REMEMBERING THE FORGOTTEN: INTERNATIONAL LEGAL REGIME PROTECTING THE STATELESS PERSONS—STOCKTAKING AND NEW TENDENCIES

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Statelessness and protection of stateless persons under public international law has not traditionally been in the forefront of academic legal research. This paper aims at drawing a picture on the legal status of stateless persons under public international law, shedding light onto the rather sporadic but noteworthy legal developments after the adoption of the core global instrument in this field, the 1954 New York Convention on the Status of Stateless Persons. It explores both the current legal framework on the universal and regional level (de lege lata) and new tendencies in legal developments (de lege ferenda). The paper concludes that public international law created a new legal category, an abstract and autonomous de iure stateless status, with its own terminology and dogmatics. All this with a view to establish a coherent, logically closed legal architecture and to offer a self-standing protection status for those having been denied the basic right of belonging to a State. One could observe significant developments and improvements in the international law "safety net" offering them protection and attaching rights to the stateless status. Nevertheless, there are still serious gaps and shortcomings in the relevant international legal framework as well as the existing norms that face also limited effectiveness.

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INTRODUCTION

Statelessness under public international law and the protection offered to stateless individuals by the international legal framework has not traditionally been in the forefront of academic research and writings of legal scholars. Only a few monographs have been published in the post-World War II period on statelessness and nationality, including their legal protection and status.[1] This paper aims at drawing a picture, making a *tour d'horizon*, on the legal status of stateless persons under public 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. It explores both the current legal framework on the universal and regional level (*de lege lata*) and new tendencies in legal developments (*de lege ferenda*).

As for the structure of this article, Part I summarizes the magnitude of this worldwide problem along with the major causes of statelessness. Part II explains what kinds of responses have been developed by the international community of States in order to tackle the phenomenon of statelessness, with some historical retrospect. After that Part III investigates into the legal nature, the object and purpose as well as the main provisions of the 1954 Statelessness Convention. Part IV examines the subsequent legal developments, both horizontally and specifically, in various branches of international law that have contributed to the gradual enrichment and strengthening of the stateless-related international protection regime. Finally Part V looks at the new tendencies and current *de lege ferenda* proposals aiming at improving the situation of the stateless people by legal means, followed by the general conclusions.

I. FORGOTTEN WITHOUT REASON: INTRODUCTION TO THE WORLD OF "LEGAL GHOSTS"

According to recent UNHCR estimates, 10 millions of people still

[1] E.G. HARO FREDERIK VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW (Leiden: A. W. Sijthoff, 1959); PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979); LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW (Antwerpen: Intersentia, 2008); ROMUALD LIKIBI, LE DROIT DE L'APATRIDIE, PRATIQUES ET CONTROVERSES (Paris: Publibook, 2013).

continue to be denied the right to a nationality,[2] and the persistence of "legal ghosts" is likely to be the case even in the long run. The biggest stateless populations can be found in the Middle-East and Asia (e.g. Rohingya in Burma, Bidoon in Kuwait and other countries, denationalized Kurds in Syria, Biharis in Bangladesh, many Palestinians, Estate Tamils in Sri Lanka) as well as in the Caribbean (persons of Haitian descent in the Dominican Republic),[3] but it is also a noteworthy topic in Europe (with around 640 thousand stateless individuals,[4] including the non-nationals in the Baltic States and the Roma in the Western Balkans).

Statelessness can occur in the migratory context (e.g. typically in European countries) as well as there are large *in situ* stateless populations, too (e.g. in Burma, Nepal, Thailand, Syria). Many reasons can lead to statelessness, such as state successions (the most common since the 1990s, as a result of the break-up of the Union of Soviet Socialist Republics, the Socialist Federal Republic of Yugoslavia, and Czechoslovakia; or more recently, see the secession of Timor-Leste or South Sudan); conflicting nationality laws leading to the non-acquisition or loss of nationality; arbitrary denial and deprivation of nationality as an extreme form of discriminatory state policy; lack of birth registration; extremely burdensome administrative practices with regard to naturalization procedures; trafficking

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[2] UNHCR, *2012 Global Trends, Displacement: the New 21th Century Challenge*, 2013, 2, 7, 41, http://unhcr.org/globaltrendsjune2013/UNHCR%20GLOBAL%20TRENDS%202012_V05.pdf (last visited January 1, 2014). By the end of 2012, UNHCR had identified some 3.34 million stateless persons in 72 countries. However, the 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 visited January 1, 2014).

[3] KATHERINE SOUTHWICK, MAUREEN LYNCH, NATIONALITY RIGHTS FOR ALL: A PROGRESS REPORT AND GLOBAL SURVEY ON STATELESSNESS 28-53 (Washington D.C.: Refugees International, 2009). http://www.refintl.org/sites/default/files/RI%20Stateless%20Report_FINAL_031109.pdf (last visited January 1, 2014); *see also* the following links: UNHCR Global Appeal 2014-2015—Addressing Statelessness, http://www.unhcr.org/528a0a1316.html (last visited January 1, 2014); http://www.opensocietyfoundations.org/projects/stateless/where-does-statelessness-happen (last visited January 1, 2014); http://www.state.gov/documents/organization/181258.pdf (last visited January 1, 2014).

[4] Viewpoint of June 9, 2008 of the Council of Europe Commissioner for Human Rights: "No one should have to be stateless in today's Europe", http://www.coe.int/t/commissioner/viewpoints/080609_EN.asp (last visited January 1, 2014). *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, December 17, 2010, https://wcd.coe.int/ViewDoc.jsp?id=1722017 (last visited January 1, 2014).

in human beings etc.[5]; or in the future, statelessness may even occur as a result of sinking of small island States due to climate change induced rising of the ocean level.[6] Because of the lack of any nationality of these individuals, stateless people are a particular vulnerable group, often marginalized and legally invisible (often referred to as "legal ghosts"). Given its specific nature, although stateless people live in every region of the world, statelessness remains a largely "hidden" and latent phenomenon, especially without government recognition. Therefore identification and mapping are major challenges, also highlighted and promoted by the Office of the United Nations High Commissioner for Refugees (UNHCR) as the principal United Nations (UN) Agency responsible for the identification and protection of stateless people as well as the prevention and reduction of statelessness. Projects mapping statelessness have recently been conducted in some countries, such as in the United Kingdom[7], in Belgium[8], in the Netherlands[9], in Slovenia[10] etc.

The international legal regime in force governing the protection of stateless persons had been created in the 1950s and 1960s (the two main UN conventions were adopted in these decades respectively), then this issue has been practically forgotten for long decades, having been largely absent from the global human rights agenda, too.[11] A turning point came in the 1990s due to different kinds of factors. First, from the institutional point of view, UNHCR's mandate was expanded in 1995 by the UN General Assembly as

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[5] For more, *see* e.g. Michel Verwilghen, *Conflits des Nationalités. Plurinationalité étapatridie*, Receuil des Cours 277 (1999) (La Haye: Kluwer Law International, at 122-176); MARILYN ACHIRON, NATIONALITY AND STATELESSNESS, A HANDBOOK FOR PARLIAMENTARIANS (Geneva: Inter-Parliamentary Union—United Nations High Commissioner for Refugees, 2005), at 27-42.; Laura Van Waas, *op.cit* Chapters IV-VII; Katherine Southwick & Maureen Lynch, *op.cit.* 2-3; Brad K. Blitz & Maureen Lynch, *Statelessness and the deprivation of nationality* (Brad K. Blitz & Maureen Lynch eds.), *Statelessness and Citizenship, A Comparative Study on the Benefits of Nationality*, Cheltenham Northampton: Edward Elgar, 2012, at 5-10; Romuald Likibi, *op. cit.* 72-99.

[6] For more, *see* Jane McAdam, Disappearing States, Statelessness and the Boundaries of International Law, UNSW Law Research Paper, No. 2010-2, http://ssrn.com/abstract=1539766 (last visited January 1, 2014); JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 119-160 (Chapter 5) (Oxford: Oxford University Press, 2012).

[7] UNHCR, *Mapping Statelessness in the United Kingdom*, November 22, 2011, http://www.refworld.org/docid/4ecb6a192.html (last visited January 1, 2014).

[8] UNHCR, *Mapping Statelessness in Belgium*, October 2012, http://www.refworld.org/docid/5100f4b22.html (last visited January 1, 2014).

[9] UNHCR, *Mapping Statelessness in the Netherlands*, November 2011, http://www.refworld.org/docid/4eef65da2.html (last visited January 1, 2014).

[10] UNHCR, *Statelessness in Slovenia: The Identification and Protection of Stateless Persons in Slovenia*, November 2013 (manuscript with the author).

[11] *See also* e.g. Maryellen Fullerton, *Without Protection: Refugees and Statelessness, A Commentary and Challenge*, Brooklyn Law School Legal Studies Research Papers, Working Paper Series, Research Paper No. 351, August 2, 2013.

a result of which UNHCR has been given a specific and global mandate to prevent and reduce statelessness as well as to protect non-refugee stateless persons[12] (it is important to note that this mandate is not limited to State parties to the statelessness conventions, but gives a global authorisation to act).[13] Secondly, the dissolution of States and the creation of new ones following the end of the Cold War in the 1990s were also a major cause of producing new stateless populations in the regions affected (former Soviet republics, former Yugoslav republics; Eritrea etc.) which shed more light on this phenomenon that started to re-emerge on the international political and human rights agenda. Thirdly, UNHCR launched a global campaign in 1996 so as to increase the number of ratifications of the two major universal legal instruments on statelessness (the 1954 and 1961 UN Conventions) and to promote this cause worldwide, along with widespread dissemination of information.[14] 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 UNHCR on the occasion of the 60th anniversary of the 1951 Convention relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness, where over sixty States made statelessness-related pledges (these included accession to one or both statelessness conventions, law reform to prevent or reduce statelessness and improvement of civil registration and documentation systems).[15] This breakthrough was described by the UN High Commissioner for Refugees, Mr. Antonio Guterres as a "quantum leap

[12] UNHCR's role in the field of statelessness dates back to 1974 when the UN General Assembly entrusted UNHCR with a specific role under Article 11 of the 1961 Convention on the Reduction of Statelessness [cf. UNGA Resolution 3274 (XXIV) of December 10, 1974]. The above treaty provision calls for the establishment of "a body to which a person claiming the benefit of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authority". Then UNHCR has been given a broader and horizontal mandate in this regard by a series of UN General Assembly resolutions (most importantly by UNGA RES/50/152, December 21, 1995), i.e. 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, October 1, 2012, 12-13), http://www.refworld.org/docid/50b899602.html (last visited January 1, 2014).

[13] Cf. Mark Manly & Laura van Waas, *The Value of the Human Security Framework in Addressing Statelessness*, *in* HUMAN SECURITY AND NON-CITIZENS (Alice Edwards & Carla Ferstman ed., Cambridge: Cambridge University Press, 2010), at 58 (footnote 30).

[14] 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)].

[15] UNHCR, *Ministerial Intergovernmental Event on Refugees and Stateless Persons—Pledges 2011*, October 2012, *at* 32-36, http://www.refworld.org/docid/50aca6112.html (last visited January 1, 2014).

forward" in relation to the protection of stateless people, contributing also to significantly expand awareness of the problem of statelessness in all regions.[16]

II. RESPONSES OF THE INTERNATIONAL COMMUNITY TO TACKLE STATELESSNESS

After the creation of the United Nations in 1945, when statelessness was a major cause for concern as an aftermath of World War II, two parallel approaches have been formulated by the international community in order to tackle this negative phenomenon. The first has been focusing on identifying the magnitude of the problem as well as preventing statelessness pro futuro and reducing the existing number of stateless persons as much as possible. This attempt is marked principally on the universal level by the 1961 UN Convention on the Reduction of Statelessness[17] being the general and horizontal instrument in this matter; and, as a specific instrument with a limited scope, by the 1957 UN Convention on the Nationality of Married Women[18]; as well as with some other not so comprehensive treaties on the regional (European) level, elaborated under the aegis of the Commission International de l'Etat Civil (CIEC) and the Council of Europe (CoE).[19] 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 right[20] ("the right to have rights").[21]

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[16] *Ibid* at 8.

[17] *Convention on the Reduction of Statelessness of August 30, 1961* (UNTS No. 14458, vol. 989, 175), entered into force on December 13, 1975.

[18] *Convention on the Nationality of Married Women of February 20, 1957* (UNTS No. 4468, vol. 309, 65), entered into force on August 11, 1958.

[19] *See* in chronological order, the CIEC Convention No. 13 to reduce the number of cases of statelessness (signed in Bern, September 13, 1973); then two Council of Europe instruments: *the 1997 European Convention on Nationality* (CETS No. 166), Chapter VI and *the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession* (CETS No. 200).

[20] *See* first, *the 1948 Universal Declaration of Human Rights* (Article 15—right to a nationality); then a series of subsequent universal treaties: *1965 Convention on the Elimination of All Forms of Racial Discrimination* (Article 5—non-discrimination; right to a nationality); *the 1966 International Covenant on Civil and Political Rights* (Article 24—right to acquire nationality); *the 1979 Convention on the Elimination of All Forms of Discrimination against Women* (Article 9—non-discrimination, re-acquisition, change, retention of nationality, nationality of children); *the 1989 Convention on the Rights of the Child* (Articles 7 and 8—birth registration, right to acquire nationality, avoidance of statelessness); *the 2006 Convention on the Rights of Persons with Disabilities* (Article 18—right to acquire and change a nationality) 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*.

[21] "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; quoted e.g. in Independent Commission on International Humanitarian Issues, Winning the Human Race? 1988, 107; Marilyn Achiron, *op. cit*. back cover; or Laura van Waas (2008), *op. cit*. 217.

Nevertheless, despite all these efforts, it is a matter of fact that the number of stateless persons will never reach zero. Therefore, representing the other approach, a new, autonomous legal status has been created by virtue of the 1954 New York Convention relating to the Status of Stateless Persons[22], aiming 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, sixty years after its adoption, under which stateless people enjoy specific international legal protection, containing the basic rules and rights determining their legal status.

Besides the 1954 New York Convention as a *lex specialis*, certain core human rights treaties are also applicable to them, notably those human rights contained in these instruments which are applicable to everyone, irrespective of nationality (e.g. 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".[23] A great illustration of this approach is provided by the treaty-body of the International Covenant on Civil and Political Rights. The Human Rights Committee held in its General Comment No. 15 on the position of non-nationals that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness".[24] The 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 that "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".[25]

Historically, after some unsuccessful attempts under the auspices of the

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[22] *Convention Relating to the Status of Stateless Persons of September 28, 1954* (UNTS No. 5158, vol. 360, 117), entered into force June 6, 1960.

[23] UN, *Our Rights as Human Beings: A Discussion Guide on the Universal Declaration of Human Rights*, New York, 1949, 13. Quoted by Laura van Waas (2008), *op. cit*. 221.

[24] Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens under the Covenant*, Geneva, April 11, 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, May 26, 2004, para. 10. In the legal literature, *see* e.g. David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 Human Rights Quarterly, 254-276 (2006).

[25] *See also* in a different context: Laura van Waas (2008), *op. cit*. 226.

League of Nations,[26] the origins of the current international law framework protecting stateless people can be found in the 1951 Geneva Convention on the Status of Refugees[27] and its *travaux préparatoires*. Here I only give a short overview of the genesis of this sub-field of law, not touch upon the roots and origins of the legal regime relating to the elimination, prevention and reduction of statelessness where the UN International Law Commission (ILC) sat behind the steering wheel and played a major role in preparing the relevant legal texts.[28]

The story begun in 1948 when the UN Economic and Social Council requested the UN Secretary General so as to undertake a study and to make recommendations on the situation of stateless persons.[29] This "Study on Statelessness", finished in1949, led to the formation of an ad hoc committee considering, amongst others, the desirability of an international convention relating to the status and protection of both refugees and stateless persons.[30] 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 UN General Assembly decided to convene

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[26] Cf. the *1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* [No. 4137. 179 LNTS 89, http://www.refworld.org/docid/3ae6b3b00.html (last visited January 1, 2014)] entered into force on July 1, 1937, but with very limited number of States parties and its *1930 Protocol on a Certain Case of Statelessness* [No. 4138. 179 LNTS 115, http://www.refworld.org/docid/3ae6b39520.html (last visited January 1, 2014)] entered into force on July 1, 1937, but with very limited number of States parties; then the *1930 Special Protocol Concerning Statelessness* [C.27.M.16.1931.V, https://www.refworld.org/docid/3ae6b36f1f.html (last visited January 1, 2014)] never entered into force. For more on this, *see* e.g. UN, *A Study of Statelessness*, New York, United Nations, August 1949 (E/1112; E1112/Add.1.), 128-130; Martin Stiller, *Statelessness in International Law: A Historic Overview*, DAJV Newsletter3/2012, 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 prestigious Institute of International Law has elaborated a resolution to 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].

[27] *Convention on the Status of Refugees of July 28, 1951* (UNTS No. 2545,vol. 189, 137), entered into force on April 22, 1954.

[28] For a good summary of the ILC's work in this topic, *see* http://legal.un.org/ilc/summaries/6_1.htm, notably points (c) and (d) (last visited January 1, 2014). For more details and in-depth information, *see* the report of Manley O. Hudson (Yearbook of the International Law Commission, 1952, vol. II, document A/CN.4/50); and the reports of Roberto Córdova (Yearbook of the International Law Commission, 1953, vol. II, documents A/CN.4/64 and A/CN.4/75; and Yearbook of the International Law Commission, 1954, vol. II, documents A/CN.4/81 and A/CN.4/83). The texts, instruments or final reports adopted by the ILC as well as instruments concluded under the auspices of the UN on the basis of prior drafts prepared by the ILC can be consulted at http://legal.un.org/ilc/texts/6_1.htm (last visited January 1, 2014).

[29] UN, *A Study of Statelessness*, New York, United Nations, August 1949 (E/1112; E1112/Add.1).

[30] NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS: ITS HISTORY AND INTERPRETATION 1-2 (Institute of Jewish Affairs, New York 1955; reprinted by UNHCR, Division of International Protection, 1997).

a diplomatic conference, which adopted in 1951 the Convention relating to the Status of Refugees; however, the draft Protocol relating to the Status of Stateless Persons was not finally adopted (it was referred back to the UN General Assembly). The draft text on statelessness was communicated by the UN Secretary General to governments with the request that they comment on those aspects of the 1951 Convention, they would be prepared to extend to non-refugee stateless persons. In 1954, a new conference of plenipotentiaries was convened in New York to revise the Draft Protocol on the Status of Stateless Persons.[31] During the Conference, however, the delegates decided to make a separate instrument from 1951 Convention, thus setting aside the protocol approach and adopted a distinct, self-standing Statelessness Convention completely independent from the 1951 Convention.[32] The text of the 1954 Convention mirrors in large parts that of the 1951 Geneva Convention, therefore the set of rights provided for in the 1954 Statelessness Convention is also similar to those in the 1951 Refugee Convention.[33] Nonetheless, despite the common roots and needs to be fulfilled, we will see below that the over overall protection regime of the stateless is much less developed compared to international refugee law.

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

According to 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".[34] One can only fully agree

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

[32] Carol Batchelor, *The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation*, 2 (22) REFUGE 2004, 34; STATELESSNESS: THE QUIET TORTURE OF BELONGING NOWHERE 15-16 (Coventry: Coventry Peace House, 2008); Laura van Waas (2008), *op. cit*. 226-227; Guy S. Goodwin-Gill, *Introductory Note, Convention Relating to the Status of Stateless Persons*, New York, September 28, 1954, UN Audiovisual Library of International Law, http://legal.un.org/avl/ha/cssp/cssp.html (last visited January 1, 2014).

[33] As an early commentator 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)". Nehemiah Robinson, *op. cit*. 25. *See also* Paul Weis, *The Convention Relating to the Status of Stateless Persons*, 10 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1961, 255; Laura van Waas (2008), *op. cit*. 227.

[34] 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 Laura van Waas (2008), *op. cit*. 228.

with this statement, since the 1954 New York Convention establishes a specific, autonomous legal status for stateless individuals and accompanying civil, political, economic, cultural and social rights for them (*lex specialis* as compared to general international human rights law). It is the only international legal instrument to do so.[35] It therefore goes without saying that exploring the protection regime of stateless persons under international law should start by analysing the scope, concept and main provisions of the Convention.

As for the scope *ratione personae* of this key international legal instrument, the 1954 New York Convention applies to non-refugee stateless persons (the stateless refugees being covered by the 1951 Geneva Convention relating to the Status of Refugees[36]) and its definition strictly covers the 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."[37] The International Law Commission (ILC) has observed that the definition in Article 1 (1) is now part of customary international law.[38] 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 Convention shall not apply to a) persons receiving from UN agencies other than the UNHCR (e.g. UNRWA) protection or assistance so long as they are receiving it; b) 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 c) persons having committed a crime against peace, a war crime, or 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 United Nations.[39]

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[35] Mark Manly, Laura van Waas, *op. cit*. 54. Similarly, but in the context of criticizing the 1954 Convention, *see* Laura van Waas (2008), *op. cit*. 393-394.

[36] *Convention Relating to the Status of Refugees of June 28, 1951*, Article 1A (2).

[37] *Ibid*. Article 1 (1). 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 http://www.refworld.org/docid/4ca1ae002.html (last visited January 1, 2014) and 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*, February 20, 2012, HCR/GS/12/01, http://www.refworld.org/docid/4f4371b82.html (last visited January 1, 2014), the latter may be conceived as the authentic interpretation of this key provision in the 1954 Convention.

[38] *Draft Articles on Diplomatic Protection with Commentaries*. In: Yearbook of the International Law Commission, 2006, vol. II, Part Two, 49.

[39] Article 1 (2) of the 1954 New York Convention.

As pointed out above, the set of rights provided for in the Convention is similar to those in the 1951 Geneva Convention. Some 30 provisions of the Convention set out a minimum standard of treatment for the stateless persons, without discrimination, beyond which States are free to extend additional protection and rights offered to them.[40] 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; thirdly, the absolute rights which are not contingent upon the treatment of any other group, but guaranteed directly.[41]The rights in respect to which the treatment at least favourable as accorded to aliens generally in the same circumstances apply are, inter alia, acquisition of movable and immovable property (Article 13), right of association (Article 15); right to engage in wage-earning employment [Article 17 (1)]; right to self-employment (Article 18); right to housing (Article 21); or the right to choose the place of residence and to move freely within the country (Article 26).[42] 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 (Article 4); access to courts, including legal assistance (Article 16);elementary education [Article 22 (1)]; public relief and assistance (Article 23); remuneration, hours of work, holidays with pay, minimum age of employment etc. and social security [Article 24 (1)]; or duties, charges or taxes [Article 29 (1)] etc. The absolute rights reflecting their special needs are non-discrimination (Article 3); the issuance of identity papers (if the person does not possess a valid travel document) (Article 27); issuance of travel documents (Article 28); and facilitated naturalization (Article 32). It is to be underlined that since there is no element of persecution (risk of persecution) in case of statelessness, no similar protection against *refoulement* like in the 1951 Geneva Convention is provided for stateless persons. However, the 1954 New York Convention sets forth in Article 31 that the Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order, and such an expulsion shall be only in pursuance of a decision reached in accordance with due process of law.

On the other hand, in return of giving the above entitlements to the

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[40] *Ibid*, Article 5.

[41] *See also* Laura van Waas (2008), *op. cit*. 230-231; UNHCR, *Guidelines No. 3: The Status of Stateless Persons at the National Level*, July 17, 2012, HCR/GS/12/03, point 11, http://www.refworld.org/docid/5005520f2.html (last visited January 1, 2014).

[42] 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* Laura van Waas (2008), *op. cit*. Chapters X-XII.

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."[43]

Another ground of classification for the rights enshrined in the 1954 Convention is the level of attachment of the stateless person with the State concerned.[44] First, in order to benefit from certain provisions, the mere physical presence[45] of the individual, satisfying the "stateless person" definition, is sufficient [e.g. in relation to non-discrimination (Article 3), personal status (Article 12), property (Article 13), access to courts (Article 16), rationing (Article 20), public education (Article 22), or administrative assistance (Article 25)]. 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 (Article 15), the right to work (Article17), the right to engage in self-employment (Article 18), the right to public relief (Article 23), labour and social security rights (Article 24), the freedom of movement (Article 26), the right to a travel document (Article 28) or the protection from expulsion (Article 31)]. Thirdly, further rights are only associated to stateless persons "habitually resident" in the territory of a given State [e.g. exemption from legislative reciprocity Article (7 (2)), artistic rights and industrial property (Article 14)].

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

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[43] UNHCR, *Guidelines No. 3: The Status of Stateless Persons at the National Level*, July 17, 2012, HCR/GS/12/03, point 12.

[44] Laura van Waas (2008), *op. cit*. 229-230; Laura van Waas, Nationality and Rights in Brad K. Blitz, Maureen Lynch (eds.), *op. cit*. 29-30; UNHCR, *Guidelines No. 3: The Status of Stateless Persons at the National Level*, July 17, 2012, HCR/GS/12/03, points 13-20.

[45] 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* Laura van Waas (2008), *op. cit*. 229-230; Laura van Waas (2012), *op. cit.* 29. I assimilate these situations since I cannot see real difference in the formulae contained in the relevant articles of the 1954 Convention; the common feature is that the stateless person shall be present on the territory of a given Contracting Party so as to benefit from those entitlements.

growing soft law and jurisprudence in this field either. Further to that, as we have seen 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, in contrast to the 1951 Refugee Convention in relation to which UNHCR had always been playing a major monitoring and implementing role since its adoption. Another weakness of the system is that the 1954 New York Convention is, by substance, not a self-executing treaty. Not only do its content and broad, not sufficiently precise formulation of the rights suggest so, but also Article 33 explicitly stipulates that States have to adopt domestic implementing legislation to make it effective as well as they are obliged to communicate those domestic laws to the UN Secretary General.[46] Moreover, the Convention does not contain provisions on the statelessness determination procedure (SDP) either (it is up to the individual States to establish such legal channels), which gap makes claiming those rights more difficult if one cannot officially obtain that status.[47] To sum up, international statelessness law has almost been forgotten for long decades.

IV. SUBSEQUENT DEVELOPMENTS OF THE PROTECTION REGIME UNDER INTERNATIONAL LAW

A. Horizontal Issues

Despite its forgotten character, statelessness has recently re-emerged on the mainstream international human rights agenda.[48] The gradually

[46] Article 33: "The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention".
[47] On the need to establish such procedures, *see* UNHCR, *Guidelines on Statelessness No. 2: Procedures for Determining Whether an Individual is a Stateless Person*, April 5, 2012, HCR/GS/12/02, http://www.refworld.org/docid/4f7dafb52.html (last visited January 1, 2014); Gábor 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, http://www.statelessness.eu/resources/ens-good-practice-guide-statelessness-determination-and-protection-status-stateless (last visited January 1, 2014).
[48] *See* e.g. Brad K. Blitz, *Policy Responses and Global Discourses on the Rights of Non-Citizens and Stateless People*, STATELESSNESS IN THE EUROPEAN UNION. DISPLACED, UNDOCUMENTED, UNWANTED 118-123 (Brad K. Blitz & Caroline Sawyer eds., Cambridge University Press, Cambridge 2011); Lindsey Kingston, Moving Statelessness Forward on the International Human Rights Agenda, http://www.statelessness.eu/blog/moving-statelessness-forward-international-human-rights agenda#sthash.Ml6IGcbe.dpuf (last visited January 1, 2014); Lindsey Kingston, *A Forgotten Human Rights Crisis: Statelessness and Issue (Non)Emergence*, 14 HUMAN RIGHTS REVIEW, 73 (2013); Lindsey Kingston, *Statelessness and Issue (Non-)Emergence*, 40 FORCED MIGRATION REVIEW, 50 (2012). Generally on the emergence studies e.g. Charli R. Carpenter, *Setting the Advocacy Agenda: Theorizing Issue Emergence and Nonemergence in Transnational Advocacy Networks*, 51 INTERNATIONAL STUDIES QUARTERLY, 99 (2007).

growing importance of this issue can be witnessed, first, in the recurring involvement or regular appearance of the topic in the activities of various international institutions and bodies such as the UNHCR, the UN General Assembly,[49] the UN Human Rights Council[50] and different treaty bodies (Human Rights Committee, Committee on the Elimination of All Forms of Racial Discrimination Against Women, Committee on the Elimination of Racial Discrimination, Committee on the Rights of the Child etc.).[51] Secondly, in the last couple of years the number of accessions to the 1954 New York Convention has been constantly increasing (seventeen new State parties since December 2011) and even more new accessions are to come due the State pledges made at the December 2011 Intergovernmental Ministerial Conference in Geneva. Thirdly, topics related to statelessness attracted greater academic interest, too, as a result of which there has been much wider academic research and more scholarly writings (legal, political, sociological, or interdisciplinary), policy-oriented study (e.g. the Open Society Institute's initiative[52] or the International Observatory on Statelessness[53]) as well as institutionalized networking (e.g. the creation of the European Network on Statelessness).[54] At the international policy-making level, all these positive developments and newly acquired attention culminated in the elaboration and adoption of a series of UNHCR soft law instruments (Guidelines) interpreting and explaining more in depth the main features, concepts, logic and provisions of the major international treaty

[49] For the statelessness related UNGA resolutions, *see* UN General Assembly, *United Nations General Assembly Resolutions of Particular Relevance to Statelessness and Nationality*, March 25, 2013, http://www.refworld.org/docid/4c49a02c2.html (last visited January 1, 2014).

[50] Mainly from the point of view of the right to nationality and the prohibition of arbitrary deprivation of nationality, *see* UNHCR, *Human Rights Council Resolutions Relating to Nationality and Statelessness*, http://www.refworld.org/statelessness.html (last visited January 1, 2014) as well as in the framework of the Universal Periodic Review (UPR), *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*, July 11, 2013, http://www.refworld.org/docid/51dfaf484.html (last visited January 1, 2014) and UNHCR, *Compilation of Recommendations Relating to Statelessness Made during the Second Cycle (13th-16th sessions) of the Human Rights Council's Universal Periodic Review*, July 11, 2013, http://www.refworld.org/docid/51dfb0ee4.html (last visited January 1, 2014).

[51] 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*, http://www.unhcr.org/4517ab402.html (last visited January 1, 2014).

[52] *See* http://www.opensocietyfoundations.org/projects/statelessness (last visited January 1, 2014).

[53] *See* http://www.nationalityforall.org/ (last visited January 1, 2014).

[54] On the renaissance of social science scholarship on statelessness, *see* Mark Manly, Laura van Waas (2010), *op. cit.* 50; Brad K. Blitz & Caroline Sawyer, Statelessness in the European Union' in Brad K. Blitz & Caroline Sawyer (eds.), *op. cit*. 7-14; Laura van Waas & Mark Manly, *The State of Statelessness Research, A Human Rights Imperative*, 19 TILBURG LAW REVIEW, 3-10 (2014).

instruments on statelessness.[55] In addition to that, another significant horizontal development is the mushrooming of national statelessness determination procedures throughout the world (the most new SDPs have been introduced in Europe, but the America and Asia are also on the map).[56] Thus despite the silence of the 1954 Statelessness Convention on this matter, individual States, cooperating with each other, took positive steps on their own initiative to fill in 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

As regards various sectors and fields of law related to statelessness, progressive developments on specific issues, rather sporadically, could be identified which are enshrined in certain subsequently adopted international instruments.

Going through these thematically, the progress made in the field of consular protection of stateless persons is worth attention first. Our 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".[57] As a sign for a different approach, the 1967 Council of Europe Convention on Consular Functions[58] is the pioneer to mention, since Article 46 (1) of this Convention stipulates:

> [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.

This Council of Europe Convention, applying the same definition as introduced by the 1954 New York Convention [referring to the latter in Article 46 (2)], makes a significant step forward and this rule can be considered as a progressive development of international law in this domain,

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[55] After expert consultations, UNHCR has published four Guidelines relating to the definition of stateless person, the national statelessness determination procedures, the legal status of recognized stateless persons at the national level as well as children's right to acquire nationality (*see* the references *infra*). A fifth Guidelines is under preparation concerning loss/deprivation of nationality under the 1961 Convention on the Reduction of Statelessness.

[56] In order to get a general picture about these procedures *see* e.g. Gábor Gyulai, *op. cit*.

[57] Paragraph 16 of the Schedule to Article 28.

[58] *1967 European Convention on Consular Functions* (CETS No. 061).

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 a bit shaded is, however, that the 1967 Convention has just recently entered into force due to the low number of ratifications.[59] 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 their protection abroad, even if these rules become legally binding not so long ago and only apply in relation to a limited number of States, but they clearly indicate the developments and the will of the international community to move forward.

As for other domains or set of rights having been extended to *de iure* stateless human beings by quasi-universal international treaties, the page is almost blank except intellectual property rights. From a human rights perspective, the right to intellectual property forms an 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 enjoying that distinct cultural life are not uncommon.[60] In 1971, Protocol No. 1 was annexed to the Universal Copyright Convention[61] as revised at Paris on July 24, 1971, which assimilated stateless persons having habitual residence in a State Party to the nationals of that State (paragraph 1). By doing so, this 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 it 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. It can be seen that Protocol No. 1 to the Universal Copyright Convention determines the same level of protection (stateless persons are on equal footing with nationals) and the same condition for benefiting this right (habitual residence in a

[59] As of January 1, 2014, five States have ratified it (most recently Georgia in March 2011) and an additional four States have signed it without ratifying yet, http://conventions.coe.int (last visited January 1, 2014).

[60] Laura Van Waas (2008), *op. cit*. 346-347.

[61] *Protocol 1 Annexed for Universal Copyright Convention as Revised at Paris on July 24, 1971 Concerning the Application of that Convention to Works of Stateless Persons and Refugees 1971* (UNTS No. 13444), entered into force on July 24, 1974.

Contracting Party). The purpose of these rules is to provide protection of the "totality of creations of the human mind".[62] 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 at Paris on June 24, 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 number of State Parties. While Protocol No. 1 has only 38, the 1954 New York Convention has 80 State Parties as of now.[63] Moreover, the geographical coverage is different as well, since despite the lower number of ratifications, Protocol No. 1 also applies to India, the Russian Federation, or the United States not becoming parties to the 1954 New York Convention.

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. The treaty with universal vocation (unfortunately not widely ratified) [64] was elaborated by ILO in 1962 (Convention No. 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security[65]). The ILO Convention No. 118 refers to the 1954 New York Convention definition of "stateless person" [66] and applies 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 (medical care; sickness benefit; maternity benefit; invalidity benefit; old-age benefit; survivors' benefit; employment injury benefit; unemployment benefit; and family benefit). However, the scope of the obligations varies from State to State, since due to its à la carte technique, "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]

A similar regional international instrument, the 1972 European Convention on Social Security[69] is also worth mentioning shortly. After the European Interim Agreements on Social Security done in 1953 under the

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[62] Nehemiah Robinson, *op. cit.* 55 in relation to Article 14 of the 1954 New York Convention.
[63] *See* http://treaties.un.org.
[64] As of January 1, 2014, 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/ratifce.pl?C118 (last visited January 1, 2014).
[65] Entered into force on April 25, 1964.
[66] *Ibid*, Article 1 lit. (h).
[67] *Ibid*, Article 1lit. (h).
[68] *Ibid*, Article 2 (3).
[69] *1972 European Convention on Social Security* (CETS No. 078). It is not a widely ratified convention, with 8 State parties as of January 1, 2014.

aegis the Council of Europe (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 coordinate the social security legislations of the CoE Member States.[70] The CoE Convention, using the 1954 New York Convention definition of "stateless person", covers stateless persons resident in the territory of a Contracting Party[71] 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, whether contributory or non-contributory, including employers' liability schemes providing benefits. This instrument can be considered as building upon, between a limited number of States in Europe, on the provisions relating to social security of the 1954 New York Convention, without prejudice to the provisions of the 1962 ILO Convention.[72]

Fourthly, noteworthy developments have occurred in relation to the facilitated naturalisation of stateless people for whom acquisition of nationality is the ultimate legal channel to put an end of this legal anomaly possessing no nationality. Despite the expansion of the concept advocating that universal human rights determine one's legal status irrespective of his/her nationality or the lack of it ("denationalization of rights"), in practical terms nationality still holds its importance as "the right to have rights". As Sir Hersch Lauterpacht opined at his time, nationality "is now increasingly regarded as an instrument for securing the rights of the individual in the national and international spheres".[73] Naturalisation is the best and therefore primary 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 (simplified) naturalisation of stateless individuals. On the universal level, the applicable international norms are quite laconic; the sole legally binding provision is Article 32 of the 1954 New York Convention. If we have a closer look at the text, this is not an individual right of the persons lacking nationality, but rather an opportunity to enjoy naturalisation. Addressees of this norm are the Contracting States, who are urged to facilitate stateless

[70] *Explanatory Report to the 1972 European Convention on Social Security*, para. 7.
[71] *Ibid*, Article 4.
[72] *Ibid*, Article 6 (1).
[73] HERSCH LAUTERPACHT, Foreword to the First Edition in Paul Weis, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979, xi).

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 is not more than prescribing that "States make every efforts" in this regard.[74] This article is quite vague as well, 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 might be made. First, the term "expedition of proceedings" can mean two things: a) shortening of the waiting period; and b) issuing the decision in a speedy manner or in a no time consuming procedure.[75] In understanding the other conditions, the *travaux préparatories* of the Convention give guidance. Manley O. Hudson, the first rapporteur of the topic in the ILC identified some issues impairing naturalisation, for instance complicated and expensive procedures, stringent requirements as to the possession of property etc.[76] Although dealing with hesitantly the question of naturalisation,[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 (which is not reflected in State practice though[78]).

Later on, richer soft law has blossomed driven by UNHCR Executive Committee, trying to set global standards (many ExCom conclusions between 2006 and 2008 called States for action on that 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) (generally), then the 2006 CoE Convention on the avoidance of statelessness in relation to State succession (with specific focus to situations of State succession) as well as CoE Committee of Ministers Recommendation R (1999) 18 on the Avoidance and Reduction of Statelessness. The above Council of Europe Conventions laid down more detailed binding rules and a concrete, more precise obligation to facilitate the naturalisation of stateless persons.[80] It is worth

[74] Laura van Waas (2008), *op. cit*. 365.
[75] *See also* JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 986 (Cambridge: Cambridge University Press, 2005).
[76] Manley O. Hudson, Nationality, including statelessness, Annex III—Statelessness, Yearbook of the International Law Commission, 1952, vol. II, document A/CN.4/50, 22.
[77] Laura van Waas (2008), *op. cit*. 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 naturalisation of stateless persons.
[79] UNHCR ExCom conclusions No. 106 (LVII) 2006, No. 107 (LVIII) 2007, No. 108 (LIX) 2008, http://www.refworld.org/docid/4b28bf1f2.html (last visited January 1, 2014).
[80] Article 6 (4) lit. g). of the ECN; Article 9 of the 2006 CoE Convention.

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) which become eligible to apply for naturalisation.[81] Furthermore, the Explanatory Report to the ECN has some further indication on the required favourable conditions (e.g. reduction of the length of required residence, less stringent language requirements, easier procedure, and lower procedural fees).[82] Similar approach is taken by the 1999 Committee of Ministers Recommendation, also adding that offences should not unreasonably prevent stateless persons seeking naturalisation.[83] Now, the question arises whether there exists already a "right to be considered for naturalisation" for stateless persons as an emerging human right related to reduce 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 naturalisation is the strengthening of the norm obliging States to grant facilitated access to nationality for those lacking it; and it has become more elaborated, 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, in order to benefit from this "right of solution", i.e. the establishment of lawful and habitual residence on the territory of a given State before acquiring the new nationality in a simplified way.

Finally, in the middle of the first decade after the new millennium, facilitation was made in favour of stateless persons concerning their right to international travel in a regional setting, within the European Union (EU).[86]

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[81] Article 6 (3) of the ECN. *See also* Laura van Waas, *Fighting Statelessness and Discriminatory Nationality Laws in Europe*, 14 EUROPEAN JOURNAL OF MIGRATION AND LAW, 248 (2012).
[82] Para. 52, http://conventions.coe.int/Treaty/en/Reports/Html/166.htm (last visited January 1, 2014).
[83] *Recommendation No.R (99) 18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness*, September 15, 1999, No. R (99) 18, point II. B. d., http://www.refworld.org/docid/510101e02.html (last visited January 1, 2014).
[84] E.g. Laura van Waas (2008), *op. cit*. 362, 366, 369-370.
[85] *Human Rights Committee, Individual Complaint of Stewart v. Canada*, case number 538/1993, A/52/40, vol. II, November 1, 1996, para. 12.4; *CERD General Recommendation 30: Discrimination Against Non-Citizens*, 2004, para. 13.
[86] Regarding the gaps in the current international legal framework relating to the international freedom of movement for stateless persons, *see* Laura van Waas (2012), *op. cit*. 33-34.

The reason behind was that the EU enlargement with ten new Member States on May 1, 2004 had the paradoxical effect on reducing the scope of the possibility of granting a visa exemption, since Regulation No. 539/2001/EC [87] (the EU Visa Regulation) 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 State. To remedy this situation,[88] 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.[89] Article 1 (1) lit. b) of the modifying Regulation says as follows: "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" (emphasis added M.T.) 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 into other Member States and reside in their territory up to 90 days within any 180 days period (intra-EU short-term stay). Beside this automatic (compulsory) visa exemption category, the Regulation goes even farther when giving the discretion to Member States to exempt those stateless persons from the visa requirement who reside in a third country listed in Annex II ("the white list" of visa free third countries) of Regulation (EC) No 539/2001 having issued their travel document. So does, for example, Hungary with regard to all stateless persons residing in any Annex II (visa-free) third countries.[90] 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, i.e. in the United

[87] Council Regulation (EC) No. 539/2001 of March 15, 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 (OJ L 81, 21.3.2001, 1-7).

[88] The European Commission has been expressly asked to do so by 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].

[89] Council Regulation (EC) No. 1932/2006 of December 21, 2006 amending 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 (OJ L 405, 30.12.2006, 23-34).

[90] Government Decree No. 114/2007 (V.24.) Implementing Act II of 2007 on the Entry and Stay of Third Country Nationals, Article 4 lit. (a).

Kingdom and in Ireland,[91] since their travel conditions within the Union has not been clarified before. The newly introduced rule leaves Member States free to decide 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.

Finally, although it is a technical norm, a further European legislative innovation makes the international travel of stateless people practically easier, 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.[92] The new Table of Travel Documents, which is made public,[93] includes in Part II "travel documents issued to stateless persons under the United Nations Convention relating to the Status of Stateless Persons of September 28, 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".[94] It is a promising sign, showing 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 recognize stateless travel documents issued by third countries even beyond the Contracting Parties of the 1954 New York Convention.

It is an innovative element in these rules on visa-free travel that they cover all stateless persons, both those under the 1954 New York Convention and those outside of the scope of that Convention. 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 it has also been recognised by the EU as valid for visa-free travel.[95] This is thus the first time in EU legislation where a larger

[91] Regulation (EU) No. 1289/2013 of the European Parliament and of the Council of December 11, 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 (OJ L 347, 20.12.2013, 74-80.), recital (9), Article 1(3) lit. b).

[92] Decision No. 1105/2011/EU of the European Parliament and of the Council of October 25, 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 (OJ L 287, 4.11.2011, 9-12), and based on this: Commission Implementing Decision C (2013) 4914 of August 2, 2013 establishing the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa.

[93] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/document-security/index_en.htm (last visited January 1, 2014).

[94] Article 3 (3) lit. c)-d), Decision No. 1105/2011/EU.

[95] RAINER BAUBÖCK, BERNHARD PERCHINIG & WIEBKE SIEVERS (eds.), CITIZENSHIP POLICIES IN THE NEW EUROPE: EXPANDED AND UPDATED EDITION 73 (Amsterdam: Amsterdam University Press, 2009).

personal scope (including eventually the *de facto* stateless as well) applies than that defined in the 1954 New York Convention.

V. DE LEGE FERENDA PROPOSALS: NEW TENDENCIES

The last substantial part of this paper 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. Twotopics will be discussed: diplomatic protection and the protection of the stateless from expulsion.

One had to wait for a couple of decades after the 1967 Council of Europe Convention on Consular Functions until the issue of protecting stateless persons abroad has been put again on the international law-making agenda, this time on the universal level (within the UN system). The ILC included the topic of diplomatic protection into its agenda in 1995[96] and adopted the Draft Articles on Diplomatic Protection in 2006, endorsed also by the UN General Assembly,[97] which is of interest from the perspective of stateless people, too, since this mechanism could offer them fair and proper treatment abroad.[98] As draft Article 1 is definitional by nature it does not mention stateless persons. Article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.[99] Draft Article 3 (2) opens the door generally for certain categories of persons not being nationals of the State concerned,[100] including stateless persons. 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. (emphasis added M.T.)

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)

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[96] First, a Working Group was created dealing with this topic in 1995. Then, in 1998 after two reports of the Working Group, a special rapporteur was designated who prepared several; interim reports on the subject. Finally, the Commission subsequently adopted the draft articles on Diplomatic Protection on second reading as well as decided to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles.

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

[98] *See also* Laura van Waas (2008), *op. cit*. 380-385; Laura van Waas (2012), *op. cit.* 39-40.

[99] *Draft Articles on Diplomatic Protection with Commentaries* (2006), 26.

[100] Draft Article 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".

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".[101] 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.[102] 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 European Convention on Nationality.[103] 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*,[104] 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 into the sphere of diplomatic protection, but States have discretion whether to extend such protection to a stateless person.

The fate and the normative character of the ILC Draft Articles on diplomatic Protection, eight years after its adoption, is still uncertain. As van Waas observes,

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[101] UNRIAA, vol. IV, 669 at 678. *See also* PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW, Alphen aan den Rijn; Germantown, Md: Sijthoff & Noordhoff, 1979, 2nd edition, 162 and *Draft Articles on Diplomatic Protection with Commentaries* (2006), 48.
[102] *Ibid*, 48.
[103] Article 6 (4), point (g), where they are used in connection with the acquisition of nationality.
[104] *Draft Articles on Diplomatic Protection with Commentaries* (2006), at 49.

> [I]f these articles were adopted in their present form (…) another opportunity would be created for the effective enforcement of the rights of the stateless. Until that time, it remains within the power of a defendant state to have a claim submitted on behalf of a stateless person declared inadmissible.[105]

As far as the protection of stateless persons against expulsion is concerned, it is again the International Law Commission that has been the driving force behind the codification of the general principles related to this matter. The ILC had adopted Draft Articles on the Expulsion of Aliens in 2012 (first reading), the text was still subject to comments by UN Member States until January 1, 2014, so this is not the final version yet. Draft Article 7 is of particular relevance in this regard, entitled "Prohibition of the Expulsion of Stateless Persons". This provision does nothing but echoes Article 31 (1) of the 1954 New York Convention, therefore the procedural safeguards articulated in paragraphs (2)-(3) of the same article are not incorporated in the draft. This is explained in the Commentaries as follows: "the Commission preferred not to address in draft Article 7 other matters relating to the expulsion of stateless persons, which are covered by the 'without prejudice' clause contained in draft Article 8."[106] Draft Article 8 stipulates that:

> [T]he rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law. (emphasis added M.T.)

This "without prejudice" clause applies in particular to the rules concerning the above mentioned procedural requirements for the expulsion of a stateless person. The not so detailed Commentaries further clarify that the term "law" as used in draft Article 8 is to be understood as referring to the other relevant rules of international law applicable to stateless persons as well as to any relevant rule of the expelling State's internal law, provided that it is not incompatible with that State's obligations under international law. As a *prima facie* observation, one can conclude that draft Articles 7-8 are a mere restatement of the existing conventional rules, having no real added value. From a formal point of view, I concur with that, because these draft rules do not represent progressive development of international law at all.

However, the question is what is more interesting is whether the principles of law on the protection of the stateless against expulsion,

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[105] Laura van Waas (2012), *op. cit.* 40.

[106] Expulsion of aliens—Text of the draft articles and commentaries thereto, Report of the International Law Commission on the work of its 64th session, 7 May to 1 June and 2 July to 3 August 2012, General Assembly Official Records, 67th session, Supplement No. 10 (A/67/10), 31-32.

enshrined in the ILC Draft Articles will attain the status of general customary international law in the near future, and so expanding the geographical scope of Article 31 of the 1954 Convention, being only binding to the State parties (*res inter alios acta*), to the whole international community? So far States did not comment on or oppose to draft Articles 7-8, consequently we can assume that they agree with their normative content.[107] The existence of the *opinio iuris* for the formulation of a new customary norm might thus be deduced; yet, exploring and adequately mapping relevant State practice is a much harder exercise and would need further research before legally qualifying Article 31 as part of customary international law.

CONCLUSIONS

After having analysed the stateless-specific protection regime under international law, both from the perspective of the current legal framework and the possible further legal developments to come, some general concluding remarks can be phrased. Since the establishment of the United Nations international action on statelessness, notwithstanding the oscillating attention to the issue, has been a good example for 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 own terminology and dogmatics. All this with a view to establish a coherent, logically closed legal architecture and to offer 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 relating to the Status of Stateless Persons, universal in its vocation. This *lex specialis* instrument and other various human rights treaties and documents presented in the foregoing are to ensure that those not enjoying the right to a nationality are not unreasonably disadvantaged by their plight (protection of stateless persons).[108] 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 as well as the existing norms facing also limited effectiveness (e.g. relatively low overall number of

[107] The comments submitted by States can be consulted at http://legal.un.org/ilc/guide/9_12.htm, point F (last visited January 1, 2014). The oral statements of the State representatives within the UNGA 6th Committee are *available at* http://papersmartv4.unmeetings.org/en/ga/sixth/67th-session/agenda/.

[108] Laura van Waas (2008), *op. cit.* 436.

ratifications of the 1954 Convention and other global or regional conventions; challenges of identification of stateless populations; unclear character of customary law of certain stateless-specific treaty rules). What is positive is the growing attention to the cause of statelessness from the international community as whole and international institutions; alongside with the changing attitude of States (enough to mention the rocketing increase of new accessions to the 1954 Convention in the last few years and the number and variety of statelessness related State pledges). My academic evaluation of this re-emerging, old-new domain of international law is rather positive, seeing the glass half full. It is undoubtedly a significant achievement that there is a theoretically well-elaborated concept employed by public international law to protect the individual in its transnational engagements. In other words, 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 amongst which the most important 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 brilliant *bon mot*, describing international law as a "normative giant, but an institutional dwarf".[109] The time has come.

[109] Georges Abi-Saab, *The International Judicial Function*, UN Audiovisual Library of International Law, http://legal.un.org/avl/ls/Abi-Saab_CT_video_1.html (last visited January 1, 2014).