THE *DE FACTO* STATELESS PERSON – A MYTHOLOGICAL REALITY?[1]

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Abstract

Stateless persons are categorised as *de facto* or *de jure*. The *de jure* stateless person has convention rights assured by virtue of the provisions within the Stateless Persons Convention 1954. As such international law comes to the aid of the *de jure* stateless person. The *de facto* stateless person however is not similarly protected by any convention. Although there is mention of inclusion of *de facto* statelessness in the Stateless Persons Convention 1954 and the Reduction of Statelessness Convention 1961, this inclusion of *de facto* statelessness is located within the Final Acts of both conventions and is therefore non-binding. There is in fact no clear definition of who a *de facto* stateless person is. Nevertheless regardless of whether a stateless person is *de facto* or *de jure*, the consequences of statelessness are indeed grave. In Malaysia there are communities that have *de facto* stateless persons in their midst. These communities include the stateless children of Sabah, the undocumented Orang Asli and Indians in Peninsular Malaysia amongst others. Traditional approaches to *de facto* statelessness have been more inclusive compared to the more recent attempts at defining this category of statelessness. The contemporary exclusive approach leaves quite a few groups of *de facto* stateless persons out of this category of statelessness and as such they do not fall within the purview of international law. The paper examines both traditional and contemporary approaches to *de facto* statelessness within the Malaysian context and provides justification for a more inclusive definition of *de facto* statelessness, thereby allowing more stateless persons within a municipal system to benefit from international law protection.

Keywords: stateless; *de facto* stateless; *de jure* stateless; refugees; *jus sanguinis*

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1. Introduction

A stateless person is one that does not receive legal protection within the State but can come within the purview of international law. Waas states that 'the protection of the stateless has become an integral part of overall human rights protection and stateless individuals can rely on the international legal framework in the same way as persons who do hold a nationality.'[2] When a person is categorised as stateless, the question arises as to who benefits from such a categorisation, should it be the State or the individual suffering the plight of statelessness? According to Article 1 of the Convention Relating to the Status of Stateless Persons 1954 a stateless person is 'one who is not considered as a national by any state under the operation of its law'. The definition being a pure legal definition does not allude to the quality of nationality, the manner in which nationality is granted, or access to a nationality.[3] It excludes those persons with ineffective nationality; are unable to establish their nationality or those who are given nationality other than the nationality of their State habitual residence in cases of State succession. Hence the convention definition relates to *de jure* statelessness i.e. statelessness as of law. There is however the problem of *de facto* statelessness as well where one is unable to say that one is a national of a State as of fact.

The underlying premise for an exclusive convention definition for statelessness is based on the fact that historically it was perceived that all those who were *de facto* stateless were probably refugees and the Convention on the Status of Refugees 1951 would cover this group of persons. The Refugee has been defined in the Conventions Relating to the Status of Refugees 1951 and its protocol as a person: 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of his country of 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'.[4]

From the foregoing definitions on stateless persons and refugees, it is obvious that many persons have fallen through the gaps of the Stateless Persons Convention and the Refugees Convention and remain without national protection. They may not be *de jure* stateless but neither are they refugees. Whilst *de jure* statelessness is a legal problem and the refugee issue is a

[2] Laura van Waas, 'Nationality and Rights' in Brad K Blitz and Maureen Lynch, *Statelessness and the Benefits of Citizenship: A Comparative Study* (Oxford Brookes University 2009) 26.
[3] Marilyn Achiron, *Nationality and Statelessness: A Handbook for Parliamentarians* (SADAG Imprimerie 2008) 17.
[4] Convention Relating to the Status of Refugees [1951] 189 UNTS 150.

humanitarian problem, the *de facto* stateless persons fit somewhere in between. It can be said that *de facto* statelessness poses a factual problem.

An exclusive definition on statelessness does have its merits though. States might be all too pleased to have a person categorised as stateless as this would bring the person within the purview of international law. It can be seen as a transfer of the burden of statelessness from the municipal system to the international system. According to Harvey 'A State which strips persons of its nationality and expels them might be only too pleased to see them cut loose and left to float free as stateless, especially if this entailed obligations upon other States to take them in and absorb them.'[5] Limiting the definition compels the State to deal with the issue of *de facto* statelessness internally without international law assistance. This stance however does not serve to benefit the individuals within the State. The plight of the stateless person does not emerge as effectively as that of the refugee. The story of statelessness is not easy to define and not easily understood; it lacks credible solutions at a global level. There is also a lack of political will in dealing with this issue of statelessness.[6] The fact that there is further categorisation of stateless persons to include *de jure* and *de facto* statelessness merely exacerbates the issue of non-emergence of the plight of the stateless person. If the matter of *de facto* stateless persons is kept at a municipal level, this may lead to protracted cases of statelessness without external pressure which would nudge States into resolving the issue. Since the right to a nationality is indeed the right to have rights, such instances of statelessness should no longer be occurring within municipal systems.

2. Development of a Definition to *De facto* Statelessness

The Study of Statelessness of 1949 defined *de facto* stateless persons as persons who:

…having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because the authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.[7]

The Constitution of the International Refugee Organisation (IRO) in its Annex 1 stipulates that a *de facto* stateless person is:

…a person … who … is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.[8]

[5] Alison Harvey, 'Statelessness: the '*de facto*' statelessness debate' (2010) 24(3) JIANL 257, 263.
[6] Lindsey Nicole Kingston, *Legal Invisibility: Statelessness and Issue (Non) Emergence*, (Ph.D. Thesis, Graduate School of Syracuse University 2009) 7.
[7] The United Nations, A Study of Statelessness ([6], UN Doc E/1112,E1112/Add.I 1949) 6.
[8] ibid 6.

A more contemporary definition is provided in The Handbook for Parliamentarians:

(a *de facto* stateless person is)… unable to demonstrate that he/she is *de jure* stateless, yet he / she has no effective nationality and does not enjoy national protection[9]

The definitions above remain useful reference points albeit are non-binding as they are not convention definitions.

Even though the convention definition of statelessness does not include the *de facto* stateless, nevertheless the notion of *de facto* statelessness has a place within the Stateless Persons Conventions. The Final Act to the Stateless Persons Convention recommends that each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the convention accords to stateless persons.

After the Stateless Persons Convention was formulated, a Conference on the Elimination or Reduction of Future Statelessness Convention was convened in March 1959 in Geneva. The Conference continued with their work in 1961 which resulted in the 1961 Convention on the Reduction of Statelessness.[10] Again it is in the Final Act which provides for *de facto* statelessness. Resolution I of the Final Act of the 1961 Reduction of Statelessness Convention recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire effective nationality. States party to these conventions therefore have the alternative to provide the *de facto* stateless person the kind of protection accorded to the *de jure* stateless persons through the Final Acts of these two conventions.

3. De facto Stateless Groups in Malaysia

There are countless instances of *de facto* statelessness that can arise around the world. Examples prevalent within Malaysia include situations whereby births are not registered, technical or procedural glitches that might cause one to lose ones nationality without acquiring a new one or conflict of nationality law where a child is born in Malaysia which practices the *jus sanguinis* principle on acquisition of nationality but whose parents come from a State that practices the *jus soli* principle. It has been observed that the predominant cause of *de facto* statelessness in Peninsular Malaysia is failure to register births. Malaysia currently grants nationality by way of *jus sanguinis*. According the S.1(a) Part II of

[9] Achiron (3) 11.
[10] Hugh Masey, *Legal and Protection Policy Research Series* (LPPR/2010/01) 31-32.

the 2nd Schedule to the Federal Constitution of Malaysia, this means that a person is only entitled to citizenship of Malaysia provided either parent is a citizen or permanent resident of Malaysia. If the parents are without documents, then the registration of the birth of the child would be arduous and may require costly procedures such as DNA testing to prove parentage. Children can therefore inherit the stateless condition of their parents. In West Malaysia specific groups of people that still have *de facto* stateless persons in their midst include ethnic Indians and the Orang Asli.

4. *De facto* Stateless Indians and Orang Asli

The diverse stateless populations of Malaysia is demonstrated through their origins. The stateless Indians and Orang Asli originate from different geographical locations and have come into the Malaysia during different periods of time. Indian migration into Malaysia began as early as 1786 during British rule. Most migrant workers that came from India were labourers.[11] The first two decades of the 20th century saw the rise in demand for rubber. Tamil labourers were brought into Peninsular Malaysia to work in the rubber plantations.[12] The Tamil labourers that came into the country were predominantly ill-educated or totally illiterate, poorly paid, lived in scattered, isolated groups housed in 'coolie lines' located on the estates in which they were employed.[13] Their conditions remained despondent even after the British left the country upon independence in 1957 as rubber and palm oil plantations are still home to some of the poorest Indians in Malaysia.[14]

Due to a life of alienation or exploitation in the estates, there have been children found not to be properly registered after birth and adults that have no identification card to establish their identity.[15] Hence they have been known as the "invisible Malaysians".[16] Data collected by Era Consumer's community centers in the States of Kedah, Perak, Selangor and Negeri Sembilan estimated the number of Indians to be without birth certificates, identity cards or even marriage certificates to be about 20,000 in the year 2006.[17] Governmental

[11] Sandhu Kernial Singh, *Indians in Malaya: Some Aspects of Their Immigration and Settlement 1786-1957* (Cambridge University Press 1969).
[12] H.E. Wilson, 'Labour, Plantations and Politics in Pre-War Malaya: The Selangor Riots' (1941) CJH 87.
[13] Ibid 88.
[14] Zafar Anjum, 'Indian Discontent in Malaysia' 2007 Asia Sentinal Consulting < http://www.asiasentinel.com/index.php?option=com_content&task=view&id=900&Itemid=31> accessed 18 July 2012.
[15] Ramdas Tikamdas, 'The Right to Identity under the Constitution and International Law', *Statelessness: An Obstacle to Economic Empowerment* (Malaysia, 2006)1.
[16] Ibid 1.
[17] Ibid 2.

officials place the number to about 3,000 to 4,000 persons in the year 2011.[18] Non-governmental agencies like Era Consumer believe that the official numbers are far from accurate.[19]

The Orang Asli of Malaysia on the other hand, have been in this country since time immemorial. The Orang Asli of Peninsular Malaysia currently refer to different aboriginal groups living in the peninsula that make up only about 0.6% of the Malaysian population as at 2004.[20] The different groups of Orang Asli have been categorized broadly as the Semang-Negrito, the Senoi and the Proto-Malay. The Semang-Negrito have been in Malaysia for over 25,000 years and are believed to have originated from populations of the Sunda Landmass and New Guinea.[21] The Senoi migrated from Mainland South East Asia at around 2,000 BC and the Proto-Malay from Borneo and Sumatra about 4,000 years ago.[22] These are further divided into eighteen 'aboriginal ethnic groups'.[23] They are scattered in all parts of the peninsula except for the States of Perlis and Penang.[24]

A variety of terms were used to name the Orang Asli of Peninsular Malaysia. The Orang Asli initially referred as 'Jakun' or 'Sakai'. The terms implied an economically and socially primitive society and were terms detested by the Orang Asli themselves[25]. The terms were therefore derogatory. These terms separated them from the majority indigenous group which is the Malay community of the peninsula which upon taking control of the peninsula, was deemed the definitive peoples of the peninsula and the territory became known as the 'Malay Peninsula'.[26] The name 'Orang Asli' which means 'original people' was later given to them by the British rulers chiefly to gain their loyalty in the fight against the communist.[27] The distinction between the indigenous peoples

[18] Datuk Sri Subramaniam, 'My Daftar Campaign' To Target As Many Indians As Possible' *Beranama.com* < http://www.bernama.com/bernama/v5/newsindex.php?id=563818> (Kuala Lumpur 15 February 2011).

[19] Nanthini Ramalo, 'Stateless Undocumented Indians' (*DHRRA Malaysia*, 23 September 2011)< http://www.seahrw.org/v1/index.php?option=com_content&view=article&id=60:stateless-undocumented-indians&catid=39:malaysia&Itemid=67 > accessed 18 June 2012.

[20] Datuk Abu Jabar Che Nai, 'Empowering the Orang Asli' *Star Online* <http://thestar.com.my/news/story.asp?file=/2010/5/26/focus/6335356&sec=focus> (Kuala Lumpur 26 May 2010).

[21] William White Howells, *Getting Here: The Story of Human Evolution*, (Compass Press, 1997) 203.

[22] Iskandar Carey, *Orang Asli: The Aboriginal Tribes of Peninsular Malaysia*, (Oxford University Press, 1976) 13-18.

[23] Yahya Awang, *Kajian Mengenai Masalah Ketiadaan Dokumen Pengenalan Diri Di Kalangan Masyarakat Orang Asli Semenanjung Malaysia* (Centre For Malaysian Indigenous Studies, University Malaya 2010) 1.

[24] ibid 1.

[25] Colin Nicholas, 'The Orang Asli: Origins and Classification' (Vol I2 *Peoples and Traditions*, Encyclopeadia Malaysiana) 20.

[26]Alice Nah, '(Re) Mapping Indigenous 'Race'/Place in Postcolonial Peninsular Malaysia' (2006) 88B (3) SSAG 286.

[27] Asia Indigenous and Tribal Peoples Network, *The Department of Orang Asli Affairs, Malaysia-An Agency For Assimilation* (2008) 4.

however still remain. The Orang Asli are still known as the aborigines of the Malay Peninsula[28] and this term carries a "semantic load" according to Anderson.[29] There are certain inferences placed on certain groups. The aborigines were no doubt indigenous peoples but they were a certain sort of indigenous peoples, in the sense that they were a "primitive people whose inevitable fate was cultural extinction".[30]

The Orang Asli do not have specific provisions within the Federal Constitution that safeguard their rights as the other indigenous communities like the Malays and the indigenous people of Sabah and Sarawak do.[31] The Federal Constitution merely defines who the Orang Asli is without giving them additional rights or privileges.[32] The Orang Asli are dependent on rights that may be created by statute, as Article 8 (5)(c) of the Federal Constitution[33] stipulates that law created for the protection, well-being or advancement of the aboriginal peoples shall not be invalidated or prohibited on the basis of lack of equality. It is submitted that the Federal Constitution only provides for the negative obligation of not invalidating rather than the positive obligation of granting rights to the Orang Asli as it is part of the exemptions to Article 8 of the Federal Constitution.

The Aboriginal Peoples Act 1954 (Act 134)[34] has given authority to the '*Jabatan Kemajuan Orang Asli*' (JAKOA) to safeguard the welfare of the Orang Asli. The Orang Asli are the only people who are officially under the authority of a governmental department. The paternal approach employed only accentuates the perception that the Orang Asli are a primitive group who are unable to fend for themselves. Hence they are doubly marginalized by being both *de facto* stateless and indigenous.

One of the predominant causes of de facto statelessness amongst the orang asli is failure to register births. Several factors exist which causes the Orang Asli to omit registering births. Low literacy rates amongst the Orang Asli of Peninsular Malaysia make it difficult for them to complete registration forms. Additionally, they suffer from the lack of understanding regarding the importance of registration of births.[35] Orang Asli families depend on the JAKOA and civil society for assistance in the administrative tasks related to registration of births.

Certain Orang Asli communities do not name their children at birth due to the fear of ill faith for the child as it is seen as a bad omen to name the child too

[28] Article 160 of the Federal Constitution.
[29] B.R.O'G Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd Edn,Verso 1991) 122.
[30] Herbert Dean Noone, 'Report on the settlements and welfare of the Ple-Temiar Senoi of the Perak-Kelantan watershed' (1936) 19 (Part 1) JFMSM, 72.
[31] Federal Constitution of Malaysia 1957, Article 153.
[32] Federal Constitution of Malaysia 1957, Article 160 (2).
[33] Federal Constitution of Malaysia 1957, Article 8 (5) (c).
[34] The Aboriginal Peoples Act 1954 (Act 134).
[35] Yahya Awang (n 23) 76.

early. As such, they may pass the deadline for registration of births, which is two weeks. Some of the Orang Asli communities do not have permanent places of abode, which is a hindrance to registration as well.[36]

The Orang Asli living in remote areas also have difficulty gaining access to the Registration Departments that are situated in urban areas and cities. Oftentimes, transportation fees are too high to bear. The Orang Asli predominantly live in isolated communities and their only link with the mainstream public is the JAKOA. If the officers of the department are not vigilant in their responsibility towards the Orang Asli, then Orang Asli children may forego birth certificates.[37] Research conducted by Awang finds that out of the 147 Orang Asli respondents from villages within Perak, Pahang and Kelantan, 98% of them do not have birth certificates.[38] Interestingly, only 22.9% of them do not have identity cards.[39] This is a positive finding that implies that registration efforts have stepped up over the years within the various organs of the JAKOA department within the State.

From the historical illustration given above, one can deduce that the situation of statelessness arises for both the Indians and the Orang Asli by virtue of the fact that their births and subsequent births of their children may not be registered.

5. Sabah stateless of Filipino Descent

In East Malaysia, there are different groups of *de facto* stateless persons that give rise to different causes of *de facto* statelessness. East Malaysia hosts a large group of persons of Filipino descent. The geographical landscape of Sabah has over the years allowed for easy albeit illegal access into Sabah for Philippine citizens[40]. This has given rise to the problem of stateless persons residing in Sabah.

Specifically, during the Mindanao insurgency in the Philippines under the authoritarian rule of President Marcos, migration took place from the Philippines to Sabah. This took place between 1970 and 1977 and at that point of time the migrants were in fact refugees of Suluk and Bajau origin. They settled in the towns of Sandakan, Tawau and Lahad Datu.[41] As of 1974 54,000 IMM-13 documents were issued in Sabah under Regulation 11 (10), Immigration Regulations 1963[42]. The IMM-13 permit issued under the Regulations allows the holder to reside and work in Malaysia but the card is renewable on a yearly basis.

[36] Yahya Awang (n 23) 65.
[37] Yahya Awang (n 23) 76.
[38] Yahya Awang (n 23) 32.
[39] Yahya Awang (n 23) 32.
[40] Tenaganita, 'Acting Today for Tomorrow's Generation, Asia Pacific Mission for Migrants and Christian Conference of Asia – Urban and Rural Mission', *Regional Conference on Stateless / Undocumented Children of Sabah* (Malaysia, 2005) 22.
[41] Kamal Sadiq, 'When States Prefer Non-Citizens Over Citizens: Conflict Over Illegal Immigration into Malaysia' (2005) 49 ISQ 106.
[42] Immigration Regulations 1963, L.N. 228/1963.

After 1978, even more persons claiming to be refugees from the Philippines began to make their way to Sabah. Technically however the reasons for the refugee status had ended as there was a peace treaty between the Philippines Government and the Moro Liberation Front.[43] As such those that arrived post-1977 were in fact economic migrants who were fortunate enough to be able to establish networks with earlier arrivals to Sabah.

It is through this backdrop of events that has led to the population growth in Sabah from 0.65 million in 1970 to 3.04 million in 2009.[44] There are about 610,104 documented workers in Sabah.[45] Non-governmental Organisations estimate that there could be more than two million illegal immigrants.[46] That would allow for the existence of at least 10,000 children in Sabah to be stateless in 2005.[47] The numbers would clearly be more today. Hence stateless persons residing in Sabah seems to be a problem that will not disappear any time soon.

For persons of Filipino descent residing in Sabah, the situation of *de facto* statelessness arises where the State of residence i.e. Malaysia believes the person to be a national of the State of origin (the Philippines) whilst the State of origin believes the person to be the national of the State of residence. In a sense, this is a conflict of perceptions between States. Giving a narrow definition to *de facto* statelessness may mean confining these instances of *de facto* statelessness within Malaysian jurisdiction.

6. Consequences of Statelessness

Regardless of whether a person is *de facto* or *de jure* stateless, the consequences of statelessness are grave both internationally and municipally. Walker calls it the 'evils of statelessness that can be visited in either two or both of two aspects of his life: 1) his treatment within the country he resides; and 2) his inability to present or have presented on his behalf a claim for a wrong suffered in or at the hands of another territorial community.'[48] Studies have employed a joint approach in researching issues pertaining to *de facto* and *de jure* statelessness

[43] Sadiq (n 41) 106.
[44]'Policy Updates 2010, Migrant Labour', *MWG-JUMP Advocacy Workshop*, Kuala Lumpur, 19th Nov 2010.
[45] Chief Minister Datuk Musa Aman, *Star* (Kuala Lumpur, 19 October 2009).
[46]'Policy Updates 2010, Migrant Labour', *MWG-JUMP Advocacy Workshop* (Kuala Lumpur, 2010).
[47] 'Young and Vulnerable, Stateless Children in Sabah' *The Malay Mail* (Kuala Lumpur,18 July 2005).
[48] Dorothy Jean Walker, 'Violation or Conduit for Violation of Human Rights?' (1981) 3 (1) HRQ 106,115.

and have found that there is no significant difference between the protection needs of *de jure* and *de facto* statelessness.[49]

Within the international arena, the *de facto* stateless person may not be provided with diplomatic protection. He or she may not have an embassy to run too in a foreign State. Municipally all 1st generation and 2nd generation rights may be eschewed from the *de facto* stateless person. For example, in Malaysia one would need some form of documentation in order to receive formalised governmental education. *De facto* stateless persons receive informal education through the initiatives of non-governmental organisations and faith based organisations. The right to formal employment is also lost for the *de facto* stateless person. This results in them acquiring only odd-jobs in order to earn an income in the State. These are the basic rights that every human being needs in order to survive and yet they may not be available to persons who have resided in Malaysia all their life but are not registered nationals of the State.

According to Batchelor, *de facto* stateless persons may languish this way for decades, unable to exercise any of the rights of citizenship and fearful to leave the country in which they reside because they will not be readmitted. As such they are unable to enter the 'country of their ancestors' and, in any event, no longer with significant ties elsewhere.[50] Batchelor's quote aptly describes the plight of the stateless in Sabah. The difference however is that regardless of the risks involved, these stateless persons do leave Sabah to return to the Philippines but make their way back to Malaysia illegally if circumstances permit. At times they are deported back. Deportees find their way back to Sabah since for them it is Sabah and not the Philippines that has become their permanent home.[51]

The Stateless Persons convention provides for extensive protection provisions to the *de jure* stateless person but omits to include the procedural questions of how to determine whether a person is stateless.[52] This is a problem that is prevalent within international law. As such difficulties abound in determining who is stateless within the State let alone *de facto* stateless.

7. Application of the Concept of de facto Statelessness

Not all commentators agree that the concept of *de facto* statelessness even existed. Special Rapporteur to the International Law Commission, Hudson together with Weis preferred the term *de facto* unprotected persons rather than

[49] Gábor Gyulai, *Forgotten Without Reason, Protection of Non-Refugee Stateless Persons in Central Europe*, (Hungarian Helsinki Committee, 2007) 8.
[50] Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(No 1 / 2) IJRL 156, 178.
[51] Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future (June 2009) Vol.47, No.1 Southeast Asian Studies 52, 83
[52] Gyulai (n 49) 11.

de facto stateless.[53] Lauterpacht was of the view that the term *de facto* statelessness was never clearly defined. [54]He also felt that it would be very difficult in practice to make a clear distinction between *de jure* and *de facto* statelessness and that including *de facto* statelessness in a convention that deals with elimination or reduction of future statelessness would impose upon States the duty and give them the right to decide that a person who was a national of State X was not really a national of that State.[55] Apart from which, States would accordingly be obliged to treat *de facto* stateless persons as assimilated in most respects to their own nationals. It has not been well settled as to whether what is needed for *de facto* statelessness to occur is a renunciation of nationality for valid reasons, which is the term used in the Final Act to the Stateless Persons Convention, denial of protection by State, or circumstance where the State is unable to protect the stateless person. Neither is it certain that the individual has to have ineffective nationality or be unable to establish his or her nationality. Different documents provide different reasons for *de facto* statelessness.

Batchelor includes in her definition of *de facto* stateless those who cannot establish their nationality; those with ineffective nationality as well as those who cannot verify their citizenship status without the final declaration of the State.[56] Massey on the other hand provides an alternative point of view. According to him, as a general rule, non-enjoyment of rights attached to nationality does not constitute *de facto* statelessness. The exception lies where the person does not enjoy diplomatic protection and consular assistance of the State of nationality in relation to other States.[57]

As for persons who are unable to establish their nationality or are of undetermined nationality, according to Massey they may be either *de jure* or *de facto* stateless.[58] For persons outside the State whose nationality is at issue, if they are found to be nationals of the State concerned then they are in fact *de facto* stateless provided they are found to be refugees or otherwise unable or unwilling to avail themselves of protection from that State. If they are on the other hand found not to be nationals of the State concerned, they will be *de jure* stateless if they do not have the nationality of another state. For persons inside the State whose nationality is at issue, the persons may not possess any documentation which proves they are nationals of the State concerned and their treatment by that State may suggest that it does not regard them as nationals, or that State may even have made an initial determination that they are not its

[53] Manley Ottmer Hudson, *Report on Nationality, Including Statelessness* (A/CN.4/50, 1952) 17.
[54] Hersch Lauterpacht, *Summary record of the 246th meeting of the International Law Commission*, (A/CN.4/SR.246, 1954) para18.
[55] Hersch Lauterpacht, *Summary record of the 249th meeting of the International Law Commission*, (A/CN.4/SR.249, 1954) paras 15-17.
[56] Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 IJRL232, 257.
[57] Massey (10) 40.
[58] ibid 52.

nationals. Nevertheless the UNHCR or another State may consider that such persons have the nationality of that State. In such cases, such persons may be considered to be *de jure* stateless.[59]

Thirdly, it was also submitted by Massey that *de facto* statelessness does not apply to persons who, in the context of State succession, against their will acquire the nationality of a State other than the State with which they have a genuine and effective link through habitual residence.[60]

Massey goes on to give his own definition on *de facto* statelessness as follows:

De facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.

Persons who have more than one nationality are *de facto* stateless only if they are outside all the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of any of those countries.[61]

Massey's definition is tailored to some extent by the Refugees Convention. It is easy to see how a refugee would be unwilling to avail him or herself of protection from a country that persecutes him or her but there is no clear guidelines as to what amounts to 'valid reasons' to be unwilling to avail oneself of protection within the South East Asian context. Hear lies the conundrum. Should we limit *de facto* statelessness to include very few categories of people within this definition of *de facto* statelessness as Massey does or do we broaden the concept for South East Asia?

Massey's definition of *de facto* statelessness becomes particularly important due to its adoption as part of the Summary Conclusions to the Prato Expert Meeting. [62] The Prato Conclusion goes further to highlight that prolonged non-cooperation including where the country of nationality does not respond to the host country's communications can be considered as a refusal of protection.[63]

Applying Massey's submissions and the subsequent Prato conclusions on the separate categories of *de facto* statelessness to the Malaysian scenario would mean that children with parents of Filipino descent residing in Sabah would probably be *de facto* stateless. However the Indians and Orang Asli without birth

[59] ibid 53.
[60] ibid 60.
[61] ibid 60.
[62] United Nations High Commissioner for Refugees, *Expert Meeting The Concept of Stateless Persons under International Law Summary Conclusions, Prato Conclusions* (II (A) 2, Prato Conclusions 2010) < http://www.refworld.org/docid/4calae002.html> accessed 20 March 2014.
[63] Ibid 7.

certificates would not be considered to be stateless at all. At the most they would be 'undocumented Malaysians.' These instances of lack of documentation will not be taken cognizance of within the international sphere.

Paragraph 12(f) of Part II of the Prato Conclusions provide for further respite for the stateless in Sabah that are of Filipino descent as unresolved situations of *de facto* statelessness, in particular over two or more generations, may lead to *de jure* statelessness.[64] Hence they can be placed within the international system of law on stateless persons and rightly so as their prospects of attaining alternative nationality would be close to nil due to the protracted nature of their plight.

8. Possible Approach to *De Facto* Statelessness

Although statelessness comes within the purview of international law and is negotiated upon at State level, resolutions of conflict may be better achieved at a lower level. States may come up with sophisticated legal constructs that look good on paper but remain artificial as it fails to address the human problem of statelessness. The author recommends the following approach in handling the issue of *de facto* statelessness. There ought to be a convention definition of *de facto* statelessness which ought not mirror the exclusivity of the *de jure* stateless definition of the Stateless Persons Convention but rather be more inclusive and all-embracing covering cases on the uncertainty of lawful place of citizenship as the Sabah Stateless. This would be the only way in which the plight of the *de facto* stateless person in developing countries like Malaysia would be able to emerge within the international arena. This emergence in the author's point of view puts positive pressure on States to address the problem of *de facto* statelessness. The cases of unregistered births as faced by the ethnic Indians and Orang Asli on the other hand remain within the domestic sphere since they are eligible to Malaysian citizenship based on the *jus sanguinis* principle of acquisition of nationality.

Although, the plight of the stateless person in general lacks clarity compared to the plight of refugees, nevertheless international media attention and general awareness is what's needed in cases such as these. In metaphorical terms it is more a case of cleaning one's own backyard rather than washing dirty linen in public. There have been instances where the status of statelessness had proved more advantageous compared to nationality.[65] It is the author's contention that perhaps being *de facto* stateless may prove more beneficial to those without documents residing in Malaysia compared to being considered to be an undocumented Malaysian since international law takes cognizance of both *de facto* and *de jure* statelessness specifically for the stateless persons of Sabah. Furthermore, the more inclusive the international law definition of *de facto* is, the more inclusive would be its incorporation within municipal levels. As

[64] Ibid 8.
[65] Walker (48) 115.

stipulated in the Hungarian Helsinki Committee analysis, it is in the States' interest to find an efficient and lawful solution for *de facto* stateless persons, avoiding thus unnecessary social risks their permanent state of legal limbo may cause.[66]

The inclusive definition of statelessness does not shift the burden from the municipal system to the international system but keeps the *de facto* stateless person within the periphery of both levels. Mutual communication in a non-hierarchical manner is pertinent in order to begin to resolve the problems relating to *de facto* statelessness and to close the protection gap that arises with minimal financial implications. Kept at the municipal level, certain *de facto* stateless persons like the Stateless of Sabah may find him or herself languishing without rights for years on end.

9. Conclusion

In conclusion, the research focusses on the *de facto* stateless person and the need for greater international law visibility of their plight. Much of the support and provision of rights to the stateless person has been created within the international sphere. The Indians and the Orang Asli without documents in Malaysia have difficulty gaining access to rights within the State but unfortunately do not fall within the international law purview with regards to statelessness as more recent jurisprudence in relation to *de facto* statelessness excludes the circumstances that they fall under. It is only the Sabah children that may fall within the purview of international law by virtue of their potentially *de facto* stateless existence in Sabah. This however is still moot and is yet to be tested at both municipal and international legal systems.

The researcher makes a recommendation that would assist the *de facto* stateless person through a holistic and clear interpretation of the treaty definition on statelessness to cover both *de jure* and *de facto* stateless persons so as to ensure that implementation of law will ultimately allow for all stateless persons within Malaysia to live with dignity.

[66] Gyulai (49) 37.