Statelessness

written by Andra le Roux-Kemp
January, 2016

'Statelessness' is a legal status denoting lack of any nationality, a status whereby the otherwise normal link between an individual and a state is absent (Conklin, 2014)

With this seemingly cinch introductory statement, William Conklin, in his monograph *Statelessness: The Enigma of an International Community*, opens the proverbial can of worms as he tackles some of the thorniest issues in contemporary international law.

Statelessness is not a recent phenomenon and examples of persons trapped in what has been described as a "legal vacuum, legal black hole, legal anomaly, anomalous zone or a liminal legal zone" can be found throughout history and as early as the sixth century BC when the community of the Jewish faith was expelled from Judea to Babylon (p. 3 & 5). Likewise, efforts to eradicate statelessness have also abound. Hannah Arendt, for example, attributed statelessness to ethnic nationalism and advocated the need for a civic, rather than an ethnic, state (p. 11; Arendt 1979: 289-290).

Efforts by the international community aimed at reducing and eradicating statelessness have, however, focused on the codification of international rules that curtail practices that lead to statelessness (for example, the Convention Relating to the Status of Refugees (1951), the Convention Relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961)). These international instruments provide, *inter alia*, for the proscription of any state from denaturalising its nationals, the establishment of a presumption of nationality in the succession of states (i.e. where one state conquers or annexes the territory of another), international rules aimed at resolving conflicts in domestic laws that may result in statelessness, and related measures like the assertion that nationality must be conferred upon birth and that stateless persons should be afforded some legal status within the international order (p. 13-18).

Yet, despite such collective efforts spanning many decades and involving many states, statelessness remains a widespread problem with dire legal, social, and economic consequences (Chapter 3). In 2011/2012, the UNHCR estimated that there were approximately 12 million persons worldwide who are stateless, i.e. have not been assigned a nationality by operation of a State's domestic law (p. 7). The UNHCR furthermore warned that this number is only an estimate and that the true extent of statelessness may actually be much higher as it is often difficult for states to recognise and document accurately who is stateless, especially during times of internal conflict and inter-state warfare (p. 8-9). Many "new causes" of statelessness have, of course, also emerged in recent years, particularly due to widespread and irregular migration, human trafficking and the

displacement of millions of refugees (p. 19).

Photo by Photo Unit (flickr, CC BY-NC-ND 2.0)

> *In Statelessness, Conklin considers the ongoing problem of statelessness as a consequence of the dichotomy that is created by the two discourses on the nature of the international community.*

He presents a methodological and meticulously crafted argument that requires the reader to engage with the content from cover to cover, rather than dipping into it at random. With the first and last of the ten chapters offering a succinct roadmap of the content and main assertions of this monograph, the eight content chapters also provides a wealth of examples from case law and references to incidences and statistics from jurisdictions across the globe; the result of many years of research that Conklin himself recognises in the acknowledgement section to the book.

While it is impossible to capture and reiterate the whole of Conklin's contribution on the issue of statelessness in international law, an attempt is made below to give readers a glimpse of the primary tenets underpinning his argument. As already indicated above, Conklin considers the problem of statelessness as a consequence of the dichotomy that is created by the two discourses on the nature of the international community.

The first discourse describes and delineates the international community with reference to and in terms of international law that recognises, justifies, and protects a state's inherent autonomy and powers to enact and administer laws over all persons and objects within its boundaries, and to the exclusion of any external interference (p. 2). In other words, the international community in terms of this discourse "is constituted from an aggregate of the wills of states", and international standards remain no more than "oughts" in an idealised

international community (p. 26). The second discourse of an international community, on the other hand, "claims a universality that is protective of all natural persons of the globe" and is often described as "the international community as a whole" (p. 1 & 3). This discourse suggests a universal jurisdiction that exists independent of the choices and powers of states. Thus, while the first discourse of international community emerges from the legal bond that exists between a natural person and his or her allegiance to a state, the second discourse of an "international community as a whole" emphasises a legal bond that is "nested in the social relationships of natural persons" (p. 4).

> *The international community in terms of this second discourse exists therefore "as a whole", rather than as a product of the aggregated wills of individual states (p. 26).*

In fact, Conklin argues that the "international community as a whole" constitutes something greater than the sum of the aggregated wills of individual states (p. 31 & 35). While the Universal Declaration of Human Rights (UNDHR) has therefore been held as guaranteeing the universality of the international community more than any other international instrument, the state-centric international community of the first discourse described above also has universalist claims of its own that stems from a bounded domain reserve initially elaborated upon by Emerich de Vattel (1714-67), and that takes the form of a universal and exclusive authority over all matters within its boundaries (p. 6 & 86). This universal and autonomous jurisdiction of states is furthermore recognised and reaffirmed in numerous international instruments, treaties and conventions (p. 154; see, for example, the Montevideo Convention on the Rights and Duties of States (1933), article 2(7) of the UN Chater, Article 15(8) of the League of Nations Covenant, and more specifically with regard to nationality see article 1 of the Rome Convention (1922)).

Photo by United States Mission Geneva (flickr, CC BY-NC-ND 2.0)

Conklin submits that these competing claims emanating from the existing two discourses on the nature of the international community are central to the ongoing problem of statelessness. The first discourse of international community, which became firmly established in the late eighteenth century, highlights the autonomy and powers of a state to confer, withdraw, and withhold nationality (p. 1-6). The second conceptualisation of the "international community as a whole", which has only emerged in recent decades post-Second World War, emphasises effective nationality that is encapsulated by way of socially experienced relationships and that goes beyond the mere allegiance of a subject to a particular state (p. 4).

> *Both these two discourses represent a legal reality and to truly come to terms with the problem of statelessness, a compromise needs to be found.*

Conklin finds this compromise in a legal historical analysis of the origin and evolution of these two discourses in international law, and specifically in terms of the pivotal role that social relationships have played in its development. He argues that our social relationships precede any legal deliberation of our nationality, just as our social connectedness embodies our belonging to an international community as a whole before signifying our relationship to a particular state or states (p. 228).

The state is therefore at best a third party to the legal bond that is generated by our social relationships (p. 233). While the key to a state's autonomous powers is the boundary of the residuary of the international community, that boundary is actually "an intellectual construction of the international community and not the state" (p. 33). The state is therefore no longer the ultimate referent on all issues of law and governance and the protected internal jurisdiction of states has since been displaced and is "increasingly being rendered transparent by universal claims in human rights law, peremptory norms and humanitarian law" (p. 52).

The "international community as a whole" discourse that emerged post-Second World War therefore asks us to revert our attention back to the importance of

social relationships in establishing connections and belonging, and with regard to nationality specifically, to look beyond the legal bond as effective nationality to evidence of social relationships as a prior legal phenomenon of the reserved domain (p. 179-180).

The time is certainly ripe to ask whether we should not rather respect and give effect to natural persons' desire to self-identify with a state of their choice and to voluntarily choose their nationality (p. 183).

> *This is indeed recognised in international law in terms of, for example, Article 12 of the International Covenant on Civil and Political Rights (ICCPR) (1966), which guarantees every person the freedom to choose their residence.*

This is also in line with the respect for the will of the individual that has become paramount with the development of human rights law (p. 184; ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' in Report of the ILC on the Work of Its Fifty-Third Session, UN GAOR 56th Sess, UN Doc A / 56/10 (Supp No 10 2001)). Currently, however, this freedom that natural persons have to choose their nationality is tempered by, and subject to, states' reserved domain (p. 185).

Conklin rightly warns that statelessness is not merely a matter of academic interest (p. 134), and in the globalised world in which we live today, where it is estimated that 215 to 232 million people no longer inhabit the territory of their birth, the time has certainly come for us to reconsider our legal posits on belonging in an "international community as a whole" (p. 130 & 223).

References

Arendt, Hannah. 1979 [1951]. The Origins of Totalitarianism New York: Harcourt Brace Jovanovich, 289-290.
Charter of the United Nations (UN Charter) (1945).
Convention Relating to the Status of Refugees (1951).

Convention Relating to the Status of Stateless Persons (1954).
Convention on the Reduction of Statelessness (1961).
Covenant of the League of Nations (League of Nations Covenant) (1919).
ILC ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ in Report of the ILC on the Work of Its Fifty-Third Session, UN GAOR 56th Sess, UN Doc A / 56/10 (Supp No 10 2001).
International Covenant on Civil and Political Rights (ICCPR) (1966).
Montevideo Convention on the Rights and Duties of States (1933).
Rome Convention (1922).

Conklin, William E. 2014. *Statelessness: The Enigma of the International Community*. Oxford: Hart Publishing. 380 pp. Hb: £60.00. ISBN: 9781849465076.

****

Featured image (cropped) by Chris Devers (flickr, CC BY-NC-ND 2.0)