

Defining Statelessness: The Conception of the Definition and Why It Matters Today

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“Statelessness is the most forgotten global human rights problem in the world today. Everyone knows what a refugee is, but many do not know what it means to be stateless.”<sup>1</sup> Stateless people are one of the most vulnerable and marginalized people in the world. Under the 1954 Convention Relating to the Status of Stateless Persons, “‘a stateless person’ means a person who is not considered as a national by any State under the operation of its law.”<sup>2</sup> Despite the global consensus on the importance of the basic right to a nationality guaranteed in the article 15 of the Universal Declaration of Human Rights, the number of stateless people continues to grow. The United Nations High Commissioner on Refugees (UNHCR) estimates there are 12 million stateless people in the world today,<sup>3</sup> while the Open Society Foundations (OSF) claims there might be as many as 15 million.<sup>4</sup> The full scope of global statelessness is unknown due to the lack of procedures to identify stateless people. This results in insufficient research and demographic data<sup>5</sup> and difficulties of addressing problems of stateless people and providing protection.

Stateless people suffer from insufficient protection and from insufficient international attention to the abuses they suffer in large part because of the complex and confusing definition of statelessness in international law. International law divides all people into those who are considered nationals by the state and those who are not; the latter includes stateless people. There is a further confusion within the definition of statelessness itself that separates all stateless people into *de jure* and *de facto* stateless granting each category different protections under international law. The complexity of the definition affects how the stateless people are identified today and the

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<sup>1</sup> Antonio Guterres. The UN High Commissioner for Refugees, extract from the speech. “Bringing Stateless ‘Out of the Shadows’.” Refugee International, (October 26, 2011), <http://refugeesinternational.org/blog/bringing-stateless-out-shadows>

<sup>2</sup> The Convention Relating to the Status of Stateless Persons, (1954), Art. 1

<sup>3</sup> The United Nations High Commissioner on Refugees Figures at a Glance: Stateless People. <http://www.unhcr.org/pages/49c3646c26.html>

<sup>4</sup> “Faces of the stateless.” Open Society Institute, <http://www.opensocietyfoundations.org/projects/statelessness>

<sup>5</sup> Bela Hovy. “Human Rights and Citizenship: The Need for Better Data and What to Do about It.” In Bhabha, Jacqueline (Ed.), *Children Without a State*, The MIT Press, Cambridge, (2011), Ch.4 (pp.89-106)

mechanisms that are developed to protect this vulnerable population.

In order to shed light on the problems one might face today trying to understand statelessness, we need to look at the historical context in which conception of the definition of statelessness took place and examine the attempts to address the issue of statelessness prior to the codification of the concept in international law by reviewing the documents from the Hague Conference (1930) and the Evian Conference (1938), the Memorandum “*Statelessness and Some of its Causes: An Outline.*” (1946), and “The Study of Statelessness” (1949), as well as the historical documents that describe the process leading to the conventions, such as the reports by the United Nations, academic and legal studies. I will elaborate on the close relationship between refugees and stateless people and review how it was addressed prior to the 1951 Convention Relating to the Status of Refugees and then in the 1954 Convention Relating to the Status of Stateless Persons itself. I will also revisit the debate about the place of *de facto* statelessness within the definition of statelessness and difficulties it created when it came to the practical application of the definition. Based on the documents reviewed for this paper, there is evidence that the way definition of statelessness was developed in international law might have been influenced by historical context. At the time of codification of the concept of statelessness, it was separated from the problem of refugees despite the fact that prior to the codification statelessness was viewed solely within the refugee problem. I believe that separation of the refugees and stateless people in international law and the introduction of the concept of *de facto* statelessness, which was not later included in the Convention on Statelessness, have contributed to the confusion we have today about the definition of statelessness. Finally, I will conclude my paper with the contemporary example of how the complex and confusion definition of statelessness makes it difficult to identify stateless people today and, therefore, provide them with protection

they need.

### *What is statelessness?*

Under the Universal Declaration of Human Rights, all people regardless of their nationality or lack of one are guaranteed protection of their rights. However, in practice, states use nationality to regulate who gets access to certain resources and who can benefit from the protection of the state. The relationship between a state and a national of the state creates a legal bond with rights and obligations. “The importance of the right to a nationality –and the reason why the statelessness issue is so important – is that having a nationality is a gateway to other rights.”<sup>6</sup> Stateless people do not belong or owe allegiance to any state because they do not have a nationality; therefore, they might face significant difficulties to benefit from the protection and security of any country because they are not allowed to vote or hold public office, and so are excluded from the participation in the political and civil life of a country.<sup>7</sup> They face many barriers, often including but not limited to the denial of education, health care, housing, formal employment, due process, and ability to travel freely. In addition, they are often subject to violence, discrimination, and trafficking in persons.<sup>8</sup>

Statelessness can result from different circumstances, but all researchers that I reviewed for this paper agree that minority communities and children are particularly affected by the problem of statelessness. Political change and break ups of states, legal differences between countries, forced expulsion, discrimination, renunciation of citizenship, complex inequitable laws regulating marriage and birth registration leading to failure or inability to officially register

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<sup>6</sup> Andrés Ordóñez Buitrago. “Statelessness and Human Rights: The Roles of the United Nations High Commissioner for Refugees (UNHCR). EAFIT University, Medellín, Colombia, Vol. 2, 02, (July-December 2011), 11

<sup>7</sup> Indira Goris, Julia Harrington, Sebastian Kohn. “Statelessness: What It Is and Why It Matters.” *Forced Migration Review* 32 (Apr 2009), 4-6.

<sup>8</sup> Katherine Southwick and Maureen Lynch. “Nationality Rights for All: A Progress Report and Global Survey on Statelessness.” *Refugee International*, (March 2009), <http://www.refugeesinternational.org/policy/in-depth-report/nationality-rights-all>

children are among main factors that lead to statelessness.<sup>9</sup> When states cease to exist, break up, or their territories are transferred and an individual does not obtain new citizenship, he or she can become legally stateless, as it happened after the dissolution of the Soviet Union and Yugoslavia.<sup>10</sup> There are two universal principles to grant citizenship, which are based either on the place of birth (*jus soli*) or family heritage and descent (*jus sanguinis*).<sup>11</sup> In most countries nationality laws incorporate both of these principles. However, when nationality is granted through paternal descent alone, single women, women living apart from children's fathers, and women married to stateless persons might not be able to pass their nationality on to their children or face significant difficulties to do so; therefore, their children can become stateless.<sup>12</sup> When migrant women from South Asia involved in sex work in Japan abandon their newborns, these children become stateless because under Japanese laws they are not eligible for Japanese nationality based on the place of birth and cannot inherit a nationality of their absent fathers or mothers, who are unwilling to recognize them.<sup>13</sup> In addition, if domestic laws only grant nationality through parental descent, a child born to two stateless parents would also become stateless, as happens in Kuwait, where nationality laws provide no mechanism for the children of stateless parents to acquire a nationality at birth.<sup>14</sup> In Lebanon, if a woman is married and has a child with a stateless man, neither of them can pass their nationality to their children.<sup>15</sup> Dependent nationality, rooted in the discrimination against women, is another mechanism that can lead to statelessness.<sup>16</sup> For example, some countries, such as Iran, deprive a woman of her

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<sup>9</sup> "Statelessness." Refugees International, (March 7, 2008), par. 2, <http://www.refugeesinternational.org/what-wedo/statelessness>

<sup>10</sup> Clay Collins, David Weissbrodt. "The Human Rights of Stateless Persons." Human Rights Quarterly 28 (February 2006), 262

<sup>11</sup> Ibid., 254

<sup>12</sup> Ibid., 254-256

<sup>13</sup> Sachiko Sakamaki. "Stateless Children." Far Eastern Economic Review 157, 3 (Jan 20, 1994), 38

<sup>14</sup> Collins; Weissbrodt, 255

<sup>15</sup> Amal De Chickera. "Critiquing the Categorization of Statelessness" in Unraveling Anomaly: Detection, Discrimination and the Protection Needs of Stateless People. The Equal Rights Trust, (July, 2010), 57

<sup>16</sup> Collins, Weissbrodt, 257

nationality, if she marries a non-national.<sup>17</sup> If a state of husband's nationality does not provide access to a new nationality or strips a woman of her new nationality in the case of divorce or death of her spouse and a woman is unable to obtain her former nationality back, she is in danger of becoming legally stateless.<sup>18</sup>

In addition, racial and ethnic discrimination are often the underlying factors of statelessness. The denial of a nationality or creating the obstacles to obtain one are used by the states as tools to marginalize the already vulnerable groups of people. Even in cases when a state grants nationality based on *jus soli* principle, discrimination could still lead to exclusion and statelessness. For example, when a child of a Burmese asylum seeker is born in a Thai hospital, the birth record is destroyed because the parents are illegal migrant workers.<sup>19</sup> The Burmese government also denies responsibility considering that many of the parents are not registered and, therefore, are not considered nationals of Burma.<sup>20</sup> We will come back to why children are specifically vulnerable in the section about Dominicans of Haitian descent in the Dominican Republic. Another example of ethnic discrimination is the case of the Muslim minority of Rohingya. The Rohingya fled to Bangladesh fearing persecution from the military regime in Burma but was denied official refugee status in Bangladesh. Unrecognized by either country, the Rohingya are legally stateless.<sup>21</sup> The Roma minority, who for centuries had faced discrimination and exclusion, is another example of this problem. When the Roma in the Balkans fled to escape violence between ethnic Albanians and Serbs, they were put in refugee camps. Since many Roma do not have legal documentation to prove their identity or prior place of residence, they face

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<sup>17</sup> Amal De Chickera, "Critiquing the Categorization of Statelessness" in *Unraveling Anomaly: Detection, Discrimination and the Protection Needs of Stateless People*. The Equal Rights Trust, (July, 2010), 58

<sup>18</sup> *Ibid.*, 58

<sup>19</sup> Maureen Lynch, Melanie Teff. "Childhood Statelessness." *Forced Migration Review*, Refugee Studies Center, University of Oxford, 32 (April, 2009), par. 6

<sup>20</sup> *Ibid.*, par. 6

<sup>21</sup> "We are Rohingya." Open Society Institute, [http://www.soros.org/indepth/stateless/who\\_it\\_affects/rohingya.html](http://www.soros.org/indepth/stateless/who_it_affects/rohingya.html)

tremendous difficulties in returning home after the conflict not only because of the break up of Yugoslavia, but also because of the perpetuating cycle of discrimination they continue to face.<sup>22</sup>

From the general overview of statelessness above, it is clear that stateless persons are “a rather amorphous group.”<sup>23</sup> Because the definition of statelessness is complex and confusing, it is often applied to groups of people who are not legally stateless under the definition in international law but fall into legal limbo because their status is hard to determine or because they are not able to access protection of their home state. To understand the debate that surrounds the confusing and complex definition of statelessness today and the difficulties it creates for the identification of stateless people, we first need to review the history of the conception of the definition of statelessness.

### ***Statelessness after the First World War***

The concept of statelessness existed on international arena before its codification in the Convention Relating to the Status of Stateless Persons in 1954, which became a major international agreement on the identification of statelessness people and regulation of their status. As of April 04, 2012, The Convention Relating to the Status of Stateless Persons has 82 signatories.<sup>24</sup> The Statelessness Convention is significant because it represents an effort to define the status of unprotected persons who are not refugees.<sup>25</sup> It has followed by the Convention on Reduction of Statelessness (1961), which obligates states to grant citizenship to children born on their territory or to their nationals abroad and focuses on preventing states from simply depriving their citizens of a nationality granted by Article 15 of the Universal Declaration of Human

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<sup>22</sup> “We are Roma.” Open Society Institute, [http://www.soros.org/indepth/stateless/who\\_it\\_affects/roma.html](http://www.soros.org/indepth/stateless/who_it_affects/roma.html)

<sup>23</sup> Paul Weis. “The Convention Relating to the Status of Stateless Persons.” *The International and Comparative Law Quarterly*, Vol. 10, No.2 (Apr., 1961), 263

<sup>24</sup> United Nations Treaty Collection, [http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg\\_no=V~3&chapter=5&Temp=mtdsg2&lang=en#3](http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en#3)

<sup>25</sup> Weis, 263

Rights.<sup>26</sup> While other regional treaty standards and international human rights law supplement these conventions, these two conventions are unique global instruments for the protection of stateless people.<sup>27</sup> To understand the historical context in which codification of the definition of statelessness took place, we will first review the pre-Convention documents mentioned in the purpose statement. For the purpose of this paper, we will concentrate on the first Statelessness Convention (1954), in which the definition of statelessness was codified.

### *1. Refugee Crisis after the First World War and the Problem of National Minorities*

The first attempts to address statelessness as an international issue appeared after the First World War. That war resulted in many refugees in Europe, mostly Russians (almost a million) fleeing civil war and revolution, as well as Armenian refugees fleeing extreme violence,<sup>28</sup> that now classify as genocide.<sup>29</sup> However, after WWI, in comparison to the refugee problem, statelessness was not considered to be a major issue because the number of stateless people, who were not also refugees at the same time, was limited.<sup>30</sup> Therefore, the concept of statelessness was only viewed within the framework of the refugee problem, because only people who were refugees but were also stateless were under discussion.<sup>31</sup> The issue of refugees was rooted in discrimination of national minorities, who fled persecution in their home states by crossing borders into neighboring countries. The problem of discrimination against national minorities was addressed in the post-war treaties, which Czechoslovakia, Greece, Yugoslavia, and Romania were pressured by the great powers to sign; Poland had to commit to specific protections for their

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<sup>26</sup> “The Convention on the Reduction of Statelessness with an Introductory Note by the Office of the United Nations High Commissioner for Refugees.” (1961), 3 <http://www.unhcr.org/3bbb286d8.html>

<sup>27</sup> “UN Conventions on Statelessness: Key for Protecting the Stateless.” UNHCR, par.1, <http://www.unhcr.org/pages/4a2535c3d.html>

<sup>28</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, 5

<sup>29</sup> “Excerpts from the UN Report on Genocide 1985: Paragraph 24 and the Armenian Genocide.” United Nations Commission on Prevention of Discrimination and Protection of Minorities.” (August 5-30, 1985, Geneva), 1

<sup>30</sup> “The Study of Statelessness,” 4

<sup>31</sup> *Ibid.*, 4



Jewish residents in these treaties.<sup>32</sup>

## 2. *Passport restrictions*

The newly created League of Nations was put in charge of enforcement of the minority treaties, which in 1921 created the first High Commissioner for Refugees office headed by a Norwegian delegate, Fridtjof Nansen. The task of the High Commissioner's Office was to help "repatriate hundreds of thousands of refugees as well as helping them to acquire legal status and attain economic independence."<sup>33</sup> Nansen was the founder of the first legal instrument for the protection of refugees, known as Nansen passport. These were issued to refugees as identification papers. Prior to WWI there was no serious administrative problems when a person moved between the states. Even though passports existed in a number of states, they were mostly "diplomatic instruments to designate a person requiring or requesting a special attention" and were never a main concern for officials.<sup>34</sup> However, during the war states were eager to close their borders to unwanted migrants as well as to prevent their needed workforce from leaving. Therefore, passports helped to enforce the new regulations restricting travel because they identified a person's nationality and either allowed or prevented one from entering.<sup>35</sup> Introduction of passports during the war was a crucial turning point in how the interstate migration was handled because an earlier irrelevant proof of nationality became a necessary credential for travel.

Passport restrictions made life difficult for many refugees in the 1920s.<sup>36</sup> Refugees from the Soviet Union, who either had some sort of documentation from the failed Tzar's regime or other forms of documentation from military commanders and municipal officers could not secure

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<sup>32</sup> Michael Marrus. *The Unwanted: European Refugees in the Twentieth Century*. Oxford University Press, (1985), 70

<sup>33</sup> "Nansen – a man of action and vision." UNHCR, (September 14, 2009), <http://www.unhcr.org/4aae50086.html>

<sup>34</sup> Marrus, 92

<sup>35</sup> *Ibid.*, 92

<sup>36</sup> *Ibid.*,93

entry visas to the countries where they intended to seek asylum.<sup>37</sup> As the Soviet regime stabilized, many groups of people were labeled as “class enemies” and forbidden from taking part in the social and political life of the country; these people were forced to flee political repression.<sup>38</sup> Many of these refugees were Jews from the east, who were not welcomed in places like Romania and Poland. These states issued visas for refugees to move along to seek asylum elsewhere, but without proper identity documentation they were not allowed to enter other countries and were forced to remain in the states where they were unwanted.<sup>39</sup> Armenian refugees to Western Europe experienced similar problems because they lacked documentation to prove their origins. “Having lived under the Ottoman Turks, the infant Armenian Republic, or the tsarist empire, they were often the very model of statelessness, coming from regions Westerners hardly knew existed.”<sup>40</sup> Without international guidelines to handle these cases, it was difficult to establish their nationality. In 1922 sixteen nations approved the Nansen passport, which was meant to serve as a valid identity document providing refugees with a judicial status through a specific international agreement, and allowed an international agency, the High Commission, to act on behalf of those who were rejected by the countries of their origins.<sup>41</sup> By 1928, the Nansen passport was recognized by fifty-one governments and became one of the most significant achievements to protect refugees and stateless people, most of whom were refugees from the Soviet Russia.<sup>42</sup> However, by the mid-1920s the Russian refugee situation stabilized, once the countries of distribution became clear. The Russians had moved away from Poland, Germany and the Balkans further to the West, relieving the pressure from these countries.<sup>43</sup>

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<sup>37</sup> Michael Marrus. *The Unwanted: European Refugees in the Twentieth Century*. Oxford University Press, (1985), 93

<sup>38</sup> *Ibid.*, 95

<sup>39</sup> *Ibid.*, 94

<sup>40</sup> *Ibid.*, 94

<sup>41</sup> *Ibid.*, 95

<sup>42</sup> *Ibid.*, 95

<sup>43</sup> *Ibid.*, 96

However, as was mentioned above, statelessness was not recognized as a valid issue at that time because the number of cases was limited; it was only viewed within the larger and more urgent problem of refugees because most people who could fall under the category of stateless were first of all refugees.

### *3. The Hague Conference*

The first attempts to address cases of statelessness in the international arena were made at the Hague Conference, in April of 1930, where the Convention on Certain Questions relating to the Conflict of Nationality Laws was adopted and a Special Protocol concerning Statelessness was created.<sup>44</sup> This protocol provided some guidelines for dealing with people who lost their nationality without acquiring another, in order to handle some of those special cases where a nationality was undetermined. Article 1 of the Special Protocol states that “if a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is.”<sup>45</sup> However, this protocol has not entered into force lacking the required number of ratifications.<sup>46</sup> On the other hand, The Convention concerning the International Status of Refugees was signed in October of 1933 by Belgium, Bulgaria, Czechoslovakia, Denmark, France, Italy, Norway, the United Kingdom and was a great achievement to guarantee protection of refugees who were admitted on the territory of the signatory states. At the same time, further attempts not only to address statelessness but to even understand its nature and the scope were not taken until the end of WWII, which compared to WWI, resulted in millions more refugees. What was different after WWII is that many of refugees, such as German and Austrian Jews,

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<sup>44</sup> “Special Protocol Concerning Statelessness.” League of Nations. The Conference for the Codification of International Law, (April 12, 1930)

<sup>45</sup> “Special Protocol Concerning Statelessness,” Art. 1

<sup>46</sup> Weis, Paul. *Nationality and Statelessness in International Law*. Sijthoff and Noordhoff International Publishers B.V. Alphen aan den Rijn, The Netherlands, (1979), 27

were deliberately deprived of their nationality by the state and others were not qualified for a refugee status under the definition but possessed no nationality at the same time.

### ***Fascist regime prior to WWII and the attempts to handle the refugee crisis***

#### ***1. "The Jewish problem"***

The numbers of displaced persons seeking refuge outside of the country of their residence continued to grow with the establishment of fascist regimes in Europe in 1930s. It resulted in one million German Jewish refugees, and the numbers increased, adding refugees from fascist regimes in Italy and, Spain, and non-Aryan Catholics in Germany.<sup>47</sup> The year 1938 epitomizes the turning point for Jews in the Third Reich, when the Nazi regime radicalized and the repression against Jews accelerated, leaving them "practically helpless" in their own state.<sup>48</sup> Governments and refugee organizations became increasingly concerned about the emerging refugee problem in Europe. By 1938, indeed, the general tendency was to see the refugee problem as the "Jewish problem."<sup>49</sup> The number of Jewish refugees doubled from the beginning of 1938 to mid-1939.<sup>50</sup> In 1938, an International Convention Concerning the Status of Refugees Coming from Germany replaced the 1936 Provisional Agreement Concerning the Status of Refugees Coming from Germany. Belgium, France and the United Kingdom signed the convention in Geneva.<sup>51</sup> Even though the Convention covers topics of welfare, education, labor conditions, and rights to due process, it does not mention a key principle of non-refoulement. Non-refoulement means that a person who seeks asylum cannot be turned back to the country he or she is fleeing from until there is a legal decision on whether the asylum is granted or not. In other words, it provides asylum-seekers with temporary safety until the court reviews their claim.

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<sup>47</sup> "Evian Conference on Political Refugees." *Social Science Review*. 12:1/4 (March/December 1938), 515

<sup>48</sup> Michael Marrus. *The Unwanted: European Refugees in the Twentieth Century*. Oxford University Press (1985), 176

<sup>49</sup> *Ibid.*, 178

<sup>50</sup> *Ibid.*, 178

<sup>51</sup> "Statelessness and Some of its Causes: An Outline." Intergovernmental Committee on Refugees (March, 1946), 10

The absence of a non-refoulement clause meant that there was no guarantee for the German refugees that they would not be sent back to the Reich where their lives and freedom were endangered.

## *2. Evian Conference*

In addition, the Evian Conference was organized in France in 1938 to discuss the increasing number of Jewish refugees fleeing Nazi persecution. U.S and many Latin American countries in addition to the Western European states have attended the Conference. During this Conference, the was lobbying to secure resettlement in North America of German Jews, the largest group of refugees, who were otherwise not welcomed in any European country. However, these hopes were shattered. The U.S. made it clear that despite the findings of the Conference, it was not going to increase its low annual quota of 27,000 admitted people from Germany, while France and the United Kingdom were not willing to take any refugees at all, claiming overpopulation.<sup>52</sup> Some countries, such as the Dominican Republic, Columbia, Mexico, and Peru despite welcoming speeches were not ready to accommodate Jewish refugees. They explained it with the lack of resources and different immigration needs. These countries claimed their need for agricultural labor and considered German Jews not to be a good fit for it.<sup>53</sup> At that point German Jews were already referred as “men and women without a country”<sup>54</sup> – a term that was used later and is still used today to describe stateless people. According to the analysis of the Conference, many delegates, including an American delegate Myron Taylor, emphasized the urgency to address the issue of German Jews, whom no country wanted to take; he warned other delegates about “catastrophic human suffering ahead, if no action was going to take place.”<sup>55</sup> A

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<sup>52</sup> “Evian Conference on Political Refugees.” *Social Science Review*. 12:1/4 (March/December 1938), 516

<sup>53</sup> *Ibid.*, 517

<sup>54</sup> *Ibid.*, 518

<sup>55</sup> *Ibid.*, 518

small result of this conference was the agreement on establishment of the inter-governmental organization to deal with the issues of refugees. However, it was not created until after WWII in 1946, under the same name originally proposed – International Refugee Organization (IRO), and was replaced by the United Nations High Commissioner on Refugees in 1952.<sup>56</sup> But for the most part, the Evian Conference was simply a discussion resulting in no real action to address the problem of Jewish refugees.<sup>57</sup> In light of the Holocaust, the Evian Conference has been condemned as “an exercise in Anglo-American collaborative hypocrisy.”<sup>58</sup>

In practice, Jewish officials in Europe started sending refugees to uncertain destinations in Central and South America. However, they faced the unwillingness of these states to accept Jews. Michael Marrus describes how one ship with 930 refugees from Germany traveled to Cuba and eventually had to come back to Europe ending up in the countries eventually occupied by Hitler, who by the middle of the war was determined to annihilate the Jewish people.<sup>59</sup> Only after WWII, resulting in millions of displaced people and the establishment of the United Nations serving as a platform for addressing the refugee crisis, did the international community mobilized again around the refugee issue.<sup>60</sup>

***The Cases of Statelessness and the Memorandum “Statelessness and Some of Its Causes: an Outline”***

After WWII, there were millions of refugees in Europe. The concrete numbers vary because at that time there was still no unified system to record the flow of refugees.<sup>61</sup> The United Nations Relief and Rehabilitation Administration (UNRA) was established in 1943 on behalf of

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<sup>56</sup> Guy Goodwin-Gill. “Convention relating to the Status of Refugees (Geneva, 28 July 1951) and Protocol relating to the Status of Refugees (31 January, 1967), Introduction; par. 2, <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>

<sup>57</sup> “The Evian Conference on Refugees.” The Bulletin on International News. Vol. 15, No 14. Royal Institute of International Affairs (July 16, 1938), 610

<sup>58</sup> Ronnie S. Landau. *The Nazi Holocaust*. I.B.Tauris (2006), 137–140.

<sup>59</sup> Michael Marrus. *The Unwanted: European Refugees in the Twentieth Century*. Oxford University Press (1985), 177

<sup>60</sup> “The 1951 Convention relating to the Status of Refugees and its 1967 Protocol.” UNHCR (September 2011), 1

<sup>61</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, 4

the United States and became a part of the United Nations in 1945. The purpose of UNRA was to provide emergency help to displaced people, and later to assist them, along with the International Refugee Organization, with either voluntary return to their home countries or resettlement in the new countries, if they were refugees.<sup>62</sup> Since the issue of refugees was widely discussed before WWII, which resulted in the conventions discussed earlier in this paper, the UNRRA officers were specifically trained to identify refugees in order to provide assistance. Refugee is a different category from simply a displaced person because, as it was later defined in the 1951 Convention relating to the Status of Refugees, because to be qualified as a refugee one must satisfy a fear of persecution clause. A refugee is a person who suffers a “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>63</sup>

However, UNRA and IRO officers also came across “numerous cases of undetermined nationality, or [of] persons claiming to be stateless,”<sup>64</sup> whom officials had difficulties categorizing to determine the form of assistance having no guidelines on how to address these cases. To help representatives of the IRO and UNRA deal with these cases “in their daily task of assessing claims of statelessness,”<sup>65</sup> the Intergovernmental Committee on Refugees, which was formed at the Evian Conference in 1938 by 31 of the 32 participating states, distributed a Memorandum called “Statelessness and Some of its Causes: An Outline.” It is important to

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<sup>62</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, (August, 1949), 4-5

<sup>63</sup> The Convention Relating to the Status of Refugees (1951), Art. 2

<sup>64</sup> *Statelessness and Some of its Causes: An Outline.*” Intergovernmental Committee on Refugees (March, 1946), 2

<sup>65</sup> *Ibid.*, 1

mention that the Intergovernmental Committee did not have mandate over stateless people but was forced to create some guidelines precisely because no other entity had an authority to do so while millions of people needed immediate assistance<sup>66</sup> and UNRA officers did not know what to do. That is why, in the Memorandum the Intergovernmental Committee asks for collaboration from the officials who work on the ground in order to revise the Memorandum if the new situations that can be classified as statelessness arise.<sup>67</sup>

The Memorandum is the first significant attempt to explain the term statelessness and to provide some guidelines for the identification of stateless people. The Memorandum defines “‘stateless’ as an individual whom no country recognizes as possessing its nationality,”<sup>68</sup> the term used later in the Convention Relating to the Status of Stateless People. However, it is not clear where the definitions come from and how this term was negotiated since the outline does not have any citations or references. The Memorandum also explains the reciprocal relationships between the nationals of a state and a state “through the medium of their nationality”<sup>69</sup> whether the nationals are inside of their states or abroad. According to the general principles of international law, because of these reciprocal relationships, the national is entitled to protection of their diplomatic representatives while abroad. On the other hand, a stateless person is deprived of these protections because he or she does not belong to any state.<sup>70</sup> The Memorandum also addresses some of the ways of how people could have become stateless as a result of the reorganization of Europe after WWII and, especially, the collapse of Nazi Germany. It is stated

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<sup>66</sup> “*Statelessness and Some of its Causes: An Outline.*” Intergovernmental Committee on Refugees (March, 1946), 1

<sup>67</sup> *Ibid.*, Ch. II

<sup>68</sup> *Ibid.*, 3

<sup>69</sup> *Ibid.*, 3

<sup>70</sup> *Ibid.*, 3



that the outline has been prepared for the IRO representatives “notably in the Western Zone of Germany and Austria,” where these undetermined cases were most numerous.<sup>71</sup>

In a short twenty-four page outline, the Memorandum goes into further differences within statelessness and lays out the possible ways one can become stateless. In particular, the Memorandum mentions the differences between *de facto* and *de jure* stateless. The fact that the distinction within the definition of statelessness was drawn prior to the drafting the Convention or even studying statelessness to understand how to approach it is important for the purposes of this paper. It is important because the difference between *de jure* and *de facto* stateless continues to be debated every time there is a discussion about extending the limits of the definition of statelessness in response to the historical changes.

According to the Memorandum, *de facto* stateless are the persons who, just like *de jure* stateless, “do not enjoy the protection of any Government,” however, what makes *de facto* stateless different is that the latter are formally denationalized by their own state.<sup>72</sup> For example, German Jews were regarded as German nationals up until the mass denationalization in 1941, which made them *de jure* stateless. However, the term for their status prior to denationalization is *de facto* stateless because the state deliberately refused to provide protection to specific national groups even though they were still officially German nationals.<sup>73</sup> Moreover, the Memorandum goes into further distinctions between the lack of temporary protection and *de facto* statelessness making the definition of statelessness a multilayered term years before the need to codify the concept was even addressed. The difference between *de facto* statelessness and the temporary lack of protection seems to evolve around the state’s deliberate refusal to provide protection to its citizens in the first case, while in the second case, the state is unable to

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<sup>71</sup> “*Statelessness and Some of its Causes: An Outline.*” Intergovernmental Committee on Refugees (March, 1946), 2

<sup>72</sup> Hugh Massey. “UNHCR and De Facto Statelessness,” UNHCR Division of International Protection, (April 2010), 3

<sup>73</sup> “*Statelessness and Some of its Causes: An Outline,*” 4

maintain diplomatic and consular representation in the territory for some time due to military occupation by a foreign power, absence of a diplomatic recognition, etc. For example, the Memorandum describes the situation of refugees from the Soviet Union as the one where they only lack temporary protection and are not *de facto* stateless. However, it is unclear how the time frame for “temporary” in the case of the refugees from Soviet Russia was defined since it was still an ongoing situation at the time of the writing of the Memorandum. The situation of German Jews, on the other hand, was classified as *de facto* stateless prior to denationalization laws but only in retrospect; this term was not used during Nazi regime. Nevertheless, the references in the Memorandum to the multiple layers of the definition without further elaboration on where these definitions come from and how they were negotiated, seems to epitomize the confusion that follows statelessness into its modern conception. We will return to of *de facto* and *de jure* statelessness later in the discussion about the Statelessness Convention.

### ***The Nuremberg Laws: an example of de jure statelessness***

The Memorandum “*Statelessness and its Causes: An Outline*” looks into some cases of statelessness in European countries and the Soviet Russia due to the re-organization of the borders; however, it identifies that a vast majority of cases involved Jewish refugees. According to the Memorandum, the case of Jews was different from some post-WWI cases of undetermined nationality precisely because German Jews were deliberately denationalized through a decree dated on November 25, 1941.<sup>74</sup> In 1935, German nationality laws, known as Nuremberg Laws, introduced a new concept, which divided all nationals into two separate groups: citizens of the Reich and other German nationals.<sup>75</sup> German Jews were not legally stateless up until 1941, when denationalization took place and the Holocaust started. Prior to this, despite not being granted the

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<sup>74</sup> Hugh Massey. “UNHCR and De Facto Statelessness,” UNHCR Division of International Protection, (April 2010), 3

<sup>75</sup> Ibid., 3

right to be citizens of the Reich with their civic rights and military obligations, they were still regarded as German nationals, and they were able to leave the country.<sup>76</sup> However, in 1941, all German Jews, whether they lived abroad or in Nazi Germany, were deprived of their nationality and became stateless.<sup>77</sup> When the war was over, German and Austrian Jews were not only refugees, but were also stateless. However, as it was discussed above, the attempts to address statelessness came only after the end of war resulting in the global refugee crisis.

*Moving towards the Statelessness Convention: “The Study of Statelessness” as an attempt to understand the issue of statelessness*

After the Second World War, the Universal Declaration of Human Rights (1948) proclaimed the right to a nationality in the Article 15: “Everyone has the right to a nationality. No one shall be arbitrary deprived of his nationality nor denied the right to change his nationality.”<sup>78</sup> The inclusion of the right to a nationality into the UDHR opened doors to search for the new ways of dealing with the unprecedented number of stateless people. To better understand the newly recognized phenomenon of statelessness, the Human Rights Commission requested the Economic and Social Council (ECOSOC) to conduct a study of the existing situation of stateless people and develop recommendations. ECOSOC conducted “The Study of Statelessness” in 1949 through which it emphasized the need to bring stateless people into the orbit of the law. “The Study of Statelessness” serves as a great historical record that provides data and describes context in which the definition of statelessness was developing. In addition, the findings and recommendations of the Study and the actual outcomes during codification of the definition of statelessness help us understand why today we have a confusing and complex definition of statelessness, which I will address later in the paper.

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<sup>76</sup> Hugh Massey. “UNHCR and De Facto Statelessness,” UNHCR Division of International Protection, (April 2010), 3

<sup>77</sup> Ibid., 4

<sup>78</sup> The Universal Declaration of Human Rights, Article 15

In a brief historical overview of statelessness the study stated that until the end of WWI, which resulted in socio-political and territorial changes, “statelessness was a limited phenomenon and consequently did not greatly disturb international life.”<sup>79</sup> However, it became a problem after the influx of refugees as a result of WWII, which the study refers to as “statelessness... [of] unprecedented proportions.”<sup>80</sup> Today many researchers find the interchangeable use of the terms statelessness and refugees confusing because we have two separate conventions on each issue; however, it might not have been confusing at that point of history simply because stateless persons were viewed only within the refugee problem framework. “No account has been taken of stateless persons who are not refugees. The only thing that can be said is that their number is limited,”<sup>81</sup> said the study in reference to the statistics regarding stateless people. This is important because the study would be a main guide for drafting the Convention Relating to the Status of Refugees, in which the issue of statelessness was meant to be addressed as an additional tool for protection in the form of the protocol.

As a result of this Study, a number of solutions were proposed, which can be categorized into two opposite propositions:

- 1) to create a separate convention
- 2) or to draft a protocol in addition to the existing 1933 and 1938 conventions.<sup>82</sup>

First of all, creating an additional convention to the two existing Refugee Conventions was considered “a needless and unjustifiable complication” because it would have required separating refugees and stateless people and dividing stateless people into different classes depending on who could benefit from the earlier refugee conventions and who might require

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<sup>79</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, 5

<sup>80</sup> Ibid., 5

<sup>81</sup> Ibid., 5

<sup>82</sup> Ibid., 64-68

additional protective mechanisms.<sup>83</sup> The study says that creating a completely new convention on statelessness though might look like an option in a “search for apparent simplicity, runs the risk of jeopardizing the results already obtained,” thus, is an “untenable” solution.<sup>84</sup> On the other hand, simply extending the protections of the two existing Refugee Conventions to the new categories of people by adopting an additional protocol on statelessness was presented as a simple and fast solution.<sup>85</sup> However, the parties to the 1933 and 1938 Refugee Conventions had to also sign and ratify the protocol on statelessness for it to enter into force, which could have posed some problems. This, as we will see later, is important because the states missed the opportunity to sign the 1951 Refugee Convention and the Protocol on Statelessness at the same time in order to avoid potential problems that were discussed in the Study of Statelessness. Moreover, what was described in the Study as an “untenable” solution mentioned above was transformed into a feasible one as a result of circumstances rather than a tactics when the states pursued the Statelessness Convention instead of the protocol, which we will discuss later in the paper.

In addition, like the Memorandum, “The Study of Statelessness” draws the distinction between *de jure* and *de facto* stateless people in the same manner, without providing references to the discussion of the origins of these terms or negotiations that took place. This is also important for understanding why the concept of statelessness is so complex, since the distinctions between *de jure* and *de facto* are continuously used in academic, legal, and policy papers without clear agreement on what these terms mean. “The Study of Statelessness” also advocated for the establishment of an independent intergovernmental organ to provide stateless

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<sup>83</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, 66

<sup>84</sup> Ibid., 67

<sup>85</sup> Ibid., 66

people with some services and protections to make up for the absence of national protection, which otherwise should be granted to the nationals by their states, when they are abroad.<sup>86</sup>

***Failure to adopt the Protocol on Statelessness to the Convention Relating to the Status of Refugees in 1951***

As it was described above, “The Study of Statelessness” suggested that extending the protections of the two existing Refugee Conventions and the new planned Refugee Convention to stateless people in the form of the protocol was a simple and fast solution. As a result, it was decided a year later at the meeting of the Ad Hoc Committee on drafting the Refugee Convention, that an additional Protocol on Statelessness would be a better tool to address the specific cases of people, whose situation and needs might have been very similar to refugees, but due to the lack of a nationality required a separate category. The idea behind an additional protocol was based on a belief that even though all refugees were stateless whether in law or practice, not all stateless people could be qualified as refugees unless they could prove a fear of persecution<sup>87</sup> based on race, religion, nationality, membership of a particular social group or political opinion, were outside the country of their nationality and were unable to return to their home countries.<sup>88</sup> For example, German Jews, many of whom were denationalized but were technically still on German territory, might not have been eligible for the refugee status because to be qualified as a refugee, including those who had no nationality, one had to be outside of the country of his or her nationality or country of the former habitual residence. Many of German Jews were still inside of their home state and were not eligible for refugee status. Therefore, these types of cases required a special category.

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<sup>86</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, 69-71

<sup>87</sup> Paul Weis, “The Convention Relating to the Status of Stateless Persons.” *The International and Comparative Law Quarterly*, Vol. 10, No.2 (Apr., 1961), 259

<sup>88</sup> *The Convention Relating to the Status of Refugees*, (1951)

For the purpose of drafting a protocol, the UN Economic and Social Council (ECOSOC) created the Ad Hoc Committee consisting of the representatives of thirteen governments. The draft of a new Convention Relating to the Status of Refugees and a Protocol Relating to the Status of Stateless Persons were completed on February 16, 1950. It was agreed in the draft of the Protocol to the Convention Relating to the Status of Refugees that “certain provisions of the Convention should apply *mutatis mutandis* [changing only the things that need to be changed] to stateless persons who are not refugees in the sense of the Convention;”<sup>89</sup> it was also agreed to define stateless persons and address their specific situation in the additional protocol.

The Conference of plenipotentiaries on the Convention Relating to the Status of Refugee took place in Geneva in 1951 with 26 states represented by delegates and two governments by observers present. During the Conference the draft of the Refugee Convention and the draft of the Protocol on Statelessness were presented for signatures. The delegates were familiar with the draft of Convention Relating to the Status of Refugees and it was adopted by 24 votes to none; at the same time, the members of the Conference did not deal with the substance of the draft of the Protocol on Statelessness.<sup>90</sup> Paul Weis, who served as a legal adviser at the Office of the United Nations High Commissioner for Refugees, in his overview of the Statelessness Convention says that one of the reasons why the Conference has not pursued the Protocol was because they “did not find time to deal with the draft of Protocol.”<sup>91</sup> However, there could be other latent reasons that influenced the decision not to deal with the Stateless Protocol that were not apparent in the historical documents reviewed for this paper. The draft of the Statelessness Protocol was transferred to the United Nations to present to participants of the Conference and to comment on

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<sup>89</sup> Paul Weis, “The Convention Relating to the Status of Stateless Persons.” *The International and Comparative Law Quarterly*, Vol. 10, No.2 (Apr., 1961), 256

<sup>90</sup> Nehemiah Robinson. *The Convention Relating to the Status of Stateless Persons: Its History and Interpretation*. Institute of Jewish Affairs, World Jewish Congress, New York, (1955), 5

<sup>91</sup> Weis, 256

which specific provisions of the Refugee Convention they would also apply to stateless people once the Protocol was going to be open for signatures after the Refugee Convention had entered into force.<sup>92</sup> The new conference on the revision and adoption of the draft of Protocol on Statelessness was scheduled to take place in April 1954. All states that attended the first conference were invited to participate.

### ***The second attempt to adopt the Protocol on Statelessness in 1954***

Three years after the adoption of the Convention Relating to the Status of Refugees, the new conference was organized in New York and was attended by twenty-seven states and five states represented by observers. The purpose of this conference was to review and adopt the Protocol of Statelessness, which states did not adopt along with the Refugee Convention in 1951. However, during the new Conference the participants began to doubt whether the Protocol was going to be “an appropriate document.”<sup>93</sup> Because the states did not deal with the Protocol at the time of adoption of the Refugee Convention in 1951, it caused these later problems.

First of all, the protocol was meant to serve as an appendix to the Refugee Convention rather than an independent document. It was anticipated that the Refugee Convention and the Protocol had to be approved and opened for signature at the same time and, therefore, would be signed by the same states as a part of one document.<sup>94</sup> Because it did not happen in 1951, it “appeared quite possible that the parties to the Refugee Convention and to the Protocol on Stateless persons might be different states: in particular some parties to the stateless persons agreement might not be parties to the Refugee Convention,”<sup>95</sup> simply because they were not there. It could have created a strange situation where some states, which were not parties of the

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<sup>92</sup> Nehemiah Robinson. *The Convention Relating to the Status of Stateless Persons: Its History and Interpretation*. Institute of Jewish Affairs, World Jewish Congress, New York, (1955), 3

<sup>93</sup> Ibid., 4

<sup>94</sup> Ibid., 5

<sup>95</sup> Ibid., 5



1951 Refugee Convention, had to accept provision of the Convention they had not agreed to. Therefore, it would have required participants of this new conference to first negotiate and sign the 1951 Refugee Convention. However, because the Statelessness Protocol did not require the states to provide the same level of protection to all people who cross the border to seek asylum, as required by the Refugee Convention, some non-signatory states to the Refugee Convention were only interested in Statelessness Protocol. I will come back to the stricter standards in the section on the Statelessness Convention and negotiations on whether refugees had to be included in this Convention.

In addition, pursuing the Protocol on Statelessness was going to create a problem with the application of the *mutatis mutandis* principle according to which certain provisions of the Refugee Convention should apply to stateless persons who are not refugees in the sense of the Refugee Convention. Adopting the Statelessness Protocol would require states to accept provisions of the Refugee Convention, which they have no obligations to because they have not signed the Refugee Convention and might not want to agree to the provisions of the Refugee Convention.<sup>96</sup> Since the Protocol was meant to cover stateless people based on the principle of *mutatis mutandis*, the adaptation of the Statelessness Protocol without Refugee Convention would have meant different things in different states and “there would be no uniformity in application – in effect, there would be as many agreements as there were parties to the document.”<sup>97</sup>

Despite the fact that potential problems of adapting a protocol separately from the convention were foreseen in the “Study of Statelessness” discussed earlier, the participants failed to adopt the Statelessness Protocol together with the 1951 Convention Relating to the Status of

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<sup>96</sup> Nehemiah Robinson. *The Convention Relating to the Status of Stateless Persons: Its History and Interpretation*. Institute of Jewish Affairs, World Jewish Congress, New York, (1955), 5

<sup>97</sup> *Ibid.*, 5

Refugees. Therefore, taking all the reasons described above into consideration, the states decided by 12 votes to none and 3 abstentions to create the Convention on the Status of Stateless Persons instead of the Protocol on Statelessness.<sup>98</sup>

Prior to this moment, statelessness was always viewed solely within the refugee context. However, this has changed once it was decided to pursue a separate convention in contrast to a protocol. The definition of statelessness in the Statelessness Protocol would have excluded people who are eligible under the Refugee Convention but covered those requiring special protections. By contrast, at the point of creation of the separate Convention on Statelessness, it was agreed not to address the refugee problem in the convention at all.<sup>99</sup> The Convention on Statelessness was meant to cover all stateless people whether they are refugees according to the Refugee Convention or not. At the same time, in the Preamble to the Convention on the Status of Stateless Persons it is mentioned that the Statelessness Convention covers stateless people who are not covered by the Refugee Convention of 1951 because they might not qualify as refugees under the definition. This suggests that at that point of discussion refugee and stateless status are not only closely connected but the line between the two is often blurry. However, beside the short statement in the Preamble to the Statelessness Convention, there is no mentioning of the previously discussed crucial relationship between refugees and stateless people in the Statelessness Convention.

Another contradictory concern about whether to include refugees in the Statelessness Convention had to do with the fact that both Refugee and Statelessness Conventions might be applied to the same person given the close relationship between the refugee and stateless

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<sup>98</sup> Nehemiah Robinson. *The Convention Relating to the Status of Stateless Persons: Its History and Interpretation*. Institute of Jewish Affairs, World Jewish Congress, New York, (1955), 6

<sup>99</sup> *Ibid.*, 11

status.<sup>100</sup> The Refugee Convention is the more favourable instrument<sup>101</sup> because it has stricter standards for protection of refugees than the Statelessness Convention would. Therefore, including refugees in the Statelessness Convention would allow state parties to both conventions to choose which convention to apply, therefore, to apply lower standards of protection if they wanted. As it was mentioned above, the Refugee Convention requires states to follow the principle non-refoulement outlined in the Article 33, meaning that a state cannot turn back a person seeking asylum back to the country he or she is fleeing from fearing for his life and freedom until there is a legal decision about repatriation according to the principles of the Refugee Convention.<sup>102</sup> In addition, according to the Article 31, the party states to the Refugee Convention cannot penalize illegal entry or presence of refugees who are coming directly from the territory they are persecuted at.<sup>103</sup> If asylum is granted, refugee is able to enjoy the same rights and protections as a national of the state. However, in accordance with the Article 2 of the Statelessness Convention, a member state should provide a stateless person with the same treatment as it generally provides to aliens.<sup>104</sup> That means that the stateless person would not be treated as a full citizen and might not be eligible for many public services, such as welfare, low-income housing, financial aid as well as political participation. Moreover, while the Refugee Convention requires an active role from the state in terms of having to accept all asylum seekers, the Statelessness Convention deals with the treatment of stateless people already within its territory and does not necessarily require contracting states to accept all stateless people.

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<sup>100</sup> Nehemiah Robinson. *The Convention Relating to the Status of Stateless Persons: Its History and Interpretation*. Institute of Jewish Affairs, World Jewish Congress, New York, (1955), 9

<sup>101</sup> Paul Weis, "The Convention Relating to the Status of Stateless Persons." *The International and Comparative Law Quarterly*, Vol. 10, No.2 (Apr., 1961), 262

<sup>102</sup> The Convention Relating to the Status of Refugees, (1951), Art. 33

<sup>103</sup> *Ibid.*, Art. 31

<sup>104</sup> *Ibid.*, Art. 2

Based on the review of the documents mentioned above, it appears that separating stateless people from refugees in international law was a result of the historical circumstances rather than negotiations and deliberate action. I believe, this has contributed to the confusion in terms of the definition of statelessness and its application to identify groups of stateless people we have today.

***Confusion about de jure and de facto components of the definition of statelessness***

The separation of the refugees and stateless people into two separate conventions created a confusion on where to draw the line between two categories, which convention to apply, and how to deal with the categories of people who fall into grey categories between the refugee and stateless as defined by the convention. In addition, there is a further confusion within the definition of statelessness itself that separates all stateless people into *de jure* and *de facto* stateless granting each category different protections under international law. The difficulty of identifying “stateless people” lies within statelessness itself. Statelessness is defined by a lack, and absence, a negation because it is the opposite of the possession of a nationality; as a negative, therefore, it is difficult to prove.<sup>105</sup> So the question of two separate categories of *de jure* and *de facto* statelessness became a point of debate during the Conference on Statelessness and continues to be a center of discussion today. There seems to be very little uniformity on what these two terms mean. The discussions about separate categories of *de jure* and *de facto* statelessness are seen in the Chapter II of the Memorandum “Statelessness and Some of its Causes: An Outline.”

*De facto* stateless are described as “unprotected persons,” who do not enjoy the

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<sup>105</sup> Nehemiah Robinson. *The Convention Relating to the Status of Stateless Persons: Its History and Interpretation*. Institute of Jewish Affairs, World Jewish Congress, New York, (1955), 12

protection of their government even though they still possess the nationality of that state.<sup>106</sup> As an example of the cases of *de facto* statelessness, the Memorandum talks about the case of German Jews, which constituted the largest number of people without a nationality. As it was mentioned, prior to 1941, German Jews were still considered German nationals despite their inability to exercise their civil and political rights and being denied protections from the state. To clarify the term *de facto* statelessness, the Memorandum compares German Jews to other nationals at that time, such as Polish citizens in the Iberian Peninsula and Soviet citizens in Switzerland, who only temporarily did not enjoy protection due to “military occupation by a foreign power, absence of diplomatic recognition or of resumption of diplomatic relations, etc.,” while German Jews were deliberately denied protections by their state.<sup>107</sup>

The differences between *de jure* and *de facto* stateless persons were also addressed in “The Study of Statelessness.” However, in contrast to the Memorandum, it concluded that despite the fact that in practice the status of *de facto* stateless is similar to *de jure* stateless, they are two different legal categories.<sup>108</sup> The study defined *de jure* stateless as persons “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>109</sup> *De facto* stateless, on the other hand, were defined 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 renounced the assistance and protection of the countries

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<sup>106</sup> Intergovernmental Committee on Refugees, *Statelessness and its Causes: An Outline*. (March, 1946), Chapter II

<sup>107</sup> Massey, Hugh. “UNHCR and De Facto Statelessness,” UNHCR Division of International Protection, (April 2010), 3

<sup>108</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, 8-10

<sup>109</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, 8-9

of which they are nationals.”<sup>110</sup> The first part of the definition addressed the cases of people, who have left their countries of their origin and have been denied protection from their governments, but who do not necessarily fulfill the definition of a refugee, unless the person has left his or her country due to the fear of persecution. However, the second part, which describes a person unwilling to benefit from the protection of his or her state, could more likely qualify this person as a refugee, if refusal to receive any protection from the state of person’s nationality is caused by the fear of persecution.<sup>111</sup> However, neither of these groups was considered legally stateless.

In terms of the connection between refugees and stateless, “The Study of Statelessness” states that refugees are *de jure* stateless persons, if they have been deprived of their nationality by their country of origin and are *de facto* stateless persons, if they still possess their nationality but cannot enjoy the protection and assistance of their national authorities.<sup>112</sup> What is important for this paper is that during the time of drafting the 1951 Refugee Convention, delegates believed that it was going to offer protection to *de facto* stateless while the Protocol on Statelessness was going to address the special case of *de jure* stateless.<sup>113</sup> However, as it was described above, the Protocol was not adopted and it was decided not to include refugees in the Statelessness Convention. Thereafter, the question of whether only stateless persons *de jure* or also stateless persons *de facto* should be eligible for benefits under Article 1 of Statelessness Convention was one of the most debated points. After long negotiations, it was decided to apply the Convention, as a rule, to *de jure* stateless persons only and to provide the possibility of extending its benefits

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<sup>110</sup> “The Study of Statelessness.” UN, United Nations Publications, Department of Social Affairs, (August, 1949), Lake Success, New York, 8-9

<sup>111</sup> Hugh Massey quoting the President’s summary of the issues in E/CONF. 17/SR.13, pp.9-12 in “UNHCR and De Facto Statelessness,” UNHCR Division of International Protection, (April 2010), 22

<sup>112</sup> “The Study of Statelessness,” IV

<sup>113</sup> Amal De Chickera, “Critiquing the Categorization of Statelessness” in *Unraveling Anomaly: Detection, Discrimination and the Protection Needs of Stateless People*. The Equal Rights Trust, (July, 2010), 52

to *de facto* stateless persons.”<sup>114</sup> As it was mentioned above, the idea of not including *de facto* stateless people in the definition of statelessness in the Convention was based on the assumption that “a person was only stateless *de facto* he was still considered a national by a state,”<sup>115</sup> therefore, did not require a special category and protection.

However, the possibility of extending the benefits to *de facto* stateless people despite them not being included into the Statelessness Convention created a debate about the meaning of the definition of statelessness. In the Final Acts of the 1954 and 1961 Statelessness Conventions and in the Recommendations it was advised to treat *de facto* stateless people as far as possible as stateless *de jure* in order to allow them acquire an effective nationality.<sup>116</sup> In practice, *de facto* statelessness was left in the legal limbo because it was not included in the definition of statelessness in the Convention on the Status of Stateless Persons despite ongoing discussions in all pre-Convention documents. At the same time, today despite no clearly defined and mutually agreed on definition of *de facto* statelessness, various actors involved in the study, discussion, and protection of stateless people repeatedly use the term of *de facto* statelessness. Despite the fact that “the term has no *legal* significance,” it is commonly used and has a meaning.<sup>117</sup> Even UNHCR, which has had a mandate over stateless people since its establishment,<sup>118</sup> admits that it has not until recently attempted to clearly define what *de facto* statelessness is, and what legal and actual responses to *de facto* statelessness should be.<sup>119</sup> To this day UNHCR claims on their website that there is “no universally accepted definition of this term.”<sup>120</sup> What is also important for this paper is that the separate convention in contrast to a protocol created a gap between

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<sup>114</sup> Nehemiah Robinson. *The Convention Relating to the Status of Stateless Persons: Its History and Interpretation*. Institute of Jewish Affairs, World Jewish Congress, New York, (1955), 16

<sup>115</sup> *Ibid.*, 14

<sup>116</sup> Hugh Massey. “UNHCR and De Facto Statelessness,” UNHCR Division of International Protection, (April 2010) i

<sup>117</sup> Laura Van Waas. “The Statelessness Phenomenon and a first encounter with the International Response.” *Nationality Matters: Statelessness Under International Law*. School of Human Rights Research Series, Vol. 29, (August, 2008), 23

<sup>118</sup> Massey, i

<sup>119</sup> Massey, ii

<sup>120</sup> “What is Statelessness?” UNHCR, <http://www.unhcr.org/pages/49c3646c158.html>

refugees and stateless people and left those who fall into grey areas between refugee and stateless status, such as *de facto* stateless, outside of the protections granted by two conventions. These historical developments influenced the definition of statelessness and our understanding of statelessness overall, which in return creates many difficulties when it comes to the identification of stateless people around the world.

### ***Why does the history of the definition of statelessness matter today?***

The complex and confusing definition of statelessness affects how the issue of statelessness is handled today. Identification of stateless populations is the first most important step to handling the problem of statelessness.<sup>121</sup> As Laura Van Waas puts it, “continuing contention as to what qualifies an individual as stateless means that different organizations and states often still adopt their own approach – not only to the *definition* itself, but also to procedures for the recognition of ‘stateless person status’ and requirements surrounding the establishment of *proof* of statelessness.”<sup>122</sup> In reality, according to 2004 UNHCR survey on statelessness, only 51.4% of respondents said that there was a procedure for the identification of stateless people on the territory of their state.<sup>123</sup> According to the findings of my research, there seemed to be an initial confusion in terms that took place at the time of the conception of the definition in international law, when statelessness was first solely viewed within the refugee problem, and then was separated from refugee issue as a result of the historical developments described above.

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<sup>121</sup> “Statelessness: An Analytical Framework for Prevention, Reduction and Protection”. UN High Commissioner for Refugees (2008), 5, <http://www.unhcr.org/refworld/docid/49a28afb2.html>

<sup>122</sup> Laura Van Waas. “The Statelessness Phenomenon and a first encounter with the International Response.” Nationality Matters: Statelessness Under International Law. School of Human Rights Research Series, Vol. 29, (August, 2008), 9, <http://arno.uvt.nl/show.cgi?fid=113179>

<sup>123</sup> “Final Report Concerning the Questionnaire on Statelessness pursuant to the Agenda for Protection.” Geneva, (March, 2004), 26 quoted in Van Waas, Laura. “The Statelessness Phenomenon and a first encounter with the International Response.” Nationality Matters: Statelessness Under International Law. School of Human Rights Research Series, Vol. 29, (August, 2008), 9, <http://arno.uvt.nl/show.cgi?fid=113179>



The narrative above suggests that this confusion can be largely attributed to the failure to address the issue of statelessness in conjunction with the problem of refugees during the adaptation of the 1951 Refugee Convention. There also seems to be a further confusion in the terms of *de jure* and *de facto* statelessness, which was discussed in many pre-Convention documents but was not included into the international human right documents. Moreover, it is important to mention that even though there is a debate about the difference between *de jure* and *de facto* statelessness in the pre-Convention documents reviewed for this paper, it does not seem clear where these distinctions come from and how they were negotiated. As a result, today there is no clear understanding of who is classified as stateless because the definition of statelessness is always interpreted based on the distinctions within the definition itself. In addition, because the Statelessness Convention and Refugee Convention are two separate legal documents that do not clearly communicate the relationship between two categories, it is not clear for those who study statelessness where to draw the line between stateless people and refugees, especially when two categories overlap. All of this means that today there still a debate on whom the Convention on Stateless should actually cover and why.

As it was discussed above, the Convention on the Status of Stateless Persons excludes *de facto* stateless people, who have a bond with their formal nationality but are unable to benefit from their state's protections. Thus the application of the legal definition of statelessness has become more and more difficult when it comes to defining people, who potentially had a nationality but could not prove, verify, or access it.<sup>124</sup> As a result of globalization leading to new forms of migration, interest in the issue of statelessness, and the *de facto* stateless persons in particular, has revived in recent years. Currently, those who are referred to as *de facto* stateless

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<sup>124</sup> Nehemiah Robinson. "Convention Relating to the Status of Stateless Persons: Its History and Interpretation." Institute of Jewish Affairs, World Jewish Congress (1955). Reprinted by the Division of International Protection of the United Nations High Commissioner for Refugees (1997), 17-22

persons are only covered by general international human rights standards with no specific treaty that addresses the needs of this vulnerable population. In recent years, UNHCR has made some attempts to address *de facto* statelessness by providing guidelines for the interpretation of the definition, such as the UNHCR 2010 Report by Hugh Massey on *de facto* statelessness used for this paper. At the same time, today there seems to be little constituency and agreement on terms within the UNHCR itself. For example, even though in earlier stages of the development of the definition of statelessness *de facto* stateless were always considered within the framework of the Refugee Convention, in 2010-2011 report UNHCR concluded that most *de facto* stateless persons are not refugees.<sup>125</sup>

### ***Case Study: Dominicans of Haitian descent in the Dominican Republic***

To illustrate the difficulties of applying the definition of statelessness to identify stateless people today, we can look at the case of Dominicans of Haitian descent in the Dominican Republic. Until 2004, the right to a nationality in the Dominican Republic was granted based on the principle of *jus soli*, which means that as long as one was born on the territory of the state, he or she was a national of this state. However, in 2004 the General Law on Migration in the Dominican Republic created a new category of “non-residents,” which included foreign workers, undocumented migrants, those who were unable to prove their lawful residence because their temporary visas have expired and even those who simply had no documents to prove their residency despite living in the Dominican Republic for generations.<sup>126</sup> Haitians constituted the largest portion of those affected by law. Dominicans of Haitian origin were left, as Open Society Foundation calls them, “effectively stateless” due to their inability to prove their lawful residence

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<sup>125</sup> “Commemorating Refugee and Statelessness Conventions: A Compilation of Summary Conclusions from UNHCR’s Expert Meetings 2010-2011.” UNHCR, (2012), 18

<sup>126</sup> James Goldston. “Stateless Children: Implementing the Right to Have Rights.” Open Society Initiative. (September 15, 2011), 3-4

without proper documentation.<sup>127</sup> However, they were still nationals of the Dominican Republic because the law did not specifically target them, but was directed at all people who could not prove their Dominican nationality.

In practice, however, the government made it almost impossible for Haitians to obtain copies of their original birth certificates and refused to issue new ones, arguing that they should have never been recognized as nationals in the first place, since they were always the nationals of Haiti and thus had to acquire a nationality in Haiti.<sup>128</sup> These discriminatory practices were challenged in the Inter-American Court of Human Rights in the case *Yean and Bosico v. Dominican Republic*. The Court concluded that the Dominican Republic violated the principle of *jus soli* and the American Convention of Human Rights principles of non-discrimination; therefore, these discriminatory practices made children of Haitian descent born in the Dominican Republic stateless.<sup>129</sup> The Dominican Republic did not only rejected the Court's ruling to change the discriminatory laws and administrative practices that denied access to legal records or refused to register children born on the territory, but also made changes to the constitution to continue to deny many Dominicans of Haitian descent their right to a nationality.<sup>130</sup>

However, what is important for our purposes of understanding the challenges the complex definition of statelessness pose, is that there is no clear agreement on whether these Dominicans of Haitian descent are actually stateless. The situation looks very similar to the case of German Jews during WWII because they are denied access to their nationality by their state. However, the situation in the Dominican Republic is different because the law was not presented as a deliberate action to target a specific ethnical group. According to the Convention on the

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<sup>127</sup> James Goldston. "Stateless Children: Implementing the Right to Have Rights." Open Society Initiative. (September 15, 2011), 4

<sup>128</sup> *Ibid.*, 4

<sup>129</sup> *Ibid.*, 4

<sup>130</sup> *Ibid.*, 4-5

Status of Stateless People, Dominicans of Haitian descent are not *de jure* stateless because they could potentially access or establish their nationality under the new law by providing a proof of their legal residence in the Dominican Republic and their Dominican nationality, which many were eligible for prior to 2004 law but might not have had since the proof was not required.

Being unable to prove their Dominican nationality, many Dominico-Haitians have no access to it, which definitely makes them *de facto* stateless. At the same time, inability to prove a nationality, as it was discussed earlier in this paper, does not automatically make one stateless. In the discussion of the situation of Dominico-Haitians there is little uniformity on whether they are stateless or not and which definition are applied to make these statements. For example, they are regarded as stateless by the legal analysis of some expert interested parties, such as the U.S. State Department<sup>131</sup> and the Open Society Foundation, which advocates for the expansion of the definition of statelessness. The Inter-American Court of Human Rights considers the situation of the children born to the parents of Haitian descent who are unable to prove their nationality as stateless. By contrast, UNHCR lists zero as their statistics on statelessness in the Dominican Republic, stating that there are people of concern in that region, who are exposed to “discrimination, abuse, exploitation and even statelessness,” which they are working on to prevent.<sup>132</sup> UNHCR explains in the note on statelessness statistics that it only “refers to persons who are not considered nationals by any country under the operation of its laws.”<sup>133</sup> We can assume that it does not consider Dominicans of Haitian descent to be *de jure* stateless in lines with the definition outlined in the Statelessness Convention, while other actors mentioned above apply a broader definition of statelessness.

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<sup>131</sup> David Robinson. “Statelessness and the Dominican Republic.” Bureau of Population, Refugees, and Migration at the U.S. State Department and Georgetown Law School, (October 26, 2011), <http://www.state.gov/j/prm/releases/remarks/2011/181082.htm>

<sup>132</sup> “2012 Regional Operations Profile – North America and the Caribbean.” UNHCR, (January, 2012), Statistical Snapshot; par. 5 <http://www.unhcr.org/pages/49e4915b6.html>

<sup>133</sup> 2012 Regional Operations Profile – North America and the Caribbean,” par. 5

At the same time, what matters in practice is that government officials in the Dominican Republic refuse to recognize the discriminatory nature of their laws that render people stateless or could lead to stateless.<sup>134</sup> The debate about whether Dominicans of the Haitian descent could be called stateless is largely attributed to the lack of agreement on what statelessness actually means in practical terms. In the mean time, there is close to one million of undocumented Haitians in the Dominican Republic both born on the Dominican Republic territory and those who immigrated a long time before the new law was passed.<sup>135</sup> While they live without legal identity in the state where they were considered nationals prior to 2004, they are denied access to education beyond fourth grade, health care, employment, and equal protection before the law; many have become subject to sex trafficking and work exploitation. Children are especially vulnerable because without any proof of their Dominican nationality Dominico-Haitians are treated like irregular Haitian migrants, thus under the new law cannot register their children and acquire a nationality.<sup>136</sup> Therefore, the American Court of Human Rights considers them stateless.<sup>137</sup> In addition, historically Dominicans have xenophobic and racial prejudices against Haitians because they perceive Dominican identity as European and Haitian as African. An extreme example of xenophobic attitudes is a military massacre of Haitians and Dominico-Haitians on the border during the ruling of the dictator Rafael Trujillo.<sup>138</sup> Due to the widespread discrimination, Haitians are already marginalized, often work in a very low paying fields, such as manual labor and agriculture, and have difficulties accessing good education or healthcare.

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<sup>134</sup> “In Dominican Republic, Haitians Grapple With ‘Stateless’ Limbo.” Public Broadcasting Station, (December 17, 2010), [http://www.pbs.org/newshour/bb/international/july-dec10/haiti\\_12-17.html](http://www.pbs.org/newshour/bb/international/july-dec10/haiti_12-17.html)

<sup>135</sup> Maureen Lynch, “Dominican Republic, Haiti, and the United States: Protect Rights, Reduce Statelessness.” (January 11, 2007), <https://www.refugeesinternational.org/policy/field-report/dominican-republic-haiti-and-united-states-protect-rights-reduce-statelessness>

<sup>136</sup> Bridget Wooding, “Contesting discrimination and statelessness in the Dominican Republic.” *Forced Migration Review* 32 (Apr 2009), 23

<sup>137</sup> James Goldston. “Stateless Children: Implementing the Right to Have Rights.” Open Society Initiative. (September 15, 2011), 4

<sup>138</sup> Bridget Wooding, “Contesting discrimination and statelessness in the Dominican Republic.” *Forced Migration Review* 32 (Apr 2009), 23-25

However, inability to obtain a proof of legal identity especially furthers the effects of discrimination Dominico-Haitians already experience because they are not able to claim their rights from the state unless they prove the legal bond between them two. The case of Dominicans of Haitian descent illustrates just a small part of the problem of global statelessness, where it is not clear who is stateless and why and how to apply the definition of statelessness to ensure protection of this vulnerable population.

***Contemporary views on how to address the problem of the confusing definition of statelessness***

Today, many researchers and interested parties involved in the issue of statelessness are working on addressing the problem of confusing definition. In general, there are two main views on how to address this confusion that is attributed to the distinction between *de jure* and *de facto* statelessness described in the earlier part of this paper:

- 1) to expand the definition to include all stateless people whether *de jure* or *de facto*;
- 2) or to keep it as narrow as possible to only address cases where it has been proven that a person indeed does not have any legal nationality in any state.

*1. The arguments for the expansion of the definition*

The argument for the expansion of the definition of statelessness beyond *de jure* is based on the idea that in contrast to a refugee status, statelessness can be a “fluid status.”<sup>139</sup> The status of *de facto* stateless people, especially, may fluctuate throughout his or her life. A person may be *de facto* stateless for a brief moment or for their entire lives, be *de facto* stateless in one country but potentially acquire a nationality in another, or become *de jure* stateless, if no measures are taken. Therefore, proponents of the expansion of the definition of statelessness argue that

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<sup>139</sup> Amal De Chickera. “Critiquing the Categorization of Statelessness” in *Unraveling Anomaly: Detection, Discrimination and the Protection Needs of Stateless People*. The Equal Rights Trust, (July, 2010), 74

approaching statelessness in a broader, more inclusive manner could help provide some sort of protection to people who do not have an effective nationality or those who fall into grey areas where they are not eligible to claim refugee status and are not legally stateless at the same time.

For example, researchers in favor of the expansion of the definition of statelessness, such as The Equal Rights Trust, believe that the “narrow construction of *de jure* and *de facto* statelessness has left many persons without the protections they deserve.”<sup>140</sup> Moreover, they think that defining the concept of *de facto* statelessness “in a robust and comprehensive manner” is crucial for the identification of stateless people as the first step to providing them with some sort of protection.<sup>141</sup> In addition, Paul Weis, a former legal adviser at UNHCR, argued not long after the adoption of the Statelessness Convention that even though it is an important document that draws attention to stateless people and defines them in international law, it might not be enough when it comes to the efforts to eliminate statelessness for a much more diverse group than refugees.<sup>142</sup>

In general, the advocates for the expansion of the definition argue that what really matters is the person’s ability to have access to the rights attached to a nationality and not the nationality itself since in practice the vulnerabilities of *de facto* stateless are similar to those of *de jure* stateless.<sup>143</sup> For example, Jacqueline Bhabha, a legal researcher of statelessness, writes that those who have a nationality but are unable to benefit from the protection of their state are actually stateless because these people are unable to enforce their inalienable rights.<sup>144</sup> Like other proponents of the expansion of the definition, Bhabha argues that “rightlessness” that results from

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<sup>140</sup> Amal De Chickera. “Critiquing the Categorization of Statelessness” in *Unraveling Anomaly: Detection, Discrimination and the Protection Needs of Stateless People*. The Equal Rights Trust, (July, 2010), 53

<sup>141</sup> *Ibid.*, 53

<sup>142</sup> Paul Weis. “The Convention Relating to the Status of Stateless Persons.” *The International and Comparative Law Quarterly*, Vol. 10, No.2, Cambridge University Press, (April, 1961), 263

<sup>143</sup> Katherine Perks and Jarlath Clifford, “The legal limbo of detention,” *Forced Migration Review* 32 (April 2009), 42

<sup>144</sup> Jacqueline Bhabha. “Arendt’s Children: Do Today’s Migrant Children Have a Right to Have Rights?” *Human Rights Quarterly*, 32, The John Hopkins University Press, (2009), 411

*de facto* statelessness should be the main concern when it comes to the identification of stateless people.<sup>145</sup> She gives an example of Roma children in Europe, who “despite their EU citizenship are disenfranchised” and denied basic rights and protections attached to the right to a nationality.<sup>146</sup> Indeed, today many *de facto* stateless people remain within the borders of their state in the same way as German Jews were described as *de facto* stateless in the “Memorandum on Statelessness and its Causes.”

The Open Society Foundation also advocates for a much broader application of the definition because they identify a very wide range of groups whom they consider stateless regardless of whether they completely fulfill the *de jure* definition of statelessness. Among the communities they consider stateless are the Rohingya of Myanmar, Roma in Europe, Dominicans of Haitian descent in the Dominican Republic, ethnic Russians in Latvia, Ivorians of Burkinabe in Cote d’Ivoire, Namibians in Kenya, Palestinians in the Middle East, Biharis living in camps between Bangladesh and Pakistan, Mauritians in Senegal, Tamils in Sri Lanka, ex-Czechoslovakians in Slovenia, the Hill Tribe people in Thailand, and opposition supporters, farmers and independent media owners in Zimbabwe.<sup>147</sup> All these communities experience similar violations of their rights due to lack of the nationality or inability to prove one and no prospects of finding the ways to do so. As it was discussed at the beginning of the paper and in the case of Dominico-Haitians in the Dominican Republic, without legal identity stateless people cannot exercise their civil and political rights, such as the right to vote and stand for election, and they have no legal protection. Stateless people cannot access their social and economic rights and, therefore, are more likely to be poorly educated, with poor healthcare, substandard housing

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<sup>145</sup> Jacqueline Bhabha. “Arendt’s Children: Do Today’s Migrant Children Have a Right to Have Rights? Human Rights Quarterly, 32, The John Hopkins University Press, (2009), 415-422

<sup>146</sup> Ibid., 415

<sup>147</sup> “Where does Statelessness Happen?” Project Statelessness. Open Society Foundations, (February 17, 2012), <http://www.opensocietyfoundations.org/projects/stateless/where-does-statelessness-happen>



and insecure property ownership, having no employment options except the lowest paying jobs, mostly in informal sector, where they can be easily exploited by employers as well as become victims of trafficking. Without legal status, stateless people are unable to travel freely.<sup>148</sup>

According to literature reviewed for this paper, without any state being responsible for them, many of the stateless communities, such as the Rohingya, Roma and others, experience violence as an extreme form of ongoing racial and ethnic discrimination all stateless communities face. Therefore, the proponents of the expansion of the definition focus on the actual implications of statelessness in order to address the human rights violations regardless of whether persons could be categorized into specific definitions in order to begin claiming their rights.

*2. The arguments for keeping the definition of statelessness within its legal limits underlined in the Convention on the Status of Stateless Persons*

On the other hand, some researchers of statelessness, such as Laura Van Waas, who worked as a consultant for UNHCR on the issues of statelessness in 2007, argues that there is no need to create a special regime for *de facto* stateless today because they are guaranteed special protections within general human rights law since they have a nationality.<sup>149</sup> Waas means that the legal bond with a state, which *de facto* still have, assumes that a person can claim his or her rights from the state, therefore, is the “subject to the regular system of implementation and supervision.”<sup>150</sup> On the other hand, *de jure* stateless are actually stateless and need special protections because there is no legal bond between the state and a person to even begin to claim their rights.<sup>151</sup> She believes that human rights mechanisms are sufficient to ensure the rights of *de*

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<sup>148</sup> Katherine Southwick, Maureen Lynch, “Nationality Rights for All: a Progress Report and Global Survey on Statelessness.” Refugee International, (March 2009), i, 3

<sup>149</sup> Laura Van Waas. “The Statelessness Phenomenon and a first encounter with the International Response.” Nationality Matters: Statelessness Under International Law. School of Human Rights Research Series, Vol. 29, (August, 2008), 24-25

<sup>150</sup> Laura Van Waas. “The Statelessness Phenomenon and a first encounter with the International Response.” Nationality Matters: Statelessness Under International Law. School of Human Rights Research Series, Vol. 29, (August, 2008), 24-2

<sup>151</sup> *Ibid.*, 24-25

*facto* stateless saying that the situation of *de facto* stateless “simply falls within the ambit of general human rights law.”<sup>152</sup> Waas does not immediately specify the exact mechanisms but she says that “*de facto* stateless,”(she puts them in quotes) people are usually victims of multiple human rights violations and “should be able to assert their rights under that regime.”<sup>153</sup> What I think she means under “the regime” is the national and international laws according to which the states are obliged to guarantee certain rights and provide protection to their nationals. According to Waas, *de facto* stateless are nationals of their states. There are all sorts of national and international instruments, which can address cases of discrimination “*de facto*” stateless face. However, *de jure* stateless need special protection because states have no obligation to people who are not their nationals. Waas argues that using “*de facto*” along side with *de jure* statelessness “maybe counterproductive since it has no legal significance” and hinder the implementation of the international standards due to the confusion created by this complex definition.<sup>154</sup>

In the same way, even though UNHCR, which has a mandate over stateless people since its establishment,<sup>155</sup> claimed that “persons who are stateless *de facto* should as far as possible be treated as stateless *de jure*,”<sup>156</sup> it has also recently argued that expanding the definition of statelessness to cover *de facto* stateless “would be doing a grave disservice to persons who should be treated as the nationals that they are, rather than as stateless persons.”<sup>157</sup> Today UNHCR acknowledges the fine line between being recognized as a national but not being able to exercise basic rights attached to a nationality. Regardless, in the 2010 expert meeting report

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<sup>152</sup> Laura Van Waas. “The Statelessness Phenomenon and a first encounter with the International Response.” *Nationality Matters: Statelessness Under International Law*. School of Human Rights Research Series, Vol. 29, (August, 2008), 24-25

<sup>153</sup> *Ibid.*, 27

<sup>154</sup> *Ibid.*, 27

<sup>155</sup> Hugh Massey. “Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness.” *Division of International Protection*, (April 2010), i

<sup>156</sup> “Guidelines: Field Office Activities Concerning Statelessness.” IOM/66/98 – FOM/70/98, (September 28, 1998), 4, par.9

<sup>157</sup> Massey, 40

UNHCR emphasizes that the definition in the Statelessness Convention is still reserved specifically for *de jure* statelessness. The main point is not whether a person has a nationality but has no access to it, “but whether or not the individual has a nationality at all.”<sup>158</sup>

One of the reasons why UNHCR prefers not to expand the legal definition of statelessness by including *de facto* stateless is because it would require extending its mandate. In this way, UNHCR will be responsible for people, who do not enjoy their rights attached to a nationality and are still within their nation state. Therefore, expanding the definition would require UNHCR to interfere with state sovereignty.<sup>159</sup> UNHCR generally cannot interfere into the domestic affairs of a sovereign state unless there is a cross-border situation similar to the movement of refugees. In addition, if UNHCR was going to expand the definition to also include *de facto* stateless, there is a dilemma as “to what extent the rights attaching to nationality would have to be violated before the persons of concern would qualify as *de facto* stateless?”<sup>160</sup> These important questions show that the debate on clarifying the definition of statelessness is an ongoing process that presents many challenges. As this paper suggests, this continuous debate seems to be a result of the failure to provide a clear definition of statelessness in 1951 during the adoption of the Convention Relating to the Status of Refugees as well the failure to address the issues of refugees and the special cases of stateless people in the same instruments.

Paradoxically, almost sixty years after the Convention on the Status of the Stateless Persons was adopted, indentifying persons and communities of stateless people remains one of the most difficult issues that surround statelessness today. The legal definition of statelessness is clearly defined in the international treaty in one sentence. However, as we have seen in this

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<sup>158</sup> “The Concept of Stateless Persons under International Law Summary Conclusions.” Expert meeting organized by the Office of the United Nations High Commissioner for Refugees, Prato, Italy, (27-28 May 2010), 2

<sup>159</sup> Massey, 39

<sup>160</sup> *Ibid.*, 39

paper, the attempts to explain this definition in relation to refugees as well as the differences between *de jure* and *de facto* stateless is a much more complex issue than the legal definition itself. Complex and confusing definition of statelessness makes it difficult to identify stateless people, collect data on them and, ultimately, ensure their protection while statelessness remains “the most forgotten global human rights problem in the world today.”<sup>161</sup>

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<sup>161</sup> Antonio Guterres. The UN High Commissioner for Refugees, extract from the speech. “Bringing Stateless ‘Out of the Shadows’.” Refugee International, (October 26, 2011), <http://refugeesinternational.org/blog/bringing-stateless-out-shadows>

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