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**Those Fleeing States  
Destroyed by Climate Change  
Are Convention Refugees**

*Abstract*

Multiple states are at risk of becoming uninhabitable due to climate change, forcing their populations to flee. While the 1951 Refugee Convention provides the gold standard of international protection, it is only applied to a limited subset of people fleeing their countries, those who suffer persecution, which most people fleeing climate change cannot establish. While many journalists and non-lawyers freely use the term “climate refugees,” governments, and courts, as well as UNHCR and many refugee experts, have excluded most climate refugees from the Convention as a matter of legal interpretation. In our 2015 paper, “Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change”, we sought to reopen the debate on “climate refugees” by arguing that some climate refugees qualify under the 1951 Convention as it is currently written: those who are stateless and are unable to return to their country of origin because climate change has rendered it uninhabitable. We rely on extensive legal analysis and the writings of experts. Our interpretation, however, has been rejected by Goodwin-Gill and McAdam (2021) and Foster and Lambert (2019), which explicitly responds to our paper. Here, we address and respond to their arguments.

*Keywords:* refugee, climate change, statelessness, sovereignty, small island states, 1951 Convention

*Introduction*

Multiple states are at risk of becoming uninhabitable due to rising seas and desertification (World Meteorological Organization 2022), forcing their populations to flee, joining millions of others fleeing war, famine,

earthquakes, and other emergencies. It is impossible to overstate the importance of the right to asylum, as guaranteed by the 1951 Refugee Convention, to those forced to flee. It provides the gold standard of international protection. The Convention, however, is only applied to a limited subset of people fleeing their countries, those who suffer persecution (UNGA 1951). Every year, millions of people fleeing emergencies are deported because they cannot meet the Convention's requirements, or they are granted an inferior legal status, one that is temporary, offers few rights, and/or can be revoked. This is the situation in which most people fleeing climate change now find themselves. The circumstances of the inhabitants of low-lying islands and desert countries are particularly dire, with many facing an existential threat, yet holding no right to enter and reside in another country unless they qualify for asylum on additional, separate grounds.

The messaging on this issue can be confusing. Many point out that small islanders do not wish to become refugees (United Nations Sustainable Development Goals Blog 2019). But wishing not to become a refugee is like wishing not to have to use your parachute. Obviously, most people do not want to be in a situation where they must use a parachute, but that is no reason not to give them one.<sup>1</sup>

Given its singular role in protecting those forced to flee and the dire consequences of being excluded, courts, experts, and politicians around the world debate every clause and term in the Convention. With 149 states parties and many more governments guided by its principles, any change in interpreting the Convention could mean life or death for millions of people. Guiding interpretation of the Convention is one of the main functions of UNHCR, the UN refugee agency, under its mandate, and the agency views itself as the Convention's protector in a world of states increasingly skeptical of asylum and hostile to migration (Hall 2011). The Convention is constantly under threat from governments who

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<sup>1</sup> The real question here is whether accepting refugee status might somehow interfere with other remedies, such as compensation or reparations (Buxton 2019), e.g. the ceding of new territory to the affected states, or the continued recognition of their governments in exile. There need be no competition between these strategies: we can try to stop the plane from crashing, while also ensuring that everyone on board has a parachute.

wish to reassert their absolute territorial sovereignty and resent being constrained by a treaty drafted decades ago. As a result, there is great anxiety over the fate of the Convention among experts, academics, advocates and UNHCR, producing what can only be described as a siege mentality around the Convention.

The argument over environmental or “climate refugees” has been particularly controversial and fraught. While many journalists and non-lawyers freely use the term, governments and courts, as well as UNHCR and many refugee experts and lawyers, have excluded climate refugees from the Convention as a matter of legal interpretation, to the point where their view has become the received wisdom (see for example Stewart 2023). As a result, most climate refugees cannot currently obtain asylum unless they can prove they have been persecuted. Meanwhile, arguments that climate change is persecution have failed to gain acceptance by lawyers or courts because persecution requires intent to harm. At the same time, enacting a new convention for climate refugees is widely acknowledged to be impossible in today’s political climate (McAdam 2011), so the situation is at an impasse. Proposed solutions for climate refugees in current conversations usually appeal to general principles of justice and fairness or of charity, requiring some kind of (potentially unpopular or difficult) political action from state actors.<sup>2</sup> We agree that such action is essential for a comprehensive political solution to the problems confronted by climate refugees, and that the 1951 Convention is not a comprehensive political solution on its own. But we argue that even in its current form, without any amendment, it helps more than many in the current conversation have recognized: some unpersecuted climate migrants in fact count as Convention refugees, interpreted according to the accepted canons of treaty interpretation, i.e. those laid out in (Vienna Convention 1969).<sup>3</sup>

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<sup>2</sup> See for discussion Bierman and Boas 2010; Buxton 2019; Cole 2022; Draper 2023; UNCTAD News 2019.

<sup>3</sup> Compare Lister (2014), who argues that inclusion of climate refugees is coherent with the underlying logic of the Convention, though not its language, meaning that amendments would still be required. Our aim here, in contrast, is to show that some (unpersecuted) climate refugees are included under the Convention strictly speaking, given its language as well as its logic.

We first argue for this in our 2015 paper, “Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change”. There, we argue that those who are displaced because their home countries submerge beneath the sea will be stateless in the strict sense of the 1951, 1954 and 1961 Conventions (i.e., not stateless *de facto* but rather stateless *de jure*),<sup>4</sup> and we argue that such persons – persons who are *de jure* stateless and are *unable to return* to their country of origin (because climate change has rendered it uninhabitable), will qualify as refugees under the 1951 Convention as it is currently written.

Though, on what has become the consensus position, only persecuted persons may qualify as Convention refugees, this in fact turns on a subtle point of interpretation. On this consensus position, the interpretation suggested by the ordinary meaning (the textualist interpretation) of the Convention conflicts with the interpretation suggested by an analysis of its object and purpose (the intent of the drafters in context), and the interpretation based on ordinary meaning should be disregarded. In contrast, we offer a different reading of the object and purpose of the Convention, one on which it coheres with the interpretation based on the ordinary meaning (Vienna Convention 1969).

At issue is whether the drafters intended to specify two separate tests – one for persons with a nationality (for whom a persecution condition was necessary), and another for stateless persons (for whom a need for international protection, even absent persecution, was sufficient) – or whether they meant to specify only one test, for persecuted persons, but made basic grammatical mistakes when formulating how it applied to stateless persons.

We defend the former view. The primary evidence for the latter view (currently the consensus view) is that the drafters clearly intended to produce a second convention specifically for stateless persons. Such a document was indeed produced, becoming the 1954 Convention Relating to the Status of Stateless Persons. Moreover, state practice has emphasized on many occasions that not all stateless persons are refu-

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<sup>4</sup> Statelessness *de facto* means having a nationality but being unable to avail oneself of its protections, say because one is persecuted. Statelessness *de jure* means not being recognized as a national under the operation of law of any nation (1954 Convention), (1961 Convention).

gees. There is also a pragmatic reason for advocating the one-test view: it renders admission criteria for the 1951 Convention more restrictive, making fewer people eligible for refugee status, minimizing the strain on host and donor countries. Some have also suggested that the two-test approach is “discriminatory” in that it singles out stateless persons for distinct treatment. Finally, one might worry that the two-test approach leads to more ambiguity in application than the one-test approach.

However, none of these are adequate reasons to support the one-test view. As we explained in our 2015 paper, a two-test criterion in the 1951 Convention is fully consistent with the fact that the drafters intended there to be distinct Conventions (Convention 1954, Convention 1961) for stateless persons. This is because, as we argue that it should be understood, the second test for stateless persons (in the 1951 Convention) is still fairly restrictive: it admits as refugees only those stateless persons who are *unable to return* to their country of former habitual residence. Much hinges on how this notion is understood. We argue (on the basis of textual and historical evidence) that it should be construed permissively enough to allow persecution as a basis for genuine inability to return, but not so permissively as to allow that difficulty obtaining appropriate paperwork renders someone ‘unable’ in the relevant sense. In effect, we take the spirit of the distinction to have been stated by Leon Henkin, U.S. representative to the Ad Hoc Committee (the first drafting committee for the 1951 Convention), when in a pivotal drafting session he contrasted between those whose problems were “humanitarian” in nature with those whose problems were “legal” in nature (UN Ad Hoc Committee 1950). The former were to be the purview of the 1951 Refugee Convention while the aim of the (yet to be drafted) 1954 Statelessness Convention would be to assist the latter. Note that at the time, “humanitarian” had a less technical meaning than today, covering what we now think of as “human rights” concerns (McAdam 2008). We suggest that “unable to return” as used in the 1951 Convention accordingly connotes an obstacle to returning that cannot be remedied by merely “legal” assistance (e.g. helping a claimant with their paperwork) in order to regain membership in their country of origin.

Of course, as applied to stateless persons displaced after the second world war, there would have been subtleties about how to draw this line. Many former states had lost their legal personality (owing to the fall of

fascist regimes, the fall of the Iron Curtain and the collapse of colonial empires). This meant that many persons displaced during the war (for one reason or another), holding only lost or expired paperwork from a defunct country, had no clear rights to re-enter. At the time of drafting, it would not have been clear, in many cases, whether “legal” assistance would suffice, or whether a path to citizenship in a second country of asylum would be the more just solution. But the law is full of vagaries: “persecution” also gives rise to many hard to classify cases. In any event, the record strongly suggests that the drafters resolved to treat this distinction between “humanitarian” and “legal” as guiding their construal of the proper tasks of the Refugee and Statelessness Conventions, respectively. This supports our claim that they would have intended “unable to return” to mean what it literally says: a genuine inability, rather than difficulty that one is indeed *able* to overcome with assistance. The decision to draft a second document for stateless persons who were not refugees was the recognition that this latter group required assistance of a different character, with a different goal (i.e., repatriation, rather than potentially permanent accommodation).

Thus, the two-test interpretation that we advocate does not entail that all stateless persons are refugees, and it explains why the drafters envisioned further conventions for stateless persons: because those stateless persons who would qualify as refugees under the second test would be only a small subset of stateless persons in general. The question of state practice is more delicate: some states have written national refugee laws which follow the one-test approach, some courts have found in favor of the one-test approach, and some guiding documents (like the UNHCR handbook) have made remarks in favor of the one-test approach. However, first of all, none of these authorities are beyond questioning – the UNHCR handbook is not a binding legal document, courts may overturn previous decisions, and states may change their national laws to better reflect an understanding of the international Convention that the national laws were meant to ratify or reflect. Second of all, none of these sources directly address and reply to our interpretation of the two-test approach: where there is commentary at all, it tends to commit the fallacy of inferring from “some stateless persons are not refugees” to “the one-test approach is correct”. There is thus still hope that change can be achieved by those in a position to shape jurisprudence as well as UNHCR and member state policy.

Nor is there anything discriminatory in the two-test approach construed as we suggest. It is not discriminatory *against* stateless applicants for refugee status because on our reading, being outside of one's country owing to persecution entails being unable to return: thus stateless applicants lose no eligibility that they have on the one-test approach. But it is also not discriminatory *in favor of* stateless applicants and against other applicants, since, again, being "unable to return" in the relevant ("humanitarian") sense connotes being in a situation as dire as persecution, but one that no persons with a home state are even subject to. Crucially, as we argue in our (2015), as well as in our (2014) and (2017), *anyone* eligible under the exemption we carve out, owing to climate change, will be *de jure* stateless, because if your former state has been rendered truly uninhabitable, it is no longer a state, and like it or not, you are stateless.

Taken in historical context, in fact, it is the one-test approach that would have been discriminatory. At issue would have been populations of stateless persons who had fled their countries of former residence because of, say, indiscriminate bombing rather than persecution, but who then were unable to return (say, because their country of former residence had lost its legal personality and the new entity there resolutely refused to recognize them, rendering a "legal" solution impossible). The one-test approach suggests that we must go through the displaced persons camp in 1951 offering solutions only to those who initially fled, back in 1943, because of persecution, rather than bombing, even if everyone in this camp is effectively homeless and encounters precisely the same obstacles to returning. This would be patently discriminatory, and it is something that our two-test interpretation avoids.

Further, as far as the pragmatic benefit of the one-test approach is concerned, we stress again that "unable to return" is still fairly stringent. On our view, it extends to those climate refugees whose countries of former habitual residence have become uninhabitable, strictly speaking. But unless host and donor countries intend to simply let those individuals die in the water, some accommodation will have to be made, so on pragmatic grounds, why not use a legal vehicle that actually covers them by intent?

Finally, as concerns ambiguity, we stress again that there is a great deal of ambiguity in the proper construal of "persecution". While the 1951 Convention enumerates the bases for which persecution renders one eligible for refugee status, the Convention says little about what

it means for there to be persecution (on such a basis), nor does it resolve all questions concerning the subtle epistemology of “well-founded fear” (Maiani 2010). Thus, while we acknowledge that it can be difficult in practice to assess whether the “legal” obstacles to return for a given population are surmountable or not, we note first that this is a contrast (between “humanitarian” and “legal” questions) that the drafting delegation already treated as of central interpretive importance, and we note second that as these things go, it is far from obvious that the second test for stateless persons is less clear than the persecution test for persons with a nationality.

But we stress that our support of the two-test reading does not hinge on pragmatic or political considerations: it hinges on a careful textual analysis of the ordinary meaning of the relevant clauses of the 1951 Convention, alongside a historical analysis of the documents surrounding the drafting of the 1951 Convention (i.e., the *travaux*) in light of its object and purpose. On our (two-test) approach, in contrast with the one-test approach, the wording of the Convention is perfectly clear, and perfectly in line with the object and purpose of the document.

Nevertheless, the status quo has been reasserted in Goodwin-Gill and McAdam (2021) as well as in Foster and Lambert (2019), which explicitly responds to our paper, challenging our interpretation and defending the consensus position that persecution is a necessary requirement of an asylum claim (though we note that Goodwin-Gill (2000), to be discussed below, forcefully defends a two-test approach). Our first aim in this paper is to address the arguments in Foster and Lambert (2019). In (§.1) we rehearse the argument from our paper (2015) for the two-test approach. In (§.2) we present and respond to the challenges to our argument found in Foster and Lambert (2019).

Our second aim in this paper, achieved in (§.3), is to develop a new argument, complementary to those we have already given, appealing to the principle of *systemic integration*, a principle enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). This principle mandates that, when there is ambiguity in the interpretation of a treaty according to the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose and subsequent state practice (i.e., the methods specified in 31(1) - 31(3)(b) of the Vienna Convention, which are the methods under debate in our 2015, and in

the exchange with Foster and Lambert) we must take into account the place of the treaty in the broader framework of international law and in particular “any relevant rules of international law applicable in the relations between the parties” (Vienna Convention 1969). We will argue that this principle supports our two-test view, by taking into account applicable principles of international law: article 15 of the UNHCR, and the general principle of external sovereignty.

### *1. Unable to return in the 1951 Refugee Convention – Our 2015 Argument*

In this section, we summarize the arguments in our (2015). The requirements of refugee status in the 1951 Refugee Convention are contained in Article 1(A)(2), which is separated by a semi-colon into two clauses. A refugee is anyone who:

~~As a result of events occurring before 1 January 1951 and~~ owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social 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 (Convention 1951).

The barred clauses were removed from the definition in a 1967 Protocol aimed at making the scope of the documents universal, but they are preserved here because they give important clues to understanding the definition as a whole.

We advance several arguments for the two-test approach, first, arguments focusing on the ordinary grammatical meaning of the text, then arguments focusing on the object and purpose of its drafters.<sup>5</sup> Concern-

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<sup>5</sup> We also argue in our (2015), as well as in our (2014) and (2017), that persons whose only state of nationality has become fully uninhabitable (e.g., because of submergence due to climate change) will be de jure stateless (see above note 4) Our argument begins with the Montevideo Convention which codifies that entities

ing grammar, there are not one but five points to make. Our first point is that, while informal discussions speak of a “persecution requirement for stateless claimants” really there is no reasonable construal of this as a requirement governing “unable to return”. Obviously such a requirement governs “unwilling to return”: it is written explicitly that stateless claimants who are not unable must instead be unwilling “owing to such fear”. But there is simply no way to warp the grammar of 1(A)(2) so that the earlier occurrence of “owing to a well-founded fear”, before the semi-colon, modifies “unable to return” after the semi-colon. The only serious interpretive question (which we address below) is whether “owing to a well-founded fear” before the semi-colon modifies “being outside of the country of his former habitual residence” after the semi-colon. Crucially, this means that even if we are wrong and there is a persecution requirement for stateless claimants, it is not that they be unable to return because of persecution; it is that the reason they left in the first place was because of (a well-founded fear of) persecution. This means that the evidence that the drafters intended a distinct convention for stateless persons supports our claim that “unable to return” must be read stringently, for otherwise, the 1951 Convention would have covered every stateless person in 1951 who merely needed help filing a new passport application, as long as that person had been persecuted by the nazis in 1942. But we digress: that is a point about intent, to which we return below.

We turn now to the four points of grammar which show that “owing to a well-founded fear” before the semi-colon does not modify “being outside of the country of his former habitual residence” after the semi-colon.

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lacking habitable territory are not states. As such the recognition by such an entity is not the recognition by a state (under the operation of its law): the definition of *de jure* statelessness. We do not argue for nor advocate that the relevant entities cease to exist entirely: it is to be desired that they retain, e.g., the rights to their territorial waters, their ability to serve as custodians of their unique cultures, or their ability to offer a type of cultural citizenship to their former nationals. Nor does it preclude other, bespoke solutions, such as bilateral treaties. Nor do we maintain that these entities cease to be states if they are ceded new land. Our claim is only that if they become fully uninhabitable (on old land or new) then whatever they are, they are not states, in the sense germane to the 1951 Convention’s assessment of statelessness. However, as Foster and Lambert do not challenge our argument on these points, we do not further discuss them here.

First, there is the semi-colon: semi-colons are used to demarcate independent clauses. A comma would have suggested a greater degree of dependence of the second clause on the first.

Second, there is a lack of verb-tense agreement. The way the text is actually worded, the two clauses disagree in tense at a crucial moment: in the clause preceding the semi-colon the indicative (“is outside”) is used, but in the clause following the semi-colon the gerundive (“not having a nationality”, “being outside”) is used, though the indicative (“has no nationality”, “is outside”) could have been used if the clause for stateless persons were also meant to be modified by the restriction, “owing to well-founded fear of being persecuted”.

Third: “or who”. Article 1(A) of the Convention begins with the clause, “For the purposes of the present Convention, the term “refugee” shall apply to any person who: ..” 1(A)(1) then begins with “...(1) has been considered a refugee under the Arrangements of 12 May 1926 ...”. Notably, these arrangements did not involve a persecution condition. Then (2) is as given above. This means that the original “who” in 1(A) sets off a list of (unrelated) types of persons who are to qualify for refugee status under the Convention, where a persecution condition applies to some but not others. Accordingly the “or who” immediately following the semi-colon of 1(A)(2) very strongly suggests that another independent category of persons qualifying for refugee status is about to be described, in a context where we cannot take for granted that the persecution condition applies to every such category. Otherwise, a simple “or” would have sufficed.

Fourth: a point of omission. It would have been perfectly grammatical to have written “owing to a well-founded fear” again, just after “being outside the country of his former habitual residence”. Thus the text might have read: “... any person who, as a result of events occurring before 1 January 1950 and owing to a well-founded fear ... is outside the country of his nationality and is unable...; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events *and owing to such fears*, is unable...” This is related to an argument concerning the intent of the drafters to which we return below. The drafters actually held a vote specifically on whether to repeat the phrase “owing to such events” after the semi-colon, to avoid ambiguity, and they decided to do so (UN Conference of Plenipotentiaries 1951). They were thus fully aware of the need for such a repetition here.

In effect, they voted to repeat the “A” of “A and B”, but they nevertheless make no mention of repeating the “B”, and they do not do so. Of course, here we verge toward a discussion of intent. As a point of grammar, it suffices to note that there is an omission here, one that is unforced by the ordinary rules of the English language.

Thus we conclude that as concerns the plain or ordinary meaning of the document, “owing to such fears”, i.e. a persecution requirement, does not apply to stateless persons unable to return: it neither modifies the reasons they fled originally, nor the nature of their inability. This is not simply a quibble over a misplaced semi-colon (as some commentators have suggested): no one has seriously suggested that such a condition modifies “unable to return”, and there are four clear interlocking grammatical reasons for denying that it modifies “being outside of the country of his former residence”.

Crucially, however, we maintain (contrary to popular opinion) that this does not create a conflict between a textualist interpretation and one based on the object and purpose of the Convention. To the contrary, there are several reasons to construe the object and purpose as intending two tests and thus, to construe the drafters’ intent as in harmony with the words they actually wrote.

We contend that the object and purpose of the 1951 Convention is to offer international protection to those who have irreparably lost national protection by restoring to them their fundamental rights and freedoms in the form of asylum. This category largely coincided with the category of persecuted persons, but it did not perfectly coincide, and crucially the object and purpose was not to alleviate persecution *per se*; it was to address the fundamental deprivations of rights, of being entirely cut off from the protections usually provided by one’s home state: a deprivation that persecution (among other things) brought on.

It is beyond our scope here to reiterate all of our reasons for thinking this: we urge readers to consult our (2015) for a thorough treatment. There, we first examine the preamble to the Convention alongside refugee documents predating the 1951 Convention, such as the IRO Constitution: finding here a focus on remedying the kinds of fundamental rights deprivations *caused by* persecution, rather than a focus on remedying persecution *per se*. We then explore the *travaux* from the first round of drafting meetings, the Ad Hoc Committee on the Reduction of Statelessness and Related Problems.

It was here that states' representatives reached the decision not to cover all stateless persons under the 1951 Convention (but instead to create a second document for those not helped by the first, which would become the 1954 Convention). Here, too, we find that the motivation for this decision was not to distinguish between those who were persecuted and those who were not, but rather to find a way to offer protection for those whose loss of national protection was truly irreparable, in contrast to those for whom the challenges were primarily administrative or bureaucratic (albeit in a way that was mitigated by concerns about clarity and enforceability). It was here that Leon Henkin, representing the U.S. delegation, contrasted between the "more urgent," "more unfortunately placed," "humanitarian" nature of the problems of refugees, contrasted with the merely "legal" problems of stateless persons (UN Ad Hoc Committee 1950).

We then explore the actual moment at which the language concerning "unable to return" in the clause following the semicolon was introduced into its final form. The drafting proceeded in three stages. First there were the meetings of the Ad Hoc Committee on Lake Success, NY in early 1950. Then their working draft was presented to the General Assembly of the UN in August, 1950. This body made a few changes to the draft, before passing it on to a final committee, the Conference of Plenipotentiaries, who convened July-December 1951 (UN Ad Hoc Committee 1949). The *travaux* of the Ad Hoc Committee are full of discussions relevant to our question, but after the UNGA made its changes (to which we will shortly turn) the Conference of Plenipotentiaries did not much discuss the clause following the semi-colon of 1(A)(2), except in order to reintroduce the temporal restriction that we note above (which, again, is a point in favor of our interpretation, because it shows that they were aware of the need to repeat the "A" of "A and B" but did not even consider repeating the "B").

The most striking moment for our purposes was the change made by the UNGA. The Secretary-General declares that article 1 was the only article of the Ad Hoc Committee draft to be altered by the general assembly (UN Secretary General 1951).

The formulation that the Ad Hoc Committee presented to the UNGA by the Ad Hoc Committee was as follows:

For the purposes of this Convention, the term refugee shall apply to any person...

(3) Who has had, or has, well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion, as a result of events in Europe before 1 January 1951, or circumstances directly resulting from such events, and, owing to such fear, has had to leave, shall leave, or remains outside the country of his nationality, before or after 1 January 1951, and is unable, or, owing to such fear or for reasons other than personal convenience, unwilling, to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, has left, shall leave, or remains outside the country of his former habitual residence” (ECOSOC 1959).

Note the grammar of this draft, in light of the grammatical concerns we discuss above: there is a comma rather than a semicolon, there is agreement in verb-tense, and “who” is not repeated. In contrast, the text as modified and approved by the UNGA in December of that year reads:

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:...

(2) As a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, 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, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it” (UN General Assembly Res. 1950).

As we note in our (2015), if the purpose of the UNGA at this stage was not to capriciously introduce grammatical discrepancies to entertain future generations of interpreters, we must conclude that in making explicit that affected stateless persons must either be unable to return or unwilling, the delegates felt no need to require in addition that persons in this group who were unable to return had fled owing to a well-founded fear, since the mere fact of lacking a nationality and being unable to return is already, in the stringent sense in which we hold that they understood “unable to return,” a dire enough lack of fundamental protection as to merit inclusion in the 1951 Convention. Persecution may have been the usual cause of this condition, but it is the condition, not its cause, that was the concern of the Convention.

The Conference of Plenipotentiaries only made two changes to 1(A)(2). First, they removed the phrase “for reasons other than personal convenience”. There were concerns throughout the drafting process with enforceability and enumerability: this phrase was too open to multiple interpretations (Conference des Plenipotentiaries 1951). The second change is the one we have already discussed: the addition of the temporal restriction phrase “as a result of such events” after the semicolon, to clarify that it was to modify “being outside the country of his former habitual residence” just as it modified “is outside the country of his nationality.” (Conference of Plenipotentiaries 1951).

Crucially, this sole change made by the final drafting body supports our argument, as it shows that the drafters were fully aware of the relevant point of grammar: if such a restriction were not made explicit following the semicolon, it would be unclear whether it was meant to apply there or not. But, as can be seen, this is equally true of “owing to a well-founded fear”, which occurs in effectively the same grammatical position as “owing to such events”. The omission of a second “owing to a well-founded fear” clause would have been glaringly obvious at this moment, while an actual vote was being held over a structurally related clause, so the fact that they did not add it is very strong evidence that they did not intend to add it, which in turn is compelling evidence that they understood “unable to return” stringently, signalling an irreparable inability, such that there was no need for a persecution requirement to complement it.

In our (2015) we then consider subsequent state practice, including cases such as *Adan*, *Revenko*, *Savvin*, *Diatlov*, *Thabet* and others which have come before courts around the world, in which stateless persons have applied for refugee status despite a lack of persecution. Courts have in many cases ruled against such applicants (*Adan* 1999; *Diatlov* 1999; *Revenko* 2000; *Savvin* 2000; *Thabet* 1998; *RSAA* 2002). We concur with the courts, because in the cases at issue the complainants were not “unable to return” when that phrase is construed as strictly as we suggest: rather their problems were of a primarily “legal” nature, and the proper remedy for them would be found under the 1954 Convention rather than the 1951 Convention. It is true that justices’ opinions and briefs in some of these cases tend to affirm the one-test approach. However, we suggest that this has been an overstep because our construal of the two-test ap-

proach yields the same verdict as the one-test approach in the cases at issue, where there is nothing that qualifies in our sense as an inability to return. Fortunately, judicial opinions may be revisited, especially when it can be shown that the justifications for original decisions overlooked salient distinctions or arguments.

## 2. *Critiques of our argument*

In Chapter 4 of their 2019 book, Michelle Foster and H el ene Lambert directly respond to our 2015 paper, as well as to an earlier report by Goodwin-Gill (2000), and to earlier court rulings that concurred with our view. Foster and Lambert first acknowledge that many leading experts on refugee law have supported our position, including Atle Grahl-Madsen, whom Foster and Lambert call “the leading refugee scholar of his generation,” as well as Guy Goodwin-Gill, also one of the leading refugee scholars of his generation. Foster and Lambert then offer seven distinct arguments, which we address here:

### ARGUMENT 1) STATELESSNESS CONVENTIONS ARE NOT EXCLUSIVELY FOR LEGALLY ADMITTED PERSONS

Foster and Lambert begin by critiquing Goodwin-Gill (2000), a report Goodwin-Gill wrote in defense of a two-test approach, to inform the judiciary opinion in *Revenko v Secretary of State for the Home Department*. One of Goodwin-Gill’s arguments was that the 1954 Statelessness Convention “... covers only the situation of stateless persons admitted to residence or otherwise lawfully within State territory” (Revenko 2000). Foster and Lambert rightly point out that this is not strictly true, as the 1954 Convention makes no such explicit restriction. We concur, and we make no claims to the contrary in our (2015) paper or here.

### ARGUMENT 2) COMMENTS FROM THE MINUTES OF THE 23<sup>RD</sup> AND 34<sup>TH</sup> MEETINGS

A second argument made by Foster and Lambert begins with a careful reading of the minutes of the 23<sup>rd</sup> meeting of the Conference of Plenipotentiaries. Considering this objection will be an opportunity for us to reflect on the subtleties involved in assessing the “object and purpose” of “the drafters” when this disparate body consists of at least three different gatherings of delegates, each with slightly different mandates

from their home states or organizations. Mr. Hoare, delegate for the UK delegation, had proposed an amendment to the language of 1(A)(2) before the 23<sup>rd</sup> meeting, which effectively reinstated the wording prior to the UNGA's changes. The meeting secretary writes, in summary of Mr. Hoare's remarks in support of his amendment, that "... *The purpose of his amendment was consequently to link stateless persons to those who were governed by the twin conditions of a date and a well-founded fear of persecution as the motives for their departure*". Later, in the 34<sup>th</sup> meeting, it was Mr. Hoare who proposed adding the language 'as a result of such events' after the semi-colon.

Foster and Lambert appear to treat this as showing that "... *the drafters indeed intended symmetry between stateless persons and those with a nationality in establishing qualification for refugee status*" (2019, 95). However, we must take the context of these debates into account, and what happened between when Mr. Hoare made the summarized remark in the 23<sup>rd</sup> meeting, and when he proposed the far more limited addition to the text in the 34<sup>th</sup> meeting. The drafters had expressed a wide range of opinions about the proper scope of the Convention throughout the process, with some having favored allowing all stateless persons to be refugees. Mr. Hoare himself, immediately before his remark about "twin conditions", is summarized as having said that "... *the grammatical sequence was, so to speak, interrupted by the placing of a semi-colon between the two clauses, and although he, for his own part, having taken his stand on the wider point of view, did not object, he believed that, since the present wording represented a compromise solution, the text should truly reflect it*" (*ibidem*).

The "wider point of view" he speaks of was an even more inclusive construal of "refugee" than the one that we advocate. The UK delegation to the Ad Hoc Committee led by Sir Leslie Brass initially proposed to classify all stateless persons as refugees. What emerges here is that Mr. Hoare (in speaking of the "compromise solution") was himself attempting to *interpret* the purpose of the changes made by the UNGA, rather than, e.g., expressing some core element of his mandate, in advocating for the "twin conditions" as a means of reflecting what he interpreted the aim of the UNGA's "compromise text" to be. However, given that his amendment would have in effect undone changes the UNGA made, its credential as an interpretation of their intent can be questioned.

Also, the *response* to Mr. Hoare's remarks and his proposed amendment during the 23<sup>rd</sup> meeting was far from unilateral. Immediately after his remarks, the French, Israeli and Swedish delegates each expressed

reservations, and a desire that the matter be further assessed. Mr. Hoare then, for this reason, *withdrew* his proposed amendment (which, again, made changes well beyond simply adding “as a result of such events”: in particular it resolves all four of the grammatical problems that we identify above, effectively undoing the UNGA’s edit of the passage), and the amendment was never reintroduced. Crucially, the change made (in the 34<sup>th</sup> meeting) when the words “as a result of such events” were added was not a ratification of Hoare’s amendment. Instead, the addition of “as a result of such events”, though initiated by Mr. Hoare, was presented as a self-standing modification, without other changes. In the summary record of the 34<sup>th</sup> meeting, we have only that:

*Mr. HOARE (United Kingdom) drew attention to the anomaly, which was really a drafting point, in sub-paragraph (2) of paragraph A resulting from the omission of a reference to events occurring before 1 January 1951 from the last phrase of the paragraph, which dealt with the person who had no nationality and was outside the country of his former habitual residence. He could not imagine that those who had drafted the compromise text in question had intended to make any difference between persons having a nationality and stateless persons. He therefore proposed that the words “as a result of such events” should be inserted after the word “residence” in the penultimate line of sub-paragraph (2) of paragraph A.*

*Mr. HERMENT (Belgium) agreed that it could not have been the intention of the drafters to make such a discrimination, and supported the United Kingdom proposal. The PRESIDENT put the United Kingdom proposal to the vote.*

*The United Kingdom proposal was adopted by 17 votes to none, with 3 abstentions.*

Here care is required. While it is clear that Mr. Hoare interpreted the aim of the UNGA to have been a one-test approach, and his aim was to align the language of the draft accordingly, he by no means spoke for the consensus or even the majority on this matter of interpretation, and his interpretation can be questioned. We can agree that as concerns the temporal and causal scope of the Convention, the drafters intended it to be limited to those whose need for international protection was triggered by events that had already taken place when the Convention was ratified, and there would have been something out of synch about imposing this restriction only on persons with a nationality: this would indeed have amounted to a form of discrimination against those with a nationality.

In contrast, concerning whether persecution were the cause for which stateless persons unable to return originally fled, matters are different. Imagine, again, a Displaced Persons camp in 1951. Persons who were persecuted during the nazi regime, but no longer are persecuted in 1951, with valid citizenship documents, in general did not need international assistance, and would not be found in such a camp. It was stateless persons who remained in these camps, in need of assistance. And again, the proposal here is not that “unable to return” be construed as meaning “unable because of persecution”. The “symmetry” proposal, rather, is that we discriminate amongst stateless, unable to return claimants we find in such a camp, on the basis of whether or not, in 1943, they fled because of nazi persecution or because of nazi bombing. It could not have been the intention of the drafters to make such a discrimination.

Thus, when we consider the motives of the 15 other delegates who accepted Mr. Hoare’s proposal, in the 34<sup>th</sup> meeting, to add “as a result of such events” and even when we consider the motives of Mr. Herment, who brought the term “discrimination” into the discussion, we must consider that while they indeed did intend to impose the same temporal limitation, ensuring that the Convention (as written in 1951) would only address those already in need of protection at the time of drafting, had Mr. Hoare also asked for further language to further restrict the scope of the Convention to exclude stateless persons unable to return who had originally fled for reasons other than persecution (e.g. bombing) – i.e., language such as the amendment he introduced and then withdrew in the 23<sup>rd</sup> meeting – the proposal might not have been accepted, just as it was not accepted during the 23<sup>rd</sup> meeting. As interpreters, we must therefore take the committee’s group action as the dispositive element: i.e., we must read them as having intended to do what they in fact did. And what they in fact did was to add the “A” restriction of “A and B” but omit the “B” restriction.

We conclude that properly understood, the minutes of the 23<sup>rd</sup> and 34<sup>th</sup> meetings of the Council of Plenipotentiaries support the two-test reading, not the one test reading. Crucially, there is a confusion in the suggestion that this construal would render the Convention’s provisions “discriminatory” against persons with a nationality, or afford preferential treatment to stateless persons. That would perhaps have been the case if the two-test reading implied that stateless persons were not bound

by the same causal or temporal restriction, and it would perhaps also have been the case if “unable to return” were construed loosely, to allow even those encountering *temporary* or merely *legal* obstacles to count as “unable”. But since the category of stateless persons unable to return actually denotes a category of absolutely destitute persons in need of international protection on “humanitarian” rather than “legal” grounds, there is nothing discriminatory in allowing them coverage by a Convention designed for precisely that, subject to the temporal restrictions that the drafters intended to limit the Convention’s scope (which were removed by the 1967 Protocol).

Accordingly, we need not accept Mr. Hoare’s interpretation of the intent of the UNGA’s modifications, nor need we construe “the drafters” as having accepted it. Instead, we may construe the UNGA as having intended “unable to return” to connote a genuine need for permanent international protection, irrespective of whether such claimants originally fled because of persecution or for some other reason. And we may interpret the drafters as having for the most part accepted this construal, which is why they did not revise the UNGA’s language in ways proposed by those, such as Mr. Hoare, who interpreted the text as being otherwise too permissive and allowing too many stateless persons (who really only needed “legal” assistance) to qualify.

ARGUMENT 3) THE DECISION NOT TO INCORPORATE A STATELESSNESS CONVENTION INTO THE REFUGEE CONVENTION

Foster and Lambert discuss, at length, the decision of the drafters of the 1951 Convention to defer the drafting of a convention specifically for stateless persons to a later body: this led to the 1954 Statelessness Convention. Foster and Lambert also observe that this “*further confirms that [the drafters] did not intend for the Refugee Convention to support de jure stateless persons on the basis of their mere statelessness and inability to return alone*” (Foster and Lambert 2019, 95). Courts in *Revenko* and *Savvin* have also appealed to this fact in supporting the one-test approach.

Here, Foster and Lambert (and the courts) appear to be reverting to the reading of “unable to return” as synonymous with “encounters some obstacle to returning” including obstacles to do with paperwork that can be remedied by, e.g., consular assistance. Given the alternative reading that we advocate, the drafters’ decision to leave the Statelessness Con-

vention to another day is best explained by Henkin's distinction between those in need of "humanitarian" assistance (the primary aim of the 1951 Convention) and those whose needs were, at least in the first instance, better described as "legal". On our reading, the drafters would reasonably have determined to create a separate agreement intended primarily for persons who, though stateless, could be given legal assistance and temporary accommodation with the ultimate aim of helping them return – even while intending to treat all stateless persons with a "humanitarian" need for potentially permanent accommodation in a country of asylum as part of the refugee agreement they were drafting.

ARGUMENT 4) THE TWO-TEST READING WOULD RENDER THE 1954 CONVENTION SUPERFLUOUS

Foster and Lambert approvingly cite the ruling from *Diatlov*, in which the presiding judge, His Honour Sackville J, argues that a two-test approach would "... render superfluous much of the *Stateless Persons Convention*" (Diatlov 1999).

This again underscores the importance of "unable to return" being construed strictly rather than loosely. Indeed, if it simply meant "encounters some obstacle or other" then the two-test reading would render many provisions of the 1954 Convention superfluous, by offering all stateless persons outside of their country encountering any difficulty getting back with a path to citizenship in a country of asylum, thereby rendering superfluous provisions intended in the first instance to help those persons get home where possible. On our reading, however, "unable to return" is construed strictly, so that many or most stateless persons are not "unable to return", even though in the future some may be.

Indeed, if "unable to return" is instead construed as just meaning "needs help", so that anyone with difficulty with their paperwork counts as unable to return, then the one-test interpretation would also render the 1954 Convention superfluous for a wide range of cases. Again, return to our 1951 Displaced Persons camp. We find here many stateless persons who fled nazi persecution 8 years ago, and are now unable to return. On our two-test reading, the drafters rightly noted the need for two conventions, because some of these people, those who are genuinely unable to return, need asylum, as they have nowhere else to go, while others just need legal assistance getting their paperwork in order to go

home. But on the one-test reading where “unable to return” = “needs help”, every one of these persons who was persecuted 8 years ago qualifies as a refugee, even those who just need the money and time to get a few documents notarized. But those are clearly cases that the drafters intended to cover with the Statelessness Conventions to be drafted later.

ARGUMENT 5) THE SEMI-COLON HAS THE EFFECT OF A COMMA

Foster and Lambert also approvingly cite remarks from Justice Katz, presiding in *in the Full Federal Court of Australia in Minister for Immigration and Multicultural Affairs v Savvin*. His honour contends that, because the semi-colon precedes an ‘or’, it has the effect ‘*merely of a comma*’, meaning that the definition of refugee is ‘*one complete clause*’ (Savvin 2000).

Here, we stress that the grammatical evidence in favor of the two-test reading goes beyond the semi-colon. As we outline above there are four inter-related points of grammar which mutually support the two-test reading. But concerning the semi-colon alone, we stress that grammatically the effect is not that of a comma, given that it occurs in a passage where semi-colons are used to separate independent groups, among them the one listed in 1(A)(1), a clause for a group of persons who would count as refugees despite lack of persecution.

ARGUMENT 6) THE REMOVAL OF RESTRICTIONS IN THE 1967 PROTOCOL WAS NOT A  
REMOVAL OF THE PERSECUTION CONDITION

Foster and Lambert observe (though this may have been intended as a supporting remark rather than a self-standing argument) that the context of the 1967 Protocol shows that its intent was not to remove a persecution condition for stateless persons (Foster and Lambert 2019, pp.95-96). We concur: our argument does not hinge on any claim to the contrary. The aim of the 1967 Protocol was to remove the restriction that the Convention only addresses the problems of claimants that were in need of international protection prior to its drafting in 1951. The 1967 Protocol expands the scope of the Convention to address all persons who qualify, irrespective of when the events occurred in light of which they qualify.

ARGUMENT 7) ARTICLE 2(D) OF THE EUROPEAN QUALIFICATION DIRECTIVE

Foster and Lambert also note that state practice in favor of the one test reading includes acts of legislation as well as jurisprudence. They cite ar-

ticle 2(D) of Directive 2011/95/EU as an example. Here, indeed, it is specified that stateless persons must be outside of their countries of habitual residence owing to a well-founded fear of persecution (EU Directive 2011).

We accept that this piece of legislation indeed opts for that construal. We stress, first of all, that this legislation may be revisited and modified, and we recommend as much, so that it better conform with the ordinary meaning and object and purpose of the 1951 Convention.

We add that some legislation favours our construal. Indeed, some legislation accommodates the fact that even for persons with a nationality, the persecution test may be too stringent. This is the case with the 1969 OAU (Organization of African Unity) Convention, which defines a refugee as either someone who is a refugee on Convention grounds or someone who “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality” (OAU Convention 1969). This document, ratified by many African heads of state, is a weighty piece of state practice establishing that persecution is not the only path to refugee status.

### *3. Statelessness, territorial sovereignty, and the refugee regime – A philosophical argument*

We take ourselves to have established that the ordinary meaning to be given to the terms of the 1954 Convention in their context and in the light of its object and purpose calls for two tests rather than one, and also that state practice favoring a one-test approach has not considered our interpretation of the two-test approach, which does as good of a job as the one-test approach of explaining why various stateless claimants (those who in our sense *are* able to return) are not refugees.

Here, we add a complimentary argument, appealing to the principle of systemic integration, a principle enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). This principle mandates that, when there is ambiguity in the interpretation of a treaty according to the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose and subsequent state practice,

we must take into account the place of the treaty in the broader framework of international law and in particular “any relevant rules of international law applicable in the relations between the parties”.

We will argue here that this principle supports our two-test view, by taking into account some applicable principles of international law. Crucially, it is now widely accepted that the proper construal of article 31(3)(c) is that ‘rules’ be understood to include “all of the sources of international law, including custom, general principles, and, where applicable, other treaties” (McLachlan 2005).

Thus, while we hold that there is no ambiguity concerning the proper construal of 1(A)(2) according to the provisions of 31(1), 31(2), and 31(3)(a)(b) of the Vienna Convention, for those who find that there still is ambiguity on these grounds, we offer as further consideration that a reading according to 31(3)(c) of the Vienna Convention supports our approach.

Our key message here is that persons from the category at issue – stateless persons outside of and unable to return to any country of former habitual residence (in the strict sense of “unable”) – would fall through the cracks of the system of international protection according to the one-test approach, while in contrast, on the two-test approach, that system more coherently divides cases according to the most salient remedy for their plight: those for whom any return is genuinely unforeseeable, and who therefore need a potentially permanent accommodation in a country of asylum are properly the subject of the Refugee Convention while those who only need temporary accommodation along with “legal” assistance for a return home are properly the purview of the Statelessness Conventions. Of course, in practice, many stateless persons languish for decades even though in principle their plight “should” be merely legal. But we can at least distinguish between cases where it is reasonable to hope for return, and cases where this would be unreasonable, say, because the home country had submerged beneath rising seas, as some south pacific island nations may soon do.

We will offer two sub-arguments to this effect, drawing on two distinct elements of the international legal system: first, article 15 of the UN Declaration on Human Rights, and second, the principle of external sovereignty at the heart of the Westphalian international legal order of territorial sovereign states.

### 3.1 Article 15 of the UNDHR

Article 15 of the 1948 UN Declaration of Human Rights (UNDHR), the foundational document of the post-war international human rights regime, declares:

“Everyone has the right to a nationality”.

We claim that our two-test reading does more than the one-test reading to ensure that vulnerable persons’ right to a nationality is honored (by a path to citizenship in a country of asylum). Stateless persons outside of and unable to return to any country of former habitual residence have no assured path to nationality under the Statelessness Conventions, and therefore they have no assured path to nationality at all if they are excluded from refugee status, as the one-test reading would do. In contrast, on our two-test reading, they have hope for a path to nationality by way of refugee status.

Importantly, the systemic integration clause is only active when there is a genuine ambiguity. Of course we could misread the Convention so that all stateless persons were refugees: this would provide even more coverage, including for those stateless persons for whom legal remedies *should* suffice to allow them to return home but for one reason or another have not done so. But there is no genuine ambiguity about whether such a reading of the Convention is correct: that it is not is obvious from the *travaux*. It is only because the two-test reading is at least *in the running* for being the correct interpretation that the systemic integration principle applies in this way. Thus, our application of it here does not prove too much.

### 3.2 The principle of external sovereignty

A second, more general principle of international law, indeed a constitutive principle of the international legal order, also bears on the proper construal of 1(A)(2) in light of the principle of systemic integration. This is the principle of external sovereignty.

The principle of state sovereignty is generally understood to be a founding principle of the international legal order. It is the idea that each state has supreme authority within its defined territory (internal sovereignty), and also that each state is bound to respect the internal sovereignty of other states (external sovereignty) (Philpott 1999; James 1998 and 1999). Since the Peace of Westphalia following the Thirty-Years

War, these principles have been at the basis of the international system of sovereign, territorial states.

The notion of external sovereignty finds many expressions in duties that states have toward one another, including the principle of non-intervention (the duty of states not to interfere in the internal affairs of other states), the principle of territorial integrity (the duty of states not to physically invade or occupy the territory of another) and the principle of the right to expel aliens (and the according duty of states to receive their own nationals if expelled while abroad) (Edwards 2014, 36; Brownlie 2003, 398; Simmons 2001, 308-309).

Crucially, all of the duties associated with external sovereignty speak to a unified, mutual objective shared by states in the Westphalian world order: that of maintaining a world that is comprehensively sub-divided into well-defined spheres of control, where for every piece of territory, it is clear which unique sovereign entity controls that territory, and for every person, it is clear which unique sovereign entity has ultimate jurisdiction over and responsibility for that person. This is the normative ideal that regulates every principle that appeals to sovereignty in international law (Boll 2006, 38-39 and 43-47; Brownlie 2003, 106-107; Conklin 2014, 73-74; Edwards 2014, 12; Jault-Seseke 2015, 21-22; Larkins 2010, 35; Shachar 2009, 113-114; Shaw 2008, 211 and 228; Van Panhuys 1959, 139).

The relevance here should be clear. Suppose for comparison that we are considering a treaty for the partitioning of some territory, and there is an ambiguity in the interpretation of the treaty, such that on one interpretation, there is no effective procedure for determining who has control over (some part of) the territory, while on the other interpretation there is such a procedure. Then the principle of systemic integration would favor the second, because the principle of external sovereignty that binds the entire system of sovereign states together under international law dictates that matters of jurisdiction over territory and people be unambiguously clarified where possible.

The same applies here. On the one-test interpretation, unable-to-return stateless claimants would be stuck in an unresolvable gap in coverage, obliged to seek recourse under the Statelessness Conventions which are geared towards offering temporary accommodation and help finding a way home, even though it is impossible for them to return home. These may thus be persons for whom no country bears antecedent responsibil-

ity, and thus exceptions to the basic principle that jurisdiction (over both territory and persons) be unambiguous. We thus suggest that the principle of systemic integration favors our two-test approach, according to which unable-to-return stateless claimants are to be treated as refugees under the auspices of the 1951 Convention, which ensures a procedure for securing them a stable place under the jurisdiction of the country of asylum, thereby maintaining the underlying order of territorial jurisdiction at the core of the Westphalian system.

This point also bears more directly on our arguments concerning the object and purpose of the drafters of the 1951 Convention. The original drafting sessions envisioned a broader solution for both refugees and stateless persons because the general target was a new regime of international protection. Allied governments were intensely preoccupied by the destabilizing effect of statelessness because of disappearing states. The number of people who had been persecuted and denationalized by the nazis was dwarfed by the number of people holding useless identity documents from countries that had ceased to exist. As discussed above, some who required international protection feared persecution, but many others held travel documents or identity documents from countries that no longer existed and found themselves displaced and (on at least one construal of the phrase) unable to return, more so after the fall of the Iron Curtain. The partition of Germany alone called into question the nationality of millions of displaced persons. It was the general risk of destabilization of the international order that lent urgency to the drafters' task. It is no accident that the Ad Hoc Committee's official title was "The UN Ad Hoc Committee on Statelessness and Related Problems", nor that the first work product of their predecessor, the Ad Hoc Committee on Refugees and Stateless Persons, was a document entitled "A Study of Statelessness" (UN Ad Hoc Committee 1949). But viewed from this perspective, the primary matter at hand was to determine procedures for re-establishing jurisdiction in line with general principles of sovereignty (i.e., uniquely and unambiguously). To this end the primary decision to make is whether a claimant needs a new home or help returning to an old one. This supports our other arguments that taken in context, the object and the purpose of the drafters is better realized by our two-test interpretation than by the one-test interpretation.

One final clarification. Many political solutions to the plight of climate refugees have been proposed (see above notes 1 and 2). On some, sinking states might be ceded new land, and indeed we can even envision that new laws are passed rendering this a general practice. In a world where there is such a mechanism for the continued existence of vulnerable states, would this change the question of how systemic integration applies? Indeed it would. Of course, if the relevant states continue to exist then by the lights of our arguments, their citizens are not stateless, and so the question of their eligibility for refugee status under the statelessness clause of 1(A)(2) does not apply. But more generally the systemic integration provision does not speak of integration with what we hope that the laws will one day be, but rather of integration with what the laws actually are, which is what the Vienna Convention means by the “broader framework of international law”. Should the framework of international law change in some relevant way this could change what interpretations of the 1951 Convention (inter alia) best systemically integrates with that framework. But our question here is how the principle of systemic integration actually applies given the current broader framework.

### *Conclusion*

Since our interpretation of the 1951 Convention leads to an application to a group of people, climate refugees, who did not exist at the time of drafting, our interpretation might seem out of keeping with the Convention’s object and purpose. But while in some cases progressive interpretation may be justified (especially when, as here, its purpose is to extend vital protection to vulnerable groups), we maintain that our interpretation adheres strictly to the dictates of every provision of article 31 of the Vienna Convention.

Stepping back, it is vital to consider the historical context as broadly as possible. It is a mistake to think of the refugee Convention as a document for persecuted persons with a clause for stateless persons added on as an afterthought. If anything, the contrary is the case: concerns over “disappearing states,” territorial sovereignty, and the issuance of nationality documents were central concerns of the drafters of the 1951 Convention. The Convention was drafted to help protect those ren-

dered stateless and displaced due to war, when countries had collapsed and been replaced across Europe, leaving millions displaced from their homes with useless pieces of paper and no valid ID.

The drafting process eventually led to three Conventions, the 1951 Refugee Convention providing international protection to many who require it, the 1954 Convention Relating to the Status of Stateless Persons, identifying stateless persons and enumerating their rights, and the 1961 Convention on the Reduction of Statelessness, which enumerates the steps to be taken by states to resolve statelessness. These conventions complement each other, though they were drafted by different groups of people as part of an extended process (which means they are not perfectly complementary). Importantly, all three conventions provide protection for stateless people. Rather than viewing persecution as the central component of the protection regime, it is statelessness that is the focus, with persecution a special exception for non-stateless persons who also require international protection. For the Refugee Convention, accordingly, the base case is that of completely lacking the protection of any home country, such that there is no path back to that country. Persons for whom that is true are paradigmatically refugees, i.e., in need of potentially permanent protection from a country of asylum. It is persecuted persons who are the exception: an extra class of individuals in need of such protection, even where in some cases this is despite *de jure* nationality in the persecuting state.

Our application of the 1951 Convention to the stateless former occupants of states destroyed by climate change is not a new use of the Convention that is out of step with its original purpose, it is in line with the object and purpose and intention of the drafters in the post-World War Two context of the Convention's drafting. Climate change is not war, but it will produce a similar effect: multitudes displaced, unable to return home, holding useless identity documents from countries that have ceased to exist. We therefore call on the international community, policy makers, judiciaries and legislatures to put the 1951 Convention to the use for which it was primarily intended and guarantee protection to all stateless persons outside of their countries of origin and unable to return.

One final question is whether the application of the 1951 Convention to remedy the statelessness of those whose states become uninhabitable owing to climate change must wait until those persons' former

states have in fact become uninhabitable (and so ceased to be states in the sense we argue in our (2014), (2015) and (2017). This is not desirable. Of course the best option would be for us all to achieve some other more comprehensive political solution that ensures the continued statehood of affected countries, by affording them new land, or preventing sea level rise. But failing that, should it become more or less inevitable that the worst comes to pass, might it be possible for the legal system to pre-emptively grant asylum to those effected before, e.g., some catastrophic storm delivers a final blow to the country in question? We suspect that the answer may be yes. Some of the principles that have been invoked to justify the doctrine of nonmootness<sup>6</sup> or statutes of limitations<sup>7</sup> in US law may be seen as precedents in the interests of supporting the orderly regulation of the judicial system as a whole. This is a topic for future work.

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<sup>6</sup> One example of the ways in which courts commonly adjudicate temporal problems similar to the one we face is *Roe v. Wade*, an abortion rights case before the US Supreme Court, where the Court declined to declare the case moot (which is usually grounds for rejecting a case) even though the claimant's pregnancy only lasted nine months, much shorter than the time it took for her case to appear before the Court. The Court held that "[p]regnancy provides a classic justification for a conclusion of nonmootness" (footnote to *Roe v. Wade*, 410 US 113 (1973)).

<sup>7</sup> "The decision about when to lower the legal curtain and extinguish a claim is a policy determination to be made by the legislature. The legislature must strike a complex balance. On the one hand, potential plaintiffs must have an adequate opportunity to bring a claim. On the other hand, defendants and the courts must be protected from having to deal with cases in which the search for the truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. By striking this balance, statutes of limitations promote justice, discourage unnecessary delay, and preclude the prosecution of stale or fraudulent claims. Statutes of limitations are essential to a fair and well-ordered civil justice system" (Alec.org 2008)

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