TOWARDS AN ETHICAL APPROACH TO STATELESSNESS AND THE RIGHT TO HAVE RIGHTS

By

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I, Casey Megan Vetrik, declare that the Ph.D. dissertation that I herewith submit at the University of the Free State, is my independent work and that I have not previously submitted it for qualification at another institution of higher education.

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ABBREVIATIONS:

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women
CRC - Convention on the Rights of the Child
CPRM - The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
EU – European Union
ICCPR - International Covenant on Civil and Political Rights
ICERD - The International Convention on the Elimination of All Forms of Racial Discrimination
ICJ- International Court of Justice
NATO - North Atlantic Treaty Organization
OHCHR - Office of the High Commissioner for Human Rights
UDHR – Universal Declaration of Human Rights
UN – United Nations
UNHCR - United Nations High Commissioner for Refugees
UK - United Kingdom
US - United States of America
WTO - World Trade Organization
WW2 - World War Two

CHAPTER 1: INTRODUCTION

1.1 Research problem

In an increasingly globalized world, where nation-states are crucial components that form the structure of the global community, statelessness represents a significant failure within international society.[1] Where, within a world made up of states, does a stateless person fit? Such people do not seem to "belong" anywhere and in the eyes of the law, often find themselves invisible, as though they do not exist.[2] Although there have been admirable attempts by the international community, along with certain individual nation-states, to respond to the issue of statelessness through various campaigns as well as the enactment of numerous international/national laws, statelessness and the problems that arise because of it, still subsists.

From the outset, it is noted that the primary focus of the international approach to statelessness has revolved around the concept of legal nationality, specifically by encouraging nation-states to ensure that their national laws are in line with the international laws that aim to uphold the tenet that everyone has the right to a nationality. While there is no doubt that some countries still have inadequate national laws that cause statelessness,[3] there are also countries whose national laws appear more than sufficient (and who often pride themselves on concepts such as human rights, equality and diversity) who despite this, still have a prominent stateless population within their territory and/or still have new cases of statelessness occurring.[4]

Similarly, the humanitarian response, with its campaigns and promises to end statelessness have also not completely succeeded in its goals. The continued existence of statelessness thus calls into question the efficiency of both the international legal approach as well as the humanitarian response to statelessness to

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1 Mancheno 2016: 110.

2 Batchelor 1995: 235 ; Also related: Weis 1962: 1073 - "From the point of view of international law, the stateless person is an anomaly, nationality still being the principal link between the individual and the Law of Nations. The stateless person has been called flotsam, a *res nullius*".

3 UNHCR "Background Note on Gender Equality, Nationality Laws and Statelessness 2023" https://www.refworld.org/docid/640751284.html (Accessed 13 November 2023). This document provides that most up to date information available to the UNHCR as at March 2023, and highlights 24 countries whose laws still propagate inequality and/or discrimination relating to the conferral of nationality.

4 South Africa as a case study for this will be discussed in Chapter 5: 5.6.

date and begs the question: Why, despite comprehensive international (and national) laws, does statelessness still exist?

The severity of the consequences of statelessness is both profound and widespread and as such, the failure to eradicate it is of great concern.[5] There is thus a need to investigate possibilities beyond the dominant approach taken to date. As statelessness and the issues that accompany it continue to cycle through generations, a need arises to re-evaluate the effectiveness of the current approach. It follows that there is a resultant uncertainty surrounding whether the issue of statelessness can ever be fully resolved by merely formulating more laws, treaties and recommendations, or whether there is something else that is inherently missing from the current approach.

It is in this context that Hannah Arendt's notion of a "right to have rights"[6] can provide an invaluable starting point to analyse the intricate subtleties that the current approach does not sufficiently address. Referencing the international initiatives after WW2 to draft a universal declaration regarding human rights (which ultimately led to the UDHR that we know today), Arendt foresaw that such attempts still exist only within the limits of state-centric international law and thus fail to provide adequate security for a right to have rights.[7]

Considering the significant and widespread societal costs associated with it,[8] the legal, practical and ethical imperative to eliminate statelessness is not in dispute. However, whilst the dominant approach has utilised an array of legal techniques, practicalities surrounding issues such as belonging, marginalisation and ethical considerations have not been as widely explored.

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5 These consequences can include limited access to basic human rights, freedom of movement and political participation as well as an increased risk of poverty, exploitation, marginalization and emotional/psychological stress. Bloom & Kingston 2021: 3; Kingston 2019: 53; Henrard 2018: 288; Irving 2016: 3; Oman 2010: 279–280; Arendt 1951: 296.

6 Arendt 1951: 296 - 297.

7 Arendt 1949: 34; Gündogdu 2015: 6. Without a right to have rights, all other human rights become vulnerable.

8 Bloom & Kingston 2021: 3; Kingston 2019: 53; Henrard 2018: 288; Irving 2016: 3; Oman 2010: 279–280; Arendt 1951: 296.

1.2 Research questions

The following research questions arise as subproblems of the overall research problem and are used to guide each substantive chapter of the study.

Research question 1: How do the concepts of nation-states, nationality and belonging relate to statelessness?

Research question 2: Why, if human rights are espoused as inalienable, do many stateless persons find themselves rightless and what is the value of Arendt's notion of the "right to have rights" in addressing the issue of statelessness?

Research question 3: What does the current legalistic approach entail and where does it fall short?

Research question 4: What is the value of an ethical approach?

1.3 Hypothesis

The dominant legalistic approach, along with the humanitarian response to date, have been an incomplete and/or inadequate solution. This is evidenced by the failure to eradicate, or even largely reduce statelessness on a global scale. The overwhelming preoccupation on formalistic methods to ensure legal nationality, has resulted in important underlying issues being overlooked or neglected.

Internationally, the legalistic approach to statelessness is not immune to the issues that plague international law in general. The long-standing tension between international law and state sovereignty is a delicate issue that purported solutions to statelessness have not been able to avoid. Nation-states often jealously guard their supreme authority to grant (or deny) nationality and there is often apprehension towards anything that is seen to encroach on this authority. Even where formal treaties are voluntarily entered into, the issue of enforceability is uncertain at best. Alternative conceptualizations are needed in order to correctly approach the complex

relationships between the statelessness, the sovereign state and international law, which the legalistic approach has failed to do.[9]

Stateless persons are at high risk for being denied basic human rights whilst concurrently lacking a sufficient platform from which to appeal for those rights.[10] Even countries that claim to uphold human rights still have human rights violations happening on their soil to stateless persons.[11] The right to a nationality is widely accepted as a human right,[12] however citizenship remains almost entirely at the discretion of the nation-state, with some still actively performing denationalisations.[13]

The reason so many stateless people find themselves rightless is because the so-called human rights often boil down to nothing more than citizenship rights, and/or are applied at the discretion of the nation-state. With stateless people being excluded as political members of society, they do not always have means or access to mechanisms which would allow them to appeal the human rights violations that take place against them. The existence of statelessness puts into question the validity of human rights themselves and exposes the nonsensical essence of basing them on any sort of natural law. The legalistic approach fails to acknowledge these fundamental shortcomings of human rights laws.

On both an international and national level, legalistic approaches also tend to gloss over ethical considerations and can overlook subtle realities. The focus on technical legal issues leaves numerous aspects of statelessness not adequately addressed. Practicalities such as discrimination, marginalization, governance policies,[14] and administrative/procedural issues are not always adequately identified or responded to.

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9 The two preceding paragraphs form a hypothesis directly related to Research Question 1

10 Southwick & Lynch "Nationality rights for all: A progress report and global survey on statelessness" https://www.refworld.org/pdfid/49be193f2.pdf (Accessed 30 October 2023).

11 Human Rights Watch. "Canada 2021" https://www.hrw.org/news/2021/06/17/canada-abuse-discrimination-immigration-detention (Accessed on 3 August 2022): "Immigration detainees are not held on criminal charges or convictions, but many experience the country's most restrictive confinement conditions, including maximum-security provincial jails and solitary confinement. They are handcuffed, shackled, searched, and restricted to small spaces with rigid routines and under constant surveillance."

12 Weissbrodt & Collins 2006: 246.

13 The UK, although having comprehensive nationality laws have stripped numerous citizens of their nationality under section 40 of the British Nationality Act 1981.

14 Governance for the purposes of this thesis is a broad concept that includes all activity of any institution and all policies, laws and norms that aim to maintain order, stability and functionality

Even where legal nationality is obtained or identified (and an individual is thus no longer considered legally stateless), the underlying issues are not always resolved and the quality of life not always restored.[15] This brings into question the link between legal nationality and effective nationality and highlights the instances where legal nationality does not equate to an effective nationality. There seems to be a lack of motivation within the current response to address these types of situations due to the fact that legal nationality has been purported by most role-players as the stand-alone "cure" for statelessness and the issues that plague those affected thereby.

In order to live a full and dignified life, a person's nationality needs to ensure the same level of rights and protections given in general to others of the same nationality. The nationality also needs to be one that the person has some sort of connection with. Nationality cannot just be conferred arbitrarily. Without a true connection, there can be serious barriers, whether linguistic, cultural or religious, but there is also a lack of true belonging. A legal nationality is thus not enough - what is required is an effective nationality. A purely legalistic approach fails to fully consider the importance of belonging and effective nationality once legal nationality is conferred.

The hypothesis therefore posits that solely creating additional laws and treaties does not constitute an adequate or complete solution to statelessness. Instead, addressing statelessness and the underlying issues may require a broader approach with new conceptualizations, paying particular regard to lived practicalities of the stateless as well as the ethical obligations relating thereto.

within society. It includes any political agendas, administrative processes, policies on national security as well as migration control.

15 Take for example detainees at the al-Hol camps that are refused refugee status due to their perceived affiliation with ISIS. They become de facto stateless as their country of origin refuses to take them back. The al-Hol camp is commonly associated with human rights violations. Luquerna 2020: 148.

1.4 Motivation / rationale

Until relatively recently, statelessness was an example of a social dilemma that had not yet emerged globally as a significant issue of international/national concern and as such, was not treated as a social or legal emergency.[16] It is however now widely acknowledged that statelessness is a phenomenon that negatively affects almost every level of society, from the personal level of the stateless themselves, to the national level of the nation-state, all the way to the international level on a global scale.[17] It can perpetuate a destructive cycle of vulnerability and deprivation of human rights, which in turn can lead to severe consequences for society as a whole. The exclusion that many stateless people face can also aggravate or create social tensions, fuel conflict or result in displacement.[18] Statelessness can leave individuals without the necessary tools to effectively demonstrate their very existence or to claim even the most basic of human rights.[19] Throughout recent years numerous international/national laws and policies have been developed in order to attempt to end statelessness, however the success thereof has been minimal.[20] Whilst there is a vast amount of research that focuses on the technical legal aspects relating to statelessness,[21] it is submitted that the heart of the issue is no longer a purely technical legal problem, but a humanitarian problem that rests within the confines of law.

Reduced to its simplest form, statelessness can be explained as "not belonging" anywhere, however a much more narrow definition has been accepted within international customary law level: The UN defines a stateless person as a person who is "not considered as a national by any State under the operation of its law".[22] From Arendt's "right to have rights"[23], Giorgio Agamben's "bare life"[24], Judith Butler's

16 Kingston 2019: 53-54.
17 Statelessness threatens the structure and stability of nation-states.
18 UNHCR "Global Appeal 2023" https://reporting.unhcr.org/globalappeal2023/pdf (Accessed 16 October 2023): 66.
19 Bloom & Kingston 2021: 3.
20 Although an exact number of stateless persons worldwide is not known, most sources are in agreement that the number is in the millions. For recent discussion on the statistics, see Manby "Statelessness statistics and IROSS: The UN Statistical Commission grapples with definitions" https://law.unimelb.edu.au/centres/statelessness/resources/critical-statelessness-studies-blog/statelessness-statistics-and-iross-the-un-statistical-commission-grapples-with-definitions. (Accessed 2 February 2023).
21 Foster & Lambert 2019; Wilson-Brown 2017; Fripp 2016; Batchelor 1995: 232–259.
22 United Nations Convention Relating to the Status of Stateless Persons 1954 Convention, UN Treaty Series, Article 1: 6.
23 Arendt 1951: 297.
24 Agamben 1998: 127.

"precarious lives"[25] to Jacques Rancière's "the enactment of rights,"[26] the stateless have long been described as symbols, and perhaps more importantly, symptoms of a deeper problem within the political realm.[27] Being stateless has also been described as being "a citizen of no country, a subject of no government, a member of no state".[28]

It is important for the understanding of this thesis to note that while refugees and stateless people are often grouped together, not all refugees are stateless[29] and not all stateless people are refugees.[30] To further confuse the matter, refugees (and any other individuals) who do not have a nationality at all are *de jure* stateless,[31] whereas those who do have a nationality, whilst not *de jure* stateless, can still be *de facto* stateless. In order to avoid being cumbersome, whenever I refer to statelessness, I shall be referring to *de jure* statelessness, unless specifically stated otherwise.

Due to the many shared characteristics and overlapping practicalities, a large section of refugee literature can be applied *mutatis mutandis* to statelessness and *vice versa*. This is particularly apparent where literature alludes to issues that often plague both population groups such as the concept of not belonging, detention camps, the abuse of state sovereignty, direct, covert and/or systemic marginalisation and governance inadequacies or exploitations. International laws themselves however differ in that there has been a strong attempt to completely separate refugee law from statelessness law.[32] Whilst I do not necessarily condone this separation,[33] this thesis

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25 Butler 2012: 138 ; See also Butler 2006.

26 Rancière 2004: 302.

27 As stated in Benhabib 1998: 102. These specific authors are mentioned due to their international recognition and success, (and the popular and widely quoted phrases that they have become known for) however not all of them form primary sources to the thesis.

28 Hanjian 2003: 1.

29 The term "legally stateless" is synonymous with "*de jure* statelessness" and is the form of legally recognised statelessness in which an individual lacks a nationality.

30 Convention Relating to the Status of Refugees, Geneva, July 28, 1951; Convention Relating to the Status of Stateless Persons (adopted September 28, 1954; entered into force June 6, 1960): A refugee is a person who is "unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion." In contrast, many stateless people have never crossed an international border.

31 As opposed to *de jure* statelessness, *de facto* statelessness is where an individual does in fact have a nationality, but where they are no longer able to enjoy the protection or assistance of their national authorities that nationality usually ensures.

32 This is evident by the exclusion of refugees in two international statelessness conventions and refusal of the UNHCR to include refugees in their statelessness projects.

33 I see this separation as another shortfall of the legalistic approach in that it highlights the lack of attention that important concepts suffer in favour of the extreme focus on nationality as the

focuses on the phenomenon of statelessness, and as such, the plight of refugees (although compelling), refugee law, and how it is linked to the insufficiencies of the dominant approach to statelessness will remain a topic for future consideration.

Whereas it is safe to say that most people are familiar with the term refugee, statelessness is not a subject that is as widely known or empathized with by the overall population. For the general public, having a nationality is at risk of just being assumed to be guaranteed at birth,[34] and consequently, statelessness is often a relatively overlooked, or even unheard of concept to the majority of people.[35]

Nationality and the popular bureaucratic forms of legal identity are central notions within the composition of statelessness. The initial formulation of the concepts of nationality and identity arose largely from western constructs such as colonialism (and decolonisation) and are influential in forming a modern understanding of statelessness as well as in defining some of the communities that face entrenched or systemic statelessness.[36] Modern governance structures, from a local all the way to an international level, involve an underlying emphasis on nationality[37]- meaning, in the majority of instances, in order to be acknowledged as a full member within the current system, an individual must first be a documented citizen of a state.[38]

Throughout history, the absence of nationality has recurrently resulted in the lack of human rights, and also in the lack of political membership, which in turn often resulted in the deprivation of the basic essential resources as well as difficulty in finding an avenue to voice concerns.[39] In essence, statelessness constitutes a violation of the "right to have rights", where a lack of a nationality can leave a person "rightless".[40]

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primary concern, cause and solution. The Refugee crises is treated as a humanitarian issue, whilst the statelessness problem is seen as a purely legal problem.

34 Whilst it is true that the majority of people acquire a nationality at birth, usually either through jus soli or jus sanguinis, this is evidently not always the case. More can be read about this at https://www.unhcr.org/ibelong/about-statelessness/ (Accessed 20 May 2020).

35 The fact that the issue of statelessness is not well known among the general public is demonstrated in Kingston 2019: 53, where she states, "I asked if immigration debates in their country affected discussions about statelessness. With a wry smile, they replied: 'I think it would if people knew what statelessness was'".

36 Bloom & Kingston 2021: 3.

37 Bloom uses the word "citizenism" to describe this preoccupation in Bloom 2018.

38 Bloom 2021: 20.

39 Kingston 2019: 53.

40 Arendt 1951: 296.

Although in theory the link between citizenship and human rights has been uncoupled to some extent in modern times,[41] in practice, stateless persons are still at a far higher risk of human rights violations than citizens.[42] The question arises: how is it possible that in the so-called "age of human rights", there exists such large populations of people throughout the world who seemingly are so easily excluded, forgotten or left behind?

In addition to being widely considered the "bedrock for fulfilling and protecting our otherwise abstracted human rights",[43] nationality moreover contributes towards an inner sense of security and belonging.[44] It is one way of ascribing oneself to a geographical area (a home) and often becomes an important part of a person's social identity.[45] In the modern world, from a practical, personal and legal standpoint, having a nationality is undeniably more beneficial than being stateless. Despite globalization and the resultant interconnectivity of the world continually increasing, stateless people can remain socially, and even physically isolated, in some extreme cases remaining incarcerated for prolonged periods of time within camps or detention centers that restrict every aspect of their lives.[46] Without consulate protection and without a nation-state willing to accept them, they are reduced to a form of bare life.[47] Despite the recent and relatively larger scale response to statelessness, legal, political, practical, social and economic roadblocks continue to stand in the way of a complete humanitarian solution.

The causes of statelessness are diverse, with no one particular reason being the sole source of statelessness. The most common channels that statelessness manifests itself are through: the implementation of new national laws,[48] disputed or changing

41 Whether by human rights laws or by nationality laws that confer most citizenship rights to people who are not citizens, such as permanent residents.
42 Southwick & Lynch "Nationality rights for all: A progress report and global survey on statelessness" https://www.refworld.org/pdfid/49be193f2.pdf (Accessed 30 October 2023): i.
43 Oman 2010: 279–280. See also Shachar 2014; Brubaker 1992: 70.
44 Henrard 2018: 288.
45 Irving 2016: 3.
46 UNHCR. Stateless persons in detention. 2017. https://www.refworld.org/pdfid/598adacd4.pdf.
47 Being only a form of biological life, without other aspects that allow one to be a member within a political community: Agamben 1998: 126-135.
48 Batchelor 1998: 157 ; http://www.statelessness.ca/who-is-stateless.html (Accessed on 21 May 2020) ; UNHCR Report: Statelessness in Central Asia and Statelessness in South Eastern Europe, http://www.unhcr.org/4dfb592e9.pdf (Accessed on 27 May 2020).

territories,[49] ethnic/racial/religious discrimination,[50] gaps in nationality laws or the lack of implementation of these laws,[51] human trafficking,[52] involuntary denaturalization,[53] and in some cases, voluntary statelessness.[54]

Despite the diversity of the causes and effects of statelessness, international focus has remained engrossed on the conferral and governance of nationality status. This is understandable when only looking at the legal definition of statelessness, and when treating statelessness as an exclusively legal problem. Thus, the issue of statelessness has historically been inherently bound up with debates focusing specifically on the technical legal issues surrounding nationality. A large portion of the literature on solving, preventing or eradicating statelessness identifies the nation-state as the key role-player - concentrating on developing national laws and frameworks that confer nationality to the stateless. The popular perspective is to portray statelessness as merely a formalised condition (albeit one of insecurity and inferiority), with the emphasis being placed upon the sovereign nation-states to differentiate between who does and who does not legally belong.[55] I refer to this approach throughout this thesis as a "legalistic approach". What I mean by "legalistic" in simple terms is the heavy reliance on written rules, such as legislation and regulations that are based on formalist or traditional positivist beliefs –what I submit law in general has been confined and equated to in the modern age. It embodies the western unwavering faith in the ability

49 According to the Canadian Council for Refugees: https://ccrweb.ca/en/statelessness#internationallaw (Accessed on 21 May 2020); For a recent example see Ukraine/Donetsk and Luhansk "People's Republics" situation. Children in these areas do not always received birth certificates from Ukraine, and since the "People's Republics" are not recognised as nation-states and are merely self-proclaimed, this can lead to instances of statelessness. Kasianenko 2021: 116. Decolonization is also a source of statelessness and many people became permanently stateless after decolonization due to siding "with the wrong faction during the struggle for independence. Others were caught between the gradual disappearance of imperial status and the difficulties of obtaining citizenship in newly formed postcolonial states". (Siegelberg 2020: 226).

50 Roma of Europe, Rohingya of Myanmar, ethnic Nepali Bhutanese of Nepal, and Haitian descendants in Dominican Republic.

51 UNHCR Report, https://reliefweb.int/report/world/gender-discrimination-and-childhood-statelessness (Accessed on 24 November 2020).

52 McLean 2011: 38 and "Displacement, Statelessness and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination against Women" https://www2.ohchr.org/english/bodies/cedaw/docs/unhcr_cedaw_background_paper4.pdf (Accessed on 30 October 2023).

53 As was seen in Germany during WW2.

54 Tuttle J "Mike Gogulski and the Citizens of Nowhere" https://c4ss.org/content/10462 (Accessed 8 December 2020). See also: https://c4ss.org/content/10462 (Accessed 27 May 2020); Hanjian 2003; Turack 1969: 215.

55 Naimou 2009: 23.

to create legislation, institutions and procedures that can resolve any foreseeable issue. It is an essentially mechanical process. Such an approach often preferences constitutionalism, legislation, and other formal doctrinal law over ethical, social, economic, humanitarian or political contexts.

In the search for a solution, there was and still is a constant focus on ascertaining and/or conferring legal nationality upon those who are stateless. Due to the negative consequences of not having a nationality, international law and policies have been specifically developed in an attempt to procure the necessary changes in national laws of nation-states. Although international law is undeniably necessary in the path to ending statelessness, it is contended that there are various shortcomings. It is a long argued point that international law has no effective legislative, executive or judiciary authority. Nation-states have a choice as to which conventions and treaties they wish to sign and ratify, and even then, there is a lack of enforceability and sanctions for deviation due to the fact that international law is primarily controlled and executed through the national law paradigm. The values that a national legal system promote, represent the dominant ideology of that nation-state – they are promulgated expressions of the states sovereign (both social and political) power.[56] Population groups that don't belong, for example the stateless and refugees, can find little comfort in a set of legal rules and principles that in effect preserve and are preserved by their subjugation.

Furthermore, these labels that are created can trap individuals in an administrative dependency and sometimes, as in the case of refugee or detention camps, a physically dependency. This type of governance, which generates the labels such as "displaced persons", "refugees in protracted situations", and "stateless" persons, cuts both ways, often robbing individuals of the autonomy, dignity, and initiative that their protection of human rights was intended to guarantee in the first place.[57] Political and ideological use of language can create and perpetuate a negatively associated social status.[58] Terminology can be a powerful tool, however definitions relating to statelessness can frame the situation as a problem, while ignoring systematic processes that are

56 Douzinas & Gearey 2005: 8.
57 Benhabib 1998: 114.
58 Benswait 2021: 96.

sometimes rooted in ideologies based on persecution, exclusion, marginalisation and discrimination.[59]

The lack of widespread success associated with the response to statelessness is a case in point on the effectiveness of the purely legalistic approach taken to date. Core humanitarian organisations such as the UNHCR openly focus primarily on the legal aspect of nationality. The UNHCR states that their method of addressing statelessness includes to "provide legal advice to governments about how to ensure their nationality laws are compliant with international standards"[60] and to work "with governments to help them to make changes to legislation and procedures, which are necessary to recognize stateless people as nationals".[61] Both of these goals are admirable, however the persistence of statelessness reveals that something may be missing from within the current strategies. By traditionally putting statelessness forward as an indication of gaps in law and policy, there is still a clear preoccupation on solving statelessness in a purely legal sense, instead of addressing the context that makes statelessness so challenging for those affected.[62] In addition to this, various studies have shown that even when a previously stateless person has been granted nationality, their problems do not always end there and therefore even in the instances where the legalistic approach has been successful in turning a stateless person into a citizen, the underlying issues surrounding statelessness sometimes still persist.[63] Belonging, covert or systemic discrimination, political agendas and governance/administrative issues are a few of the factors often coupled with statelessness which are not always sufficiently addressed once legal nationality is conferred, and this is not adequately covered in international law and policies.

Therefore, a legalistic approach, whilst undoubtedly imperative, is constricted, in that it may not always consider or reflect normative, practical or moral concerns. For too

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59 Benswait 2021: 87. There is a premise that the type of language/wording used is a form of social action through which social relations, ideologies, and identities are constructed.

60 UNHCR "How UNHCR helps stateless people" https://www.unhcr.org/what-we-do/protect-human-rights/ending-statelessness/how-unhcr-helps-stateless-people (Accessed 23 January 2024).

61 UNHCR "How UNHCR helps stateless people" https://www.unhcr.org/what-we-do/protect-human-rights/ending-statelessness/how-unhcr-helps-stateless-people (Accessed 23 January 2024).

62 Bloom & Kingston 2021: 6.

63 Lynch & Blitz 2011: 207; Luquerna 2020: 148.

long, the study of statelessness has focused on technical legal issues. While this type of approach is indeed crucial in addressing and responding to urgent needs, they embody only one facet of a complex and tangled reality.[64] Whilst the existence of stateless people is in the interest of no nation-state– in fact, statelessness threatens to destabilize the nation-state model itself[65]- statelessness is still prevalent, proving that the international efforts are falling short or perhaps, at the very least, are insufficiently developed. Within a solely legalistic approach, the public realm loses its importance, in that normative considerations and concerns are not fully acknowledged due to being regarded as more private issues.[66]

When digging deeper into the problem, it becomes apparent that the scope of statelessness is much wider than just a formal lack of nationality. Nationality and identity are commonly used or even weaponised in nationalistic campaigns and political agendas.[67] Governance and administrative processes can be convoluted or inadequate, sometimes even hiding covert discrimination behind seemingly well formulated legislation and/or comprehensive and "inclusive" constitutions. The shortcomings of human rights instruments, state sovereignty, enforceability of international laws, covert discrimination as well as convoluted administrative processes are all factors that affect the efficiency of the approach to statelessness, however they are mostly not acknowledged within the legal frameworks. Whilst some aspects of these factors could possibly be regulated to some extent by a solely legalistic approach, there is a deep need for alternative conceptualizations in order to effectively understand the complex dynamics at play. Whilst the importance of legal nationality is not argued, there is a clear neglect of the concepts such as belonging, "effective nationality" and "equaliberty"[68] that go beyond the scope of mere legal nationality.

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64 Bloom & Kingston 2021: 1.

65 The stateless symbolize a possibility of legal and political identification beyond the jurisdictional boundaries of nation-states. If the refugee represents such a disquieting element in the order of the nation-state, this is so primarily because, by breaking the identity between the human and the citizen and that between nativity and nationality, it brings the originary fiction of sovereignty to crisis.

66 Van Marle 1999: 49.

67 For example, Akram 2002: 36-51: being labelled a "stateless Palestinian" in Lebanon excludes a person from Lebanese citizenship.

68 Equaliberty embodies the link between freedom and equality and rejects any separation between the legal and the real. The term originating from Étienne Balibar's notion of which is a translation of Greek isonomia via its Latin formulation ("aequum ius or aequa libertas"). See Balibar 2014: 48-49; Gündogdu 2015:183.

An objective observation of reality reveals a trend where accepted legal norms are not always easily reconsidered, and thus there is a constant need to examine how the law meets contemporary social problems. For the stateless, they face a constant battle against legal norms without there being adequate procedures in place for them to raise meaningful objections. The lack of a nationality can not only affect the enforcement of human rights, but it can also be a deciding factor as to who is able to actively participate in creating, maintaining, and reforming the laws and legal structures.[69] This exclusion from participation makes it less likely for the problems surrounding nationality and statelessness to be challenged, as the very people who are suffering the most have been effectively barred from being able to do so. Their lack of political membership has the effect of muting their voices. This in turn makes moving towards more inclusive systems more difficult. Thus, there is an importance in bringing these issues to light, so that legal norms surrounding nationality (and even perhaps the accepted sovereign state system) can be more thoroughly examined on a conceptual level and perhaps, one day, even reconsidered.

It should not be misconstrued that there is a diametric opposition between law and any suggested “correct” approach, or that anarchism is the solution, but rather that neither existent nor new laws alone are enough to overcome the complexities of statelessness, including those that affect human rights and human dignity, that present themselves on a daily basis throughout the world. It is undeniable that a legalistic approach is vital (especially within the current sovereign state system), however, this approach unaided is fundamentally flawed. The lack of insight into the more “human” or ethical components and the apparent legalistic “tunnel vision” not only risks overlooking important characteristics inherent to statelessness, but also threatens to cloud our vision as to possible alternate solutions. A distinction within modern legal education is commonly drawn between law and politics, law and socio-economic sciences, law and the arts, and law and philosophy, and this is then reflected in the legal system as a whole. I argue that these facets are not completely separate from each other and are inherently and historically intertwined, and a solely legalistic approach does not make use of the possibilities that a more flexible approach could

69 Bloom 2021: 20.

offer.

Recently, the dominant approach is gradually being more often questioned by radical thinkers within academic and humanitarian fields. The ISI's World Conference on Statelessness in 2019 showed promising developments in this regard. There was a strong consensus that a solely legalistic approach is not sufficient. Key takeaways from the conference were that "we must do more to promote not just legal remedies but also to challenge the narratives that allow statelessness to be created and perpetuated"[70] and the need for incorporation of interdisciplinary measures was heavily acknowledged. There was also emphasis on the proposal that listening to and learning from the lived experiences of stateless individuals should be prioritized in order to develop and implement a more efficient way to address statelessness and protect the human rights of stateless persons. Thus, it is submitted that perhaps one of the most simultaneously important and overlooked theories when it comes to the legalistic approach to statelessness is the simple fact that there is more to statelessness than just the lack of a nationality (despite the UN's definition).

Being born as a citizen with a nationality, it is easy to overlook the problems that (the lack of) nationality creates for certain other individuals. It is also easy to overlook those people who are excluded from various aspects of social, economic, legal and political life. Where stateless people are detained in camps for prolonged periods or where human rights are clearly being violated, it is also easy for the unaffected population to close their eyes to a perceived "exception", or even to presume that this treatment of other human beings is somehow appropriate or acceptable. Living in a country that purportedly prides itself on the concept of human rights, it could be easy to assume that any violation thereof is somehow justified. Additionally, there can also be a strong level of dissociation within a population in instances where the issue is far removed from the average person's daily life. However, in any instance where the form and function of nationality makes it problematic for certain individuals to access human rights, to be an active member in society or to benefit from development efforts, the onus to address and respond to the situation not only lies upon those directly involved in law and policy making, but also with every single person who is able to voice their

70 Bloom 2021: 20.

concern. Any culture or society that tolerates such disparities when it comes to upholding human rights has a corrosive effect not only on nationality and the concept of human rights itself, but equally on perceptions of what we owe each other as fellow human beings.

Even though there will always be a distinct need for a technical legal approach when dealing with matters of nationality and statelessness, (especially for as long as nation-states remain the fundamental components of the international society), the significant global population of stateless people is proof that this approach has not been entirely effective. Alternate approaches need to be considered, ones that acknowledge the need for formal laws, whilst also acknowledging the need to expand beyond them. This is where I submit that a critical jurisprudential approach can pave the way toward a broader, more effective solution.

1.5 Method and theoretical approach:

An analogy for the importance of a good research method is that as long as you keep going in the right direction, you will eventually reach your destination even if you take a few wrong roads along the way. Although it goes without saying that a strong method in itself cannot guarantee success, a weak one can most definitely prevent success. This is no different for a desktop-based research (which I employed here), as for more primary research (where data is collected or surveys performed for example). I followed a logical progression, from the inquiry and reading stage, into exploring the principles underlying the major themes that arose as well as their practical significance, and then finally to a delineation of the broad overarching findings to form my final thoughts/conclusion.

Initially it was necessary to incorporate a somewhat historical method, in order to fully understand the origin and evolution of statelessness from the conception of nation-states to the formulation of international conventions specifically focused on statelessness, to the various projects currently in progress in the present day. This was done to formulate a broad overview on statelessness.

I then turned to a more traditional legal research method, namely doctrinal method, to build an understanding on statelessness, the laws that surround it and the current

approach thereto. This traditional approach to law was done by examining relevant legislation and case law, as well as looking at the direct methods and policies of the various humanitarian institutions/organisations in order to understand their approach to statelessness and what effects these approaches have had to date. In doing so, I also consulted numerous refugee laws, as the line between refugees and stateless persons is often non-existent, despite the clear definitions that attempt to separate them.

For the majority of this thesis, I approach statelessness from the perspective of the general international structure and features that make up the dominant approach to statelessness, rather than focusing on the idiosyncratic features of any approach that is particular to a specific nation-state, organisation or legal system. However, there are numerous instances where I compare or analyse various laws or situations of different countries. This is because, even though this is not a comparative study, comparing or highlighting certain nationality laws, or certain situations in a specific country allows me to better illustrate or defend certain statements or assertations that I may make. This is similar in the way that although I used case law in the early stages of my research to familiarise myself with statelessness, within this thesis I only cite specific cases in instances where I want to prove a point or provide an example.

After my initial research, it became apparent that since the very first acknowledgements that statelessness constitutes a serious problem within society, there has been a common trend of approaching statelessness as a purely legal dilemma. This brought about a large collection of laws (international as well as national) that attempt to eliminate or reduce statelessness either directly or indirectly. Very quickly, I realised that on paper, international laws, as well as national laws seemed adequate in most instances, with the right to a nationality being a commonly entrenched right in numerous national laws throughout the world, as well as in the most prominent international human rights instruments. This however, did not correlate to the current statelessness situation (which instead of being eradicated, has persisted stubbornly – even in countries with sophisticated constitutions). It appeared that a purely legalistic approach was not entirely sufficient.

> "Philosophical research is an indispensable instrument in the toolbox of a legal researcher. In spite of being abstract in the higher levels of reasoning, the philosophical approach to legal research is expected to be rooted in social realities".[71]

Philosophical discourse becomes intellectually significant, especially given the uncertainties pertaining to future developments with regards to social, legal and political structures and systems,[72] and the resultant theoretical nature of any purported prognosis. Law, like other social sciences, is not an exact science that can be mathematically or scientifically predicted, but rather always includes of a plethora of open-ended notions and concepts. It is here that the potential of philosophical discourse shines. Law has an extensive impact and reach on each stage of individual and collective life that infiltrates all forms of human interaction. Theoretical discussion provides a useful method to deal with both practical and conceptual complications that arise within the diverse assortment of legal categories that regulate all aspects of human life. Statelessness, an occurrence that simultaneously presents puzzles in both theory and practise could thus benefit immensely from legal-philosophical discourse, in that the actual experience and urgent struggles of people in the real world can be brought to the fore and legal norms challenged, as opposed to solely focusing on formalistic "protections" that do not always find application to those most in need.

I realised the need of employing and making use of various different methods of research, which is not uncommon in the context of legal research in general.[73] In addition to this, I conducted some inter-disciplinary research, taking information not only from the legal field but also from various other fields such as sociology, psychology, humanitarian studies and philosophy. I eventually found myself within the realm of critical legal theory and general jurisprudence.

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71 Bhat 2017:1

72 Relating not only to statelessness per se but also to widely accepted, and mostly unchallenged, systems such as the sovereign state and nation state system, the international law structure and the authority or power that international organisations hold over independent nation-states.

73 Bhat 2017: 8 ; See also McCrudden 2006: 636.

What became apparent is that there is a striking similarity between the issues that modern normative jurisprudence faces and the issues that have plagued the approach to statelessness. In the same way that jurisprudence has moved towards a restrictive approach, so too has the approach to statelessness. In fact, a parallel can be drawn between the approach to statelessness and the popular trend throughout all aspects of law and legal education, in that a purely formal, legalistic approach is mostly relied upon.[74] Critical jurisprudence,[75] which was historically the norm, has been replaced by "a technical and professional approach".[76] So too has statelessness been approached from a technical perspective. The preoccupation on analytical positivism has thus resulted in a large volume of formalistic laws that on their own have not yet been successful in eradicating statelessness. It is in this context that there is need to reintroduce critical theories back into legal theory, especially when trying to address problems such as statelessness that have not yet been fully resolved despite numerous legalistic "solutions".

Thus, as part of my literature review,[77] my primary sources included authors such as Hannah Arendt, Costas Douzinas and Giorgio Agamben, all of whom are authors with solid philosophical backgrounds, and strong critical jurisprudential tendencies. The works of these authors were initial focus of my literature review.

Arendt not only published works that specifically mention and deal with statelessness (stemming from her own personal experiences), but also on other issues that often go hand in hand with statelessness even to this day, such as discrimination,[78] and , nationalism.[79] Her views on rights, human dignity as well

74 Douzinas and Geary 2005: 3-42.

75 Critical jurisprudence, as opposed to the dominant type of legal thinking (restrictive jurisprudence), is a return to the traditional method of legal theory that is wider in scope and incorporates classical philosophy as well as all aspects of society. While restrictive jurisprudence can be said to be characterised by cognitive and moral poverty, critical jurisprudence allows a radical rethinking of the nature of rights, justice, sovereignty and judgment. It is not only concerned with the posited law, but the law of law.

76 Douzinas & Gearey 2005: 5.

77 Here literature review does not include legislation, case law, international law, international policies etc.

78 Arendt 1949:33. Her specific focus being on anti-Semitism and racism, however many of her views can be equally applied to other forms of discrimination.

79 While she often focused specifically on the examples of Nazism and Stalinism, she also gave her perspective of nationalism on a global scale as well as on the concept of citizenship.

as her emphasis on "world making" and the importance of participation as a political being provide an interesting perspective on many of the issues surrounding statelessness.[80] Arendt's emphasis on the importance of the ability of individuals to engage in meaningful political action as a way of belonging and engaging in the world in all its multiplicity and complexity is particularly relevant to the phenomenon of statelessness.[81]

Douzinas was of particular importance to the initial parts of my research, particularly when deciding on my method and theoretical approach. His book, co-authored with Adam Geary, *Critical Jurisprudence* gave immense insight into the field of general jurisprudence and heavily influenced my thought processes throughout my research.[82] At the heart of critical jurisprudence is the need for continuous rethinking of the political,[83] as well as the need to reconceptualise political and legal norms. Douzinas and Gearey seek a return to what they call a "general jurisprudence".[84] They believe that law has merely become "a guidebook to technocratic legalism, a science of what legally exists and a legitimisation of current policies".[85] Rationalism and positivism, doctrine and dogma replaced the humanistic immersion in legal text.[86] Within modern normative jurisprudence, positivism and formalism are dominant, which approach Douzinas and Geary blame as both the cause and effect of "moral poverty"[87] in jurisprudence (i.e. restrictive jurisprudence). Hence my decision to approach the core chapters of this thesis with general jurisprudence in mind, rather than an analytical, formalist approach.

Agamben's concept of bare life and sovereignty is particularly relevant to statelessness.[88] He expresses that the muscle of sovereignty is revealed most directly through exception, i.e. by placing an individual either outside or beyond the law or specific laws. He explains that those who are excluded to the extreme

80 Arendt 1951: 296-297; Gündogdu 2015: 168; Nancy & Lacoue-Labarthe: 1997.
81 Arendt 1951: 297.
82 Douzinas & Geerey 2005.
83 Van Marle 2019: 209.
84 Douzinas & Gearey 2005: 10.
85 Douzinas & Gearey 2005: Foreword.
86 Douzinas & Gearey 2005: 4.
87 Douzinas & Gearey 2005: 5.
88 Agamben 1998: 126-135.

and stripped of all legal status, find themselves effectively banned from the political community. In this way, the nation-state decides who belongs to the community of political beings and who will be classified only in terms of biological fact - bare life. Agamben further argues that despite the claims made by certain international organisations, NGO's, legal scholars, and governments, human rights laws today are not sufficient to protect us from the abuse of state sovereignty, but, on the contrary, are actually a concerning sign of our mounting powerlessness and political alienation. Agamben's critique reveals important paradoxes that are central to the politics of human rights, statelessness and exclusion.[89]

During the process of my literature review, a large number of books and journal articles became relevant. Whilst some were commentaries or critiques on my primary sources or were heavily influenced thereby, others where independent or unique and provided different useful perspectives. Authors that featured prominently within my literature review stage include Kingston, Benhabib, and Batchelor, just to name a few out of a very large number of academic scholars and authors.[90]

As is common with most types of research, the process was not linear. I was constantly reverting back to previous stages of the method I have set out above, or branching outward towards new ideas or theories, whilst continuously re-examining and revisiting various sources. I did this by, for example, going back and re-looking at the various international laws with new eyes after having been influenced by various authors. Or re-reading an article with a new understanding after making a new connection that only became apparent to me later on. Whilst I most certainly had a clear method and theoretical approach that I followed, this thesis evolved in a patchwork way, with me continuously finding new pieces of the puzzle as I progressed in my academic journey.

1.6 Limitations

89 Agamben 1998: 126-135. And will be discussed in more detail in Chapter 3.
90 Kingston 2010, 2013, 2014, 2017, 2019, 2021; Benhabib 1998, 2002, 2005, 2006, 2007, 2009, 2011, 2012, 2014; Batchelor 1995, 1998.

This thesis will not focus on refugees, migrants and/or internally displaced persons even though there is often a large overlap between these persons and stateless persons. This was done in order to avoid the thesis from branching off in too many directions and running the risk of losing sight of the core research problem.

This thesis also adopts a more international approach and thus sometimes needs to make comments based on the general approach to statelessness on a global scale. As such, this thesis does not limit itself to a single nation-state where statelessness is evident, but rather treats statelessness as the global phenomenon that it is. Not every state has the same reasons for statelessness and not every state has the exact same approach to statelessness, and as such, it is not possible to investigate the approach to statelessness that each specific nation-state has adopted. With the exception of a short case study on the South African national laws in particular, this thesis only briefly mentions specific national laws in instances where it is necessary to provide an example, or to make a point on a certain topic, rather choosing to focus on the global aspect of statelessness.

Lastly, there are some inherent limitations to desktop research, one such being that it may not always be possible to find articles, reports and research that are completely up-to-date and include the most recent information. As such, it is sometimes necessary to use statistics that may be a few years old. It is submitted however that this limitation does not affect the core submissions of this thesis as statelessness statistics in themselves are not always precise due both to the undocumented nature of statelessness as well as due to the reluctance of numerous states to report statelessness. However, all efforts have been made to use the most recent available information. Another inherent limitation to desktop research is the lack of personal engagement with the subject matter, in this case, being stateless persons themselves. Lastly, due to the very nature of desktop research, it is limited to secondary research, i.e. research that has done by others. This combined with the less scientific nature of jurisprudence, can lead to the risk of potential bias and/or conflicted findings or interpretations.

1.6 Outline of Chapters

Chapter 1, the current chapter, provides the necessary structure by dealing with the research problem, hypothesis, motivation and method, as well as this brief outline of the chapters. In doing so the purpose and core issues of the thesis becomes evident. Together this provides a general introduction to the topic by broadly introducing the phenomenon of statelessness, the causes of statelessness and the effects it can produce. This enables the reader to formulate an understanding of the thought processes behind the research which in turn sets the context for the more substantive chapters to follow.

Chapter 2, responds to the Research Question 1,[91] dealing with both nationality and belonging, beginning with a brief description of the nation-state and an introduction of the concept of state sovereignty. The link between human rights and nationality is then established and examined. This provides a foundation upon which the later chapters are built. Alternate political theories that would modify our current conceptions of nationality are lightly hypothesized.

Chapter 3, responds to Research Question 2,[92] using the works of Hannah Arendt, with the help of contemporary authors who specialize in Arendt's work, to seek further insight into the phenonmenon of statelessness and ineffectiveness of human rights. It consists of a brief introduction to Arendt and thereafter moves onto to examining her views on statelessness, human rights and human dignity. Her conception of and views on totalitarianism enables a critical reflection on our own systems and governance structures. Correlations are made between the current issues of statelessness and the issues that Arendt dealt with. Her phrase the "right to have rights" is analysed and then used to build on contemporary terms such as "equaliberty" and "effective nationality". The attempt is to look at her work through a contemporary lens in order to gain a different perspective on some of the possible deficiencies of the current legalistic approach.

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91 Research Question 1: How do the concepts of nation-states, nationality and belonging relate to statelessness?

92 Research Question 2: Why, if human rights are espoused as inalienable, do many stateless persons find themselves rightless and what is the value of Arendt's notion of the "right to have rights" in addressing the issue of statelessness?

Chapter 4 responds to Research Question 3[93] by setting out the most important international laws and policies that relate to statelessness. Firstly, the two statelessness conventions are discussed in depth, touching on the various problems raised by scholars over the years since their inception. Thereafter, numerous international laws that deal with nationality and/or associated human rights are set out. The chapter concludes with an overview of the major international/NGO organisations and projects that have taken a vested interest in solving statelessness. This chapter adopts a more traditional approach to legal studies as it consists of setting out, interpreting and analyzing various laws. This is essential in order to fully understand the current legal framework that is both a product and a support of the legalistic approach.

Chapter 5 also responds to Research Question 3 and sets out to answer the question of whether the current approach to statelessness is sufficient/in what ways it falls short. It does this by dividing the answer into five sections, although there is significant overlapping of the sections, so each section should not be considered in isolation.

The first section deals with how the dominant legalistic approach has been insufficient due to its assumption that human rights are inalienable or based on natural law. It brings together Arendt's concept of human rights and shows how human rights still have the same limitations or shortfalls that they had at the time of Arendt. It shows that on a practical level, human rights are meaningless without nationality laws. As a set of international human rights, they are meaningless without the existence of an authority that can enforce them. This ties in with state sovereignty as well as the lack of enforceability of international laws in general.

The second section shows that the dominant legalistic approach to statelessness always comes second to state sovereignty. The way that governance policies easily circumvent, exploit or take preference over international laws in practice highlights the power of state sovereignty and ties in with the general lack of enforceability of international law. The topic of governance ties in with, and overlaps with, the sections on marginalization and administrative issues.

93 Research Question 3: What does the current legalistic approach entail and where does it fall short?

The third section demonstrates how any approach that is based upon international laws and projects is dubious without a means of enforcing such laws. Various examples are given where human rights violations occur unpunished. Some hypothetical scenarios regarding the UN's future authority are considered.

The fourth section deals with how the dominant legalistic approach fails to effectively address issues of marginalization. It specifically highlights instances where such discrimination is covert or indirect, or where it is systemically practiced. The notion of effective nationality is emphasized.

The final section examines how administrative issues can cause roadblocks along an individual's path towards nationality, and once again, how the current approach has not adequately dealt with this. A brief case study using South Africa as an example is used to demonstrate that a comprehensive constitution and seemingly adequate national laws is not always enough to prevent or eliminate statelessness. Various case law is also used to provide examples.

Chapter 6 responds to Research Question 4,[94] on the value of an ethical approach and is also the conclusion to this thesis. The chapter addresses the ethical/ moral obligations society has to eradicate statelessness and why we, both as individuals and as members of society, should care about this phenomenon. This chapter concludes by explaining that merely formulating more laws and treaties is not a complete solution to statelessness, and that a different approach with new conceptualizations is necessary if statelessness and the underlying issues are ever to be fully resolved. This new approach can and should incorporate legal reforms, but it should also encompass other broader strategies that may have the ability to address the social, economic, administrative and political dimensions of statelessness on a deeper level.

94 Research Question 4: What is the value of an ethical approach?

CHAPTER 2: NATIONALITY AND BELONGING

2.1. Introduction

This chapter responds to Research Question 1 (How do the concepts of nation-states, nationality and belonging relate to statelessness?) and begins by setting out and describing crucial legal concepts such as the nation-state, nationality and state sovereignty, within the context of statelessness. The link between the nation-state system itself and the phenomenon of statelessness is explained, paying particular attention to how the system itself enables the creation of statelessness. In doing so, the idea of possible alternate political theories/systems is introduced. The attempt being to encourage and expand the thought process beyond the current understanding of nationality, nation-states and the sovereign state system.

Thereafter, the multifaceted concept of belonging is defined and established. The relevancy of belonging within the context of statelessness is emphasized, and in doing so, establishes an underlying theme that should be kept in mind throughout the remainder of the thesis: that statelessness is a broad concept that cannot be truly defined or addressed within a purely legal framework. The fact that belonging forms a quintessential part of the human condition is used to solidify the importance of its role within any credible solution to statelessness.

Throughout the chapter, the notion of human rights, especially the current connection and dependency between human rights, citizenship rights and nationality, is also discussed – setting the foreground for the deeper discussion on human rights and statelessness that follows in the next chapter. In this way, the importance of balancing the present need of a legal nationality (and the benefits thereof) with the need to uphold human rights for all human beings, including those without a nationality, is introduced.

2.2 Nationality

Our entire modern world is made up of a system of nation-states. A nation-state can be described as a territorially bounded sovereign political unit —i.e., an autonomous state that is ruled in the name of a community of citizens who identify themselves as a

nation, which is restricted to a physically defined territory.[1] Within this sovereign nation-state system,[2] a person's legal status and quality of membership can be perilously reliant on the specific state that rules over the physical territory upon which that person resides. By its very legal definition,[3] in order for statelessness to exist, there needs to be both defined political spaces and specific determination relating to political and legal belonging, i.e. nation-states and nationality.[4] Nationality is an influential concept in global governance, both ideologically and administratively.[5]

Ideologically,[6] modern nationality confers the notion that a citizen of a state is more than a subject of a ruler. Whereas a subject is a servant directly under the power of a ruler, a citizen in a democratic state is an equal member within a mass of free people who, collectively, possess sovereignty. Whilst not all nation-states are democratic in nature, old-fashioned ruler/subject systems, such as feudalism, and are no longer popular, with only a handful of countries being run autocratically.[7]

Administratively, nationality is not only a tool for social cohesion, but a form of identification and population control by the state. The conditions and effects of nationality imposed by a state are, without question, a direct result of state sovereignty and self-determination. What follows from this is the widely accepted and upheld notion that a state has the right and power to decide how and in what circumstances citizenship is conferred.

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1 I base this definition off of the definition given in Britannica https://www.britannica.com/topic/nation-state (Accessed 10 September 2020).

2 Our global society as well as international law is strongly founded on the sovereign state system. Sovereignty relates to the exclusive authority and control that a state holds over its own territory, and its power to independently govern itself and its population, i.e. the independence and supreme authority of a state. See Ferreira-Snyman 2006: 9.

3 United Nations Convention Relating to the Status of Stateless Persons 1954 Convention, UN Treaty Series, Article 1: 6.

4 Mancheno 2016: 113.

5 Bloom 2021: 21.

6 By this I mean the ideology surrounding nationality as is used in international law (as well as customary international law), wherein there is a strong tendency towards democratic elements (such as the separation of powers, accountability, rule of law, and transparency, democratic elections such as universal suffrage, secrecy of the vote, the right to vote and be elected, the right to freely assemble and associate, and, importantly, the right to an election that is "genuine"). See also https://www.un.org/en/global-issues/democracy. In 2015, world leaders committed in the 2030 Agenda for Sustainable Development to a world in which "democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development".

7 An example of a fallen closed autocracy is the Soviet Union while ruled by Joseph Stalin.

The notion of nation-states and nationality, along with the concept of national boundaries/borders are thoroughly western phenomena, being largely derived from the European experience - with the borders of numerous third world countries still heavily influenced by colonialism to this day.[8] The concept of nationality (and therefore also the lack of nationality) is thus a product of the imperial core of nation-states. The flowering of nationalism in the 20th century, as well as the fall of various expansive empires that employed more fluid forms of political identification, has often been connected to the emergence of statelessness by historians and authors alike.[9] Statelessness can thus be seen as an unintentional by-product of western design.

The rise in nationalist ideologies, as well as the advent of welfare states, increased the motivation of states to define stricter distinctions between those who were their nationals - and therefore entitled to the social benefits ensuing from political membership - and who were non-nationals.[10] Directly linked to this was the shifted focus towards methods of identification, such as passports and identity documents, to serve the need to control and document issues surrounding migration, nationality and general internal administration.[11] This power to control a population through bureaucratic documentary practices was not only a sign of the nation-state's growing and strengthening authority over its citizens, but also constitutive of its very identity as a sovereign state.[12] Consequently, with the advent of stateless people came the need to control, prevent and eradicate statelessness.

The right to a nationality is arguably most famously entrenched in the UN's Universal Declaration of Human Rights (UDHR) and has since been described as a "primary value" and "…a source of protection, a way of attaching persons to a territorial home, an important, indeed paramount, human need".[13] The unjust exclusion from the rights connected to nationality, as is often associated with statelessness, can be described as "the dark side of democracy, sovereignty, and national self-determination"[14] and

8 Amadife & Warhola 1993: 536.
9 Siegelberg 2020: 3.
10 Jain 2022: 240.
11 Torpey 2001: 256.
12 Torpey 2001: 270
13 Irving 2016: 3.
14 Siegelberg 2020: 3-4.

international organizations such as the UN thus have indeed attempted to address this, mostly by way of international laws, treaties, policies and advisories.

The right to a nationality is accordingly often referred to as a fundamental human right.[15] Within the sovereign nation-state system, the absence of a nationality, or the inability to prove nationality, can lead to the denial of essential resources, such as a public education, legal employment or access to public health care.[16] This logically should never be the case, as loss of nationality (a human right) should actually be the catalyst for protective mechanisms to kick in, rather than being the agent for further deprivation of other basic human rights.[17] This can been seen as an exploitation of state sovereignty, one which is arguably not justifiable. Today's governance structures, from a local all the way to an international level, suffer from an underlying "citizenism".[18] That is, in most cases, in order to be acknowledged as a full member within the national, and thus also the global system, an individual must first be verified and documented – usually as a citizen of a state.

The problem of the lack of nationality for stateless individuals is particularly insidious as it affects not only the accessibility of protective measures within governance regulations, but also who is able to actively participate in creating, maintaining, and reforming such regulations.[19] This exclusion (specifically of those who suffer the most) from participation both on the world stage and in the governance conference rooms makes it less likely for the problems associated with nationality and statelessness to be successfully challenged. This can also result in less consideration being given to the development of more inclusive or alternate systems, as for the majority of the population (as well as for those in a position of power) there is no personal reason for this to be a priority. By considering the exclusionary effects the legacy of citizenship (including the consequences of being withheld the resultant bureaucratic forms of identification such as I.D. cards and passports) can produce, the underlying citizenism

15 Irving 2016: 3; Oman 2010: 279–280. See also Kingston 2019: 53; Shachar 2014; Brubaker 1992: 70.
It should be noted that whilst the UDHR (which is not a legally binding instrument) states that "everyone has the right to a nationality", the binding international treaties which followed do not assert the right to a nationality in the same broad manner as the UDHR.
16 Kingston 2019: 53.
17 Petrova 2009: 14.
18 Bloom 2018.
19 Bloom 2021: 20.

within governance structures becomes open to criticism. This perspective challenges the popular narrative that citizenship is a tool of empowerment and a form of protection.

Keeping this in mind, it is a recognised view that citizenship is a legal membership to a nation-state, one that should be mutually beneficial - with the state providing protection and security in exchange for effective allegiance. Traditionally, nationality is commonly described as a legal instrument that transforms a genuine link between a person and the state into a formal legal status. In doing so, it provides the state with extra stability by ensuring that even if a person were to lose the genuine link with their home state, nationality as a legal status would remain intact as long as that nationality is not formally withdrawn by the state itself. This adds a rationalising and stabilising function within the nation-state system, removing any need to second guess the factual links of an individual at any given point in time.

A common ideology is that a person is regarded a worthy citizen by his or her qualities/abilities (such as understanding the language and customs) and willingness to fulfil duties (for example obeying the laws of the country and paying taxes). However, a large portion of these ‘‘duties’’ are imposed equally on citizens and non-citizens alike.[20] What then exactly justifies a nation-state in utilizing its sovereignty to withhold citizens’ rights from non-citizens in situations where they are effectively functional members of the same society?[21] What of cases where non-citizens (such as stateless individuals) who learn the national language and customs, obey the laws of the country and are willing to pay taxes to the government, but yet still legally have less rights than a citizen? On the other hand, it should also be noted that such contractualising of citizenship risks distorting the meaning of citizenship from that of shared fate among equals to that of a conditional privilege. This in turn leads to nationality, belonging and social inclusion no longer equating to inherent rights but rather earned privileges that are conditional upon the ability to exchange something of equal value.

The challenge that emerges, becomes evident when one acknowledges the importance of nationality (and the right to a nationality), whilst at the same time

20 Exceptions can include military or jury duties for example.
21 Vleiks, Ballin & Vela 2017: 162.

acknowledging the importance of safeguarding and ensuring that the lack of a nationality does not cause further violations of human rights. A middle ground needs to be found between the two concepts. If stateless persons are afforded such protection that there is no longer any difference between them and a citizen of a state, that would render nationality redundant - something that, it can be assumed, most nation-states at present would not be willing to entertain due to the perceived threat on state sovereignty, concerns on state security and fears regarding mass migration and the economic impact thereof. Fierce protection of the authority to decide upon matters of nationality has been a long-standing tradition of nation-states, and although that may change in the future, it currently still holds strong.

Highlighting the power of state sovereignty, are the two contrasting processes of naturalisation and denationalization. For example, whilst many countries provide for the possibility to gain citizenship through naturalization, it remains the sole discretion of the nation-state to decide the conditions relating thereto.[22] This can cause numerous issues between nations whose views and laws differ. Problems faced can thus relate to differences in nationality laws that leave some people stateless and others with dual citizenship. Where it is a requirement that a person renounces other nationalities before naturalisation will be considered by the state,[23] problems can arise if the application for naturalisation is later rejected and the applicant is unable to reacquire their former nationality. In addition to this, due to the discretion being in the hands of the nation-state, situations do arise where certain foreigners can become naturalised while others – sometimes even permanent residents or people born within the country – cannot.[24]

22 League of Nations. Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, League of Nations, Treaty Series, 179 (4137): 89 https://www.refworld.org/docid/3ae6b3b00.html (Accessed 1 December 2021). See also Shaheen 2018: 3 and *Stoeck v. Public Trustee.*

23 Lesotho, Malawi, Namibia and Zimbabwe are examples of such countries; Manby 2011: 21.

24 For example, Palestinians who fled from their homes during the 1948 war and thus were not there during the census were denied Israeli citizenship even if they did not move further than a few hundred yards from their home (Jiryis 1973). Another very different example is that in 2008 France's highest administrative body, the Conseil d'Etat, denied citizenship to a Muslim woman from Morocco (whose husband and three French-born children are all nationals), ruling that her practice of 'radical' Islam was not compatible with French values (http://news.bbc.co.uk/2/hi/europe/7503757.stm).

Similarly, the decision to denationalise a citizen ultimately rests upon the sovereign state, notwithstanding international laws that attempt to restrict or curtail this authority. During Theresa May's period in office as Home Secretary, the government used its powers to denationalize approximately 30 U.K. nationals using the reason that it was "conducive to the public good".[25] The U.K. however is not alone in its view on denationalization. Some interesting statements have been made by high seated politicians where it becomes apparent that nationality is seen as a tool for political agendas or even as a weapon.[26] For example, Canada's Immigration Minister stated "Citizenship is not a right; it is a privilege".[27] In a similar vein, Donald Trump, after being elected president of the U.S., published on social media that "Nobody should be allowed to burn the American flag – if they do, there must be consequences – perhaps loss of citizenship".[28]

With the current system as it is, wherein nationality is a deeply ingrained concept in a world made up of sovereign nation-states, statelessness presents a challenging problem. If statelessness is a by-product at best, and a direct result at worst, of this system, then how can a complete solution be realised within the foreseeable future?
It is thus not unreasonable to deduce that the jealous guarding of state sovereignty; encouraged and accepted nationalistic ideologies; and the differentiation between basic citizenship rights versus basic human rights all contribute to the difficulty of finding a viable and effective solution to statelessness. Not only this, but they provide an environment where nationality can be conditional or even weaponised.[29] Thus, as long as nationality remains an imperative condition to both living a protected and

25 The speech on counter-terrorism is available at: https://www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism (Accessed 1 December 2021). This decision was upheld in *Aziz & Ors v Secretary of State for the Home Department*; See also the Immigration, Asylum and Nationality Act 2006 https://www.legislation.gov.uk/ukpga/2006/13/contents (Accessed 1 December 2021).

26 The examples in 31, 32, 33 were taken from the abstract: Gibney: 2020.

27 Canada's Citizenship and Immigration Minister: Chris Alexander on CBC News, 25 September 2015.

28 New York Times, 29 November 2016.

29 Kingston 2021 makes use of the word "weaponized" to describe the form of exploitation of nationality where, due to the value, rights and consequences attached to it, it is used as a weapon to intimidate, control, punish and/or deport individuals or portions of a population, often in order to fulfil underlying political agendas that may be based on discrimination. Throughout this thesis I choose to also use this word/variations of this word due to the strong emotive connotation it evokes and the ease with which it assists in portraying the sovereign power that nationality and nation-states can have over a population or part thereof.

meaningful life and of being an active, participatory member of society, statelessness will remain a tragic miscarriage of justice.

Although the road to a complete solution to statelessness is not clearly paved, alternate political/legal theories relating to nationality should perhaps be explored, even if initially only on a theoretical basis. With many rights progressively being universalized by international human rights agreements, there becomes a new sense of global justice and the development of new political models or new global concepts – ones that could amplify the effectiveness of this universalization of rights - become more and more relevant.[30]

Even though it has traditionally been seen as a starting point for all other rights,[31] the concept of nationality has been recurrently challenged and debated in political, legal and sociological theory.[32] From a theoretical perspective, the necessity and ethical significance of nationality is sometimes critically questioned. With some evidence pointing towards the erosion of the link between nationality and civil rights, the question arises whether nationality will (or should) continue to serve its traditional role relating to rights.

Due to advances in human rights norms as well as international political engagement, Seyla Benhabib and others argue that we are witnessing a "disaggregation of citizenship rights"[33] in which the civil, political and social rights traditionally associated with nationality are becoming less dependent thereon.[34] This view is strengthened by the fact that worldwide many rights can indeed be exercised at both local and supranational levels by a range of individuals – long-term/permanent residents, denizens, refugees or those with multiple memberships.[35] It must also be kept in mind however, that even in these cases, the exercising of rights is only possible after going

30 Siciliano 2012.
31 Batchelor 199: 156.
32 See Lister 1997: 28-48; Yuval-Davis & Werbner 1999; Skjeie & Siim 2000: 345 – 360; Stephens & Boonzaier 2020: 1-19.
33 Benhabib 2005: 10-18, Sassen 2002: 277, See also Shachar 2009.
34 Glover 2011: 209.
35 Benhabib 2006: 176.

through application processes[36]–i.e. the rights are not automatically conferred as is mostly the case for citizens. Furthermore, in considering Benhabib's view of disaggregation as an "inescapable aspect of contemporary globalization",[37] one must not forget the very real and recurring instances of 're-aggregation' of rights and benefits, the precarious fluctuation between extension and retraction of citizenship's constitutive parts, as well as the continuing denial of full political rights to outsiders.[38]

Consider for example the stateless Estonians of Russian origin whose statelessness is taken by some to be inconsequential due to the high level of civil, political and social rights they enjoy due to residency permits. This includes numerous basic welfare and human rights, legal protection, certain political rights,[39] passports[40] and consular protection – to such an extent that they are sometimes referred to as "*de facto*" citizens.[41]

I submit however, that claiming that *de facto* citizenship renders statelessness inconsequential constitutes a great under-appreciation of the consequences of being stateless, and can also exist as a tool for "avoiding the granting of full and equal citizenship".[42] An important aspect, is that without full citizenship, these individuals lack the political power to vote in national elections. Furthermore, the reality is that, due in part to state sovereignty, that all the rights received by the stateless Estonians of Russian origin run the risk of being removed or amended arbitrarily.[43] In addition to this, there is a risk of rejection each time the temporary residency permits are renewed.

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36 Eg. Applications for permanent residency or application for refugee status. Often certain documentation is needed for these applications, something that not all stateless persons for example are able to provide.

37 Benhabib 2005: 13.

38 Glover 2011:213.

39 Stateless permanent residents only lack the right to vote in parliamentary elections, however they are able to vote in Municipal elections. Although the language requirements to become a permanent resident is often an issue.

40 Grey passport which does allow them to travel in the EU, albeit does not allow them to work in the EU.

41 Tucker J 2014: 280. In the Integration Monitoring 2017 (Kallas & Kaldur 2018: 6), 48% of people with "undefined" citizenship stated that the fact that they can live in Estonia without citizenship was one of the reasons they are not applying for citizenship. See also Jarve "Report on Citizenship Law" https://cadmus.eui.eu/bitstream/handle/1814/65466/RSCAS_GLOBALCIT_CR_2019_7.pdf (Accessed 3 November 2023): 13. Also in Kallas & Kaldur 2018: 6, 18% said that they do not want any citizenship whatsoever.

42 Kymlicka 2006: 138.

43 Tucker J 2014: 280.

For example, if the state deems a person a threat to national security or public order, or if such person has committed a serious crime (which criminal record has not expired), this person risks losing their *de facto* citizenship.[44] There thus exists a level of uncertainty and unstableness to such situation.

Furthermore, the effectiveness of a *de facto* citizenship does not prevent future cases of statelessness and by claiming that it renders statelessness inconsequential there is a risk of treating statelessness with less urgency, or of governments using the *de facto* citizenship argument to actively justify the perpetuation of statelessness to suit their political agendas.[45]

Notwithstanding, it is not to say that such disaggregation of citizenship rights is not feasible or that the concept is inherently flawed, but that the current nation-state system is not entirely compatible with the theory at present. It is thus not surprising that on a more extreme level, some of the more "radical" thinkers foresee not just the erosion of the link between nationality and various rights, but the eventual collapse of the nation-state system all together.[46] Whilst this may seem radical at first glance, it is not entirely unrealistic. If one would be asked to imagine a world without nation-states, it would be extremely difficult, as that is all we know. However, it is important to remember that not so many years ago, in fact, within our recent history, the norm was not nation-states, but rather empires. Just as the world evolved from empires to nation-states, so too can there be an evolution away from nation-states. However, because "nation" and "nation-states" are currently such rhetorically powerful and entrenched terms, any attempts to abolish them outright would be futile at this point in time. Instead, theories that take the weaknesses of the current system and try to redefine and reconceptualize it, are more pragmatic endeavors.

With the incalculable political and legal theories amassing journal articles today, it is impossible to examine each and every theory on alternate systems that could provide an answer to resolving statelessness. However, two distinct, but strongly related,

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44 Article 21 (1) of the 1995 Citizenship Act. See also UNHCR "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights Compilation Report - Universal Periodic Review: ESTONIA 2011": 10.

45 Tucker J 2014: 282.

46 Due in part to factors such as globalisation, open borders, transnational agreements and quasi-citizenships such as the EU.

schools of thought stand out, and are described below in order to show the possible direction in which the global dynamic in future could possibly go and what this could mean for statelessness.

Cosmopolitanism

> "Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also of perpetual peace."[47]

Cosmopolitanism is a controversial concept that is often the topic of debate. Its normative conception supports the notion that every person, as a member of the global community, is entitled to equal treatment and respect, regardless of what their nationality status is. From a moral or ethical standpoint, it emphasizes that human beings possess an inherent worthiness irrespective of their physical location upon the globe, nationality or ethnicity.[48] From a stateless point of view, it emphasises a sense of universal hospitality, where every person, when acting peacefully, has the right of temporary sojourn and a right to associate.

Immanuel Kant, who is seen as a typical representative of 18th century cosmopolitanism,[49] states:

> "They have it by virtue of their common possession of the surface of the earth, where, as a globe, they cannot infinitely disperse and hence must finally tolerate the presence of each other. Originally, no one had more right than another to a particular part of the earth."[50]

His views were both predictive and suggestive, and indeed arguably foreshadowed

47 Kant 1795: 9.
48 Benhabib 2009: 30.
49 Cavallar 2012: 95.
50 Kant 1795: 8.

contemporary international human rights doctrines.[51]

Likewise, Arendt's suggestion for a "new law on earth" that would ensure that every person could claim membership somewhere, and her notion of the "right to have rights" are compatible with certain cosmopolitan ideals in the sense that it attempts to set a global standard that provides the basis for a minimalist threshold for inclusion that would be accepted and applied universally.[52]

Feminists too have adopted many of the normative cosmopolitan ideals, having internationalist inclinations since their inception. Emancipatory politics, participation and political agency, are recurring themes often with the focus being on the right to belong, and importantly, the right to participate as equal adults in a political community.[53] Functioning within the international arena through the paradigm of human rights, many feminists critically engage with and adopt many cosmopolitan and transnational ideologies.[54]

As a legal-political theory, it is founded on the idea that all human beings are members or world citizens of a single, universal community that constitutes a world-state that should be governed by a global authority. Some authors go as far as to suggest that each member would have the individual capacity to directly participate in global democratic decision-making and governance.[55] This differs from our current system, where individuals are represented by their nation-states when it comes to international law making.

Strong cosmopolitan ideals are commonly adopted in the age of modernity, and are actively developing alongside our nation-state system. Beginning with the adoption of the UDHR, there has been an international evolution towards cosmopolitan norms of

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51 Kant 1996: 322.

52 Siegelberg 2020: 192.

53 A recent study (Salami & Mohammad 2021) showed that women in many developing countries still enjoy less economic, social, cultural and political rights than men. See also Yuval-Davis 2011: 76 and Routledge International Encyclopedia of Women, ed. Kramarae & Spender, 2000 for more history on Woman's Rights.

54 Deiana 2013: 184 - "Embodying promises of equality, peace and justice in responses to challenges posed by globalisation (e.g. Spike Peterson 1990; Grewal 1999; Hilsdon *et al*. 2000; Stivens, 2000; Zalewsky 2004; Reilly 2007)".

55 Tan 2017: 1.

justice.[56] The UN is perhaps the closest approximation to a global authority and is arguably the result of a cosmopolitan vision. However, it is not, at this stage, a complete, authoritative form of world governance,[57] being limited in most cases to an advisory role. The formation of an organizing political authority has thus only partially been realised, and although international human rights have proven to exert some form of binding power in certain instances, the global public as a cohesive society remains weak.[58]

Taken in the most literal legal-political sense, cosmopolitanism would result in the establishment of a world-state and global government – the actual possibility of which is uncertain. Still, at first glance, there seems little reason not to put this forward as the answer towards creating world peace and realising the universal utopia that has been coveted by various philosophers since the first forms of society emerged. One could anticipate, whilst risking being overly optimistic and perhaps naïve, that a global world order would eradicate international wars, would eliminate currency risks (by standardising the use of a global currency), solve migration and refugee problems and would completely eliminate statelessness, as every person would hold world citizenship. A world-state in these terms would supersede the system of sovereign states, engage a global civil society, embrace globalisation and transcend national borders and boundaries.[59]

Whilst the idea of a world-state forming is a contentious one, for both practical and normative reasons, some authors argue for the inevitability of such a development simply by drawing conclusions from historical trends.[60] The consensus of these authors is that there exists a long-term historical trend by which the world has progressively been separated into ever fewer political units. Thus, the prediction of

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56 Benhabib 2009: 35.

57 As it lacks certain fundamental parts of a government, i.e. lack of a sovereign territory, lack of direct control over the population, no executive, legislative or judicial authority in the traditional sense, membership is voluntary and no independent taxation powers.

58 Brunkhorst, 2002: 196 as referenced by Albert 2014: 523.

59 Yuval-Davis 2011: “Mary Kaldor (2003) even went so far as to construct a typology according to which only a cosmopolitan politics of belonging could provide the right antidote to those who initiate and maintain the endless new wars so typical to the contemporary era”.

60 See Carneiro, 2004; Marano, 1973; cf. Chase-Dunn and Inoue, 2012 on the possible acceleration of the process. As referenced by Albert 2014: 521.

these authors is that this trend will continue until such a point where only one such political unit will be left, i.e. a world-state.[61]

The literal version of cosmopolitanism is however not the most frequently proposed or suggested version in academic literature. Even Immanuel Kant, is unconvinced of the possibility of a single world-state.[62] He oscillates between envisioning the constitutionalisation of cosmopolitan law in terms of a world-state and an institutionally more modest league or confederation of nation-states.[63] In "Perpetual Peace" he emphasises the difficulty of achieving a world-state. He states that, given the vastness of the world and the challenges of human diversity, even if attainable, a world-state would be onerous to maintain.[64] In addition to this, there is the belief that should such a world-state be realized, it would only be possible through some kind of global tyranny and totalitarianism. Thus, Kant consistently hesitates before fully committing to the idea of a world-state because of the dangers he perceives of a tyrannical world-state that risks devolving into autocracy, such as a universal monarchy or dictatorship.

Similarly, Arendt, whilst acknowledging the need for a "new law on earth",[65] rejects the notion of a world government.[66] As she wrote in 1955, "the abolishment of a plurality of sovereign states would harbour its own peculiar dangers".[67] She describes her fears of an unchecked, centralised power over earth that holds control of all forms of violence, as a "nightmare of tyranny" and "the end of all political life as we know it".[68] Her concerns are that (reminiscent of WW2) there would then be nothing effectively stopping humanity from deciding to eradicate certain groups thereof.[69] Thus, she did not foresee a world-state as viable or desirable, as it would merely replicate the ability of states to cast out individuals as well as whole population groups, but on a larger, and perhaps more dangerous, global scale.[70] She instead proposed her own version of a "new state", which I discuss under the next heading.

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61 Predictions here varying from the year 2300 to 3500. Albert 2014: 521.
62 See Pauline Kleingeld 2016: 14–23 for a survey of Kant's cosmopolitanism.
63 Scheuerman 2008: 136.
64 Kant 1795: 93–130.
65 Arendt 1951: ix.
66 Arendt 1951:142 & 420.
67 Arendt 1968: 94.
68 Arendt 1968: 81
69 Arendt 1951: 298.
70 Stewart 2021: 170.

Likewise, today, the cosmopolitan agenda is frequently criticized for its hegemonic aspirations. Moreover, it is often accused of Eurocentric parochialism, which tends to exclude de-colonial or subaltern versions of cosmopolitanism.[71] Authors such as Mouffe, who has strong feminist inclinations,[72] and whose writings have been influential on topics on democratic theory and citizenship, provide important views on cosmopolitanism in this regard. Mouffe equates the accomplishment of a world-state with the forcible imposition of western ideals upon a profoundly pluralistic world. Said differently, in a world as diverse as ours, why should one specific ideal be forced upon the entire globe? The cultural differences alone would make this a dangerous task, and Mouffe logically contends that the imposition of a world-state could further aggravate current tensions, and would possibly ignite already volatile relationships, such as those between the West and the Islamic world.[73]

In terms of statelessness, even a world-state on its own would not necessarily completely eliminate all forms of statelessness. Even a world-state where there is no need to document the nationality of each individual (since every person is assumed to be a world citizen), there would still be a need to be able to positively identify individuals within the population.[74] This would entail administrative processes, and the current issues surrounding birth registrations for example could arguably carry over. Failure for whatever reason to register births could still result in people to fall outside of the system and for "statelessness" to occur. This is because an unregistered person would not legally exist and would therefore not be a world citizen. Furthermore, discrimination and marginalisation would still occur, so *de facto* statelessness could live on in the memory of nation-states.

Despite the concerns surrounding cosmopolitanism, various related constructions of contemporary citizenship are visibly developing today.[75] A notable example of this,

71 Kaunonen 2014: 5.

72 Feminists have adopted many of the normative cosmopolitan ideals, and have had internationalist inclinations since their inception. Emancipatory politics, participation and political agency, are recurring themes often with the focus being on the right to belong, and importantly, the right to participate as equal adults in a political community.

73 Mouffe 2005a: 90-119.

74 This would be necessary to avoid certain crimes, fraud and to ensure welfare gets spread evenly throughout the population.

75 Yuval-Davis 2011: 35.

whilst not on a global scale, is the evolution of the EU where a type of quasi-cosmopolitan citizenship has emerged. The creation of European Citizenship is one aspect where the EU shows a tendency towards a legal-political cosmopolitanism that the UN does not. At the heart of legal-political cosmopolitanism, is the idea of the world citizen. The EU has materialized this concept within its own locality with the creation of EU Citizenship. Where the UN comprises of member states, the EU comprises of individual European Citizens. Similarly, the adoption of open borders across EU countries for its citizens, demonstrates the impact of universalization and the possible growing irrelevance of national borders. This abstract form of European "nationality" as it has been developing, has been a topic for debate and it will be interesting to see where it progresses from here.[76] What it does exhibit however, is how a reconceptualization of citizenship could be used to combat the negative effects of globalisation and to embrace the positive aspects thereof.

While both the EU and the UN are heavily laden with such normative cosmopolitanism ideals, however they still uphold state sovereignty and respect nation-states' capacity for self-determination. It could be said that this form of "statist cosmopolitanism" is a step in the right direction, where the territorial authority of the state is preserved, but where states are subject to some extent to an external institution(s) that have the possible ability to develop methods to pressure states to adhere to their international agreements.

From the numerous versions and the even more numerous interpretations of cosmopolitanism, it is clear that the conceptualisation thereof is still in a very fluid and evolving state. However, it is possible that some form of cosmopolitanism is what might help us counter nationalism and humanize globalization, pushing it to be a vehicle of freedom and opportunity for not only a privileged few, but also for the most vulnerable amongst us. At the very least, while some of the more literal, legal-political conceptions of cosmopolitan citizenship are uncertain, the normative conception is a coherent and morally galvanizing ideal.[77]

76 Garner 2018: 132 and Kostakopoulou 2007: 623.
77 Tan 2017: 1.

Hence, the formulation of political authorities such as the UN or EU demonstrates the possibility of a future multi-layered global governance, which could function at a transnational, and/or supranational level, without losing governance at a national level.[78] It is here that the related theories of post-nationalism and transnational governance are of particular interest.

Post-nationalism and the possibility of transnational governance

Moving away from the more literal versions of cosmopolitanism, there emerges other conceptions that rely on new transnational institutions and empowered international organizations that are not necessarily linked to political membership of a singular world government. These conceptions often include a more democratic notion that provides the individual with the entitlement and responsibility to participate in global decision-making. Although still cosmopolitan in many senses, these conceptions fall under a broader category than traditional hegemonic cosmopolitanism. Whereas legal-political cosmopolitanism typically consists of a singular world government to the detriment of nation-states, post-national and transnational governance theories foresee a type of global system that weakens the control, but does not oppose the existence of nation-states. When I refer to transnationalism as a governance regime, I refer to the dissemination and extension of governance processes to non-state actors and organisations that operate in between and beyond the sovereign jurisdictional limitations of nation-states.

Post-nationalism is a broader concept than cosmopolitanism (in fact, modern cosmopolitanism evolved out of post-national tendencies) and similarly challenges the concept of nationality. Post-nationalism, despite its name, is not exclusive of nationalism, and does not mean that nationalism should be rejected in its entirety. It similarly can peacefully coexist with our current understanding. It is a middle ground within the debate of the necessity of nationality. Supporters of post-national forms of citizenship encourage the severance of political identities from citizenship and oppose the norm of forming social groups defined by nationality.[79] They support combining parts of the culture, society, government, politics and economics of an individual nation-state with the global perspective narrative.

78 In addition to the UN and EU, see also WTO and NATO as examples.
79 Benhabib 2005: 15.

Post-nationalism also tends toward the disintegration of traditional citizenship in the same way as cosmopolitanism. Such disintegration is commonly examined as it is arguably a logical and perhaps inevitable reaction towards both globalization, the refugee crisis and statelessness.[80] Post-national propositions vary from global forms of citizenship to more nuanced and inclusive concepts of nationality,[81] with some theories transcending the nation-state system. Allowing nationality to be framed outside the boundaries of the nation-state would also go towards diminishing the more negative autochthonic aspects of nationalism and be more in line with the ever-increasing globalisation of the world.

Especially when considering the issue of statelessness, there is a clear need for a new model where nationality is no longer a requirement to access social, civil and human rights.[82] Such a model, by its very nature, would necessitate the existence of a governing body in order to ensure compliance throughout the world. The necessity of this is exemplified by the current situation where, although human rights have become part of customary international law, since there is no governing body that can provide enforceability, human rights violations continually occur with often little or no meaningful consequences (especially when such violations are committed by powerful – or nuclear weapon holding – states).

Arendt's idyllic solution to this is explained in an interview published at the end of *Crises of the Republic*.[83] She insisted that more was needed than the creation of a global authority (such as a new international court).[84] Rather, she proposed a "new concept of the state" that would be more of a council-state where no single body would hold sovereignty over the world, with power being spread horizontally as opposed to

80 For similar tendencies within a non-European context see Ong 1999.

81 It is interesting to note that some municipalities in Switzerland have taken a completely unique approach to naturalisations, wherein the local community votes as to whether to grant citizenship or not. Although this is no doubt in line with identifying nationality as heterogeneous, this method of granting citizenship (based on Switzerlands direct democracy policy) has not proven to be a fair process, as emotionally charged decisions are sometimes made. (E.g. Nancy Holten who had to appeal to the Aargau government after being denied citizenship by the local community twice). "Swiss trouble-maker finally granted citizenship" https://www.swissinfo.ch/eng/swiss-passport_dutch-troublemaker-finally-granted-swiss-citizenship/43143162 (Accessed 15 October 2022).

82 Thaa 2001: 503–525.

83 Arendt 1972.

84 Arendt 1972: 230.

vertical nature of hegemonic systems.[85] She believed that the interconnectedness forged by globalisation necessitated the need for a system of universal mutual agreements, which eventually would lead into a world-wide federated structure.[86] Arendt did however acknowledge in the same interview that without a full scale revolution, the probability of such a structure emerging, in her opinion, was not high. Nevertheless, our international law system is undoubtedly an ever-growing system of such universal mutual agreements, and the establishment and general acceptance of organisations such as the UN, EU, WTO and NATO point to evidence that some sort of modular transnational global system is already in existence.

In fact, there are numerous contemporary authors whose views are in line with Arendt's vision of a horizontal "council-state". Habermas for example defends a three-tiered system of global governance, where decision-making is spread between the nation-state, a supranational or global level authority and a transnational democracy.[87] This multilevel approach is more in line with Arendt's "Council-state", than the singular world-state often equated with legal-political cosmopolitanism. He in fact already sees the makings of a decentered world society that functions within a multilevel system.[88] He suggests that nation-states can still retain their sovereignty even if crucial facets of governance have been relocated to the supranational and transnational.[89] Throughout his work, he takes the cosmopolitan views and weaknesses of Kant (previously described) and attempts to reconstruct and further modernise them from a post-national perspective.[90] An interesting point to note is that there is no compelling conceptual reason to assume that global governance will necessarily follow the same processes and structure that are observable at the national level.[91] This reflection opens up the way for a wider range of thought and conceptualisation. Habermas was acutely aware of the disadvantages of "merely treading well-worn paths"[92]

85 Arendt 1972: 233
86 Arendt 1968: 93.
87 Habermas 2006a.
88 Habermas 2006a: 131-136.
89 Habermas 2006a: 176.
90 Kant has served as a constant intellectual companion, both inspiring him and functioning as a friendly target against whom he has developed his own position, See Habermas 1997: 113 – 154.
91 Scheuerman 2008: 137.
92 Habermas 2006b: 90.

Mouffe, for example, similarly contends that "pseudo-universalisms"[93], should be abandoned, and insists that any form of global governance would need a multilevel approach in order to be successful. Again there is the proposal for global governance to be modular in design, being constructed around transnational bodies that she calls "autonomous regional blocks"[94] As is popular within feminist discourse, there is an appeal to go beyond the traditional nation-state system and to reconsider the issue though the perspective of globalised human rights.[95] As stated earlier, Mouffe is against the forced imposition of western ideals upon our multicultural world, and thus her ideal approach would need the ability to escape the blanket of western ideals whilst at the same time being able to uphold culturally specific human rights discourses and diverse versions of human dignity.

What is perhaps important to note, is that underlying the various constructs of cosmopolitanism and post-nationalism discussed is the undertone that everyone belongs. For statelessness in particular, as will be discussed next, this is an important notion that is not always given due consideration within the current approach to ending statelessness.

2.3 Who belongs?

> "The land belongs to the voices of those who live in it. My own bleak voice among them"[96]

Although the concept of belonging forms an integral part of the philosophy behind nationality, the two are not interchangeable terms. Whilst nationality is the defining legal element of statelessness, belonging is the human experience; one of inclusiveness and membership, of feeling included and fitting in – the other side of the same coin.

Statelessness poses a daunting problem in that it directly challenges the fundamental logic of the twentieth-century politics of belonging that tend to be based on nationality.

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93 Mouffe 2005a: 117-118.
94 Mouffe 2005a: 117-118.
95 Healy 2020: 122. See also Deiana 2013; Yuval-Davis 2009; Yuval-Davis 2011.
96 Antjie Krog, *Country of my skull*. Antjie Krog is a South African author and poet who often questions South African nationhood and selfhood, often writing of those marginalized by colonialism and its legacies.

There is so much more substance to the concept of statelessness than just a lack of nationality. Statelessness is irrefutably a legal anomaly, however, at its core, it is also a human condition. It infiltrates the lives of its victims - often in devastating ways.[97] It not only deprives people of their legal status and ability to exercise rights, but it can also deeply affect the way people are perceived and how they perceive themselves.[98]

Various theorists, including those mentioned in the previous sections on cosmopolitanism and post-nationalism, have endeavoured to reformulate nationality in an attempt to produce a more nuanced and inclusive concept, often based on new reflections on belonging or multiple senses of belonging.[99] From this multidimensional understanding, they attempt to transcend the formal legalistic approach to nationality by including a broader context with regards to historical, cultural, social and personal notions and practices.[100] Emphasis is placed on the concept of multiple senses of belonging by identifying nationality as dialogical and heterogeneous,[101] emphasising the capacity of shared dialogue to explore and encourage diversity.

The significance of belonging, is not only an important aspect within nationality law debates worldwide,[102] but also a central point in various philosophical and sociological theories related to statelessness.[103] Belonging (whether to a family, to a community, or to a nation) is generally accepted as a profound human need.[104] In the field of social science, it has been emphasised that there is a deep need to "know where we belong in order to make sense of our lives and to give us a sense of purpose; and we need a sense of purpose to make sense of our experiences".[105] I.e., part of the human condition is the strong and inevitable desire to belong.

97 It can cause as well as perpetuate extreme poverty and human insecurity. Tucker 2013: 1.
98 Manly & van Waas 2014: 5.
99 For examples from feminist discussions See Pateman: 1988, Young: 2000, Siim 2000; Siim and Squires: 2008.
100 Deiana 2013: 184 (See also Halsaa, Roseneil and Sümer, 2012).
101 Mouffe 2005b & Yuval-Davis 1999: 119.
102 Geshiere & Jackson 2006: 3.
103 Yuval-Davis 2007: 564.
104 Healy 2020 (See references of Healy: Frankl 1985; Guibernau 2013; Curlette & Kern 2010; Bond 2006).
105 Healy 2020: 120.

Failure to belong can be divided into two parts: the loss of a personal sense of belonging and the actual removal of membership (unbelonging).[106] The former may be caused by outside treatment such as social stigmatization, marginalization or the lack of a nationality for example, but can also stem solely from internal feelings (whether based on reality or not) of not belonging or from being discriminated against, i.e. it is self-defining and subjective - "a personal, intimate, private sentiment of place attachment".[107] Unbelonging on the other hand can be objectively observed and is the loss or denial of official or public-oriented membership, such as the loss or denial of nationality.[108] Not belonging for a stateless person usually incorporates both of these parts as not only do they lack a nationality, but they can also suffer from a personal sense of loss of attachment or inclusivity.

Stateless people can harbor feelings of isolation, of being an outsider or an outcast. They can also face external social effects of other people within the community as treating them as though they do not belong.[109] This can have a serious impact on the health of stateless persons with numerous studies having highlighted the increased risk on mental health and psychological well-being that is directly related to the uncertainty and vulnerability that stem from prolonged statelessness.[110] If one considers the fact that statelessness also increases the risk of not being able to access adequate health care services,[111] the consequences of not belonging can be devastating on a person's mental health and psyche.[112]

If belonging epitomises rooting and security, not belonging is a place of exile and danger.[113] Being stateless is perhaps one of the most consequential forms of not belonging that a person can experience. Besides the mental and psychological trauma and practical day-to-day difficulties that it can entail, it is an infraction of the right to a place in the world that causes a situation where the speech and action of stateless

106 Healy 2020: 119.
107 Antonsich 2010: 645.
108 Antonsich 2010: 645.
109 Geshiere & Jackson 2011: 323.
110 Tay *et al* 2019, Tay *et al* 2015, Riley *et al* 2017 .
111 Kingston, Cohen & Morley 2010.
112 Herberholz 2022 and Riley et al 2017.
113 One of the moving images at the 2016 Olympics was the decision to allow refugees to compete under a neutral Olympic flag. Whilst there has been a considerable history of independent athletes competing under such a fag, this was the first time it was applied to the stateless, allowing ten athletes to compete. (Available at http://www.bbc.co.uk/sport/olympics/37037273).

persons no longer hold significant weight or political value. Without the capacity for meaningful speech and action, authors such as Arendt claim, we are deprived of our humanity,[114] and that this deprivation is the equivalent of not belonging to humanity itself.

So who belongs? This is a global question that has plagued numerous nation-states and populations throughout history. Strong beliefs of who belongs and who does not, still endure today, often in the form of "autochthony".[115] With its inherent demand to exclude outsiders, it is a political mantra with virulent connotations in different parts of the world, often striking a deep – and sometimes dangerous - emotional chord within a population.[116]

There exists a paradox, where there is a fixation on "belonging"[117] that seems contradictory to the ever increasing globalisation and transnationalisation of the world.[118] There is a growing phenomenon of dual and multiple state citizenships on the one hand, but also a growing of statelessness on the other, which endangers the governability and stability of states, blurring the linear boundaries of belonging.[119] The quest for unattainable "purity", at a time where migration and cultural and ethnic mixing is so prominent, simultaneously generates both trepidations about one's own autochthony, as well as an obsession to find and remove the people who "do not belong".[120] Not only is this concerning for all minority groups, but it also undermines the effectiveness of the current approach to ending statelessness.

Autochthonic politics of belonging can take very different forms in different countries and can also be constantly reconfigured in the same places. Their intentions, (similarly to many forms of racialisation), regularly appear to express self-evident or natural worries or desires, such as patriotism, the guarding of ancestral legacy or the fear of

114 Arendt 1958: 176. Parekh 2004: 41.
115 A term that can be described as "belonging" to a certain area due to place of birth or origin (often limited to the "original" or indigenous people of a country) – Geshiere & Jackson 2006: 2.
116 Nazi Germany is an example of this: Safranski 1995: 229.
117 Geshiere & Jackson 2011: 321-399.
118 Ceuppens & Jackson 2005: 386.
119 Yuval-Davis 2011: 79.
120 Geshiere & Jackson 2011: 323. The dangers of this type of thinking are most infamously exhibited by the horrendous crimes committed during World War II, where similar concepts of "purity" were put forward in an attempt to eliminate certain groups from the population.

foreign influences. However, this is often nothing more than a thin veil hiding very different intentions.[121] These autochthonic inspired outlooks can have dangerous consequences, at times being at the heart of large-scale tragedies.

Social and cultural segregation can stem directly from a population's view on who belongs and who does not, [122] often with the notions of belonging and nationality being deeply entwined. It thus becomes apparent that perhaps nationality should not be treated in isolation as merely a legal status - it should go hand in hand with a person's identity and their sense of belonging within the community."[123] When various identities within the population are ignored, the political can become associated with the "tyranny of the majority".[124] Subordinating entire portions of the population in this way not only results in the dehumanisation of the individual members within that portion, but can also have the effect of making their lives more precarious and seemingly disposable,[125] thus reinforcing the polarised position of "us versus them". Well known autochthonous movements that have had widespread effect throughout the world, across numerous countries and borders, include the ideologies of nationalism and xenophobia.

Martin Heidegger for example invoked the term "Bodenständigkeit"[126] as an interpretation of autochthony and used it to promote his form of nationalism for the emerging Nazi-Germany.[127] Defenders of Heidegger note that Heidegger was not alone in his support of the National Socialist German Workers' Party,[128] and that "a widespread feeling of deliverance, of liberation from democracy" was felt by the German population at large during Adolf Hitler's first year of leadership.[129] This corroborates the theory that autochthony often strikes a "deep emotional chord" within a nation-state - a common thread that unites the population. As Hannah Arendt

121 Yuval-Davis 2011: 101; Geshiere & Jackson 2011: 323.
122 Stephens & Boonzaier 2020: 13. (See also: Mkhize *et al* 2010 and Moreau 2015: 494–508 as referenced by Stephens & Boonzaier 2020).
123 *Chisuse v Director-General of Home Affairs* CCT 155/19, 22 July 2020. "South Africa belongs to all who live in it."
124 Healy 2020: 125.
125 Lytle 2017: 71–86.
126 Grunenberg & Daub 2007: 1003–1028: Philosophers such as Karl Jaspers refused to vindicate Heidegger's political actions during the Nazi regime, going so far as to recommend to a de-Nazification committee that Heidegger should be suspended from teaching. He regularly spoke of Heidegger's ontology with ethical disapproval.
127 Geshiere 2011: 323-324; see also Bambach 2003: 135-137.
128 Pöggeler 1992: 248.
129 Safranski 1995: 229.

described it,[130] "Homogeneity of population and its rootedness in the soil of a given territory become the requisites for the nation-state everywhere".[131] Hitler used both nationalism and xenophobia as autochthonic weapons to fulfil his agenda, and openly condemned Jews as enemies of the state.[132] As is widely known, the decision of Germany (and the ability to convince large portions of the population) that certain population groups (most notably the Jewish population) did not belong, resulted in the denationalization,[133] marginalization and later on, in the deaths of millions of people.[134]

This, as well as the aftermath of WW2, undoubtedly brought the spotlight on both statelessness as well as on the dangers of autochthony. History however does at times threaten to repeat itself. For example, 23 years after the end of WW2, Enoch Powell, a former Conservative political figure in Britain, prophesied in a now infamous speech, that "rivers of blood"[135] would flow through Britain unless all those who did not belong there were sent back to their "proper" countries. He was adamant that being born in a certain country, does not mean you belong there and argued that "the West Indian does not by being born in England, become an Englishman".[136] He was later controversially removed from his position in parliament for this. His was the first attempt by a public figure to establish restrictions to English belonging in the post-imperial era. He realised early on that the British Empire was failing and therefor focused on (his vision of) "strengthening" the homeland itself.[137] For Powell, descent

130 Whilst Heidegger displays a clear aversion to inclusiveness, he did formulate the notion of "the lawful space of worldly appearing". This notion was of substantial importance for Arendt's political thought, and ironically provided the foundation for Arendt's famous principles on the "right to have rights" - the right to a place in the world where meaningful speech and action are possible.

131 Arendt 1958: 256.

132 "Our opponents are the same, and behind these opponents there stands the same eternally driving force, the international Jew. And it is again by no means an accident that these forces were on the inside, and have now met again on the outside." And "International Jewry will be recognized in all its demoniac peril." Adolf Hitler's Speech on the 19th Anniversary of the Beer Hall Putsch (1942)
by Adolf Hitler

133 Leaving large numbers of people stateless.

134 First they were no longer allowed to function as full members of society and Jewish people were stripped of their German citizenship. Later this escalated to the deportation to concentration camps, where the majority of deaths occurred.

135 This exact phrase was not used, however it was alluded to when Powell said that he could foresee, "the River Tiber foaming with much blood". The speech however became known as the "Rivers of Blood" speech. See Heffer 1999: 449 for an explanation of this.

136 Quoted in Gilroy 1987: 46. The full text of the "Rivers of Blood" speech can be found at https://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html (Accessed 20 May 2020); (Powell 1968).

137 Yuval-Davis 2011: 21-22.

and bloodline was the ultimate criterion for belonging, and he was unconvinced by any other purported claims – his opinions perhaps clouded by his preconceived autochthonic tendencies.

Autochthonic ideologies have since experienced recurrent intermittent resurgence within more recent political history, some (in)famous examples being policies produced under the reign of the likes of Margaret Thatcher[138] and Donald Trump.[139] There is growing reliance on deportation, weaponisation of nationality, and extradition which, together, have been equated to "twenty-first century state extremism".[140] The Trump administration had strong autochthonic undertones, often placing great importance on who belongs. The resultant effect was large groups of people finding themselves either deported or in detention camps. Other policies included preventing immigrants who rely on government benefits from gaining permanent residency (green cards),[141] as well as implementing additional, more stringent, restrictions and conditions when considering refugee applications.[142] The result being that for many people, stateless persons in particular, permanent residency and/or refugee status became much more difficult (or impossible) to obtain, thus perpetuating the cycle of not belonging.

These real-life examples emphasize how belonging and nationality are intrinsically linked and highlight how both can be a powerful tool utilized by persons in authority to validate decisions that can create or perpetuate statelessness. The resultant exclusion of stateless people effectively renders the affected person a national of "nowhere" and a foreigner "everywhere."[143] The consequences thereof bring about an element of dehumanisation and in spite of globalization and the rapid growth within the human rights discourse, these groups of people are still suffering the negative effects of not belonging.

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138 Prime Minister of the United Kingdom from 1979 to 1990, whose ideologies became known as Thatcherism and was heavily influenced by British Nationalism.

139 President of the United States from 2017 to 2021 whose immigration policies were a topic of bitter debate during his campaign.

140 Kapoor & Narkowicz 2019.

141 This is known as the Inadmissibility on Public Charge Grounds rule. More information on the government website https://www.uscis.gov/archive/final-rule-on-public-charge-ground-of-inadmissibility (Accessed 1 December 2021).

142 Wasem RE 2020: 246-265.

143 Lawyers for Human Rights. "South Africa belongs to all who live in it," but stateless and undocumented children are still fighting to belong. https://www.lhr.org.za/lhr-news/press-statement-south-africa-belongs-to-all-who-live-in-it-but-stateless-and-undocumented-children-are-still-fighting-to-belong/ (Accessed 1 December 2021).

Once stateless, administrative and/or systemic marginalisation can place yet more barriers on the path to belonging. Often being unable to obtain birth certificates and/or identity documents for their children or themselves, the stateless can face multiple challenges. Accessing public or higher education, obtaining public health benefits, entering into a marriage, travelling and obtaining employment, amongst other "normal" life experiences become problematic.[144] As stated by the Constitutional Court in South Africa:

> "Citizenship is not just a legal status. It goes to the core of a person's identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person. Deprivation of, or interference with, a person's citizenship status affects their private life and family life, their choices as to where they can call home, start jobs, enrol in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement."[145]

Although these restrictions can sometimes be overcome with the help of national and international laws, (often only after being brought before a court of law), the fact remains that these restrictions, which do not exist for a citizen, exist for the stateless in the first place. There is thus a positive duty on the stateless person to go through the relevant processes in order to enforce certain rights – rights which are supposedly promised to all human beings. Not only do the stateless not belong as citizens to the nation-state, but now they also arguably do not belong to the human race on the same level as citizens do. Hence, an aspect of humanity is lost to them.[146] This dehumanizing effect is not sufficiently dealt with within the current legalistic approach to statelessness, where legal nationality takes the forefront, and the nuanced concept of belonging is at times not even an afterthought.

In summary, belonging is a connected yet separate concept to nationality, with the focus being on human experience rather than the legalistic form of nationality. The

144 Weissbrodt & Collins 2006: 265.
145 *Chisuse v Director-General Department of Home Affairs* CCT 155/19.
146 Yuval-Davis 2011: 158, "As Hannah Arendt argued in her classic writing on 'the rights of Man' (1986 [1951]), the human rights discourse is not anchored in any supranatural 'god' authority but in people's humanity".

concept of belonging should thus not be ignored as it forms a recurring inner principle common to various social constructs that are directly related to statelessness, such as nationalism, autochthony and xenophobia. The ease with which nation-states can manipulate and even weaponise nationality to push their own agendas highlights the need for a more progressive approach to belonging on a global scale.

2.4 Conclusion

This chapter shows how the concepts of nation-states, nationality and belonging each relate in an integral way to statelessness. It also shows that despite the narrow legal definition of statelessness, statelessness goes deeper than just purely a lack of nationality. This gives us some preliminary insight into why despite comprehensive national and international laws statelessness and the effects thereof still exist and why the current approach has not been fully successful to date.

Whilst nationality is the legal element, belonging is the more human element. Similarly, whilst statelessness, as a construct constituting a lack of both nationality and belonging, is irrefutably a legal anomaly it is also, at its core, a human condition. Not having a nationality indeed boils down to the absence of a specific legal status, but the element of not belonging encompasses a human experience. The framing of statelessness solely within the confines of “nationality law,” “international law” and “citizenship statuses” with stateless people being legally and politically visible only through the lens of their legal status, has a significant dehumanizing effect.

This chapter provides some initial evidence for the fact that nationality commonly forms the basis for upholding and protecting basic human rights. The notions of human rights and humanity recur as important conceptual facets within this thesis, specifically with regards to the polarity between citizens and the stateless. This polarity is what lies at the core of Research Question 2,[147] and later chapters build onto the concepts introduced in this chapter. At the core of the question, lies the fact that rights that are promised to all human beings are not being fulfilled in an equal capacity to all and certain groups (such as the stateless), need to fight for something that is touted as

147 Research question 2: Why, if human rights are espoused as inalienable, do many stateless persons find themselves rightless and what is the value of Arendt’s notion of the “right to have rights” in addressing the issue of statelessness?

inalienable.[148] The connection between nationality and the fulfillment of human rights that this chapter asserts highlights the abstract nature of human rights and the lack of substance behind the proclamation thereof.[149] The idea of a loss of humanity for stateless persons is introduced that should be kept in mind throughout this study.

Possible negative influences of state sovereignty are touched on and are revisited and expanded upon in further chapters of this thesis. An important concept that has been revealed in this chapter is that although commonly proffered as the solution to statelessness, nationality can be a double-edged sword. Not only does it in itself not provide a complete solution to statelessness (as will be expanded upon later), but on a conceptual level it can also be seen as a cause or propagator of statelessness – and in extreme cases, used as a weapon to further political agendas or to perpetuate systemic discrimination.[150]

Alternate ideologies to the current nation-state system were also discussed and provided some insight into possibilities that could be beneficial in the quest for eradicating statelessness. A point to keep in mind is that the forced imposition of western ideals upon a multicultural world might not always be an effective solution and that the possible necessity of going beyond the traditional nation-state system may be the way forward.

After exploring the concepts of nation-state, nationality and belonging within the context of the research problem, we now have a strong foundation on which to begin to address the individual research questions in more depth. The next chapter uses the works of Hannah Arendt and various commentaries on her work by other authors, to seek further insight into the phenomenon of statelessness and the ineffectiveness of the current approach specifically as it relates to human rights violations.

148 This is examined in more detail in Chapter 3.
149 There is an ineffectiveness of human rights experienced by the very people who depend on them the most.
150 See Chapter 5: 5.4.2.

Chapter 3: Hannah Arendt and statelessness

3.1 Introduction

> "Once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth."[1]

This chapter responds to Research Question 3: Why, if human rights are espoused as inalienable, do many stateless persons find themselves rightless and what is the value of Arendt's notion of the "right to have rights" in addressing the issue of statelessness? The lack of the current approach to deal with, or even acknowledge the shortcomings of international human rights law weighs heavily on the lives of many who are stateless. In order to fully understand her philosophy, this chapter begins by setting out a brief background on Hannah Arendt which also explains the motivation for choosing her work specifically. The relevance and significance of Arendt's work is set out in detail, and an analysis on her views on human rights is undertaken in order to identify and criticise the abstract nature of human rights.

Although this chapter does not attempt to isolate a definitive remedy for the challenges that plague the stateless in their quest for human rights, important concepts of effective nationality and equaliberty are introduced.[2] These are concepts that are not always fully considered within the current dominant legalistic approach and could prove to be valuable in augmenting and redefining the said current approach.

Whilst once again addressing the tension created by the nation-state system, the importance of political membership and belonging is emphasised throughout. The polar forces of state and nation, law and the people, the rise of nation-state sovereignty and the pursuance of individual sovereignty, and who belongs and who does not are recurring themes of particular importance not only to this chapter, but to the research problem as a whole.

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1 Arendt 1951: 267.
2 Equaliberty: Balibar 2014: 48-49; Gündogdu 2015:183.

3.2 Why Arendt?

Hannah Arendt is considered by many as one of the most significant intellectual thinkers and political philosophers of the twentieth century. Born in 1906 into a German-Jewish family, she was forced to leave Germany at the age of 27 due to the growing Nazi regime and found herself stateless until she was naturalised as a citizen of the United States in 1951 – after 18 years of statelessness. She held a number of prominent academic positions until her death in 1975. Arendt's work frequently draws upon her own personal experience of statelessness, wherein she critically discusses statelessness as a core concern of human rights and international politics.[3]

Arendt, in *The Origins of Totalitarianism*, scrutinized post-war peace treaties, such as the Minority Treaties,[4] that in her opinion had derided the system of nation-states.[5] She expressed how these treaties uncovered the contradictions revolving around so called "inalienable" human rights and their tie to nationality and natality, and how this relationship between a citizen's place of birth, their rights, and the nation-state seemed to have disintegrated. These contradictions are still present today, with the current refugee and statelessness crisis being an obvious example.

It is after the injustices and atrocities committed during the World Wars that the "right to a nationality" finally materialised within international law. What developed was a widespread concession that legal nationality was a social good that would provide a method of political membership and at the same time guarantee the protection of human rights.[6]

Despite this, during the 19th and early 20th centuries, nation-states frequently used statelessness, in the way of denationalisation, as a punishment or weapon to uphold their social or political agendas. This is what Arendt called a "tool of totalitarian

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3 Whilst Arendt was initially doubtful regarding the future effectiveness of international law, she later on became more optimistic, albeit with regards to criminal law. This is most notable in her report on the Eichmann trial and her discussion of the need and possibility to develop international criminal law and to establish the jurisdiction of international criminal tribunals.

4 She saw that according to the treaties "only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions" (Arendt 1951: 275). Therefore, the minorities were at the mercy of the nation-states: "Representatives of the great nations knew only too well that minorities, within nation-states must sooner or later be either assimilated or liquidated". (Arendt 1951: 273).

5 Arendt 1951: chap. 9.

6 Kingston 2021: 99.

politics".[7] Today, we continue to see troubling developments in how nation-states view nationality rights. Denationalisation is sometimes used to punish enemies and reward others, which has the result of de-valuing the concept of citizenship as a fundamental right and instead positing it as a privilege.[8] As touched on in the previous chapter, denationalisation is also sometimes used in autochthonic movements to target whole population groups. The increasing reliance on deportation, the deprivation of nationality, and extradition can be termed as "twenty-first century state extremism",[9] and is a modern version of Arendt's "tool of totalitarianism".

Just like the post-World War populations of national minorities whose safety and security within the nation-states depended on Minority Treaties, so too do the refugees and stateless currently depend on international treaties that ideally should be upheld by the governments of the individual nation-states. Just like there were populations who had become "undeportable", so too are there similar populations in the modern age. Observing the lack of basic rights that such populations experienced led her to conclude that a deep irony existed. The assertion of the inalienable character of human rights purported by well-meaning idealists was a paradox, the reality being that these rights were in fact very much conditional – I.e. were only enjoyed by the citizens of certain countries. Mirroring the current detention and refugee camps found around the world, for the displaced person post-World War 1, the internment camp, wherein human rights violations abounded, had become the norm.[10]

As someone who personally witnessed the birth and initial evolution of international human rights laws, Arendt's work offers a unique insight into statelessness that can be used to examine the shortcomings of the current approach and humanitarian response thereto. She experienced both a world where human rights were only abstract thoughts without any formalistic qualities, as well as a world where international legal instruments that aimed to create tangible and enforceable human rights started emerging. She witnessed how easily a person can be stripped of their very humanity, but also how resilient the human race is.

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7 Arendt 1951: 19.
8 Kapoor & Narcowickz 2017:1.
9 As seen in the title of Nisha Kapoor's 2018 book "Deport, Deprive, Extradite: 21st Century State Extremism".
10 Motha 2018: 41.

Instead of searching for the source of international legal authority beyond the nation-state, the majority of legal scholars at the time instead focused on basing international human rights on the foundations of state agreement, which arguably has not changed much since.[11] What makes Arendt's critique of human rights so unique and influential however is her effort to understand it within political and historical terms.

Whilst I do not believe that Arendt fits squarely into any definition, her political thinking can be described as civil republican in nature,[12] with emphasis on the connection between individual freedom and civic participation as well as the importance of non-domination or independence from arbitrary power. Put more simply, her work, similarly to civil republicanism, is in strong contrast to any type of autocratic philosophy or government system.

Throughout her exploration of the notion of statelessness, she offers a reconstructed critique on human rights that is still relevant to this day. Her work emphasises the tension between the desire to make all human beings the bearers of rights and the fact that in practice, rights have been proven not to be inalienable, but rather determined by political membership.[13] Arendt argued that a pre-condition for political membership remained essential even as citizenship appeared an increasingly reliable and stable concept within the era of welfare reform that aimed to assure social equality for all citizens. She was acutely aware of the link between statelessness and the resulting human rights conundrum, as well as the failure of nation-states at the time to ensure and implement the normative principles of international human rights. In taking on the demanding task of understanding the crisis of statelessness, she does not rely purely on formalistic statements demonstrating the logical impossibility of human rights, but instead offers a historically and politically informed analysis that I submit is worthwhile to consider when examining the insufficiencies of the current approach to statelessness we face today.[14]

11 Siegelberg 2020: 10.
12 For an indepth discussion on this see Villa 2021: 8.
13 Siegelberg 2020: 10.
14 Gündogdu 2015: 4.

Although there is no guarantee as to what Arendt would have thought about the present statelessness situation, and thus a perfect interpretation of her work is not possible, her work and the subsequent research it inspired carries importance with regards to a vast array of contemporary subjects which include statelessness, international law and human rights.

3.3 Arendt and Human Rights

Who is the subject of the "Rights of Man", asks Jacques Rancière in his widely cited critique of Hannah Arendt.[15] Are they perhaps "the rights of those who have not the rights that they have and have the rights that they have not"?[16] Are human rights simply rights for the rightless and thus by definition void? For Arendt, it is more practical as rights are for: "a new kind of human being- the kind that are put in concentration camps by their foes and in internment camps by their friends."[17]

International law contends that all human beings are entitled to human rights, regardless of nationality/legal status, stating: "All human beings are born free and equal in dignity and rights."[18] I.e., human rights are possessed by all humans for the simple reason of their being human. Thus, such rights are often called natural (pre-social and pre-political), as they are justified by the existence of humanity as such and not by any particular membership attachments. According to such theories, even when totally unencumbered by all things social or political, a stateless person is by nature still a bearer of fundamental rights. Such is the optimism of the philosophy that grew into the concept of human rights that we know today.

The modern institutionalization of human rights makes the existence and persistence of statelessness difficult to comprehend – the paradox of being "rightless in an age of rights"[19] becomes apparent. Arendt saw the assumed stability of the nation-state system as the reason statelessness was seen as an "unfortunate exception to an otherwise sane and normal rule."[20] At the time when Arendt was reflecting on her

15 Rancière 2004: 297–310.
16 Rancière 2004: 302.
17 Arendt 2017: 111.("We Refugees": Originally published 1943 in a small Jewish journal called *Menorah* (shut down in 1961).
18 United Nations General Assembly 1948, Article 1.
19 Gündogdu 2015: 11.
20 Arendt 1951: 267–268.

experiences as a stateless refugee, the general assumption was that everyone had membership to a state, with statelessness being treated "as an unwelcome yet anomalous condition" that "did not need to raise any questions about the ordering principles of the international system itself"[21].

Similarly, in today's world, it is the assumed stability of the human rights framework that risks turning stateless people into "unfortunate exceptions" to the trusted international standards. It is a general blind acceptance and faith in human rights law that threatens to minimalize and turn the challenges faced by stateless persons into merely exceptions to the norm.[22] Yet ten to fifteen million people around the world face situations of statelessness – a rather large "exception".[23] For this reason Arendt was adamant that statelessness should not be treated as an unfortunate exception but rather as a symptom of the complexities of human rights.[24]

Hannah Arendt began forming her ideas about human rights from as early as 1946,[25] which early ideas were eventually integrated into two articles and a book and further developed from there.[26] She witnessed what she called the "decline of nation-states",[27] resulting in the "end of the rights of man".[28] This was demonstrated by the fact that exactly the figures that should have exemplified the inalienable nature of human rights more than any other — namely, the stateless and the refugee —instead exposed all of its cracks. The conception of human rights based solely on the fact of being human, proves to be untenable when faced with people who find themselves unprotected, having lost all qualities except the pure fact of being human (naked life).[29] She saw this as a frightening concept.[30] Indeed, there is no autonomous or secure space within the nation-state system for such naked life. Even in the "best" scenarios, for example where such person is granted refugee status, such status has always been intended

21 Gündogdu 2015: 11.
22 Kingston 2017: 68.
23 Estimates of the number of stateless persons worldwide varies greatly, due in large part to the challenges associated with researching undocumented and vulnerable populations.
24 As Arendt calls them the "Rights of Man"; Arendt 1951: 276.
25 Letter of September 3, 1946, in Hannah Arendt and Hermann Broch, Briefwechsel: 1946–1951, ed. Paul Michael Lützeler (Frankfurt: Jüdischer Verlag, 1996), 14.
26 In particular: Arendt 1949 and 1951.
27 Arendt 1951: Chapter 9.
28 Arendt 1951: 267-304.
29 Arendt 1951: 290-295.
30 Arendt 1951: 291.

as a temporary solution that ought to lead either to naturalization or to repatriation. However, as can be seen in detention and refugee camps around the world, temporary solutions can often become prolonged ways of life. A completely stable reality for the human in its bare form (without the cushion of nationality) is inconceivable in the law of the nation-state.[31]

Agamben (who was heavily influenced by Arendt) provides further insight with his reflections on "bare life".[32] Stateless people are reduced to something stripped down to a metaphorically bare being (a primal state of nature) and seem to exist "solely through an exclusion".[33] Stateless persons not only have a higher risk of human rights violations, but also of experiencing a lack of political life, identity, subjectivity and belonging.[34] They run the risk of lacking important aspects of what it means to live a meaningful life. The statelessness situation exposes the disconnection between human rights and "the rights of the citizen", as well as the contradiction between the universal claims to human dignity and the specificities of indignity placed upon those who only have human rights upon which to rely.[35]

It became apparent to Arendt that, after the atrocities of WW2, human rights based on natural right theory, were nothing more than "hopeless idealism or fumbling feeble-minded hypocrisy".[36] Here she was not referring to specific rights in particular, but to the "loss of a community willing and able to guarantee any rights whatsoever".[37] Without being able to guarantee all human rights to all people, the rights become symbolic in nature, and open to being completely disregarded by authoritative forces. Thus, equating human rights to natural rights ultimately holds no water when human rights violations regularly occur. She inferred that the emerging international instruments of human rights were nothing more than a repetition of previous failed

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31 Agamben 2000: 20.
32 Agamben 1998: 127. "Bare life": Ancient Greeks had two different words for 'life': *bios* (the form or manner in which life is lived) and ***zoē*** (the biological fact of life). Agamben argues that the loss of this distinction conceals the fact that in a political context, 'life' refers almost exclusively to ***zoē*** and with no concern or guarantees about the quality of the life lived. Bare life in this thesis thus refers to a person who has been stripped of their rights, becoming a human life valued only for their biological existence.
33 Agamben 1998: 13
34 Yuval-Davis 2011: 157.
35 Benhabib 1998: 102.
36 Arendt 1951: 269.
37 Arendt, cited in Gibney 2004: 1.

human rights declarations without accounting for, or addressing the reasons for, the profound crisis that had previously befallen the concept of human rights in the face of totalitarian politics.[38] Despite this, human rights continue to be espoused in international law as "inalienable" and "universal", both of which carry strong natural right theory undertones.

Arendt was very much conscious that international human rights laws were undeniably necessary to address statelessness, however she was unsatisfied that the approach seemed "only concerned with laws and treaties".[39] She welcomed the concept of a form of legality that would preside over nation states, but claimed that due to the understanding of state sovereignty, this was most likely impossible. Alluding to the international efforts at the time to draft a universal declaration (which later became the UDHR), she suggested that such humanitarian attempts still exist only within the limits of state-centric international law and thus fail to provide securities for a right to have rights.[40] It is argued that the international community has built fatal errors into modern human rights frameworks by assuming that each person can count on their governments to uphold these rights and be responsible duty-bearers.[41] Whilst the UDHR deviated from the ambiguous language of "man and citizen" that was previously more common and instead introduced an all-inclusive category of a "human person", the formal guarantees of human rights at the national and international level still created dissections within humanity, which left certain categories of people (such as migrants, refugees and the stateless for example) with often insecure entitlements to a much narrower set of rights than those afforded to citizens.[42] Hence, the statelessness situation grew to expose the disconnection between human rights and "the rights of the citizen".

Arendt was often scathing in her critique of postulating human rights as natural or universal rights. In particularly, she pointed to the UDHR's apparent conceptual confusion which would "invariably (lead) to philosophically absurd and politically unrealistic claims such as that each man is born with the inalienable right to

38 She saw the attempts to re-animate the notion of human rights as "lacking in reality". Arendt 1949: 34.
39 Benhabib's (Benhabib 2018: 112) interpretation of Arendt 1949: 24-37.
40 Gündogdu 2015: 6.
41 Kingston 2019.
42 Gündogdu 2015: 5.

unemployment insurance or old age pension".[43] Her objections were based on the fact that the UDHR's attempt to reformulate human rights was merely a formalised repeat of previous (failed) attempts – one that, once again, has no capacity for action or realisation.

Arendt questions not only the possibility of practically realizing human rights but the very idea of human rights itself. Other theorists had similar scathing reactions. When Edmund Burke labels the UDHR as "monstrous" and "tragicomic,"[44] or when Jeremy Bentham refers to human rights as "nonsense upon stilts"[45] they expounded that human rights are normative demands that detach themselves from the very forms of action by means of which they could be realised.[46] Burke's famous statement that he preferred "the rights of an Englishman" over those of the human being emphasise the fact that any rights we enjoy are created from within the nation-state, and are not the product of any natural, divine or universal law.

The very fact that there are people in existence that are stuck in a generational cycle where they do not have access to basic human rights, or who face blatant human rights violations for prolonged periods of time, proves that the very epitome of human rights, as something inherent to all human beings, is baseless. The gap between the triumphs of human rights ideology and the disaster of its practice highlights the paradox that has been created.[47] International/universal human rights, as they have been promoted, thus do not exist. They only exist with permission of each individual nation-state, being administered and enforced only through various national laws. Despite international recommendations and pressure that can be applied, as well as the current form of humanitarian action available, the supposed universal quality of human rights is fragile at best – the stateless being prime tokens of this revelation.

For the stateless and many others that are at risk of falling outside the scope of human rights, there is a need to reconsider the current logic. Approaching human rights using a different understanding of universal validity, one that does not mimic traditionally

43 Arendt 1949: 34.
44 Burke 1987: 9.
45 Bentham 1843: 523.
46 Menke et al 2007: 742.
47 Douzinas 2000: specifically the chapter: The Triumph of Human Rights.

engrained assumptions such as natural right tradition, allows new conceptions relating to modern rights declarations to be formulated beyond the original context. This is only possible where human rights are not seen as natural, and hence insurmountable, but as historically, politically and socially formulated and therefore amendable.[48] If this is the case, then rights can be seen as originating, not from some abstract phenomenon, but rather from public utterances, and consequently necessitates a recognition of equality and freedom.

Statelessness, for Arendt, was a crisis originating from the tension created by the western nation-state system - the polar forces of state and nation, law and the people and who belongs and who does not. Also, the tension between the rise of nation-state sovereignty, and the pursuance of individual sovereignty. It was the view that only those who belong could be citizens that, in turn, had rendered the global reaction to the refugee crisis predictable. What Arendt saw was the exposal of human rights as being nothing more than national rights. Arendt both witnessed and experienced that denationalisation, coupled with the inability to become a rights-bearing member within another country when seeking asylum, was tantamount to expulsion from civilized life. And this, for Arendt, was comparable to being eliminated from humanity altogether.[49]

Arendt was also aware of the preoccupation of law with the need to execute punishment. She stated that “jurists are so used to thinking of law in terms of punishment, which indeed always deprives us of certain rights, that they may find it even more difficult than a layman to recognize that the deprivation of legality, i.e., of all rights, no longer has a connection with specific crimes. In our times, absolute rightlessness is the punishment for absolute innocence”.[50] Within traditional conceptions of law, there is a need to find who is accountable and to punish that person. What Arendt is saying, is that such a conception is inadequate to address a state of rightlessness resulting not from the commission of a crime, but as a result of no particular action whatsoever.[51] There is a parallel between Arendt’s statement and the current international law framework. If one looks at international criminal law, it can be seen that it has a higher level of enforceability when compared to international

48 Wohlfarth 2020: 4.
49 Villa 2021: 68-69.
50 Arendt 1951: 295
51 Children born stateless due to inability to register birth.

human rights law. The parallel does not end there. Despite the lack of enforceability of international human rights law, there is still a tendency by international lawyers to first address the issue of accountability.[52] This is perhaps another area where a form of global cosmopolitanism seems to be a possible solution. A form of cosmopolitanism which not only makes room for the possibility of a renewed engagement with the radical force of human rights but positively demands such engagement.[53] This would allow an approach in which focus can be given to developing positive law and effective safeguards for the protection of rights to prevent deprivation and, failing which, develop further safeguards to ensure the restoral of rights once lost. In other words, whilst accountability is indeed a critical step in obtaining justice, legal interventions should not end there – the prioritising of mechanisms that can restore rights and attempt to reverse the consequences of rights violations should also be ensured.

Apart from a systemic lack of accountability within international law, human rights laws lack something else at a deeper level. What the stateless situation has shown, is that despite the formal step away from natural law conceptions (as evidenced by the resultant codification), human rights laws do not necessarily guarantee a true entitlement to those rights. Although Arendt does not postulate a specific theory of human rights as such, she notably deviates from the methodologies that have always been popular amongst human rights theorists. Her conception of political action attempts to protect a fundamental human dignity that is continuously at risk by the constraints of the nation-state.[54] In a 1949 journal article,[55] she famously coined the term “the right to have rights”, and proposed that there is only one human right, and that is the right to have rights - the one right, from which all other rights accrue.[56] It is something that stems from the right to be a member of an organized community,[57] without which it becomes difficult to be a bearer of positive legal rights.[58] It is the

52 Stewart 2021: 171.
53 Özsu 2008: 879. “Douzinas ’ work is invaluable in this regard, laying the groundwork for a form of cosmopolitanism which neither clings unquestioningly to the humanitarian tradition nor permits itself to be captured by the machinery of an ostensibly mature and conscientious pragmatism”.
54 Isaac 1996: 61–73.
55 Journal: Die Wandlung (in part later reproduced in Arendt 1951 (Origins of Totalitarianism).
56 Arendt,“Es gibt nur ein einziges Menschenrecht,”Die Wandlung 1949: 754–770 also Later reproduced in Arendt 1951: 296 - 297.
57 Arendt 1951: 297.
58 The right to have rights is thus not only the right to be a bearer of positive legal rights, but also the right to belong to a political community and be an active political subject.

primary right of recognition, inclusion, and membership in both political and civil society. For Arendt this existential right to recognition and inclusion can only be conferred by a political body, but she is deeply agnostic about the necessity of that body being a nation-state.

Against the backdrop of modern human rights and the sovereign state system, Arendt thus clearly recognised the primary need to belong to (and be recognised within) a political community before effective realisation of so-called human rights is possible. Arendt's critique of human rights and her right to have rights have received a vast reception, particularly in critical legal and political theory, with a wide range of intellectual dialogue stemming from it, and provides a radical distinction between the formal rights attached to nationality in the legal sense, and the right to human personhood - recognition as a moral equal, that is - endowed by full inclusion within a social and political society.

Losing the right to have rights, results in the sudden concurrent inability to evoke the so-called human rights. This is encountered in varying degrees by all those who have found themselves outside the normative system - the stateless, the refugee, the asylum seeker, and the displaced person.[59] The experiences of the twentieth century are what initially brought to light what had formerly been less apparent and, in fact, before authoritarian rule, had never been questioned.[60] Before WW2, it was widely assumed that human rights were "a general characteristic of the human condition which no tyrant could take away" [61] - an undisputable part of a human being's existence.[62]

Although Arendt's ability to combine observations and experiences with abstract thought does not always culminate in clear-cut solutions, it does have the effect of bringing a new perspective to the issues of statelessness and human rights. After living through WW2, and witnessing how many people were deprived of human rights exactly, and most urgently, at a time when these rights were desperately needed, she

59 Benhabib 1998: 104.
60 Robitzsch 2019: 245.
61 Arendt 1949: 30 and Arendt, "Menschenrecht," 761.
62 Robitzsch 2019: 246.

stated that “we only became aware of the existence of a right to have rights . . . , when suddenly emerged millions of people who had lost and could not regain these rights because of the new global political situation.”[63] This statement succinctly highlights the absurdity of the claim that human rights are inalienable. It demonstrates the deep contradiction between the universal claims to human dignity and the specificities of indignity upon those who only have human rights upon which to rely.[64]

She saw the reason for this as being the fact that rights are strongly rooted in the rise of nation-state sovereignty over individual sovereignty. The concept of universal human rights suggests an abstract understanding of being human. When considering universal human rights as an ideology, one can assume that in matters relating to human rights there should be no higher authority than the individual themselves – i.e. that no institution, group or individual should have the ability to supersede those human rights. Arendt noted that this ideology is evident in the UDHR, wherein it claims the inalienability of human rights and implies that the prescribed rights are independent of any greater power. In reality however, at the time of Arendt as well as in current times,[65] an incredibly large number of individuals find that this does not translate into practice.

It is submitted that the real source of power is found in community and not the individual. As a result, Arendt observed the promised “inalienable” human rights as only being guaranteed through the collective, with individual sovereignty finding itself lacking. Membership to a political community became the vessel through which individuals could call upon human rights laws and anyone without such membership found themselves without the right to have rights. Of course, the most common form of political membership being nationality, with legal status being strongly connected to the ability to be a rights-bearing person.[66]

Despite this, it is argued that the right to have rights cannot be simply equated with the right to a nationality. For Arendt, the right to have rights encompasses the right to belong to a political community but also the right to be a political subject who has the

63 Arendt 1949: 30. See also Arendt, “Menschenrecht,” 760.
64 Benhabib 1998: 102.
65 OHCHR “New global data on human rights showcased in Sustainable Development Goals Report 2020” https://www.ohchr.org/en/stories/2020/07/new-global-data-human-rights-showcased-sustainable-development-goals-report (Accessed 28 June 2023).
66 Benhabib 2011: 13.

ability to express meaningful speech and actions. Taken from this, it can be deduced that is not the possession of legal nationality in itself that is important – it is the effectiveness of membership (whether it be one of nationality or an entirely new conception of political membership that is yet to be created) that is paramount. There appears to be a certain failure within the current approach to statelessness to take this into consideration.

In our current age, and for as long as the nation-state system prevails, Arendt's right to have rights can thus be interpreted to mean effective nationality.[67] Take for example a situation where a citizen's passport is confiscated by the government as a form of punishment.[68] Or in certain cases where all forms of proving nationality (even though the individual does indeed have a nationality) have been lost or destroyed.[69] In order for nationality to be effective, the political membership and social inclusion needs to be both *de jure* and *de facto* recognised. It is only this primary right of inclusion and membership that makes possible the mutual acknowledgement of the other as a moral equal, and thus worthy of equal social and political recognition. "Due recognition is not just a courtesy but a vital human need."[70]

In all of these examples, the individual's citizenship is not effective, in that they, to varying extents, are not able to enjoy all of the rights normally afforded to a citizen. This can vary from the inability to claim certain human rights, to full scale *de facto* statelessness, all whilst the individual holds a legal nationality.

This observation has indeed been endorsed by various experts in the field of statelessness.[71] By viewing Arendt's right to have rights in conjunction with the concept

67 Effective nationality both a true connection to a state (a political member that belongs) and the full protection of the state and all the rights and responsibilities that usually go with having a nationality.

68 Example of the UK weaponising nationality

69 Manby and Clark "Papers please?": The importance of refugees and other forcibly-displaced persons being able to prove identity https://blogs.worldbank.org/dev4peace/papers-please-importance-refugees-and-other-forcibly-displaced-persons-being-able-prove-identity (Accessed on 28 June 2023).

70 Taylor 1994: 25-26.

71 Kingston 2014: 127. Rubenstein & Lenagh-Maguire 2014: 269; See also van Waas & de Chickera 2017.

of “effective nationality”,[72] the deeper connotations of statelessness and the effects thereof become more understandable.[73] This reinforces the idea that in order for statelessness to be solved, more than a purely formal concept of nationality is required. There needs to be a “functionality” which includes the ability to participate politically, a genuine connection (belonging) to the nation-state, as well as the ability to access basic human rights that are generally associated with citizenship,[74] free from discrimination and marginalisation. The right not just to a nationality, but to an effective nationality therefore needs to be developed both as politically compelling and as universal consensus. Only then, can the right to have rights be truly accomplished. This brings us to the question of whether any rights can ever actually be inalienable, since all rights are linked first and foremost to the right to have rights.

The dilemma is if human rights are equated to citizenship rights, then they are not truly “human” rights and are not truly inalienable. However, if human rights are truly beyond the authority of the nation-state, then what authority exactly will ensure they are enforced? Following Arendt, contemporary authors such as Benhabib and Agamben recognise that within the current nation-state (sovereign) system, human rights, being the so-called “inalienable rights of man”, prove to be worryingly unprotected once they are no longer described as rights of citizens of a state.[75] These thoughts are a reflection of what Arendt meant when she indicated that no paradox of modern politics is laden with more irony than the obvious gap between the genuine efforts of idealists who still regard human rights as "inalienable" and the actual position of the rightless themselves.[76]

Arendt’s analysis of statelessness takes this paradox as a symptom of “the perplexities of the Rights of Man”[77] and offers one of the most powerful criticisms of human rights. Questioning the idea that the answer could be in describing them as natural rights, her

72 Not to be confused with the term “effective nationality” when dealing with dual (or multiple) citizenship cases, where it is necessary for whatever reason to determine which nationality is dominant and effective.
73 Vlieks, Ballin & Vela 2017: 170. See also Southwick & Lynch “Nationality rights for all: A progress report and global survey on statelessness” https://www.refworld.org/pdfid/49be193f2.pdf (Accessed 30 October 2023).
74 Kingston 2014: 127. Vlieks, Ballin & Vela 2017: 172 - 173.
75 Yuval-Davis 2011: 156.
76 Arendt 1951: 279.
77 Arendt 1951: 290.

critique highlights how the effective guarantees of rights actually rely on effective membership in an organized political community. Going back once again to the example of WW2, Arendt explains that in order to cultivate an environment wherein genocide would be possible, Nazi-Germany created a population of stateless people by depriving nationality. Hence, the Nuremberg Laws was one of first orders of business. Importantly to note, is that the Nazis understood that statelessness would deprive the targeted population of membership in a political community. In addition to this, statelessness had the exclusionary and dehumanizing effect of taking away the inherent qualities and rights that form part of humanity. Thus, the stateless were transformed from fellow humans into the "scum of the earth".[78] With no disturbance whatsoever to the sacred "Rights of Man" and with their "natural" human rights fully in hand, the stateless were easily removed, detained and even annihilated.

The fallibility of the assumption that human rights were something that no tyrant could take away ignited Arendt's unyielding resistance to base human rights upon any conception of nature. For Arendt, the existence of stateless people brought an end to the illusion of human rights based on natural right tradition. She purported that no notion of natural rights can be defended because such notions are based upon a concept that has never appeared on earth in such a way that it could actually be observed and examined – they are, to Arendt, an abstract concept with no political power.[79] Arendt emphasised the unfeasibility of basing this "new" right to have rights upon the modern concepts of "nature".[80] Instead, she looked towards the concepts of human freedom and humanity. She called for a radical rethinking of human rights.

When interpreting Arendt's work, it can be said that it is the aptitude for introspection that she found to be the root of what makes humans human as well as the source of

78 Terms such as these were reportedly commonly used in Nazi Germany under the authority of Joseph Goebbels, the Nazi propaganda minister. For an example of a poster referring to Jews as the scum of the earth, see the US Holocaust Memorial Museum page, https://collections.ushmm.org/search/catalog/irn544503 (Accessed 11 July 2023).

79 Benhabib S "Critique of humanitarian reason" https://www.eurozine.com/critique-of-humanitarian-reason/ (Accessed on 10 June 2021) 3.

80 Arendt 1951: 298: "[H]umanity, which for the eighteenth century, in Kantian terminology, was no more than a regulative idea, has today become an inescapable fact. This new situation, in which 'humanity' has in fact assumed the role formerly ascribed to nature or history, would mean in this context that the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible."

human freedom. While this freedom is not limitless, being subject to the “human condition”, it is with regard to this and not to a fixed “human nature” that we must attempt to account for the right to have rights.[81] Accordingly, she instead proposes a different category of “humanity,” understood as the unity of all human beings.[82] In order for this right to be assured, she saw a need for the unanimity of all human beings, something which she was not sure could ever be achieved. However, despite this, she still never lost faith in humanity’s ability to "start anew" and to alter its conditions of existence.[83] The notion of “humanity” was invoked by Arendt in order to support her theory of the right to have rights, not as a basis but as a guarantee.[84]

> “The right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible”[85]

Rather than proposing a new foundation for human rights, she encouraged debate on how these rights can be politically established, acknowledged, and asserted through reciprocal undertakings that find a degree of stability within the law and related institutions.[86] And encourage debate she surely did, with numerous intellectuals and academics using her thoughts in critiques, as inspiration and as a form of philosophical stimulation.[87] Political theorist Edmund Burke indicated the vulnerability of those left without political membership, and of the importance of humanity as a safeguard:

> “If Dutchmen are injured and attacked, the Dutch have a nation, a government, and armies to redress or avenge their cause. If Britons are injured, Britons have armies and laws, the laws of nations (or at least they once had the laws of nations) to fly to for protection and justice. But the Jews have no such power, and no such friend to depend on. Humanity then must become their protector and ally.”[88]

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81 Benhabib S “Critique of humanitarian reason” https://www.eurozine.com/critique-of-humanitarian-reason/ (Accessed on 10 June 2021) 3.
82 Arendt 1951: 296-297.
83 Benhabib 2011: 22.
84 Gündogdu 2015: 168.
85 Arendt 1951: 296-297.
86 Arendt 1951: 296-7.
87 Rancière and Agamben for example.
88 Burke 1816: 251.

This emphasises the fact that legal nationality is not a complete protection. The Jewish population within the budding Nazi Germany (before WW2) were in fact legal nationals, however this did nothing to protect them from denaturalisation or the atrocities to come. Without effective political membership, legal nationality was easily circumvented and even revoked. Not only does this quote highlight the importance of belonging within a nation-state, (with the Jewish population being described as an outsider group), but it also implies the existence of belonging on a wider scale as well as the importance of a functioning global community that takes responsibility in instances where injustices occur.

Although Burke was in favour of the idea of international law as a tool to be utilised towards these ideals, he, similarly to Arendt, was hesitant to see it as a complete solution.[89] Whilst he acknowledged that international law, at the very least provides a useful theoretical base of protection for individuals such as the stateless, he also foresaw the inherent risks of solely relying on something as idealistic as international law. His concern was that international law and its modern human rights, having evolved from the rights of natural right tradition, would still be vulnerable to the pitfalls of the past. Reminiscent to the work of Arendt,[90] Burke too put forward the idea that rights depend on membership within a collectivity, and derive from history and prescriptive precedent.[91] Hence, with the absence of an alternate form of global membership, nationality thus becomes imperative. However, being a purely legal solution, and being conferred solely at the discretion of the sovereign nation-state, nationality alone does not provide a concrete basis for human rights – as is showcased by the consequences of statelessness. The right to have rights is what is evidently missing.

In addition to the above, Arendt saw the forfeiture of the right to have rights as form of the loss of the freedom of speech and so, she deduced, of the very existence of speech itself. This is relevant to the concept of human dignity, as from as early as Aristotle,

89 Such ideologies are not new, according to the *corpus iuris civilis*, the medieval codification of Roman law, Roman citizens deported as a punishment lost the rights and privileges that derived from a connection to civil law, but retained the rights that derived from the law of nations.
90 Chountis 2021: 19-32.
91 Siegelberg 2020: 26; Burke 1987: Reflections on the Revolution in France.

human beings were differentiated from other animals due to the ability to command the power of speech and thought. This is twofold, in that freedom of speech confers a power upon an individual, but it also shows that the extent to which an individual is able to both speak and to be heard is a reflection of how much power they have.[92] To Arendt, the loss of the ability to be heard politically corresponds to the loss of all human relationships, community and humanity itself.[93] Arendt states that "the fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective"[94] and continues, "this extremity, and nothing else, is the situation of people deprived of human rights".[95] They are deprived, "not of the right to freedom but of the right to action; not of the right to think whatever they please, but of the right to opinion."[96] It is not only the lack of a nationality, but the lack of belonging; not only the lack of human rights, but the lack of the "right to have rights"; not only the lack of legal membership to a nation-state, but the lack of meaningful membership to a political community – all of which encompasses a fundamental lack of human dignity.

A deep tension evolves between the practical need for universal human rights and Arendt's discontent with the philosophical construction of these rights. For Arendt, rights are born within the political community itself, arising from political activities. She was aware that these rights that claim to be "universal", can simply be considered irrelevant by a particular nation-state, and as such the idea of natural/universal rights is inherently flawed. With regards to statelessness specifically: "Theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality, and expulsion".[97] So if human rights cannot be based solely on being a "natural" phenomenon, and are easily violated when hidden behind state sovereignty, what then is the philosophical basis for calling them "universal".

92 Blommaert 2005.
93 Arendt, "Menschenrecht," 761. Translated into English as per Robitzsch 2019: 247.
94 Arendt 1951: 376.
95 Arendt 1951: 376.
96 Arendt 1951: 376.
97 Arendt 1951: 278.

Perhaps the answer is not to only approach human rights from any one specific perspective. For example, approaching from the view of liberalism characteristics such as liberty, autonomy, and natural rights are proffered; for republicanism, it may be the concepts of equality and political participation; for communitarianism, it is moral self-regulation and duty; and for ethnonationalism, it is ethnic belonging to the nation. Not surprisingly, it can be beneficial when developing theories to mix and match, and reconfigure various traditional (and often times rigid) views into more malleable, original or practical perspectives.[98]

The right to have rights has the potential to take the best of specific theories, accepting that each is necessary but not necessarily sufficient on its own, and therefore combining them into one. More specifically for example, although liberalism's dedication to liberty and individual rights is absolutely necessary, liberalism does not offer a complete solution when attempting to provide a philosophical basis for human rights. Similarly, republicanism's focus on equality, membership, and the principle of participation is also necessary but not sufficient. Finally, communitarianism's insistence on the sphere of the social as a critical site of solidarity is again necessary, but insufficient on its own. The right to have rights, as a developing concept, has the ability to combine the necessary elements from each theory while abandoning their less appealing assumptions (such as liberalism's insistence on grounding rights in the state of nature). For example, the right to have rights could create a configuration that consists of the right of membership and inclusion which re-grounds the principle of human rights not in nature but in the recognition, solidarity and membership of civil society.[99]

Although Arendt doesn't provide a specific label for the principle that should encapsulate the right to have rights and the resultant declarations of human rights, the hybrid term "equaliberty" (which contains aspects of liberalism, communitarianism, and republicanism)[100] has been put forward by contemporary authors.[101] This term

98 For example: Habermas 1997: "constitutional patriotism" & "procedural democracy" ; Balibar 2014: "equaliberty"; Van Gunsteren 1998: "neo-republicanism".
99 Somers 2008: 118-14.
100 Gündogdu 2015:183.
101 Gündogdu 2015: 183; Balibar 2014: 48-49.

encapsulates the co-dependency of equality and freedom,[102] from which human rights can then be evaluated from a substantive or performative perspective rather than a purely legalistic one. The right to have rights challenges the exclusions found within the so-called equal claim to political membership within the current nation-state framework. Gündogdu states that "rethinking Arendt's call for a right to have rights as a proposal that is animated by equaliberty offers us a new perspective on the scholarly debates on the normative foundations of human rights"[103]. Equaliberty, can challenge standardized boundaries and attend to groups that have found themselves without the right to have rights. Reconfiguring the concepts of equality and freedom has the effect of augmenting the conceptualisation of human rights, and can perhaps provide these rights with a more substantial political foundation. This is similar to Benhabib's comprehension of human rights in terms of "democratic iterations" which also calls for reconfiguration of the current human rights system. According to her, each democratic iteration "transforms meaning, adds to it, enriches it in ever-so-subtle ways"[104] which is reminiscent of Arendt's notion of augmentation.[105] Similarly, her emphasis on the practices of groups who "claim that they belong within the circles of addressees of a right from which they have been excluded in its initial articulation,"[106] resonates with Arendt's view pertaining to groups of people that were excluded from "consensus universalis"[107] in her accounts of civil disobedience.

In order to answer the question of what principle should drive the call for the right to have rights, an author such as Gündogdu suggests looking at the way that Arendt analysed the American Revolution and examining the various parallels.[108] There are similarities when one looks at revolutions and human rights development. The similar

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102 Balibar 2014: 48. As Balibar writes, "Simply put, the situations in which both are present or absent are necessarily the same. Or, again, the (*de facto*) historical conditions of freedom are exactly the same as the (*de facto*) historical conditions of equality."

103 Gündogdu 2015: 184.

104 Benhabib 2006: 47; see also Benhabib 2012: 179.

105 Arendt 1963: 214.

106 Benhabib 2012: 197.

107 Being defined as: the necessary correlation and interconnection among elements of a society and the foundation for solidarity within a community. Where there is consensus universalis, by its very translation (universal consensus), all groups of people should be included. An example of how this is not the case, is that the creation of the US constitution was authorised on the basis of "consensus universalis", however as Arendt described African Americans and Native Americans were specifically excluded: "(these people) had never been included in the original consensus universalis of the American republic." Arendt 1972: 89-90.

108 Gündogdu 2015: 181 – 182.

perplexities in their struggles can help us form new conceptions of human rights.[109] Arendt's analysis of the American Revolution submits that one should explore the actual political foundation in order to formulate the basis of authority for any new laws and rights. According to Arendt, this political foundation is brought to life by "the interconnected principle of mutual promise and common deliberation".[110] In the same way, in order for human rights to have authority, there needs to be a strong political foundation that follows mutual promise and common deliberation. The "right to have rights" can then be a statement that both demonstrates and augments the principles currently at work within human rights declarations, in a similar way that "civil disobedience" was able to initiate the augmentation of laws during the American Revolution.[111]

With regards to current international law, the right to have rights has the capacity to reactivate and in effect, augment declarations such as the UDHR using the basis of equaliberty that is already apparent within its text. In the same way that Arendt saw the American revolution, in that there was an introduction of new claims to rights that went against the instituted order, this concept of the right to have rights too can assist in reinventing the meanings of equality and freedom, and perhaps produce a new political ideal. A right to have rights, along with the perplexities arising from its alleged "groundlessness", urges us to attend to how these new claims to rights augment the principle of equaliberty and present alternative possibilities for reconfiguring the relationship between rights, nationality, and humanity. [112] The concept of equaliberty thus drives the call for a right to have rights, and signifies "an equal claim to political activity" and "highlights the inextricably intertwined nature of equality and freedom."[113] A person can only truly live with dignity in a society that aspires to human emancipation

109 Gündogdu 2015: 186-187: For example, in the eighteenth-century struggles of women's rights, Olympe de Gouges, acted as a self-appointed legislator when she proclaimed the Declaration of the Rights of Woman and the Female Citizen, and in doing so, no longer accepted the definition of women as passive citizens. Like the revolutionaries and civil disobedients in Arendt's account, de Gouges set out to do what she was not authorized to do: Exercising the very rights that she did not yet have, especially the most politically salient right of self-legislation, she acted as if she were an active citizen and participated in the ongoing reformulation of rights with her own declaration. Women such as de Gouges demonstrated the injustice of their exclusion from the instituted order of rights by enacting the rights that they were denied and bringing to view the possibility of instituting rights in a much more egalitarian fashion.

110 Arendt 1963: 214.

111 Gündogdu 2015: 181 - 182

112 Gündogdu 2015: 187.

113 Gündogdu 2015: 183.

and guarantees public freedoms not only to its citizens, but to all people within its territory.

Within Arendt's interpretations of principles such as political life, mutual promise, common deliberation and augmentation there is one common thread, and that is that it is not the individual that is the centre of thought, but rather both the individual and the community. She talks of the individual as being a member while at the same time being a distinct component of the community - distinct in that the individual preserves their unique identity and a component in that they cannot be considered as a completely separate political entity unconnected to the community. The agent that has the capacity to promote or invoke basic rights is not the individual or the state - but both, in every situation. These rights can only be protected when they are publicly and consciously embedded into both state and international institutions,[114] whilst being available to every individual within society. This has remained relevant and still mirrors the international law system today. With this notion, the concept of human rights can take on a new form in political theory. Whereas most commonly human rights are pursued as ends in themselves, in Arendt's thought, human rights are a tool for political change. In other words, human rights are no longer seen as the end result of politics but are instead a way through which politics can be approached.[115] Arendt was thus searching for a way to concretely attach the universal value of human rights to the contingent political reality.[116]

She believed that the public sphere, where speech and action could occur, was the key to mutual recognition and equality of political beings. Once a human lost such a place in a community, they would have to rely only on their mere existence as human – which is something that historically has proved to be insufficient to rely on. By institutionalising human rights,[117] Arendt contends that the aim was to " to spell out primary positive rights, inherent in man's nature, as distinguished from his political status, and as such they tried indeed to reduce politics to nature".[118] However, by relying on nature as a basis, declarations of human rights actually disprove one of the

114 Cartland 1992: 6.
115 Cartland 1992: 97.
116 Cartland 1992: 97.
117 Specifically referring to the French Declaration
118 Arendt, 1963: 104.

basic tenets purported by any juridical political community: the idea of equality.[119] For in reality, as proven by the struggles of the stateless, "(w)e are not born equal, we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights"[120] If equality is in practice not a natural attribute, but an attribute of being political members, any intimation of a “natural” human being or of “human” rights in this regard, destroys any claim to equal rights.

It is at this point that it is necessary to note that Arendt held a clear distinction between private and public life, one that takes homage from the classical Greek division. She relied on two semantically and constructively distinct terms: zoe, which is the biological fact of living common to all living beings, and bios, which is the form of living that distinguishes a single individual or group.[121] Throughout Arendt’s work, it is clear she holds high regard for political life and finds it not only admirable, but an inherent aspect of the human condition. Again, this brings us back to her continual emphasis on the significance of speech and action as distinct human qualities. Bios, for Arendt, is political in nature, and is a definitive part of the human condition because it is precisely when speech and action is executed by political members upon a public stage that our humanity and our capacity to rise above, is most palpable.[122] Whilst her preoccupation on political life as a condition for being human is especially open to criticism, it is not necessary to take every part of her work literally. We are in the favourable position of interpreting her views in different ways. Both critiques and extensions of her work are beneficial when tackling challenging topics, and is it thus the ability of Arendt to incite debate on an intellectual level that is perhaps part of her genius and the reason for the renewed interest in her works.

3.4 Conclusion

Human rights discussions have understandably experienced extraordinary political and normative ascendency throughout the preceding two decades. For some, the institutionalisation of human rights is a sign of a progressively post-national or cosmopolitan era, whilst others see it, particularly in respect to the international humanitarian responses, as a type of neo-imperialism. Some others hint at more

119 Menke *et al*. 2007: 745-746.
120 Arendt 1949: 33.
121 Agamben 2000: 3.
122 Villa 2021: 6-7.

subtle forms of political power at play, suggesting that human rights expose us to the very state power from which they promise to protect us. However, a common theme throughout human rights laws is the supposed inalienability of these rights.

So why, if human rights are espoused as inalienable, do many stateless persons find themselves rightless? This chapter shows that without a right to have rights, any attempt to claim that human rights are inalienable or universal in nature is in vain. In other words, without a right to have rights (that is enjoyed by all people, regardless of nationality), no other right can truly be inalienable. Although nationality is often the doorway to numerous rights, the right to have rights should not be merely equated to nationality. Doing so, in a world of sovereign states where nationality can be stripped or withheld at will, would not provide any guarantee that the right to have rights would not be arbitrarily revoked or withheld. Thus, the right to have rights should be guaranteed by humanity itself, and should be synonymous to the right of every individual to belong to humanity as a functioning member that can speak and be heard, especially on a political level. This would entail a level of global responsibility and unity, as well as a universal acknowledgement of the ethical obligations, the possibility of which within our current system is uncertain. However, a disconcerting thought is that the current system has such a strong hold on our political imagination that it has become very difficult to conceive any other reality.

What is certain however, is the importance of political membership, effective nationality and equaliberty within the context of statelessness in building the right to have rights. In order for a legalistic concept such as nationality to solve statelessness, a measure of equaliberty needs to simultaneously exist for all persons, regardless of legal status, which can be invoked to drive the call for a right to have rights. Equaliberty places on a pedestal the importance of owning an equal claim to political activity whilst upholding the inextricably intertwined nature of equality and freedom. Equaliberty prioritises the importance and inherent dignity that evolves within a society that aspires to human emancipation and guarantees public freedoms and rights not only to its citizens, but to all people within its borders.

Flowing from this equaliberty, an important aspect is that there needs to be some form of political membership, to which all people qualify, regardless of a nation-state's

conferral of nationality or not. If the right to have rights was merely equivalent to nationality, then it would be vulnerable to the same deficiencies that human rights succumb to. This is where the concept of equaliberty can contribute towards a solution to statelessness, in that it encourages thought beyond the confines of our current system and forms part of an ethical approach to human rights.

Lastly, once nationality has been confirmed, it needs to be both effective and functional. Without being effective and functional, residual traits or underlying issues of statelessness may remain. This understanding of the right to have rights provides invaluable insight into the research problem, as the current legalistic approach appears not to have sufficiently addressed Arendt's concerns.

The findings of this chapter show that whilst human rights should not be based on something as abstract as natural law, they can however be taken in a new direction by rethinking them in terms of a right to have rights. Arendt's work clearly takes issue with the way groups of people can so easily be excluded from the equation of "man and citizen" and the discourse on the right to have rights can be seen as a critique of this state of affairs as well as an appeal to consider a redesign of the sovereign state system itself.

In conclusion, whilst Arendt's political philosophies do not provide a finite account of all moral and legal concerns involved with human rights, it does afford a vital insight that is not often found within most prominent human rights philosophies. That is, the problem of rightlessness can only be resolved by a reconstruction of political identities and the creation of new forms of community, perhaps even one that can challenge the sovereignty of the nation-state. With this distinctive approach, Arendt makes a significant and often overlooked contribution to human rights literature. I argue that such an oversight risks diminishing creativity within the quest for a solution to statelessness and allows the stagnation of the current approach that has proven to be insufficient. The lack of a right to have rights is thus submitted to be at the root of human rights that are not actually afforded to all human beings.

CHAPTER 4: THE CURRENT APPROACH TO STATELESSNESS

4.1 Introduction

In a letter dated 21 October 1960, Hélène Batresco implored the (then) secretary-general of the United Nations to grant her French citizenship in an attempt to bring her protracted condition as a stateless person to an end. Writing in bold capital letters, she stated "I do not want to die apatride," and adding, "What is it to be human if not to have the right to a nationality?"[1] What is noteworthy is the expectation that the UN had the power and ability to intervene with decisions made by the French government. Batresco appealed for the upholding of her right to a nationality, and was adamant that the possession of a nationality was intrinsically bound to her so-called human rights. Her letter highlighted the post WW2 view that the solution to statelessness depended on a cooperative international approach to ensure that everyone possessed a nationality.[2]

Due to the "stateless" nature of statelessness, any large-scale attempt at a solution inevitably involve an inherent international aspect and for that reason this chapter aims to set out the international laws and organisations that contribute to the current approach to statelessness. In doing so, the first part of Research Question 3 (What does the current legalistic approach entail?) is answered. This is important as knowledge and understanding of this legal framework is necessary before the research problem can be fully addressed. Due to the strong human rights aspect that is prevalent in the current approach, the value of the right to have rights should be kept in mind throughout.[3]

Having finally arisen from its obscure position within the dregs of international law, the phenomenon of statelessness still however manages to persist, seemingly able to elude the conventional international legal instruments that strive to abolish it. Challenged by issues of nationality that traditionally fall within the greedily protected domain of sovereignty, international bodies are indeed faced with a daunting task. This

1 McAdam 2010:105–131.
2 Siegelberg 2020: 193.
3 This provides a link to Research question 2: Why, if human rights are espoused as inalienable, do many stateless persons find themselves rightless and what is the value of Arendt's notion of the "right to have rights" in addressing the issue of statelessness?

chapter begins by setting out the international legal framework surrounding statelessness as well as the general human rights laws that relate thereto. This framework includes international law (in the form of treaties)[4] as well as the various humanitarian organizations and their projects and policies on statelessness. By doing this, the legalistic nature of the approach to statelessness will be made apparent. The international law that is relevant to statelessness has largely been governed by the UN, and as such, I begin this chapter by focusing on the various UN treaties. The most noteworthy products of UN's effort to address statelessness are the two conventions: the 1961 Convention on the Reduction of Statelessness and the 1954 Convention relating to the Status of Stateless Persons. While these two conventions are the only pieces of international law that are directed specifically at statelessness only, it is important to note that there are many other pieces of international law that relate to statelessness – oftentimes filling in when it comes to situations that can fall outside of the scope of, or are not sufficiently covered by the statelessness conventions. In particular, developments in the field of human rights law have vastly contributed to the expanding set of international laws that address specific (sub) topics relating to the problem of statelessness. For parts of the chapter, it is clear that I move temporarily to a more traditional approach to law, i.e. by studying legal instruments, legislation and case law in a practical way, noting any gaps or inadequacies therein. This directly relates to the research problem in that it shows that although there are in fact very few gaps in the laws surrounding statelessness and the right to nationality, these laws in themselves are not sufficient to fully address the problem.

4 I use the word treaty as a general term that includes conventions and other similar international agreements.

4.2 International Law

> "No state, no matter how draconian its law, should have the right to deprive citizenship."[5]

The founding document of the UN is the Charter of The United Nations and Statute of The International Court of Justice (UN Charter), which was signed on the 26 June 1945 at the conclusion of the UN Conference on International Organization, and came into force on 24 October 1945.[6] The purposes of the UN was stated as including: maintaining international peace and develop friendly relations between nations; achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character; and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. In fact, the preamble specifically refers to the aim of reaffirming confidence in "fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

As previously stated, the global response to statelessness to date has been a predominantly legalistic approach - with statelessness being treated as a "legal anomaly", one that can be corrected through legislation and treaties. These strategies for combatting statelessness are inclined to be focused on gaining (or re-gaining) legal status in the form of nationality, irrespective of whether the nationality is effective/functional or not. Furthermore, certain subtleties regarding the issues such as belonging or Arendt's right to have rights are not sufficiently addressed.

From a legal perspective, international law is comprehensive in many ways, and with regards to human rights law the developments therein have been unprecedented, with many nation-states now officially incorporating such laws (including the right to nationality) into their various regional and national legislations. New supranational entities, such as the International Criminal Court (that aims to bring justice in instances of crimes of genocide, war crimes, crimes against humanity and crimes of aggression),

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5 Arendt 1955: This publication does not have page numbers but can be viewed at https://www.loc.gov/item/mss1105601307/ (Accessed 14 October 2023).

6 UN Charter https://treaties.un.org/doc/publication/ctc/uncharter.pdf (Accessed 14 October 2023); See also Van Waas 2014: 65.

that play a role in upholding human rights on an international scale have also begun to emerge.[7] In 1994 a major UN human rights conference was held in Vienna, resulting in more civil society organizations being established or declaring themselves to be pursuing human rights goals. It is thus clear that we live in the age of human rights, however there seems to be hit or miss situation when it comes to how effective human rights are in practice. On a smaller scale, many of the principles of the statelessness conventions too have been incorporated into various national laws of nation-states (at times even those nation-states who have not ratified either of the statelessness conventions). A former UN Secretary General once said "the United Nations was not created in order to bring us to heaven, but in order to save us from hell."[8]

At an international level, there are two UN declarations (1954 and 1961) that are dedicated specifically to statelessness, however Mark Manly, head of the UN Refugee Agency's (UNHCR) statelessness unit was quoted as saying, "It may be a bit of understatement to say that these are the two least loved multilateral human rights treaties… For many years they were pretty much forgotten and that was in large part because they had no UN agency promoting them."[9]

The current international legal framework regarding statelessness and human rights, is briefly reflected on below, beginning with the two treaties that deal specifically with statelessness, and then moving on to the treaties that relate indirectly to statelessness or the rights of the stateless. Despite the cautious and pragmatic method taken when drafting the two statelessness conventions, they did not gain immediate traction. There was difficulty in attracting signatories and they were largely overlooked in academic scholarship for the first four decades of their existence, being referred to as the "orphan conventions."[10] Although there has been a renewed global interest in these conventions, sparking a slew of new accessions, it is noted that the conventions are more than 50 years old, having the effect that other newer human rights instruments are now often found to be more inclusive and beneficial to stateless persons than the statelessness conventions themselves.

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7 Human Rights Watch. http://www.hrw.org/legacy/campaigns/icc/ (Accessed 1 December 2021).
8 Hammarskjöld 1954: 301.
9 IRIN "An ambitious plan to end statelessness" https://www.refworld.org/docid/5460be514.html (Accessed 23 January 2024).
10 Van Waas 2014: 78.

4.2.1 The Universal Declaration of Human Rights

The inclusion of the right to nationality in article 15 of the UDHR, like the UDHR as a whole, was motivated by the impulse to respond to the atrocities of the Second World War, among them mass denationalizations and huge population movements, the largest in European history.[11] Besides the many human rights that are entrenched therein, Article 15 specifically provides that "(e)veryone has the right to a nationality" and that "(n)o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." The fact that it is declared that every human has the right to nationality infers that the lack of any nationality – statelessness – is, alone, a human rights violation.

Although Article 15 was a groundbreaking provision in international law, the vagueness thereof diminished much of its immediate force. More specifically, Article 15 does not create a specific corresponding obligation upon nation-states to confer nationality, and fails to indicate precisely which nationality an individual has the right to and under what circumstances that right arises.

Despite the above, and despite the fact that the UDHR is not a treaty and is not technically legally binding in itself, the standards it sets out have inspired a rich body of legally binding international human rights treaties, with many of its provisions having been incorporated into customary international law.[12] It represents the vision that basic rights and freedoms are widely recognized to be inherent to all human beings. Perhaps idealistically, it presents these rights as inalienable and sets out the notion that every single person is born equal in dignity and rights. Many of the rights – both civil and political, economic, and social –contained in the UDHR have been elaborated into binding international human rights instruments, some with UN treaty body mechanisms to guarantee the universal interpretation of the scope of their norms.

11 Adjami & Harrington 2008: 96.

12 UN "The Foundation of International Human Rights Law" https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law (Accessed 3 November 2023) see also, Hannum 1995: 25.

The inclusion of Article 15 in the UDHR had the effect of (briefly) bringing statelessness and the general problem of what was then termed as "political homelessness"[13] to the attention of the Economic and Social Council of the United Nations. This in turn led to the council requesting that the secretary-general undertake a study focusing on the protection of stateless persons and to further recommend whether a separate convention defining the obligation of states toward stateless persons was needed.[14] The end result thereof was a document called "A Study of Statelessness", which was open and direct in its condemnation of statelessness. It was from this first UN study on statelessness, that the Refugee Convention, and later the two Statelessness Conventions eventually materialised.[15] Thus, the inclusion of Article 15 in the UDHR can be seen as an important catalyst for the current international laws surrounding statelessness.

Despite this however, it is evident and should be kept in mind, that the nationality rights enshrined in Article 15 have garnered considerably less international attention if compared to other human rights, and have consequently developed substance at a slower rate. International law has traditionally afforded states a broad discretion to define the content of, and delimit access to, nationality, which may explain why political will to develop international norms on citizenship has been lacking.[16]

This also perhaps explains why article 15(2) of the UDHR's prohibition on arbitrary deprivation of nationality has developed perhaps more robust content than the broad aspiration that every individual has a right to nationality under UDHR 15(1). This is so because article 15(2) of the UDHR begins from the premise that an individual already has a nationality recognized by a state; states are simply prohibited from taking citizenship away, once it is given and acknowledged, without respecting procedural and substantive constraints. As such, the declaration regarding the right to a nationality appears the weaker of the two contained in article 15 (1) and (2) of the UDHR.[17]

13 Siegelberg 2020: 196.
14 Belton 2011: 59–71; Kingston 2013: 73–87; Foster & Lambert 2016: 564–584.
15 "A study of statelessness" played an important role in the ultimate decision to treat refugees and the stateless separately.
16 Adjami & Harrington 2008: 94-95.
17 Adjami & Harrington 2008: 104.

What is evident is that in order to benefit from the full aspirations of article 15 of the UDHR there needs to be effective implementation of the binding international statelessness and human rights laws that have since emerged. Although, as will be seen below, the current international law is a strong start, the continued existence of statelessness proves that further conceptual and practical commitment is required in order to realize the true promise of Article 15 of the UDHR.

4.2.2 The 1954 Convention Relating to the Status of Stateless Persons

The Convention relating to the Status of Stateless Persons was adopted on 28 September 1954 and came into force on 6 June 1960. As at 4 November 2021, as published by the UNHCR, 96 states are parties to the convention.[18]

The most notable attribute of this treaty is its considerable contribution to international law in setting out an unambiguous and concise definition of a stateless person; that is as being a person "who is not considered a national by any state under the operation of its law".[19] This definition has since widely become accepted as part of international customary law, with the International Law Commission considering the definition to be internationally established.[20] There is copious evidence that it has indeed been universally adopted, with the definition being used as a reference in other treaties as well as numerous national legislations.[21] The UNHCR takes the view that being considered as customary law has the effect that it is taken to be "binding"[22] upon all member states and not just states who have acceded to the two statelessness conventions.[23] This convention thus had a pivotal impact on the approach to statelessness, as defining who is stateless is an obvious initial step in the process of

18 UNHCR "UNHCR urges governments to accelerate progress and resolve plight of world's stateless" https://www.unhcr.org/news/press/2021/11/618387874/unhcr-urges-governments-accelerate-progress-resolve-plight-worlds-stateless.html (Accessed 13 November 2023).

19 1951 Convention: 6. (This is the only international instrument that provides a definition for a stateless person). Note the exceptions being people who are receiving protection or assistance from a UN organ/agency other than the UNHCR, people who enjoy the rights and obligations attached to citizenship in the country of their residence and people to whom there are serious reasons for considering that they have committed certain crimes or contraventions of the purpose and principles of the UN.

20 Khan 2019: 22.

21 The International Law Commission, 2006 Articles on Diplomatic Protection with commentaries: 49 http://www.refworld.org/docid/525e7929d.html.

22 The UNHCR uses the word "binding" (see next footnote), however there is debate as to how much any international law is actually binding upon a state.

23 UNHCR. Identifying and Protecting Stateless People in Europe: 3. https://rm.coe.int/briefing-paper-session-1-with-coverpage-en-unhcr/1680a3e6a5 (Access on 14 October 2023).

responding to the global problem.

Secondly, in order to implement any policies that specifically target statelessness, it is imperative to distinguish between who “would otherwise be stateless”. For example, the 1961 Convention on the Reduction of Statelessness Article 1 lays out directions for the acquisition of nationality based on birth on the territory of a contracting state if a person would otherwise be stateless. Thus in order to benefit from this right, there is a need to firstly identify the child’s prospective status, in that the fact of being “otherwise stateless” needs to be proven (or if the acquirement of nationality is delayed for whatever reason, then the actual statelessness of the child needs to be established). Similarly, with regards to naturalisation, it is required to establish who is stateless and therefore entitled to facilitated naturalisation in terms of Article 32 of the 1954 Convention.[24] It becomes apparent that without defining statelessness, any other attempt to solve the problem of statelessness would be unfeasible, hence the significance of this treaty.

In addition to the above, for those who qualify as a stateless person under the definition, the convention specifies the treatment that should be accorded to stateless persons by the contracting states.[25] These rights are guaranteed to differing degrees depending on the legal status and/or degree of attachment of the stateless person and the state. For example, it dictates that stateless persons have the same rights as citizens with respect to freedom of religion, elementary education, artistic rights, access to courts, certain labour laws and certain other welfare considerations. For a number of other rights, such as the right of association, the right to freedom of movement, the right to employment and to housing, it provides that stateless persons are to enjoy, at a minimum, the same treatment as aliens.[26]

Although there is significant importance in having clear definitions when it comes to any form of law, one outcome of this definition in particular is that *de facto* stateless

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24 Article 32 of the 1954 Convention: Whilst the 1954 Convention does not require contracting parties to grant the stateless person nationality, it does call on states to facilitate naturalisation of stateless persons as soon as is reasonably possible.

25 For example, see Articles 4, 16 and 22.

26 Introductory note of convention on page 3. With regards to freedom of movement, stateless people are to have at a minimum the same treatment as aliens, which can include detention in detention camps/centres.

has been excluded from the definition of a stateless person.[27] It is widely acknowledged that the reason for this was largely to ensure that there was no overlap with the Refugees Convention.[28] This has the effect of narrowing the legal meaning of statelessness, and as such, this definition has had its fair share of criticism, with commentators arguing that what it gains in succinctness, it loses in handling nationality as a solely technical problem.[29] By limiting its scope to *de jure* stateless persons, it discounts numerous situations for example where an individual does not lack a legal nationality on paper, but where such nationality is not effective in practice.[30] This observation recognizes that there are cases where persons may be effectively stateless though officially having a citizenship. This concern continues today, especially as some groups (such as the Nubians in Kenya, who after being granted citizenship have noted no significant or real-term change in their status).[31]

It is important to take into account that developments that have taken place within international law since its adoption have considerably changed the significance of the convention, both with regard to statelessness, as well as with regard to human rights in general.[32] Numerous of the rights stated in the 1954 Convention have subsequently been addressed in other international treaties, which at times offer advantages over the 1954 Convention, such as more distinct formulation, stronger wording, improved enforcement options, and/or wider geographical range. This can result in a stateless person's rights actually being more protected under those treaties when compared to the 1954 Convention. An example of this is The Convention on the Rights of the Child which has stronger implementation monitoring mechanisms than the 1954 Convention,[33] and a significantly wider accession rate.[34] Similarly, the freedom of religion and freedom of association have broader application in the International Covenant on Civil and Political Rights[35] and The International Covenant on Civil and

27 Khan 2019:22.
28 Batchelor 1995: 247-248.
29 Batchelor 1995: 232 and 239, citing Goodwin-Gill 1994.
30 Jain 2022: 243
31 Blitz & Lynch 2009: 45. See also Belton 2013: 221- 247.
32 https://rm.coe.int/briefing-paper-session-1-with-coverpage-en-unhcr/1680a3e6a5 Page 4
33 Such as the Committee on the Rights of the Child with its periodic reporting system, in accordance with arts. See also pages 43-44 of the UN Convention on the Rights of the Child of 1989.
34 Acceded to by all eligible States except the USA, 196 States.
35 Article 18.

Political Rights respectively[36] than in the 1954 Convention.

As such, care should be taken to not apply the 1954 Convention to modern situations of statelessness in isolation from the more recent legal instruments that supplement the list of rights stateless persons are entitled to, and in some cases, have the effect of simplifying some of the 1954 Convention's intricacies.[37]

Notwithstanding this, there are still certain rights that are unique to the 1954 Convention that are important to stateless persons and cannot be derived from other treaties of more general human rights application.[38] Such unique rights are, for example, the right of the stateless to be given identity documents,[39] travel documents,[40] protection against expulsion,[41] and the right to administrative assistance equal to that which other foreigners would normally be able to obtain from the state of their nationality.[42]

Lastly, a simple, but vital principle enshrined in the 1954 Convention is that it states that no requirements with regards to accessing any of the rights conferred therein can be imposed on stateless persons which compliance would be impossible due to the fact that they are stateless.[43] Specifically including this principle may seem pedantic, due to its obvious nature, however it does occur in practice that stateless persons are sometimes obligated to comply with (often administrative) requirements which they

36 UN International Covenant on Civil and Political Rights of 1966: Art. 22. This article is not absolute, and can be limited, specifically if the restrictions are "prescribed by law and […] necessary in a democratic society in the interests of national security or public safety, public order […], the protection of public health or morals or the protection of the rights and freedoms of others".

37 UNHCR "Identifying and Protecting Stateless People in Europe" https://rm.coe.int/briefing-paper-session-1-with-coverpage-en-unhcr/1680a3e6a5 (Accessed 30 October 2023): 5.

38 See the UNHCR Handbook on the Protection of Stateless Persons (Geneva 2014), para 143. See also K. Bianchini, The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States, PhD thesis defended at the University of York, UK, in April 2015, p. 69, pp. 71-75; L. van Waas, Nationality Matters. Statelessness under International Law, (Intersentia 2008), pp. 359-387.

39 1954 Convention relating to Status of Stateless Persons, art. 27. Some states that have acceded to the 1954 Convention made a reservation regarding the right to identity documents, among which Austria, Bulgaria, Czech Republic, Germany, Latvia, and Moldova

40 Article 28 (For stateless that have residency permits)

41 Article 31 (For legally residing stateless persons)

42 Article 25.

43 Article 6.

cannot possibly comply with due to the very nature of being stateless.[44]

4.2.3 The 1961 Convention on the Reduction of Statelessness

The most obvious and comprehensive source of concrete international agreements on the prevention of statelessness is the 1961 Convention on the Reduction of Statelessness. This Convention was adopted on 30 August 1961 and came into force on 13 December 1975, with 77 states being parties thereto as at 4 November 2021.[45]

The objective of this Convention is to both prevent and reduce statelessness. Whilst initially driven to eliminate statelessness, this was reduced to the more humble aim of merely reducing the occurrence of stateless at birth, later in life, and in the course of state succession.[46] This convention requires that acceding states ensure that their nationality laws contain certain precautions in order to prevent statelessness. In this convention the right of every person to a nationality is once again emphasized and a framework to ensure the reduction of statelessness is set out.

One surprising feature of the 1961 Statelessness Convention is the absence of an idealistic, loftily drafted preamble that was common in treaties of this sort at the time. Instead, after briefly mentioning that it is "desirable to reduce statelessness by international agreement", the Convention immediately begins with substantive provisions, i.e. Article 1 which prescribes granting nationality *jus soli* under certain circumstances. This Convention deals with many important issues, including principles of equality, non-discrimination, protection of ethnic minorities, rights of children, territorial integrity, the right to a nationality and the avoidance of statelessness.[47]

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44 The Dutch Committee for Migration Affairs, for example, relied on this Convention provision to argue that Dutch administrative procedures for registering statelessness where in tension with the Dutch international obligations under the 1954 Convention, since stateless persons were required to provide documentation which they were unable to obtain by virtue of being stateless. See Adviescommissie Vreemdelingenzaken (Dutch Advisory Committee on Migration Affairs) "Geen land te bekennen. Een advies over de verdragsrechtelijke bescherming van staatlozen in Nederland" https://www.adviesraadmigratie.nl/binaries/adviesraadmigratie/documenten/publicaties/2013/12/4/geen-land-te-bekennen/Geen_land_te_bekennen_ACVZ_beleidsadvies_20131204.pdf (Accessed 3 November 2023): 72.

45 UNHCR "UNHCR urges governments to accelerate progress and resolve plight of world's stateless", https://www.unhcr.org/news/press/2021/11/618387874/unhcr-urges-governments-accelerate-progress-resolve-plight-worlds-stateless.html (Accessed 30 October 2023).

46 Convention on the Reduction of Statelessness, Art. 1, Aug. 30, 1961, 989 UNTS 175.

47 UNHCR "Information and accession package: the 1954 Convention relating to the status of stateless persons and the 1961 Convention on the reduction of statelessness, Geneva"

Building on article 15 of the UDHR's assurance of the right to be free from arbitrary deprivation of nationality, article 8(1) of the 1961 Statelessness Reduction Convention articulates a duty of states not to create statelessness through the deprivation of nationality, stating that a "Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless". Though article 8 allows limited legitimate grounds for the deprivation of nationality, even if such deprivation would result in statelessness, article 11 provides an important safeguard in specifying that deprivation of citizenship can occur only after providing individuals concerned with due process protections.[48]

This Convention deals specifically with various situations in which statelessness threatens instead of formulating a more general policy of nationality attribution. [49] Three particular situations are undertaken in the substantive articles: the creation of statelessness at birth in situations where a child is unable to acquire the nationality of any state; the creation of statelessness later in life where a person loses, renounces or is deprived of his nationality without gaining another; and the creation of statelessness in the specific circumstance of state succession. In approaching these situations, the Convention has taken a carefully formulated approach. The obligations are cautiously set out, contemplating factors like birth, descent and residence when determining whether there is an appropriate link with the nation-state upon which to base the attribution of nationality.[50] The convention furthermore heavily restricts what reservations may be made by states or the instances in which a state may limit the scope of their obligations regarding the attribution of nationality in the event of statelessness.[51]

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https://www.unhcr.org/media/information-and-accession-package-1954-convention-relating-status-stateless-persons-and-1961 (Accessed 13 November 2023): 7.

48 Adjami & Harrington 2008: 97.

49 Weis 1979: 253.

50 UNHCR, Information and Accession Package: the 1954 Convention relating to the status of stateless persons and the 1961 Convention on the reduction of statelessness, Geneva: January 1999: 7; Batchelor 1998: 162.

51 States may only make a declaration under Article 8, paragraph 3 of the Convention when they accede to the instrument, by which they specify the inclusion of one or more additional grounds for deprivation of nationality under their municipal law. Beyond this, the Convention explicitly permits reservations to Article 11 (regarding the supervisory mechanism of an international agency), Article 14 (granting jurisdiction to the ICJ for the settlement of disputes) and Article 15 (relating to territories for which the state party is responsible) and then just to be absolutely clear – expressly prohibits reservations in respect of all other articles. Article 17, paragraphs 1 and 2 of the 1961 Convention on the Reduction of Statelessness.

However, low levels of ratification of both of the two statelessness conventions indicates a worrying lack of political resolve to address the issue of statelessness. This, along with their relatively limited scope in general, has considerably weakened the effectiveness of these conventions.[52]

In problematizing this convention, various issues frequently arise. For example, during the committee meetings that were held regarding the 1961 convention almost a half of states had a problem with the *jus soli* bias that is present in the said Convention.[53] However, since then all states have acceded to the 1989 Convention on the Rights of the Child, which also contains the provision to grant *jus soli* citizenship if no other is available. It is thus submitted that the *jus soli* bias present in the 1961 convention is perhaps no longer something states should take issue with. While both *jus soli* and *jus sanguinis* can be criticized, neither is morally superior.[54] Within our current nation-state system, a default method of conferring nationality is necessary if we are ever to eradicate statelessness, despite the different pressures this could put on states that do not already have provisions for a form of *jus soli* nationality acquisition.

States that have acceded to the 1961 Convention should not, in theory, contain any stateless persons, or at least, not for long (since anyone stateless on their territory should be given citizenship). For states with large populations of stateless persons (to whom they may not wish to grant nationality) there is thus a strong disincentive to accede to this convention. What is evident, by historical statistics, is that of the countries where stateless figures are available, less than half have acceded to this convention, and conversely, of all states that have acceded, a large number have chosen not to provide statelessness data to the UNHCR.[55] The under reporting of statelessness, whilst sometimes due to the lack of efficient procedures in identifying

52 Petrova 2009: 25.
53 See UN. United Nations Conference on the Elimination or Reduction of Fugure? Statelessness. Summary Records, 3rd meeting of the Committee of the Whole. A/CONF.9/C.1/SR.3. 1961. UN. United Nations Conference on the Elimination or Reduction of Future Statelessness. Comments by Governments on the revised Draft of the Convention on the Elimination of Future Statelessness and the revised Draft Convention on the Reduction of Future Statelessness, prepared by the International Law Commission at its sixth session. A/CONF.9/5. 1959. See also Forlati 2013: 21.
54 Bloom 2013: 19.
55 Bloom 2013: 20.

and documenting stateless persons, can also be due to the negative light it would shed on the state. While reporting a large number of refugees for example reflects a country as beneficent, having large numbers of stateless person reflects the opposite. This is especially the case for states that accede to the 1961 Convention, as large stateless populations lead to the assumption that a state is voluntarily withholding nationality from those who should have it.

4.2.4 General Human Rights Laws that relate to statelessness:

4.2.4.1 The Convention on the Nationality of Married Women:[56]

Historically, it was not too uncommon for women to encounter nationality problems within their own country after marrying a foreigner. These problems included instances where women, upon marrying a foreigner, would have their nationality stripped and replaced by that of their husband, or at times, with no other nationality at all. Although less common today, these problems have not been eradicated in totality.[57] Various international instruments exist that attempt to eliminate this sort of gender-based discrimination, the first of which is The Convention on the Nationality of Married Women.

This convention reiterates the right to a nationality, as well as the right to be protected from arbitrary deprivation of nationality (specifically referring to Article 15 of the UDHR). It furthermore emphasizes in particular that all human rights must be respected without discrimination based on sex.[58] Article 1 states that that no marriage (or the dissolution thereof) between a national and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife. Article 2 ensures that if a husband who is a citizen acquires another nationality, or renounces his nationality, the wife will not be prevented from keeping her nationality. Lastly, Article 3 provides for privileged naturalisation procedures for an alien wife whose husband is a national.

Although this convention, which was not widely ratified, has for most intents and purposes been overtaken by the 1979 Convention on the Elimination of All Forms of

56 Adopted 29 January 1957, entered into force 11 August 1957.
57 Palo 2009: 673-679.
58 Preamble. (South Africa has signed and ratified this convention. Signed on 29 January 1993 and ratified on 17 December 2002).

Discrimination Against Women (which shall be discussed below), it remains historically relevant.

4.2.4.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):[59]

Gender discrimination in nationality laws do not only cause statelessness, but it also creates a cycle of statelessness between generations. Article 9 of this convention seeks to protect women from discrimination by directing that states should ensure that women have equal rights to men regarding the acquisition and/or retention of nationality and the capacity to transfer their nationality on to their children. It further states in particular that a woman should not be left stateless as a result of changes in her husband's nationality. Article 9 reads as follows:

> "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
> 2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

It is clear that both Article 9 of this convention, as well as The Convention on the Nationality of Married Women, were developed to protect a woman's independent right to a nationality.[60] As will be discussed in more detail in chapter 5, covert discrimination continues to occur under various guises. For example, some states have made reservations to Article 9 or gone as far as violating it, justifying their actions with a defense based on cultural relativism and "family solidarity".[61] Cultural relativism argues that certain practices and traditions have a legitimate value for a certain community, and should be accepted based on its cultural significance (for an extreme example see the cases of female genital mutilation).[62] In other words, proponents of this ideology

59 South Africa has signed and ratified this convention. Signed on 29 January 1993 and ratified on 15 December 1995.
60 Shaheen 2018: 7.
61 Palo 2009: 673 – 679.
62 Brennan 1989: 367.

assume that human rights are fine for people in some parts of the world (mostly western countries) but are irrelevant in other parts of the world.[63] This however is seemingly not always compatible with the premises of international law, wherein all cultures are expected to apply the same minimal standards of protection and human dignity.[64] It has thus been submitted that "[s]ubordinating human rights to cultural traditions disables the international community from enforcing these rights so that all people… may enjoy them."[65]

Cultural traditions that threaten a woman's nationality should be viewed as a human rights violation. Unequal treatment of women in nationality laws puts women at a higher risk for statelessness by making it so women can be both born stateless and also become stateless.[66] In this way, by making reservation to CEDAW's Article 9, states aggravate the number of stateless people in the world today. Although such does not necessarily immediately result in statelessness, allowing such (gender discriminatory) nationality laws increases a woman's risk for statelessness.[67] It is submitted that cultural relativism and the excuse of "family solidarity" does not explain why women should be forced to lose their individual nationality, thereby being treated as a second class citizen.[68] The fact that states are able to choose which conventions they ratify, and the fact that reservations are allowed to be made on accepted treaties, is not only related to gender discrimination, but to a wider array of issues, and is directly related to the subject of the enforceability of international laws that shall be discussed in chapter 5.

4.2.4.3 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD):

63 Charlesworth & Chinkin 2000: 225.
64 Brennan 1989: 367 and 371.
65 Palo 2009: 673-679.
66 Patricia Schulz, Swiss Member of CEDAW Committee, Gender-Related Dimensions of Refugee Status, Asylum and Statelessness, Speech delivered at CEDAW: 30 Years of Working for Women's Rights, Istanbul November 1-3, 2012.
67 Edwards A "Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination Against Women" http://www2.ohchr.org/english/bodies/cedaw/docs/UNHCR_CEDAW_Background_Paper4.pdf (Accessed 30 October 2023); Shaheen 2019: 12, see also Patricia Schulz, Swiss Member of CEDAW Committee, Gender-Related Dimensions of Refugee Status, Asylum and Statelessness, Speech delivered at CEDAW: 30 Years of Working for Women's Rights, Istanbul November 1-3, 2012.
68 Palo 2009: 677.

Article 5 prohibits racial discrimination and guarantees racial equality in the enjoyment of, among other fundamental human rights, the right to nationality:[69]

> "States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of… the right to equal treatment before the tribunals and all other organs administering justice… (and) other civil rights, in particular… the right to nationality..."[70]
>
> "[States parties undertake to guarantee the right of everyone to equality before law, notably in the enjoyment of] … (and) economic, social and cultural rights, in particular the rights to work, to free choice of employment... (and) the right to education and training…"[71]

The monitoring body, the Committee on the Elimination of Racial Discrimination (the Committee), has indeed specifically clarified that deprivation of nationality on discriminatory grounds is a breach of ICERD.[72] It further has recognized that ethnic or racial differences are frequently exploited by way of deprivation of nationality to further political agendas leading to detrimental effects to those who are deprived.[73]

More specifically:

> "Differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation (…) are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[74] It thus follows that, "deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure nondiscriminatory enjoyment of the

69 South Africa has signed and ratified this convention. Signed on 3 October 1994 and ratified on 10 December 1998.
70 Everyone is entitled to civil rights, including stateless people. Fundamental rights such as equality before courts and tribunals must be enjoyed by everyone without exception.
71 As with civil rights, everyone is entitled to economic, social, and cultural rights, including stateless people.
72 GR 30, UN Doc CERD/C/64/Misc.11/Rev.3 (n 13) [14].
73 Hoornick 2020: 228.
74 GR 30, UN Doc CERD/C/64/Misc.11/Rev.3 (n 13) [4].

> right to nationality."[75] Furthermore, the Committee urges States to "reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children;"[76] and to "regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party."[77] It also addresses naturalization whereby it was agreed that it should be "ensure(d) that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents."[78]

In its Concluding Observations, the Committee made references related to nationality, citizenship and statelessness in more than half of its Concluding Observations between 2004–19.[79] This, as well as the abovementioned comments, is an obvious sign that racial discrimination and statelessness are frequently connected, and also highlights that statelessness is of particular importance to the Committee and ICERD.

One of the advantages of this convention is the large number ratifications it has gained (being one of the most widely ratified human rights treaties).[80] In fact, over 95 per cent of the world's population are covered by this convention, including countries with significant stateless populations who are not parties to the statelessness conventions,[81] giving ICERD the potential to combat statelessness caused by racial discrimination across most of the world.[82]

One cause for concern however could be the interpretation of Article 1(3), wherein it states: "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

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75 GR 30, UN Doc CERD/C/64/Misc.11/Rev.3 (n 13) [14].
76 GR 30, UN Doc CERD/C/64/Misc.11/Rev.3 (n 13) [16].
77 GR 30, UN Doc CERD/C/64/Misc.11/Rev.3 (n 13) [17].
78 GR 30, UN Doc CERD/C/64/Misc.11/Rev.3 (n 13) [13].
79 Hoornick 2020: 245.
80 Khanna & Brett 2016: 35.
81 Dominican Republic, Kenya, India and Thailand for example.
82 Hoornick 2020: 224.

Initially, this can be seen as upholding the concept of state sovereignty when it comes to granting nationality, citizenship and naturalization, and has led some to argue that there is an implication that matters of nationality and statelessness lie outside the purview of the convention.[83] However, as noted by Prof. Patrick Thornberry, former member and Rapporteur of the Committee, in his Commentary on the ICERD: "With regard to [Article] 1(3) and the repeated use of 'nationality,' the [T]ravaux [Préparatoires] and subsequent practice support the view that 'nationality' in the second sense of a forbidden ground of discrimination means 'national origin' on a par with 'ethnic origin.'… In light of [this], the right to nationality protected by Article 5, and attendant questions around citizenship and naturalization, are not treated as appreciably diminished by Article 1(3)."[84] Therefore, if nationality is deprived or denied on the basis of race or ethnicity, it is still in violation of the ICERD.

4.2.4.4 The International Covenant on Civil and Political Rights (ICCPR):

Both Article 3 and Article 23 refer to gender equality, with Article 3 referring to the "...equal right of men and women to the enjoyment of all civil and political rights" and Article 23 referring to the "...equality of rights...of spouses as to marriage...". This is important as, as stated above with regards to CEDAW, gender discriminatory national laws increase the risk of statelessness. The importance of gender equality specifically as it relates to nationality was clarified in the General Comments of the Human Rights, where it was stated that "States parties should ensure that no sex-based discrimination occurs in respect of the acquisition or loss of nationality by reason of marriage, of residence rights, (…)".[85]

Article 24 of this covenant confirms that "[e]very child has the right to acquire a nationality", with the General Committee adding "States parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard

83 UNHCR, ICERD: Quick Reference Guide Statelessness And Human Rights Treaties. www.refworld.org/pdfid/5983305e4.pdf (Accessed on 3 July 2023).

84 Thornberry 2016: The Committee further clarified this point in General Recommendation No. 30 on Discrimination against Non-Citizens (2005), when it affirmed that "deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."

85 Committee GC No. 28: Article 3 (The Equality of Rights Between Men and Women). See specifically paragraph 25.

to (…) the capacity to transmit to children the parent's nationality (…)"[86] Additionally, it promises the right of a child to be registered immediately after birth.[87] This is important as failure to register a birth can lead to statelessness, as will be discussed further under chapter 5.

Article 24 requires states to do whatever is necessary, both internally and in cooperation with other states, to ensure that no child is born stateless. It also aims to eradicate any form of discrimination with regards to the acquisition of nationality, specifically when it comes to children, regardless of external factors such as whether they are legitimate, born out of wedlock or born from stateless parents. It also aims to prevent a child from being afforded less protection solely due to being stateless.[88]

The use of words such as "everyone"[89] and "all persons"[90] throughout the convention is interpreted to include stateless persons. And as such, the rights conferred in this convention should be upheld regardless of whether a person is stateless or not.[91]

It is worth to note that despite purportedly being one of the two covenants intended to give more detailed legal effect to the Universal Declaration, it curiously omits reference to the right to nationality in Article 15 of the Declaration. The only direct mention of nationality within the convention itself is in fact Article 24 as described above. Again, (similarly to what was discussed regarding Article 15 of the UDHR), no corresponding obligation to grant nationality is created. Johannes Chan, in his examination of the *travaux preparatoires* to the ICCPR, concluded that the complexity of this problem resulted in this Covenant's exclusion of a general right to nationality.[92]

86 GC No. 28: (The Equality of Rights Between Men and Women) (para. 25).
87 South Africa has signed and ratified this covenant. Signed on 3 October 1994 and ratified on 10 December 1998.
88 GC No. 17: Article 24 (Rights of the child) paragraph 8
89 For example, Article 9 and 12.
90 For example, Article 14.
91 For example: GC No. 35: Article 9 (Liberty and security of person): "'Everyone' includes, among others, (…) stateless persons (…)" (paragraph 3).
92 Chan 1991: 4-5.

4.2.4.5 The Convention on the Rights of the Child:

Similar to the ICCPR, this convention also deals with the right to immediate birth registration, the right to a name and the right to acquire a nationality.

Article 7 (1) states that a "child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality…", with Article 7(2), going a step further (even than the ICCPR) by declaring: "States parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."[93] A number of General Comments (GC) of the Committee on the Rights of the Child have been issued with regard to Article 7(2) that are directly relevant to preventing and reducing statelessness and protecting stateless persons.[94] This includes recommending that states take all measures to ensure that all children are registered at birth,[95] that they acquire a nationality,[96] and that a birth certificate be provided free of charge wherever it is necessary to prove age,[97] as well as that immediate birth registration (at birth) be free of charge and universally accessible to all.[98] It was furthermore stated that "the right to name and nationality, preservation of identity (…) are all universal civil rights and freedoms which must be respected, protected and promoted for all, including children with disabilities."[99]

Other Articles of this convention are also relevant to statelessness, including Article 2 ("without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.")[100], Article 8.1 ("States Parties undertake to respect the right of the child to preserve his or her identity, **including nationality**, name and family relations as recognized by law without unlawful interference.") and Article 12(2) ("the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.")[101].

93 South Africa has signed and ratified this convention. Signed on 29 January 1993 and ratified on 16 June 1995.

4.2.4.6 The Convention on the Rights of Persons with Disabilities

Article 18 deals with freedom of movement, in that documents that prove nationality should not be deprived on the basis of disability, as well as the right to a nationality on an equal basis with other people, and to not be deprived of nationality arbitrarily or on the basis of disability.

4.2.4.7 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[102]

Although Article 3 expressly excludes stateless persons from the scope of the convention, Article 29 confirms that any child of a migrant worker shall have the right to a name, to registration of birth and **to a nationality**.

There are also various resolutions and reports on "Human rights and arbitrary deprivation of nationality" by The Human Right Council that relate to the right to a nationality and statelessness.[103] Similarly, the General Assembly, in its resolution 50/152, also recognized the importance of the prohibition of arbitrary deprivation of nationality.

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94 For a concise summary, see UNHCR, ICERD: Quick Reference Guide Statelessness And Human Rights Treaties. www.refworld.org/pdfid/5983305e4.pdf (Accessed on 3 July 2023).

95 GC No. 7: Implementing child rights in early childhood: paragraph 25.

96 GC No. 11: Indigenous children and their rights under the Convention paragraph 41

97 GC No. 10: Children's rights in juvenile justice paragraph 39

98 GC No. 11: Indigenous children and their rights under the Convention paragraph 41.

99 GC No. 9: The rights of children with disabilities: paragraph 34.

100 GC No. 14: The right of the child to have his or her best interests taken as a primary consideration: "The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention." (paragraph 41) This means that States must take active measures to ensure that nationality laws do not discriminate on the basis of the gender of the child's parents, and that the rights of stateless children are protected.

101 GC No. 12: The right of the child to be heard: "(…) attention is needed to ensure that stateless children are included in decision-making processes within the territories where they reside." (paragraph 124)

102 Article 29.

103 Resolution 7/10 (2008); Resolution 10/13 (2009); Resolution 13/2 (2010); Resolution 20/4 on the Right to a Nationality: Women and Children (2012); Resolution 20/5 (2012); Resolution 26/14 (2014); Resolution 32/5 (2016); Report of the Secretary-General on human rights and arbitrary deprivation of nationality - A/HRC/10/34; Report of the Secretary-General on human rights and arbitrary deprivation of nationality - A/HRC/13/34; Report of the Secretary-General on human rights and arbitrary deprivation of nationality - A/HRC/19/43; Report on discrimination against women on nationality-related matters, including the impact on children - A/HRC/23/23; Report of the Secretary-General on human rights and arbitrary deprivation of nationality - A/HRC/25/28; Report of the Secretary-General on the impact of the arbitrary deprivation of nationality - A/HRC/31/29.

4. 3 The argument of technical gaps in the international statelessness law

It is worth to mention at this point, that a common theme revolving around statelessness studies is to attempt to identify and expose gaps that exist within the two statelessness conventions, often with recommendations being made to reconsider certain aspects of the conventions, or sometimes to adopt an entirely new international statelessness instrument to deal with specific shortcomings. However, these gaps or limitations are becoming increasingly smaller and often times insignificant, often due to the increase in general international human rights instruments. More and more often, perceived gaps or limitations to the statelessness conventions are rectified by other human rights instruments.

For the purposes of comprehension, I give one example of this, in order to give context to the statements above. Article 9 of the 1961 Convention, when looked at in isolation, is limited in scope, and arguably leaves a gap wherein certain groups of the population are not fully protected. This article states that a person may not be deprived of their nationality based on racial, ethnic, religious or political grounds. As is evident, this can only be interpreted as a finite list, wherein only four possible prohibited grounds are listed. There are no additional words to suggest that there could be any other prohibited grounds of discrimination. Even if these four prohibited grounds are given the widest definitions and treated expansively, there will unquestionably be obvious gaps, as it is not possible to read entirely new or different prohibited grounds into this very predetermined list. Gender discrimination that results in the loss of nationality is one such ground that is impossible to read into the given list.[104]

This gap could at first be concerning to the person reading the convention, however there are numerous other human rights instruments that provide a much broader protection and would apply in situations where the 1961 convention falls short. Taking into account all of these instruments the final list would now include: Race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status – a much larger and open-ended list.[105] Whilst not every nation-state is a

104 Lee 2005: 40. Elsewhere (Chapter IV) Lee also alludes to the impact that policies discriminating on the grounds of gender can have on access to nationality and the risk of statelessness.

105 Article 2, paragraph 1 of the International Covenant on Civil and Political Rights, 1966; Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights, 1966.

party to every convention, this provides an example of how, stateless people who fall outside of the statelessness conventions, can be caught by other human rights instruments. When looking at the conventions in conjunction with the wider human rights framework, statelessness and solutions thereto appear to be very well provided for legalistically. There seem to be adequate mechanisms to cover most cases and to ensure that, technically, statelessness should no longer be equated to the loss of all rights and of the loss of an individual's status in society. We know, however that this is not yet the case and that both statelessness and human rights violations do continue to occur. Article 9 is just one example, however there are many other similar examples that have been discussed in detail by other authors. It is thus not necessary to go through and list every instance where a gap or limitation presents itself within one of the two conventions, as this has already been thoroughly studied and a bulk of information is already readily available in this regard.

At the same time, gaps within the two conventions that cannot be resolved by relying on human rights instruments do exist, and these have also been identified and discussed thoroughly through-out the years since the conventions came into effect. These technical gaps within the international framework most notably contribute towards the persistence of statelessness, the failure of the conventions to adequately prevent future statelessness and the issue of identifying who is stateless. As stated previously, due to the large collection of work that already exists that focuses solely on the gaps within the law, it is not necessary for the purpose of this thesis to repeat, however I will provide some important examples in order to provide clarity and in the interest of completeness.

Such a clause can also be found in article 1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Convention on the Rights of the Child maintains a similar list but with the added element that discrimination is prohibited on these grounds whether both in respect of the child and his parents. Article 2, paragraph 1 of the Convention on the Rights of the Child, 1989. It should be noted that some of these terms overlap since "racial discrimination" is already considered to include distinctions based on colour or national origin. Meanwhile, the Convention on the Elimination of All Forms of Discrimination Against Women focuses on outlawing gender discrimination in a similar context. All of the major regional human rights instruments render (their own version of) the same list: Article 14 of the European Convention on Human Rights; Article 1 of the American Convention on Human Rights; Article 2 of the African Charter on Human and Peoples' Rights; Article 3 of the African Charter on the Rights and Welfare of the Child; and Article 5 of the Covenant on the Rights of the Child in Islam. There are subtle variations, for example the term "property" is replaced in the African Charters with the word "fortune" and the European Convention on Human Rights includes an additional ground, namely "association with a national minority". However these differences are negligible.

From the outset, a primary concern in the definition is that it requires the proof of a negative. This stands as an obstacle which impedes the protection of the rights of the stateless, as only those who can prove that they do not have a nationality can benefit under the statelessness conventions. When facing impending deportation or detention, there can be limited time in which to determine nationality. Therefore, this definition potentially has the added impact of creating an environment which is more conducive to the restriction of liberty.

Articles 1 and 4 of the 1961 convention, dictate the granting of nationality to certain persons who would otherwise be stateless. The convention however allows for this conferral to be conditional and upon application. One result of this is that states may for example, delay the granting of nationality based on the age of the applicant or on the amount of years the applicant has been residing within the territory of the state. The wide range of conditions that are allowable under this convention can cause confusion or difficulties for stateless persons who may not have easy access to information or legal advice. In these cases, it is very possible for a stateless person to be unaware of the time limits imposed upon them.

Similarly, the Convention determines that no-one shall lose or be deprived of their nationality unless they hold or acquire another nationality. However, thereafter numerous exceptions are listed where such loss or deprivation is allowed. If for example a naturalised person resides abroad for over 7 years without registering his intention of retaining his nationality, his nationality may be stripped, regardless of whether this will leave them stateless or not. Further exceptions exist for scenarios where deprivation of nationality would be in the interests of national security. Exceptions such as this that are open to a broad interpretation can be easily exploited or manipulated to further discriminatory and/or political agendas.[106]

Furthermore, the convention opens up a risk of statelessness due to conflicting laws of two states. It prescribes that “a contracting state shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be

106 This will be brought up again in Chapter 5.

stateless, if the nationality of one of his parents at the time of the person's birth was that of that State. If his parents did not possess the same nationality at the time of his birth, the question whether the nationality of the person concerned should follow that of the father or that of the mother shall be determined by the national law of such Contracting State". Thus, it can happen that where the parents have different nationalities, the contracting state's national laws state that the child should obtain the nationality of the other parent (one who is a national of a different state). In the contracting state's opinion, the child is thus not stateless but merely has the nationality of another state. If that other state then denies that the child has obtained their nationality according to their own national laws, this will then leave the child vulnerable to statelessness.

There is currently no international law that imposes an explicit obligation on the contracting parties to establish procedures to determine and identify statelessness. Although an implicit obligation to do so has been derived from the 1954 Convention by the UNHCR,107 the task of, and the procedure of identifying statelessness remains something that each state must set for itself.

The lack of imposing an explicit obligation upon states in this regard is a concern. It is impossible to establish who is entitled to rights listed in the 1954 and 1951 Conventions without a status determination procedure.108 Similarly, the aim to regulate and improve the status of stateless persons in terms of the 1954 Convention would be difficult to achieved if this status itself is not first identified and formalised.109 This has recently been reiterated by the Human Rights Committee in a decision from December 2020, where it confirmed the importance of statelessness determination procedures in safeguarding access of the children's right to acquire a nationality under the ICCPR.[110] It is also arguably the lack of an effective procedure to determine statelessness that

107 UNHCR Handbook on the Protection of Stateless Persons (Geneva 2014). See also European Network on Statelessness, Good Practice Guide on Statelessness Determination and the Protection Status of Stateless Persons, (December 2013), pp. 5-6.

108 https://rm.coe.int/briefing-paper-session-1-with-coverpage-en-unhcr/1680a3e6a5 page 7

109 It could be argued that it is possible to protect stateless persons without identifying them if stateless persons can be adequately and effectively covered by protection regimes of general application. Katia Bianchini, however, shows in her thesis that states which do not have statelessness-specific protection regimes in Europe offer a lower level of protection to stateless persons than states which do have such specific protection regimes. Bianchini 2015.

110 *Zhao v. the Netherlands* (2020) CCPR/C/130/D/2918/2016 (UN Human Rights Committee, 28 December 2020), para. 10

can sometimes result in (otherwise avoidable) human rights violations, such as in many cases of indefinite detention of stateless persons.[111]

However, since the obligation to establish statelessness determination procedures is only implicit in the treaties, the UNHCR acknowledges that "states have broad discretion in [their] design and operation".[112] This can result in stateless individuals failing to be identified as such even. In such instances, the provisions of the 1954 Convention will not be fully implemented despite whatever mechanisms are in place within the national system that aim to improve the humanitarian situation of stateless people.[113]

This also brings us to the use of the phrase "who would otherwise be stateless"[114] that is used numerous times in the convention. This phrase is not sufficiently defined and is open to a wide interpretation (as can be seen in the example above). This puts the stateless person in a position where they may have to fight prolonged legal battles in order to fulfil their right to a nationality.

In fact, Dr. Paul Weis, the former Protection Director of the UNHCR, who assisted in the drafting of the Refugee Convention, submitted that the wording and resultant requirement of a state to grant its nationality if the person concerned would otherwise be stateless was not satisfactory. He also highlighted the difficulty there is of determining a person's nationality or lack thereof, as well as the difficulty of distinguishing in practise the difference between the *de jure* and the *de facto* stateless.[115] Circumstances in daily life vary considerably from case to case, and there

111 Petrova 2009: 26.

112 See UNHCR Handbook on the Protection of Stateless Persons (Geneva 2014), and Guidelines which preceded the publication of the Handbook in particular UNHCR, Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, (20 February 2012); UNHCR, Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, (5 April 2012); and UNHCR, Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, (17 July 2012).

113 Bianchini 2015.

114 1961 Convention: Article 1 at (1), (4) and Article 4 at (1).

115 As cited in Summary Record of the Conference's Twenty-Third Plenary Meeting on 25 August 1961, A/CONF.9/SR.23, pp. 13 – 14 https://www.unhcr.org/4bc2ddeb9.pdf. See also A/CONF.9/11, "Observations transmitted by the United Nations High Commissioner for Refugees", 30 June 1961, paragraph 7: "The United Nations High Commissioner hopes that persons who are refugees within his mandate and who are *de jure* or *de facto* stateless, as well as persons who derive their nationality from such persons, will be enabled to benefit equally from the provisions of the Convention on the Reduction of Future Statelessness."

are many instances where a person's nationality status is not able to be clearly ascertained.[116] There is also a notable silence within international law when it comes to regulating the procedural aspects of determining statelessness.

Another limitation that is regularly mentioned is the lack of provisions being made for the *de facto* stateless who are not, or do not qualify as refugees. The problem stems from the narrow definition of statelessness and the clear distinctions drawn between stateless people and refugees. There emerges the gap between the technical legal position of having a nationality and the position of having an effective national protection. This is significant because not all those who lack effective protection qualify as refugees. Certain people can find themselves in-between those who are stateless refugees, and as such protected refugee laws, and those who are *de jure* stateless and, therefore, covered by the statelessness conventions.

The narrowness of the definition has been alluded to on numerous occassions. Even Weis stated that in order to succeed in reducing statelessness, and for as many persons as possible to be able to acquire an effective nationality, the term statelessness should be interpreted in its widest and most liberal sense. The crucial question should be one of protection.[117] However, upon examining the definition of statelessness, it is clear that it is very difficult to interpret more widely when there is nothing therein that places any importance on the quality or attributes of nationality. The characteristics of nationality, the connection to the state, belonging and being an equal member are profound, stabilizing factors and ignoring them can result in statistical success (less people without a nationality) on paper without the corresponding (and necessary) improvement to people's lives.

116 Farinha 2022: 799-815: An example of this is the "Ungeklärte Staatsangehörigkeit" (a category of unclear nationality) people in Germany. An unclear nationality represents a de facto statelessness, and persons in this category thus cannot invoke the rights established for *de jure* stateless people. They are further impeded if they attempt naturalization and access to a travel documents and settlement permit is further complicated. Even people who were born in Germany can be placed into this category and face de facto statelessness. "Even though the classification 'unclear nationality' is supposed to be a 'temporary working term', it may extend over decades, whole life times, or even across generations." Since there is factually no nationality that such a person may make effective use of, unclear nationality represents a *de facto* statelessness. Yet, in contrast to a recognized *de jure* stateless status, unclear nationality is an administrative term without legal rights attached to it.

117 For the final discussion and vote, see UN doc. A/CONF.9/SR.23, (11 October 1961).

One reason given for the adoption of the narrow definition is that it was initially assumed that all *de facto* stateless persons would also be refugees and would therefore receive the assistance by way of refugee laws.[118] This assumption is patently clear from the various statements of various delegates at the 1959 Conference, one of whom indicated he "did not understand what stateless persons *de facto* were, if they were not refugees'".[119] However, in reality there are several reasons why *de facto* stateless persons might not qualify as refugees, and hence, would not receive refugee rights and protections. For example, in order to be considered a refugee, one has to, amongst other requirements, be outside the territory of the state to which they hold nationality. A person who chooses not to, or is unable to flee their country and seek asylum can thus be rendered *de facto* stateless, 120 but cannot be considered a refugee.[121] Such a person would therefore not be able to rely on either statelessness or refugee laws. So whilst it is true that many de facto stateless can qualify as refugees, many also cannot. Nonetheless, *de facto* statelessness has remained firmly outside the scope of the current approach to statelessness, with no legally binding regime in existence at the global level for *de facto* stateless persons who are not refugees.

Whilst acknowledging that some gaps do exist, for the purposes of this thesis, they are largely irrelevant and the ability of any legalistic approach in completely solving the issue of statelessness is questionable. What it arguably does boil down to however is the concept of an effective nationality rather than a purely legal one. This thesis focuses on the problem of a purely legalistic approach, and the idea that merely formulating more formalistic laws to address the problem of statelessness is not ever going to be a complete solution. If one has to look at the expansive collection of human rights laws that now exist, and the human rights violations that continue to happen, it is clear that comprehensive international laws are not always enough. Thus, it is reasonable to imagine a similar situation occurring with regards to statelessness, even

118 Although the 1961 Convention on the Reduction of Statelessness does not define stateless persons, it is generally assumed that the definition is the same as that in the 1954 Convention. Further, the fact that *de facto* stateless persons are relegated to a recommendation in the Final Act indicates that they are not, indeed, included in the Convention itself.

119 UN doc. A/CONF.9/C.1/SR.19, p. 10.

120 This is in contrast to the "traditional" view of de facto statelessness, was also that de facto stateless persons are by definition outside the State of their nationality and lacking in that State's protection. This was due to the assumption that all de facto stateless are also refugees.

121 Weissbrodt 2006: 252.

if more conventions relating directly to statelessness are enacted. I thus embark on a thought experiment, wherein I imagine that there are no gaps within our laws with regards to statelessness. It is hypothesised that even if the international law relating to statelessness becomes technically perfect, with all gaps being closed with no further additions or amendments being able to improve upon it, it would still be inadequate. Chapter 5 will discuss the reasons for my belief thereof.

4.4 Organisations & International Projects

Leading organisations that come to mind that deal with the issue of statelessness include the UN (more particularly UNHCR), Plan International, the European Network on Statelessness, and the Institute on Statelessness and Inclusion. Whilst other organisations have certainly contributed towards the response to statelessness, the UNHCR is the most influential and has dictated the global agenda for combatting statelessness. It has had a mandate for stateless persons ever since the Office was established in 1950, with their scope at that stage being restricted to stateless refugees. This mandate was extended in 1974 to incorporate stateless persons who were not also refugees. Since then, the UNHCR has professed to be continuously working on at least three goals: identifying stateless persons; protection of stateless persons; and the prevention and reduction of statelessness.

The UNHCR's has since focused on actively promoting accession to the statelessness conventions,[122] with the steady rise in accessions thereto proving some success of these advocacy efforts.[123] Their extended mandate furthermore provides for the UNHCR to offer technical assistance to states in drafting and implementing nationality legislation,[124] with progress in this regard being evident by the development of guidance on important technical issues.[125] It has also played an important role in data

122 GA Res. 50/152 (Feb. 9, 1996).

123 See the status at https://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&clang=_en. As at 23 June 2022, the 1954 Convention has ninety-six parties and twenty-three signatories, whereas the 1961 Convention has seventy-eight parties and five signatories.

124 GA Res. 50/152 (Feb. 9, 1996).

125 UNHCR, Guidelines on Statelessness No. 1: The Definition of “Stateless Person” in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons, HCR/GS/12/01 (Feb. 20, 2012); UNHCR, Guidelines on Statelessness No. 2: Procedures for Determining Whether an Individual Is a Stateless Person, HCR/GS/12/02 (Apr. 5, 2012); UNHCR, Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, HCR/GS/12/03 (July 17, 2012); UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality Through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness, HCR/GS/12/04 (Dec. 21, 2012).

collection, promotion and acquisition of identity documents as well as raising awareness of the problems faced by stateless persons.[126]

Perhaps the most relevant international project relating to statelessness at present is the UNHCR's Global Action Plan to End Statelessness 2014–2024, wherein it is stated that "… millions of people still suffer the lifelong denial of their human rights because they are stateless. And certain worrying trends, including a rise in damaging forms of nationalism, and increased forced displacement, threaten to increase statelessness in some parts of the world if action isn't taken".[127] From this statement alone, it is thus clear that despite holding the extended statelessness mandate for almost 50 years, the efforts of the UNHCR have not yet been successful in preventing or eradicating statelessness. The results to date do not reflect statelessness as being an "easily resolvable and preventable issue", as stated by the UNHCR.[128]

10 "Actions" were proposed to end statelessness: Resolving existing major situations of statelessness, preventing childhood statelessness, removing gender discrimination from nationality laws, preventing denial, loss or deprivation of nationality on discriminatory grounds, preventing statelessness caused by state succession, grant protection status to stateless migrants and facilitating their naturalization, ensuring birth registration, issue nationality documentation to those who are entitled to it, accede to the UN Statelessness Conventions and to improve data on stateless populations.[129]

Upon closer inspection, the "actions" and stated goals of the UNHCR, a recurring theme becomes apparent, and that is the focus on the legal acquisition of a nationality. The solution to statelessness, according to the UNHCR, in its most simple form, is stated as turning the "existing links with his or her (the stateless person's) country of birth and upbringing into the legal bond of nationality".[130] Attentive as the action plan

126 See Mark Manly, UNHCR's Mandate and Activities to Address Statelessness, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW, supra note 27, at 88, 97–113. See also Jain 2022: 244.

127 UNHCR "Global Action Plan" https://www.refworld.org/pdfid/545b47d64.pdf (Accessed on 10 June 2021).

128 UN News, Ending Statelessness "A Matter of Political Will," Says UN Refugee Agency Chief (Nov. 11, 2020), at https://news.un.org/en/story/2020/11/1077392.

129 UNHCR "Global Action Plan" https://www.refworld.org/pdfid/545b47d64.pdf (Accessed on 10 June 2021).

130 UNHCR "I Am Here, I Belong: The Urgent Need To End Childhood Statelessness" https://www.unhcr.org/ibelong/i-belong-i-am-here/ (Accessed 16 October 2023).

is on blatant discrimination that results in statelessness, as well as on encouraging states to adopt formal, technical solutions to statelessness, this policy fails to identify or acknowledge the existence and seriousness of discrete state-manufactured statelessness.[131] In addition to this, the focus on legal nationality over effective nationality risks that the state response to some of the UNHCR's recommendations might result in *de facto* or effective statelessness becoming all the more invisible, thus aggravating rather than eradicating statelessness.

Although the action plan has not yet reached its term, in the recent Global Appeal 2023, it was admitted that the goal will not be met by 2024 and that progress has not been linear. According to the UNHCR "only three States have removed gender discrimination from their nationality laws so that women can confer nationality on their children in the same way as men. There are still 24 countries that don't allow women to confer nationality on their children".[132]

In contrast to the general approach of the Global Action plan, the closely related "I Belong" campaign saw a subtle shift that hints towards a less legalistic approach. The name in itself is interesting, as the UNHCR could have chosen names that fit the focus on nationality, such as "citizenship for all" or "nationality is my right".[133] Instead, they have taken an issue which is generally treated as a legal matter and have highlighted its personal and affective nature. From the viewpoint of stateless persons, this is an empowering statement of presence and agency. Although this campaign is progressive in that it forces a new perspective and encourages questions regarding the current nation-state system, the scale and impact of it to date, although important, have been negligible and more often than not fall in the shadow of more legalistic movements. There are only two years left for the #IBelong Campaign, and although the UNHCR has not given up, with 28 UNHCR operations currently refining their actionable goals and concrete targets for 2023, there is a recurrent implication within UNHCR documentation that statelessness would easily be solvable if only nation-states would address their policies and systems.[134] This in itself, can be construed as

131 Jain 2022: 239.
132 UNHCR "Global Appeal 2023" https://reporting.unhcr.org/globalappeal2023/pdf (Accessed 16 October 2023): 66.
133 Belton 2016: 419-427.
134 "We always stress to governments that statelessness is a solvable problem, and we have many good practices to draw on. What is most important is political will." And "What I think is really

an acknowledgement of lack of authority and power of the UNHCR to solve statelessness without the cooperation of the nation-states. That is, that state sovereignty is more powerful than the current international recommendations and pressures when it comes to statelessness.

The dogmatic legalistic approach of the UNHCR is obvious when one looks at the stateless people of Palestine. UNHCR excluded Palestinians from its statistics and global campaign to end statelessness in 2014, notwithstanding the fact that Palestinians represent one of the largest stateless groups in the world. This exclusion was justified on the basis that Palestinians require a “political solution" since the State of Palestine has yet to approve its nationality laws.[135] The increasing sense of separation of humanitarianism from politics has been described as “the extreme phase of the separation of the rights of man from the rights of the citizen”.[136] However, when looking more closely, it is apparent that humanitarian organizations are also preoccupied with “bare life”,[137] and therefore, despite themselves, maintain an underground unanimity with nation-states that they ought to challenge.[138]

In general, the effectiveness of organisations such as the UN are largely reliant on the willingness/co-operation of the various nation-states.[139] This is seen not only in the realm of statelessness, but in all international aspects. Attempts to instil stronger decision-making powers upon the UN, and thereby threatening the sovereignty of nation-states, has in the past ended in failure,[140] The negligible (and arguably unsuccessful) roles the UN has played in wars such as in Afghanistan, and more recently the war in Ukraine, have further highlighted its deficiencies. Even the

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compelling about statelessness is that in many cases it is really an anomaly, a mistake in our governance systems, where people fall through the cracks. It’s not that it could never end – we know what safeguards can be put in place to prevent it and how it can be addressed.” UNHCR “Global Appeal 2023” https://reporting.unhcr.org/globalappeal2023/pdf (Accessed 16 October 2023): 66.

135 UN refugee chief Antonio Guterres quoted and reported by Nina Larson “UN kicks off stateless people campaign, but omits Palestinians” https://www.timesofisrael.com/un-kicks-off-stateless-people-campaign-but-omits-palestinians/ (Accessed 16 October 2023).

136 Agamben 2017: 110.

137 As opposed to quality/dignity of life. Agamben 2017: 110-112; “Bare life”, Agamben 1998: 127.

138 Agamben 2017: 111.

139 The ability of a nation-state to disregard international law is further evidenced by the Trump administrations withdrawal of the U.S.A. from numerous agreements such as the 2014 Climate Change Agreement, the repudiation of the 2015 Nuclear Program Agreement with Iran as well as the refusal to take part in international efforts regarding global migration and refugee flows.

140 Yuval-Davis 2011: 154.

"Millennium Development Goals"[141], which originally promised to be the realization of the best global aspirations for the benefit of humanity, was largely unsuccessful.[142] It remains to be seen if its successor, "Sustainable Development Goals" [143] fairs any differently. There is, however, evidence to suggest that stateless people in particular may once again fall through the cracks, firstly by being at risk of being uncounted in demographic poverty measures, and secondly being at risk at being declared ineligible for social protection.[144]

4.5 Conclusion

When observing the international response to statelessness, one can surmise that the legal problem of statelessness, along with various connected human rights, have garnered increasingly more attention over the recent decades. This is important as, due to the "stateless" nature of statelessness, any large-scale attempts at a solution inevitably involve an inherent international aspect. Numerous treaties now exist that address the problem of statelessness to varying degrees, and the number of acceding states has grown since their inception. Not only are there two statelessness specific conventions, but there are numerous other international laws that are relevant to statelessness. These laws, in conjunction with each other, form an extensive and admirable contribution to the current legalistic approach to statelessness. They not only form the bulk of international efforts to end statelessness, but are also often the basis of many national laws that strive to do the same. What is evident is, that from a legal point of view, the right to a nationality, as well as basic human rights are strongly (and continuously) upheld within international law. The basic tenets thereof are both admirable and desirable when contemplating the eradication of statelessness, however, despite the progress in international law, such eradication has not been forthcoming.

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141 UN "The Millennium Development Goals Report 2015" https://www.un.org/millenniumgoals/ (Accessed 16 October 2023).

142 See statistical data at https://ourworldindata.org/millennium-development-goals (Accessed 16 October 2023).

143 UN ""Sustainable Development Goals" https://www.un.org/sustainabledevelopment/sustainable-development-goals/ (Accessed 16 October 2023).

144 Bloom 2021: 21-22.

International humanitarian organizations too have continued to develop, with statelessness in recent years being isolated as a focal point and specifically targeted by the most prominent of these organisations. With large scale projects that aim to end statelessness in progress, the UN in particular has recurrently emphasised the seriousness of the situation and has put pressure on numerous states to reform their national legislation to be more in line with international law standards.

In answering the first part of Research Question 3,[145] this chapter shows that the international laws and organizational recommendations that form a major part of the current approach to statelessness are, in general, both comprehensive and sufficiently legally sound. From the outset, it seems the overall international legal response to statelessness has never been stronger than it currently is. This chapter has thus confirmed the previous assertations that there are comprehensive international laws in place aimed at ending/reducing statelessness.

Whilst there are arguably certain gaps within various statelessness specific laws and treaties, the gaps should not be fatal, as other international instruments (such as human rights laws) are, in theory, in place to close the gaps. In saying this, the theory is a far cry from what occurs in practice and from what numerous stateless individuals experience on a daily basis. This contrast between theory and practice strengthens the hypothesis that the problem of statelessness is not a solely legal problem that can be solved *in toto* by a solely legalistic approach. The continuation of statelessness despite the valiant international response rightfully exposes the legalistic approach to criticism and opens debate as to why it is seemingly insufficient and necessitates one to question what exactly it is lacking.

145 I.e. What does the current legalistic approach entail?

CHAPTER 5: THE INSUFFICIENCY OF THE DOMINANT LEGALISTIC APPROACH

5.1 Introduction

> "We breathe, we bleed, we vibrate under the same sky as you. Our cries; our whispers; our shouts, our demands; our love utterances; our curses; our prayers. We pulsate in and among these as you do, yet, in your need to recognise, hypothesise, categorise, theorise, legalise, you forget to humanise. We are not stateless, we are not merely a word, within the act of listening, lives the right to be heard."[1]

On both an international and national level, a purely legalistic approach can risk glossing over certain ethical, practical or social considerations and can overlook certain subtle realities. With a focus on technical legal issues numerous other aspects of statelessness can be left insufficiently addressed, which as will be discussed below, can have serious consequences for those trapped within the cycle of statelessness. This chapter responds to the question: where does the current legalistic approach fall short?[2] It also integrates the discussions in previous chapters in order to respond to the overall research problem of the study.

It is highlighted how the concepts of effective nationality, the limits of international law, and state sovereignty intertwine and interact in ways that reduce the efficiency of the legalistic approach to statelessness. This chapter also attempts to uncover how these concepts are either at best inept at preventing, and at worst encouraging, discriminative and/or exploitive practices. The way that problems caused by incompetent administrative processes can be detrimental to attempted solutions is explained, with reference to South Africa. The dominant legalistic approach is thus criticized not by finding significant inadequacies within the current law itself, but by examining why, despite comprehensive laws already being in place, the issue of statelessness is still persistent. In doing so, the limits of the law, and of any legal structure or institution that adopts a purely legalistic approach, are exposed.

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1 Extract of spoken word poem "Humanise" by Kristy Belton ISI / International Studies Association, as quoted in Rahman 2020: 273.

2 Being Research Question 3: What does the current legalistic approach entail and where does it fall short?

5.2 Effective Nationality

Effective nationality is an important concept that the current legalistic approach does not concern itself with. This has the effect of at times creating situations where the legalistic approach appears "successful" in reducing statelessness, but where the legal success does not correlate to practical or "lived" success. This subsection draws heavily on Arendt's concept of being a member of society, having a political life and having the power to speak and be heard.[3] The necessity of having an effective nationality is sometimes ignored in favour of conferring any nationality, regardless of whether this solves the underlying issues of statelessness or not. If one looks to the narrow definition of statelessness as per the 1951 convention, it is clear that it is not concerned with the concept of an effective nationality. It is a technical, legal definition that attempts to only address a technical, legal problem. Quality and attributes of citizenship are not referenced, even indirectly, within this definition. Whilst it can be argued that this type of definition is necessarily in the interests of clarity and ease of interpretation, it is submitted that such a technical, legal approach is restricted with regards to the range of its utility. Despite the legal definition ascribed to it, statelessness is multifaceted and its effects and consequences are much more than just solely legal in nature.

This is evident by the fact that solving the legal aspect of statelessness does not always resolve all the consequences of statelessness.[4] That is, even where legal nationality is attained (resulting in a person no longer being classified as stateless), a person can still lack an effective nationality.[5] In order for a nationality to be effective, it needs to afford the person the required protection that other nationals are entitled to, and it also arguably should be a nationality of a state to which the person is actually connected to. Granting an arbitrary nationality to a person would not solve the issues of not belonging, and, in situations where language or cultural differences (or systemic discrimination) are a possible barrier, might not always translate into a better quality of

3 Arendt, "Menschenrecht," 761. Translated into English as per Robitzsch 2019: 247; Arendt 1951: 295 - 267.

4 Lynch & Blitz 2011: 207.

5 For the purposes of this thesis, unless otherwise evident from the context, effective nationality will mean not only the nationality of a state to which the person is connected but that the nationality is effective in conferring rights, protecting the citizen and ensuring equal opportunities to other citizens.

life. As Manley Hudson, Special Rapporteur for the International Law Commission on the subjects of nationality and statelessness, commented, [6]

> "Any attempt to eliminate statelessness can only be considered as fruitful if it results not only in the attribution of a nationality to individuals, but also in an improvement of their status. As a rule, such an improvement will be achieved only if the nationality of the individual is the nationality of that State with which he is, in fact, most closely connected, his 'effective nationality', if it ensures for the national the enjoyment of those rights which are attributed to nationality under international law, and the enjoyment of that status which results from nationality under municipal law. **Purely formal solutions which do not take account of this desideratum might reduce the number of stateless persons but not the number of unprotected persons. They might lead to a shifting from statelessness *de jure* to statelessness *de facto* which, in the view of the Rapporteur, would not be desirable".**[7] (Cf. the proceedings of the International Law Association at its 39th Conference in Paris in 1936, where it was suggested that neither *jus soli* nor *jus sanguinis* should be decisive but the *jus connectionis* or right of attachment, i.e., a person should have the nationality of the State to which he has proved to be most closely attached in his conditions of life as may be concluded from spiritual and material circumstances).

In other words, legally eliminating statelessness cannot be considered fully successful unless it is accompanied by a positive development with regard to the previously stateless person's status and quality of life – when compared to the period of statelessness. In order for this to happen an individual must have enjoyment of the rights that are normally attributed to nationality both under international law and under national and municipal law of their country. Without

6 Hudson "Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur" https://digitallibrary.un.org/record/1299414?ln=en (Accessed 16 October 2023): 20. (Bold being my emphasis).

7 Hudson "Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur" https://digitallibrary.un.org/record/1299414?ln=en (Accessed 16 October 2023): 20. (Bold being my emphasis).

such an improvement in status, statelessness as a legal concept may be reduced, but the underlying issues can remain unresolved.[8]

The purely legalistic approach, whilst focusing on the acquisition of a legal nationality, does not adequately take into consideration the need to ensure protection and improvement of status. Furthermore, the issue of belonging and the effectiveness of nationality are swept to the side in favour of formal criteria. This results in a limited scope that risks ignoring the underlying issues such as marginalisation and discrimination.[9]

Where one is a national, but is not able to enjoy the rights and protections usually associated with nationality under international law and under the national laws of the country, then that person risks finding themselves *de facto* stateless. The exclusionary effect of the current definition has been criticised as problematic because the "…definition only encompasses *de jure* statelessness, and its failure to treat *de facto* statelessness is implicitly detrimental to *de facto* stateless persons".[10] This is relevant as history has indeed shown that sometimes the effects of *de jure* and *de facto* statelessness are so similar that there is no significant difference in practise between the two. This was, in effect, the case for the *de facto* stateless German Jews who were classed at the same time as German nationals but also non-citizens under the Reich laws. Although legally still holding a nationality, it was not an effective nationality. The existence and consequences of *de facto* statelessness further emphasises the need to consider a broader definition of statelessness compared to that as currently set out in international law.

Another example is the situation where a person attains legal nationality, so is no longer *de jure* stateless but who is also not completely *de facto* stateless whilst still lacking certain aspects of an effective nationality.[11] This can be a result for example of

8 Lynch & Blitz 2011: 207.
9 See Chapter 5: 5.5 for a detailed analysis of marginalisation.
10 Stiller "Statelessness in International Law: A Historic Overview" (DAJV Newsletter 3, 2012): 94. As quoted in Tucker 2013: 277.
11 Since the working definitions of *de facto* statelessness are so ambiguous, there is no clear line of when to label a person *de facto* stateless. For example, where population groups are denied political participation (for example voting rights) based on gender or ethnic reasons, their nationality is ineffective, but arguably they are not de facto stateless. Similarly, during the aftermath of hurricane Katrina, many affected citizens were claimed to be *de facto* stateless due

marginalisation that either was the underlying cause of original statelessness or that stems directly from the residual stigmatization of being previously stateless. There are examples where stateless persons have been forced to accept an arbitrary nationality.[12] Such circumstances can lead to increased social exclusion, loss of identity and further restrictions, such as preventing such people from being political voting members within the society that they live. Going back to Arendt's right to have rights, the ability to participate as a political member in society is an important part of having an effective nationality.

Whether *de facto* statelessness should be formally and legally identified and defined within international law or not is not a topic of this thesis. However, what can be taken from these contexts is that effective nationality is paramount in all aspects of life, including where legal nationality is newly conferred upon a previously *de jure* stateless person. It therefore should be considered when contemplating solutions to the statelessness problem. The current response falls short in this regard, in that it holds a "thin" notion of nationality, which is operationalised primarily through legal status without properly considering the effectiveness of that legal status. This allows important aspects of nationality, such as participatory membership and enjoyment of rights, to sometimes go unprotected.[13]

Whilst having a connection to the nation-state of which one is a citizen can be considered closely related to, or even part of, having an effective nationality, it must be remembered, that the "right to have rights" should supersede the importance placed on this connection. That is, lack of a true connection should not be used to tacitly create any form of statelessness.

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to the governments lack of response, however this claim cannot be entertained, as this understanding would open the flood gates to labelling large amounts of the world's population as *de facto* stateless. Tucker 2013: 277 - 278; See also Somers 2008.

12 The Bidoon people in Kuwait being pressured to accept other (such as Iraqi) nationality, or even being coerced into signing affidavits stating they are nationals of another state in terms of "status adjustment" goals. In 2014 for example, Bidoon children were targeted to submit false nationality declarations in order to obtain certificates needed to access schools. See Kennedy 2017: 265 – 667 (Table G4 wherein examples, sources and references are given for numerous examples such as these).

13 Balaton-Chrimes 2014: 17.

An important case that shows the dangers in this regard is *Liechtenstein v Guatemala* (the Nottebohm case),[14] a matter brought before the ICJ by the governments of Liechtenstein and Guatemala. In this case Nottebohm who was born with German citizenship, had established a successful business in Guatemala. He no longer had any ties to Germany and was living (as far as he was concerned) as a sort of cosmopolitan citizen. In the lead up to WW2, he acquired citizenship (at the cost of 37 500 Swiss Francs) in Liechtenstein due to the concern that as a formal German citizen, he could be designated as an alien enemy during the war. Although continuing his business in Guatemala, he was now there on a Lichetenstein passport only. Liechtenstein, and its citizens were considered neutral, and so, by acquiring citizenship thereof, he hoped to also acquire the protection from any sort of detainment related to enemy aliens. Despite this, when Guatemala later declared war on Germany, Nottebohm was still sent to a detention camp as he had feared.

Surprisingly, the ICJ ruled in favour of Guatemala, where it was decided that Nottebohm had not possessed a genuine link with Liechtenstein at the time of his naturalisation, and therefore the court upheld Guatemala's claim. The court determined that nationality was not a rubber stamp that could be picked up and relinquished at a moment of emergency but a social category that reflected an authentic bond between the individual and the state. The court was not implying that Liechtenstein had not properly conferred citizenship in accordance with its naturalisation laws, but instead declared that Liechtenstein could not offer the protection that came with that citizenship because of the quality of the nationality acquired by Nottebohm.[15] By this judgement, the ICJ tacitly created a situation of *de facto* statelessness, as Nottebohm was left without the protection of any nation-state.

A Swiss judge, Paul Guggenheim, objected to the court's introduction of the genuine link principle by stating that by rejecting Liechtenstein's claim to exercise diplomatic protection for Nottebohm, the court had tacitly allowed the creation of a stateless person.[16] He argued that the effect thereof would only further weaken the already limited protection of the individual under international law and was "contrary to the

14 *Liechtenstein v. Guatemala*, Second Phase, ICJ (6 April 1955). ICJ Reports 1955.
15 Jones 1956: 244. John Mervyn Jones was a British legal expert on nationality and international law.
16 Siegelberg 2020: 213.

basic principles embodied in the UDHR according to which everyone has the right to a nationality."[17] Even ICJ judge, Hersch Lauterpacht, exhibited surprise at the court's decision to invoke "effective nationality",[18] specifically because the use of this legal argument had never previously been invoked. All previous matters where the argument of a genuine link was depended upon involved cases of dual nationality, in which two possible loyalties were being examined.[19]

It must be noted however, that in order to be heard before international courts, a case needs to be brought by a nation state (Guatemala in the above case). An individual stateless person has no power to do so. Therefore, as was the case above, international courts run the risk of only being approached in circumstances where it fits with the agenda of a certain nation-state.

This case highlights the dangers of allowing the argument of a "genuine link" to supersede the right to a nationality. In the 1950s and 1960s national governments seized on the genuine-link principle articulated in Nottebohm to formulate the foundations of citizenship in new constitutions. Remnants of this can be seen in modern day nationality law, where it is not uncommon to have to prove a genuine connection to the state before naturalisation can take place (e.g. passing a language and cultural test for Dutch naturalisation). Care should thus be taken to ensure that statelessness is not created when relying on notions such as the genuine-link principal.

Whilst upholding the right to a nationality, Arendt's interpretation of what being a meaningful member of society entails (including having a political life and having the power to speak and be heard) should form an important aspect when concluding whether a case of statelessness has fully been resolved or not, despite the acquisition of nationality. Effective nationality should thus not be ignored if the underlying issues of statelessness are ever to be resolved.

17 *Liechtenstein v. Guatemala* (Dissenting Opinion of Judge Guggenheim), International Court of Justice Reports of Judgments 4, Advisory Opinions and Orders 1955, 59–60.

18 Hersch Lauterpacht had been elected as a judge on the ICJ but had been precluded from taking part in the Nottebohm case due to a perceived conflict of interest.

19 Lauterpacht 2010: 383.

5.3 Inefficiencies of Human Rights law

Due to both the historically poor level of ratification and the limited scope of international statelessness conventions,[20] many stateless persons find themselves outside the protection thereof, and as such, have no choice but to (attempt to) search for other legal remedies such as one of the various human rights conventions that their country may have ratified. The general norms of international human rights law then become of particular relevance. As such, the cause and consequences of statelessness are increasingly being perceived in human rights terms,[21] which terms are legalistic in nature as they are entrenched and codified within international law.

When reviewing the impressive human rights developments and codifications, it could easily be assumed that the problems associated with statelessness should have long been resolved by the institutionalization of these human rights standards.[22] With the progression of international human rights law, individuals are now declared to hold human rights directly under international law with international instruments, such as the UDHR, centring on the individual. Therefore in theory, stateless persons, even those who are undocumented, can stand before the courts as equal persons and demand that their human rights be upheld.[23] This has been taken by some as proof of "the disaggregation of citizenship"[24] and applauded by others as an indication of a "post-national membership".[25] In practise however, individuals still seem to only become a functional part of international legal order - thus gaining protection – through the vessel of the nation-state.[26] In the majority of cases, only nation-states represent the "subjects" of international law, and all other entities (including individuals) struggle to enjoy any effective independent agency, only attaining meaningful access to international law derivatively through their national/political status.[27] This lack of individual agency in the international law arena is of significant relevance to stateless people. They are observed as objects of national law in that they fall under the sovereignty of the nation-state on whose territory they reside, however they lack certain protections under the same national law due to their statelessness. Since they

20 The 1954 & 1961 Conventions.
21 Foster & Lambert 2016: 567.
22 See Chapter 4: 4.3.
23 Gündogdu 2015:10; see also Bosniak 2006: 64–68.
24 Benhabib 2002: chap. 6; Benhabib 2012: 145–146.
25 Tonkiss 2022: 695-696, a review of Soysal 1994.
26 Siegelberg 2020: 7.
27 Cassidy 2004: 539.

are without nationality, the agency by which they could obtain the benefits from international law is absent/deficient. There is thus an inherent weakness within the current human rights discourse including a failure to form a suitable foundation for the substance and character of the rights it proclaims.[28]

What is apparent, is that there is an inconsistency between the promises of human rights and the actual experience of many people (stateless people being just one such vulnerable group).[29] Human rights "guaranteed" to all people seem to be side-stepped without difficulty throughout history, especially with regard to stateless persons. Whether due to legal, political, social and/or economic factors, what is clear is that in these situations there is a fundamental loss of the right to have rights. The relationship between statelessness and human rights is a complex one. Not only are stateless people still more vulnerable to various human rights violations and other issues related to the (lack of the) "right to have rights", but they also can lose a part of their human dignity when they are denied these rights – ones that are supposedly inherent to all humans. Many facets of human rights law infiltrate the issue of statelessness, whether directly or indirectly. It becomes apparent that not only is the legalistic approach to statelessness lacking, but so too the legalistic approach to international human rights themselves.

The importance of the distinction between nationals and non-nationals when it comes to human rights has long been questioned by scholars who assert the universality of human rights.[30] These scholars base their support for the decoupling of possession of rights from nationality on the argument that being human is the sole requirement for entitlement to human rights.[31] As stated, on paper the international developments look extremely encouraging in this regard and certain scholars have suggested that this approach has reconfigured the relationship between nationality, rights, and state sovereignty, in that they claim that the source of entitlement to human rights has shifted from nationality based to "universal personhood".[32]

28 Yuval-Davis 2011: 168.
29 Gündogdu 2015: 8-11.
30 Jain 2022: 245,
31 Jain 2022: 245; Weissbrodt & Collins 2006: 248-249.
32 See, for example Cohen 1999: 258–259. Also see examples given by Ellerman 2020: 2464, (i.e.: Soysal 1994; Jacobson 1996; Feldblum 1998).

The resultant international institutionalization of human rights, these scholars argue, provide the stateless with a way to claim rights that were previously only associated with nationality. When reading documents such as the UDHR, it is purported that simply being human is the sole prerequisite entitling a person to the enjoyment of a range of human rights, regardless of nationality or the lack thereof.[33] It is thus based on the premise that all humans have human rights purely because they are human, i.e. it is a natural right. Time, however, has shown us that this has simply not been the case historically, nor is it presently the case for numerous individuals and groups across the globe. There is still a noticeable trend that the rights people effectively have are still generally determined according to the country to which they belong.[34]

Notwithstanding this, authors such as Beth Simmons[35] and Benhabib[36] have documented the positive results of some of the major human rights instruments within several nation-states. Their work shows that various international treaties and covenants have indeed started affording possibilities to citizens of signatory countries that have less than fully developed constitutional democracies to appeal the doctrine and practice of human rights in their own countries using the internationally acknowledged human rights standards.[37] There are political groups such as the transnational women's movements that rely heavily on documents such as The Convention Against the Elimination of all Forms of Discrimination Against Women. In one example, concerns were raised regarding the equality of women in Tunisia and the state's responsibilities under CEDAW, resulting in very public debates. This arguably directly gave rise to the passing of Article 45, which guarantees women's rights and equality for women in elected bodies – something which was previously unheard of in the Arab world.

Benhabib says, "…international human rights instruments have created a conceptual and normative space within which a jurisgenerative struggle is taking place between

33 Weissbrodt & Collins 2006: 249.
34 Owen 2018: 300; Bauböck & Paskalev 2015: 49.
35 For example in her book *Mobilizing for Human Rights: International Law in Domestic Politics* (Simmons 1999).
36 Benhabib S "Critique of humanitarian reason" https://www.eurozine.com/critique-of-humanitarian-reason/ (Accessed on 10 June 2021): 6.
37 Benhabib S "Critique of humanitarian reason" https://www.eurozine.com/critique-of-humanitarian-reason/ (Accessed on 10 June 2021): 6.

international human rights and institutionalized civil and political rights". [38] She purports a democratic iteration of human rights and has a very positive belief in the progress thereof. According to her, this has created a cosmopolitan political community that functions democratically in that an individual is not only the subject of laws, but also the author, and which includes both citizens and non-citizens alike.[39] Evidence of this exists, at least to some extent in Europe, with the approval of rights being extended to non-citizens who are resident within a certain territory.[40]

As stimulating as Benhabib's arguments are, it has been argued that they function at a high level of abstraction. Whilst abstract thought is no doubt an important tool for progressing as a society, it must be kept in mind that certain assumptions are present in her work that are enabled purely by this abstraction. Assumptions, (such as that "iterations" of human rights are actually democratic, that there is progress towards the acceptance of international human rights agreements within states and that this acceptance is contributing to cosmopolitan justice by equalising the distribution of rights and responsibilities across groups within political communities), risk creating an overly optimistic sense of reality that possibly underestimates the role that nationality still plays within the sovereign state system.[41]

This is not to say that international human rights laws have no substantive qualities, but rather that the enjoyment of rights however has been proven not to always be simply a matter of legal entitlement. If it were, then statelessness would not exist, as according to international law, everyone has the right to a nationality. The work of David Lockwood deals with this problem and argues that the actual enjoyment of rights depends on two interlinked axes of inequality: the presence or absence of legal, bureaucratic rights as well as the possession of moral or material resources, which generally operate informally.[42] It is argued that by focusing on the legal, bureaucratic axis only, human rights themselves can in fact contribute to the institutionalisation of new and complex inequalities. The stateless are an example of this, as they experience first-hand the uneven application of human rights law combined with

38 Benhabib 1998: 120 – 121.
39 Benhabib 2007: 19-36.
40 Nash 2009:5.
41 Nash 2009: 5-6.
42 Nash 2009: 5.

existing social and economic inequalities. This contributes to the proliferation of labels and statuses (such as “stateless”) regarding citizenship and human rights that diversify rather than encourage an equalisation of treatment for nationals and non-nationals alike.[43]

In addition to this, the intangible nature of human rights is difficult to consolidate and enforce within legalistic, codified laws. As stated previously, Arendt had a strong distrust for natural rights and the subsequent human rights laws and the question emerges: if such rights are inalienable, why then have they historically (and currently) been so easily violated? Her disagreement was most notable when discussing the UDHR at its inception. Looking at this, whilst keeping the statelessness problem in mind, it can be seen that human rights continue to be violated - even in countries whose constitutions are supposedly based upon them.[44] The abstract foundation of human rights has enabled these rights to have no political value at exactly the times when they are most essential. It seems that Arendt’s statement that human rights notions "had never been philosophically established but merely formulated, [and] had never been politically secured but merely proclaimed"[45] is still relevant today.[46] Human rights today are still founded upon the abstract ideologies reminiscent of natural right tradition, having merely been declared without having a concrete political basis. Deeper philosophical exploration has been largely neglected, both by nation-states and international organisations alike, in favour of a solely legalistic approach that is ironically reminiscent of the completely abstract concept of natural rights. It thus becomes apparent that there is a deep deficiency that goes to the heart of human rights law itself. Without first philosophically formulating human rights with a concrete political base, statelessness, as a human rights issue, can never be fully resolved.

In addition to this, the continuation of human rights violations is closely linked to the issue of enforceability of international laws in general, which will be discussed under the next sub-heading. The attempt to create a set of laws that supersede national laws in order to provide universal basic human rights protections to each and every person,

43 Nash 2009: 6-7.
44 Cartland 1992: 7.
45 Arendt 1951: 447.
46 Some authors going even as far as to reject human rights completely “as western, individualistic and legalistic” (See Sharma 2006 for an example).

is no doubt commendable in principle, however to date, it has not been universally successful. One only has to look at the large number of human rights violations occurring every day to see that international law is sometimes powerless to intervene.[47] This brings us to question of what extent the existence of international law and universal human rights are compatible with (and enforceable over) nation-state's inherent sovereignty and its authority to govern over issues of citizenship. A clear need exists to enable the enforcement of basic human rights and other international laws without depriving the political community of autonomy – however the possibility of achieving this is not as clear.[48]

It is my opinion however, that from whichever side one chooses to view human rights, it is clear that international human rights law along with its legalistic approach is vital and should most definitely not be discarded. Even when looking at Arendt's work, there is an interesting evolution of thought, beginning with scepticism toward international law and human rights laws,[49] and ending with a cautious confirmation of their role in shaping politics among nations.[50] However, whether a legalistic approach, in isolation, can ever be a complete solution is questionable, especially since problems such as statelessness and the resultant human rights violations have not yet been eradicated despite numerous detailed laws and treaties aimed at doing so. The extent of the efficiency of human rights treaties thus remains in question. As does the tendency for such treaties to only be honoured in the breach.

With stateless persons sometimes having nothing else to rely upon other than their human rights, the approach to statelessness needs to be cognisant of the inefficiencies

47 Throughout the world, human rights violations of all kinds seemingly continue uninterrupted despite international laws. Every one of us has seen a news headline or article depicting shocking issues that have been normalised/condoned by certain nation-states, such as bombing of civilian occupied areas, child labour, internment camps, honour killings, compulsory hijab wearing or female genital cutting. This raises further controversy regarding the question of whether Western conceptions on human rights can/should be imposed on non-Western populations. Should westernised international laws and institutions have the power to nullify local, regional, and national laws within such a pluralistic world? More relatable questions that stem from those questions however, is how exactly would such a large scale consensus be attained, and how would it be reconciled with sovereignty and self-determination? In essence, by simply proclaiming that all humans have certain rights, does not make it true.

48 Menke, Kaiser & Thiele 2007: 750.

49 Benhabib 2012: 49-61.

50 Benhabib 2011: 44.

of human rights laws in general, as well as with regard to the unique issues that stateless persons face when attempting to claim basic human rights.

Sadly, the truth is that human rights law has seemingly failed to accomplish its objectives in a meaningful way for a large number of people around the world. Human rights have not achieved the universality that was aimed for, and the hope that such rights could be imposed upon all countries as a matter of international law is far from being fulfilled. One can merely look to the recent breaches of human rights laws as proof of this: the genocide of nearly one million Rwandans, the ethnic cleansing of hundreds of thousands of former Yugoslavs, and the displacement of nearly two million Colombians are just some of the examples.[51] It should be kept in mind however that the continued violations do not disprove the case for international human rights law. The fact that it is not upheld globally does not mean that it serves no useful purpose anywhere, however it does mean that there could be a need to re-evaluate the current aims, method and approach in a perhaps more realistic way. To what extent this is needed, however, is a question that may need more time to be answered. The main human rights treaties were not adopted until 1966 and did not enter into effect, with only 35 ratifying states, until 1976. Since then there have been constant developments, both within the law as well as with regards to enforcement mechanisms, under both the UN Charter and the principal human rights treaties. International human rights law and institutions are as such, still considered to be relatively “young”. Therefore, the greatest developments and successes may yet be still to come to.

5.4 Sovereignty and Governance

> "It is for each State to determine under its own laws who are its nationals."[52]
>
> "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."[53]

Reflecting on the discourses of globalization and human rights it is reasonable to argue that there is a significant erosion of state sovereignty. With the ever-increasing global

51 Cassel 2001: 122.
52 Art. 1: League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930 (Hereinafter referred to as “1930 Hague Convention”).
53 Art. 2: 1930 Hague Convention.

interdependence as well as the rise of nongovernmental/transnational organizations, state sovereignty seems to be approaching its end. However, the very notion of statelessness represents a strong icon of state power in an era of (supposed) waning state capacity.

With decisions relating to nationality traditionally falling under the umbrella of each specific nation-state's authority, statelessness indeed raises unsettling questions about the established international system of sovereign states. Whilst the causes and consequences of statelessness have received ample attention in both academics and practice alike, there remains a need to pay closer attention to the different contexts in which statelessness emerges,[54] as well as its relationship to sovereignty and governance.[55]

State sovereignty in nationality matters includes the nation-state's authority to govern over and decide upon who is entitled to citizenship and who is not. During these contemporary times of globalisation, migration and polarization, the nation-state is constantly forced to re-assert its sovereignty. State sovereignty and statelessness have a direct but divergent connection. Each nation-state guards the sovereign power to set its own laws and conditions for acquisition, change and loss of citizenship of a person, and this power is in turn internationally recognised as legitimate.[56] Whilst a nation-state can decide to enter into specific international treaties that curtail this power, they are under no legal obligation to do so. Even where nation-states agree to such (self-imposed) limitations, or where they are otherwise assumed to be morally bounded by international law documents such as the UDHR, the enforceability of such laws (as will be seen) is consistently falling short, often at precisely the time they are most needed.

Since the inception of international law, some have argued that there is some form of limitation beyond a nation-state's self-imposed limitation as described above. A

54 Institute on Statelessness and Inclusion "The world's stateless: Deprivation of nationality", https://www.institutesi.org/year-of-action-resources/worlds-stateless-2020 (Accessed on 16 October 2023).
55 Fortin *et al* 2021: 125.
56 UNHCR "Nationality and Statelessness: A Handbook for Parliamentarians" https://www.un.org/ruleoflaw/files/Nationality%20and%20Statelessness.pdf (Accessed 13 September 2018).

common example is that of the Nottebohm case that was already described above with regards to effective nationality. Although some see the Nottebohm decision as proof of a degree of limitation on Liechtenstein's sovereignty (and ability to choose its nationals), it must be remembered that Liechtenstein was free to treat Nottebohm as its national for its own national law purposes, however Liechtenstein could not expect other states do so for purposes of international law. Thus, a nation-state's decisions on nationality cannot necessarily be imposed upon other nation-states when it comes to international court cases. Situations such as these however, are not common occurrences, and for the majority of stateless persons, there is no nation-state that is interested in bringing the issue of their nationality before an international court. In fact, it would not be possible for an international court to force a nation-state to confer its nationality upon an individual and accept them as a citizen. The Nottebohm case for example did not have the effect of conferring nationality upon a stateless person, but rather of deciding which nationality was the effective one. Liechtenstein's sovereignty was not limited in any way with regards to its own domestic affairs, however it was shown that under international law, Guatemala (and the International Court of Justice) was not bound to accept Liechtenstein's decision regarding Nottebohm's nationality.[57] Said differently, the validity of Nottebohm's nationality under Liechtenstein's legal system was not at issue in the case and was not affected by the Court's judgment. Whilst this case has many aspects that are relevant to statelessness, it must be kept in mind however, that statelessness cases in general do not often go before international courts due to the fact that stateless individuals in most cases lack any sort of nation-state to protest on their behalf.

Building upon the concept of sovereignty, is the nation-state's ability to self-govern. The role of sovereignty and governance in the failure of the legalistic approach to statelessness is multifaceted. The general connotation of nationality within the international community at large is one of empowerment. However, in some cases, nationality is used as a tool to exert to extensive control that can culminate in rights violations – the very opposite of empowerment. We can have "non-decisionism",

57 "[a] State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State." *Liechtenstein v. Guatemala* 1955 I.C.J. 23. The decision has been criticized in this regard for introducing uncertainty into diplomatic protection.

weaponisation of nationality, political agendas, systemic marginalisation and administrative issues all leaving people stateless,[58] and no amount of legalistic "solutions" have yet been able to adequately resolve the issue. Whilst weaponisation of nationality is more or less openly put forward by nation-states as intended governance procedures, marginalisation and administrative issues surrounding statelessness can be overt or covert governance procedures, systemic in nature, symptoms of incompetency of the government, economic in nature and/or stemming from other social or cultural factors.

"Governance" in general can be described as the power structure/s and mechanisms that maintain order, stability, and well-functioning societies.[59] This definition is purposely broad enough to include government institutions as well as non-governmental, transnational or international institutions.[60] Applied to nationality and statelessness, this broad definition allows the examination of multiple structures at different levels as well as the interplay between them. Approaching governance from the perspective of statelessness can also uncover facets that sometimes go unnoticed within the traditional approaches.[61]

The inefficiency of the legalistic approach to statelessness is notable when one considers sovereignty, governance and the issue of enforceability of international laws. The three terms being closely related and linked. Sovereignty gives power to governance whilst simultaneously weakening the enforceability of any law that is not in line with the sovereign state's agenda. I.e. governance empowered by state sovereignty can ignore or reduce the impact of the current international approach to statelessness.

58 Marginalisation and administrative issues, whilst falling under governance, will be discussed in more detail under their own heading, due to the fact that they are less overtly governance decisions. Whilst weaponisation of nationality is openly put forward by nation-states as intended governance procedures, marginalisation and administrative issues can be overt or covert governance procedures, symptoms of incompetency of the government, economic in nature or stemming from other social or cultural factors.

59 Bloom & Kingston 2021: 4.

60 Boas 1998 & Finkelstein 1995 as stated in Bloom & Kinston 2021: 4.

61 Bloom & Kinston 2021: 4.

5.4.1 Lack of enforceability of international laws

The issue of enforceability of international law and state sovereignty are inherently linked. International laws are often fiercely opposed by nation-states. State sovereignty also causes constant disagreements both in principle as well as in practice about the consequences of international human rights law - both for those countries that already have a set of human rights laws entrenched in their national laws,[62] as well as for countries whose customs do not necessarily conform to western ideals. Regardless of the origin of, or the reason for, a specific violation, it is well known that since its inception, international law has been plagued with the issue of enforceability.[63] The majority of international human rights laws are set out in treaties that do not create efficient forms of punishment for violations nor have they been successful in creating a functional or successful enforcing agency. Looking at these treaties from an enforcement view, they are more akin to friendly agreements, than to legally binding law. Similarly, because the Universal Declaration for example, is "merely" a declaration and does not provide any mechanism for enforcement thereof,[64] some argue that it can only act, at best, as a recommendation and cannot function adequately as law.[65] National laws often supersede international human rights laws where the two seem to be contradictory, with nation-states often defending such laws in the name of state/border security, culture, tradition or religion.[66] This ultimate ineffectiveness of international law can result in cases of grave injustices to humanity, including when it comes to the treatment of stateless people.

On a global scale, the UN is currently the closest thing to an overarching world governance that we have at the moment, so it is natural to look towards it in hopes that it can ensure world peace and the upholding of human rights. However, the question arises as to how could disobliging governments be held accountable should they

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62 Benhabib “Critique of humanitarian reason” https://www.eurozine.com/critique-of-humanitarian-reason/ (Accessed on 10 June 2021) 6.

63 One important development in the international law sphere was the move towards enforcement in the realm of criminal law, such as the introduction of the ICC. In fact, the establishment of the ICC was one of the crucial points that softened Arendt’s hesitancy towards international law.

64 There are certain bodies that have been set up by the UN to monitor specific human rights treaties, however none of the six are responsible for monitoring the two statelessness conventions of 1954 and 1961.

65 Benhabib 2011: 5; Example: The American response to the 9/11 attacks in 2001 that produced a counterterrorist campaign that subjected suspects to torture and indefinite detention without charges or trial.

66 Benhabib 2011: 135.

transgress international law? As we can see from the Ukraine and Russia situation, the feeble attempts at international sanctions have remained ineffective. Without the UN holding some sort of operative cosmopolitan (or totalitarian) authority which would have to include significant military and political power, nation-states - especially the great powers such as the U.S., China or Russia - would have little reason to abide in situations where international law does not coincide with their own agenda. At present, there is a hegemonic "law of the stronger"[67] entrenched within the UN, which is clearly visible by the veto powers that permanent members (U.S., China, Russia, France and U.K.) hold. Notably, these are all amongst the most powerful countries in the world (in wealth, political and/or military power, and they also all happen to be nuclear weapon states).[68] The veto power of these members can perhaps be criticised as undemocratic and even a major cause of inaction when it comes to war crimes, genocide and crimes against humanity (which all often includes serious human rights violations). One only has to look at Russia's recent move to veto a draft resolution condemning its own invasion in Ukraine, to see how little clout the UN and international laws have in certain situations.[69] Thus, where governments are powerful globally (the US, China, Russia) or regionally (India, Nigeria, Saudi Arabia, Brazil), they appear impervious to any external human rights pressures.[70] It is clear that although international law is important and can grow a more universal respect for human rights, it is not authoritative over all nation-states at all times.

With this hegemonic system, smaller countries and their problems are at risk of being undermined. Similarly, issues that the larger countries do not see as a priority can be left insufficiently attended to. If the UN cannot prevent or stop Russia in their invasion, the likelihood of them ever being able to oppose the sovereign right to decide upon matters of nationality (especially of powerful countries, such as the U.S., China or Russia) does not seem likely. As Habermas asserts, only significant reforms to the UN can offset the debilitating "selectivity" with which international law is presently enforced and ultimately provide a way for a fair cosmopolitan legal order in which citizens of Gambia or Luxembourg, for example, might enjoy the same rights as those in the U.S.

67 Habermas 2006a: 142.
68 See Treaty on the Non-Proliferation of Nuclear Weapons 5 March 1970.
69 UN security council 25 February 2022.
70 Cassel 2001: 135.

or France.[71] Generality and consistency in law necessitates the capacity to enforce legal norms, and this is where international law currently falls short. And should the enforceability be in the hands of those against whom they may need to be enforced, then such enforceability is no longer democratic and leans dangerously towards totalitarianism.[72]

This ineffectiveness of international laws with regards to statelessness is brought to the fore when one examines some practical real-life examples. One such example is the case of prolonged detention. A stateless person can sometimes face years in unnecessary detention due to harsh or inadequate national laws. The Migration Act in Australia which authorises the Australian government to detain stateless people indefinitely, irrespective of whether they will ever be able to be deported, is one such law.[73] In the Al-Kateb case, it was found that the indefinite detention of stateless persons awaiting deportation was lawful as long as the government maintained an intention to deport that person.[74] While it may seem reasonable that detention may lawfully continue for unavoidable, prolonged periods of time whilst entry or removal decisions are made, the idea that, theoretically, detention may legally continue for the term of a person's entire life is a terrifying thought.[75] Other examples of this law being put into practice are the cases of Peter Qasim and Eidreiss al Salih.[76] Given the fact that Australia is a party to both the 1954 and 1961 Conventions, it is not only disappointing that their national laws make provision for the indefinite detention of stateless persons, but also highlights the supremacy of state sovereignty, as well as the lack of any recourse to the contravention.

It is clear that there is currently no authoritative judicial system or coercive penal system to address breaches of international law. Although it is not impossible for such

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71 Habermas 2006a: 134.

72 Scheuerman 2008: 142.

73 *Migration Act* 1958. The full Act can be found at https://www.legislation.gov.au/Details/C2018C00337 (Accessed on 1 December 2021). The US is similar in that it treats stateless persons in the same way it treats any unauthorised migrant, i.e. detention centres. Balaurte 2015: 352-353

74 *Al-Kateb v Godwin* 2004 219 CLR 562, 575 (Gleeson CJ), 651 (Hayne J) ('Al-Kateb').

75 Although more recent judicial reviews have attempted to offer more protection to people who are at risk of being detained, the Al-Kateb ruling has not been overturned. However Department of Immigration and Citizenship has provided a new class of visa which can offer relief to the harsh effects of the Al-Kateb case.
Also see Ritcher 2005: 32.

76 Stephen 2004: 10.

a system to be developed in the future, due to the current structure of sovereign states, it would always remain the choice of the nation-state to consent to the laws and to the jurisdiction thereof. This approach would therefore be fatally flawed from the beginning, unless the entire current sovereignty-model is drastically changed. So even though it seems there is an inclination toward a world in which a universal rule of law that exemplifies human rights would be possible, such a world does not presently exist, nor has ever existed in the past. Nation-state sovereignty with its territorial boundaries, (often fuelled by autochthonic/nationalistic ideologies), historically outweighs human rights concerns in situations where the two contradict. The use of the word "human" in human rights thus remains ironic as the implementation thereof is still dependent on national procedures.

When one looks to a more individual level, to the lives of the stateless who need to rely heavily on international law, there is more evidence of the lack of power or enforceability within the international community. Where citizens can at least in theory depend on consular protection when outside their country's borders, stateless persons usually have no such protection. It is here where there should be some sort of international body (such as the UN) that has authority and power to act on behalf of the stateless. However, it is not certain how such a body could operate and how it would assist in eradicating statelessness. Because of the nation-state system, and because of state sovereignty, any act by an international body to unilaterally confer nationality to a stateless person would be strongly defended against by that nation-state.[77] In my opinion, even if nationality could be conferred by an independent body, this would just open the door for the transfer of *de jure* statelessness to *de facto* statelessness, where a meaningless nationality is conferred by an outside body. This could happen for example, where the nation-state involved effectively ignores the conferral, where impossible administrative requirements are put into place by the nation-state in order for these people to obtain documentation or where a nationality is conferred upon a person to a nation-state where they have no effective connection and might not even speak the language. Thus, any attempt at present to supersede state sovereignty by "force" would be met with fierce resistance, and even if such

77 This can be seen in other instances where countries have defended their sovereign right over nationality matters.

attempt was made possible, the action would in all likelihood lack value at a national level.

It is thus clear that in circumstances involving emigration, naturalisation, nationality, and expulsion, state sovereignty remains absolute. Looking into international law literature in general, there does not seem to be an easy solution to the issue of implementation and enforceability. Sanctions are usually ineffective, and often hurt both the sanctioned state and the sanctioning states economically,[78] whilst recommendations are easily ignored.

Human rights committees such as the now defunct Commission on Human Rights, and its successor, the Human Rights Council have been plagued by scientism (based on the fact that states that are well-known human rights violators sit on the council)[79] and issues of effectiveness. Despite the council adopting processes that include country visits and reports, special sessions, commissions of inquiry, the Universal Periodic Review and treaty bodies, they come across as powerless in the face of a number of extreme human rights violations.[80] The real challenge the international community faces in almost all regards is implementation of so-called international norms and effectiveness and enforceability of laws/treaties. The power of the sovereign state system is evident, with even the HRC admitting that many human rights violations are not addressed due to “political reasons”, and implores the states themselves in assisting the HRC with prevention of violations, implementation of recommendations and accountability.[81] At the same time, states that have sat or currently sit on the council continue to commit human rights violations.[82] There is thus an obvious disconnect between what is being said and what is being practised and allowed.

78 Bradford & Ben-Shahar 2012: 377.
79 Chilton & Golan-Vilella 2016: 8-10.
80 One only needs to look through the Human Rights Watch reports for countries such as China, Russia, Syria or Myanmar at https://www.hrw.org/world-report/2022.
81 John Fisher (Geneva Director of Human Rights Watch) quoted at Human Rights Watch “UN Human Rights Council Should Strengthen Impact on the Ground” https://www.hrw.org/news/2018/04/23/un-human-rights-council-should-strengthen-impact-ground#:~:text=The%20Human%20Rights%20Council%20plays,violations%20for%20primarily%20political%20reasons (Accessed on 16 October 2023).
82 For example China. See: Amnesty International report 2021/22 https://www.amnesty.org/en/documents/pol10/4870/2022/en/ (Accessed 10 November 2022): 124 – 130.

It is submitted that the legalistic approach to statelessness fails to fully consider the issues surrounding state sovereignty, governance and the ability of international law to be implemented and enforced. This perhaps cannot be blamed, as these issues have been recurring since the inception of international law itself, however, without addressing or finding an effective way to work around these issues, the phenomenon of statelessness will be able to continue. In addition to this, there are other, although often closely related, facets that contribute to the ineffectiveness of the current approach that shall be discussed in the following subsections. It appears that there is a "blind spot" deep within the political system itself with underlying causes and consequences that inhibit the effectiveness of a legalistic approach not always being immediately evident.[83]

5.4.2 Nationality as a tool rather than a human right

> "To deprive a person of their citizenship on the grounds of their behaviour or opinion is to cast them out of society"[84]

The reality that nationality can be granted or taken away, rather than being an inalienable human right as pledged, further encourages the use of statelessness as a strategy or a tool. A well-known example is the role that statelessness played during WW2, when Nazi Germany denationalised Jewish and other minorities under its German Reich Citizenship Law of 1935. More recently, around 1.9 million people in Assam, India found themselves excluded from the national register of citizens, despite some being Indian citizens for decades.[85] This is an autochthonic move by the Indian government that is rooted in linguistic, religious and cultural divides between the Assamese and Bengalis, choreographed to enable the removal of Bengali people from the land. These people are stateless unless proven otherwise. With administrative procedures in place (or even appeals processes being delayed) that make the procedure of submitting this proof problematic. There are innumerous cases such as

83 Benhabib 2012: 163.
84 Yeo 2019: 134.
85 Kingston 2021: 105.

these that display the use of nationality as a method of enforcing discrimination on a national level.[86]

A thought-provoking, and concerning, characteristic of nationality is its ability to be used by political leaders as either a reward or a punishment. Take for example how Mamoudou Gassama (a refugee at the time) was rewarded with French citizenship after saving a child who was seemingly about to fall from a balcony.[87] Similarly, in Thailand, 3 stateless people were granted Thai nationality, once rescued, after being trapped in a cave for 18 days. The process of obtaining citizenship, which often takes years (if ever), was suddenly finalised within a matter of months.[88] This, whilst a positive development for those involved, demonstrates the state's power to expedite matters which are brought suddenly to the global public's attention by the media. In other cases, conferral of citizenship can be completely symbolic in nature, to be used as a tool to improve public perceptions or relations. When for instance, in October 2013, a boat tragically sank near the island of Lampedusa, Italy reacted by awarding honorary (symbolic) citizenship and a state funded funeral to the hundreds of people who had died – however the "lucky" Eritrean survivors were charged with illegal entry and detained.[89] The public performance of the welcome for the deceased running concurrently with the criminalization of the living provides an ambiguous message about the value of human life. However, the second message is clear: that the country's sovereign borders will be resolutely defended.[90] Looking at these examples, one can't help but feel that nationality is no longer treated as an ordinary right but rather as instrument to exhibit state power. Stateless and refugees should not have to accomplish certain feats (such as saving the life of a child, surviving being stuck in a cave or dying in a sinking ship) to have a legal nationality officially conferred or recognized.

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86 For example, the Kurds (Turkey): Yegen 2009: 597-615, the Rohingya (Myanmar): Awan 2020: 83-209, the Palestinians (Israel): Jefferis 2012: 202-230.

87 Kingston 2021: 100. Interestingly, and as a side note, there has been accusations, and scientific attempts to prove, that the rescue was staged. Rousseau 2019: 1-4.

88 Singh 2019, see also Ives M & Jirenuwat R 3 "'Wild Boars' Get Thai Citizenship, but Statelessness Is Pervasive", https://www.nytimes.com/2018/08/09/world/asia/-thai-cave-boys.html#:~:text=HONG%20KONG%20%E2%80%94%20Three%20of%20the,drama%20that%20captivated%20the%20world (Accessed 23 October 2023).

89 Kingston 2021: 104.

90 FitzGerald 2019: 205-206.

Conversely, various states are treating nationality as something that is dependent on conduct.[91] Giving it a provisional and weaponisable nature, as opposed to a purely natural right. This is openly apparent where denationalisation is used for a political agenda, with some nation-states making specific "loop-holes" within their national laws in order to facilitate and legalise the act of denationalization upon very broad terms.[92] Consider the stripping of UK citizenship for reasons where it is deemed conducive to the public good.[93] This can be used as a punishment for various acts or crimes that are deemed to pose a threat to the UK.[94] This is once again evidence of the ineffectiveness of the "natural" nature of human rights. Nationality, which is clearly listed as a human right in the UNHDR, is thus being used as a political tool that flexes the muscle of state sovereignty – the message being conveyed that it is a privilege and not a right. In order to by-pass restrictions placed by international law on denationalisation when it would leave a person stateless, some countries have merely developed measures that essentially facilitate a form of denationalisation by proxy.[95] This can include temporary exclusion orders as well as removing passports or blocking ID's for an indefinite and unspecified period of time.[96] Whilst the former has triggered critique for its potential violations of international human rights and statelessness laws,[97] the latter is more ambiguous with the human rights violations being less clearly defined and therefore less protected.

For example, a large number of South Africans have had their ID's blocked either for being suspected of being "illegal immigrants", or because the ID number has been marked as being involved in fraudulent activity or comes up as a duplicate. In December 2020 the Minister of Home Affairs, Aaron Motsoaledi, revealed that the department was investigating close to one million blocked identity documents.[98]

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91 There has been a marked increase in denationalisations since the 9/11 attacks in USA: Gibney 2017: 358–382. and 364-366. Also see the examples of Canada, Belgium, Australia, Germany, France in Kapoor & Narkowicz 2019: 2 for descriptions.

92 Gibney 2020: 2560.

93 A specific example of this is the UK's Immigration, Asylum and Nationality Act 2006, Section 40(2): "The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."

94 *British Nationality Act* 1981: sec. 40.

95 Kapoor & Narkowicz 2019: 3.

96 Kapoor & Narkowicz 2019: 2-4. See also *Nzama v Minister of Home Affairs* (High Court of South Africa, DavisJ, 4 April 2018).

97 Gibney 2013: 646–658; Macklin 2014: 1–53. See also court case: *Hilal al Jedda v UK.*

98 "Parliamentary Question NW2763 to the Minister of Home Affairs", https://pmg.org.za/committee-question/15119/ (Accessed 16 October 2023).

If one considers how crucial a valid ID is in proving nationality, as well as in accessing a plethora of other important rights, e.g. the right to education, the right to work, the right to social assistance and the right to vote, it becomes clear that such blocking could easily constitute a human rights violation. Once an ID is blocked the onus is placed on the individual to prove the block is erroneous. This can take the Department of Home Affairs an indefinite time to investigate and resolve, leaving the affected person in limbo. In addition to this, this process involves submitting substantive proof, which can include proof of citizenship in the form of a birth certificate and/or DNA test. Furthermore, children born from parents' whose IDs have been blocked are at risk of statelessness as there will be difficulties in registering the birth and later in obtaining an ID for the child without their parents' documentation.[99] This results in a situation of ineffective nationality at best, and de facto statelessness at worst – one that can transcend generations.

A persuasive argument against the use of denationalisation (and other exclusionary tactics) as punishment is that it is often used too quickly in cases that don't warrant such extreme action, and that it is a human rights violation that diminishes the value of citizenship which can lead to political instability.[100] Despite this, nation-states, are able to manipulate the right to a nationality mostly due to gaps or loopholes, (whether purposeful or unintended) in their national laws (or international laws), administrative regulations and procedures or general practice that give room for exploitation and/or arbitrary decision-making – with the target often being on marginalized groups.[101] This is equivalent to a modern version of exile or banishment, effectually casting the denationalised person out of society. Yet, we see a recent trend towards denationalisation, sometimes in cases where the seriousness of the offence is not to scale with the seriousness of the punishment.[102] We see a rise in situations where nation-states expand the grounds on which denationalisation can take place,[103] which

99 Lawyers for Human Rights "Statelessness and Nationality in South Africa", https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf (Accessed 16 October 2023).
100 Kingston 2021: 103.
101 See the example of USA in Open Society Justice Initiative "Unmaking Americans: Insecure citizenship in the United States", www.justiceinitiative.org/publications/ unmaking-americans (Accessed 10 October 2022).
102 Yeo 2019: 134.
103 Kingston 2021: 104.

can range from symbolic justifications (citizens who engage in certain behaviour don't deserve their citizenship) to security justifications (denationalisation is needed to neutralise threats).[104] This continues to occur despite evidence that such arbitrary practices may be counterproductive.[105] In fact, such wide, and often vague, grounds upon which denationalisation takes place, enables the resulting weaponisation, misuse and exploitation that are evident today. This practise leads to the very real possibility of people finding themselves suddenly stateless.[106] The methods to appeal such decisions are plagued with difficulties. This can stem from the fact that (in most countries), there is no right to state appointed counsel in civil proceedings, that individuals can be removed or detained while cases are still pending or due to ineffective internal protective measures - thus impeding access to appeal rights.[107] Political agendas and considerations under the reason of national security are seemingly taken in preference over human rights by the exploitation of exceptions provided for by international laws-[108] and can be seen as reminiscent of Arendt's "tool of totalitarian politics".[109] The states sovereign power to denationalise citizens thus exposes a yet unresolved loophole in the protection of human rights.[110]

Making nationality something that can be awarded or unilaterally removed diminishes its value and threatens one of its defining contemporary legal features – security.
Once nationality is "contingent on performance (it) demotes citizenship to another category of permanent residence. Citizenship revocation thus weakens citizenship itself. It is an illegitimate form of punishment and it serves no practical purpose"[111] Governance policies that require payment of fee or proof of economic self-sufficiency in order to be naturalised similarly weakens the concept of nationality as a human right.[112] With many stateless, living in poverty, or being unable to obtain legal

104 Pillai & Williams 2017: 845–889.
105 ISI Statelessness Conference 2019.
106 Open Society Justice Initiative "Unmaking Americans: Insecure citizenship in the United States" www.justiceinitiative.org/publications/ unmaking-americans (Accessed on 16 October 2023) 11.
107 Open Society Justice Initiative "Unmaking Americans: Insecure citizenship in the United States" www.justiceinitiative.org/publications/ unmaking-americans (Accessed on 16 October 2023) 8-9.
108 Mantu 2018: 38.
109 Arendt 1951: 269.
110 Open Society Justice Initiative "Unmaking Americans: Insecure citizenship in the United States" www.justiceinitiative.org/publications/ unmaking-americans (Accessed on 16 October 2023): 6.
111 Macklin 2018: 163.
112 For a Study on the naturalisation fees of 9 EU countries between 1985–2014, see Stadlmair 2018: 42–63.

employment, conditions such as these can sometimes have the same effect as an open denial of citizenship. Careful attention to practices such as these should factor into statelessness discourse – especially in regard to the international community's legalistic approach that tends to be ineffective when posited against sovereign decisions.[113]

5.5 Failure to effectively address marginalisation

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[114]

The International Covenant on Civil and Political rights, with 173 state parties, makes a clear stand against discrimination on a wide array of grounds.[115] Seemingly, over 80% of the world are in agreement that race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status are not grounds for discrimination. Despite this, whether it be because of systemic racism, xenophobia, extreme autochthonic policies, or other reasons based on religion or gender biases, marginalization is often found alongside statelessness.[116] Especially when it comes to stateless cases that involve denationalisation, deprivation of nationality-based rights, selective naturalisation and forced displacement, it is imperative to note the often coexisting presence of marginalization and discrimination.[117] Due to this, any effort to address statelessness needs to concurrently address marginalization too. Failing to do this would result in only scratching the surface of the problems.[118] Although it has been acknowledged that there is a need to increase cooperation between UN

113 Alexander 2021: 239-240.
114 United Nations (General Assembly). 1966. *International Covenant on Civil and Political Rights.* Treaty Series 999 (December): 171: Art. 26.
115 To view the number of state parties see https://indicators.ohchr.org/.
116 OHCHR "Equality and Non-Discrimination in Nationality Matters to End Statelessness" https://www.ohchr.org/sites/default/files/2022-01/OHCHR-UNHCR-Event-Outcome.pdf (Accessed 16 October 2023).
117 Kingston 2017: 23
118 Kingston 2017: 17-34.

agencies, states and other organisations,[119] statelessness still tends to be treated in isolation, with much of the focus being on legal nationality, and less of the focus on the discrimination and marginalisation surrounding it.

Whilst statelessness undoubtedly leads to further human rights violations, the roots that are often a result of discrimination and repression cannot be ignored.[120] Recognising that statelessness is both a cause and a symptom of marginalisation thus exposes the weaknesses of the legalistic approach.

For example, denationalization, and the possible statelessness that results therefrom, can stem not only directly from discrimination, but can also be used as a method for the marginalization. The result is often repression (or even the erasure) of specific targeted identity groups.[121] I.e. Discrimination can cause statelessness and conversely, statelessness can cause marginalisation. In the first instance, discriminatory governance and laws can result in statelessness, and in the second, statelessness can result in marginalisation by way of human rights violations or social stigmatisation – and in many cases, both examples occur simultaneously. Minority populations who, according to the state, are seen not to belong (such as the Rohingya in Myanmar)[122] are forced out of national territories and systematically erased from national histories and identities through the calculated use of statelessness, combined with discriminatory governance policies that can include genocide and ethnic cleansing.[123] In this way, nationality can thus be used to transform citizens with full rights into stateless persons with limited rights, who can then later be more easily removed from their home, detained and/or deported.[124]

119 OHCHR “Equality and Non-Discrimination in Nationality Matters to End Statelessness” https://www.ohchr.org/sites/default/files/2022-01/OHCHR-UNHCR-Event-Outcome.pdf (Accessed 16 October 2023).
120 Kingston 2021: 100.
121 Kingston 2017: 17–34.
122 MacLean 2019: 87, 90.
123 Kingston 2021: 100.
124 As satellite imagery shows, Rohingya homes were demolished and quickly replaced by new homes occupied primarily by Buddhist citizens. State resettlement plans show that the government doesn’t intend to return refugees to their original villages, but rather herd them into segregated Rohingya-only settlements (McPherson et al “Erasing the Rohingya” https://www.reuters.com/investigates/special-report/myanmar-rohingya-return/ (Accessed on 16 October 2023).

It therefore becomes apparent, that (legally) solving statelessness would not automatically solve the underlying marginalisation, and that eradicating marginalisation would also not solve statelessness. Solving one, does not equate to solving the other – the intricate connection between the two demands that both should be addressed if an effective solution to statelessness is to be found. It is here where the legalistic approach again falls short. At a practical level, the current approach, is inclined to ignore important, yet subtle realities regarding systemic marginalisation (which often in turn leads to rights abuses). Previous data has shown that obtaining a nationality "ameliorates many, but not all, of the complex problems that have roots in economic inequality, systemic discrimination and other forms of injustice".[125] With its narrow approach focusing on legal nationality, especially within the UN, the issue of marginalisation is left to other sectors, entities or agencies to address (ones that do not hold a mandate to eradicate statelessness). This leaves the approach to statelessness seemingly oblivious to the various underlying issues that fester beneath the formal definition of statelessness.

One such reason for this, could be that nationality, and the documents that prove it, are prima facie legalistic and bureaucratic in nature, which one might presume to equate to being neutral or even immune to exploitation. Practise however, has proven otherwise. In addition to this, there are multiple connotations to nationality. On the one hand, a human rights approach may understand legal identity, nationality and status as means to providing access to rights, while a state government may understand these as purely an effective way to govern. Although throughout this thesis the importance of legal nationality within the present world system, and the vital connection it currently provides to human rights protection, has been emphasized, it does not always function as a tool for empowerment.[126] A more totalitarian state may see these as crucial tools of surveillance and population control, while a genocidal state may take it even further and use it as a method to "cleanse" their nation. Indeed, the conferral of nationality and its ensuing documentation has been used regularly throughout history by nation-states to exercise control and sometimes to violate rights or discriminate against large groups of people.[127] Thus something that is often presupposed to be a

125 Lynch & Blitz 2011: 207.
126 Please see paragraph 5.4.2 above on governance for a more in depth discussion on the exploitation and weaponisation of nationality.
127 Kingston 2021: 107.

positive good, something that is meant to establish identity and provide access to services and rights, can instead be weaponised in the absence of meaningful political membership.[128] The ways by which individuals are rendered stateless – including denationalisation, exclusionary citizenship laws, and inequalities that obstruct registration and naturalisation – often serve to discriminate against minority populations and create structural barriers to their full protection under the law.

Whilst overt discrimination is often easy to recognise, covert discrimination can be more subtle and overlooked. One may assume that because of this, and because of the numerous international laws that prohibit discrimination, that overt discrimination should no longer be a problem in modern society. Unfortunately, there are still many states that incorporate clear discrimination into their legislation and policies. Historically, Saudi Arabia is probably the most infamous in this regard, however they are not alone. Gender often poses as a hindrance when it comes to birth registration and/or nationality conferral in countries around the world. As at March 2022, 25 nations do not allow conferral of nationality by maternal descent to biological children born.[129] Discriminatory laws such as these can place single female parents, same-sex parents, parents where the father is stateless, or even sometimes mixed-sex parents with a noncitizen father in a situation where their children may be at risk of statelessness.[130]

It should be noted, that discrimination is not only present in countries that are openly discriminatory - even countries that claim to be against discrimination can harbour direct or indirect forms within their nationality laws. For example, in Malta, a child born abroad to an unmarried man can be unable to take on that man's nationality as it is assumed that the child will inherit nationality from the mother,[131] in Austria unmarried men must prove paternity within a certain time frame,[132] and in Poland, cases have been reported where birth registration has been refused to same sex parents.[133]

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128 See Myanmar "white cards" and South African "dompas"

129 UNHCR "Background Note on Gender Equality, Nationality Laws and Statelessness 2022" https://www.refworld.org/docid/6221ec1a4.html (Accessed 2 August 2022).

130 Buterman 2021: 159.

131 European Network on Statelessness "ENS Statelessness Index Survey: Malta" https://index.statelessness.eu/ (Accessed on 16 October 2023).

132 European Network on Statelessness "ENS Statelessness Index Survey: Austria" https://index.statelessness.eu/ (Accessed on 16 October 2023).

133 European Network on Statelessness "ENS Statelessness Index Survey: Poland" https://index.statelessness.eu/ (Accessed on 16 October 2023); Björn Sieverding, Network of European LGBTIQ* Families Associations (NELFA), Vice President: "Even where countries in

Gender based laws such as these can have drastic consequences, in some instances directly increasing the amount of new cases of statelessness within a nation-state.[134] The reason behind these gender based laws is important. Are these laws allowed because of an actively discriminatory government or are they merely outdated laws that have not yet garnered enough attention or reasoning to be amended? In some instances, a legalistic approach could provide a solution to the resulting statelessness, but in other instances, the underlying discrimination, unless eradicated, could continue covertly even in the presence of seemingly non-discriminatory laws.

"Zero Option"[135] rules for example can have the effect of excluding large portions of a population when citizenship is awarded based on who was resident within a certain territory at a specific time.[136] Policies such as these often conceal the underlying discrimination in order to appear not to go against international laws such as the widely ratified International Convention on the Elimination of All Forms of Racial Discrimination. Those who cannot supply documentary proof of residence during a certain time-frame may find themselves stateless, or may face protracted administrative procedures in order to attain (or maintain) nationality.[137] This can act as a sorting device for distinguishing between those who belong and those who do not, by carefully specifying a time period that would ensure the sought after result is achieved. While appearing neutral and non-discriminatory on the face of it, these temporal limits can be used strategically to ethnically (or racially, religiously, or linguistically) engineer the constitution of a population.[138] This in turn can have the

Europe recognise marriage equality, children born to same-sex families remain at risk of statelessness" www. statelessness.eu/blog/even-where-countries-europe-recognise-marriage-equality- children-born-same-sex-families-remain (Accessed 29 November 2019).

134 Petrozziello 2019: 31–47.

135 An example would be where the entire population is required to submit proof of residence within the stated territory during a specific time frame, or face being denied nationality.

136 UNHCR "The State of the World's Refugess" https://www.unhcr.org/3eb7ba7d4.pdf (Accessed 16 October 2023). For example, 12 countries which now comprise the Commonwealth of Independent States chose variants of the so-called "zero-option", whereby all those people who were permanent residents when the new law entered into force were recognized as citizens, irrespective of their ethnic origins. Because of the different rules and policies used by the successor states for the granting of citizenship to those people who were not permanently resident when their respective citizenship laws were adopted, some groups of people have encountered problems of statelessness. Amongst such people are the "formerly deported peoples", who were forcibly transferred *en masse* during the period of Stalinist rule, and who had not managed to return to their place of origin before the new laws were enforced.

137 Jain 2022: 238.

138 Jain 2022: 250.

effect of creating tailor-made pockets of statelessness or ineffective nationality.[139] This was the case in both Latvia and Estonia where a "zero option" policy rendered thousands of ethnic Russians and other Russian-speaking minorities resident on their territories stateless. In instances such as these, a specific category of discrimination (for example ethnic discrimination) can be difficult to prove as the conditions surrounding the "zero option" rule are purely based on a time period and a location – neither of which are discriminatory in themselves. Whilst a certain population group does emerge as the most effected, it is not blatantly discriminatory, as every single person falls under the same, seemingly neutral, rule – a façade of equality is thus created. Such examples are important as they demonstrate how what may appear to be candid, neutral and equally applied civil procedures may be instrumentalised to become exclusionary and discriminatory in practice. It also demonstrates once again the ease with which international law has been side-stepped in the past (and can be again).

Similar covert discrimination can also be seen in situations where perhaps the right to a nationality is acknowledged by the nation-state but where internal administrative process or certain laws inhibit/threaten this right in a discriminatory way. This can be where birth registration frameworks are reformed in order to prevent or deter certain groups, such as the children of refugees, asylum-seekers, and/or undocumented migrants born on the territory from obtaining legal birth certificates.[140]

In some instances, a nation-state can coerce portions of their population into waiving their nationality rights, by arbitrarily assigning a (fake) new nationality to them upon, for example, their application of renewal of identity documents. In this way, they pressure certain population groups into accepting these identity documents, as without them, they would not be able to continue to manage their daily lives.[141] This can be espoused by the nation-state as a measure to reduce statelessness, however it is an act of discrimination and does not result in the affected individuals obtaining an

139 Lori 2019: 94.
140 Horne 2014: 131.
141 Amnesty International "Kuwait: Rising signs of despair among Bidun highlight cruelty of draft law" https://www.amnesty.org/en/documents/mde17/1362/2019/en/ (Accessed 2 August 2022). On page 2: "The Central System has arbitrarily assigned many Biduns [sic] who applied for renewed IDs in recent years a false, non-Kuwaiti nationality (typically Iraqi or Syrian), which then appears in both the database records system and on their new official documents".

effective nationality. It is also an overstep of state sovereignty and an example of governance that exploits the desperation of the stateless in order to fulfil the state's agenda.

An important aspect that highlights the inadequacy of the current approach is the lack of access to proper mechanisms for affected parties to address such marginalisation. Stateless persons facing marginalisation can feel helpless, especially when they perceive the government (the same government that refuses to accept them as a citizen) to be the discriminatory agent acting against them. How does such a person even begin to fight against government mandated policies? Even where such mechanisms may be in place, the convoluted nature thereof can result in a failure of the system. There is a need for engagement (and improvement) between and within statelessness agencies, other agencies (in particular those with functioning human rights mechanisms) and the relevant governance structures.[142]

Similarly, from a human rights perspective, discrimination,[143] (both official and unofficial), can make it much more difficult for stateless people to evoke the protection offered by human rights laws.[144] This is aggravated by the fact that many stateless people may struggle to gain access to, or information regarding, the legal mechanisms that could give them the opportunity to contest the discrimination and/or human rights violations.[145] In addition to this, the stateless, refugees, migrants and undocumented people are sometimes hesitant to even try assert their rights for fear of punishment or further discrimination.[146] There are documented cases where refugees who are in possession of legitimate EU papers and/or permit cards, have been forcibly "escorted" across borders in an attempt to return them to their country of origin. This suggests a deeper problem than that of documents, but one based on discrimination due to race

142 OHCHR "Equality and Non-Discrimination in Nationality Matters to End Statelessness" https://www.ohchr.org/sites/default/files/2022-01/OHCHR-UNHCR-Event-Outcome.pdf (Accessed 16 October 2023).
143 Such as police profiling and racial segregation, gender discrimination, arbitrary detention,
144 Gündogdu 2015: 10.
145 Poretti 2022: 110-119.
146 Bustamante J "Report of the Special Rapporteur on the Human Rights of Migrants", http://www.ohchr.org/en/Issues/Migration/SRMigrants/Pages/AnnualReports (Accessed on 1 December 2021). See also OHCHR "The Rights of Non-Citizens" http://www.ohchr.org/Documents/Publications/noncitizensen.pdf (Accessed 16 October 2023).

or ethnicity.[147] Thus the fear that undocumented migrants and stateless persons may have of bringing attention to themselves is understandable to say the least, when even documented people are facing being "pushed back". The gross human rights violations that stateless people often face and the apparent blindness of the general public to their plight is perhaps a reflection of how desensitised humanity is becoming to the suffering of other human beings – which is arguably also not something that can be amended by a legalistic approach.

Agendas that raise awareness and formulate focused solutions that address discriminatory laws, policies and practices that could lead to statelessness thus need to be prioritised. And wherever possible, mechanisms should be made available at ground roots level that can intervene, address or assist with individual complaints and other communications procedures. Whilst the UN has acknowledged these needs,[148] such recommendations have not yet been realised or evolved/implemented to the extent of being effective yet (evidenced by the abovementioned issues still being in existence). The most widespread approaches that are used in practice have remained legalistic in nature, focusing on legal nationality, whilst other recommendations seem to be treated as side projects or merely theoretical. It is here that I once again submit that a major fault within the current approach is the lack of focus on effective nationality. Without an effective nationality, marginalisation can occur unrestrained, human rights violations can continue even after legal nationality is conferred, and protective mechanisms can continue to fail – even where a legal nationality has been conferred.

What this means is that although legal nationality is important in our society (and the main factor in determining statelessness), this nationality needs to be both functional and effective, especially if all associated issues surrounding statelessness are to be

147 This has been extensively documented for example at the Greek–Turkish land border since 2018: See Barker & Zajović 2020a, 2020b; ARSIS, Greek Council for Refugees and Human Rights "The New Normality: Continuous Pushbacks of Third Country Nationals on the Evros River" https://www.humanrights360.org/the-newnormality-continuous-push-backs-of-third-country-nationals-on-the-evrosriver/. (Accessed 30 July 2020); Human Rights Watch "Greece: Violence Against Asylum Seekers at Border: Detained, Assaulted, Stripped, Summarily Deported" https://www.hrw.org/news/2020/03/17/greece-violence-againstasylum-seekers-border (Accessed 2 October 2022).

148 OHCHR "Equality and Non-Discrimination in Nationality Matters to End Statelessness" https://www.ohchr.org/sites/default/files/2022-01/OHCHR-UNHCR-Event-Outcome.pdf (Accessed 16 October 2023).

resolved.[149] Reminiscent of Arendt's "right to have rights" authors such as Kingston state that there is a requirement of "an active and mutually-beneficial relationship with a government in order to be full members of a political community and to access their fundamental rights".[150] By viewing statelessness as both a cause and symptom of marginalisation, we begin to unravel the complex relationships and political contexts that make this condition so dangerous. From this perspective, the current approach needs to expand its definition of statelessness and nationality, and at the same time more critically consider the process of recognising claimants of human rights in the first place. Due to the fact that statelessness studies and research tend to be dominated by legal scholars, people who "typically [evoke] an implicit liberal tradition of citizenship"[151], post-statelessness inequalities are often disregarded. It is thus necessary for any approach to take into consideration that the acquisition of legal nationality alone does not always ensure access to the human rights that were withheld from the previously stateless person. This can be because the root cause (marginalization, discrimination and/or oppression) is still present.

Perhaps what all the above examples begin to illustrate, is that discrimination (where it be based on racism, xenophobia, patriarchy or any other factor) needs to be identified and unpicked in order to be able to clarify our analysis and nuance our understanding of the causes and consequences of statelessness. Without this nuance, proposed solutions will not work. The narrow focus on nationality (and the right to a nationality) is thus not sufficient to fully address the complex issue of statelessness - legal status is merely one piece of the puzzle. A narrow focus not only denies the agency of affected individuals and communities, but also tends to ignore the underlying, and intersecting, oppressions.

There remains a challenge as to how to remedy the fact that stateless people are often disenfranchised in everyday life, as well as when it comes to societal status, power and politics. Statelessness is not an accident, nor is it something that anyone deserves. Historically, States have abused their power to decide who can and cannot

149 Kingston 2017: 53.
150 Kingston 2017: 53.
151 Balaton-Chrimes 2014:16.

belong. Such abuse needs to end and measures should be taken to prevent it from re-occurring in the future.

Discrimination is not only a reason for why some people become stateless, but it is also a reason why they remain so. Statelessness situations across different parts of the world regularly have one notable aspect in common. That is, often the victims of statelessness belong to disadvantaged or minority groups who have had their right to nationality oppressed by a more dominant group. There is thus a continuous need to fight all forms of discrimination and marginalisation if statelessness laws are ever to be effective.[152]

5.6 Failure/inability to effectively address administrative and regulatory issues

> "The stateless person does not fit smoothly into the legal administrative or social life of his country of sojourn. The provisions of international law which determine the status of foreigners are designed to apply to foreigners having a nationality. The stateless person is an anomaly and for reasons of principle or method it is often impossible to deal with him in accordance with the legal provisions designed to apply to foreigners who receive the assistance of their national authorities, and who must, in certain cases, be repatriated by the countries of which they are nationals. Administrative authorities which have to deal with stateless persons, having no definite legal status and without protection, encounter very great and often insurmountable difficulties. Officials must possess rare professional and human qualities if they are to deal adequately with these defenceless beings, who have no clearly defined rights and live by virtue of good-will and tolerance".[153]

It is true that a large majority of nation-states have already incorporated some sort of legislation affirming human rights into their national laws or even constitutions, however, the lived reality for many vulnerable groups is still far from corresponding to these laws in many countries. Similarly, although on a much smaller scale, there are concurrently many countries whose national laws include provisions that intend to

152 Ivashuk 2022: 13-15.
153 The United Nations. "A Study of Statelessness", UN Doc E/1112;E1112/Add.1, 1949: 8-9.

reduce and/or prevent statelessness. However, even countries whose laws acknowledge the right to a nationality and are seemingly in accordance with international laws relating to statelessness, still often present a stateless problem – many times the reason for which is on an administrative or regulatory level rather than a purely legislative or judicial level.

Despite the role of law in creating the administrative system, legal discussions often treat legal and administrative aspects as separate topics, focusing on boundaries that are designed to distinguish between the two.[154] A level of authority is given to administrative bodies and officials to allow them to interpret and give effect to the laws and policies mandated to them by the government.[155] Officials are tasked with duties that range from the less authoritative roles such as giving information and handing out forms, to high level decision making roles such as accepting or rejecting applications or supporting documents. Taking into account how decisions stemming from the administrative system often affect the most vulnerable people in society, there should be a close re-evaluation of whether the aforementioned boundaries are still appropriate.[156]

In many instances, the recurring stateless problem is often exacerbated by administrative and/or regulatory issues - not for the lack of appropriate national laws. Whilst it is true that in some cases these administrative or regulatory issues can stem from discrimination, in this section I will be dealing with other reasons, such as officials with inadequate skills or knowledge, lack of supervision/monitoring, lack of adequate regulations to supplement national laws (or the implementation thereof) and the lack of functioning procedural mechanisms.

Birth registrations are one area where administrative/regulatory issues can greatly increase the chances of a person becoming stateless. The first legal acknowledgment of a child's existence and identity is at registration of their birth. To be recognized as a

154 Pottie & Sossin 2005: 147.

155 In this regard statelessness can be created "at the counter". See Liew 2019: 95-135 for examples of this. In one situation on applying for routine identity card at the age of 12, a government official deemed the child's birth certificate to be fraudulent, confiscated same, and issued a new one that now indicated that she was not a citizen, thus rendering her stateless at the counter.

156 Pottie & Sossin 2005: 77.

person before the law (and therefore having a legal identity) is not only crucial for a person's sense of belonging, but is also extremely important when trying to prove nationality. Despite the significance of birth registration when it comes to establishing both nationality and legal identity, it has been estimated that in 2020, up to 25% of births of children under the age of five worldwide were not ever recorded.[157]

Reminiscing on your last visit to a government counter to apply for or renew your driver's licence, you may have memories of the exciting moment of being on the brink of independence in finally being able to join others on the road, or in the worst case, memories of mild inconvenience of standing in a queue for a couple of hours – just one of many necessary errands to be performed for the week. A somewhat innocuous, albeit time consuming, event. For stateless persons however, a visit to a government counter can evoke feelings of fear, dread or even hopelessness. Applying for citizenship can be a soul-destroying experience filled with denials, obstacles, rejections, misunderstandings, judgements, marginalisation, incompetence and deceptions, with little hope in sight. In extreme cases, deportation might also be a very real threat. Furthermore, a common barrier at the counter faced by stateless persons is the lack of assistance given by government officials,[158] as well as a practical impossibility of obtaining official documentation.[159] In fact, (in Africa in particular) a lack of assistance and/or an inablility to obtain the necessary official documentation, rather than an explicit legal denial of nationality, is quite often the major roadblock in applying for citizenship, and is often due to an underlying ethnic discrimination.[160]

This section aims to further the understanding of administrative concerns, specifically as they relate to how statelessness occurs/is perpetuated from the point of view of the stateless person. It is shown that one should be careful in presuming that the administrative system functions as it should, just because there are sufficient laws in place. The following discussion focuses on the situation in South Africa, however many of the insights gained can pertain to other jurisdictions that rely on administrative organs to implement their laws and policies.

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157 UNICEF "Birth Registration (2020a). UNICEF Data" https://data.unicef.org/topic/child-protection/birth-registration/ (Accessed 1 December 2021).

158 Liew, chapter in Statelessness, governance, and the problem of citizenship page 79

159 Owen 2019: 304 – 305.

160 Stories of such difficulties are widespread in African states and "typically exhibit an ethnically patterned character". Owen 2019: 305 & Manby 2009: 115 – 117.

5.6.1 South Africa

South Africa is a post-colonial, democratic republic that employs an administrative system to apply many of its policies and legislation. It boasts some of the most progressive and inclusive citizenship laws on the African continent, protecting the right to citizenship in both its constitution and legislation. After a simple exercise in comparative law one would probably reach the conclusion that there is no statelessness problem in South Africa, however that would be far from the truth. South Africa is a very good example of a country whose national laws seem more than adequate, but within its borders, statelessness is flourishing. A closer look at the implementation of the laws reveals serious problems within the government's nationality administration, resulting in statelessness. South Africa is thus a fitting site to examine how statelessness interconnects with the administrative system. The wide range of applicable laws means that South Africa ought to be well-equipped to eradicate statelessness, however the implementation of these laws has been met with great difficulty. This can be argued to be, in part, due to a marked lack of knowledge or understanding of the problem of statelessness amongst the state officials who are best positioned to prevent or reduce it, as well as insufficient or inadequate regulations to set out the procedures to be followed.[161] The issue of birth registration and administrative decisions relating to the conferral of legal status surrounding issues of nationality has indeed come under fire in the courts for an extreme lack of administrative justice or due process.[162]

From the outlook, it seems that South Africa's national laws comply very well with the relevant international laws.[163] The South African Constitution,[164] regarded as the highest law in the country, specifically states that no one shall be deprived of their

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161 See Elphick & George 2014: 1- 152 for numerous example where the regulations are inadequate or do not exist at all.

162 *Ruyobeza v Minister of Home Affairs* [2003] 2 B All SA 697 (C); *Nzama v Minister of Home Affairs* (High Court of South Africa, Davis J, 4 April 2018)

163 This is despite South Africa not being party to either the 1954 Convention or the 1961 Convention. However that is irrelevant for the purposes of this discussion, as South Africa's law comply very well with both Acts.

164 The Constitution of the Republic of South Africa, 1996.

nationality,[165] and "every child has a right to a name and a nationality from birth."[166]

In addition to this, The Citizenship Act[167] governs the acquisition of South African citizenship. The Act provides citizenship by birth or descent to:

a. children born on the territory who would otherwise be stateless;[168]

b. children born on the territory and who have lived in South Africa until age of majority, and whose parents are permanent residents;[169] and

c. children adopted by South African citizens.[170]

d. children born in South Africa to other migrants (non-citizen and non-permanent residents); or those on a visa that does not lead to permanent residence status, are entitled to citizenship by naturalisation at the age of 18.[171]

A lack of regulations for certain sections of the Citizenship Act however has posed a significant barrier to applying sections of this Act. For example, there has been exceptional difficulty in applying Sections 2(2)[172] and 4(3) in practice – both of which have been designed to safeguard against childhood statelessness.[173]

Consider the experience of a Cuban couple, both of whom were engineers on temporary contracts in South Africa, who only intended to stay a couple of years. During that period, in 2008, they had a child. South Africa does not confer citizenship by birth to children who are born from foreign parents who are not permanent residents. Children such as these are assumed to be able to take on their parent's nationality. The child in this case was however rendered stateless because the parents were unable to register their baby as a citizen of Cuba due to her being born

165 Section 20.
166 Section 28 (1) (a). While this provision does not stipulate that every child has a right to a South African nationality, it should be interpreted in light of South Africa's obligations under Article 7 CRC, which includes an absolute protection against childhood statelessness.
167 South African Citizenship Act 88 of 1995.
168 Section 2(2).
169 Section 2(3).
170 Section 3.
171 Section 4(3). Note that this section is dependent on birth registration.
172 *DGLR v Minister of Home Affairs* (2015): DHA was ordered to publish draft Regulations for section 2(2) applications. This has not been done to date.
173 It is important to note that the Citizenship Act does not protect children born outside the country, but resident in South Africa, from statelessness.

outside of Cuba and the fact that her parents had been outside the country for too long.[174]

As such, DGLR's mother initially approached the DHA in order to apply for citizenship for DGLR under section 2(2). However, upon stating her intention, the official at local DHA office informed her that there were no forms available for such application. Upon further investigation, it was discovered that there are in fact no regulations that provide for an application form to be filled in (in terms of section 2(2)). Consequently, the official quite simply had no idea how to facilitate the application and was not able to assist further.

Despite being "otherwise stateless", she was firstly prevented from obtaining a nationality due to the lack of administrative forms, and later the DHA went further to outright deny her right to citizenship. The main point of contention in the later court cases boiled down to South Africa believing that she was entitled to Cuban nationality, whilst Cuba categorically denied this. Without legal means to travel internationally with their stateless child and unwilling to leave the child behind, the family ended up stranded in South Africa. After exhausting all other means, her case was brought before the High Court where it was declared that DGLR was a South African citizen.[175] However, Home Affairs decided to appeal this order, resulting in further drawn out legal battles, which culminated in the SCA upholding the High Court order.[176] Even still, Home Affairs tried one last attempt at avoiding abiding by Section 2(2) by attempting to get the original High Court order rescinded. This attempt was thankfully unsuccessful, and finally DGLR's statelessness struggle came to an end, after 5 years of court battles and 11 years of life without an effective nationality. This case is a clear example of where legislation exists that should afford individuals a high level of protection against statelessness, but where the legislation is found to be ineffective. Throughout her ordeal, there was no international assistance or intervention, as once again, decisions regarding nationality are ultimately left to the sovereign state. This

174 Lawyers for Human Rights "Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review" https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=3801&file=EnglishTranslation (Accessed 27 October 2023).

175 *DGLR v Minister of Home Affairs* (2015).

176 *Minister of Home Affairs v DGLR* (SCA) (unreported) case number 1051/2015 of 6 September 2016.

highlights the fact that policies aimed at stopping people from settling in a new country can even create situations of statelessness that prevent them from leaving it.[177] Had concise regulations been in place, that not only clarified the scope of s2(2) but also defined the procedure and administrative processes that should be followed in terms of s2(2), it is argued that this court case could have been avoided. The court was ordered to grant DGLR citizenship and to issue regulations to s 2(2) for its practical application,[178] however neither orders had been complied with as at 2022—which in itself reveals the failure of the Department to implement the law[179]—the judgment's contribution to the development of the law is important to the cases that follow.[180] Despite no regulations for s2(2) being issued, the case law resulting from this matter now confirms the following:

- Permanent residency is not a substitute for citizenship and it is not in the best interests of the child to have permanent residency instead of citizenship.[181]
- The handwritten birth certificate commonly issued to all children born in South Africa who are not citizens, constitutes registration in line with the BDRA,[182] despite the position taken by the DHA. This interpretation is crucial to the operation of s 2(2). If such birth certificates did not constitute registration in line with the BDRA, it would mean that hardly any stateless children would qualify for citizenship in terms of s 2(2) because stateless children in South Africa are unlikely to have permanent residency or refugee status.[183]
- That a factual enquiry should be made when deciding if a person "would otherwise be stateless", as a misunderstanding or incorrect assumption on the part of government officials can lead to devastating consequences. This case

177 Bloom 2021: 26.
178 See the Order in *Minister of Home Affairs v DGLR* (SCA) (unreported) case number 1051/2015 of 6 September 2016, which upheld the High Court Order. For a copy of both orders https://citizenshiprightsafrica.org/south-africa-dglr-and-another-vs-minister-of-home-affairs-and-others/ (Accessed 27 October 2023).
179 See, eg, Lawyers for Human Rights " Briefing By Lawyers For Human Rights on Statelessness in South Africa, Re-Opening of Refugee Reception Offices and Processing of Documentation for Refugees and Asylum seekers, and Trends on Arrests and Detention of Migrants" https://static.pmg.org.za/220920LHR_submission_to_the_PC_Home_Affairs_Sep_2022.pdf (Accessed 27 October 2023).
180 Muller 2022: 256-279.
181 Muller 2022: 265.
182 Births and Deaths Registration Act No 51 of 1992, s 5(3) (Republic of South Africa).
183 Muller 2022: 265.

revealed the consequences and injustice that a basic misunderstanding (or perhaps wilful ignorance) by those in administrative power on the way in which nationality laws can and do operate differently in each country can proliferate.

- Whether a person may be able to acquire the nationality of a state in the future is irrelevant to the determination of statelessness.[184] Statelessness is a status that is determined according to the current circumstances, and not what might occur in the future, or the options that may become available to the stateless person in the future (i.e. being able to apply for naturalisation).

Similar to the situation in DGLR, in the cases of Jose v Minister of Home Affairs and Minister of Home Affairs v Ali, a lack of regulations caused s4(3) to be practically ineffective. Once again, officials at the local DHA were not able to assist over the counter, as there were no forms for such applications. Furthermore, the interpretation of the law was in contention, with the Minister of DHA rejecting the claims of that aggrieved that they were entitled to South African citizenship. In both cases however, the applicants were declared to be South African citizens, with the Jose case going further by declaring that the Minister does not have the discretion to deny an application in terms of s4(3) if all the prescribed requirements have been met, unlike in naturalisation matters.[185] The judgments in these matters, despite providing important case law, have not fully resolved the issue, as despite being ordered to issue regulations for s4(3), the DHA has yet to comply and according to the information available, no further applications have been granted to the anecdotal knowledge of practitioners in the sector, with some reporting that rejections continue to occur.[186] As such, it is likely that further litigation in this regard will be necessary.

A further concern, is that whilst the Citizenship Act provides provisions for prima facie safeguards against statelessness, in practice in all these instances, birth registration is a prerequisite.[187] In a country where birth registration rate is not 100%, this

184 UNHCR "Experts Meeting: The Concept of Stateless Persons under International Law 2010" www.unhcr.org/fr-fr/en/media/expert-meeting-concept-stateless-persons-under-international-law-summary-conclusions (Accessed 1 Novemebr 2023): 20.
185 Muller 2022: 270.
186 Muller 2022: 270.
187 Lawyers for Human Rights "Briefing By Lawyers For Human Rights on Statelessness in South Africa, Re-Opening of Refugee Reception Offices and Processing of Documentation for Refugees and Asylum seekers, and Trends on Arrests and Detention of Migrants"

effectively excludes certain children from relying upon these provisions.[188] A recent South African study found that 40% of foreign children in care centres were stateless, while a further 47% were in substantial danger of being stateless. For example, in the Limpopo particularly, 82% of children in care centres had no documents at all. In addition to this, 23% of children who did have documentation as dependents under the Refugees Act had lost contact with the main applicant whose attendance is mandatory to extend and/or finalise asylum applications.[189] Therefore, despite South Africa having many well-structured national laws that relate to childhood statelessness particularly, it is obvious that the implementation of these laws is lacking. One of the most significant shortcomings is evident when one looks to the registration of births.

The Birth and Deaths Registration Act and its regulations[190] provide the legal framework for birth registration of all persons born in South Africa. States regularly rely upon proxies such as identity cards and passports in order to identify and legally recognise a person as a citizen or an alien, the issuing of such documents are all dependent upon one initial document - a birth certificate. Thus, individuals are for all practical purposes, not born fully formed citizens, even in nation-states where citizenship is conferred "automatically" by birth. That is, in order to obtain the necessary proof of legal status, the birth itself must first be registered through a formal administrative process. It is therefore evident that birth registration is a crucial part of establishing legal identity and nationality. Without the official documentation that results from birth registration, it becomes difficult to subsequently prove that any given individual is entitled to citizenship. In other words, being incapable of presenting identification documentation results in an individual being incapable of proving that they have the required relationship/connection to a state, and are consequently at risk of not be considered a national under its laws.[191]

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https://static.pmg.org.za/220920LHR_submission_to_the_PC_Home_Affairs_Sep_2022.pdf (Accessed 27 October 2023): 4.

188 Birth registrations are discussed in more detail below.

189 Manicom L "Foreign children in care: South Africa" https://scalabrini.org.za/wp-content/uploads/2019/07/Scalabrini_Centre_Cape_Town_Foreign_Children_in_Care_Comparative_Report_South_Africa_2019.pdf (Accessed on 24 November 2020). See also Lee 2019.

190 Birth and Deaths Registration Act 51 of 1992, and Regulations on the Registration of Births and Deaths, 2014.

191 Geldenhuys 2018: 26 – 30.

Birth registration is therefore a crucial step in order to protect new born babies against statelessness,[192] however this can prove to be a monumental task if the parents themselves lack the necessary documentation or legal status, as the regulations require parent/s of the child who wish to register the birth to first submit their own valid identity documentation.[193] In addition to this, until fairly recently, unmarried fathers could not easily register the births of their children in the absence of or without the consent of the mother (or where the mother was undocumented).[194] Furthermore, the requirement of DNA tests has been proven to be an administrative hurdle for numerous people, with the DA Women's Network stating that one of the key causes of inter-generational statelessness is the lack of free DNA testing for indigent South African fathers or relatives. DNA tests are required in certain instances, for example, for children born out of wedlock where one parent is a foreigner or where the 30 day period (discussed below) has lapsed.[195] However it has been admitted that there are numerus cases of officials at the DHA requesting DNA tests to all fathers that attempt to register their child's births, regardless of whether it is required by law or not:

"While the DHA say that fathers are allowed to register their baby's birth, this does not stand to be the case on the ground. Fathers are told to complete a paternity test as a default response in all such cases. The Constitutional Court specifically said that imposing paternity tests creates unacceptable barriers. The Department is now ensuring that updates are made to the Standard Operating Procedures (SOPs) as well as initiating training for officials."[196]

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192 The birth certificate (a product only of registration) provides evidence of the place of birth and the parents' nationality – which is necessary to achieve nationality by way of jus soli and jus sanguine. See Elmolla 2019: 541-566.

193 Birth and Deaths Registration Act 51 of 1992, and Regulations on the Registration of Births and Deaths, 2014.

194 *Centre for Child Law v Director General: Department of Home Affairs and Others* (CCT 101/20) [2021] ZACC 31 (22 September 2021): The Constitutional Court judgment declared Section 10 of BDRA unconstitutional because it did not allow unmarried fathers to register the births of their children in their name when the mother could not do so or was unwilling to do so, which left children without birth certificates.

195 For insight into the practical situation, see local news report Masele T (SABC News) "Home Affairs urged to ensure indigent South Africans get free DNA tests to prove citizenship" https://www.sabcnews.com/sabcnews/home-affairs-urged-to-ensure-indigent-south-africans-get-free-dna-tests-to-prove-citizenship/ (Accessed 27 October 2023).

196 On 2 March 2022 a virtual meeting was held wherein various governmental departments discussed issues raised during public meetings relating to the Children's Amendment Bill. A summary has been made available by the Parliamentary Monitoring Group at https://pmg.org.za/committee-meeting/34466/ (Accessed 27 October 2023), hereinafter referred to as "DHA Meeting".

This is a clear case of officials impairing both legislative and judicial decisions by their actions at an administrative level. Despite the concrete laws and case law in place, statelessness is still able to continue due to these administrative issues, whether they be due to ignorance or due to something more nefarious such as discrimination.

For children born to foreign parents who have not been able to obtain their parents nationality (whilst according to South Africa the child is entitled to that foreign nationality), not having a birth certificate can remove any chances of naturalisation in the future, in terms of s4(3) of the Citizenship Act, which states that:

"A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if –

- He or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and
- His or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act of 1992

A further concern is The Department of Home Affairs' 2018 proposal to replace birth certificates for children of foreign parents with "birth confirmations".[197] Where previously every child had the right to be issued a birth certificate (albeit subject to the various requirements being met), regardless of their parents' nationality – which was theoretically in line with both the constitution and international law on children's rights - the new regulations propose that foreign children be issued with a "confirmation of birth". These children would then need to present their "confirmation of birth" to their embassy in order to obtain a birth certificate from their country of nationality (remembering that being born in South Africa is not enough on its own to secure South African citizenship). Such an amendment would put children of refugees and asylum seekers, as well as orphaned or abandoned children and those born to undocumented or irregular migrants at serious risk of statelessness.

197 Government Gazette, 12 OCTOBER 2018, No. 41970, pages 21, 27, 28 & Annexure 4. For a copy: https://static.pmg.org.za/181012draftreg-registrationofbirthsdeaths.pdf (Accessed 27 October 2023).

The regulations furthermore stipulate that birth registration must be done within 30 days of birth.[198] Late registration is possible, however it is subject to additional costs (fee) and requirements - often including a DNA test and panel interview, especially if one parent is not South African and not married to a South African. The requirement of a DNA test not only incurs the cost of the actual test and the application fee, but also of the travel expenses and in some instances the loss of income of not working that day (taking into consideration the queues often seen at public hospitals and clinics) as well as the day that they need to visit the DHA offices. Although mobile DHA offices exist, their functionality and effectiveness has been called into question:

"The Committee asked what the use of the Home Affairs mobile units is if they are always offline. It also asked if the DHA could not prioritise allocating the mobile offices to the largest townships first? The Department said that the mobile units should not be seen as permanent solutions to communities but rather to provide temporary relief."[199]

In a country where a large portion of the population live in extreme poverty, these extra costs and requirements can discourage/prevent people from registering the birth, especially in cases where they have missed the 30-day deadline.[200] In situations where children are born in informal settlements (that are often not walking distance to the correct governmental department), it is easy to imagine numerous scenarios where the 30-day period can lapse. This could happen because of birthing complications, where the mother may need some weeks to recover, or were lack of transport money prevents the family from travelling to the relevant office (noting that the DHA mobile offices are not available in every township, and where they are present, they are often offline)[201]. Without a child's birth being registered (and without obtaining the resultant birth certificate), many vital human rights become elusive or more difficult to enjoy, such as the right to nationality, education[202] and healthcare – all of which risk following such child into adulthood and being passed on to the next generation.

198 See Regulations 3, 4 and 5.
199 DHA Meeting fn 195.
200 The cost of travel, and the general anxiety among stateless persons about dealing with a government agency should also be kept in mind.
201 DHA Meeting fn 195.
202 Some schools still require a birth certificate for admission, despite a court decision last year ordering public schools to admit all children, including those without certificates.

What can be seen, is that it is not only the lack of regulations that can hinder a stateless person's quest for nationality. In some instances, the regulations themselves place a heavy administrative burden upon portions of the population (such as those living in poverty or those married to a foreigner) that can discourage or even prevent such persons from obtaining vital documents for their children, such as the requirement of a DNA test (as described above), the mandatory fees that may accompany applications as well as the nature of the documents that are required. For example, in instances where proof of renunciation of citizenship is compulsory, such proof must be obtained from the country of origin, and must be submitted within 6 months of the applicant receiving a letter of conditional approval of South African citizenship.[203] Depending on the country of origin (and the time it takes to process such applications), as well as the applicant's financial ability and procedural knowledge and means to travel, this requirement can prove to be daunting. In addition, by reading through the regulations, it can also be seen that often documents such as the foreign passport or permanent residency permit are requirements, which would in most cases automatically rule out a stateless person.

The Immigration Act is a piece of legislation that attempts to prevent statelessness by providing a way forward should a stateless individual, due to whatever reason, be unable to rely on other legislation to gain nationality.[204] The act makes provision for an exemption under section 31(2)(b) wherein an application for an order for permanent residency may be made and wherein power is conferred to the Minister of Home Affairs under special circumstances to grant such an order. For individuals who have discovered that they are unable to rely on other legislation to end their statelessness, this act provides the only pathway to nationality, as once they receive permanent residency, the pathway to subsequent naturalization is opened (albeit not immediately). However, in practice, the Minister of Home Affairs has thus far been reluctant to grant such applications.[205]

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203 Regulation 4(1) and (2)

204 Immigration Act 13 of 2002, and Immigration Regulations, 2014.

205 It should be noted that the Immigration Act does not make provision for a legal immigration status for unaccompanied migrant children not born in South Africa. These children are at risk of statelessness.

A surprising fact to note, is that even if such application is successful, or if a Court Order is made under any of the aforementioned Acts, the implementation of that order is not always guaranteed. Whether this failed administrative system is due to a lack of leadership, a lack of knowledge by officials as to what procedures to follow, pure incompetence, discrimination or lack of accountability for inaction, it presents a very serious and concerning aspect on the effectiveness of the South African legal system.

Lawyers for Human rights, in their presentation to the Department of Home Affairs Portfolio Committee on 9 March 2021, reported various cases where court orders were not implemented.[206] In Chisuse v Minister of Home Affairs[207] the Constitutional Court upheld an order which declared that four of the applicants are South African citizens by birth in terms of section 2(1) (b) of the Citizenship Act. It was decided that in the interests of justice, the Department of Home Affairs be ordered to issue the applicants birth certificates and assign them South African identity numbers and identity documents. Despite this order, numerous follow ups had to be made, and as at the date of the Lawyers for Human Rights presentation (two years after the order), only one of the applicants had successfully obtained an identity document.[208]

As has been shown, despite apparently numerous laws in place that should be preventing cases of statelessness, statelessness is still a problem. Without clear and properly functioning administrative processes and regulations, the current laws are at risk of being ineffective at translating into practice and at providing real results for the

206 Lawyers for Human Rights "Presentation on Statelessness" https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf (Accessed 27 October 2023). Hereinafter reffered to as "LHR Presentation". In addition to the case mentioned intext, the following was also reported on: In the case of *Chombo v Minister of Home Affairs* (28 November 2018), an order was granted declaring a mother of 4 children to be a citizen by birth and that her children must be registered and issued with identity documents. As of 2020, two years after the court order was issued, only one child had received an identity document. In *DGLR v Minister of Home Affairs* (2015), the Department of Home Affairs was ordered to publish draft Regulations for section 2(2) applications. As at the date of the presentation, such draft had not been forthcoming. In *Lumka Nzama v Minister of Home Affairs* (7 March 2018) Mr Nzama was declared a citizen by birth in terms of section 15 of the Citizenship Act. The Department of Home Affairs was ordered to lift the blockage on his identity document. Lawyers for Human Rights spent the remainder of 2018 and 2019 pushing for the implementation of this order. As at the date of the presentation, the order had still not been implemented.

207 *Chisuse And Others V Director-General, Department Of Home Affairs And Another* CCT155/19 available at https://www.concourt.org.za/index.php/judgement/371-chisuse-and-others-v-director-general-department-of-home-affairs-and-another-cct155- (Accessed 27 July 2023).

208 LHR Presentation.

victims of statelessness. What is needed is a better functioning administrative level, along with better trained officials, so that there would be no need for individuals to have to approach the courts in the first place when trying to rely on the relevant legislation. At the same time, easier access to, and faster turn-around times for judicial review is also necessary in cases where administrative decisions are questioned. There needs to be greater accountability at an administrative and regulatory level when it comes to the implementation of legislation that could reduce the occurrence of statelessness. The experience of stateless persons shows us that we need to take a closer look at what transpires at government offices. Although, as already stated, there is an important place in the system for judicial review, where courts can review the decisions of government officials, there is also some debate as to the extent to which courts can/should intervene in administrative decision making. While it is certainly necessary for an option of judicial review to be in place to see if a decision was made in a procedurally fair manner, to see whether the relevant official had the authority to make such decision, and whether they interpreted the law correctly, the reality is that a very limited number of cases are brought for judicial review. This results in relatively little procedural protection being given surrounding administrative decisions.[209] One reason for this, is the manner in which the administrative system fails a person. For example, how can one conceive of bringing a judicial review (and expending the costs involved with such legal action) to a court arguing the denial of a form? Especially when the people needing such judicial review not only often lack access to such finances, but also lack access to the relevant legal advice and guidance as to the various remedies available. This, as well as other difficulties, create multiple barriers to accessing the judicial review process for stateless persons.[210]

Although it is beyond the scope of this chapter to propose reforms for boosting accountability at the front lines of the administrative system, it is encouraged to include the administrative state within the gaze of statelessness studies and not limit the conversation to only legislatures, international conventions, and the courts. As interview data highlights, much power is exercised by government bureaucrats; while many may view their everyday decisions as procedural, the effect is substantive. A stateless person's very existence sometimes depends on an encounter with a

209 Adler 2010: 145.
210 Adler 2010: 145; Liew 2021: 84.

government official. Under customary international law, a person is stateless because of non-recognition of citizenship by any state, whether legally or illegally. As a result, nationality administration procedures are as important as laws. South Africa's failure to formally recognise its citizens because of insurmountable administrative barriers and discriminatory practices is making children in South Africa stateless, rendering its impressive laws useless.

As has been proven throughout the cases mentioned above, there is an urgent need for a more just administrative system which ensures due process. Without due process, legislative goals cannot be reached. What can be concluded is that the administrative and regulatory procedures governing nationality are as important as legislation when it comes to access to citizenship rights. South Africa has a long way to go to resolve these issues. However, it is not unsolvable but would necessitate a conscious effort of political will.

5.7 Humanitarian Action

> "We breathe, we bleed, we vibrate under the same sky as you. Our cries; our whispers; our shouts, our demands; our love utterances; our curses; our prayers. We pulsate in and among these as you do, yet, in your need to recognise, hypothesise, categorise, theorise, legalise, you forget to humanise. We are not stateless, we are not merely a word, within the act of listening, lives the right to be heard."[211]

Humanitarian action is defined by at least three longstanding orientations: to alleviate or mitigate human suffering, to improve the condition of humanity, and to respond to morally compelling crises, which generally incorporate four main principles, being humanity, impartiality, independence and neutrality (commonly referred to as humanitarian principles).[212] These four principles are, in part, what differentiates humanitarian action from various political and legal actions that may have the same aim/orientation. The assumed neutrality of the action as well as the immediate, direct consequences that its aid can provide allows humanitarian action to function within its

211 Extract of spoken word poem "Humanise" by Kristy Belton ISI / International Studies Association.
212 Bernard 2015: 8-9.

own sphere, ideally independent from the legal or political. Humanitarianism is thus not meant to be a formulating of laws and regulations, but rather a real-time response that is supposed to directly improve the lives of the people it is aimed at. Whilst in formulating laws and regulations there can be a risk of breeding a disconnection between the law makers and the everyday person, the concept of humanitarian action functions at ground level, with field workers being involved directly with the people.

It is for this reason that the tendency of major humanitarian organisations (such as the UN) to become preoccupied with purely legalistic solutions when dealing with statelessness imperils the fundamental principles of humanitarianism and perhaps explains the surprising lack of pure humanitarian action actually taken.

5.7.1 The preoccupation of Humanitarian Organisations on legal nationality

Statelessness scholarship in general often focuses on understanding, theorising, and solving statelessness with the pre-assumption that the acquisition of nationality "is the principal appropriate remedy" for statelessness.[213] If one considers the findings of this chapter so far, it becomes apparent that at a deeper level, there is a need to push the response beyond the thin (legalistic) notion of nationality.[214] Laws that provide avenues to access legal nationality, such as naturalization laws, are often seen as solutions to end statelessness, but the legacy of statelessness afterwards and the problems associated thereto are rarely attended to by these laws or by the humanitarian organisations that often push for these laws. When one looks to the example of refugees (specifically the ones who are not also stateless), it becomes apparent that having a formal nationality is in itself not always enough to ensure that a person can be a participating, equal member of a political community. If nationality was the complete answer to statelessness, then refugees (many of whom do have a nationality) and stateless persons would not share so many of the same issues. Being a citizen of a nation-state is not synonymous with being a functional member of a political community. It is here where it becomes apparent that the full meaning of Arendt's "right to have rights" as discussed previously has still not yet been fully realized within the statelessness paradigm.

213 Bloom *et al* 2017: 2.
214 Kingston 2017: 72.

The consequence of this is that less attention is given to the actual experiences of those whose statelessness is deemed "solved". In other words, a myriad of post-statelessness issues tends to be ignored once nationality is (re)gained. Nationality is celebrated with the assumption that inclusion and access to basic human rights will follow automatically. This celebration however has been described as "premature declaration of triumph",[215] as despite the change of legal status from stateless to citizen, a long-lasting legacy of statelessness can still linger behind.[216]

The residual effects of statelessness have been reported on globally, especially in situations of previous protracted statelessness, where the issues surrounding statelessness and the marginalisation attached to it, are not necessarily solved upon the acquisition of nationality. For example, where nationality is given in situations where the underlying discrimination is not first eradicated, the formally stateless can still face similar difficulties that they did when they were stateless.[217] In corroboration of this, interviews with formally stateless persons highlight that citizenship is important – but not sufficient – to guarantee a full protection of all basic rights. The consensus being that the struggles connected to statelessness do not immediately end with the attainment of a formal nationality. Numerous individuals still complain of issues such as unemployment, poverty and the inability to access higher education, following them despite attaining a nationality.[218] This can be due to administrative challenges, marginalisation or discrimination amongst others. Testimonies further refer to the social stigma and complex problems of property and land ownership in addition to real and perceived lost opportunities that are necessary for a dignified life.[219] Even the process of naturalisation can in and of itself be exclusionary. This is especially evident

215 Balaton-Chrimes, 2014: 16).

216 For example, see recent study conducted by Syrians for Truth and Justice (2019) on the detrimental effects of the 1962 census, several testimonies by Syrian Kurds are given on outstanding issues after the naturalisation.

217 Vlieks *et al* 2017: 159: "For example, in 2008 an Urdu-speaking minority living in Bangladesh, formally known as the Bihari, were recognised as Bangladeshi nationals through a ruling by the Supreme Court. This put an end to nearly 40 years of statelessness, and was a very positive outcome. The issue of Bihari statelessness can be considered to be fully solved from a legal perspective. However, almost eight years after becoming Bangladeshi nationals, many Bihari continue to face the same obstacles they encountered while they were stateless: for instance, they face difficulties in obtaining birth certificates, obtaining legal documents, accessing education and finding employment. Many still live in camps, as they did prior to becoming citizens, and suffer poverty and exclusion. The Bihari are no longer formally stateless, but their situation does not seem to have significantly improved since becoming Bangladeshi nationals."

218 Kingston & Stam 2017: 398-401

219 Kingston & Stam 2017: 398-401

when naturalised citizens are provided with distinctive identity documents (i.e. identity documents that differ from the standard identity documents). This provides a convenient avenue for future exclusionary tactics due to the ease of identifying naturalised citizens, and therefore does nothing to reduce the essence of distrust towards the state that many previously stateless persons hold.[220]

The tendency of humanitarian organisations to concentrate on legalistic solutions allows many subtle realities about the nature of marginalisation and rights abuses to go unnoticed.[221] Therefore, while solutions to statelessness need to have legalistic elements and active engagement in legal reform, they also need to expand to include other missing elements of establishing post-statelessness justice. It is thus apparent that additional measures are indeed necessary for ensuring that the formally stateless can enjoy their rights and participate as full members of society. Statelessness causes deprivation of so many basic opportunities in life that merely awarding a legal nationality is not enough to repair the damage. The legacy that statelessness leaves in its wake indicates that legal nationality, although vital, cannot on its own ensure justice. This is particularly significant given that statelessness is not an isolated condition, but rather deeply connected to a net of problems including discrimination and marginalisation.

Thus, in order for nationality to truly solve statelessness, it needs to comprise of additional characteristics.[222] This is where the concept of ‘‘effective’’ nationality becomes increasingly important.[223] In fact, statelessness—and its effects—has often been associated with the absence of an ‘‘effective’’ nationality.[224] The focus of humanitarian organisations on legal nationality has the effect of losing sight of the importance of effectiveness. The struggles of the *de facto* stateless exemplifies this. Hannah Arendt saw *de facto* stateless people as the “core of statelessness”[225] despite their lack of legal recognition as stateless. Although officially having a nationality, these people are unable to reap the accepted benefits of such nationality, whilst at the same

220 Bahram 2021: 268-270. “This distinctive mark drives a persistent fear on the part of the naturalised who thus remain particularly branded”.
221 Kingston, 2017: 17.
222 Rubenstein & Lenagh-Maguire 2014: 269.
223 Van Waas & Khanna 2017: 169.
224 Southwick & Lynch “Nationality rights for all: A progress report and global survey on statelessness” https://www.refworld.org/pdfid/49be193f2.pdf (Accessed 30 October 2023).
225 Arendt 1951: 279.

time also unable to claim the rights afforded to stateless persons. This shows that what is important is not purely the legal status or conferral of nationality, but the effectiveness of the nationality (or membership) and the existence of the right to have rights.

This corroborates the idea that the current response to statelessness, with its focus on a purely formal nationality, is inadequate. In addressing statelessness, nationality should ideally be effective by ensuring the right to have rights- encompassing both belonging and human rights-[226] rather than focusing exclusively on the existing legal framework. It needs to truly reflect a genuine link between the individual and the State, as well as providing the individual with access to all the rights and freedoms that are generally associated with citizenship.[227] It is only then, that nationality can protect and ensure the right to have rights. Humanitarian organisations should continue with the intent to eradicate statelessness as a legal issue, because it is an important aspect within our nation-state system, however more attention should be paid to improving the underlying social and political issues that facilitate it. Arendt states that there is a right to be a member of an organized community,[228] however the theoretical foundations that form the basis for membership itself should be challenged and perhaps transformed. What both "membership" and "organized community" means should be debated, rather than taken for granted to equate to legal nationality. It is important to realise that this cannot be done by theorists and policy makers in isolation, but needs to take into account the perceptions and experiences of the stateless themselves. What is needed is a joining of both theory and lived experience.[229] The wider framing of the problem has not been fully captured and there thus exists a need to recast the problem in terms of more practically, socially and morally richer considerations whilst still acknowledging the inherent legal nature of statelessness.

5.7.2 Lack of Stateless Specific Humanitarian Action

If one looks to the UNHCR's statements, for example "How UNHCR helps stateless people", the lack of humanitarian action is glaring. It is focused on helping governments identify statelessness, incorporate or amend legislation that would reduce

226 Van Waas & Khanna 2017: 172-174.
227 Van Waas & Khanna 2017: 173.
228 Arendt 1951: 283-284.
229 Cole 2017: 255 & 258.

statelessness and encouraging them to accede to the 1954 Convention relating to the Status of Stateless Persons. Rather than focusing on developing a humanitarian solution, the UNHCR thus takes a legalistic approach whilst simultaneously strengthening the concept of state sovereignty by implying that only the individual nation-states themselves are the parties that have the power to end statelessness. "We always stress to governments that statelessness is a solvable problem, and we have many good practices to draw on. What is most important is political will".[230]

International and transnational partnerships have been developed and grown in an effort to increase the efficiency of this approach, however the results of which have not been overwhelming. In addition to the UNHCR, numerous bilateral global partnerships have added humanitarian value, with other UN agencies, academic institutions, and governments. The Geneva-based Friends of the Campaign to End Statelessness for example aims to mobilise and engage Member States to align and exert diplomatic influence to support the statelessness campaign. Additionally, the UNHCR states longstanding partnerships, such as that with the Inter-Parliamentary Union (IPU), as particularly important when it comes to circulating information to parliamentarians around the world and engaging them in discussions on promising practices.[231] Despite this, it is admitted that effective overarching affiliations and full UN system-wide cooperation have not been developed or used to the full advantage.

The approach taken, and the laudable campaigns by the humanitarian organisations would most likely not be questioned if they were producing adequate results, however progress in resolving statelessness has been slow, and in some major situations, like the Rohingya, there has been no progress at all.[232] 2022 marked a decade long of detention for many stateless Rohingya people. As stated by Shayna Bauchner, a researcher at Human Rights Watch, "A decade is a grim milestone for the 135,000

230 UNHCR "Global Appeal 2023" https://reporting.unhcr.org/globalappeal2023/pdf (Accessed 16 October 2023): 66.

231 UNHCR "Evaluation of UNHCR led initiatives to end Statelessness" https://www.unhcr.org/sites/default/files/legacy-pdf/60f18fcd4.pdf (Accessed on 27 October 2023).

232 UNHCR "Global Appeal 2023" https://reporting.unhcr.org/globalappeal2023/pdf (Accessed 16 October 2023): 66.

Rohingya detained in Myanmar's camps whose accounts of deprivation receive scarce international attention."[233]

In fact, it has been admitted throughout the statelessness campaign that the UNHCR has struggled to meet statelessness targets for all but one key statelessness indicator within its Results Framework.[234] Furthermore, the goals set out by the UNHCR for 2023 seem to be miniscule in comparison to the global statistics. The goal that 90 000 people will acquire nationality or have it confirmed is relatively insignificant when one looks at the sheer number of stateless persons worldwide (which is estimated to be more than 4.3 million).[235] What of the remaining 4.2million+ individuals who remain stateless? The UNHCR is not able to enforce any campaigns upon a nation-state that is not willing to participate. A good example of a countries that have previously disregarded certain humanitarian recommendations is the US and Australia, where stateless persons are generally treated like any other unauthorised migrants.[236] This treatment includes being placed into detention centres until such time that they can be returned to their own country – something that is futile in the case of a stateless person, and has resulted in life-long detention.[237] Arbitrary or prolonged detention is in conflict with international laws, and when such detentions occur, it highlights the lack of effective humanitarian action by organisations like the UNHCR, as well as the discretionary characteristic of international law.

Despite this apparent disregard for stateless persons, it is common for nation-states to have relatively comprehensive humanitarian protections when it comes to refugees.[238] The lack of a global appeal for humanitarian action when it comes to statelessness in particular is concerning, as not all stateless persons are able to rely on refugee aid. Refugee aid is interesting, as although it is not directly aimed at conferring or identifying nationality, it (along with refugee camps) is, to the general

233 Human Rights Watch "Myanmar: The Rohingya's Decade of Detention" https://www.hrw.org/news/2022/06/15/myanmar-rohingyas-decade-detention (Accessed 27 October 2023).
234 UNHCR "Evaluation of UNHCR led initiatives to end Statelessness" https://www.unhcr.org/sites/default/files/legacy-pdf/60f18fcd4.pdf (Accessed on 27 October 2023).
235 UNHCR "Global Appeal 2023" https://reporting.unhcr.org/globalappeal2023/pdf (Accessed 16 October 2023): 66.
236 Balaurte 2015: 352-353; see also *Al-Kateb v Godwin* 2004 219 CLR
237 Balaurte 2015: 354.
238 Balaurte 2015: 354.

public, probably the most well-known and recognizable humanitarian action that affects stateless persons – even though it is not specifically aimed at stateless persons but rather at refugees. This is not surprising, as there is an overlap between statelessness and refugees. Simplified, stateless persons can usually find themselves in two main situations: the first where the stateless person also qualifies as a refugee, and thus falls under the large-scale humanitarian response directed at refugees; or secondly, where the stateless person is not a refugee (and therefore does not qualify for refugee humanitarian aid) and must instead rely upon stateless specific laws and human rights instruments. Similarly, since statelessness is commonly perceived as a legal issue (whilst refugees as a humanitarian issue), the status of "stateless" in and of itself, does not always trigger any suitable protection mechanism or assistance of value.[239] Due to the often-intertwining relationship between refugees and stateless persons, a large number of stateless persons can indeed be found within the refugee camps.

Thus, any discussion relating to humanitarian action and statelessness would be incomplete without reference to the refugee camps currently present within numerous countries throughout the world. The camps themselves are often seen as humanitarian action (in that they are providing a "safe" place for displaced people) but also as establishments that desperately require humanitarian intervention (due to the conditions within some camps).[240] This creates a confusing situation wherein the humanitarian action creates a situation where more humanitarian action is needed. Individuals in these camps often find themselves not only in a forced administrative dependency but also in a physically dependency.[241] This dependency not only has a dehumanising effect, but also has far reaching implications when services are at risk of being suddenly withheld. At the outset of the COVID-19 pandemic for example, where many nation-states turned inward to protect their own citizens, some refugees

239 Liew 2020: 89.

240 For examples see Goodman & Mahmood 2019: 490-501; Chakraborty & Bhabha 2021: 244-245.

241 The significance of this dependency is highlighted by the sheer volume of people and instruments that is needed to facilitate such camps, such as the masses of aid workers, humanitarians, camp directors, and international lawyers and the creation of large number of transnational set of institutions and treaties.

and stateless persons suddenly found themselves excluded from some essential services such as access to food[242] and health care.[243]

One such recent example is that in Pakistan pandemic-related lockdowns have been accused as operating as "*de facto* regimes of incarceration, reminiscent of Agamben's states of exception in which law is indefinitely suspended",[244] where Afghan refugee camps were forcibly locked down by way of armed military personnel guarding the entrances and exits. Medical supply stores and food stores within the camps were shut down, leaving the inhabitants without regular access to food and medicine. [245]

For both *de facto* and *de jure* stateless within these camps, the circumstances do not allow any opportunity for integration with the society beyond the borders of the camps. The uncertainty, and the lack of any real permanency or existence to the stateless has the effect of politically, financially and physically maintaining the transient nature of the stateless, restricting them from any claim of belonging. The fundamental principles of human rights and human dignity are threatened when there is a prohibition of permanent structures (including homes), an inability to work or seek education or the lack of freedom to integrate in any official way. This then perpetuates their status as outsiders. What started out as a humanitarian response to refugees, has resulted in a situation that requires humanitarian action just to sustain the camps' populations.

De facto statelessness is something that receives even less attention on a humanitarian level, and in some cases even being caused by refugee repatriation efforts. In one example, due to affiliations (either assumed or true) with terrorist organisations has resulted in countries refusing to accept their citizens back into the country. This refusal to repatriate is driven by the fear of importing extremism. This then renders these refugees *de facto* stateless, and confines them to a life of detention

242 Chakraborty & Bhabha 2021: 244-245 (Organisations such as the UNHCR were not considered "essential services" and therefore were denied access to provide humanitarian aid such as food parcels).
243 Chakraborty & Bhabha 2021: abstract.
244 Chakraborty & Bhabha 2021: 243, referencing Agamben: 2015.
245 MENAFN "Afghan refugees Camps in Nowshera, Lower Dir Sealed" https:// menafn.com/1099995897/Pakistan-Afghan-refugeescamps-in-Nowshera-Lower-Dir-sealed (Accessed on 10 November 2022); Chakraborty & bhabha 2021: 243.

and dependence on humanitarian aid within the camps.[246] Many of these detainees have never been brought before a court, making their detention arbitrary as well as indefinite.[247]

Going back to the definition of humanitarian action, can these camps really be considered to be to alleviating human suffering or improving the condition of humanity? With the humanitarian actor's creation and/or acceptance of these camps, they become a modern tool as both providers of basic needs and also of surveillance and detention that simultaneously allows for the population to be effectively controlled whilst barely sustained. This can have the effect of maintaining moral assurance and an image of humanitarianism to the outside world, whilst inside the camps human suffering continues. These camps enable countries to avoid securitization threats or resource concerns by not accepting a particular group onto their territory, whilst still being able to proclaim to be providing humanitarian aid. Their investment in "camp society" keeps open a bare state of existence that is equally precarious and stable, but not, in my opinion, humane.

It should be noted that various organisations do aim to encourage self-reliance and provide training and assistance within the camps with the goal of creating a way towards independence.[248] However, most, if not all, of these initiatives are targeted at refugees. Any stateless person who does not qualify as a refugee thus would not have access to this assistance, and once again, falls through the cracks.

In another example, in one case where the UNHCR attempted to physically intervene, the lack of foresight into potential administrative and language complications resulted in the project being unsuccessful for many refugees who were not able to obtain proof of nationality once they were repatriated. In this case, the UNHCR formed voluntary repatriation agreements with Mauritania and Senegal in order to attempt to by-pass

246 For example al-Hol camp in Syria. The women and children at al-Hol camp are unable to leave the camp because the majority of countries where they come from have refused to take them back. Some countries have even encouraged stripping citizenship from the detainees at al-Hol camp (Luquerna 2020: 151-152).

247 Human Rights Watch "Thousands of Foreigners Unlawfully Held in NE Syria" https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria (Accessed 29 June 2023).

248 For example the Refugee Self-reliance initiative: https://www.refugeeselfreliance.org/what-we-do-1.

the obstacles caused by the traditional state sovereign privilege to grant nationality.[249] Despite the tripartite agreement in place, the process was fraught with administrative hurdles, which subsequently led to a large portion of people finding themselves *de facto* or even *de jure* stateless.[250]

To compound these issues, there is not only a need for effective statelessness specific humanitarian aid, but there is also a need to improve or augment the humanitarian approach to reducing statelessness in general. Coming back to the legalistic approaches that are taken by the majority of humanitarian organisations, this type of action, although often focused on stateless persons specifically, seems to lack significant results. In 2019, the mid-point of the campaign to end statelessness by 2024, it is reported that only around 200 000 people had their statelessness issues resolved in the first 5 years of the campaign.[251] In relation to the (known at the time) 3.9 million stateless persons, this result casts serious doubt on whether the goal is achievable by 2024.[252] Without devaluing the progress to date, nothing less than the complete eradication of statelessness should be strived for given the severe consequences statelessness has on the lives of those it affects.[253]

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249 Since 2012, the Mauritania government has stated that the voluntary repatriation process is concluded, despite appeals by the UNHCR to reinstate it – reinforcing the notion that state sovereignty is still entire. UNHCR "UNHCR Senegal Multi-Country Office (MCO) 12 January 2021" https://reporting.unhcr.org/sites/default/files/UNHCR%20Senegal%20MCO%20factsheet%20January%202021.pdf (Accessed 1 December 2021).

250 The UNHCR assisted many people with returning home to Mauritania from Senegal, supplying them with travel documents under the tripartite agreement governing their return. However only roughly one third of these people received the necessary documents to prove their nationality. Issues included cases where certain documents were lost/destroyed, documents that were in the incorrect language (French, not Arabic) and documents that contained spelling errors of names.
IRIN. "An ambitious plan to end statelessness" 7 November 2014. https://www.refworld.org/docid/5460be514.html (Accessed 2 December 2021).

251 See UNHCR 'Global Trends' report, https://reliefweb.int/report/world/unhcr-global-trends-forced-displacement-2018-0 (Accessed 29 June 2023).See also Batchelor 2019: 308.

252 The figure of 3.9 million comes from See, eg, UNHCR 'Global Trends' report, https://reliefweb.int/report/world/unhcr-global-trends-forced-displacement-2018-0 (Accessed 29 June 2023).

253 Batchelor 2019: 312.

5.7.3 Lack of Public Awareness

If the concept of state or collective responsibility is to have any real meaning, it must be underpinned by the notion of individual accountability as well as accompanied by widespread public awareness. Mass occurrences of statelessness and refugee movements do not happen by mistake. They do not happen because of some unknown or abstract force. They occur because certain individuals or groups of individuals decide to discriminate, decide to violate rights or decide to make it impossible for certain people to remain safely in their homes or their country – often being a direct objection of political or military powers. As has been seen many times over, prosecuting individuals at an international level is no easy task. Even in cases of horrendous war crimes or crimes against humanity, the international tribunals and courts continuously experience problems, one of which is the inability to try many of the most important suspects.[254] This lack of enforceability and accountability, risks leading to impunity for past actions, which does nothing to deter future violations.

The humanitarian response directed specifically towards statelessness has been relatively inconspicuous to the public eye, in comparison to the large scale humanitarian efforts that concentrate on refugees. In addition to this, on a public level, there is an apparent lack of action emphasising or creating widespread empathy and awareness for stateless individuals or groups. Statelessness has thus been allowed to develop into a tolerated and marginalised condition. There is a need for statelessness to be humanized utilizing stateless people's perceptions and views.[255] There is perhaps also a lack of visual representation to bring the issue of statelessness to wider audiences,[256] with the refugee situation often attaining much more publicity. Despite the laudable intentions of the UNHCR's "I Belong" campaign, which does attempt to do this, their otherwise dominant legalistic approach tends to "flatten" the problem of statelessness. The #IBelong Campaign does however present a much needed

254 For example, the US has continuously opposed the existence of international courts since their inception. (See Ralph 2003). As recently as April 2019, the Trump Administration renewed a long-standing U.S. opposition to international courts by revoking visas of the International Criminal Court's Chief Prosecutor, Fatou Bensouda, and her team in response to the prospects of a looming investigation of the U.S. involvement in Afghanistan. See also: European Parliament "WORKSHOP Universal jurisdiction and international crimes: Constraints and best practices" https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf (Accessed on 29 June 2023).

255 Rahman 2020.

256 Kingston 2019: 52.

opportunity to expand our notions of nationality and identity and to educate the public at large regarding the issue of statelessness. This is necessary if we are to evolve our thinking regarding statelessness beyond the current legalistic solutions whilst simultaneously creating societal and cultural constructs that can contribute to ending statelessness. [257] However, there is still a need for this campaign to be accepted universally if it is to be successful.

Humanitarian action should perhaps move away from policies that encourage control and detention, and move towards creating environments that empower people. There should also be a specific focus on preventing further human rights violations and ensuring accountability for nation-states that do not do so.

Statelessness identification or determination procedures vary from state to state, and many humanitarian organisations play a positive role in assisting stateless persons in navigating these procedures. However, where States have created or sustained statelessness, there can be a tendency to refuse to call statelessness by its name for fear of being held accountable on an international level. This deters international organisations from doing humanitarian work, especially with regards to identifying statelessness, because of the political nature of the subject (for example in Palestine where, due to the political tension, the UNHCR excluded stateless Palestinians from various projects and statistics). Large humanitarian organisations like the UNHCR are notoriously weak when it comes to tackling such situations, choosing to appease certain states at the expense of helping those in need.[258] Where stateless is left unidentified, this further hides the true nature of the situation from the general public and the strategy of denying statelessness or refusing to call it by its name has thus been very successful in keeping statelessness out of the spotlight. The way forward is to take a firm stand in recognising and calling out states that obstruct the path to eradicating statelessness. This is an exercise that the international community, including humanitarian organisations, as well as for national politicians, activists and the media need to engage. Successful awareness-raising on statelessness with direct involvement of stateless people's voices and perspectives is an important aspect to this and is important in contending misinformation and lack of knowledge and

257 Batchelor 2019: 314.
258 Ivashuk 2022: 13 – 17.

empathy. The more stateless people's voices are heard, the more accurate and balanced discussions of statelessness can take place on the public stage – which is a key towards resolving statelessness that has not yet been used to its full potential.[259] International interest can contribute to mobilising the necessary role players and garner the level of attention that is needed, as well as put pressure on state actors that may not be acting in good faith. Additionally, wider public awareness can help create a safer environment for stateless persons and assist in giving them the courage to be less hesitant/afraid to voice their opinions and concerns and embrace their freedom of expression. Moral outrage has been said to sufficiently galvanize world public opinion,[260] and perhaps this is what is missing from the current legalistic approach to statelessness.

5.8 Conclusion

Guided by the question of "where does the current legalistic approach falls short?",[261] this chapter exposes the various ways in which the approach to statelessness is either inadequate, ineffective and/or incomplete. On both an international and national level, a purely legalistic approach can risk glossing over certain ethical, practical or social considerations and can overlook subtle realities. The focus on technical legal issues leaves numerous aspects of statelessness not adequately addressed which can in turn perpetuate the cycle of statelessness.

Beyond this, certain deficiencies within human rights theory are clear. With regards to statelessness, human rights and the "right to have rights", the current framework represents only one particular way of approaching the various relationships (relationships such as those between universal and particular, nature and history, human and citizen), i.e. a legalistic approach. While it is the prevailing approach by most, if not all, major role players in the realm of statelessness, it is by no means unanimously accepted. A divide has been exposed regarding the term "human" in human rights—more particularly between citizens and non-citizens, legal residents and undocumented immigrants. This exemplifies the existence of the need for a right

259 Ivashuk 2022: 13 – 17.
260 Goldsmith 2000: 338.
261 Research question 3: What does the current legalistic approach entail and where does it fall short?

to have rights and the need to attach this right to the current political reality. Rights are not a given but rather need to be articulated and guaranteed together with others in community: they are the product of human action— for Arendt in particular, human action within political community.[262]

On a more doctrinal level, the concepts of sovereignty and governance are major factors when considering the efficiency of any statelessness solution or international law. Matters relating to nationality are jealously guarded by nation-states in general, and due to the perceived/real threat on sovereignty and self-determination, international laws are not always well-received.[263] In conjunction to this, the lack of enforceability of the international statelessness and human rights laws can contribute to the various failures of the current approach. As such, tension remains due to the need to respect nation-states' sovereignty, whilst simultaneously attempting to ensure that every person has the right to have rights and more specifically, an effective nationality.

The use of nationality as a tool or weapon falls under the same category, and demonstrates the extent that sovereignty and governance can reach and highlights how nationality can suddenly be stripped of its title of a "human right" when doing so enables a state to fulfil a political agenda.

Closely related to this is how marginalisation can be a major road block in the path to eradicating statelessness. On both a legal and social level, the consequences of marginalisation are significant. Covert discrimination in particular can be especially sinister, enabling nation-states to perpetuate statelessness without any apparent openly discriminatory laws or explicitly unfair treatment, often hiding behind thinly veiled "neutral" criteria for nationality. This, in conjunction with the lack of enforceability, makes the solution to ending statelessness with a purely legalistic approach difficult to achieve.

262 Arendt 1951: 295-297.
263 Besson 2011: 26.

Even without purposeful discrimination and even in the presence of apparently comprehensive and protective laws, stateless individuals can still face difficulties in obtaining a nationality due to administrative issues.

The argument regarding the effectiveness of humanitarian action in general is still very much alive within international, humanitarian and legal debates. Whilst there is not much statelessness specific humanitarian action being provided, where there has been attempts at aiding the stateless, these attempts can often be regarded as insufficient and at times, even detrimental. Humanitarian action to date has not only been ineffective in providing any lasting solution to statelessness, but has at times directly contributed to the human rights abuses that the stateless face. It is thus submitted that on a more systemic level, investments need to be made that make provision for basic human rights that do not compel (and propagate) dependence on humanitarian aid organizations in the first place.

It is submitted that an important avenue where humanitarian organizations can greatly contribute towards ending statelessness is in the area of public awareness. Campaigns such as the #IBelong Campaign are an excellent concept, but the inner concepts of belonging need to be universally accepted in order for such campaigns to achieve large-scale results. In striving to develop and implement a successful humanitarian response, the end goal must be to establish a world in which the current and future generations of people can live together in peace, security and dignity. It must be recognized that a legalistic approach is only of limited value unless it is accompanied by vigorous and universal advocacy as well as long-term action on behalf of the stateless that goes beyond the notion of nationality.

In conclusion, this chapter criticizes the dominant legalistic approach, not by finding significant inadequacies within the current law itself, but by examining why, that despite comprehensive laws already being in place, the issue of statelessness is persistent still. Deep human rights issues that have plagued philosophers, law makers and humanitarians alike for centuries continue to resurface time and time again. The tie between the right to have rights, state sovereignty, marginalisation, administrative governance and the current humanitarian response highlight the insufficiencies of the attempts at a purely legalistic solution to statelessness.

CHAPTER 6: ETHICAL OBLIGATIONS AND CONCLUSION

6.1 Ethical obligations

Whilst it is commonly accepted that legal systems are primarily concerned with formulating, interpreting, applying and enforcing codified laws, moral obligations whilst not inherently legalistic in nature, form an important jurisprudential aspect that should indeed be considered when studying and practicing law. It is essential to recognize that laws themselves (and the moral obligations that they infer) are often rooted in ethical ideals and societal values. Contradictions between laws and ethical principles/societal values can thus become a catalyst for, and play a crucial role, in shaping (and re-shaping) legal norms and regulations. It is in this context that this final chapter first responds to the question: "What is the value of an ethical approach?"[264], whereafter a final response to the overall Research Problem is set out in the Conclusion.

Whilst morality can be defined as any attempt to describe the process of determining the "right way to behave" in order to set out behavioural norms (that can in turn be translated into a set of codified laws), the ethical relation focuses on the type of person one must become in order to establish a non-violative relationship with the other.[265] The concern of the ethical relation, is therefore a way of being in the world that can traverse varying judiciaries and perhaps allows us to criticise any repressive aspects of competing moral systems.[266] Whilst prioritising both moral and ethical obligations that relate to statelessness is paramount, I believe it is the ethical relation that has not been sufficiently explored and thus may provide a different perspective within the path to the solution to statelessness. Using Cornell's understanding of morality and ethics, one can foresee an ethical opening within the self-enclosed system of law:

> "Thus the deconstructive emphasis on the opening of the ethical self transcendence of any system that exposes the threshold of the "beyond" of the not yet is crucial to a conception of legal interpretation that argues that the "is" of law can never be completely separated from the elaboration of the "should be" dependent on an appeal to the Good. Ethical alterity is not

264 This is Research Question 4.
265 Cornell 1995: 78 – 79.
266 Van Marle 1996: 332.

> just the command of the Other, it is also the Other within the nomos that invites us to new worlds and reminds us that transformation is not only possible, it is inevitable."[267]

In this way, taking into account underlying ethical implications and the obligations that arise therefrom, one can possibly create an alternate method that can contribute towards the solution to statelessness in ways that a set of codified laws cannot. In additional to this, by paying more attention to the ethical relation, the resultant moral obligations that arise therefrom have the potential to contribute greatly towards ensuring that the system of law upholds the fundamental principles of justice and fairness that can span divergent value systems. Conversely, failure to consider the ethical relation could risk legal systems becoming detached from societal values (and the essence of human rights), which could in turn erode public trust as well as the perceived legitimacy of the laws themselves.

It is clear that the perspective of solving statelessness has traditionally come from a legalistic point of view and although the dominant approach has indeed incorporated certain aspects of morality (seen within the comprehensive collection of international human rights instruments), ethical obligations do not feature as prominently. The importance of these ethical obligations become apparent when considering the serious consequences that the ongoing failure of the dominant approach to eradicate statelessness can have (and has had) on society.

This thesis shows that although the current international approach has been extensively developed legalistically, it is clearly still falling short in terms of providing large-scale positive results. I contend that many of the deficiencies of the current approach, and the lack of meaningful humanitarian action, could be overcome if the concept of ethical obligations were more fundamentally ingrained within society as well as the international legal system itself. What lacks is a universal acceptance (and sense of urgency) to attend to the ethical obligation to end statelessness.

Although not as widely discussed as the legal aspects of conferring nationality, the strong ethical imperative to avoid statelessness has rightly begun to be recognised by

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267 Cornell 1992: 111, as quoted in Van Marle 1996: 332.

organisations such as the Institute for Security Studies (ISS). From an African perspective, the ISS has stated that African governments need to acknowledge the detrimental costs of statelessness to all of society, and therefore it can be conferred that an ethical obligation exists to eradicate it..[268]

When examining this ethical obligation arising from statelessness, we are brought back to the common underlying theme throughout this thesis, i.e., that stateless people should retain inherent human dignity and have access to basic human rights despite the lack of a nationality.[269] Beneath this, on a more fundamental level, is the concept of suffering. From a humanitarian as well as an ethical perspective the alleviation of suffering should form a key aspect of any intervention. The preceding chapters, show that statelessness is a major cause of suffering for many people, and therefore, in order to be considered effective, any humanitarian response should result in the reduction of this suffering.

Literature often states that the most fundamental moral principle, from which all others are derived, is that good is to be done and evil avoided, and if one admits that suffering is an intrinsic evil, it is reasonable to conclude that there is an ethical duty to prevent human suffering –[270] or stated differently that to prevent suffering is a "prima facie duty".[271] Andrew Fagan, the director of the Human Rights Centre in Essex, suggests that the "ethical imperative of human suffering" needs to form a vital role in discussions about human rights, and that "the cornerstone of human rights must be a concern for human suffering."[272] Humanitarian principles, such as compassion, empathy, and the duty to alleviate human suffering, thus underscore the ethical obligation to address statelessness. However, Chapter 4 shows that the humanitarian response to date, perhaps more so resembles a form of political guidance (relying largely on the legalistic measures) than actual humanitarian action that relieves suffering.

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268 Mbiyozo "Statelessness: An old problem with new threats" https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats (Accessed 25 November 2020).
269 Andorno & Baffone 2014: 186.
270 Andorno & Baffone 2014: 182. From a biblical perspective, "treat others how you want to be treated".
271 Andorno & Baffone 2014: 183: See also Ross 1930.
272 Fagan 2008: 1-6.

Along with the duty to alleviate suffering, the concept of "fairness" is an important principle to be considered. When it comes to equality and non-discrimination, the stateless often encounter marginalisation[273] which is in direct conflict of the notion that all individuals should be treated fairly and with dignity as well as the ethical imperative to rectify historical injustices and eradicate discriminatory practices. On a governance level, states have an assumed responsibility to provide safety, security, and legal protection for all individuals under their jurisdiction in a fair and equal manner. Stateless people however often find themselves excluded in a variety of ways that more often than not, cannot be ethically justified. Take for example a child that is born stateless. If that (innocent) child has any less rights, or is treated with less dignity than a child born with citizenship, based purely on the fact that the former lacks a legal nationality, then there is a clear travesty of justice. Greg Constantine, is a photojournalist that recognizes that there is an ethical obligation to identify and attend to the injustices faced by many stateless individuals. His website is difficult to view without feeling a strong sense of ethical duty. In his opinion, "statelessness is rooted in discrimination and intolerance", but that this discrimination and intolerance goes unnoticed by a large percent of the global population - i.e. that they are essentially invisible. He therefore wishes to "provide tangible documentation of proof that millions of people hidden and forgotten all over the world actually exist".[274]

Being "invisible" has a direct effect on the social dynamics experienced by stateless people and also contributes to political and social tensions, especially in fragile states around the world.[275] From the state's perspective, statelessness poses serious threats to development, public health, security and international relations. By breaking the identity between the human and the citizen and that between nativity and nationality, statelessness brings a disquieting element in the order of the nation states and poses real threats to national and regional stability.[276] This can also lead to concerning outcomes that have both practical and ethical ramifications, such as human insecurity, illegal migration and forced displacement. This is especially evident in countries where large stateless populations exist that are confined within refugee camps – being denied

273 See Chapter 5 at 5.5.
274 The website can be found at http://www.nowherepeople.org/main (Accessed 27 October 2023).
275 Dible 2016: abstract.
276 Mbiyozo "Statelessness: An old problem with new threats" https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats (Accessed 25 November 2020).

the opportunity to assimilate into that society due to their lack of belonging, and being unable to be repatriated or deported due to their lack of a nationality.

From a political stand-point, the socio-economic burden, as well as the health and security risks that these situations create are detrimental to the stability of the nation-state. Even in less extreme examples, statelessness regularly interferes with the ability of individuals to access basic rights such employment, health care and education, which in turn can aggravate or create situations of destitution. In this way statelessness directly conflicts with attempts to alleviate poverty, and even worse, with every birth of a stateless child, risks perpetuating a generational cycle of both poverty and statelessness. [277]

This generational cycle occurs as these future generations often struggle with the most basic life tasks, such as registering a SIM-card, opening a bank account or obtaining employment.[278] The deprivation of nationality often also seriously impacts the education of stateless children. Due to being unable to obtain any form of identity document without a birth certificate it is a struggle to enrol these children in school, and even if basic education is provided, further education is often out of reach.[279] Their ability to improve their lives is now limited and this only enforces the cycle of poverty further.[280] The UNHCR's case study and subsequent report illustrates these struggles from a real life South African perspective. [281] Similarly to the ethical obligation to eradicate statelessness, there is an ethical obligation to alleviate poverty that arises from a recognition of the inherent dignity and worth of every individual and the principles of justice and fairness. Poverty is a condition characterized by a lack of basic necessities, such as adequate food, clean water, shelter, healthcare, education, and economic opportunities. It deprives individuals of their fundamental rights and limits their capabilities to live a dignified life. So whilst not every stateless person will

277 SIS "The world's stateless children" http://children.worldsstateless.org/assets/files/worlds-stateless-full-report.pdf (Accessed 25 November 2020) 132.

278 UN Human Rights Council (HRC) "Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless" http://www.refworld.org/docid/56c42b514.html (Accessed 25 November 2020) paragraph 31 and CRC article 8.

279 Elphick & George 2013: 49, See note 6.

280 Proudlock (ed) 2014: 21: See note 309.

281 UNHCR https://www.unhcr.org/afr/news/stories/2018/6/5b2ba9912d5/risk-of-statelessness-plagues-mother-in-south-africa.html (Accesssed on 25 November 2020).

necessarily be affected by poverty, and not every person affected by poverty is stateless, the two do often go hand in hand. While there is an ethical obligation to end poverty in general, there is also an ethical obligation to end statelessness because, amongst the other reasons already provided, of the cycle of poverty that is so often associated therewith.

Statelessness thus has the potential to damage not only the very structure of a nation-state when a portion of its residents are forced to live outside the jurisdiction of many of its laws (and without being protected by any other) but also the individual lives of the stateless. Arendt was acutely aware of the instability both for the nation-state and for the individual stateless persons, noting that at times, being a delinquent of the state was the only way for a stateless person to obtain rights. She observed that "the stateless person, without right to residence and without the right to work, had of course constantly to transgress the law".[282] What Arendt meant by this, was that not only did stateless persons often need to break the law in order just to live (for example by working illegally to be able to afford basic necessities or purely just by being an illegal resident). What she found however, was that in many instances, the stateless actually obtained more rights after transgressing the law than they had before doing so. She defended this by providing the theory that since the stateless person is an "anomaly for whom the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal".[283] If committing a crime is expected to improve a person's legal position, and to afford that person a degree of human equality that they did not previously possess, even if only temporarily, Arendt submits that this is proof that that person has been deprived of human rights.

> "The same man who was in jail yesterday because of his mere presence in this world, who had no rights whatever and lived under threat of deportation, or who was dispatched without sentence and without trial to some kind of internment because he had tried to work and make a living, may become almost a full-fledged citizen because of a little theft. Even if he is penniless he can now get a lawyer, complain about his jailers, and he will be listened to respectfully. He is no longer the scum of the earth but important enough

282 Arendt 1976: 286.
283 Arendt 1976: 286.

> to be informed of all the details of the law under which he will be tried. He has become a respectable person".[284]

Although not every nation-state is the same, and although what Arendt describes may not necessarily be the case in every country with a stateless population, her observations do provide insight into an interesting philosophical predicament, wherein a criminal may have more rights than an innocent person. Such a situation goes against the ethical values of fairness and equality, and disregards the fundamental notion of human dignity.

As inherently social beings, there should be a sense of equality combined with a constant effort to construct a world which is inclusive of all members of humanity – regardless of legal status. This is in the best interests of all nation-states, as the more people who are disenfranchised and marginalised, the worse off the socio-economic, health, and security prospects of a country become.[285]

What can be deduced, is that statelessness is not a purely legal phenomenon that can be solved using a purely legalistic method; it is a complex human condition and humanitarian crisis that brings up challenging questions on morality and ethics that are rooted in the principles of human dignity, equality, and justice. By recognising the ethical obligation to end statelessness, we are forced to simultaneously acknowledge the serious flaws that exist within the global nation-state system and the resultant legal systems alike. The fact that legal nationality (or the lack thereof) can have such devastating consequences calls into question the legitimacy and efficiency of the international system (one which proclaims to be based on human rights) itself.

Whether the answer to statelessness involves ensuring each individual is a recognised member of a nation-state, or whether the answer can only be found in a complete redesign of the nation-state system itself, ending statelessness is no doubt a crucial step towards building a just, inclusive, and compassionate society for all. With the

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284 Arendt 1976: 286–287.

285 SIS "The world's stateless children" http://children.worldsstateless.org/assets/files/worlds-stateless-full-report.pdf (Accessed 25 November 2020) 131.

costs of which to society as a whole being so substantial and vast, the ethical obligation to end statelessness is difficult to deny.

6.2 Conclusion

This thesis sets out the comprehensive set of international instruments that make up the bulk of the current failed approach to statelessness and finds them, from a legalistic point of view, not to be lacking in any serious/fatal way. With international pressure upon nation-states to ensure their national laws are in line with the international statelessness laws, many have done so. Whilst there are arguably certain gaps within various statelessness specific laws and treaties, the gaps should not be fatal, as other international instruments (such as human rights laws) are, in theory, in place to close the gaps.

However, despite this, there has been an obvious failure to eradicate, or even largely reduce statelessness on a global scale, and even in countries whose national laws provide for safeguards to prevent/reduce statelessness,[286] statelessness still exists. Thus, as is shown throughout this study, the dominant legalistic approach, along with the humanitarian response to date, is clearly lacking in its ability to fully resolve statelessness. Although the international legal response to statelessness has never been stronger than it currently is, the ambitions and promises are a far cry from what occurs in practice and what numerous stateless individuals experience on a daily basis. This contrast between theory and practice strengthens the hypothesis that the problem of statelessness is not solely a legal problem that can be solved by a purely legalistic approach. Taking into account the research questions answered throughout this study, and in responding to the overall research problem, it can be concluded that the overwhelming preoccupation on formalistic methods is the core reason for this failure and has resulted in important underlying issues being overlooked or neglected.

On both an international and national level, legalistic approaches tend to gloss over important ethical considerations and can overlook subtle realities. However, just because the current approach is insufficient, it does not follow that it is useless or should be discarded. A legalistic approach has a very important place within our

286 South Africa as set out in 5.2.4.

society at present, and the advances (and evolution) of international law should be encouraged. Whilst not being able to eradicate statelessness completely, these laws have indeed assisted certain groups and individuals to varying degrees and ways, however the degree to which they have been successful pales in comparison to the sheer number of stateless persons across the globe that are left seemingly helpless. In order to form a thorough and coherent conclusion, a brief summary of the most important findings of this thesis is set out below.

An important part of the legalistic approach has been the focus on legal nationality and, although it is true that there is an impenetrable link between nationality and statelessness, statelessness goes much deeper than just a lack of legal nationality. This is exemplified by the fact that conferring a nationality (thus legally ending a term of statelessness) without ensuring such nationality is effective and functional, does not always resolve the problems associated with statelessness – i.e. there is a risk that the underlying causes and consequences of statelessness may remain.[287] In other words, even where an individual is no longer considered legally stateless, this does not always correlate to an improvement of status and/or quality of life.[288] Due to the fact that legal nationality has been purported by most role-players as the stand-alone "cure" for statelessness, there is consequently a lack of motivation within the current response to address these types of situations (despite the ethical reasons to do so).

The experience of statelessness is a deeply complex matter that the current definition does not attempt to detail. The notion of belonging is an element that is not always sufficiently covered when it comes to the current approach to statelessness, despite often being described as a basic human need.[289] It is a central theme throughout the history of statelessness, featuring prevalently in nationalistic, autochthonic and xenophobic policies that has contributed towards the creation or continuance of statelessness. Belonging forms part of the human element of statelessness, which, as a construct that constitutes both nationality and belonging, is irrefutably both a legal anomaly but also, at its core, a human condition. Thus the legalistic framing of statelessness solely within the confines of nationality as per the accepted international

287 Lynch & Blitz 2011: 207. See also Chapter 5: 5.5 for a detailed analysis of marginalisation.
288 Lynch & Blitz 2011: 207; Luquerna 2020: 148.
289 Healy 2020 (See references of Healy: Frankl 1985; Guibernau 2013; Curlette and Kern 2010; Bond 2006).

definition arguably has a dehumanizing effect. This can result in stateless people being legally and politically visible only through the lens of their (often absent) legal status – which can reduce them to a type of legal and political invisibility.

In accepting that, within the current nation-state system, nationality commonly forms the basis for upholding and protecting basic human rights,[290] it must consequently also be accepted that human rights are thus not inalienable. This highlights the polarity, and inequality, between citizens and the stateless, where rights that are promised to all human beings, are often less accessible to stateless persons.[291] In the worst cases, stateless persons find these human rights to be nothing more than abstract concepts with no substance behind them.[292] At the core of statelessness there is thus a loss of humanity and an ineffectiveness of human rights for the very people who depend on them the most. Stateless persons are at high risk for being denied basic human rights whilst concurrently lacking a sufficient platform from which to appeal for those right,[293] and even countries that claim to uphold human rights still have human rights violations happening within their borders.[294]

What then is the value of Arendt's notion of the "right to have rights" in addressing the issue of statelessness? Without a right to have rights, so-called human rights often boil down to nothing more than citizenship rights – rights that can applied/revoked at the discretion of the nation-state when deciding who is a citizen and who is not (or which international laws to accede). In addition to this, with stateless people being excluded as political members of society, they do not always have means or access to mechanisms which would allow them to appeal the human rights violations that take place against them. As such, any attempt to base human rights on conceptions of inalienability or universality is in vain. Without human rights being grounded upon any

290 Kingston 2019: 53.
291 Arendt 1951: 267–268; Gündogdu 2015: 11.
292 Arendt 1951: 269.
293 Southwick & Lynch "Nationality rights for all: A progress report and global survey on statelessness" https://www.refworld.org/pdfid/49be193f2.pdf (Accessed 30 October 2023): i.
294 Human Rights Watch Canada 2021 "Immigration detainees are not held on criminal charges or convictions, but many experience the country's most restrictive confinement conditions, including maximum-security provincial jails and solitary confinement. They are handcuffed, shackled, searched, and restricted to small spaces with rigid routines and under constant surveillance." https://www.hrw.org/news/2021/06/17/canada-abuse-discrimination-immigration-detention (Accessed on 3 August 2022).

concrete basis, there is a need, and an ethical obligation, to protect a fundamental human dignity that is continuously at risk by the constraints of the nation-state. There is thus a need to ensure the right to have rights by attending, on a deeper level, to the notions of humanity, political membership, effective nationality and equaliberty within the context of statelessness.

The tendency to look to international law in situations of statelessness (in particular in cases where the nation-state is not willing to confer its nationality to the stateless) is often ineffective due to the issues that plague international law in general.[295] Even where formal treaties are voluntarily entered into, the issue of enforceability if those treaties are violated is (due to the nature of international law and state sovereignty) uncertain at best. The unresolved tension between international law and state sovereignty is a contentious issue that proposed solutions to statelessness have not yet been able to circumvent. Nation-states jealously guard their ability to grant (or deny) nationality and therefore apprehension is often clearly evident towards any attempts to encroach on this authority. As such, international laws and recommendations are not always well-received by the nation-state that they are directed towards due to the perceived/real threat they exert on state sovereignty and self-determination.[296]

The conditional nature of nationality (despite being declared a human right), in conjunction with the power of state sovereignty, is highlighted in instances where nationality is used as a tool or weapon to meet political agendas. Nationality, a supposed "human right", can suddenly be stripped of this title when the exploitation thereof works in favour of a state's particular political ideals. This can be accomplished by nation-states in numerous ways, for example by formulating specific national laws and then hiding behind a (arguably sometimes fabricated) need to protect state security, or by simply outright refusing to accede to (or abide by) particular international laws. In other words, political subjectivity precedes legal recognition of citizen-subjects.[297]

295 This was set out in Chapter 5: 5.4.
296 Besson 2011: 26.
297 Nyers 2015: 23-39.

Similarly marginalisation and discrimination are also key elements that the current legalistic approach has not yet been able to sufficiently combat, and on both a legal and social level, the consequences thereof are significant. Covert discrimination in particular can be especially sinister, enabling nation-states to perpetuate statelessness without any apparent openly discriminatory laws or explicitly unfair treatment, often hiding behind thinly veiled “neutral” criteria for nationality. It is submitted that discrimination, empowered by state sovereignty, is perhaps one of the most concerning and difficult to address issues when studying the failure of the current approach. Discrimination is often at the very core of major statelessness populations, both creating and perpetuating statelessness.

In addition to this, administrative and regulatory issues can (with or without the added aspect of discrimination) also contribute to the problem of statelessness. What the current legalistic approach fails to provide protection for in this regard, is that even in the presence of apparently comprehensive and protective laws (and even specific and duly issued court orders), stateless individuals can face difficulties in enjoying the promises of these laws, finding that obtaining a nationality is not as easy as finding a law on which to rely. Thus, irrespective of the comprehensibility of international and national laws, there is an additional facet to statelessness that the current approach does not have the tools to deal with. Without effective regulations and administrative processes, and without properly trained and knowledgeable officials, the effectiveness of the law is severely curtailed. In instances such as the cases mentioned in South Africa,[298] Court Orders remain unfulfilled, which seriously undermines both the judicial and the legislative pillars of the country. In the face of such a defective system, any endeavour by the current approach to end statelessness can fall short, despite appearing on paper to be promising.

Taking into account the failures of the current approach and the ongoing proliferation of statelessness, the role of humanitarian action for those who find themselves stateless becomes a logical next step. Unfortunately, where attempts have been made at aiding the stateless, the results have not always been successful, sometimes being regarded as insufficient and at other times even being regarded as detrimental. With

298 For example, *DGLR v Minister of Home Affairs.*

many humanitarian organisations also taking a legalistic approach, i.e. focusing on the legal aspects of nationality, much of the humanitarian action to date also falls victim to the same downfalls as the current approach in general. The concerning aspect however is that at times, humanitarian action has directly contributed to the human rights abuses and dismal quality of life that numerous stateless people face (in particularly those living within refugee camps and detention camps). Therefore, on a more systemic level, investments need to be made that make provision for basic human rights that do not compel (and propagate) dependence on humanitarian aid organizations in the first place.

What can be deduced however, is that the humanitarian action to date has not only been ineffective in providing any large scale, long-lasting solution to the phenomenon of statelessness, but has also failed to adequately garner wide-spread public attention and empathy – something that I argue would considerably enhance efforts towards a more ethical approach.

It is submitted that an important avenue where humanitarian organizations can greatly contribute towards ending statelessness is in the area of public awareness. Campaigns such as the #IBelong Campaign are an excellent concept, but the inner concepts of belonging need to be universally accepted in order for such campaigns to achieve large-scale results. Encouraging partnership between the state, civil society, stateless populations and humanitatian organisations is thus what is recommended in order to empower statelessness campaigns. Building and strengthening such partnerships on statelessness is critical to advance and support the pledges made and those yet to materialise as part of the #IBelong Campaign.[299]

In striving to develop and implement a successful humanitarian response, the end goal must be to establish a world in which the current and future generations of people can live together in peace, security and dignity, irrespective of their legal nationality status. In order for this to happen, it might not be necessary for a world government or a world democracy to be established, instead, the less controversial notion of a universalistic morality of justice within all populations across the globe would perhaps suffice.[300] A

299 Batchelor 2019: 312.
300 Habermas 2006: 143 ; See also Scheuerman 2008.

step towards reaching such a goal, would be to foster widespread agreement with regards to the ethical obligations to uphold the concept of human dignity and humanity, and encourage conformity with regards to reactions of moral outrage toward gross human rights violations.

Reminiscent of Arendt's clear acrimony when detailing the sudden loss of rights when becoming stateless,[301] the ease of which stateless persons can be excluded from the equation of "man and citizen" should evoke outrage, if for no other reason than the disregard for the concepts of humanity itself. Using the right to have rights to critique this state of affairs leads to an appeal to consider a redesign of the nation-state system itself.[302] An effort should be made to avoid the situation wherein the current system has such a strong hold on our political imagination that it becomes impossible to conceive any other reality.[303] Although it is arguably unrealistic to expect a completely different global system to be suddenly put into place, it is reasonable to consider a progression towards a reconfiguration of the system that conserves the achievements of the nation-state,[304] whilst going beyond its frontiers in a new form that welcomes the ever increasingly globalisation of the world.[305]

Although providing a comprehensive account of all moral and legal concerns involved with statelessness and human rights is not the intention of this thesis, vital insights from Arendt, that are not often found in most prominent human rights philosophies, enable a wider range of thought. That is, that the problem of rightlessness can possibly be resolved by a reconstruction of political identities and the creation of new forms of community - perhaps one that can challenge the very sovereignty of the nation-state system itself. The distinctive approach adopted by Arendt is what makes her work such a significant, albeit often overlooked, contribution not only to human rights literature, but particularly to the field of statelessness.[306] It is submitted that the current legalistic approach to statelessness tends to overlook important considerations, theories and philosophies from Arendt and that the focus on legalistic measures risks diminishing

301 Arendt 1951: 290-95.
302 Benhabib 1998: 106.
303 Golder 2014: 77-79; Brown 2004: 451; Kennedy 2004: 131; 133.
304 Relative stability, democracy and the social and economic development that came due to the lack of a centralised dictatorship.
305 Habermas 2014: 90.
306 Isaac 1996: 62.

creativity within the quest for a final solution to statelessness - perpetuating an approach that has proven to be disappointingly insufficient. In order to progress further in the plight to end statelessness, the right to have rights should be given more importance, and an ethical approach that encompasses meaningful, effective and functional membership for all (in view of Arendt's concept of human dignity) should be embraced.[307]

In conclusion, the dominant legalistic approach, along with the humanitarian response to date, have been an incomplete and/or inadequate solution, due to the various complex challenges and limitations. The focus on technical legal issues leaves a variety aspects of statelessness not adequately addressed, that can lead not only to the continued creation of new cases of statelessness but can also allow the perpetuation of the cycle of statelessness through generations. The persistent nature of statelessness underscores the need for a more comprehensive and holistic approach and alternative conceptualizations are needed in order to correctly approach the complex relationships between the statelessness, the sovereign state and international law. It must be recognized that a legalistic approach is only of limited value unless it is accompanied by vigorous and universal advocacy as well as long-term action on behalf of the stateless that goes beyond the notion of nationality. Deep human rights issues that have plagued philosophers, law makers and humanitarians alike for centuries continue to resurface time and time again. To effectively tackle statelessness, a more interdisciplinary and "right to have rights" based approach from a jurisprudential as well as ethical view point is needed. This approach should include legal reforms, but it should also encompass broader strategies that address the social, economic, administrative and political dimensions of statelessness on a deeper level.

Finally, in order to fully understand the reality of statelessness, the voices of the stateless themselves should not be ignored. Engaging with and listening to the stateless brings to light the lived reality of these people. Intersectionality helps us to look inside categories, such as minority groups, to understand differences in lived experiences and stitch together new understandings, greater awareness, and more effective coalitions for change. Karl N. Llewellyn argued that society changes faster

307 Menke, Kaiser & Thiele 2007: 752.

than law, and so there is a constant need to examine how law meets contemporary social problems, they based their reasoning on objective observation of realities.[308]

How we relate to each other as global citizens is pivotal to the future of the world. How we respond to statelessness is a good test of that. Rather than passively accepting the erosion of the human rights of stateless persons, we need to reclaim their original promise, and to address the racial, ethnic, and gender injustices submerged beneath their beneficent sheen. There needs to be a concerted effort to fulfil the ethical obligation to end statelessness and to uphold the tenets of human dignity. Continuously formulating more laws and treaties has proven to not be a realistic (or complete) solution to statelessness, and thus a broader approach with new conceptualizations is necessary if statelessness and the underlying issues are ever to be resolved.

308 Lewellyn 1931: 1236.

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