Statelessness and Human Rights:
A commentary on law's reach outside itself

Jacob Glover

I. Introduction

The legal definition of statelessness appears in the 1954 Convention relating to the status of Stateless Persons:

> the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.[1]

The operative perspective in this definition is that of the state. This means that determining if someone is stateless requires a state interpret its own laws and find them inapplicable to that person. These people exist in the interstices between states. They dwell in the territory owned or claimed by a state, but they do not participate, juridically or politically speaking, in any state. National or domestic laws do not apply to them in any consistent or logical way. In fact, Hannah Arendt points out that for some stateless people breaking the law actually improves their position.[2]

Stateless people occupy conflicting realities: one in which they physically live and exist inside a state and, another, in which they are not a member of that state in a legal sense. Therefore, the story of counter-statelessness legislation and international law can be read as the story of the law attempting to deal with externalities by reaching outside itself to gain, at first, nominal jurisdiction and, eventually, substantive authority.

---

[1] The United Nations 1954 Convention relating to the Status of Stateless Persons, Art. 1. The United Nations has two conventions targeting statelessness: The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. I will be referring to them as the 1954 Convention and the 1961 Convention, respectively.

[2] Hannah Arendt, *The Origins of Totalitarianism*. New York: Harcourt Brace & Company, 1973 pg. 286.

It is due to its exceptional status that statelessness offers an instructive and revelatory lens for examining the institutional and rhetorical structures at work in international human rights law. This paper aims to uncover the way in which counter-statelessness legislation represents law reaching outside of itself to make an extra-legal problem, first, nominally legal, and, secondly, substantively legal.

I focus on the relationship between the 1961 Convention and the first resolution of its final act. By comparing the nature of these two legal moments we can see how statelessness reveals the original legal maneuver when is the law reaches outside itself and claims nominal jurisdiction over something before it can then begin endowing it with substantive legal status. In my conclusion I draw a comparison between this theoretical structure of counter-statelessness legislation and the project of international human rights law in general.

II. The 1961 Convention on the Reduction of Statelessness

II.1 The History of the 1961 Convention[3]

For the purposes of my argument the most important parts of the history of the 1961 Convention are each of the moments when, in relation to statelessness, the drafters asserted a state's ultimate discretion in determining who is a citizen and who is not. Weis points out that even in the earliest stages of thinking about statelessness the League of Nations made efforts to balance the reduction and elimination of statelessness and a given state's ultimate authority in determining its own citizens.[4] This is relevant to my discussion because it emphasizes the discretionary nature of citizenship. That is to say, whether or not someone is a citizen ultimately

[3] This section is a condensed version of the 1961 Convention's history found in Paul Weis, "The United Nations Convention on the Reduction of Statelessness, 1961" 1962 11 Int'l & Comp. L.Q. 1073

[4] Ibid., 1074.

depends on the choice of the state. It is not, therefore, co-original to the person qua person. Rather there is a person around whom the state chooses to wrap its juridical authority and to whom it gives the option to access legal rights. In other words, citizenship and nationality are functions of designation not of qualitative definition.

Between the 1954 Convention and the 1961 Convention there was a period of disagreement amongst diplomatic representatives, scholars, and state officials with regards to jurisdictional issues and international obligations around statelessness. Insofar as statelessness is a function of sovereignty's designative caprice, encroaching on this sovereignty by legislating the criteria of the decision becomes *the issue* of statelessness. This moment of disagreement, therefore, re-emphasizes the capriciousness of citizenship. The international law community recognized that statelessness is a problem, but, in some ways, conceded that the ultimate sovereignty of a state to decide on its own citizens is more important than any sweeping maneuver to solve the problem of statelessness. This is evident in the fact that in 1959 there were two potential conventions on the table: one which would eliminate statelessness and one which would reduce it, and the conference ended up ratifying the one which reduced, only in procedural ways, statelessness, i.e. the 1961 Convention.

II.2 The Substance of the 1961 Convention

The 1961 Convention attempts to reduce statelessness by focusing on procedural ambiguities and creating clarity for nations in how to draft laws in order to create and perpetuate

the least amount of statelessness. This reading is in line with van Waas who points out that by and large the 1961 Convention deals with administrative technicalities.[5]

Articles 1-4 deal with the granting children nationality. These four provisions ensure that fewer children are born without a nationality. In these articles it is clear that the work being done is not altering the status of stateless people or preventing statelessness in general. Rather these first four articles shore up some of the gaps in legislation and provide an answer for some of the most common scenarios which create statelessness.

Articles 5-8 deal with the loss of nationality. These provisions place restrictions on how such laws can function and attempt to prevent someone from losing their nationality without having another. Again, however, we are not dealing with an expansion of rights. These provisions place conditions on the loss of nationality so as to create procedural friction against statelessness.

Article 8 allows states to retain the right to deprive a person of their nationality with some restrictions. The two most important restrictions are that there must be some sort of judicial or quasi-judicial hearing and the deprivation cannot result in statelessness.

Article 9 provides that a state cannot arbitrarily deprive a person of their nationality on racial, ethnic, religious, or political grounds. Note that this is a closed list and does not explicitly include gender.

Article 10 is supposed to protect people from becoming stateless during the process of state succession.

---

[5] Laura van Waas, *Nationality Matters: Statelessness under International Law*. Antwerp: Intersentia, 2008 at pg. 194-5 [*Nationality Matters*].

According to van Waas, Article 9 does not engage enough grounds to be very helpful; and Article 10 does not have enough substantive depth to be effective.[6]

Based on the foregoing we can see that the substantive provisions of the 1961 Convention fill procedural gaps in the law which would allow someone to become stateless from birth or from some legal circumstances. The 1961 Convention creates a citizenship safety net to catch the people who might otherwise fall through the legal holes and into the abysses of statelessness. Most of the provisions walk the thin line of broadening the possibility of nationality while allowing states to retain control over who has citizenship.

In relation to my overall argument, it is important to note that the Convention does not give any content or substance to what it means to have citizenship or nationality. And it does not suggest that the nationality granted by a contracting state need to be a of a certain kind or equivalent to any other citizen. The Convention is concerned with ensuring people are nominally citizens of some country, but it is not concerned with that citizenship might mean.

II.3 The First Resolution of the Final Act

The First Resolution of the Final Act of the 1961 Convention (the "First Resolution") says:

> The Conference
>
> Recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.[7]

---

[6] Laura van Waas, *Nationality Matters*, *supra* nt. 5, pg. 194-5.

[7] United Nations Conference on the Elimination or Reduction of Future Statelessness, 30 Aug. 1961, Final Act, 91 23, U.N. Doc. A/Conf./ 9/14 (1961).

Generally, commentators[8] refer to this resolution in passing and rarely stop to consider its full rhetorical implications, i.e. what it says about statelessness and the project of international human rights law that the First Resolution exists at all. I think that the First Resolution can offer us some insight if we compare its nature and message to the Convention itself.

Before inquiring into the meaning of this resolution however, it is necessary to define some of the terms it uses.

II.3.1 De facto and de jure statelessness

In simplest terms *de jure* statelessness meets the definition of statelessness from the 1954 Convention. It refers to those people who, from the perspective of a state, do not garner legal protection and do not have a legal bond with a state. The UN's *Study of Statelessness*, from 1949, defines *de facto* stateless people as those who "without having been deprived of their nationality no longer enjoy the protection and assistance of their national authorities."[9]

The scholarship around this conceptual bifurcation points out that it is not the most effective or "precise" way to distinguish the situations of these two groups of people. Paul Weis, for example, argues:

> From the legal point of view, the terms 'de jure' and 'de facto' stateless are probably misleading, as the qualifying adjectives are not related to nationality or lack of nationality, but to one of its functions, namely, the diplomatic protection enjoyed by persons possessing a nationality. It would be more precise to speak of 'unprotected persons', thus including both persons devoid

[8] See for example: David Weissbrodt & Clay Collins, "The Human Rights of Stateless Persons", 2006 28 Hum. Rts. Q. 252 nt. 4; Carol A. Batchelor, "Stateless Persons: Some Gaps in International Protection" (1995) 7 Int'l J. Refugee L 258ff.; Caia Vlieks, Ernst Hirsch Ballin, & Maria José Recalde Vela, "Solving Statelessness: Interpretting the right to nationality" (2017) 35:3 *Netherlands Quarterly of Human Rights* 170.

[9] *A Study of Statelessness*, United Nations Publication No. 1949. XIV. 2. E/1112; E/1112/Add.1

> of nationality, i.e. stateless persons, and persons who, though having a nationality, are devoid of the diplomatic protection of the government of their country of nationality, i.e. refugees.[10]

Weis' re-characterization of stateless people in terms of refugee status comes from a time when the question of statelessness was intimately tied to the question and status of refugees. Van Waas reminds us that originally the two Statelessness Conventions along with the Refugee Conventions were supposed to be able to protect all unprotected people.[11]

The problem with Weis' re-definition of *de facto* statelessness is that not all *de facto* stateless people are refugees.[12] *De facto* statelessness is not always a question of persecution or asylum seeking; it is perhaps more helpfully understood as a question of access. This comes across implicitly in van Waas' nuanced recognition that the protection afforded by citizenship is not only positively given but also a question of reliance. In other words, part of citizenship is not always needing protection but being able to rely on it or have access to it.[13] We see this implicit idea of access to something more than nominal citizenship in the way Batchelor characterizes *de jure* statelessness. She writes: "The definition [of *de jure*] statelessness is not one of quality, simply one of fact." In other words, the simple fact of legal citizenship, a nominal nationality, does not immediately point to a realization of or access to any qualitative understanding of citizenship. For the purposes of my argument the distinction between *de facto* and *de jure* statelessness will occur on this fracture point, i.e.: one names a lack of legal, nominal, and procedural designation while the other points to a lack of access to what that designation *should*

---

[10] Paul Weis, "Review of *A Study of Statelessness*" (1950) 27 Brti. Y.B. Int'l L. 510

[11] Laura van Waas, *Nationality Matters*, *supra* nt. 7, pg 20.

[12] Cf. Carol A. Batchelor, "Stateless Persons: Some Gaps in International Protection", *supra* nt. 8, pg. 242. At 248, Batchelor notes that part of the source for this conflation was an attempt by the delegates for the 1954 Convention to garner more signatories by excluding the more complicated *de facto* statelessness from the Convention and focusing on the more technical and manageable *de jure statelessness.*

[13] Laura van Waas, *Nationality Matters*, *supra* nt. 5, pg 20.

mean. In other words, we are not distinguishing two kinds of statelessness. Rather we are noting that there are some people who simply do not have a designation while others regardless of that designation do not have access to the content and meaning of that designation.

De jure statelessness occurs when a state decides that a person or a group of people no longer qualify as citizens and thereby no longer garner the associated rights, privileges, or protections of that citizenship. *De facto* statelessness, on the other hand, occurs when a person or a group of people can no longer access the rights, privileges, and protections associated with the citizenships they may legally have. Thus, these people face a legal problem caused by an extra-legal force. That is to say, the cause of *de facto* statelessness is not a legal operation or mechanism. Rather, it is the radical denial of access to legal structures at all. Here again we see this moment wherein international human rights law struggles with sovereignty. Where sovereignty manifests in the form of exclusion from nationality people lose access to those rights a sovereign state is supposed to protect for them.

II.3.2 Effective nationality"?

Effective nationality (or citizenship) refers to a designation by a state which allows a citizen access to an arsenal of political power in the forms of rights. Having effective nationality means that a person can deploy this power at their caprice. In the statelessness literature a lack of effective nationality has become more or less synonymous with *de facto* statelessness. Scholars operate from the presumption that legal nationality is meaningless without the concomitant access to rights, i.e. the effectiveness of the nationality.[14]

[14] Caia Vlieks, Ernst Hirsch Ballin, & Maria José Recalde Vela, "Solving Statelessness: Interpreting the right to nationality", *supra* nt. 8, pg.172; Lindsey N. Kingston, "Statelessness as a Lack of Functioning Citizenship", (2014) Tilburg L R 19 127; Laura van Waas, *Nationality Matters*, *supra* nt. 5, pg 218; Keith Faulks, *Citizenship*, London: Routledge, 2003, pg. 8 (cited by van Waas).

There seem to be two general arguments emerging in the scholarship regarding the substance of citizenship. One deals with citizenship as a spectrum and the other conceives of it as a bundle of rights. Vlieks et al. and Kingston (following Elizabeth F. Cohen), fall in the spectral-citizenship camp. On the other hand, van Waas spends her time enumerating the fundamental rights of citizenship.

The citizenship-as-a-spectrum argument offers commentators a way to conceive of citizenship without creating in-groups and out-groups. One end of the spectrum is purely legal nationality while the other is a more enriched form of citizenship which contains rights and privileges. This is helpful for envisioning alternative shades of citizenship rather than a simple binary opposition. On the other hand, the bundle-of-rights argument allows thinkers to attempt to identify the most important or fundamental nature of citizenship.

It is possible that these two theories can be collapsed if we consider that both operate by hypothetically stripping rights away from citizenship and seeing if what is left over is still citizenship. The spectrum allows the process to occur without the normativity of the rights argument, i.e. citizenship devoid of rights *should not* be considered citizenship according to a rights-based theorist, but, for a spectrum-theorist, it is just one version of citizenship along a continuum of effectiveness. Regardless of how we define nationality or citizenship the effectiveness of that citizenship is always an issue of rights. Put differently, by whichever theory we define citizenship the pith remains that legal citizenship or citizenship in name alone provides the recipient with no rights or privileges. It is simply a designation without content.

When the First Resolution of the Final Act says that the international law community and states dealing with stateless persons should enable them to acquire effective nationality it means that we should be working to move beyond the legal or nominal form of nationality. We should

push pass that end of the spectrum and enrich the bundle of rights of which citizenship is symbolic and garner those who are non-citizens of anywhere the access to political power in the form of political effectiveness, i.e. give them an effective nationality.

III. The meaning of the First Resolution of the Final Act of the 1961 Convention

Now that we have a sense of the ideas at play in the First Resolution we can begin to examine what it means and how it might work. On the surface, the First Resolution is a simple encouragement for states to try to make it easier to deal with the complex issues of *de facto* citizenship. But, at a deeper level, the First Resolution reveals an anxiety around the law's inability to deal with *de facto* statelessness because it transcends law's jurisdiction.

Let's review the words of the First Resolution:

> The Conference
>
> Recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.[15]

Note, first, the degree to which the drafters of this resolution equivocate -- not only did they place it in the Final Act not the Articles of the Convention, they also couch it in terms of a recommendation. Furthermore, they include the phrase "as far as possible" which opens a hatch door for hard or complex cases. Thirdly, the grammar of the sentence places the burden of acquiring effective nationality on the stateless person. I rehearse all this only to emphasize that the drafters were aware of the problematic nature of this recommendation. The language of the resolution reflects an impulse to attenuate how much responsibility it places on the states to do anything it suggests. This attenuation on state responsibility echoes the disagreements during the creation of the Convention with regards to not limiting the ultimate discretion of a state over its citizenry. In other words, the construction and connotation of this recommendation contains the notion that statelessness and citizenship are two sides of the same sovereignty coin. They both are functions of the state's decision-making and law-interpreting apparatus.

If we strip away the equivocation we are left with a simple, albeit flawed, conditional: If someone is stateless *de facto,* the state should treat them as if they are stateless *de jure* so that they can garner effective nationality. Put another way this resolution asks contracting states to put aside the context of someone's statelessness and treat it as if the person only lacks a designation. Remember that *de facto* statelessness is the kind of statelessness wherein law has ceased to apply to the people. The law's lack of application is not due to some nominal mis-designation or

---

[15] United Nations Conference on the Elimination or Reduction of Future Statelessness, *supra* nt. 7.

procedural failing. Rather the context of the people and, frankly, accidents of history have conspired together rendering these people outside of any state's juridico-political machinery. The First Resolution proposes, however, that rather than recognize the systemic extra-legal situation we designate these people as simply procedurally without a state. In theory, this would allow a state to confer citizenship on them by some procedural mechanism and then, hopefully, that citizenship would carry with it some rights and privileges. Thus, the impulse behind the First Resolution is an attempt to solve a problem caused by extra-legal forces by just re-classifying it as something caused by a procedural failure.

In large part, the fact that this recommendation appears in the Final Act is what makes it so evocative. By placing it in the Final Act and not as one of the articles, the drafters recognize the importance of the sentiment but the unlikeliness of it actualizing. The United Nations characterizes the final act to a treaty in the *Final Clauses of Multilateral Treaties Handbook*:

> A Final Act is a document summarising the proceedings of a diplomatic conference. It is normally the formal act by which the negotiating parties bring the conference to a conclusion. It is usually part of the documentation arising from the conference, including the treaty, the resolutions and interpretative declarations made by participating States. There is no obligation to sign the Final Act, but signature may permit participation in subsequent mechanisms arising from the conference, such as preparatory committees. Signing the Final Act does not normally create legal obligations or bind the signatory State to sign or ratify the treaty attached to it.[16]

This passage indicates that the First Resolution has no legal force. It is simply an agreed upon guiding principle attached to the 1961 Convention. As above, its relative legal impotence actually endows the First Resolution with greater symbolism. Because it has no binding authority this Resolution *means* more than it *does*. In fact, its only real activity is meaning something. It draws attention to the ideas it contains. And it contains the optimistic recommendation that if we

[16] UN, *Final Clauses of Multilateral Treaties Handbook*, (United Nations Publication, 2007) pg. 122-23.

can just give more people nominal nationality then eventually they might be able to turn that into an effective nationality.

By way of conclusion we must hold the prima facie message of the First Resolution in relation to the implicit recognition that it is unlikely to come to pass. It is the juxtaposition of this powerful and multifaceted recommendation against its own lack of legal authority that reveals the repeated structure in statelessness. That is, once again we see how statelessness sheds light on the moment when the law must reach outside itself – where it has no power – and pull something inside of itself in a nominal way so that, in theory, it could eventually have more substantive authority over that thing.

The First Resolution recommends a strategic redefinition of *de fact* as *de jure*, but by placing it in the Final Act, the drafters accepted the difficulty (read: impossibility) of making it come to pass. Without determining with some specificity what citizenship means, just being able to designate a person as a citizen does not necessarily make them any closer to having effective nationality. Effectiveness is not a nominal or procedural question, but one of substance.

I am not the first to suggest that that without effectiveness, granting nationality to stateless people does not actually solve their problem.[17] Special Rapporteur, Manley O. Hudson, wrote the following in his report on statelessness:

> … improvement [of the position of stateless people] will be achieved only if the nationality of the individual is the nationality of that State with which he is, in fact, most closely connected, his " effective nationality ", if it ensures for the national the enjoyment of those rights which are attributed to nationality under international law, and the enjoyment of that status which results from nationality under municipal law. Purely formal solutions which do not take account of this desideratum might reduce the number of stateless persons but not the number

[17] For example: Jason Tucker, "Questioning *de facto* statelessness by looking at *de facto* citizenship", 2014 Tilburg L R 19 276; Caia Vlieks, Ernst Hirsch Ballin, & Maria José Recalde Vela, "Solving Statelessness: Interpreting the right to nationality", *supra* nt 8, pg. 160; Carol A. Batchelor, "Statelessness and the Problem of Resolving Nationality Status" *supra* nt. 8, pg.180; Lindsey N. Kingston, "Statelessness as a Lack of Functioning Citizenship", *supra* nt. 14, pg.127.

> of unprotected persons. They might lead to a shifting from statelessness de jure to statelessness de facto which, in the view of the Rapporteur, would not be desirable.[18]

Hudson's contention here is of the same ilk as my thesis. His language reveals that he is from an earlier moment in statelessness commentary, but the gist of the passage is that the effectiveness of citizenship is the only way to solve the problem of statelessness. A simply formal re-designation does not actually do anything. Hudson was arguing against just formal citizenship designations, but the logic remains the same when we apply to it re-defining *de facto* stateless people as *de jure*. This re-designation actually only makes it technically simpler to give someone a nationality. It probably does not change their context and provide them with access to the power contained in effective citizenship.

IV Conclusion: Statelessness and International Human Rights Law

In the following section I argue that looking at the rhetorical logic of statelessness allows us to identify a central anxiety in international human rights law, i.e. much of this body of law attempts to use legal solutions to solve legal problems caused by *extra-legal forces.* I want to be clear here, by extra-legal forces I mean those agents of history which have jeopardized the safety and dignity of individuals or groups. These forces exist outside of and scoff at the sovereignty of the law in ways which have encouraged law makers and theorists to insist on using non-legal justifications for legal manifestations of power.

As I argued above, the First Resolution's toothlessness compared to what it purports to do echoes an internal conflict of statelessness legislation, i.e. it attempts to use a legal solution to solve a legal problem caused by a non-legal force. Furthermore, the First Resolution's suggestion

---

[18] Manley O. Hudson, *Report on Nationality, Including Statelessness*, International Law Commission 4th Session: UN doc. A/CN.4/50, 21 Feb. 1952, 49; Cf.: Carol A. Batchelor, "Stateless Persons: Some Gaps in International Protection", *supra* nt. 8, pg. 25.

that a simple re-designation of status from *de fact* statelessness to *de jure* statelessness is the gateway to effective nationality perfectly typifies the maneuver of the law reaching outside itself to make a non-legal problem and a legal one so that it can be solved with the law. It implies that if we make someone's statelessness a question of law then we have the machinery and power to endow that legal designation with content. However, this ignores the fact that *de facto* statelessness is by definition not a problem of form but a problem of substance. Sometimes, these people already have a nationality in form, but they lack access to the substantive content which the western legal tradition has identified as a component of that nationality. Their problem is not fixed by the law because they are not within its jurisdiction.

In a similar way, international human rights law is trying to solve problems often not caused by legal forces. These are forces which undermine and humiliate people and demonstrate a general disregard for their humanity. In order to combat this, international human rights law reaches outside the artificial legal institution and attempts to use humanness as the justification for itself. That is to say, rather than suggest for legal reasons we should uphold and affirm the dignity of others, international human rights law actually makes having humanity a legal quality which grounds and justifies certain rights.

Statelessness offers a special glimpse of this structure in international human rights law. Statelessness represents the absence of a citizenship designation which lays bare the framework on which human rights law is possible. In the face of statelessness we have to contend with the fact that *mere humanity* does not garner stateless people any special set of rights. As Hannah Arendt writes:

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships-except that they were still human. The world found nothing sacred in the abstract nakedness of being human. And in view of objective political conditions, it is hard to say how the concepts

> of man upon which human rights are based […] could have helped to find a solution to the problem. [19]

Arendt notices here that human rights require reliance on the sovereign state to endow citizenship with substance in the form of these rights. Interestingly, the toothlessness of the First Resolution compared to its vigorous prima facie message operates along the same logic. That is to say that, the idea that humanness is sufficient to garnering human rights is analogous to the notion that nominal citizenship solves the problem of statelessness. In both maneuvers the law attempts to claim jurisdiction over something through a process of re-designation without definition. But, again, both maneuvers fall prey to the same fallacy, i.e. attempting to solve a substantive problem without attending to that substance. In both moments we are simply re-defining terms to allowlaw to take over control, but we are never attending to the substance of the issue. Thus, counter-statelessness legislation echoes and reveals the rhetorical logic present in the project of international human rights law in general. The fallaciousness of this logic indicates that simply writing more laws to caulk up legal lacuna only fixes the legal problems those lacuna caused; and when the law does not apply to a problem, it might be more productive to abandon legal solutions.

[19] Hannah Arendt, *The Origins of Totalitarianism*, *supra* nt. 2, pg. 299-300; Cf. 276 & 279.