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**From a Traditional International Law Approach
to a Human Rights-Based Approach to
Statelessness**

Clara Van Thillo

European University Institute

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**From a Traditional International Law Approach
to a Human Rights-Based Approach to Statelessness**

Clara Van Thillo

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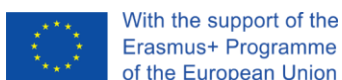
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Abstract

This paper sets out two approaches that have been taken to address statelessness over the past century: a traditional international law approach and a human rights-based approach. According to traditional international law, stateless persons cannot enjoy diplomatic protection or other benefits associated with a nationality. To protect stateless persons and to reduce statelessness worldwide, two global conventions were adopted in the middle of the 20th century: the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). Over the past decades, scholars and practitioners have increasingly taken a human rights-based approach to statelessness. They have complemented provisions of the Statelessness Conventions with provisions from human rights treaties, such as the International Convention on the Rights of the Child (1989) and the International Convention on the Elimination of All Forms of Racial Discrimination (1965). Numerous provisions of international human rights law directly relate to statelessness; the most apparent example is the right to a nationality (as guaranteed by Article 15 of the Universal Declaration on Human Rights), but other rights deserve mentioning as well, such as the right of a child to be registered at birth. This human rights-based approach relies on the fundamental premise that rights and protection are not offered on the basis of nationality, but on the basis of humanity and human dignity. Hence, it seems that scholars perceive the human rights-based approach as the ‘fairer’ one within current international law and its underpinning values. The present paper explores the differences between the two approaches and analyses the weaknesses of the Statelessness Conventions, and the strengths of the human rights law regime. Through this analysis, the paper attempts to answer the following question: Why do scholars and practitioners consider a human rights-based approach to statelessness as fairer, and is this effectively the case?

Keywords

Statelessness, nationality, human rights law, fairness

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1. Introduction

Statelessness has long been recognised as problematic under international law. Although the issue remained overlooked for a long time and received little attention in international discourse throughout most of the 20th century, early writers already acknowledged the detrimental consequences of being stateless.¹ As it is a nationality that establishes the relationship between the State and an individual, individuals who are devoid of that link are prevented from exercising the rights generally associated with citizenship. As such, statelessness affects all areas of a person's life. Stateless persons encounter difficulties in opening a bank account, registering births, marriages, or deaths, finding employment, enjoying an education, concluding contracts, and so forth.² Nevertheless, it took a long time until the international community tackled statelessness and its consequences, and in the first half of the 20th century the issue was largely overlooked. Only after the two world wars, when thousands of Russians and Jews were displaced and rendered stateless due to mass denationalisation campaigns,³ a global response to statelessness was taken. In 1948, the Universal Declaration of Human Rights (UDHR) laid down the right to a nationality, and the prohibition of arbitrary nationality deprivation.⁴ In 1954, the Convention Relating to the Status of Stateless Persons (1954 Convention) was adopted, enshrining minimum rights for stateless persons.⁵ In 1961, another convention was adopted, *i.e.* the Convention on the Reduction of Statelessness (1961 Convention), which aimed to prevent future cases of statelessness.⁶ Yet, accessions to these

¹ See e.g. Intergovernmental Committee on Refugees 'Statelessness and Some of Its Causes' in *Basic Legal Documents* (1947), 2.

² United Nations High Commissioner for Refugees (UNHCR) 'What is Statelessness?' (2018), 2 <<https://www.refworld.org/docid/5829c3514.html>>.

³ Jane Perry Clark Carey, 'Some Aspects of Statelessness Since World War I' (1946) 40 *The American Political Science Review* 113, 114; Asbjorn Eide, 'Citizenship and the Minority Rights of Non-Citizens' (15 April 1999) Working Paper UN Doc E/CN.4/Sub.2/AC.5/1999/WP.3, para. 19.

⁴ *Universal Declaration of Human Rights* (adopted 10 December 1948) UN Doc A/RES/217(III)A (UDHR), art. 15.

⁵ *Convention Relating to the Status of Stateless Persons* (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Convention).

⁶ *Convention on the Reduction of Statelessness* (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention).

two conventions remained relatively low for a few decades and statelessness received little attention again until the end of the Cold War. The breakup of the Soviet Union, Czechoslovakia and Yugoslavia demonstrated how individuals could be rendered stateless in the context of State succession, and made the issue more pressing.⁷ Moreover, the emergence of international human rights law throughout the second half of the 20th century laid more emphasis on the individual and his rights, and enshrined the right to a nationality more firmly. Human rights scholars and practitioners increasingly uncovered the underlying human rights issues related to statelessness, and considered human rights law as the appropriate tool to tackle it. Furthermore, the United Nations High Commissioner for Refugees (UNHCR), mandated to address statelessness, launched its #IBelong campaign in 2014 to eradicate statelessness entirely by 2024.⁸ As a consequence, statelessness has received much more attention in the last ten years from the bodies and agencies of the United Nations (UN), regional organisations, civil society and academics, who have taken a human rights-based approach to statelessness.

Against this backdrop, this paper analyses how statelessness was understood and addressed under traditional international law in the early 20th century and in the years leading up to the adoption of the Statelessness Conventions. This early approach is contrasted with the current human rights-based approach. The paper examines how the international community came to understand the root causes of statelessness overlooked by traditional writers, and how it came to acknowledge that statelessness does not only lead to severe human rights consequences, but also has a distinct human rights dimension at its creation. The paper then goes on to assess these two approaches, and comes to conclusion that while the human rights-based approach is the only appropriate approach to address statelessness and must be considered as the most 'fair', still important challenges remain. By continuing to build on the work of traditional international lawyers, the human rights-based approach runs into its limits.

2. Understanding and addressing statelessness

A. *The traditional international law approach*

At the beginning of 20th century, statelessness was already considered as an undesirable, possible consequence of the sovereign power of States to decide on the acquisition and loss of nationality. As early as 1896, the Institut de Droit International formulated "nul ne doit être sans nationalité" ("no one should be without a nationality").⁹ After World War I, statelessness was gradually recognised as an issue of international law.¹⁰ In 1930, the League of Nations organised a conference in the Hague, with among others the aim to address statelessness.¹¹ The preamble of the Convention on Certain Questions Relating to the Conflict of Nationality

⁷ UNHCR 'Evaluation of UNHCR's role and activities in relation to statelessness' (July 2001) UN Doc EPAU/2001/09, para. 29.

⁸ <<https://www.unhcr.org/ibelong/>>.

⁹ Institut de Droit International 'Principes relatifs aux conflits de lois en matière de nationalité (naturalisation et expatriation)' (1895) <https://www.idi-iii.org/app/uploads/2017/06/1895_camb_02_fr.pdf>.

¹⁰ Mira L Siegelberg, *Statelessness: A Modern History* (Harvard University Press 2020), 83-85.

¹¹ Hunter Miller, 'The Hague Codification Conference' (1930) 24 *The American Journal of International Law* 674, 674.

Law (1930 Hague Convention)¹² states that “it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only.” According to the Final Conference Act, the Conference “was unanimously of the opinion that it is very desirable that States should, in the exercise of their power of regulating questions of nationality, make every effort to reduce, so far as possible, cases of statelessness.”¹³

The outcome of the conference was the first multilateral convention on nationality – the 1930 Hague Convention – and two protocols specifically dealing with statelessness. The 1930 Hague Convention laid down a number of rules to prevent statelessness. It addressed in particular the position of (adopted) children, foundlings, and married women.¹⁴ Two protocols to the 1930 Hague Convention were also adopted, *i.e.* the Protocol Relating to a Certain Case of Statelessness¹⁵ and the Special Protocol concerning Statelessness¹⁶. However, the latter protocol only entered into force in 2004 due to a lack of ratifications.¹⁷ Although the 1930 Hague Convention and its protocols provided for some legal safeguards, the number of ratifications was relatively low, and many protection gaps remained. States were reluctant to regulate nationality matters, and concluded that it was the States’ prerogative to determine their own nationals.¹⁸ This principle was laid down in Article 1 of the convention, which is considered customary international law.¹⁹ State sovereignty remained the overriding principle regarding nationality matters.

After World War II, the number of stateless persons exponentially increased. Although the distinction between refugees and stateless persons was not always clearly delineated back then – both categories were often referred to as ‘lacking protection’²⁰ – the number of stateless persons was presumed to be very high.²¹ The reason for this increase was a series of nationality laws by Nazi Germany, which used denationalisation as a weapon against Jews during the war.²² Yet, denationalisation was still considered to be lawful under international law. Siegelberg observes that “though the mass denationalisation of Jewish citizens in Nazi Germany struck observers as extreme, it remained within the arena of justifiable behaviour.”²³ As hundreds of thousands of people had been rendered stateless throughout the war, the issue of statelessness gained a degree of urgency. In 1946, the Intergovernmental Committee on

¹² *Convention on Certain Questions relating to the Conflict of Nationality Law* (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89.

¹³ Final Act of the League of Nations Conference for the Codification of International Law (12 April 1930), as cited by Paul Weis, ‘Statelessness as a legal political problem’ in Paul Weis and Rudolf Graupner (eds), *The Problem of Statelessness* (World Jewish Congress 1944), 15.

¹⁴ *Convention on Certain Questions relating to the Conflict of Nationality Law* (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89, chapters III, IV and V.

¹⁵ *Protocol Relating to a Certain Case of Statelessness* (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 116.

¹⁶ *Special Protocol concerning Statelessness* (adopted 12 April 1930, entered into force 15 March 2004) 2252 UNTS 435.

¹⁷ Gerard-René de Groot and Olivier Willem Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers 2016), 100.

¹⁸ Siegelberg (n 10), 131-133.

¹⁹ De Groot and Vonk (n 17), 87.

²⁰ Hugh Massey, ‘UNHCR and De Facto Statelessness’ (2010) 16 Legal and Protection Policy Research Series 1, 2.

²¹ Weis, ‘Statelessness as a legal political problem’ (n 13), 20.

²² Eide (n 3), para. 19.

²³ Siegelberg (n 10), 140.

Refugees published a memorandum on the causes of statelessness.²⁴ In 1948, the UDHR enshrined the right to a nationality for the first time.²⁵ However, Weis observed that “in view of the exclusive competence of States to regulate nationality, and in the absence of effective joint action of States for the elimination of statelessness, this pronouncement must be regarded largely as being of a promissory and rather platonic nature.”²⁶ In that same year, the Economic and Social Council (ECOSOC) requested the UN Secretary-General to study the existing national legislation and conventions relevant to statelessness, and to make recommendations regarding the desirability of adopting a new convention.²⁷ Hence, the UN Secretary-General published ‘A Study of Statelessness’ in 1949.²⁸ The International Law Commission (ILC) was also engaged on the issue. In 1949, the ILC selected the topic of ‘nationality, including statelessness’ for codification,²⁹ and in 1950, ECOSOC requested the ILC to “prepare [...] the necessary draft international convention or conventions for the elimination of statelessness.”³⁰ The ILC published its report in 1952.³¹

This renewed interest in statelessness eventually led to the signing of the Statelessness Conventions in 1954 and 1961 respectively. After ‘A Study of Statelessness’ was published, ECOSOC appointed the Ad Hoc Committee on Statelessness and Related Problems, which was tasked to consider the desirability of a new convention relating to refugees and stateless persons, and if desirable, to draft that convention.³² The Committee recommended a convention relating to the status of refugees, accompanied by a separate protocol relating to the status of stateless persons.³³ Subsequently, the UN General Assembly convened a Conference of Plenipotentiaries to sign said convention and protocol.³⁴ However, the Conference eventually only adopted the Convention relating to the Status of Refugees, while the protocol was referred back to the UN for further study.³⁵ In 1954, ECOSOC convened another conference to discuss the protocol that had not been adopted.³⁶ The outcome of the conference was not a protocol, but rather a self-standing convention, *i.e.* the 1954 Convention. Later that year, the UN General Assembly expressed its wish to convene another conference

²⁴ Intergovernmental Committee on Refugees ‘Statelessness and Some of Its Causes’ in *Basic Legal Documents* (1947).

²⁵ UDHR, art. 15.

²⁶ Paul Weis, ‘The United Nations Convention on the Reduction of Statelessness, 1961’ (1962) 11 *International and Comparative Law Quarterly* 1073, 1075.

²⁷ Economic and Social Council (ECOSOC) ‘Report of the second session of the Commission on Human Rights’ (1-2 March 1948) UN Doc E/RES/116(VI)D.

²⁸ United Nations Ad Hoc Committee on Refugees and Stateless Persons ‘A Study of Statelessness’ (1 August 1949) UN Doc E/1112, E/1112/Add.1.

²⁹ International Law Commission (ILC) ‘Report on Nationality, Including Statelessness by Mr. Manly O. Hudson, Special Rapporteur’ (1952) *Yearbook of the International Law Commission* 1952, Vol. 2, 4.

³⁰ ECOSOC ‘Refugees and stateless persons’ (11 August 1950) UN Doc E/RES/319(XI)BIII.

³¹ ILC ‘Report on Nationality, Including Statelessness by Mr. Manly O. Hudson, Special Rapporteur’ (1952) *Yearbook of the International Law Commission* 1952, Vol. 2.

³² ECOSOC ‘The Study of Statelessness’ (6 August 1949) UN Doc E/RES/248(IX)B.

³³ ECOSOC ‘Report of the Ad Hoc Committee on Statelessness and Related Problems’ (17 February 1950) UN Doc E/1618 and E/AC.32/5, para. 19.

³⁴ United Nations General Assembly (UNGA) ‘Draft Convention relating to the Status of Refugees’ (14 December 1950) UN Doc A/RES/429(V), para. 1.

³⁵ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (25 July 1951) UN Doc A/CONF.2/108/Rev.1, Resolution III.

³⁶ ECOSOC ‘Statelessness’ (26 April 1954) UN Doc E/RES/526(XVII)A, para. 1.

of plenipotentiaries to adopt a convention for the reduction or elimination of future statelessness.³⁷ It took until 1961 for the 1961 Convention to be adopted.³⁸

So how were nationality and statelessness understood in the middle of the 20th century? The classic point of view was that individuals were not subjects of international law, but rather linked to the law of nations through their nationality. A nationality allowed the individual to enjoy the benefits of the law of nations, such as diplomatic protection.³⁹ Stateless persons were thus devoid of those benefits. In the words of Loewenfeld: "Their position may be compared to vessels on the open sea not sailing under the flag of a State, which likewise do not enjoy any protection."⁴⁰ A similar view can be found in the memorandum published by the Intergovernmental Committee on Refugees.⁴¹ But other disadvantages of being stateless were acknowledged as well, such as the difficulties stateless persons encounter in moving from one State to another, accessing the labour market, registering a marriage or a divorce, concluding contracts, and acquiring property.⁴² For Lauterpacht, the solution to the issue was situated within the law of nations; the individual must be able to invoke the protection of the law of nations against the State that severed the link of nationality. Therefore, conventions setting out such a protection were considered the appropriate solution.⁴³

As to the causes of statelessness, statelessness was traditionally understood as a technical, legal issue.⁴⁴ It was generally viewed as an anomaly in international law, originating from a lack of harmonisation and coordination of laws. In 'A Study of Statelessness', it was stated that "the absence of general rules for the attribution of nationality and the discrepancies between the various national legislations constitute the permanent source of statelessness."⁴⁵ Scholars distinguished between two kinds of statelessness, *i.e.* original or absolute statelessness and subsequent or relative statelessness. In the case of absolute statelessness, the stateless person has not acquired any nationality at birth or thereafter, whereas in the case of relative statelessness, the stateless person did acquire a nationality at birth, but lost it in the course of his life without acquiring another.⁴⁶

Conflicts of laws were identified as the cause of absolute statelessness, resulting from the two distinct systems of nationality laws throughout the world.⁴⁷ In systems operating on the basis

³⁷ UNGA 'Elimination or reduction of future statelessness' (4 December 1954) UN Doc A/RES/896(IX), para. 2.

³⁸ Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961' (n 26), 1078-1080.

³⁹ Eli Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press 1970), Vol. 2, Part 1, 489-490.

⁴⁰ Erwin Loewenfeld, 'Status of Stateless Persons' (1941) 27 Transactions of the Grotius Society 59, 59.

⁴¹ Intergovernmental Committee on Refugees 'Statelessness and Some of Its Causes' in *Basic Legal Documents* (1947), 2.

⁴² *ibid.*

⁴³ Siegelberg (n 10), 168.

⁴⁴ Michelle Foster and Helene Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 International Journal of Refugee Law 564, 567.

⁴⁵ United Nations Ad Hoc Committee on Refugees and Stateless Persons 'A Study of Statelessness' (1 August 1949) UN Doc E/1112, E/1112/Add.1.

⁴⁶ ILC 'Report on Nationality, Including Statelessness by Mr. Manly O. Hudson, Special Rapporteur' (1952) Yearbook of the International Law Commission 1952, Vol. 2, 17; Weis, 'Statelessness as a legal political problem' (n 13), 4.

⁴⁷ ILC 'Report on Nationality, Including Statelessness by Mr. Manly O. Hudson, Special Rapporteur' (1952) Yearbook of the International Law Commission 1952, Vol. 2, 17-18; Weis, 'Statelessness as a legal political problem' (n 13), 4-5.

of the *jus soli*-principle, nationality is acquired by birth on a State's territory.⁴⁸ In States following the *jus sanguinis*-principle, nationality is acquired at birth on the basis of parental descent.⁴⁹ While the *jus soli*-principle is more prevalent in States with a common law heritage and the *jus sanguinis*-principle in States with a civil law tradition, many States also combine both principles.⁵⁰ *Jus soli*-systems are inherently more inclusive, as every individual born on the territory is granted nationality. When a child is born to stateless parents or to parents of unknown nationality in a State solely operating on the basis of the *jus sanguinis*-principle, the child will be left stateless and the condition becomes hereditary.⁵¹ Also in the case of foundlings, the *jus sanguinis*-principle offers no protection.⁵² Finally, conflicts of laws emerge due to the co-existence of both systems. For example, when a national moves from a *jus soli*-system to a *jus sanguinis*-system, his child born on the territory of the latter will be stateless.⁵³ Regarding relative statelessness, multiple causes were identified, including conflicts of laws. For example, marriage can result in statelessness when nationality laws provide for the loss of a woman's nationality when she marries a man of another nationality, even though she does not acquire her husband's nationality.⁵⁴ State succession can also cause statelessness, as this necessarily involves a change of nationality. When inhabitants of the territories concerned do not retain their former nationality and are excluded from the treaty determining the beneficiaries of the nationality of the new State, they are rendered stateless.⁵⁵ Unilateral acts of nationality deprivation by the State can also result in relative statelessness. A distinction was made between denationalisation, *i.e.* when the provisions apply to all nationals, and denaturalisation, *i.e.* when the provisions only apply to naturalised nationals.⁵⁶ Denationalisation can take effect by operation of the law (collective denationalisation), or by a judicial or administrative decision (individual denationalisation).⁵⁷ Finally, an individual can also become stateless by means of his own unilateral act. Nationality laws may provide for a right of expatriation, meaning that nationals can voluntarily renounce their nationality.⁵⁸ If the individual cannot obtain any other nationality when receiving an expatriation permit, he becomes stateless.⁵⁹

⁴⁸ Paul Weis, *Nationality and Statelessness in International Law* (2nd ed., Sijthoff & Noordhoff 1979), 95.

⁴⁹ *ibid.*

⁵⁰ Ivan Shearer and Brian Opeskin, 'Nationality and Statelessness' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (1st ed., Cambridge University Press 2012), 98-99.

⁵¹ International Union for Child Welfare, *Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness of Children* (International Union for Child Welfare 1947), 15-16.

⁵² *ibid.*, 14.

⁵³ *ibid.*, 22.

⁵⁴ Weis, 'Statelessness as a legal political problem' (n 13), 5. For an extensive analysis of statelessness resulting from marriage, see Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States: A Study in Nationality and Conflict of Laws* (Digest Press 1934).

⁵⁵ Rudolf Graupner, 'Statelessness as a Consequence of the Change of Sovereignty over Territory after the Last War' in Paul Weis and Rudolf Graupner (eds), *The Problem of Statelessness* (World Jewish Congress 1944), 30; Weis, 'Statelessness as a legal political problem' (n 13), 5.

⁵⁶ Weis, 'Statelessness as a legal political problem' (n 13), 6.

⁵⁷ *ibid.*; ILC 'Report on Nationality, Including Statelessness by Mr. Manly O. Hudson, Special Rapporteur' (1952) Yearbook of the International Law Commission 1952, Vol. 2, 18.

⁵⁸ Weis, 'Statelessness as a legal political problem' (n 13), 6.

⁵⁹ ILC 'Report on Nationality, Including Statelessness by Mr. Manly O. Hudson, Special Rapporteur' (1952) Yearbook of the International Law Commission 1952, Vol. 2, 18.

These causes of statelessness, as identified by the ILC and traditional scholars, show that statelessness was primarily perceived as a technical, legal problem. The nexus between statelessness and discrimination was not yet clearly established. Nevertheless, the mass displacement and denationalisation of Jews during World War II drew some attention to how discrimination could play a role in causing statelessness. Some occasional references to the potentially discriminatory dimension of nationality deprivation can be found. In its report, the ILC stated that “some States have enacted special legislation providing for collective denationalisation on political, racial or religious grounds.”⁶⁰ According to the ILC, collective denationalisation should be prohibited, as discrimination is inconsistent with the UN Charter.⁶¹ Weis also distinguished between ‘general denationalisation’ and ‘special or discriminatory denationalisation’, the latter “which is directed against certain groups of nationals and which is very frequently mass denationalisation.”⁶² By 1979, Weis wrote that “prohibition of discriminatory denationalisation may be regarded as a rule of present-day general international law.”⁶³ Nevertheless, Weis still considered discriminatory denationalisation as a marginal exception in the general practice of nationality deprivation.⁶⁴

The solutions proposed to solve statelessness were also of a technical, legal nature. According to the ILC, statelessness could be eliminated by the adoption of two rules: (a) if no other nationality is acquired at birth, the individual should acquire the nationality of the State in whose territory he is born; and (b) loss of nationality subsequent to birth shall be conditional on the acquisition of another nationality.⁶⁵ Yet, the ILC equally recognised that a purely technical solution would not suffice, as a nationality must also be effective, and the conferment of a nationality must thus be accompanied by a conferment of its functions.⁶⁶ Moreover, the ILC acknowledged that States were not willing to accept these two principles, and thus possible solutions must be focused on reducing statelessness, rather than eliminating it entirely.⁶⁷ As a consequence, efforts to improve the status of stateless persons were considered necessary, since cases of statelessness were considered inevitable.⁶⁸

Ultimately, the international response to statelessness gave rise to the two global Statelessness Conventions. The aim of the 1954 Convention was to set out a number of minimum rights for stateless persons. It is clear that these rights are merely minimal, and do not foster the ambition of realising the level of protection that a nationality offers (for example, political rights and the right to diplomatic protection are notably absent). The convention merely provides an interim protection status pending the acquisition of nationality, which remained the ultimate goal.⁶⁹ As regards the aim of reducing statelessness, the 1961 Convention is clearly a product of the understanding of statelessness at the time, and was designed to offer technical solutions to the various causes of statelessness: conflicts of laws, renunciation, deprivation and loss of nationality, and State succession. Various provisions offer concrete guidance to States how statelessness can and must be prevented in case of conflicts of laws and nationality

⁶⁰ *ibid.*

⁶¹ *ibid.*, 21.

⁶² Weis, ‘Statelessness as a legal political problem’ (n 13), 6.

⁶³ Weis, *Nationality and Statelessness in International Law* (n 48), 125.

⁶⁴ *ibid.*

⁶⁵ ILC ‘Report on Nationality, Including Statelessness by Mr. Manly O. Hudson, Special Rapporteur’ (1952) Yearbook of the International Law Commission 1952, Vol. 2, 20.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008), 364.

deprivation. Interestingly, Article 9 prohibits nationality deprivation on racial, ethnic, religious or political grounds, thereby resonating the concerns voiced by the ILC. In spite of these efforts to address statelessness at a global level, the Statelessness Conventions did not achieve their aim of preventing and reducing statelessness and effectively protecting stateless persons, and have been widely criticised.⁷⁰ Ratifications of these instruments remained dramatically low for a long time, and the issue of statelessness was pushed to the back of the international agenda, overshadowed by concerns for refugees.⁷¹

B. The human rights-based approach

The emergence of human rights law has fundamentally changed the understanding of statelessness, and the approaches to it. While traditional international lawyers labelled stateless persons as ‘outlaws’,⁷² whose link with the law of nations was severed due to a lack of nationality, human rights law re-introduced that link. It pushed for the idea that individuals are granted human rights protection because they are human beings, not nationals of a particular State.⁷³ The UN Human Rights Committee (CCPR) stated that the rights contained in the International Covenant on Civil and Political Rights (ICCPR)⁷⁴ “apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”⁷⁵ Such a proposition can be contrasted with Hannah Arendt’s famous phrase regarding the right to a nationality, which she described as “the right to have rights”.⁷⁶ It was Arendt’s view that only by being member of a State, by having a nationality, one could truly possess human rights.⁷⁷ International human rights law proclaims that this point of view no longer holds. Nevertheless, reality often indicates otherwise, as States remain responsible for the domestic implementation of human rights standards and often distinguish between citizens and non-citizens.⁷⁸ Human rights law has also proclaimed the right to a nationality as a fundamental right to which all human beings are entitled. The right to a nationality was laid down for the first time in the UDHR, and was later incorporated in multiple international and regional human rights treaties.

⁷⁰ See e.g. *ibid*; Carol A Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (1995) 7 *International Journal of Refugee Law* 232; Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018), Chapter 3 (74-113); Tendayi Bloom, ‘Problematizing the Conventions on Statelessness’ (2013) 02/01 *United Nations University - Institute on Globalization, Culture and Mobility*.

⁷¹ By June 1997, only 44 States were party to the 1954 Convention and 19 States to the 1961 Convention. UNHCR, *The State of the World’s Refugees 1997-1998: A Humanitarian Agenda* (Oxford University Press 1997), 257.

⁷² This wording was, among others, used by Weis. Weis, ‘Statelessness as a legal political problem’ (n 13), 13.

⁷³ For example, Donnelly states that “*human rights are literally the rights that one has simply because one is a human being.*” Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013), 10.

⁷⁴ *International Covenant on Civil and Political Rights* (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷⁵ Human Rights Committee (CCPR) ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (11 April 1986) UN Doc HRI/GEN/1/Rev.1, para. 1.

⁷⁶ Richard J Bernstein, ‘Hannah Arendt on the Stateless’ (2005) 11 *Parallax* 46.

⁷⁷ *ibid*.

⁷⁸ ECOSOC ‘The rights of non-citizens: Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283’ (26 May 2003) UN Doc E/CN.4/Sub.2/2003/23, 10-12.

These developments gradually changed the way in which scholars thought about statelessness as a phenomenon, *i.e.* a violation of human rights. In 1994, Goodwin-Gill criticised the traditional, technical approach to statelessness, and called for academics and practitioners to look at the underlying human rights issues.⁷⁹ He argued that “statelessness is indeed a broad human rights issue, even as it retains a distinct technical dimension.”⁸⁰

Arbitrary deprivation of nationality as a cause of statelessness shows the interplay between the technical dimension of statelessness on the one hand, and the human rights dimension on the other. Today, arbitrary deprivation of nationality and discrimination are considered as the main drivers of statelessness.⁸¹ The role of discrimination is testified by UNHCR’s estimation that 75 per cent of the world’s stateless population belongs to minority groups.⁸² In 2018, the Special Rapporteur on minority issues recognised the existence of a pattern of statelessness affecting minority groups, as a result of arbitrary nationality deprivation.⁸³ Nationality deprivation encompasses both the impossibility to obtain any nationality, and all forms of loss of nationality, both automatically by operation of the law and by a decision of the administrative authorities.⁸⁴ As such, the meaning is broader than ‘denationalisation’, which was the notion primarily used by traditional international lawyers. Nationality deprivation is considered arbitrary when it is unlawful, discriminatory, or when there is a lack of due process.⁸⁵ The Human Rights Council (HRC) has listed the following grounds as discriminatory: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸⁶ While denationalisation was already considered as a cause of statelessness early on, traditional international lawyers failed to grasp the full extent of the role that discrimination plays in the creation of statelessness.

One of these prominent forms of discrimination causing statelessness is gender discrimination. Today, many States still have nationality laws in place that do not grant women equal rights with men to acquire, change and retain their nationality.⁸⁷ In some States, women are not allowed to pass on their nationality to their children, thereby causing an increased risk of childhood statelessness.⁸⁸ While gender discrimination is a root cause of statelessness, the drafters of the 1961 Convention did not yet recognise it as such. Another relevant form of discrimination is racial discrimination. For example, some African States only grant their

⁷⁹ Guy S Goodwin-Gill, ‘The Rights of Refugees and Stateless Persons’ in Krishan Prasad Saksena (ed), *Human Rights Perspective and Challenges (in 1990 and Beyond)* (Lancers Books 1994), 378, 389, as cited by Foster and Lambert (n 44), 565.

⁸⁰ *ibid.*

⁸¹ UNHCR ‘Background Note on Discrimination in Nationality Laws and Statelessness’ (20 October 2021), 3 <<https://www.refworld.org/docid/616fda104.html>>.

⁸² *ibid.*

⁸³ UNGA ‘Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities’ (20 July 2018) UN Doc A/73/205, para. 21.

⁸⁴ Human Rights Council (HRC) ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’ (14 December 2009) UN Doc A/HRC/13/34, para. 23.

⁸⁵ van Waas (n 69), 94-95.

⁸⁶ HRC ‘Human rights and arbitrary deprivation of nationality’ (26 March 2009) UN Doc A/HRC/RES/10/13.

⁸⁷ HRC ‘Report on discrimination against women on nationality-related matters, including the impact on children: Report of the Office of the United Nations High Commissioner for Human Rights’ (15 March 2013) UN Doc A/HRC/23/23, para. 19.

⁸⁸ *ibid.*, paras. 34-39.

nationality to persons of African descent.⁸⁹ Racial discrimination also plays an important role in the context of State succession, as ethnic minority groups are vulnerable to exclusion from the nationality of the newly independent State.⁹⁰ Finally, discrimination may also result in arbitrary nationality deprivation on other grounds, such as religion, disability, age, and sexual orientation, gender identity and gender expression, sex characteristics (SOGIESC).⁹¹

Two other causes of statelessness that were overlooked by traditional international lawyers have been identified throughout the 1990s. The first one is deficient registration of births and marriages, which was acknowledged as a cause of statelessness by UNHCR in 1997.⁹² Birth registration provides the legal proof of a child's existence. While not all unregistered children are automatically stateless, it becomes more difficult to prove a child's nationality when the child does not have a birth certificate.⁹³ In that context, marriage registration is also important, as in many States the nationality of the spouses (and their children) is affected by marriage. Furthermore, if the marriage is unregistered, the child may be considered illegitimate and the mother may be more reluctant to register the child.⁹⁴ The second newly identified cause of statelessness is migration. Migrants who are particularly vulnerable are irregular migrants, victims of human trafficking and refugees.⁹⁵ For example, irregular migrants may lose their nationality due to long-term residence abroad, and may be unable to acquire the nationality of their host country as lawful residence is a general condition for naturalisation.⁹⁶ Another issue is the loss of documentation, which is often the case for victims of human trafficking and refugees, who as a result cannot prove their nationality, heightening their risk of statelessness.⁹⁷

In many cases, it is not one cause in isolation that renders a person stateless, but rather the concurrence of multiple factors. For example, the birth registration system may be less accessible for persons who belong to a particular ethnic minority, due to discriminatory practices.⁹⁸ Registering a child may also be more difficult in the context of State succession resulting from an armed conflict, as governmental authorities may not be able to perform birth registrations.⁹⁹ Migration also exacerbates other factors increasing the risk of statelessness. For example, irregular migrants face additional barriers in registering their children's birth in their host State, such as discrimination.¹⁰⁰ These are only a few examples of how the interaction of various factors and vulnerabilities may eventually result in statelessness. This complexity was overlooked by traditional writers. These newly identified causes of statelessness show that quite some progress has been made in the understanding of statelessness over the last decades. It has been demonstrated that statelessness is not a mere

⁸⁹ UNHCR 'Background Note on Discrimination in Nationality Laws and Statelessness' (20 October 2021), 8 <<https://www.refworld.org/docid/616fda104.html>>.

⁹⁰ *ibid*, 9.

⁹¹ *ibid*, 2.

⁹² UNHCR, *The State of the World's Refugees 1997-1998* (n 71), 226.

⁹³ Norwegian Refugee Council 'Statelessness and displacement' (15 April 2016), 19 <https://files.institutesi.org/stateless_displacement.pdf>.

⁹⁴ van Waas (n 69), 156-157; UNHCR 'UNHCR Handbook for the Protection of Women and Girls' (January 2008), 123-124 <<https://www.refworld.org/docid/47cfc2962.html>>.

⁹⁵ van Waas (n 69), 164.

⁹⁶ *ibid*, 167-168.

⁹⁷ *ibid*, 180-181.

⁹⁸ *ibid*, 155-156.

⁹⁹ *ibid*, 156.

¹⁰⁰ *ibid*, 170-171.

anomaly, arising only exceptionally from a technical incompatibility between nationality laws. While these technical causes may at times lead to statelessness, in many instances statelessness is rather a deeply rooted human rights problem, resulting from systemic discrimination and exclusion of particular vulnerable groups, such as women, ethnic minorities, and irregular migrants.

Human rights law did not only fundamentally change the understanding of statelessness, it did also cause a shift in the approach to it. The Statelessness Conventions were gradually complemented by human rights standards. The UDHR prohibits arbitrary deprivation of nationality, reflecting the condemnation of the mass denationalisation campaigns during the two world wars.¹⁰¹ In 1996, the UN General Assembly confirmed that this prohibition is a fundamental principle.¹⁰² Various binding treaties have also laid down the right to a nationality, albeit with varying scopes. At the international level, the ICCPR¹⁰³, the Convention on the Rights of the Child (CRC)¹⁰⁴, and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families¹⁰⁵ set out the right of every child to acquire a nationality, while the Convention on the Rights of Persons with Disabilities (CRPD) stipulates the right to a nationality in favour of persons with disabilities.¹⁰⁶ The HRC has also confirmed the right to a nationality of every individual in various resolutions.¹⁰⁷ At the regional level, the African Charter on the Rights and Welfare of the Child provides for the right of every child to acquire a nationality,¹⁰⁸ while the Arab Charter on Human Rights follows the scope of the UDHR.¹⁰⁹ The most far-reaching right to a nationality can be found in the American Convention on Human Rights (ACHR), which does not only include the right of every person to a nationality and the right not to be arbitrarily deprived of that nationality – thereby copying the text of the UDHR –, but it also stipulates that every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.¹¹⁰ Hence, it legally enshrines the *jus soli*-principle, the prevalent principle in the Americas.¹¹¹

¹⁰¹ Open Society Justice Initiative 'Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality, And Combating Statelessness' (November 2005), 7 <https://www.justiceinitiative.org/uploads/0d3774dc-821e-4f09-849e-a21e984378a6/citizenship_20051101.pdf>.

¹⁰² UNGA 'Office of the United Nations High Commissioner for Refugees' (9 February 1996) UN Doc A/RES/50/152, para. 16.

¹⁰³ ICCPR, art. 24(3).

¹⁰⁴ *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art. 7(1).

¹⁰⁵ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (CRMW), art. 29.

¹⁰⁶ *Convention on the Rights of Persons with Disabilities* (adopted 24 January 2007, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), art. 18(1)(a).

¹⁰⁷ See e.g. HRC 'The right to a nationality: women and children' (16 July 2012) UN Doc A/HRC/RES/20/4, para. 1; HRC 'Human rights and arbitrary deprivation of nationality' (11 July 2014) UN Doc A/HRC/RES/26/14, para. 1.

¹⁰⁸ *African Charter on the Rights and Welfare of the Child* (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9L49 (ACRWC), art. 6(3).

¹⁰⁹ *Arab Charter on Human Rights* (adopted 22 May 2004, entered into force 15 March 2008), art. 29(1).

¹¹⁰ *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR), art. 20.

¹¹¹ De Groot and Vonk (n 17), 237; Shearer and Opeskin (n 50), 98.

Several human rights provisions articulate the prohibition of discrimination in nationality matters, which is now considered as a general principle of international law.¹¹² The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) prohibits racial discrimination in the enjoyment of the right to a nationality.¹¹³ In a similar vein, gender discrimination in nationality matters is prohibited. The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) states that States party to the convention must grant women equal rights with men to acquire, change or retain their nationality.¹¹⁴ Another example, although less stringent, includes Article 29(2) of the Arab Charter on Human Rights, stipulating that States must take measures to allow children to acquire their mothers' nationality. Furthermore, the CRPD states that State parties must ensure that disabled persons are not deprived of their nationality arbitrarily or on the basis of their disability.¹¹⁵ The importance of the principle of non-discrimination in connection with the right to a nationality has also been reiterated by the HRC.¹¹⁶

These human rights standards are increasingly being used to tackle statelessness through existing human rights mechanisms. The treaty monitoring bodies supervising the implementation of the human rights standards enshrined in the UN human rights treaties are of particular importance. Through the established practice of publishing 'general comments', the treaty monitoring bodies have further interpreted the relevant provisions. For instance, the CCPR clarified that the right of every child to acquire a nationality entails a prohibition to discriminate between legitimate children and children born out of wedlock.¹¹⁷ The treaty monitoring bodies have also made several recommendations to States related to statelessness in the form of 'concluding observations'.¹¹⁸ For example, both the CCPR and the Committee on the Rights of the Child have recommended States to facilitate birth registration to prevent statelessness.¹¹⁹ Another relevant human rights mechanism is the Universal Periodic Review (UPR), a process through which the human rights records of the UN member States are reviewed under the auspices of the HRC.¹²⁰ In various outcome reports, States made recommendations to other States related to statelessness, such as removing gender discriminatory provisions from their nationality laws.¹²¹ Finally, the various UN Special

¹¹² Alice Edwards, 'The meaning of nationality in international law in an era of human rights' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), 26-27.

¹¹³ *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD), art. 5(d)(iii).

¹¹⁴ *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), art. 9(1).

¹¹⁵ CRPD, art. 18(1)(a).

¹¹⁶ HRC 'Human rights and arbitrary deprivation of nationality' (15 July 2016) UN Doc A/HRC/RES/32/5, para. 2.

¹¹⁷ CCPR 'General Comment No. 17: Article 24 (Rights of the Child)' (7 April 1989), para. 8.

¹¹⁸ CEDAW, art. 18; CRC, art. 44; CRMW, art. 73; CRPD, art. 35; ICCPR, art. 40; ICERD, art. 9.

¹¹⁹ See e.g. CCPR 'Concluding observations on the third periodic report of the Central African Republic' (30 April 2020) UN Doc CCPR/C/CAF/CO/3, para. 32; Committee on the Rights of the Child 'Concluding observations on the combined fifth and sixth periodic reports of Viet Nam' (21 October 2022) UN Doc CRC/C/VNM/CO/5-6, para. 21.

¹²⁰ UNGA 'Human Rights Council' (15 March 2006) UN Doc A/RES/60/251, para. 5(e).

¹²¹ See e.g. HRC 'Report of the Working Group on the Universal Periodic Review: Togo' (14 April 2022) UN Doc A/HRC/50/5, paras. 119.47-119.48; HRC 'Report of the Working Group on the Universal Periodic Review: Sudan' (20 April 2022) UN Doc A/HRC/50/16, para. 137.235. Recommendations related to statelessness have steadily increased over the three cycles thus far. Institute on Statelessness and Inclusion 'Mainstreaming Statelessness and the Right to Nationality in the Universal

Rapporteurs have also published reports and made recommendations related to statelessness, ranging from the facilitation of birth registration to the removal of discriminatory provisions.¹²²

Regional human rights mechanisms have also demonstrated their relevance in tackling statelessness. Various judgments of regional human rights courts deserve mentioning. Although the European Convention on Human Rights (ECHR)¹²³ does not include the right to a nationality, the European Court of Human Rights (ECtHR) has dealt with nationality and statelessness issues on the basis of Article 8 on the right to respect for private and family life. By contrast, the ACHR does recognise the right to a nationality, and the IACtHR has rendered a number of progressive judgments in that regard. In *Yean and Bosico children*, the IACtHR held that the right to a nationality is non-derogable, and that States' freedom to determine who their nationals are is limited by the prohibition of discrimination and the obligation to prevent, avoid and reduce statelessness.¹²⁴ The IACtHR confirmed this reasoning in *Expelled Dominicans and Haitians*.¹²⁵ On the African continent, the African Court on Human and Peoples' Rights recognised in *Anudo Ochieng v. Tanzania* the right to a nationality, as enshrined in Article 15 UDHR, as customary international law.¹²⁶

3. The elimination of statelessness as a fair outcome

The traditional international law approach to statelessness was gradually replaced by the human rights based-approach. While the technical causes of statelessness are still relevant in many situations, they have been pushed to the back in the understanding of the statelessness phenomenon. Scholars and practitioners have identified underlying human rights causes, such as systemic discrimination on various grounds, migration and deficient civil registration systems, as the true motors of statelessness worldwide. It also appears that the solutions developed over time to address statelessness have been tailored to the understanding of the causes of the phenomenon. Whereas the 1961 Convention only addressed the three technical causes of statelessness identified at the time, *i.e.* conflicts of laws, deprivation of nationality and State succession, resolutions of the HRC, for instance, have addressed some of the 'new' causes of statelessness, such as gender discrimination and arbitrary deprivation on other discriminatory grounds, and the lack of birth registration.¹²⁷

Periodic Review: UPR Third Cycle Evaluation and Lessons for the Future' (17 March 2023), 6 <https://files.institutesi.org/Statelessness_in_the_UPR_Evaluation_Report.pdf>.

¹²² See e.g. HRC 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (14 March 2017) UN Doc A/HRC/34/67, para. 90(d); HRC 'Visit to Tajikistan: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally' (5 May 2022) UN Doc A/HRC/50/33/Add.1, para. 88(c).

¹²³ *European Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

¹²⁴ Inter-American Court of Human Rights (IACtHR), *Case of the Girls Yean and Bosico v. Dominican Republic* (Judgment) [2008], paras. 136, 140.

¹²⁵ IACtHR, *Caso personas Dominicanas y Haitianas expulsadas vs. República Dominicana* (Judgment) [2014], para. 256.

¹²⁶ African Court on Human and Peoples' Rights, *The matter of Anudo Ochieng Anudo v. United Republic of Tanzania* (Judgment) [2018] 012/2015, para. 76.

¹²⁷ See e.g. HRC 'Birth registration and the right of everyone to recognition everywhere as a person before the law' (3 April 2012) UN Doc A/HRC/RES/19/9; HRC 'The right to a nationality: women and children' (16 July 2012) UN Doc A/HRC/RES/20/4; HRC 'Human rights and arbitrary deprivation of nationality' (15 July 2016) UN Doc A/HRC/RES/32/5.

The weaknesses of the Statelessness Conventions lie precisely in the limited understanding of statelessness at the time.¹²⁸ The 1961 Convention provides clear rules for how conflicts of laws resulting in statelessness should be remedied, but fails to adequately address other causes. For example, it prohibits nationality deprivation on discriminatory grounds, but fails to include important grounds, including gender and disability.¹²⁹ The provision also solely deals with denationalisation, but does not acknowledge the role that discrimination plays in the denial of nationality. While the 1954 Convention seems to propose a rights-based approach at first glance, it only provides for a minimum standard of treatment for stateless persons. Various provisions oblige States to grant stateless persons particular rights – for instance, the right to religion – that are as favourable as the rights of nationals,¹³⁰ but for many other rights, such as the right to housing, the 1954 Convention provides that States should grant rights that are not less favourable than those accorded to aliens generally in the same circumstances, thereby allowing a distinction to be made between nationals and aliens.¹³¹ Even more, many provisions allow States to limit those rights when the stateless person is unlawfully residing in the State's territory.¹³² This approach is at odds with the premise of human rights law that individuals are entitled to human rights on the basis of their humanity, not their nationality or residency status. The human rights-based approach, on the other hand, presents a number of clear advantages. Although accessions to the Statelessness Conventions have risen significantly over the past twenty years,¹³³ they do not enjoy such a wide acceptance as many international human rights treaties. Having 196 parties, the CRC is the most widely ratified convention globally, and CEDAW and ICERD count 189 and 182 parties respectively.¹³⁴ The provisions of these instruments have been further fleshed out by treaty monitoring bodies, a practice that allows for greater flexibility and leaves room for further interpretation and development of standards in light of new findings. This flexibility can also be observed in the UPR process. Human rights law allows to overcome the gaps in the Statelessness Conventions, and to weave a more comprehensive framework. Since statelessness is a multi-faceted issue, of which the patterns, causes, and consequences can take many forms, it can only be solved by an holistic approach to it, which human rights law offers.

Both the traditional approach and the human rights-based approach agree on one particular point: statelessness is undesirable. This paper started out with the question why the human rights-based approach is considered as 'fairer' by scholars and practitioners. It can be argued that the 'fairness' of both approaches must be assessed in light of the aim of eliminating statelessness, which both approaches consider as the desirable and fair outcome. Linked to that perception of fairness, is the inclusion of all individuals in the solutions to statelessness, as elimination of statelessness in its entirety necessarily entails that no individual is left stateless. The regulation of nationality has always been perceived as a difficult balancing exercise between the State's interests on the one hand, and the interests of the individual on

¹²⁸ For a detailed evaluation of the Statelessness Conventions, see van Waas (n 69).

¹²⁹ 1961 Convention, art. 9.

¹³⁰ 1954 Convention, arts. 4, 14, 20, 22(1), 23 and 24(1).

¹³¹ 1954 Convention, arts. 13, 15, 17(1), 18, 19, 21, 22(2) and 26.

¹³² 1954 Convention, arts. 15, 17, 18, 19, 21, 23, 24, 26, 28 and 31.

¹³³ Currently, the 1954 Convention has 90 parties, and the 1961 Convention 78 parties.
<https://treaties.un.org/pages/Home.aspx?clang=_en>.

¹³⁴ <https://treaties.un.org/pages/Home.aspx?clang=_en>.

the other.¹³⁵ Traditional writers studied statelessness from the State's perspective as the primary subject of international law, because they considered that the individual was only indirectly linked to the law of nations through their nationality.¹³⁶ Human rights law fundamentally changed that paradigm by connecting the individual directly to the international legal order. It is true that statelessness as a phenomenon has particular negative consequences for States. It undermines the State's ability to expel non-nationals, since no other State will feel obliged to admit them. Stateless persons are also not bound by any duty of loyalty to the State in which they reside.¹³⁷ Nevertheless, it is in the first place individuals who are confronted with the adverse effects of statelessness, ranging from exclusion from society to abuse and violence. From that perspective, statelessness demands that is understood and addressed from the perspective of the individual in need of protection, rather than the State, the grantor of protection. Thus, a human rights-based approach is the only appropriate one.

Nevertheless, the current human rights-based approach meets several challenges. The response to statelessness must be tailored to the understanding of the causes of the phenomenon. However, such a response can only be adequately developed if sufficient information exists on these causes, and on their contribution to the creation of statelessness globally. While significant progress has been made in the understanding of the various causes, the actual identification of stateless persons remains poor. As such, no accurate data exists regarding the magnitude of statelessness globally and the proportional contribution of the various causes to the creation of statelessness. The mere estimation of UNHCR that 75 per cent of stateless persons belong to minority groups does not allow for any specifically tailored, legal responses.¹³⁸ For example, very little information exists on what role discrimination on SOGIESC grounds play in the creation of statelessness, and how many people are affected by it.¹³⁹ While part of UNHCR's mandate for stateless persons includes identification,¹⁴⁰ its efforts to improve the identification of stateless persons have not been very successful so far. Furthermore, in spite of the weaknesses of the Statelessness Conventions, these instruments remain the primary source of reference to address statelessness today. This is demonstrated by UNHCR's successful campaigns to promote accessions to the conventions.¹⁴¹ Since human rights law has complemented the conventions, the current legal framework is an incoherent

¹³⁵ Serena Forlati, 'Nationality as a human right' in Alessandro Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013), 19.

¹³⁶ Lauterpacht (n 39), 489-490.

¹³⁷ Matthew J Gibney, 'Statelessness and citizenship in ethical and political perspective' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), 49-50.

¹³⁸ UNHCR 'Background Note on Discrimination in Nationality Laws and Statelessness' (20 October 2021), 3 <<https://www.refworld.org/docid/616fda104.html>>.

¹³⁹ See Thomas McGee, "Rainbow Statelessness" — Between Sexual Citizenship and Legal Theory' (2020) 2 *The Statelessness & Citizenship Review* 86.

¹⁴⁰ Executive Committee 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons' (6 October 2006) No. 106(LVII); UNGA 'Office of the United Nations High Commissioner for Refugees' (19 December 2006) UN Doc A/RES/61/137, para. 4.

¹⁴¹ In 2011, UNHCR organised the Ministerial Intergovernmental Event on Refugees and Stateless Persons, and in 2019, the High-Level Segment on Statelessness. At both events, many States pledged to accede to the Statelessness Conventions. UNHCR 'Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011' (October 2012) <<https://www.refworld.org/docid/50aca6112.html>>; UNHCR 'High-Level Segment on Statelessness: Results and Highlights' (May 2020) <<https://www.refworld.org/pdfid/5ec3e91b4.pdf>>.

patchwork of legal rules, which further builds on the insufficient understanding of statelessness in the middle of the 20th century. As a result, the human rights-based approach at times runs into the limits of what it can offer. The prime illustration of that is the definition of a stateless person, as enshrined in Article 1 of the 1954 Convention. Batchelor observed that “a problem arises, however, in that the definition itself precludes full realisation of an effective nationality because it is a technical, legal definition which can address only technical, legal problems.”¹⁴² Many persons who formally have a nationality, are not afforded its protection. In 1951, the ILC already stressed the importance of an effective nationality.¹⁴³ Nevertheless, as a result of the decisions of the drafters in 1954, persons with an ineffective nationality fall outside the scope of protection provided on the basis of the right to a nationality. If they also do not qualify for protection as refugees, they slip through the cracks of the different protection regimes.¹⁴⁴ Finally, the right to a nationality as it is currently developed and interpreted leaves some protection gaps. Regarding the right to acquire a nationality, the first gap relates to the absence of a specific duty bearer, as it is often not clear which State has the duty to grant its nationality to an individual.¹⁴⁵ Regarding the acquisition of nationality at birth, various (regional) instruments set out more specific rules as to which State should grant its nationality to the child.¹⁴⁶ However, Forlati rightly points out that almost half of the States are not party to any of these instruments.¹⁴⁷ The protection level becomes even more dire regarding the acquisition of nationality throughout the individual’s life, *i.e.* naturalisation. No international obligation to grant a nationality by means of naturalisation currently exists in human rights law, so States enjoy a wide margin of discretion.¹⁴⁸ The only limits to States’ discretion include the prohibition of discrimination and arbitrariness.¹⁴⁹ Regarding nationality deprivation, specific instances still exist in which nationality deprivation resulting in statelessness is deemed lawful. While some scholars have argued that nationality deprivation resulting in statelessness is by definition arbitrary,¹⁵⁰ both the HRC and UNHCR maintain that it is lawful in limited circumstances, as long as it serves a legitimate aim and is proportionate.¹⁵¹ In sum, these protection gaps show that the right to a nationality is not full-fledged yet under the current human rights law principles.

¹⁴² Batchelor (n 70), 232.

¹⁴³ ILC ‘Report on Nationality, Including Statelessness by Mr. Manly O. Hudson, Special Rapporteur’ (1952) Yearbook of the International Law Commission 1952, Vol. 2, 20.

¹⁴⁴ The definition of a refugee, which serves as the ground for protection under international refugee law, is included in Article 1 of the 1951 Convention Relating to the Status of Refugees. *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art. 1.

¹⁴⁵ ILC ‘Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries’ (1999) Yearbook of the International Law Commission 1999, Vol. 2, Part 2, art. 1, commentary (2).

¹⁴⁶ 1961 Convention, arts. 1(1) and 4(1); ACHR, art. 20(2); ACRWC, art. 6(4); *European Convention on Nationality* (adopted 7 November 1997, entered into force 1 March 2000), ETS 166, art. 6(2).

¹⁴⁷ Forlati (n 135), 21.

¹⁴⁸ *ibid.*, 23.

¹⁴⁹ *ibid.*

¹⁵⁰ See e.g. James A Goldston, ‘Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens’ (2006) 20 *Ethics & International Affairs* 321, 333. Nevertheless, van Waas and Brandvoll maintain that there is insufficient evidence that such a rule exists. Jorunn Brandvoll ‘Deprivation of nationality: Limitations on rendering persons stateless under international law’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), 197-198; van Waas (n 69), 95, footnote 10.

¹⁵¹ HRC ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’ (19 December 2013) UN Doc A/HRC/25/28, para. 4; UNHCR ‘Guidelines on Statelessness No. 5: Loss

4. Conclusion

Under traditional international law, statelessness was understood as a technical, legal issue. The problematic nature of statelessness was understood early on, since a nationality was considered as the only link between the individual and the law of nations. In absence of that link, individuals would not be able to enjoy the benefits provided by the law of nations. Statelessness was perceived as an anomaly in international law, which could only arise due to a lack of harmonisation and coordination between States' nationality laws. It was considered as an inevitable consequence of States' discretionary power to decide who are their nationals and who are not. As such, three main, technical causes of statelessness were identified by writers throughout the 20th century: conflicts of laws, deprivation of nationality, and State succession. While it took a long time until an international response to statelessness was taken, the conventions that were ultimately adopted were tailored to the understanding of statelessness at the time. The 1961 Convention addressed those three technical causes of statelessness, albeit State succession was only dealt with in a very limited fashion. The 1954 Convention, on the other hand, provided a minimum protection status to stateless persons. The emergence of international human rights law fundamentally changed the understanding of and the approach to statelessness, and demonstrated the underlying human rights causes of statelessness that were overlooked by traditional international lawyers. Discrimination on varying grounds, including race and gender, arbitrary nationality deprivation, and deficient civil registration systems were acknowledged as the prime drivers of statelessness globally. More attention was gradually awarded to statelessness by the international community from the 1990s onwards, and responses to it were increasingly human rights-based. The UN human rights treaties set out various provisions related to the right to a nationality and the principle of non-discrimination, which complemented the standards of the Statelessness Conventions. As a result, statelessness was increasingly addressed through these provisions. The HRC reiterated in its resolutions the fundamental nature of the right to a nationality and the principle of non-discrimination, and acknowledged the importance of avoidance of statelessness. Thus far, statelessness has been tackled as a core human rights issue through various human rights mechanisms. This evolution towards a human rights-based approach is laudable. While the regulation of nationality under international law has always been a balancing exercise between the interests of the State on the one hand, and the rights of the individual on the other, the negative consequences for the stateless individual clearly outweigh the State's interests in this matter, and the response to it should be tailored to the protection needs of the individual. While the human rights-based approach presents a number of clear advantages, both in terms of global support and flexibility, persistent challenges remain. While the root causes of statelessness are better understood today than in the middle of the 20th century, identification of stateless persons and populations, and the underlying causes of particular statelessness situations, remains very poor. UNHCR has a mandate to identify stateless persons, but has not properly implemented it thus far. Another challenge lies in the current international legal framework on statelessness, which is a patchwork of varying norms, originating both from the Statelessness Conventions and human rights treaties. The human rights-based approach continues to build on the outdated, technical provisions of the Statelessness Conventions, which failed to properly grasp the complexity of statelessness at that time. Moreover, the right

and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness' (May 2020) UN Doc HCR/GS/20/05, para. 95.

to a nationality, which is the foundation on which the human rights-based approach is built, remains underdeveloped and cannot yet be considered as a full-fledged right. As long as the creation of statelessness is deemed lawful in particular circumstances, the right to a nationality cannot be considered as fully realised.