

# The untold dangers and unfeasibility of a global registration of stateless persons: A reply to Jay Milbrandt's 'Stateless'

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## Introduction

Milbrandt's article highlights the need for increased debate surrounding the dire situation in which many stateless persons around the world find themselves.<sup>1</sup> It provides a step in the right direction in that his article attempts to challenge the phenomena of statelessness and reduce its prevalence in the world. However, the idea put forward of global registration of stateless persons is critically flawed for several reasons. First it is based on a theoretically weak definition of statelessness that leaves many questions unanswered. Second pragmatic concerns with regard to how registration may not be possible within certain local socio-political context are drawn out. Third, Milbrandt fails to acknowledge the key dangers of global registration which can be clearly seen if historic and current examples of registering the stateless are considered.

Essentially this article stresses that statelessness does not exist within a political vacuum. While it can sometimes be simply rectified through a techno-legal fix it also exists within a political space of discrimination. This political space created and perpetuates the current stateless situations we find across the world today. It is argued here that a one size fits all policy of registering all stateless persons is unfeasible, will not lead to the perceived outcomes and could in fact increase the vulnerability of some stateless populations. Instead more context sensitive methods of understanding and tackling statelessness are proposed.

### 1. Who is to be registered as stateless?

Before a global registration system could be put in place one must first tackle the question of who is to be included and equally as important to this task who is to be excluded from being categorised as stateless. Milbrandt explores the definitions of *de jure* (by law) and *de facto* (by fact) statelessness as well as the genuine and effective link principle, but fails to clarify the crucial definitional issue.<sup>2</sup> After discussing *de jure* and *de facto* statelessness Milbrandt states that:

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<sup>1</sup> Jay Milbrandt. "Stateless", *Cardozo Journal of International and Comparative Law (JICL)*, 20(1) (Fall 2011), 75-104

<sup>2</sup> Indira Goris, Julia Harrington, & Sebastian Köhn, "Statelessness: What It Is and Why It Matters", *Forced Migration Review* 32 (2009): 6, 4-6

“This article will address both forms of statelessness broadly, but focus on the latter, *de facto* statelessness, because it takes several forms and has received less recognition within the international legal community”<sup>3</sup>

This poor reflection on the definition sets the article off on a theoretically weak footing. It should be made clear that there is only one definition of statelessness under international law, commonly referred to as *de jure* statelessness. This is the definition set out in the 1954 Convention Relating to the Status of Stateless Persons (Article 1:1) which notes:

“For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any state under the operation of its law”.<sup>4</sup>

*De facto* statelessness, if it exists at all, is hard to summarise and build consensus around as it is based on the concept of a person having a nationality but that this nationality is ‘ineffective’. This concept has no international legal grounding and little cohesion in the literature surrounding it. Considering *de facto* statelessness as another manifestation of statelessness is highly problematic as it makes the population of concern so broad as to be unhelpful, contrary to the claim that it could be another framework to help us address another ‘stateless’ group. This is due to the fact that *de facto* statelessness, based on the concept of ineffective nationality should include all, if not the majority of the world’s refugees, internally displaced persons, stateless persons, and trafficking victims as well as those who suffer from a plethora of human rights violations which their ineffective nationality has caused or fails to protect them from.

There is the danger that this line of thinking could reach the conclusion that the vast majority of persons in the world suffer from ineffective nationality at one time or another in their lives. This becomes especially apparent if one compares individuals’ nationality to more socially, economically or politically developed nations who provide more ‘effective’ nationality. While this is an extreme theoretical progression the debates on *de facto* statelessness reflect that finding a suitable and useful theoretical cutting off point for who is to be considered as suffering from ineffective nationality is at best highly problematic and at worst unachievable.

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<sup>3</sup> Jay Milbrandt. “Stateless”, *Cardozo Journal of International and Comparative Law (JICL)*, 20(1) (Fall 2011), 75-104, pp:7

<sup>4</sup> United Nations, 1954, *Text of the 1954 Convention Relating to the Status of Stateless Persons* [online], Available from: <http://www.unhcr.org/3bbb25729.html>

Previous scholarly work on ‘statelessness’ also suffers as the flexibility of *de facto* statelessness has been seized upon because it is perceived as allowing more freedom to explore issues, while the definition enshrined in international law is considered as restrictive. Milbrandt himself states that the definition of *de facto* statelessness was chosen as it ‘takes several forms’.<sup>5</sup> This has led to research that fails to clearly define who or what is being investigated. Far from simply suffering from theoretical flaws, such an approach is also in danger of hiding statelessness itself behind a wall of information produced by a theoretically questionable definition. Therefore before such a global registration could even be considered, these definitional issues must be tackled.

My final point on the definitional issue is related to United Nations (UN) agencies mandates and how Milbrandt fails to make explicit how these relate to his conception of inclusion and exclusion from registration. The international law on statelessness that forms the backbone of the international protection regime differentiates on issues of assistance and protection for the stateless depending on their situation. While the United Nations High Commissioner for Refugees (UNHCR) has the overall mandate on statelessness Article 2 (1) of the 1954 Convention notes that the convention shall not apply:

“To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance”.<sup>6</sup>

This is an issue which Milbrandt fails to critically reflect on. He uses the UNHCR figures on the number of stateless persons globally, namely 12 million, but in his summary of statelessness in each region briefly mentions that “millions of Palestinians remain stateless”.<sup>7</sup> However, the Palestinians are not included in the UNHCR’s figures as they fall under the mandate of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA). So would the stateless Palestinians be included in registration? Similarly would stateless refugees who are receiving protection under the UNHCR’s refugee mandate be included in registration?

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<sup>5</sup> Jay Milbrandt. “Stateless”, *Cardozo Journal of International and Comparative Law (JICL)*, 20(1) (Fall 2011), 75-104, pp:7

<sup>6</sup> United Nations, 1954, *Text of the 1954 Convention Relating to the Status of Stateless Persons* [online], Available from: <http://www.unhcr.org/3bbb25729.html>

<sup>7</sup> Jay Milbrandt. “Stateless”, *Cardozo Journal of International and Comparative Law (JICL)*, 20(1) (Fall 2011), 75-104, pp:76

## 2. Pragmatic concerns of global registration

This brings me to my next point which focuses on the unfeasibility of global registration. First we have to acknowledge that the cost and resources of undertaking such a project would be vast. Considering the lack of interest on statelessness from governmental and non-governmental organisations, securing sufficient funds and resources for such an undertaking seems highly unlikely. Even if such funding could be raised, I would question whether using this funding for global registration would be the most appropriate use of resources. This is especially apparent if we consider the dire situation many stateless people find themselves in and their desperate need for assistance.

Second, the inclusion and exclusion of certain stateless groups in the current literature is not simply due to lack of research or poor theorisation and conceptualisation of statelessness. It is the result of the difficulty in researching certain populations due to the political situation. Milbrandt hints at the politics of citizenship or “wielding citizenship as a political weapon” and its relation to statelessness by drawing on the work of Goldston.<sup>8</sup> However, the reasons why certain groups are excluded from citizenship does not factor significantly in Milbrandt’s considerations and his conceptualisation of a global registration of stateless persons suffers as a consequence. Statelessness does not exist within a political vacuum and cannot be considered simply as a techno-legal issue of naturalising the stateless. In some contexts there will be, and currently is, crippling socio-political resistance to changes in favour of the identification, assistance, protection and reduction of statelessness from multiple state and non-state actors.

One example of how the politics of citizenship ties in significantly with statelessness and the unfeasibility of registration of stateless persons in certain contexts is the case of statelessness in Lebanon. Lebanon’s confessional equilibrium (division of political and administrative power based on the confessional demographics) means that those who are excluded from citizenship, as well as those who are included, play a crucial role in perpetuating the current political balance of power.<sup>9</sup> With several large stateless groups including the Palestinians, some Kurds, some Bedouin and those rendered stateless due to gender discrimination in the nationality legislation, Lebanon provides an interesting context in which to apply the feasibility of global registration. Lebanon has not conducted a population census since 1932, which was carried out under the French mandate and excluded large swathes of those residing in the country. This was due to the

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<sup>8</sup> *Ibid* pp:80

<sup>9</sup> Rania Maktabi. “The Lebanese Census of 1932 Revisited. Who Are the Lebanese?”, *British Journal of Middle Eastern Studies*, 26 (2 1999), pp;219-241

collection, analysis and presentation of the figures being heavily politicised as contestation over the 'identity' of the newly created nation-state was being played out between the Christian and Muslim élites.<sup>10</sup> Despite a slight reshuffle of the balance of power after the end of the civil war in 1990, relatively little has changed. Registering all the stateless persons in Lebanon would significantly threaten the socio-political equilibrium and would be contested by the dominant Christian and Shia'a political parties whose current share of political power may be threatened if the largely Sunni Muslim stateless population of Lebanon was even to be quantified.

This is just one example of the difficulty in registering stateless persons but represents some of the barriers that global registration of stateless persons would face that have not been fully considered in Milbrandt's article.

We would also do well to remember that the majority of the stateless Palestinians have been registered by UNRWA and this information is available to advocates and academics, and has been for some time. This follows what Milbrandt calls for, yet a durable solution to this very protracted and dire stateless situation has yet to be found. The reason for this is that their statelessness is heavily intertwined with other political concerns. One cannot, and should not, ignore the political climate within which statelessness was created, perpetuated and currently exists when considering solutions to it. Responses need to be tailored to contexts.

### **3. The other dangers of listing the stateless**

The assumption that the opportunities of registration of the global stateless population outweigh the potential dangers is the third area that I fear Milbrandt has not considered fully.<sup>11</sup> Milbrandt's first example of the risks of global registration is identity theft. Yet there are examples of much greater risks of registering stateless persons that should top the list.<sup>12</sup> These include ethnic cleansing and targeting populations for systematic human rights abuses.

Examples of the listing of details of stateless persons or persons soon to be rendered stateless can be found in recent history. Arendt's harrowing accounts of life as a stateless 'enemy alien' during the Second World War reflects an extreme danger that Milbrandt did not consider in his article. In *The Origin of Totalitarianism* Arendt states:

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<sup>10</sup> *Ibid*

<sup>11</sup> Jay Milbrandt. "Stateless", *Cardozo Journal of International and Comparative Law (JICL)*, 20(1) (Fall 2011), 75-104

<sup>12</sup> *Ibid* pp;101

“One need only remember the extreme case of the Nazis, who insisted that all Jews of non-German nationality should be deprived of their citizenship either prior to, or, at the latest, on the day of deportation (for German Jews such a decree was not needed, because in the Third Reich there existed a law according to which all Jews who had left the territory – including, of course, those deported to a Polish camp – automatically lost their citizenship) in order to realize the true implications of statelessness.”<sup>13</sup>

Arendt then notes the phases of the Third Reich’s plans to abuse the Jews stateless position:

“Even the Nazis started their extermination of Jews by first depriving them of all legal status (the status of second-class citizenship) and cutting them off from the world of the living by herding them into ghettos and concentration camps; and before they set the gas chambers into motion they had carefully tested the ground and found out to their satisfaction that no country would claim these people. The point is that a condition of complete rightlessness was created before the right to live was challenged.”<sup>14</sup>

The Jews in Germany and the countries occupied by Germany were registered as Jewish by the German Reich and could be distinguished as they were forced to carry ID that noted they were Jewish. In the autumn of 1938 their passport was stamped with the letter ‘J’. This ID did not provide protection for the Jews who held them but was a means to identify who to discriminate against, essentially forcing them to carry ID which stated their statelessness and rightlessness. This example highlights the role that the nation-state can have in the creation of statelessness as a means to persecute certain groups and how having detailed accounts of this population can be used to facilitate this persecution to devastating effect.

Listing stateless person and furnishing them with ID which confirms their statelessness is a practice we can also see today. A current example is how the government of Myanmar (Burma) maintain ‘family books’ of the stateless Rohingya. An ethno-linguistic and religious minority group found predominantly in the Northern Rakhine State of the country who were stripped of

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<sup>13</sup> Hannah Arendt, *The Origins of Totalitarianism*, 3<sup>rd</sup> ed, (San Diego, New York, London: Harcourt 1968) pp:280.

<sup>14</sup> *Ibid* pp:295–6.

their nationality in 1982. The government security forces use the collection and updating of these records to persecute the Rohingya.<sup>15</sup> Refugees International note:

“Family lists, the basic registration system in Burma, include the names of all residents of each household. For Rohingyas, the lists also include a tally of livestock, and are checked by the NaSaKa [border security agency] on a regular basis. If a resident is not present during a family list check, their name is struck off and the resident is not allowed to return unless an exorbitant tax is paid.”<sup>16</sup>

These lists are used to allocate the days of forced labour that each household has to complete, based on the numbers and age of the family members and to appropriate land for the military. The Rohingya are used as forced labour to build government and military projects such as model villages, laying barbed wire fencing, land cultivation and military building maintenance.<sup>17</sup> If a household does not meet its criteria they face threats, beatings and even murder by the authorities.

These examples show that lists of stateless persons already exist and have been used to perpetuate systematic human rights abuses including administrative and ethnic cleansing of populations. This is a more significant risk in the registration of stateless persons than identity theft, corruption in the system of obtaining data and the vulnerability of data storage as stated by Milbrandt.<sup>18</sup> Instead of registration, in certain contexts we should consider other methods of enhancing our understanding of the scale and consequences of statelessness. These methods may include, but are not limited to broad mapping, legal analysis, regional/country/population profiles and interviews with the stateless populations. The method chosen should depend on the

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<sup>15</sup> National Coalition Government of Burma, “Burma Human Rights Yearbook 2008”, (Human Rights Documentation Unit 2008), <http://www.ncgub.net/NCGUB/mediagallery/downloadc516.pdf?mid=20091123192152709> (21<sup>st</sup> November 2011)

<sup>16</sup> Refugees International, “Bangladesh: The Silent Crisis Field Report” (2009), <<http://www.refugeesinternational.org/policy/field-report/bangladesh-silent-crisis>> (10<sup>th</sup> November 2011) pp:2

<sup>17</sup> NUI Galway, “Crimes against Humanity in Western Burma: The Situation of the Rohingyas” (2010) <[www.nuigalway.ie/human\\_rights/documents/ichr\\_rohingya\\_report\\_2010.pdf](http://www.nuigalway.ie/human_rights/documents/ichr_rohingya_report_2010.pdf)> (12<sup>th</sup> November 2011), pp:11

<sup>18</sup> Jay Milbrandt. “Stateless”, *Cardozo Journal of International and Comparative Law (JICL)*, 20(1) (Fall 2011), 75-104, pp:101

context in which the stateless are found. Research along these lines has been undertaken by the UNHCR and several non-governmental organisations. While much more work is required these efforts have proved fruitful in assisting our understating of statelessness. Efforts should be focused on these methods of research which are more adaptable and can allow the researcher to more effectively negotiate the contexts of statelessness. This is not only a more pragmatic approach than global registration, in terms of funding, resources and feasibility but also avoids many of the potential dangers of increasing the vulnerability of the stateless populations in question.

### **Concluding remarks**

Milbrandt's article starts with a failure to clearly state who is to be included in global registration of stateless persons, notably by adopting the theoretically questionable concept of *de facto* statelessness. When this is compounded with the more pragmatic issues of the resistance that such registration may receive in certain socio-political context and the vast cost of such an undertaking, Milbrandt's registration scheme seems highly improbable. It could also potentially redirect much need resources away from more fruitful methods of understanding statelessness and short term assistance and protection schemes that many stateless so desperately need. Following this alternative dangers of registering the stateless have been highlighted by drawing on the examples of the treatments of the Jews by the German Reich during the Second World War and the current situation of the Rohingya in Myanmar.

I do not wish to completely discredit the idea of registration of stateless persons but I question whether this is the solution to statelessness in all contexts. If, in the unlikely event, the issues of feasibility of registration were to be overcome, I fear that ignoring the context in which stateless persons find themselves we could potentially place some of the stateless in a more vulnerable position. To truly begin to understanding statelessness and avoid these risks we will need to draw on context specific understanding of statelessness. It is this understanding that will be the most useful to tailor our responses to most effectively reduce and prevent statelessness.