

*After 60 Years: The
International Legal Regime
Protecting Stateless
Persons—Stocktaking
and New Tendencies*

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I. SETTING THE SCENE

STATELESSNESS UNDER INTERNATIONAL law has not traditionally been at the forefront of academic research or the writings of legal scholars. Only a few monographs have been published on statelessness and nationality since World War II.¹ This chapter aims to present an overview of the legal status of stateless persons under international law, shedding light onto the rather sporadic but noteworthy legal developments after the adoption of the 1954 New York Convention on the Status of Stateless Persons, which celebrated its 60th anniversary in 2014.² It is thus timely to explore both the current legal framework on the universal and regional levels (*de lege lata*) and new tendencies in legal developments (*de lege ferenda*).

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¹ Eg HF van Panhuys, *The Role of Nationality in International Law* (AW Sijthoff 1959); P Weis, *Nationality and Statelessness in International Law* (Sijthoff & Noordhoff, 1979); L van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia, 2008); R Likibi, *Le droit de l'apatridie, pratiques et controversies* (Publibook, 2013). The newest reference book devoted to the topic is a collected volume edited by L van Waas and A Edwards (*Nationality and Statelessness under International Law*, Cambridge University Press, 2014, 306 pages).

² For example, the First Global Forum on Statelessness, held in The Hague on 15–17 September 2014 (co-organized by Tilburg University and UNHCR), was devoted to this occasion. At the end of November 2014, UNHCR started its 10-year campaign to eradicate statelessness by 2024 in the context of this commemoration, too. See <http://www.unhcr.org/pages/53174c306.html> (last accessed on 12 January 2015).

II. INTRODUCTION INTO THE WORLD OF 'LEGAL GHOSTS'

According to a recent estimate of the Office of the United Nations High Commissioner for Refugees (UNHCR), 10 million people continue to be denied the right to a nationality,³ and the existence of such 'legal ghosts' is likely to persist for a long time. The biggest stateless populations can be found in the Middle East, Asia and the Caribbean,⁴ but it is also noteworthy in Europe (with around 640 thousand stateless individuals⁵).

1. Statelessness can occur in the migratory context (typically in European countries), though there are also large in situ stateless populations (eg in Burma, Nepal, Thailand, Syria). Many factors can lead to statelessness, such as: state successions (the most common reason since the 1990s); conflicting nationality laws leading to the non-acquisition or loss of nationality; arbitrary deprivation of nationality as an extreme form of discriminatory state policy; lack of birth registration; extremely burdensome administrative practices with regard to naturalization procedures; and the trafficking of human beings.⁶ In the future, statelessness may even occur as a result of the sinking of small island states due to a rise in the ocean level induced by climate

³ UNHCR, '2012 Global Trends. Displacement: The New 21st Century Challenge' (2013) 2, 7, 41, available at http://unhcr.org/globaltrends/june2013/UNHCR%20GLOBAL%20TRENDS%202012_V05.pdf (last accessed on 12 January 2015). By the end of 2012, UNHCR had identified some 3.34 million stateless persons in 72 countries. However, UNHCR estimated that the overall number of stateless persons worldwide, given the hidden character of the phenomenon, could be far higher—about 10 million people. According to estimates of the Open Society Institute, being recently involved in the advocacy activities related to statelessness, this number is even higher, around 15 million (<http://www.opensocietyfoundations.org/projects/statelessness> (last accessed on 12 January 2014)).

⁴ K Southwick and M Lynch, *Nationality Rights for All: A Progress Report and Global Survey on Statelessness* (Refugees International, 2009) 28–53, available at http://www.refintl.org/sites/default/files/RI%20stateless%20Report_FINAL_031109.pdf (last accessed on 12 January 2015); see also UNHCR Global Appeal 2014–2015, 'Addressing Statelessness', available at <http://www.unhcr.org/528a0a1316.html> (last accessed 15 October 2014); <http://www.opensocietyfoundations.org/projects/stateless/where-does-statelessness-happen> (last accessed on 12 January 2015); <http://www.state.gov/documents/organization/181258.pdf> (last accessed on 12 January 2015).

⁵ Viewpoint of 9 June 2008 of the Council of Europe Commissioner for Human Rights: 'No One Should Have to Be Stateless in Today's Europe', available at http://www.coe.int/t/commissioner/viewpoints/080609_EN.asp (last accessed on 12 January 2015). See also: 'The Rights of Stateless Persons must be Protected', statement by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, at the 4th Council of Europe Conference on Nationality 'Concepts of Nationality in the Globalised World' (CommDH/Speech(2010)13), Strasbourg, 17 December 2010.

⁶ For more see, eg M Verwilghen, 'Conflits des nationalités. Plurinationalité et apatridie' (1999) 277 *Recueil des Cours de l'Académie de Droit International de la Haye* 122; M Achiron, *Nationality and Statelessness. A Handbook for Parliamentarians* (Inter-Parliamentary Union—United Nations High Commissioner for Refugees, 2005) 27–42; van Waas (n 1 above), chs IV–VII; K Southwick and M Lynch (n 4 above) 2–3; BK Blitz and M Lynch, 'Statelessness and the Deprivation of Nationality' in BK Blitz and M Lynch (eds), *Statelessness and Citizenship. A Comparative Study on the Benefits of Nationality* (Edward Elgar 2012) 5–10; Likibi (n 1 above), 72–99.

change.⁷ Because of their lack of nationality, stateless people are a particular vulnerable group, often marginalized and legally invisible ('legal ghosts'). Given its specific nature, statelessness remains a largely hidden phenomenon, especially with regard to government recognition. Therefore, identification and mapping are major challenges, as highlighted and promoted by the UNHCR as the principal UN agency responsible for the identification and protection of stateless people. Projects mapping statelessness have recently been conducted in a number of countries, including the United Kingdom,⁸ Belgium,⁹ the Netherlands,¹⁰ Slovenia,¹¹ Poland¹² and Malta.¹³

2. The international legal regime governing the protection of stateless persons currently in force was created in the 1950s, since when the issue was practically forgotten for decades, and was largely absent from the global human rights agenda, too.¹⁴ A turning point came in the 1990s, due to a number of factors. First, the UNHCR's mandate was expanded in 1995 by the UN General Assembly, as a result of which the UNHCR was given a specific and global mandate to prevent and reduce statelessness as well as to protect non-refugee stateless persons¹⁵ (it is important to note that this mandate is not limited to state parties to the statelessness conventions, but gives a global authorization to act).¹⁶ Secondly, the dissolution of states and the creation of new ones

⁷ For more see J McAdam, 'Disappearing States, Statelessness and the Boundaries of International Law', UNSW Law Research Paper No 2010-2; J McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 119–60.

⁸ UNHCR, 'Mapping Statelessness in The United Kingdom' (November 2011), available at <http://www.refworld.org/docid/4ecb6a192.html> (last accessed on 12 January 2015).

⁹ UNHCR, 'Mapping Statelessness in Belgium' (October 2012), available at <http://www.refworld.org/docid/5100f4b22.html> (last accessed on 12 January 2015).

¹⁰ UNHCR, 'Mapping Statelessness in the Netherlands' (November 2011), available at <http://www.refworld.org/docid/4eef65da2.html> (last accessed on 12 January 2015).

¹¹ UNHCR, 'Statelessness in Slovenia: The Identification and Protection of Stateless Persons in Slovenia' (November 2013) (manuscript with the author).

¹² The Halina Niec Legal Aid Center, 'The Invisible. Stateless Persons in Poland (Executive Summary)' (December 2013), available at http://www.pomocprawna.org/images/stories/Pomoc_migrantom/The_Invisible_stateless_Persons_in_Poland_2013_Summary.pdf (last accessed on 12 January 2015).

¹³ UNHCR, 'Mapping Statelessness in Malta' (August 2014), available at <http://www.unhcr.org/mt/news-and-views/press-releases/774> (last accessed on 12 January 2015).

¹⁴ See also, eg M Fullerton, 'Without Protection: Refugees and Statelessness. A Commentary and Challenge', Brooklyn Law School Legal Studies Research Paper No 351 (August 2013), 2.

¹⁵ The UNHCR's role in the field of statelessness dates back to 1974, when the UNGA entrusted the UNHCR with a specific role under Article 11 of the 1961 Convention on the Reduction of Statelessness (cf UNGA Resolution 3274 (XXIV) of 10 December 1974). Then the UNHCR has been given a broader and horizontal mandate in this regard by a series of UNGA resolutions (most importantly by UNGA RES/50/152, 21 December 1995), ie the agency was asked to continue its activities on behalf of stateless persons, to promote accession to and implementation of the 1954 and 1961 UN conventions, and to provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested states: UNHCR, 'Self-Study Module on Statelessness' (1 October 2012) 12–13, available at <http://www.refworld.org/docid/50b899602.html> (last accessed on 12 January 2015).

¹⁶ Cf M Manly and L van Waas, 'The Value of the Human Security Framework in Addressing Statelessness' in A Edwards and C Ferstman, *Human Security and Non-Citizens* (Cambridge University Press, 2010) 58, fn 30.

following the end of the cold war were also a major cause of new stateless populations (eg in the former Soviet and Yugoslav republics, Eritrea), and shed more light on this phenomenon which had started to re-emerge on the international political and human rights agenda. Thirdly, the UNHCR launched a global campaign in 1996 to increase the number of ratifications of the two major universal legal instruments on statelessness and to promote this cause worldwide, along with the widespread dissemination of information.¹⁷ Finally, the latest symbolic event highlighting all these efforts and developments, as well as paving the way for the mid-term future, was the December 2011 Intergovernmental Ministerial Event in Geneva, organized by the UNHCR on the occasion of the 60th anniversary of the 1951 Refugee Convention and the 50th anniversary of the 1961 Statelessness Convention, where over 60 states made statelessness-related pledges (these included accession to the statelessness conventions, law reform to prevent or reduce statelessness, and improvement of civil registration systems).¹⁸ This breakthrough was described by the then UN High Commissioner for Refugees, Mr Antonio Guterres, as a quantum leap forward in relation to the protection of stateless people, contributing also to significantly expanding awareness of the problem of statelessness in all regions.¹⁹

III. RESPONSES OF THE INTERNATIONAL COMMUNITY TO TACKLE STATELESSNESS

1. After the creation of the UN, when statelessness was a major cause for concern as an aftermath of World War II, two parallel approaches were formulated by the international community in order to tackle this negative phenomenon. The first focuses on preventing future statelessness and reducing the existing number of stateless persons as much as possible. This attempt is marked principally by the 1961 UN Convention on the Reduction of Statelessness²⁰ being the universally recognized general instrument in this matter and, as a specific instrument with a limited scope, by the 1957 UN Convention on the Nationality of Married Women.²¹ In addition, a number of other, not so comprehensive, treaties appeared on the regional (European) level, elaborated under the aegis of the Commission International de l'Etat Civil (CIEC) and

¹⁷ The legal basis and authorization for UNHCR's global campaign was Conclusion No 78 of Executive Committee of the High Commissioner's Programme on Prevention and Reduction of Statelessness and the Protection of Stateless Persons [ExCom Conclusion No 78 (XLVI), points (c)–(d)].

¹⁸ UNHCR, 'Ministerial Intergovernmental Event on Refugees and Stateless Persons—Pledges 2011' (October 2012) 32–36, available at <http://www.refworld.org/docid/50aca6112.html> (last accessed on 12 January 2015).

¹⁹ *Ibid.*, 8.

²⁰ Convention on the Reduction of Statelessness of 30 August 1961 (UNTS No 14458, vol 989, 175.).

²¹ Convention on the Nationality of Married Women of 20 February 1957 (UNTS No 4468, vol 309, 65).

the Council of Europe (CoE).²² This specific legal framework is embedded in the general international human rights law, completed and strengthened by provisions relating to the right to a nationality as a human right²³ ('the right to have rights').²⁴

2. Nevertheless, despite all these efforts, the number of stateless persons will never reach zero. Therefore, representing the other approach, a new, autonomous legal status was created by virtue of the 1954 New York Convention relating to the Status of Stateless Persons,²⁵ aimed at providing an appropriate standard of international protection, a status comparable to other forms of international protection, such as refugee status. In today's international law, it is still the 1954 New York Convention alone, more than 60 years after its adoption, under which stateless people enjoy specific international legal protection, as it contains the basic rights determining their legal status.

Besides the 1954 New York Convention as a *lex specialis*, certain core human rights treaties are also applicable to stateless persons, notably those human rights contained in these instruments which are applicable to everyone, irrespective of nationality (eg the majority of civil and political rights, and some economic, cultural and social rights). The rationale behind this logic is that 'the rights of the individual do not spring from the fact that he is a citizen of a given state, but from the fact that he is a member of the human family'.²⁶ A great illustration of this approach is provided by General Comment No 15 of the Human Rights Committee on the position of non-nationals: 'the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'.²⁷ The

²² See, in chronological order, the 1973 CIEC Convention No 13 to Reduce the Number of Cases of Statelessness; then two Council of Europe instruments: the 1997 European Convention on Nationality (CETS No 166), ch VI and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (CETS No 200).

²³ See, first, the 1948 Universal Declaration of Human Rights (Art 15); then a series of subsequent universal treaties: 1965 Convention on the Elimination of All Forms of Racial Discrimination (Art 5); the 1966 International Covenant on Civil and Political Rights (Art 24); the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Art 9); the 1989 Convention on the Rights of the Child (Arts 7 and 8); the 2006 Convention on the Rights of Persons with Disabilities (Art 18) or other regional human rights treaties, such as the 1969 American Convention on Human Rights; the 1990 African Charter on the Rights and Welfare of the Child; the 1995 Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms; or the 2004 Revised Arab Charter on Human Rights.

²⁴ 'Citizenship is man's basic right for it is nothing less than the right to have rights' (United States Supreme Court Chief Justice Earl Warren, in *Trop v Dulles, Secretary of State et al*, 356 US 86, 1958).

²⁵ Convention relating to the Status of Stateless Persons of 28 September 1954 (UNTS No 5158, vol 360, 117).

²⁶ UN, 'Our Rights as Human Beings: A Discussion Guide on the Universal Declaration of Human Rights' (New York, 1949) 13. Quoted by van Waas (n 1 above), 221.

²⁷ Human Rights Committee, 'CCPR General Comment No 15: The Position of Aliens under the Covenant' (Geneva, 11 April 1986). See also Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (Geneva, 26 May 2004) para 10. In the legal literature, see, eg D Weissbrodt and C Collins, 'The Human Rights of Stateless Persons' (2006) 28 *Human Rights Quarterly* 254.

1954 New York Convention itself refers to and establishes links with general human rights law, serving as the ‘legal safety net’ behind the specific status and protection created by the Convention when reaffirming in its preamble ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’; nevertheless ‘it is desirable to regulate and improve the status of stateless persons by an international agreement’ and ‘to assure stateless persons the widest possible exercise of these fundamental rights and freedoms’.²⁸

3. Historically, after a number of unsuccessful attempts under the auspices of the League of Nations,²⁹ the origins of the current international law framework protecting stateless people can be found in the 1951 Geneva Convention on the Status of Refugees³⁰ and its *travaux préparatoires*. The story began in 1948, when the United Nations Economic and Social Council requested of the UN Secretary General that a study be undertaken and recommendations made on the situation of stateless persons.³¹ This ‘Study on Statelessness’, finished in 1949, led to the formation of an ad hoc committee to consider, amongst others, the desirability of an international convention relating to the status and protection of both refugees and stateless persons.³² In February 1950, a Draft Convention relating to the Status of Refugees was elaborated, accompanied by a Draft Protocol relating to the Status of Stateless Persons. As a result, the United Nations General Assembly (UNGA) decided to convene a diplomatic conference, which adopted in 1951 Refugee Convention; however, the Draft Protocol relating to the Status of Stateless Persons was not adopted (it was referred back to the UNGA). In 1954, a new conference of plenipotentiaries was convened in New York to revise the Draft Protocol on the Status of Stateless Persons.³³ During the Conference, however, the delegates decided to make a separate instrument from the 1951 Convention, thus setting aside the protocol approach and adopted a distinct, self-standing Statelessness Convention that was completely independent from the 1951 Convention.³⁴ The text of

²⁸ See also, in a different context, van Waas (n 1 above), 226.

²⁹ Cf the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (No 4137, 179 LNTS 89) and its 1930 Protocol on a Certain Case of Statelessness (No 4138, 179 LNTS 115); then the 1930 Special Protocol concerning Statelessness (C.27.M.16.1931.V—never entered into force). For more on this see, eg UN, ‘A Study of Statelessness’ (New York, August 1949) E/1112; E/1112/Add.1, 128–30; M Stiller, ‘Statelessness in International Law: A Historic Overview’, *DAJV Newsletter*, 3/2012, 97–98. It is worth mentioning that during the interwar period, after the above Conference for the Codification of International Law in The Hague, the Institute of International Law elaborated a resolution on the attention of states on the desired legal status of stateless persons (*Statut juridique des apatrides et des réfugiés* (rapporteur: M. Arnold Raestad), Institut de Droit International, Session de Bruxelles—1936, le 24 avril 1936).

³⁰ Convention Relating to the Status of Refugees of 28 July 1951 (UNTS No 2545, vol 189, 137).

³¹ UN, ‘A Study of Statelessness’ (n 29 above).

³² N Robinson, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (Institute of Jewish Affairs, 1955; reprinted by UNHCR, 1997) 1–2.

³³ Conference of Plenipotentiaries on the Status of Stateless Persons convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954.

³⁴ C Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation’ (2004)

the 1954 Convention in large part mirrors that of the 1951 Geneva Convention (eg the set of rights provided for in the 1954 Statelessness Convention is similar to those in the 1951 Refugee Convention).³⁵ Nonetheless, despite the common roots and needs to be fulfilled, the overall protection regime of the stateless is much less well developed than international refugee law.

IV. SCOPE AND CONTENT OF THE 1954 NEW YORK CONVENTION: AN OVERVIEW

According to the UNHCR, the 1954 New York Convention is ‘the primary international instrument adopted to date to regulate and improve the legal status of stateless persons and to ensure to stateless persons fundamental rights and freedoms without discrimination’.³⁶ One can only fully agree with this, since the 1954 New York Convention establishes a specific, autonomous legal status for stateless individuals, with accompanying civil, political, economic, cultural and social rights. It is the only international legal instrument to do so.³⁷ It therefore goes without saying that any investigation into the protection regime of stateless persons under international law should start by analysing the scope, concept and main provisions of the Convention.

1. With regard to its scope *ratione personae*, the 1954 New York Convention applies to non-refugee stateless persons (stateless refugees are covered by the 1951 Geneva Convention³⁸) and its definition strictly covers so-called *de iure* stateless persons. It stipulates that ‘[f]or the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law’.³⁹ The International

22 *Refugee* 34; *Statelessness: The Quiet Torture of Belonging Nowhere* (Coventry Peace House, 2008) 15–16; van Waas (n 1 above), 226–27; GS Goodwin-Gill, ‘Introductory Note, Convention Relating to the Status of Stateless Persons, New York, 28 September 1954’ (UN Audiovisual Library of International Law, 1954), available at <http://legal.un.org/avl/ha/cssp/cssp.html>.

³⁵ As Robinson (n 32 above), 25, notes, ‘the prevailing view of the conference was that for a practical consideration (time) they should not engage in rewording the text of the 1951 Refugee Convention, except when this was justified by the difference between the two groups (refugees vs. Stateless persons)’. See also P Weis, ‘The Convention Relating to the Status of Stateless Persons’ (1961) 10 *International and Comparative Law Quarterly* 255; van Waas (n 1 above), 227.

³⁶ UNHCR, ‘Information and Accession Package: The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness’ (Geneva, January 1999) 10. Quoted by van Waas (n 1 above), 228.

³⁷ Manly and van Waas (n 16 above), 54. Similarly, but in the context of criticizing the 1954 Convention, see van Waas (n 1 above), 393–94.

³⁸ Convention relating to the Status of Refugees of 28 June 1951, Art 1A(2).

³⁹ For a thorough analysis and interpretation of this seemingly straightforward but, if one deconstructs it, actually complex and difficult definition, see UNHCR, ‘Expert Meeting—The Concept of Stateless Persons under International Law (“Prato Conclusions”)’ (May 2010), available at <http://www.refworld.org/docid/4ca1ae002.html> (last accessed on 12 January 2015); UNHCR, ‘Guidelines on Statelessness No 1: The Definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons’ (20 February 2012), HCR/GS/12/01, available at <http://www.refworld.org/docid/4f4371b82.html> (last accessed on 12 January 2015). The

Law Commission (ILC) has observed that the definition in Article 1(1) of the New York Convention is now part of customary international law.⁴⁰ It should be noted, however, that not all stateless persons falling under the definition of Article 1(1) are entitled to benefit from this protection regime. According to the exclusion clause, the New York Convention shall not apply to: (i) persons receiving from UN agencies other than the UNHCR (eg United Nations Relief and Works Agency) protection or assistance so long as they are receiving it; (ii) persons recognized by the competent authorities of the country of residence as having the rights and obligations which are attached to the possession of the nationality of that country; and (iii) persons having committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside the country of their residence prior to their admission to that country or having been guilty of acts contrary to the purposes and principles of the UN.⁴¹

2. The set of rights provided for in the New York Convention is similar to those in the 1951 Geneva Convention. Some 30 provisions of the New York Convention set out a minimum standard of treatment for stateless persons, without discrimination, beyond which states are free to extend additional protection and rights.⁴² Three different levels of protection are established: first, treatment at least as favourable as that accorded to aliens generally; secondly, treatment on a par with nationals; and thirdly, the absolute rights which are not contingent upon the treatment of any other group, but are guaranteed directly.⁴³ The rights in respect to which treatment at least as favourable as that accorded to aliens generally in the same circumstances applies are, inter alia: the acquisition of movable and immovable property; the right of association; the right to engage in wage-earning employment; the right to self-employment; the right to housing; and the right to choose the place of residence and to move freely within the country.⁴⁴ Regarding the next, higher level of legal protection, stateless persons shall enjoy the same protection as is accorded to nationals of the country of residence with respect to: freedom of religion; access to courts, including legal assistance; elementary education; public relief and assistance; remuneration, hours of work, minimum age of employment, etc. and social security; and duties, charges or taxes, etc. The absolute rights reflecting their special needs are: the right to non-discrimination; the issuance

latter may be conceived as the authentic interpretation of this key provision in the 1954 Convention in the light of the rules on the interpretation of treaties of the 1969 VCLT.

⁴⁰ 'Draft Articles on Diplomatic Protection with Commentaries' (2006) II-ii *Yearbook of the International Law Commission* 49.

⁴¹ Art 1(2) of the 1954 New York Convention.

⁴² *Ibid.*, Art 5.

⁴³ See also van Waas (n 1 above), 230–31; UNHCR, 'Guidelines No 3: The Status of Stateless Persons at the National Level' (17 July 2012), HCR/GS/12/03, point 11, available at <http://www.refworld.org/docid/5005520f2.html> (last accessed on 12 January 2015).

⁴⁴ For a comprehensive analysis of protecting civil, political, economic, cultural and social rights of stateless persons under the 1954 New York Convention and general human rights law see van Waas (n 1 above), chs X–XII.

of identity papers (if the person does not possess a valid travel document); the issuance of travel documents; and facilitated naturalization. It should be emphasized that, since there is no element of persecution (risk of persecution) in the case of statelessness, no similar protection against refoulement like in the 1951 Geneva Convention is provided for stateless persons. However, the 1954 Convention sets forth in Article 31 that the contracting states shall not expel a stateless person lawfully from their territory save on grounds of national security or public order, and such expulsion shall be only in pursuance of a decision reached in accordance with the due process of law. On the other hand, in return for giving the above entitlements to the stateless, 'the responsibility placed on states to respect, protect and fulfil 1954 Convention rights is balanced by the obligation in Article 2 of the same treaty that stateless persons abide by the laws of the country in which they find themselves'.⁴⁵

3. Another classification for the rights enshrined in the 1954 Convention is the level of attachment of the stateless person with the state concerned.⁴⁶ First, in order to benefit from certain provisions, the mere physical presence⁴⁷ of the individual, satisfying the 'stateless person' definition, is sufficient (eg in relation to non-discrimination, status, property, access to courts, rationing, public education or administrative assistance). Secondly, some other rights are conferred on those stateless persons who are 'lawfully in' or 'lawfully staying in' the territory of a contracting party (this set of rights includes, amongst others: the right of association; the right to work; the right to engage in self-employment; the right to public relief; labour and social security rights; the freedom of movement; and the right to a travel document or the protection from expulsion). Thirdly, further rights are only given to stateless persons who are 'habitually resident' in the territory of a given state (eg exemption from legislative reciprocity, artistic rights and industrial property).

4. The international protection regime of stateless persons cannot be compared to international refugee law, where, in addition to the 1951 Refugee Convention, the UNHCR ExCom and other bodies (non-judicial and judicial ones) have developed detailed conventional rules and interpreted on several occasions the meaning of different concepts, such as the act of persecution and the principle of non-refoulement. International refugee law has been constantly evolving since its creation, while the only international instrument for the protection of stateless people is the 1954 New York Convention; and we have not witnessed such a rich and constantly growing soft law and jurispru-

⁴⁵ UNHCR, 'Guidelines No 3' (n 43 above), point 12.

⁴⁶ van Waas (n 1 above), 229-30; L van Waas, 'Nationality and Rights' in Blitz and Lynch (n 6 above) 29-30; UNHCR, 'Guidelines No 3' (ibid), points 13-20.

⁴⁷ Other scholars differentiate between the terms 'being subject to the state's jurisdiction' and the 'physical presence' according to the wording of the Convention (although neither of these expressions is used in its text). See van Waas (n 1 above), 229-30; van Waas (ibid) 29. I treat these situations as the same since I cannot see any real difference in the formulae contained in the relevant articles of the 1954 Convention; the common feature is that the stateless person must be present on the territory of a given contracting party in order to benefit from those entitlements.

dence in this field either. Further, as mentioned above, no supervisory body has been set up for a long time to monitor the situation of stateless persons under the jurisdiction of the contracting states. This is in contrast to the 1951 Refugee Convention, in relation to which the UNHCR had always played a major monitoring and implementing role since its adoption. Another weakness of the system is that the 1954 New York Convention is not, by its substance, a self-executing treaty. Not only do its content and broad, insufficiently precise formulation of the rights suggest, but Article 33 also explicitly stipulates that states have to adopt domestic legislation to make it effective, and they are obliged to communicate those domestic laws to the UN Secretary General. Moreover, the New York Convention does not contain provisions for the procedure to determine statelessness either (it is up to the individual states to establish such legal channels), which omission makes claiming those rights more difficult if one cannot officially obtain that status.⁴⁸ To sum up, international statelessness law has been all but forgotten for long decades.

V. SUBSEQUENT DEVELOPMENTS OF THE PROTECTION REGIME UNDER INTERNATIONAL LAW

A. Horizontal Issues

Despite having hitherto been forgotten, statelessness has recently reappeared on the mainstream international human rights agenda.⁴⁹ The gradual growth in importance of this issue is evidenced, first, in the recurring appearance of the topic in the activities of various international institutions and bodies, such

⁴⁸ On the need to establish such procedures, see: UNHCR, 'Guidelines on Statelessness No 2: Procedures for Determining Whether an Individual is a Stateless Person' (5 April 2012), HCR/GS/12/02, available at <http://www.refworld.org/docid/4f7dafb52.html> (last accessed on 12 January 2015); G Gyulai, 'Statelessness Determination and the Protection Status of Stateless Persons. A Summary Guide of Good Practices and Factors to Consider when Designing National Determination and Protection Mechanisms' (European Network on Statelessness 2013), available at <http://www.statelessness.eu/resources/ens-good-practice-guide-statelessness-determination-and-protection-status-stateless> (last accessed on 12 January 2015).

⁴⁹ See, eg BK Blitz, 'Policy Responses and Global Discourses on the Rights of Non-citizens and Stateless People' in BK Blitz and C Sawyer (eds), *Statelessness in the European Union. Displaced, Undocumented, Unwanted* (Cambridge University Press, 2011) 118–23; L Kingston, 'Moving Statelessness Forward on the International Human Rights Agenda', available at http://www.statelessness.eu/blog/moving-statelessness-forward-international-human-rights_agenda#sthash.Ml6IGcbe.dpuf (last accessed on 12 January 2015); L Kingston, '“A Forgotten Human Rights Crisis”: Statelessness and Issue (Non-)Emergence' (2013) 14 *Human Rights Review* 73; L Kingston, 'Statelessness and Issue (Non-)Emergence' (2012) 40 *Forced Migration Review* 50. Generally on the emergence studies see, eg CR Carpenter, 'Setting the Advocacy Agenda: Theorizing Issue Emergence and Nonemergence in Transnational Advocacy Networks' (2007) 51 *International Studies Quarterly* 99.

as the UNHCR, the UNGA,⁵⁰ the UN Human Rights Council⁵¹ and different treaty bodies.⁵² Secondly, in the last few years the number of accessions to the 1954 New York Convention has increased continually (18 new state parties since December 2011), and even more new accessions are to come as a result of the pledges state made at the December 2011 Intergovernmental Ministerial Conference. Thirdly, topics related to statelessness have attracted greater academic interest, too, as a result of which there has been much wider academic research and more scholarly writings (legal, political, sociological and interdisciplinary), policy-oriented study (eg the Open Society Institute's initiative⁵³ and that of the International Observatory on Statelessness⁵⁴) and institutionalized networking (eg the creation of the European Network on Statelessness).⁵⁵ On the international policy-making level, all these positive developments and newly acquired attention have culminated in the elaboration and adoption of a series of UNHCR soft law instruments (guidelines) interpreting and explaining in greater depth the main features, concepts, logic and provisions of the major international treaty instruments on statelessness.⁵⁶ Another significant development is the mushrooming of national statelessness determination procedures throughout the world (most of which have been introduced in Europe, but the Americas and Asia are also on the map).⁵⁷ Thus, despite the silence of the 1954 Statelessness Convention on this matter, individual states, cooperating with each other, took their own positive steps

⁵⁰ For the statelessness-related UNGA resolutions see 'United Nations General Assembly Resolutions of Particular Relevance to Statelessness and Nationality' (25 March 2013), available at <http://www.refworld.org/docid/4c49a02c2.html> (last accessed on 12 January 2015).

⁵¹ Mainly from the point of view of the right to a nationality and the prohibition of arbitrary deprivation of nationality see UNHCR, 'Human Rights Council Resolutions Relating to Nationality and Statelessness', available at <http://www.refworld.org/statelessness.html> (last accessed on 12 January 2014). In the framework of the Universal Periodic Review see UNHCR, 'Compilation of Recommendations relating to Statelessness Made during the First Cycle (1st–12th Sessions) of the Human Rights Council's Universal Periodic Review' (11 July 2013), available at <http://www.refworld.org/docid/51dfaf484.html> (last accessed on 12 January 2015); UNHCR, 'Compilation of Recommendations relating to Statelessness Made during the Second Cycle (13th–16th Sessions) of the Human Rights Council's Universal Periodic Review' (11 July 2013), available at <http://www.refworld.org/docid/51dfb0ee4.html> (last accessed on 12 January 2015).

⁵² For the relevant texts produced by these treaty bodies see UNHCR, 'Extracts of Selected General Comments and Recommendations of the United Nations Human Rights Treaty Bodies relating to Nationality and Statelessness', available at <http://www.unhcr.org/4517ab402.html> (last accessed on 12 January 2015).

⁵³ See <http://www.opensocietyfoundations.org/projects/statelessness>.

⁵⁴ See <http://www.nationalityforall.org/>.

⁵⁵ On the renaissance of social science scholarship on statelessness see Manly and van Waas (n 16 above), 50; BK Blitz and C Sawyer, 'Statelessness in the European Union' in Blitz and Sawyer (n 50 above), 7–14; L van Waas and M Manly, 'The State of Statelessness Research. A Human Rights Imperative' (2014) 19 *Tilburg Law Review* 3.

⁵⁶ After expert consultations, UNHCR has published four sets of guidelines, relating to the definition of stateless person, the national statelessness determination procedures, the legal status of recognized stateless persons at the national level and children's right to acquire nationality (see the references below). A fifth set of guidelines, concerning loss/deprivation of nationality under the 1961 Convention on the Reduction of Statelessness, is in preparation.

⁵⁷ In order to get a general picture about these procedures see, eg Gyulai (n 48 above).

to fill this gap and to grant effective access to the rights offered via the 1954 Convention for the 'legal ghosts' by officially identifying them.

B. Specific Domains

Progressive developments on specific issues of law related to statelessness have sporadically been made and are enshrined in a number of subsequently adopted international instruments.

1. Considering these thematically, the progress made in the field of consular protection of stateless persons is worthy of attention first. The starting point is the Schedule to Article 28 of the 1954 Convention, which declares that the delivery of travel document 'does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not ipso facto confer on these authorities a right to protection'.⁵⁸

The 1967 Council of Europe Convention on Consular Functions took a different approach,⁵⁹ its Article 46(1) stipulating:

[a] consular officer of the state where a stateless person has his habitual residence, may protect such a person as if [the consular officer is entitled to protect the nationals of the sending state], provided that the person concerned is not a former national of the receiving state.

Thus the Council of Europe Convention, applying the same definition as introduced by the 1954 Convention (referring to the latter in Article 46(2)), takes a significant step forward, and this rule can be considered as a progressive development of international law in this domain since, according to the classical standpoint of public international law, states are entitled to grant consular protection only to their own nationals. Hence, habitual residence of the stateless person concerned is a precondition for the state to exercise this function. What makes the picture less clear, however, is that the 1967 Convention has only entered into force recently, due to the low number of ratifications.⁶⁰ This right is not a widely shared treaty law rule, but shows the tendencies of legal developments in this regard.

Summing up, it can be stated that consular protection operates as an additional element of a state's protection abroad, even if the rules only become legally binding a short time ago and only apply in relation to a limited number of states, but they clearly indicate the developments of the international community and its will to move forward.

⁵⁸ Para 16 of the Schedule to Art 28.

⁵⁹ 1967 European Convention on Consular Functions (CETS No 061). For a recent analysis of the convention made by the Council of Europe Secretariat, see Examination of the European Convention on Consular Functions (ETS No 61), CAHDI (2014) 18, available at <http://www.coe.int/en/web/cahdi/48th-meeting-meeting-documents> (last accessed on 12 January 2015).

⁶⁰ As of 1 January 2015, five states have ratified it (most recently Georgia in March 2011) and an additional four states have signed it without ratifying it yet (source <http://conventions.coe.int>).

2. There are virtually no domains or set of rights extended to *de iure* stateless by quasi-universal international treaties other than intellectual property rights. From a human rights perspective, the right to intellectual property is one element of a cluster of rights broadly referred to as 'cultural rights'. For the stateless, a cultural identity distinct from that of the majority of the population is often a contributing factor to their plight; similarly, difficulties in enjoying that distinct cultural life are not uncommon.⁶¹ In 1971, Protocol No 1 was annexed to the Universal Copyright Convention⁶² as revised in Paris on 24 July 1971. This assimilated stateless persons having habitual residence in a state to the nationals of that state (paragraph 1). By doing so, the protocol builds upon the provisions of the 1954 New York Convention. Article 14 of the latter sets forth the rights concerning artistic rights (which is a synonym for copyright) and industrial property, stating that stateless persons shall be accorded, in the country in which they have the habitual residence, the same protection as accorded to nationals of that country. However, they also enjoy protection in any other contracting party: they shall be accorded the same protection as provided for the nationals of their country of habitual residence in the territory of that contracting party. Protocol No 1 to the Universal Copyright Convention determines the same level of protection (stateless persons are on an equal footing with nationals) and the same condition for benefiting from this right (habitual residence in a contracting party). The purpose of these rules is to provide protection of the 'totality of creations of the human mind'.⁶³ Although the 1954 New York Convention does not specify the type of protection and it can thus be assumed that all aspects of protection are covered, the Universal Copyright Convention as revised in Paris on 24 June 1971 lays down specific rules in this regard. Even if the scope *ratione materiae* of the two provisions are roughly the same, the two treaties have significantly different numbers of state parties. While Protocol No 1 has only 38, the 1954 New York Convention currently has 84 state parties.⁶⁴ Moreover, the geographical coverage is different as well, since, despite the lower number of ratifications, Protocol No 1 also applies to India, Russia and the United States, which are not parties to the 1954 New York Convention.

3. Thirdly, two treaties on the equal treatment of nationals and non-nationals in social security matters develop the related provisions of the 1954 New York Convention. One treaty, which was universally acclaimed though not widely ratified,⁶⁵ was elaborated by the International Labour Organiza-

⁶¹ van Waas (n 1 above), 346–47.

⁶² Protocol 1 annexed for Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to works of stateless persons and refugees 1971 (UNTS No 13444).

⁶³ Robinson (n 32 above), 55, in relation to Art 14 of the 1954 New York Convention.

⁶⁴ See <http://treaties.un.org>.

⁶⁵ As of 1 January 2015, it has only 37 state parties (the Netherlands denounced it in 2004). However, it is in force in relation to important countries of concern such as Bangladesh, Iraq or Pakistan. See <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C118> (last accessed on 12 January 2015).

tion (ILO) in 1962 (Convention No 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security). Convention No 118 refers to the 1954 New York Convention definition of 'stateless person'⁶⁶ and applies it to them 'without any condition of reciprocity'⁶⁷ and without the requirement of residence. It prescribes equal treatment between nationals and stateless persons in different branches of social security (eg medical care, sickness benefit, maternity benefit, old-age benefit, unemployment benefit and family benefit). However, the scope of the obligations varies from state to state, since 'each Member shall specify in its ratification in respect of which branch or branches of social security it accepts the obligations of this Convention'.⁶⁸

The second, similar regional instrument, the 1972 European Convention on Social Security,⁶⁹ is also worth mentioning briefly. After the European Interim Agreements on Social Security made in 1953 under the aegis of the CoE, the CoE Member States left open the possibility of extending the agreements to give non-nationals and migrants more complete and effective protection. Thus, in 1959, it was decided to draft a multilateral convention to co-ordinate the social security legislations of the CoE Member States.⁷⁰ This convention, using the 1954 New York Convention definition of 'stateless person', covers stateless persons resident in the territory of a contracting party⁷¹ who have been subject to the legislation of the contracting parties, together with the members of their families and their survivors. It affirms the principle of equality of treatment with nationals in the fields of application of the convention, such as general and special schemes and whether contributory or non-contributory, including employers' liability schemes providing benefits. This instrument can be considered as building upon, for a limited number of states in Europe, the provisions relating to social security of the 1954 New York Convention, without prejudice to the provisions of the 1962 ILO Convention.⁷²

4. Fourthly, noteworthy developments have occurred in relation to the facilitated naturalization of stateless people, for whom acquisition of nationality is the ultimate legal channel to put an end to this legal anomaly. Despite the expansion of the concept advocating that universal human rights determine one's legal status irrespective of one's nationality or lack of it ('denationalization of rights'), in practical terms nationality still holds its importance as 'the right to have rights'. As Sir Lauterpacht opined, nationality 'is now increasingly regarded as an instrument for securing the rights of the individual in the national and international spheres'.⁷³ Naturalization is the best and most

⁶⁶ Ibid, Art 1 lit (h).

⁶⁷ Ibid.

⁶⁸ Ibid, Art 2(3).

⁶⁹ 1972 European Convention on Social Security (CETS No 078). It is not a widely ratified convention, with only eight state parties as of 1 January 2015.

⁷⁰ Explanatory Report to the 1972 European Convention on Social Security, para 7.

⁷¹ Ibid, Art 4.

⁷² Ibid, Art 6(1).

⁷³ H Lauterpacht, 'Foreword to the First Edition' in Weis (n 1 above), xi.

durable solution for stateless people, since it addresses what is really missing for them: nationality. However, one cannot find a comprehensive international legal framework concerning facilitated naturalization of stateless individuals. On the global level, the only legally binding provision is Article 32 of the 1954 New York Convention. If we take a close look at the text of the article, it is not an individual right of persons lacking nationality but, rather, an opportunity for them to enjoy naturalization. The addressees are the contracting states, which are urged to facilitate stateless persons' access to nationality, but it remains within their discretion to do so. In other words, Article 32 contains a 'shall clause', but content-wise this obligation is much softer, since it does no more than prescribe that states make every effort in this regard.⁷⁴ This is quite vague, with no further details on the conditions listed therein (expedition of proceedings and reduction of related charges and costs). After deconstructing this provision, some preliminary remarks can be made. First, the term 'expedition of proceedings' can mean two things: (i) shortening the waiting period; or (ii) issuing the decision in a speedy manner or in a non-time-consuming procedure.⁷⁵ In understanding the other conditions, the *travaux préparatoires* of the New York Convention give guidance. Manley O Hudson, the first rapporteur of the topic for the ILC, identified a number of issues that were impairing naturalization, for instance complicated and expensive procedures, and stringent requirements as to the possession of property.⁷⁶ Although hesitantly dealing with the question of naturalization,⁷⁷ the strength of this treaty provision lies in the fact that Article 32 applies to all stateless people, irrespective of the lawfulness of their stay in a given state (but which is not reflected in state practice⁷⁸).

Richer soft law has subsequently blossomed, driven by the UNHCR ExCom trying to set global standards (many ExCom conclusions between 2006 and 2008 called for states to take action on the matter).⁷⁹ The need for facilitated acquisition of nationality for the stateless has also been propelled by certain regional instruments, namely the 1997 European Convention on Nationality (ECN), the CoE Committee of Ministers Recommendation R (1999) 18 on the Avoidance and Reduction of Statelessness and the 2006 CoE Convention on the Avoidance of Statelessness in relation to State Succession (with specific focus on situations of state succession). The above CoE conventions laid down more detailed binding rules and a concrete, more precise obligation to facilitate the

⁷⁴ van Waas (n 1 above), 365.

⁷⁵ See also J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 986.

⁷⁶ MO Hudson, 'Nationality, Including Statelessness, Annex III—Statelessness' (1952) II *Yearbook of the International Law Commission* document A/CN.4/50, 22.

⁷⁷ van Waas (n 1 above), 385.

⁷⁸ According to the UNHCR Final Report concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection (2004), only 59.5% of the responding states provide for facilitated naturalization of stateless persons.

⁷⁹ UNHCR ExCom conclusions No 106 (LVII) 2006, No 107 (LVIII) 2007, No 108 (LIX) 2008, available at <http://www.refworld.org/docid/4b28bf1f2.html> (last accessed on 12 January 2015).

naturalization of stateless persons.⁸⁰ It is worth noting that the ECN is currently the only international convention setting a maximum waiting period (10 years) that a state can require before lawful and habitual residents (including stateless individuals) become eligible to apply for naturalization.⁸¹ Furthermore, the Explanatory Report to the ECN indicates the required favourable conditions (eg reduction of the length of required residence, less stringent language requirements, easier procedure and lower procedural fees).⁸² A similar approach is taken in the 1999 Committee of Ministers Recommendation, which also adds that criminal offences should not unreasonably prevent stateless persons seeking naturalization.⁸³ The question now arises whether there already exists a 'right to be considered for naturalization' for stateless persons as an emerging human right related to reducing existing statelessness. The emergence of such a human right, a form of *ius connectionis*, has been advocated by scholars in this field,⁸⁴ and the concept is implicitly supported by the practice of certain treaty bodies, notably the Human Rights Committee and the Committee on the Elimination of Racial Discrimination.⁸⁵

All in all, what we have seen as regards naturalization is the strengthening of the norm obliging states to grant facilitated access to nationality for those lacking it; and it has become a more sophisticated and self-standing rule than at the time of the drafting of the 1954 Statelessness Convention. Nonetheless, regional human rights law developments appear to require an additional element not present in Article 32 of the 1954 New York Convention, ie the establishment of lawful and habitual residence in the territory of a given state, in order for stateless persons to be able to acquire the new nationality in a simplified way.

5. Finally, in the years 2000, facilitation was made in favour of stateless persons concerning their right to international travel in a regional setting, within the European Union (EU). The reason behind this was that the EU enlargement with 10 new Member States on 1 May 2004 had the paradoxical effect of reducing the scope of the possibility of granting a visa exemption, since the EU Visa Regulation (Regulation No 539/2001/EC) did not provide for a visa exemption for stateless persons residing in a Member State that does not yet fully apply the Schengen acquis, who have to cross an external Schengen border when entering into the Schengen zone or other non-Schengen Member

⁸⁰ Art 6(4) lit g) of the ECN; Art 9 of the 2006 CoE Convention.

⁸¹ Art 6(3) of the ECN. See also L van Waas, 'Fighting Statelessness and Discriminatory Nationality Laws in Europe' (2012) 14 *European Journal of Migration and Law* 248.

⁸² Para 52, available at <http://conventions.coe.int/Treaty/en/Reports/Html/166.htm> (last accessed on 12 January 2015).

⁸³ Point II.B.d, available at <http://www.refworld.org/docid/510101e02.html> (last accessed on 12 January 2015).

⁸⁴ Eg van Waas (n 1 above), 362, 366, 369–70.

⁸⁵ Human Rights Committee, *Individual complaint of Stewart v Canada*, case number 538/1993, A/52/40, vol II, 1 November 1996, para 12.4; CERD General Recommendation 30: Discrimination against Non-Citizens, 2004, para 13.

State. To remedy this situation,⁸⁶ Regulation (EC) No 1932/2006, modifying the EU Visa Regulation, included a new type of automatic visa exemption for stateless persons recognized by the EU Member States. Article 1(1) lit b) of the modifying regulation says that ‘stateless persons and other persons who do not hold the nationality of any country who reside in a Member State and are holders of a travel document issued by that Member State’ shall be exempt from the visa requirement. This means that stateless persons residing in a Member State in possession of a valid travel document (not necessarily that prescribed in the Schedule annexed to the 1954 New York Convention) are not required to have a visa in order to enter other Member States and reside in their territory for up to 90 days within any 180 day period (intra-EU short-term stay). Besides this automatic (compulsory) visa exemption category, the Regulation goes even further in giving to Member States the discretion to exempt those stateless persons from the visa requirement who reside in a third country, listed in Annex II (‘the white list’) of the EU Visa Regulation, having issued their travel document. The latest modification of the EU Visa Regulation further expanded the intra-EU visa free travel to those stateless persons ‘and other persons who do not hold the nationality of any country’ who reside in two non-Schengen Member States, ie the United Kingdom and Ireland,⁸⁷ since their travel conditions within the EU have not hitherto been clarified. The newly introduced rules leave Member States free to decide on the exemption from the visa requirement for that category of persons in compliance with their international obligations (‘may clause’). For the sake of transparency, Member States should notify such decisions to the European Commission. It is an innovative element in these rules on visa-free travel that they cover all stateless persons, both those who come under the 1954 New York Convention and those outside of its scope. For example, non-citizens of Latvia are given a special passport (not the one according to the 1954 New York Convention) which not only grants them the constitutional right to belong to the state, but has also been recognized by the EU as valid for visa-free travel.⁸⁸ This is thus the first time in EU legislation where a larger personal scope (including eventually the de facto stateless as well) applies than that defined in the 1954 New York Convention.

In addition, although it is a technical norm, a further EU legislative innovation makes the international travel of stateless people easier in practice,

⁸⁶ The European Commission has been expressly asked to do so by the European Parliament and the Council in the course of the negotiations on the proposal of the Schengen Borders Code (Regulation No 562/2006/EC). This exemption was mainly aimed at resolving the situation of ‘Latvian non-citizens’ (see COM 2006(4) final, 5).

⁸⁷ Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2013] OJ L347, 74–80, recital (9), Art 1(3) lit b).

⁸⁸ R Bauböck, B Perchinig and W Sievers (eds), *Citizenship Policies in the New Europe: Expanded and Updated Edition* (Amsterdam University Press, 2009) 73.

creating legal certainty and transparency. This is the reformed Table of Travel Documents recognized by Member States, which consists of travel documents issued by Member States, third countries and international organizations.⁸⁹ The new EU-wide Table of Travel Documents, which is available to the public,⁹⁰ includes in Part II ‘travel documents issued to stateless persons under the United Nations Convention relating to the Status of Stateless Persons of 28 September 1954’ as well as ‘travel documents issued to persons who do not hold the nationality of any country and who reside in a Member State’.⁹¹ It is a promising sign, showing the mutual trust between them, that Member States recognize each other’s travel documents issued for the above two categories of stateless individuals, as well as some Member States recognizing stateless travel documents issued by third countries even beyond the contracting parties of the 1954 New York Convention.

VI. DE LEGE FERENDA PROPOSALS: NEW TENDENCIES

This section is devoted to the way forward and examines what the future holds for enhancing the protection regime offered to this highly vulnerable group of people. Two topics will be discussed: diplomatic protection and the protection of the stateless from expulsion.

1. One had to wait a couple of decades after the 1967 CoE Convention on Consular Functions until the issue of protecting stateless persons abroad has been put again on the international law-making agenda, this time at the global level (within the UN system). The ILC included the topic of diplomatic protection on its agenda in 1995 and adopted the Draft Articles on Diplomatic Protection in 2006, endorsed by the UNGA,⁹² which is of interest from the perspective of stateless people, since this mechanism could offer them fair and proper treatment abroad.⁹³ As draft article 1 is definitional by nature, it does not mention stateless persons. Article 3, on the other hand, makes it clear that diplomatic protection may be exercised in respect of such persons.⁹⁴ Draft article 3(2) opens the door generally for certain categories of persons not being nationals of the state concerned,⁹⁵ including stateless per-

⁸⁹ Decision No 1105/2011/EU of the European Parliament and of the Council of 25 October 2011 on the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa and on setting up a mechanism for establishing this list [2011] OJ L287, 9–12, and, based on this, Commission Implementing Decision C(2013) 4914 of 2 August 2013 establishing the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa.

⁹⁰ Available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/document-security/index_en.htm (last accessed on 12 January 2015).

⁹¹ Art 3(3) lit c)–d), Decision No 1105/2011/EU.

⁹² A/RES/62/67. *Diplomatic Protection* (General Assembly of the United Nations).

⁹³ See also van Waas (n 1 above), 380–85; van Waas (n 46 above), 39–40.

⁹⁴ Above n 40, 26.

⁹⁵ Draft Art 3(2) reads: ‘Notwithstanding paragraph 1, diplomatic protection may be exercised by a state in respect of a person that is not its national in accordance with draft article 8’.

sons. This is explicitly expressed in draft article 8, which relates to stateless persons and refugees. By virtue of paragraph 1 of this article, ‘a state may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that state’.

This is clearly an attempt for progressive development of international law, because traditionally the general rule was that a state might exercise diplomatic protection only on behalf of its nationals. This is well illustrated in the *Dickson Car Wheel Company v United Mexican States* case (1931), when the United States–Mexican Claims Commission held that a stateless person could not be the beneficiary of diplomatic protection: ‘[a] state . . . does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no state is empowered to intervene or complain on his behalf either before or after the injury’.⁹⁶ As the ILC found, this dictum no longer reflects the accurate position of international law for stateless persons. Contemporary international law reflects a concern for the status of this category of persons, evidenced by specific conventions on statelessness.⁹⁷ In line with these efforts, according to draft article 8(1), a state may exercise diplomatic protection in respect of a stateless person, regardless of how he/she became stateless, provided that the person was lawfully and habitually resident in that state both at the time of injury and at the date of the official presentation of the claim. The requirement of both lawful residence and habitual residence sets a high threshold, notions borrowed from the 1997 ECN.⁹⁸ Habitual residence in this context is intended to convey continuous residence. Although this threshold is high and may lead to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is, as pointed out by the ILC in the Commentaries, justified in the case of an exceptional measure introduced *de lege ferenda*,⁹⁹ since states are more likely to accept such a new rule if enlarging the scope *ratione personae* of diplomatic protection is not without limitations and conditions. I also draw attention to the temporal requirement for the bringing of a claim: the stateless person must be a lawful and habitual resident of the claimant state both at the time of the injury and at the date of the official presentation of the claim, even if quite a long time has already elapsed between the two acts. Finally, it is to be noted that the ‘may clause’ contained in draft article 8(1) emphasizes the discretionary nature of the right. In other words, it is not an obligation of states to include legally and habitually residing stateless individuals within the sphere of diplomatic protection; rather, states have discretion about whether to extend such protection to a stateless person. The fate and

⁹⁶ UNRIAA, vol IV, 669, 678. See also Weis (n 1 above), 162; and Draft Articles (n 40 above), 48.

⁹⁷ Draft Articles (n 40 above), 48.

⁹⁸ Art 6 (4), point (g), where they are used in connection with the acquisition of nationality.

⁹⁹ Draft Articles (n 40 above), 49.

the normative character of the ILC Draft Articles on Diplomatic Protection is still uncertain eight years after its adoption.

2. As far as the protection of stateless persons against expulsion is concerned, it is again the ILC that has been the driving force behind the codification of the general principles related to this matter. The ILC adopted Draft Articles on the Expulsion of Aliens in August 2014 on second reading,¹⁰⁰ which were then referred to the UNGA for further consideration (either to take note of the draft articles in a resolution and to encourage their widest possible dissemination, or to consider, at a later stage, the elaboration of a convention on the basis of the draft articles).¹⁰¹ Draft article 7, entitled ‘Rules relating to the expulsion of stateless persons’, is of particular relevance in this regard. However, its content is disappointing. This provision does not even echo Article 31 of the 1954 New York Convention; it is merely a ‘without prejudice clause’. Therefore neither substantial requirements nor the procedural safeguards articulated in paragraphs (1)–(3) of the same article are incorporated in the draft. Draft article 7 stipulates that

[t]he present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a state shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

The Commentaries laconically state as follows: ‘[d]raft article 7 consists of a “without prejudice” clause aimed at ensuring the continued application to stateless persons of the rules concerning their expulsion’.¹⁰² There is not much explanation about the intentions of the drafters or the reasons behind such a minimalist approach. As a *prima facie* observation, one can conclude that draft article 7 has no added value, which is evidence of the lack of consensus between the ILC members on this matter. I regret this missed opportunity to consolidate and develop the law.

VII. CONCLUSIONS

Having analysed the stateless-specific protection regime under international law, I will now make some general concluding remarks. Since the establishment of the UN, international action on statelessness, notwithstanding the oscillating attention to the issue, has been a good example of the normative power of the law of the nations. Public international law created a new legal category, an abstract and autonomous *de iure* stateless status, with its

¹⁰⁰ Report of the International Law Commission, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014), GAOR, Sixty-ninth session, Supplement No 10, A/69/10, Ch IV.

¹⁰¹ *Ibid.*, para 42.

¹⁰² ‘Expulsion of Aliens—Text of the Draft Articles and Commentaries Thereto’, Report of the International Law Commission, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014), GAOR, Sixty-ninth session, Supplement No 10, A/69/10, 32.

own terminology—all with a view to establishing a coherent, logically closed legal architecture and to offering a self-standing protection status for those having been denied the basic right of belonging to a state. This approach is embodied first and foremost in the 1954 New York Convention, which is universal in its acclaim. This *lex specialis* instrument and the other various human rights treaties and documents presented in the foregoing have been designed to ensure that those not enjoying the right to a nationality are not unreasonably disadvantaged by their plight (protection of stateless persons).¹⁰³ We could observe some significant developments and improvements in the international law ‘safety net’ offering them protection and attaching rights and entitlements to the stateless status. Nevertheless, there are still serious gaps and shortcomings in the relevant international legal framework, and the existing norms also face limited effectiveness (eg the relatively low overall number of ratifications of the 1954 Convention and other global or regional conventions, the challenges of identifying stateless populations and the unclear character of customary law of certain stateless-specific treaty rules). What is positive is the growing attention to the cause of statelessness from international institutions and the international community as a whole, alongside the changing attitudes of states (enough to mention the remarkable increase of new accessions to the 1954 Convention in the last few years and the number of statelessness-related state pledges).

My academic evaluation of this re-emerging, old–new domain of international law is rather positive. It is undoubtedly a significant achievement that there is a theoretically well-elaborated concept employed by public international law to protect the individual in his/her transnational engagements. This is a specific example of creating a new substantive legal category of individuals under international law. International statelessness law is now in transition into ‘adulthood’, with richer, more robust and more sophisticated legal foundations, backed up with soft and hard enforcement mechanisms, the most important of which should be domestic authorities and domestic courts. In my assessment, the perspectives and potential in this field of law are promising enough to soon falsify Judge Abi-Saab’s brilliant bon mot, describing international law as a ‘normative giant, but an institutional dwarf’.¹⁰⁴

¹⁰³ van Waas (n 1 above), 436.

¹⁰⁴ G Abi-Saab, ‘The International Judicial Function’ (UN Audiovisual Library of International Law), available at http://legal.un.org/avl/lis/Abi-Saab_CT_video_1.html (last accessed on 12 January 2015).

