationalists have addressed the problem of denigrative statelessness by creating a stateless/non-statist society demands our full attention.

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