

Refugees and Stateless Individuals: Who Wins and Who Loses?

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Upon arrival in a particular country, one may provisionally be categorized by immigration officers, in unsavory ways. These include so-called "asylum seekers" as they are perceived to be. The terms refugees, undocumented persons, illegal immigrants or stateless individuals are categorically more specific terms that may be used to describe such people. These terms, however, have a central underlying theme which one may neglect while discharging his or her duties at particular checkpoints, and that is this: they are dealing with human beings in desperate circumstances.

Individuals with improper travel papers enter a particular state with the hope of securing at least one of these unsavory designations, to a greater or lesser degree. One may prefer to be declared a refugee rather than a stateless individual. This is due to the fact that being termed a refugee may safeguard one's rights more effectively than being stateless.

In the course of my paper I will attempt to distinguish between the refugee and the stateless individual. I will then probe into the treaties which provide for rights to these sets of individuals and determine who ends up with a better deal. I will conclude by looking at whether there is a possibility for the lesser privileged group to gain access to rights allocated to the more privileged group of undocumented persons.

The Refugee and the Stateless Individual

Article 1 of the **Convention relating to the Status of Stateless Persons 1954**¹ defines the "stateless person" as a person who is not considered as a national by any State under the operation of its law. As at December 2008, sixty-three states have acceded this convention.

The **Convention relating to the Status of Refugees 1951**², on the other hand,

defines, in Art 1A(2), a refugee as one owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

There are now approximately 147 states which are party to this convention and its protocol.

At first blush it seems that the two conventions deal with entirely different sets of individuals. However, after a little more scrutiny into the second limb of the definition article to the Refugee Convention, it seems as if this convention may encompass the stateless individual in limited circumstances.

A brief look at the run-up following the creation of the two treaties will give one an idea of what the states expected from these conventions. Looking at the law as it stood in 1938, refugees and stateless individuals were viewed in tandem. Article 1 of the 1938 Convention Concerning the Status of Refugees Coming from Germany applied to the following individuals:-

(a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or fact, the protection of the German Government.

(b) Stateless persons not covered by previous conventions or agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.

In 1949 the Secretary General of the United Nations proposed the creation of a Convention that encompasses all persons without diplomatic protection. The Economic and Social Council approved the drafting of a convention that would include stateless persons as well as refugees who are considered to be *de facto* stateless, as their state of nationality would be unwilling to protect them. The states had divergent opinions on this broad-based form of protection proposed. On one side of the spectrum, countries like the USSR believed that only those *de jure* stateless persons deserve assistance from the United Nations, as refugees were deemed to be traitors of their home states. At the other end of the spectrum were states like France and the United States, which asserted that refugees present a more serious problem of

humanitarian need, compared to the stateless. Hence two separate sets of treaty law were created, one for the refugee and the other for the stateless individual.

Article 1A(2) of the Refugee Convention, however, through the second limb of that paragraph, does cater to a special group of stateless individuals—those termed “Stateless Refugees”.

Definitional differences are also evident with the phrase “persecution for reasons of race, religion, nationality, membership of a particular group or political opinion” which is contained in Art 1(A) of the Refugee Convention and not in Art 1 of the Statelessness Convention. ‘Persecution’ generally refers to a reasonable chance of infliction of serious harm if the refugee returns to his home state or state of former habitual residence. Traditionally, forms of persecution included vile acts of torture and brutality. Today, the consequences of transgressing social mores may be a form of persecution.

It ought to be remembered, however, that the Refugee Convention was highly Eurocentric and focused on reasons that were based on civil and political rights eschewing economic and social rights that are held dear by developing states. Hence those running from the harsh consequences of a tsunami, for example, are not deemed to be refugees. According to Kristen Walker, human threat to life, liberty and safety are distinguishable from adversity caused by geographical or economic factors in two ways: First, a voluntary human element is involved in the threat to life, liberty and safety. Second, assistance required in circumstances of encroachment to one’s civil and political rights differs from that of situations of economic downturn or natural disaster. The former individual would need a sanctuary while the later individual may just need physical or financial aid.

From this, one can see that there are stark purposeful and definitional differences between stateless individuals and refugees. Yet there are a few theories that may allow for these sets of individuals to have merged rights and protection.

In international law, the right of diplomatic protection is a right of the state that ultimately benefits the nationals of the state. As international law involves the interaction between states, ordinary individuals are unable to directly attain certain benefits, such the right of diplomatic protection, without the State taking up the matter on their behalf.

The refugee, according to Paul Weis, lacks diplomatic protection. So too does the stateless individual. Stateless persons are *de jure* unprotected and the refugee is *de facto* unprotected. The reasons for lack of protection, however, differ. Stateless individuals are unprotected due to lack of nationality, while the refugee remains unprotected because of fear of persecution in his or her home state or state of habitual residence.

Looking at the fine print, however, one may be able to see that there are some hang-ups with this theory. Nathwani clearly spells out three of such hang-ups:- First, the refugee does theoretically have the option of diplomatic protection via his country of origin. Therefore it is incorrect to say that he has no avenues to diplomatic protection whatsoever. The stateless individual, on the hand, is crippled, with no option of diplomatic protection whatsoever. Second, one cannot truly link lack of diplomatic protection to persecution. There could be other reasons for lack of diplomatic protection apart from persecution. Third, since the right of diplomatic protection is a right of the state and not the right of the individual, it seems odd that the lack of such protection may be grounds for asylum. Refugees do not lack diplomatic protection the same way as stateless individuals lack such protection. Rather they can be lumped together with a whole host of other people whose states may choose not to protect them for one reason or another.

Atle Grahl-Madsen believes that refugees are like stateless persons. He categorizes refugees as a special group of stateless individuals who are unable to benefit effectively from his nationality. Those who only have nationality in name like refugees are *de facto* stateless. Refugees are looked at as a subset of the whole corpus of statelessness. Over the years, however, the number of persons who fall within the category of *de facto* stateless individuals has increased. Conflicts involving national laws, concerning state of birth and state of descent of parents, may cause *de facto* statelessness, as may cases of state succession and technical or procedural administrative glitches that may take place while applying for naturalization. How should these individuals be categorized? Obviously they are not refugees and are therefore unable to gain privileges via the Refugee Convention. Hence the Statelessness Convention would have to cater to not only *de jure* stateless individuals but *de facto* stateless individuals who are not refugees. Is it possible, then, to simply go back to the initial 1938 approach on statelessness in general? And why would one want to do so?

Does the Refugee Convention Provide Advantages?

Looking at the Refugee Convention, one can clearly see that there are provisions in there that place the refugee in a better position compared to the stateless individual. Both the refugee and the stateless individual are granted certain basic rights by Contracting States, such as the right to education, religion, employment and the like. Some of these rights, however, are particularly advantageous for the refugee.

Article 15 of the Refugee Convention grants refugees who are lawfully staying in the territory of the Contracting State the right of association on par with the most favorable treatment accorded to nationals of a foreign country. Certain representatives to the Statelessness Convention felt that if the stateless individual was accorded rights of association that were equivalent to that of the refugee, then they may enjoy more favorable treatment than nationals of some countries in certain instances. Additionally, there were also representatives who feared that the stateless might not be encouraged to acquire nationality from their countries of residence if they already are the beneficiaries of rather extensive rights.

Article 17 of the Refugee Convention grants greater rights of wage-earning employment to the refugee compared to the stateless individual. In order to protect the labor market of the States, the restrictive measures imposed on aliens would apply to the stateless but not to the refugee who has either completed three years of residence in the country, has a spouse who is a national of the country of residence, or has one or more children possessing the nationality of the country of residence.

Both the stateless individual and the refugee are granted rights that are as favorable as possible, or not less favorable than those accorded to aliens generally in the same circumstance when it comes to the practice of a liberal profession. The refugee, however, does benefit from the moral obligation that has been entrusted to the Contracting States by virtue of the 2nd paragraph of Article 19 of the Refugee Convention. These states have an obligation to try their best to secure employment for the refugee.

Article 25 of the Refugee Convention speaks of the right of administrative assistance which would include assistance in attaining certain documents. Since the stateless individual is a national of no country, only the country of residence may be able to provide such service to the individual. The refugee, however, has the added advantage of attaining some form of assistance from International Authorities such as the United Nations High Commissioner for Refugees (UNHCR). On

top of that, the Contracting State has a duty to co-operate with the UNHCR in the exercise of its functions, including that of providing information and statistical data as requested by the UNHCR. It ought to be noted, however, that The Convention on the Reduction of Statelessness 1961, through its Article 11, laid the seeds for international protection on behalf of stateless persons by International authorities. The UNHCR was appointed in 1975 by the General Assembly for the promotion of Art 11, which states:

The Contracting States shall promote the establishment within the framework of the United Nations ... of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.

Hence the UNHCR is now involved in the protection of the stateless individual. The General Assembly appointment, however, cannot be equated to having protection from an international authority entrenched in treaty law.

The stateless individual found to be unlawfully in a particular country may be subject to severe punishment, depending on municipal legislation that exists there. By virtue of Article 31 of the Refugee Convention, however, the Contracting state shall not impose penalties on account of an illegal entry by a refugee who is coming directly from which his life or freedom was threatened in a manner covered by Article 1. Apart from this, Article 33 of the Refugee Convention prohibits the expulsion or return of a refugee in any manner whatsoever on account of his race, religion, nationality, membership in a particular group or political opinion, provided he is not a threat to the security of the country and has been convicted by final judgment of a particularly serious crime. Although this may not be an obligation as such to grant asylum to a particular individual, in practice it has been taken to be such a right. This concept of non-refoulment has already attained the exalted status of being customary international law and all states, including Malaysia, are bound by it.

Looking at all the articles of the Refugee Convention that grant better or additional privileges to the refugee, one is tempted to ask whether there is any possibility for the stateless individual to gain access to these rights. History seems to answer this question in the negative, although some theories may give rise to an affirmative answer, depending on how liberally one interprets these theories. Suffice it to say, at this point, that for the sake of clarity in application of the law, the only stateless

individual who may gain access to the Refugee Convention would be the "stateless refugee".

Who is this Illusive Stateless Refugee?

The 2nd limb to Art 1A(2) of the Refugee Convention speaks of the person who is unable to return to his former country of habitual residence owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular group or political opinion. This limb caters to those without nationality but with a place of habitual residence. This is a special group of stateless individuals and not all stateless individuals may acquire the protection that the stateless refugee does.

Paragraph 102 of the UNHCR Handbook stipulates the following:

It will be noted that not all stateless persons are refugees. They must be outside their country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.

In determining who the stateless refugee is, one would have to focus on the individual's former country of habitual residence. There are, however, various ways in which the country of former habitual residence is to be assessed. One approach is to look toward the country of original persecution, i.e., where the claimant first experienced persecution. Another is to look at the last country of former habitual residence which was applied by the Canadian Federal Court in the case of *Thabet v. Canada* (Minister of Citizenship and Immigration). This approach, though, may result in a country violating international law rules by committing *refoulement*. A rather strict approach would be requiring the stateless refugee to show a well-founded fear of persecution against all countries of former habitual residence. The converse to this approach is the over-generous test of any country of former habitual residence that was applied in the case of *Al-Anezi v. Minister of Immigration and Multicultural Affairs*.

The final approach requires that a stateless individual show a well-founded fear of being persecuted in one country of former habitual residence, and proof that he cannot return to any of the other countries of former habitual residence.

Based on the above, one can deduce that depending on which test applies in a given state, the individual might find the task of asserting the rights to refugee protection

by referring to the country of former habitual residence rather daunting.

Whether one attains the exalted status of a refugee or the lesser status of a stateless individual, the fact remains that for both these categories of individuals, the right to nationality is a remote possibility. No doubt both conventions do refer to the process of naturalization, in practice various administrative and legal obstacles obstruct the individual from attaining nationality in the state of habitual residence. Needless to say, international law has much to accomplish in this area of human and civil rights for refugees and stateless individuals. Let us hope that international law will one day be furnished with the capacity to directly assist those in need of some form of sanctuary.

ENDNOTES

- 1 Adopted on September 28, 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526(XVII) of April 26, 1954, entered into force 6 June 1960.
- 2 189 U.N.T.S. 150, entered into force 22 April 1954.
- 3 1938 Convention concerning the status of refugees coming from Germany: 191 LNTS 4461.
- 4 Hathaway, C, James, "A Reconsideration of the Underlying Premise of Refugee Law", *Harvard International Law Journal* Vol 3, Number 1 Winter 1990, p.129.
- 5 *Ibid* para [2].
- 6 Kelley, Ninette, "Opinion The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress", *International Journal of Refugee Law*, 2001, 13, p. 559.
- 7 *Ibid* para [4] at p.149.
- 8 Walker, Kristen, "Defending the 1951 Convention Definition of Refugees", *Georgetown Immigration Law Journal*, 2003, p. 583.

- 9 Shaw, M.N., *International Law*, 5th ed., Cambridge University, 2003.
- 10 Weis, Paul, "Legal Aspects of the Convention of 28 July 1951 relating to the Status of Refugees", 30 BYIL, (1953), p.480.
- 11 Nathwani, Niraj, "The Purpose of Asylum", *International Journal of Refugee Law*, 12, 2000, p. 354.
- 12 Grahl-Madsen, Atle, *The Status of Refugees in International Law*, Vol.1, Leiden: Sijthoff, 1966, p.255.
- 13 Batchelor, Carol, A., "Statelessness and the Problem of Resolving Nationality Status", Volume 10 *International Journal of Refugee Law*, (1998), p. 156
- 14 Robinson Nehemiah, "Convention Relating to the Status of Stateless Persons, Its History and Interpretation: A Commentary by Nehemiah Robinson", Institute of Jewish Affairs, World Jewish Congress, 1955, Republished by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997, p.1.
- 15 Convention on the Reduction of Statelessness 1961, 989, U.N.T.S. 175; entered into force 13 December 1975.
- 16 Blackman L. Jeffrey, "State Successions and Statelessness: The Merging Right To An Effective Nationality Under International Law", 19 Mich. J. Int'l L, 1998, p.1141.
- 17 Ibid para [8] at p. 583.
- 18 Coursen, Zama, "Malaysia / Burma Living In Limbo Burmese Rohingyas in Malaysia", Aug 2000 Human Rights Watch, Vol 12, No.4, (c), [http://www.hrw.org/reports/2000/malaysia/maybr008.htm#Top of Page](http://www.hrw.org/reports/2000/malaysia/maybr008.htm#Top%20of%20Page).
- 19 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para 102.
- 20 (1995) 105 F.T.R 49 (Fed T.D).

21 (1999) 92 FCR 283.

22 Simperingham Ezekiel, "The International Protection of Stateless Individuals: A Call for Change", A dissertation presented in partial fulfillment of the requirements for the degree of Bachelor of Laws (hons) ,University of Auckland, June 2003, p. 11.