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Addressing the anomaly of statelessness in Europe:

An EU law and human rights perspective

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TABLE OF CONTENT

LIST OF ABBREVIATIONS	8
INTRODUCTION	10
TOPICALITY OF THE ISSUE	10
REASONS OF CHOOSING THE SUBJECT	11
PROBLEM FORMULATION	13
MAIN HYPOTHESES.....	14
CHAPTER 1: RESEARCH DESIGN AND METHODOLOGY.....	16
INTRODUCTION	16
1. 1. RESEARCH QUESTIONS, OBJECTIVES TO ACCOMPLISH AND OPPORTUNITIES OF THEIR UTILIZATION.....	16
1. 2. RESEARCH METHODOLOGY.....	18
1. 3. STRUCTURE OF THE DISSERTATION	23
1. 4. DELIMITATIONS.....	25
SUMMARIZING THE RATIONALE OF MY RESEARCH.....	27
CHAPTER 2: LITERATURE REVIEW	28
INTRODUCTION	28
2. 1. HISTORICAL PROGRESS IN THE CONCEPT OF STATELESSNESS.....	29
2. 2. VIEWS ON NATIONALITY AND STATELESSNESS IN LIGHT OF STATE SOVEREIGNTY.....	30
2. 3. LITERATURE ADDRESSING STATELESSNESS AS A HUMAN RIGHTS ISSUE.....	31
2. 4. LITERATURE ON STATELESS POPULATIONS IN EUROPE.....	32
2. 5. LITERATURE ON THE ROLE OF THE EU IN ADDRESSING STATELESSNESS.....	34
2. 6. LITERATURE ON STATELESSNESS DETERMINATION PROCEDURES	35
2. 7. LITERATURE ON A REGIONALLY HARMONISED STATUS DETERMINATION MECHANISM.....	37
2. 8. LITERATURE ON THE RATIONALE OF A REGIONAL LEGAL INSTRUMENT TO ADDRESS STATELESSNESS.....	38
SUMMARIZING THE RESULTS	40
CHAPTER 3: THEORETICAL BACKGROUND.....	41
INTRODUCTION	41
3. 1. NATURAL RIGHTS THEORY	42
3. 2. LIBERAL POLITICAL THEORY	44
SUMMARIZING THE RESULTS	45
CHAPTER 4: IMPLICATIONS OF STATELESSNESS	46
INTRODUCTION	46
4. 1. BACKGROUND	46
4. 2. DISTINCTION BETWEEN THE DIFFERENT CATEGORIES OF STATELESSNESS	51
4. 2. 1. <i>DE IURE STATELESSNESS</i>	52
4. 2. 2. <i>DE FACTO STATELESSNESS</i>	53
4. 2. 3. <i>IN SITU STATELESSNESS</i>	56
4. 2. 4. <i>STATELESSNESS IN THE MIGRATORY CONTEXT</i>	57
4. 3. THE RIGHT TO A NATIONALITY AS A HUMAN RIGHT.....	58

4. 3. 1. CASE STUDY: STATELESS PERSONS' RIGHT TO WORK	63
4. 4. STATELESSNESS AND GENDER-BASED DISCRIMINATION	65
SUMMARIZING THE RESULTS	67
CHAPTER 5: STATELESS POPULATIONS IN EUROPE.....	68
INTRODUCTION	68
5. 1. BACKGROUND	69
5. 2. NON-CITIZENSHIP IN THE BALTIC STATES OF LATVIA AND ESTONIA.....	71
5. 2. 1. HISTORIC BACKGROUND AND PERSISTING IMPLICATIONS OF NON-CITIZENSHIP	73
5. 2. 2. NEXUS BETWEEN NON-CITIZENSHIP AND STATELESSNESS	80
5. 2. 3. POSITIVE IMPACT OF EU ACCESSION ON THE SITUATION OF NON-CITIZENS.....	83
5. 2. 4. GEOPOLITICAL IMPLICATIONS OF NON-CITIZENSHIP IN THE EU CONTEXT	87
5. 3. ROMA AND POST-YUGOSLAV STATELESSNESS IN EUROPE.....	89
5. 3. 1. BACKGROUND.....	89
5. 3. 2. GENDER DIMENSION OF ROMA STATELESSNESS	92
5. 3. 3. CASE STUDY: ITALY	94
5. 3. 4. POTENTIAL OF EU ENLARGEMENT AND THE COE	98
5. 4. STATELESSNESS IN EUROPE AS A RESULT OF BIASED NATIONALITY LAWS	100
5. 4. 1. BACKGROUND.....	100
5. 4. 2. GENDER-BASED DISCRIMINATION IN NATIONALITY LAWS	101
SUMMARIZING THE RESULTS	107
CHAPTER 6: INTERNATIONAL HUMAN RIGHTS REGIME RELATING TO STATELESSNESS	109
INTRODUCTION	109
6. 1. UNIVERSAL HUMAN RIGHTS REGIME RELATING TO THE RIGHTS OF STATELESS PERSONS .	109
6. 1. 1. CONVENTION ON CERTAIN QUESTIONS RELATING TO THE CONFLICT OF NATIONALITY LAWS (1930)	110
6. 1. 2. UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), THE RIGHT TO A NATIONALITY.....	111
6. 1. 3. CONVENTION RELATING TO THE STATUS OF REFUGEES (1951)	112
6. 1. 4. CONVENTION ON THE STATUS OF STATELESS PERSONS (1954)	114
6. 1. 5. CONVENTION ON THE REDUCTION OF STATELESSNESS (1961)	119
6. 1. 6. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)	121
6. 1. 7. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1965).....	122
6. 1. 8. CONVENTION TO REDUCE THE NUMBER OF CASES OF STATELESSNESS (1973)	123
6. 1. 9. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979)	124
6. 1. 10. CONVENTION ON THE RIGHTS OF THE CHILD (1989).....	127
6. 1. 11. INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (1990).....	130
6. 1. 12. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2006)	130
6. 2. GENERAL PRINCIPLES RELEVANT TO INTERNATIONAL LAW	131
6. 2. 1. THE NOTTEBOHM CASE.....	133
SUMMARIZING THE RESULTS	136
CHAPTER 7: REGIONAL PROTECTION THROUGH COE INSTRUMENTS.....	136
INTRODUCTION	136
7. 1. COE CONVENTIONS.....	137
7. 1. 1. THE EUROPEAN CONVENTION ON HUMAN RIGHTS.....	137

7. 1. 2. FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES.....	141
7. 1. 3. THE EUROPEAN SOCIAL CHARTER.....	142
7. 1. 4. THE EUROPEAN CONVENTION ON NATIONALITY.....	143
7. 1. 5. THE EUROPEAN CONVENTION ON THE AVOIDANCE OF STATELESSNESS IN RELATION TO STATE SUCCESSION.....	145
7. 2. CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATING TO STATELESSNESS	146
SUMMARIZING THE RESULTS	153
CHAPTER 8: REGIONAL PROTECTION THROUGH EU LAW RELATING TO STATELESSNESS..	154
INTRODUCTION	154
8. 1. PRIMARY SOURCES OF EU LAW RELATING TO HUMAN RIGHTS.....	155
8. 1. 1. <i>EU TREATIES</i>	155
8. 1. 2. <i>THE EU CHARTER OF FUNDAMENTAL RIGHTS</i>	158
8. 1. 3. <i>GENERAL PRINCIPLES OF EU LAW</i>	161
8. 2. SECONDARY SOURCES OF EU LAW RELATING TO STATELESSNESS	162
8. 3. COUNCIL CONCLUSIONS ON STATELESSNESS: AN ENHANCED ROLE OF THE EMN...	163
8. 4. THE CJEU AND THE ECtHR: TOWARDS A SINGLE EUROPEAN LEGAL SPACE?	168
8. 5. RELEVANT CASE LAW OF THE CJEU.....	171
SUMMARIZING THE RESULTS	178
CHAPTER 9: STATELESSNESS DETERMINATION PROCEDURES IN THE EU.....	179
INTRODUCTION	179
9. 1. BACKGROUND	179
9. 2. STATELESSNESS DETERMINATION IN THE EU.....	184
9. 2. 1. <i>CASE STUDY 1: HUNGARY</i>	186
9. 2. 2. <i>CASE STUDY 2: ITALY</i>	194
9. 3. BEST PRACTICES OFFERED BY THE UNHCR.....	196
SUMMARIZING THE RESULTS	198
CHAPTER 10: THE ROLE OF THE UNHCR AND OTHER REGIONAL NON-STATE ACTORS	200
INTRODUCTION	200
10. 1. UNHCR'S MANDATE TO ADDRESS STATELESSNESS	201
10. 2. UNHCR GUIDELINES RELATING TO STATELESSNESS.....	202
10. 3. CROSS-CUTTING WORK OF NGO STAKEHOLDERS IN THE REDUCTION OF STATELESSNESS IN EUROPE	204
10. 3. 1. <i>EUROPEAN NETWORK ON STATELESSNESS</i>	205
10. 3. 2. <i>INSTITUTE ON STATELESSNESS AND INCLUSION</i>	205
SUMMARIZING THE RESULTS	206
CHAPTER 11: NORMATIVE MODEL FOR AN EU DIRECTIVE RELATING TO THE PROTECTION OF STATELESS PERSONS	206
INTRODUCTION	206
11. 1. BACKGROUND	206
11. 2. NORMATIVE ELEMENTS OF AN EU DIRECTIVE.....	208
SUMMARIZING THE RESULTS	212

CHAPTER 12: AN EXTERNAL DIMENSION: THE EU'S ADVOCACY TOOLS TO ADDRESS STATELESSNESS WITH THIRD COUNTRIES	213
INTRODUCTION	213
12. 1. BACKGROUND	213
12. 2. POLICY DEVELOPMENTS IN ADDRESSING STATELESSNESS WITH THIRD COUNTRIES.....	214
12. 3. REALM OF EU EXTERNAL HUMAN RIGHTS ACTION	215
12. 4. BILATERAL CHANNELS OF EU EXTERNAL HUMAN RIGHTS ACTION	219
12. 5. PROMOTION OF EQUAL NATIONALITY RIGHTS THROUGH MULTILATERAL EFFORTS.....	223
SUMMARIZING THE RESULTS	229
CONCLUSIONS AND RECOMMENDATIONS	230
NEW RESEARCH FINDINGS	234
<i>FROM AN EU LAW PERSPECTIVE</i>	234
<i>FROM A HUMAN RIGHTS PERSPECTIVE.....</i>	235
<i>FROM AN EXTERNAL ACTION POINT OF VIEW.....</i>	236
RECOMMENDATIONS	236
BIBLIOGRAPHY	238
ANNEX.....	263
GLOSSARY	263
LIST OF TABLES AND FIGURES.....	272
LIST OF PUBLICATIONS BY THE AUTHOR.....	276
BIOGRAPHY OF THE AUTHOR.....	277

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LIST OF ABBREVIATIONS

1951 Convention: UN Convention Relating to the Status of Refugees
1954 Convention: UN Convention Relating to the Status of Stateless Persons
1961 Convention: UN Convention on the Reduction of Statelessness
CEDAW: Convention on the Elimination of All forms of Discrimination Against Women
CERD: UN Convention on the Elimination of All Forms of Racial Discrimination
Charter: Charter of Fundamental Rights of the European Union
CJEU: Court of Justice of the European Union
CoE: Council of Europe
COM: European Commission
CRC: Convention on the Rights of the Child
EC: European Community
ECJ: European Court of Justice
ECOSOC: United Nations Economic and Social Council
ECtHR: European Court of Human Rights
ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms
ECN: European Convention on Nationality
ECRE: European Commission for Refugees and Exiles
ECOSOC: United Nations Economic and Social Committee
EEA: European Economic Area
EMN: European Migration Network
ENS: European Network on Statelessness
EP: European Parliament
EESC: European and Economic Social Committee
EU: European Union
FRA: Fundamental Rights Agency of the European Union
GA: General Assembly of the United Nations
HHC: Hungarian Helsinki Committee
HRC: UN Human Rights Council and Human Rights Committee (latter: CCPR treaty body)
IACHR: Inter-American Court of Human Rights
ICJ: International Court of Human Rights
ICRC: International Committee of the Red Cross
IOM: International Organization for Migration

ISI: Institute on Statelessness and Inclusion

LIBE: Committee on Civil Liberties, Justice and Home Affairs of the European Parliament

MENA: Middle East and North Africa

NHRI: National Human Rights Institutions

OHCHR: Office of the High Commissioner for Refugees

SCIFA: Strategic Committee on Immigration, Frontiers and Asylum

SFRY: Socialist Federal Republic of Yugoslavia

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNHCR: United Nations High Commissioner for Refugees

UPR: Universal Periodic Review

USSR: Union of Soviet Socialist Republics

INTRODUCTION

TOPICALITY OF THE ISSUE

According to Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, by definition „*the term „stateless person” means a person who is not considered as a national by any State under the operation of its law.*” In practical terms statelessness means having no nationality, therefore, no legal bond with any state and no sense of really belonging anywhere. Statelessness is one of the most pressing human rights issues of today, yet it remains a fairly hidden phenomenon. It is a common belief that statelessness concerns solely developing countries, whereas generations of stateless persons live their entire lives without a nationality suffering from their statelessness in developed countries as well, including European countries, many of which are Member States of the European Union, as well as the Council of Europe.¹

Based on UNHCR estimates, statelessness affects 10-12 million people around the world, of whom approximately 600,000 reside in Europe,² and new cases of statelessness continue to emerge in the region. In Europe, statelessness predominantly concerns populations who have been living in the same country for generations, including non-citizens and persons of undetermined citizenship residing in the Baltic and other successor states of the USSR, Yugoslavia and Czechoslovakia. Additionally, there are also stateless individuals who arrived within recent mixed migration flows and were either stateless prior to departure from their country of origin or became stateless since their departure. Indeed, in the upheaval of the recent refugee crisis, European immigration officers face the particular case of stateless asylum-seekers among migrants arriving to the borders of the European Union. Thus, considering the scale, historical-social embeddedness and diverse profile of statelessness in the European context, it may be assumed that statelessness remains a major human rights challenge in Europe which must be put higher on the European political agenda. Despite the complex coherencies of statelessness which are often very different from those of refugees, as

¹ All EU Member States (hereinafter: EUMS) are members of the Council of Europe.

² As it will be explained later in this work, statelessness related statistics are rather sporadic, as states generally do not collect precise data on stateless persons. According to UNHCR estimates, in 2015 a total number of 592,151 stateless persons lived in Europe. See: UNHCR, Global Trends; Forced Displacement in 2015. Available at: <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>. (accessed 6 May 2018). The same scale was mentioned in a more recent study by the Institute on Statelessness and Inclusion, ‘The World’s Stateless 2017,’ available at:

<http://www.worldsstateless.org/continents/europe/stateless-persons-in-europe>. (accessed 6 May 2018)

well as its implications on the life of the affected individuals, it is puzzling how little attention statelessness has been given compared to the extensive policy, political and social debates relating to the recent refugee crisis, also greatly covered by the media.

Although this work focuses notably on addressing the situation of non-refugee stateless persons, it must be mentioned that there is an undeniable link between statelessness and forced migration/mass displacement which needs to be taken into consideration when looking deeper into the past refugee crisis and the mass influx into the European territory. With a view to justifying the topicality of addressing the statelessness challenge in Europe and to demonstrating the scale of statelessness in the recent refugee crisis in Europe at its peak, ISI data reveal that out of the 1.2 million asylum seekers who arrived in Europe³ in 2015 and by the beginning of 2016, approx. 3% faced nationality problems.⁴ Nonetheless, the phenomenon of statelessness demonstrates diverse profiles in each European country and EUMS. As a result, every European country chose to adopt a different approach on how to address the statelessness challenge at the domestic level which has led to important discrepancies to be tackled at the EU level.

REASONS OF CHOOSING THE SUBJECT

In choosing to dedicate my doctoral research to address statelessness in Europe, I was driven by both professional motives and personal dedication to the promotion of the human rights of stateless persons. At an early stage of my PhD programme, I completed a field assignment providing legal aid to asylum seekers under the supervision of a senior legal associate at the Hungarian Helsinki Committee.⁵ This is where I first became aware of the legal anomaly of statelessness in the migratory context. Then as a migration expert working at the Ministry of the Interior I assisted to UNHCR Study Visits discussing the exemplary Hungarian statelessness determination procedure and related legislation. Thereby I became familiar with the numerous statelessness related efforts Hungary has made in the last decade which makes

³ In this context, Europe is defined as the geographical region comprising of 50 States: the 47 CoE Member States (including the 28 EUMS) and Belarus, as well as the Holy See and Kosovo (UNSCR 1244/99).

⁴ Institute on Statelessness and Inclusion, 'The World's Stateless 2017', available at: <http://www.worldsstateless.org/continents/europe/stateless-persons-in-europe>. (accessed 6 May 2018)

⁵ The Hungarian Helsinki Committee (HHC) is one of the leading non-governmental human rights organisations in Hungary and Central Europe. Its main areas of activities focus on protecting the rights of asylum-seekers, stateless persons and other foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. The HHC is a member of the European Council on Refugees and Exiles (ECRE), the European Network on Statelessness (ENS) and is an implementing partner of the United Nations High Commissioner for Refugees (UNHCR).

Hungary an exemplary state in the context of statelessness, being State Party to all relevant international instruments relating to the protection of stateless persons and the reduction and prevention of statelessness.⁶ Molnar underscores that by being a State Party to all these multilateral instruments, Hungary chose to comply with her international obligations pertaining to the avoidance of statelessness.⁷ Hungary's reputation in this regard was further enhanced when the Government established a new self-standing statelessness determination procedure by law (Act No. II of 2007 on the Entry and Stay of Third-Country Nationals - hereinafter: TCN Act) in 2007 which was considered a substantial pioneer move at the time providing further encouragement to other EUMS to establish such a dedicated regime at the domestic level.⁸

In my experience, already the meaning of statelessness lacks common knowledge not to mention the myriad vulnerabilities of stateless persons and the grave consequences of statelessness. Yet, it has occurred to me that once comprehended; the meaning and consequences of statelessness are generally met with genuine shock by most interlocutors. This experience set the decisive goal for me to help to raise awareness about this greatly overlooked phenomenon concerning individuals as well as entire populations in the EU and to find ways to tackle it both from an EU law and human rights perspective. I chose this particular research subject with the precise aim of making a contribution to the substantial and forward-looking European discourse on statelessness. Working as a human rights diplomat in Geneva, the city where major multilateral human rights dialogues take place that are fed into policy making inducing far-reaching global impacts, including those on statelessness, constituted a major impulse to my research. I had the chance to engage in the work of the United Nations Human Rights Council during the first year of the HRC membership of Hungary (2017-2019). This one year allowed me to gain a thorough understanding of the power relations and regional dynamics among members and non-members, also within the regional groups (in Hungary's case: as an EU Member State within the Eastern European Group) and how successful outreach efforts may benefit certain human rights priorities, such as statelessness.

⁶ Including the 1954 UN Convention on the Status of Stateless Persons, the 1957 UN Convention on the Nationality of Married Women, the 1961 UN Convention on the Reduction of Statelessness, the 1997 European Convention on Nationality and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

⁷ Tamás Molnár (2014): Moving Statelessness Forward on the International Agenda, *Tilburg Law Review* Vol. 19, Issue 1-2, pp. 194-202.

⁸ *Ibid.*

PROBLEM FORMULATION

The EU's competence in terms of statelessness is often contested. As a result, European legislators and policy-makers at the national level assume that issues related to the lack of an effective nationality as nationality matters continue to be subjected to the sovereignty of (Member) States. Therefore, they fail to consider the vulnerabilities of those who are not recognized as nationals by any state and to put in place adequate legislative and policy frameworks aiming to the identification, protection and empowerment of stateless persons, as rights holders in the EU.

We have witnessed an immense progress in the universal and regional human rights realm which has been reinforced by the large number of State Parties which is of great importance when it comes to the implementation of these instruments. Considering that they essentially apply equally to every human being, including those without a(n effective) nationality, stateless persons should enjoy a wide range of social, political, economic and cultural rights. A series of human rights instruments (some of which are universally) ratified by EUMS mention the *right to a nationality*, *the prohibition of arbitrary deprivation of nationality*, *as well as the prohibition of discrimination*, all relating to statelessness. By acceding to these human rights instruments, (Member) States accepted to abide by the provisions thereof which create international obligations for them to comply with, for instance, when they put in place domestic legislations which affect the rights ensured by these universal and regional human rights instruments. This implies that, although treaty-making is largely seen as an act of exercising state sovereignty, State's sovereignty necessarily decreases when they decide to accede to international human rights conventions. Furthermore, when applying these instruments, domestic courts must also take into account general principles of law (which constitute primary sources of public international law) which were developed in *foro domestico* and are now embedded in international human rights law, providing guidance for judges in contested cases. Therefore, when it comes to nationality legislation, judges must consider general principles of law beyond ensuring the rights protected under the treaties relating to equality and non-discrimination in the fulfillment of their treaty obligations. Consequently, although international law used to be based on state sovereignty, since the adoption of the Universal Declaration of Human Rights international law started to slowly decrease States' room for man oeuvre when it comes to issues relating to human rights, including nationality issues and statelessness.

Although the EU has made a call for its Member States to ratify the UN statelessness conventions, some EUMS decided not to accede to them for different reasons to be discussed later in this work. Thus, the EU should further encourage EUMS to ratify and implement these conventions. Therefore, the problem I attempt to address in this dissertation is how the EU could address statelessness through EU law leading a rights-based approach in a way to oblige EUMS to guarantee the rights of stateless persons based on a set of minimum standards (stemming from the 1954 Convention), identify the affected individuals and grant identified stateless persons a protection status, all in an EU-harmonized way. Equality and non-discrimination principles were enshrined not only in the TFEU but also in the Charter of Fundamental Rights of the European Union (hereinafter: EU Charter), both primary sources of EU law which could serve as excellent tools for strategic human rights litigation on behalf of stateless persons to be addressed by secondary sources of EU law, potentially by an EU directive. In this regard it must be noted that although the EU Charter may not under any circumstance create new competences in light of Article 51(2)⁹, Article 18 TFEU clearly sets out the prohibition of discrimination on the grounds of nationality.

Based on my consideration that the TFEU, underpinned by the Charter, could provide a good basis for strategic human rights litigation, I shall argue that an EU directive would have the potential to oblige EUMS to respect a minimum set of basic rights of stateless persons (based on the 1954 Convention), put in place an EU-harmonized statelessness determination procedure and an EU-harmonized statelessness-specific protection status. Therefore, I seek to justify that the EU does have competence when it comes to the rights of stateless persons, not only in the migratory context but also through the lenses of equality and non-discrimination which constitutes the basis of my doctoral pondering.

MAIN HYPOTHESES

As explained aforehand, this dissertation primarily aims to flag the existing policy and legislative framework of the EU relating to statelessness, explore further potential policy, legislative and advocacy channels, as well as to suggest an enhanced statelessness-specific foreign policy approach at the EU level. The central question of this paper focuses essentially on whether the adoption of an EU directive relating to the introduction of an EU-harmonized legal framework, consisting of EU-harmonized minimum standards, status determination

⁹ „This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”

procedure and statelessness-specific protection status (granted on the basis of statelessness recognized through the latter mechanism) would have the potential to reflect better on the growing policy need of avoiding statelessness emerging among populations who have been living in Europe for generations, as well as those affected individuals who arrived recently to Europe in the migratory context. I argue that the growing awareness of statelessness in Europe suggests the repositioning of EU human rights priorities and related policy and advocacy tools, the question is rather how. The dissertation essentially strives to address these comprehensive research questions by applying the four hypotheses below. The overarching aim of this dissertation is to provide a comprehensive assessment of why it is imperative for the EU to reflect on statelessness through its policy and legislative tools, applying a rights-based approach.

1st hypothesis: *Considering the diverse Member State approaches towards statelessness, an EU-harmonized legal framework should be adopted, consisting of a set of minimum standards of treatment, a statelessness determination mechanism and a protection status granted on the basis of statelessness, by means of an EU Directive as a secondary source of EU law.*

2nd hypothesis: *Article 18 in conjunction with Article 67(2) TFEU render the TFEU an excellent tool for the protection of the basic rights of stateless persons in the EU through the lenses of equality and non-discrimination and may provide a potential legal basis for the adoption of the mentioned Directive, especially in light of Article 18 TFEU providing for the prohibition of “any discrimination on the grounds of nationality” which is underpinned by Article 21(2) of the EU Charter.*

3rd hypothesis: *Non-citizenship constitutes a major human rights violation on two levels; it interferes with the basic human right to a nationality, as a result of the consistent denial of nationality, as well as with the right to equality and non-discrimination and must be addressed accordingly through the lenses of equality and non-discrimination, leading an enhanced human rights-based approach addressing non-citizens as rights holders in the EU.*

4th hypothesis: *Eradicating statelessness has yet to become a key priority area of EU human rights action, reflecting particularly on the protection of in situ stateless populations in Europe and in third countries.*

I shall therefore reflect predominantly on these challenges and seek to suggest adequate recommendations thereto.

CHAPTER 1: RESEARCH DESIGN AND METHODOLOGY

INTRODUCTION

This chapter explains the research questions, objectives and opportunities of their utilization, as well as the methodology employed with a view to explaining the ultimate aim of the undertaken research and how I attempted to address these questions and accomplish the research objectives. Additionally, it also provides an overview of the structure of the dissertation, as well as a review of the most important delimitations of the doctoral research.

1. 1. RESEARCH QUESTIONS, OBJECTIVES TO ACCOMPLISH AND OPPORTUNITIES OF THEIR UTILIZATION

This work approaches the subject through a twofold prism; seeking to offer solutions from a policy and EU law perspective, while applying a human rights-based approach challenging statelessness as a human rights violation. This work thus aims to eventually suggest a normative model for an EU directive which could provide for an EU-harmonized legal framework in light of the existing Member State approaches, related gaps and shortcomings. This would serve as an incentive for EUMS to establish regionally harmonized minimum standards for the protection of stateless persons, a common statelessness determination procedure and a uniform protection status granted on the basis of statelessness at the domestic level. The dissertation therefore aims to provide a synthesis of positive developments relating to the identification and protection of stateless persons, as well as the potential of EU law in this regard. Although in the EU common rules and minimum standards should apply for the treatment of third-country nationals and stateless persons in light of the Lisbon Treaty which provides that stateless persons shall be treated as third country nationals, there are considerable disparities between Member States' practices and legislation providing for the treatment of stateless persons, as well as the existence and accessibility of status determination procedures.

Consequently, I seek to justify that the elaboration of an EU-harmonized legal framework for the identification and protection of stateless persons would be beneficial, considering that it would also limit undesirable secondary movements of stateless persons seeking to benefit from the more favorable protection and treatment standards of certain Member States of the EU.¹⁰ Further to the elaboration of regionally (EU-) harmonized common rules and minimum

¹⁰ I refer to this phenomenon as 'protection-shopping.' See: See: Katalin Berényi (2016): Statelessness and the refugee crisis in Europe, Forced Migration Review, Volume 53. Refugees Studies Centre, University of Oxford p. 70.

standards relating to the identification and protection of stateless persons, I shall also argue that the full implementation of the UN statelessness conventions must be prevalent not only in Europe but also beyond its territory in order to mitigate the implications of the recent refugee crisis in Europe. This would envisage a positive impact on millions of stateless peoples' lives, with special regard to Syrian children without a nationality, to get a chance to lead a meaningful life and be able to reclaim their nationality upon return to postwar Syria. Further to this consideration, I also sought to signal how the EU could play an advocacy role in advancing statelessness related efforts by promoting statelessness related general principles of EU law in third countries which produce stateless populations. In this regard, I argue that it is now imperative for the EU to assume a more proactive advocacy role in the fight against statelessness at the EU level, at the Member States level, as well as with third countries and in the context of EU enlargement.¹¹

The broader aim of this thesis was to contribute to the wider understanding of the implications of not having an effective nationality and the acute need for regionally harmonized identification mechanisms throughout Europe. This dissertation thus attempts to offer a normative model for an EU directive providing for an EU-harmonized framework of regionally harmonized standards for the treatment of stateless persons, statelessness determination procedures and protection status granted on the basis of statelessness at the domestic level, to be implemented by every EUMS according to their national context. This would shed light on statelessness as a violation of major non-discrimination rights, enshrined by the TFEU and the EU Charter, instead of reflecting on it simply as a nationality-problem where the EU's competence is still contested.

Certain parts of the research has been published in the national (Belügyi Szemle - Hungarian Interior Review, Acta Humana – Emberi Jogi Közlemények - Human Rights Publications) and international (Forced Migration Review, Statelessness Working Paper Series) literature. With its regional focus - Europe, primarily EU -, policy and EU-law perspective, rights-based approach and analysis of the EU's advocacy role in addressing statelessness with third countries, it is my hope that this dissertation shall bring an added value to statelessness related research to be further explored by fellow scholars at the national and European levels.

¹¹ See: Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting Legal Principles to the MENAT Region to Tackle Childhood Statelessness, Statelessness Working Paper Series No. 2016/05.

1. 2. RESEARCH METHODOLOGY

The analysis undertaken in this thesis was notably exploratory and qualitative with the aim of suggesting key findings and solutions to tackle statelessness in Europe. For the purposes of this work, I employed a wide range and a multitude of research methods while considering a human rights-based approach along the research process, decoupling the enjoyment of basic rights from possessing a nationality, looking beyond the existing legal gaps in nationality laws. The initial stage of my research consisted of qualitative, exploratory research with a view to gaining an understanding of the underlying reasons and perceptions with the aim of providing an insight into the inconsistencies relating to the implementation of the UN statelessness conventions which helped me to uncover negative trends in state practices. To this end, I reviewed the provisions of the UN statelessness conventions, EU law instruments and Member States' nationality laws and elaborated on my prior perceptions on the issue. In doing so, I undertook comparative research on existing statelessness determination procedures demonstrating a number of different models.

In addition, qualitative data collection methods were applied, including group discussions on the issue on the occasion of expert meetings, as well as individual interviews with those working with stateless persons. This was complemented by regular peer group debriefings; sharing the key findings of my research on a regular basis with my supervisor, expert colleagues, as well as academics at (international) conferences and bilateral consultations with a view to leaving room for constructive suggestions and avoiding potential bias during the research process. Quantitative research methods were used to quantify the global, regional and country-specific scale of the phenomenon, soliciting government statistics and those generated by international organizations in order to reveal regional patterns and policies in terms of statelessness determination procedures put in place across Member States, for instance, through EMN ad hoc queries. Nonetheless, in Europe reliable statistics on statelessness are rather sporadic and therefore extremely hard to come by.¹² Where relevant data is available on the number of persons affected by statelessness, it is often not disaggregated by gender or age which would be crucial to address the scale and profile of the phenomenon in the European context.

¹² See Institute on Statelessness and Inclusion, *The World's Stateless*, 2014; and "Counting the world's stateless: reflections on statistical reporting on statelessness" in UNHCR Statistical Yearbook 2013, 2 February 2015.

Furthermore, I undertook a thorough analysis of the historical and societal background of statelessness to gain a strong sense of the political, social, and cultural context of this phenomenon in Europe, as well as the legal implications of statelessness both at the individual, group and state level. To this end, I examined the historical context of statelessness in Europe, and then consulted related international and regional conventions which required extensive qualitative documentary analysis. The review of statelessness related case law of the ICJ, CJEU, ECHR and the analysis of statelessness related judicial decisions of competent national courts was an essential step for me to uncover the positive shifts in terms of court rulings on statelessness in Europe. Similarly, the study of legislative frameworks and procedural guarantees together with related nationalism policies of countries with a significant stateless population, including EUMS, was inevitable in this process. Hence, I undertook an extensive desk research soliciting secondary data on the subject through books, academic literature and online sources reviewing the experience and viewpoints shared by internationally recognized statelessness researchers and practitioners focusing on the European context which was very helpful in terms of prior understanding of the challenges while identifying further gaps in EU legislation in light of EUMS practices. In my efforts, the recently launched Statelessness Index which provides extensive information on statelessness, including the progress of the ratification and implementation of the 1954 Convention in European countries, especially in terms of the statelessness determination, the grant of legal status, and access to basic economic and social rights, was of great use.

As a significant momentum of the research process, I developed four hypotheses to be challenged thoroughly along the thesis, reflecting on the potential introduction of an EU-harmonized statelessness-specific legislative framework, the need to revisit the rights of non-citizens, and the consideration of new foreign policy endeavors in terms of EU external human rights action. Further on, taking a closer look at EUMS approach and state practices relating to statelessness, with a special regard to their nationality laws required extensive legal research. I found that there is a variety of models of statelessness determination procedures and many types of legal status granted to stateless persons. This also helped me to contextualize statelessness as a legislative gap and to understand the urgent need for regionally harmonized minimum standards, statelessness determination mechanisms and legal status.

National practices were also carefully mapped and it was assessed how EUMS with or without a stateless population address the legislative gaps with regard to their non-nationals; whether they have put in place a statelessness determination procedure, if so, what are their shortcomings and whether there have a spillover effect of introducing such procedures on other EUMS. With a view to identifying potential best practices relating to status determination procedures, I explored the Hungarian and the Italian statelessness determination procedures and the recent developments they were subjected to in order to uncover important shifts in the related legislation and jurisprudence. These results provided a firm basis for the offered normative model of an EU-harmonized status determination procedure to be established by every EUMS, provided by a legally binding EU directive.

Furthermore, I considered the existing synergies between the UN, EU and CoE instruments in order to identify the potential of joint advocacy efforts. In my efforts, I reviewed the lists of EUMS State Parties of relevant UN and CoE Conventions, as well as the co-sponsors lists of UN Human Rights Council resolutions related to statelessness. To give an example, the UN's Universal Periodic Review (UPR) mechanism proved to be an essential tool in providing a platform for constructive discourse between the UN, its Member States, the concerned government and other stakeholders (NGOs, National Human Rights Institutions, hereinafter: NHRIs) on the human rights situation of the countries under review. In my experience, at the UPR sessions statelessness related recommendations are increasingly addressed to countries affected by statelessness (and those who are not State Parties to the UN statelessness conventions, including some EUMS). This indicates an emerging global awareness of the issue. In this process, I paid particular attention to the UPR recommendations and outcomes of EUMS, especially those who have not acceded to either or none of the UN statelessness conventions.

Then I attempted to assess the potential room for maneuver of the European Union which is not necessarily apparent in this tangible issue. I solicited the outcomes of relevant EMN ad hoc queries summarizing the experiences and challenges EUMS generally face in the implementation of the UN statelessness conventions. Led by the firm determination to explore statelessness in the EU within the global context, I continued my research by undertaking a thorough analysis of the potential advocacy role that the EU could assume beyond its borders in its external human rights action with third countries in the mainstreaming of the rights of stateless persons by promoting general principles of EU law which may relate to gender-

discriminatory state practices in the MENA region, for instance. Within this analysis, I chose to focus on third countries which produce stateless populations themselves while hosting refugees (some of whom are also stateless) from other countries where statelessness is an apparent issue, including Syria, Jordan and Lebanon where gender-discriminatory nationality laws continue to persist. In doing so, I sought to gain a well-rounded understanding of the relevant EU external policy framework to address statelessness, general principles of EU law potentially related to statelessness and other policy instruments.

Along the thesis, I aimed to consistently lead a *human rights-based and gender based protection approach* while addressing the issues of the rights and protection of stateless persons, a particularly vulnerable group of individuals. A human rights-based approach primarily aims to uphold basic human rights in compliance with international human rights standards, empowering people to know and claim their rights, whereas to increase the ability and accountability of institutions/governments that are responsible for respecting, protecting and fulfilling the fundamental human rights of their people. This would suppose the enhanced participation of people to have their say in decisions that affect their human rights.¹³

A human rights-based approach may be a good basis to uphold human rights and integrate them into policymaking, prioritizing the application and the prevalence of human rights principles, such as *participation*,¹⁴ *accountability*,¹⁵ *non-discrimination and equality*,¹⁶ *empowerment of rights holders*¹⁷ and *legality of rights*.¹⁸ Throughout my research I therefore aimed to reflect on these principles, while exploring the possibilities of enhancing the realization of stateless persons' basic right to a nationality. This required me to undertake an analysis of gender norms, different forms of discrimination and power imbalances among the

¹³ See more at: <http://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html>. (accessed 6 May 2018)

¹⁴ Everyone has the right to participate in decisions which affect their human rights. Participation must be active, free, meaningful and give attention to issues of accessibility, including access to information in a form and a language which can be understood.

¹⁵ Accountability requires effective monitoring of human rights standards as well as effective remedies for human rights breaches. For accountability to be effective there must be appropriate laws, policies, institutions, administrative procedures and mechanisms of redress in order to secure human rights.

¹⁶ This principle proclaims that all forms of discrimination in the enjoyment of rights must be prohibited, prevented and eliminated, requiring the prioritisation of rights holders who are in the most marginalised and vulnerable situations facing the biggest difficulties in realising their basic rights.

¹⁷ This human rights principle primarily suggests that individuals and communities should know their rights. It also means that they should be fully supported to participate in the development of policy and practices which affect their lives and to claim rights where necessary.

¹⁸ This human rights principle requires the recognition of rights as legally enforceable entitlements and is linked in to national and international human rights law.

most marginalized populations throughout Europe. Further to the principles of equality and non-discrimination, I addressed how equality and non-discrimination rights could be better leveraged in the EU to promote the rights of stateless populations, with a particular focus on national and ethnic minorities living in Europe. By applying a human rights-based approach, human rights monitoring was instrumental to gather information on alarming developments which may potentially put people at risk of statelessness in the EU, relating to events affecting the protection of basic human rights in compliance with international human rights standards, the ability and accountability of governments who are responsible for upholding the basic rights of their people. Blog entries of the ENS and monthly bulletins of the ISI reflecting on recent developments on statelessness constituted a major source of information in this regard.

Further to the human rights-based approach, a *gender based-approach* was employed in order to reflect on the implications of gender-biased nationality laws, touched upon beforehand, which remain prevalent in almost 50 countries¹⁹ around the world, including countries of the MENA region which is a producer of stateless populations, whose members are equally displaced as a result of the recent crisis in the Middle East. In my endeavor, I reflected on how the vulnerabilities of stateless women in Europe and gender-based barriers to the recognition of nationality may be addressed by targeted measures to integrate them into the labour market and by putting in place gender-sensitive EU-harmonized statelessness determination procedures in Europe.

A gender-based approach implies the assessment of the implications for women of any planned action, including legislation, policies, in all areas and at all levels. It notably constitutes a strategy for making women's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies in the political, economic and societal spheres in order for women and men to benefit equally from their opportunities. In my endeavor, I reflected on how the vulnerabilities of stateless women in Europe and gender-based barriers to the recognition of nationality may be addressed by targeted measures to integrate them into the labour market and by putting in place gender-sensitive EU-harmonized statelessness-determination procedures throughout Europe.

¹⁹ Today 25 countries continue to deny women the right to confer nationality on their children on equal terms with men, including the Bahamas, Bahrain, Barbados, Brunei, Burundi, Iran, Iraq, Jordan, Kiribati, Kuwait, Lebanon, Liberia, Libya, Malaysia, Mauritania, Nepal, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Swaziland, Syria, Togo and the United Arab Emirates. In addition, more than 50 countries continue to deny women equal rights with men in their ability to acquire, change and retain their nationality, as well as to pass their nationality onto their non-national spouses. See: <https://equalnationalityrights.org/the-issue/the-problem>. (accessed 6 May 2018)

My research has been carried out in compliance with the principles and rules of research methodology of social sciences. To this end, I solicited the book *The Practice of Social Research*.²⁰ In addition, in order to uphold the highest professional, moral and ethical standards of the doctoral research and dissertation, I abided by the principles included by the *European Code of Conduct for Research Integrity*²¹ and those proclaimed by the *Science Ethics Code of the Hungarian Academy of Sciences*.²² Having employed the good research practices enshrined in these documents, I gained an understanding of the wider professional, legal and ethical responsibilities inherent to scientific research. This dissertation is also in line with the rules and principles of other regulations, including the Doctoral Regulations of the National University of Public Service. Nonetheless, any views expressed in this thesis are mine and in no way represent those of the National University of Public Service.

My intensive research encompassing the anomaly of statelessness in Europe, with special regard to the EU, lasted for more than 3 years starting from November 2014 to May 2018. I undertook this doctoral research besides my official functions as a migration expert and later human rights diplomat. My professional experience allowed me to participate in high-level expert meetings relating to statelessness at the national, EU and UN levels which provided me with a particular insight into the dynamics of policy-, law- and decision-making relating to statelessness which I attempted to reflect on in this work.

1. 3. STRUCTURE OF THE DISSERTATION

To substantiate the content, the work comprises of 14 major parts. At the beginning of the thesis, the *Introduction* serves as a brief overview of the topicality of the issue, reasons of choosing the research subject, problem formulation and main hypotheses which are challenged throughout this doctoral thesis, in an attempt to contribute to the wider knowledge on statelessness in the context of the European Union.

Chapter One attempts to explain the research design and methodology with a view to reflecting on the main research questions and research objectives, the structure of the dissertation and the main delimitations of the work. *Chapter Two* provides a literature review

²⁰ Earl Babbie (2011): *The Practice of Social Research*, Chapman University, Wadsworth Cengage Learning.

²¹The European Code of Conduct for Research Integrity, ALLEA All European Academies (Hungarian stakeholder is the Hungarian Academy of Sciences), published by ALLEA - All European Academies, Berlin 2017.

²² A Magyar Tudományos Akadémia Tudományetikai Kódexe - Science Ethics Code of the Hungarian Academy of Sciences, 2010.

which describes and evaluates the extensive literature I consulted, suggesting gaps and room for further research. *Chapter Three* offers a theoretical framework which seeks to provide a deeper understanding and theoretical context of the human rights-based approach that I applied throughout the doctoral pondering.

Chapter Four presents the European context of statelessness; the distinction between *de iure*, *de facto* and *in situ* statelessness, in addition to statelessness in the migratory context, along with the underlying reasons of statelessness in the EU context.

Chapter Five seeks to give an overview of stateless populations in Europe, including the particular case of non-citizens in the Baltic States of Latvia and Estonia, stateless Roma and stateless asylum-seekers throughout the European Union and its candidate countries. Also it addresses the right to a nationality within the nexus between statelessness and human rights which constitutes the basis of the human rights-based approach employed in this dissertation.

Chapter Six introduces the universal conventional framework relating to statelessness, as well as exemplifies the ICJ jurisprudence on this issue. *Chapter Seven* explores the regional human rights instruments adopted under the aegis of the Council of Europe which relate to the right to a nationality, also presenting the case law of the ECtHR.

Chapter Eight attempts to provide an overview of the EU law regime relating to statelessness, as well as the particular cases of jurisprudence on nationality issues by CJEU (further to the nexus between the ECtHR and the CJEU) with a view to mapping progressive trends in this regard and to understanding the potential of legal instruments to tackle statelessness in a regional context.

Chapter Nine reflects on statelessness determination procedures put in place in the European Union, identifying best practices through two case studies based on the Hungarian and Italian models.

In *Chapter Ten*, I present the instrumental role of the UNHCR in assisting interested State Parties in legislating on issues relating to statelessness, as well as the cross-cutting work of the work of the ENS and ISI.

In *Chapter Eleven*, I shall propose a normative model for an EU directive providing for the adoption of an EU-harmonized set of minimum standards for the treatment of stateless

persons, an EU-harmonized status determination procedure and of an EU-harmonized protection status provided for recognized stateless persons.

Chapter Twelve addresses the external dimension of tackling statelessness in the EU; it explores how the EU could use its existing tools to enhance its advocacy efforts to mainstream the protection of stateless persons and the long-term goal of reducing statelessness beyond its borders by promoting statelessness related general principles of EU law in third countries. The dissertation is concluded by the conclusions, main scientific findings and related recommendations of the thesis.

In the Annex, first a *Bibliography* is offered to consult the exhaustive list of literature which was solicited during the research process. Secondly, a *Glossary* is provided to enhance readers' understanding of the terms widely applied throughout the thesis. Then the *List of Tables and Figures* sets out the figures and tables which were employed in the thesis and finally a *List of Publications by the Author* is provided, including all articles and studies which I published during the time of my doctoral research, followed by a short biography summarizing my academic and professional background.

1. 4. DELIMITATIONS

The thesis has three important delimitations. First, although the thesis has a regional focus on the European continent, instead of looking primarily at Member States of the Council of Europe (CoE) which has a wider membership in Europe than the European Union (EU), as well as a number of nationality and statelessness related instruments, I decided to focus on how the EU could tackle statelessness in its territory, from an EU law-making and human rights perspective. This is partly because although Member States of the European Union are all Members of the Council of Europe and therefore have ratified and implemented many of the relevant regional human rights instruments, statelessness related CoE Conventions have very low ratification rates which considerably impede their implementation in Europe which calls for EU action. Despite the common values upheld by the CoE and shared by its Member States (including EUMS), some EUMS decided not to comply with the objective of avoiding statelessness, enshrined in both CoE and UN conventions, including the UN statelessness conventions. This is the reason why I decided not to analyze the potential of CoE instruments in terms of strategic litigation but to consider the potential of the EU and EU-law making, from a human rights-based approach.

To this end, the enhanced potential of EU legal tools was considered beyond EUMS nationality legislations. Although statelessness as an urging human rights concern in the European context was examined through the lenses of both international and regional human rights instruments, the EU law perspective remains predominant in this thesis with a view to suggesting recommendations to enhance efforts to identify stateless persons and eventually end statelessness on the territory of the EU, including the enlargement perspectives which in terms of statelessness would be imperative.

Secondly, this work addresses primarily the treatment of non-refugee stateless persons in the territory of the European Union. Nevertheless, I considered it necessary to reflect briefly on the coherencies between statelessness, gender-biased nationality laws in third countries and the recent refugee crisis in order to provide a full picture of the statelessness related regional challenges in Europe and beyond its borders. Statelessness increasingly emerged in the migratory context in Europe within the recent migration flows, as a result of the recent refugee crisis, nonetheless, the wider context of the refugee crisis which is politically a very sensitive issue shall not be addressed beyond its statelessness related implications. I will argue that the suggested EU-harmonized framework of minimum standards of treatment, statelessness determination procedure and protection status envisaged to be put in place in all EUMS would not only allow non-citizens of Europe to be protected and empowered but would also contribute to the mitigation of the crisis through the status determination of stateless persons who arrived to Europe within mixed migration flows. This would be urgent due to the fact that because of the large numbers of asylum seekers in Europe, the vulnerabilities of stateless persons who arrived to Europe within the recent mixed migration flows are often not realized and thus greatly overlooked. Relating to countries of origin where the majority of asylum seekers arriving to the shores of Europe come from, are solely mentioned in terms of unequal nationality rights from a gender perspective, because these gender-discriminatory nationality rights impede women from conferring their nationality to their children which put their children at heightened risk of statelessness. Nevertheless, statelessness emerging among refugee children in Europe will not be subject to the present research. The present work mainly reflects on the challenges inherent to the identification and protection of stateless persons who have been living in their own country for generations.

Thirdly, although statelessness is prevalent notably among ethnic minority populations which I shall reflect on more occasions in this work, I confined myself to addressing statelessness from an equality and non-discrimination perspective which I find to be more inclusive in terms of the diverse profiles of statelessness in Europe, instead of addressing it solely as a minority rights issue. Similarly, although I consider the (immigration) detention very relevant in terms of the situation of stateless persons in Europe which is why I consulted extensively the book *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, published by the Equal Rights Trust, I decided not to reflect on this particular segment of the research subject in detail due to length constraints.

SUMMARIZING THE RATIONALE OF MY RESEARCH

Further to the detailed research questions and objectives, I attempted to address how the EU could address the situation of non-refugee stateless persons in its territory and whether there could be a rationale of an EU-harmonized framework to be put in place, introducing relevant minimum standards, a regionally harmonized status determination procedure and a regionally harmonized protection status, all envisaged to be put in place through the adoption of an EU directive. I therefore seek to recommend a normative model for an EU-harmonized legislative framework relating to the identification and protection of stateless persons. Second, I aim to explore the potential advocacy role of the EU in addressing statelessness with third countries (including those with an EU perspective), demonstrating how the EU could assume a proactive role in advancing statelessness related efforts by promoting statelessness related general principles of EU law to third countries which produce stateless populations. The research findings are the result of extensive empirical, qualitative, quantitative and comparative research methods. By exploring the mentioned research questions, I strived to make a personal scientific contribution to the wider knowledge of statelessness in the context of the European Union. Throughout the research a consistent human rights based and, where relevant, gender based approach was employed. The doctoral pondering necessarily had a few delimitations which I set out beforehand.

CHAPTER 2: LITERATURE REVIEW

INTRODUCTION

This chapter provides a historical overview and evaluation of the solicited international human rights instruments (to be set out in their entirety in Chapter 5), policy and scholarly outputs pertaining to the research subject in an attempt to illustrate the immense progress in statelessness related research, to uncover potential areas of further research and to exemplify the productive synergies between the variety of stakeholders involved in statelessness.

Throughout my research, I relied on both national and international literature which is exhaustively set out in the bibliography of the dissertation. Nonetheless, I would like to mention some of the authors who greatly influenced my approach and research questions. Among the Hungarian authors, I relied on the writings of **Tamás Molnár** and **Gábor Gyulai** who reflect on very practical problems relating to statelessness stemming from their extensive experience as practitioners in the field of human rights, migration and statelessness, discussing a variety of questions relating to the potential of EU law in the protection of stateless persons and the rationale of an EU-harmonized legal framework. With regard to my extensive research of international scholarly works, I must mention the works of **Laura van Waas** and **Katja Swider** who were the most influential in terms of my legal, policy and rights-based approach, as well as regional focus. Nonetheless, the scholarly works of **Mónika Ganczer**, **Caia Vlieks**, **Amal de Chickera**, **Carol Batchelor**, **Katia Bianchini**, **Jessica Parra** and **Brad Blitz** further inspired my viewpoint on the issue, as it will be set out in this review.

My empirical pondering, on the one hand, included the analysis of universal and regional human rights conventions (to be explained extensively in Chapters 6-7-8), primary and secondary sources of EU law, statelessness related general principles of law, nationality laws and related court rulings, policy documents, as well as testimonies of stateless persons from all regions recorded by the UNHCR. On the other hand, I undertook an extensive empirical research of secondary data on the subject through books, academic literature and online sources reviewing the experience and viewpoints shared by internationally recognized statelessness researchers and practitioners focusing on the European context which was very helpful in terms of prior understanding of the existing challenges while identifying further gaps in EU legislation in terms of EUMS practices. In this empirical research process, an

interesting synergy manifested; I discovered that relevant policy documents published under the aegis of EU institutions (notably at the request of the thematic committees of the European Parliament) were elaborated by the internationally recognized European statelessness experts representing non-governmental organizations and research institutes.²³ This implies that the emerging discussion on statelessness in the EU context is based on the extensive expertise of practitioners in the field whose key findings serve as a basis for policy- and decision-making in the field of statelessness.

2. 1. HISTORICAL PROGRESS IN THE CONCEPT OF STATELESSNESS

Looking at earlier scholarly works, we find that the essence and consequences of statelessness remained unaddressed for a long time and statelessness as a legal fact was notably denied until the 20th century. Sporadic discussions pertaining to nationality and the lack thereof started to emerge in the 18th-19th century. Scholars, for instance, **Zitelmann** explicitly denied the relevance of statelessness as a legally relevant fact in 1897, considering that international law recognized the possibility to change nationality but it did not provide anything for the lack of nationality²⁴ which must be interpreted in light of the conception at the time that states are the sole subjects of international law. According to this perception, individuals who were not recognized by any state as their nationals are thus considered irrelevant by international law.²⁵

This perception was challenged by the **United Nations' report on statelessness** which portrayed statelessness as an anomaly, implying that statelessness is a relevant fact in international law which must be duly addressed.²⁶ The significance of this document lies in the fact that its dates back to 1949, only a year after the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 (which includes the right to a nationality), and not long before the adoption of the Refugee Convention (1951) and the UN statelessness conventions (1954, 1961). The 1954 Convention relating to the Status of Stateless Persons remains the primary instrument to address statelessness on a global scale, and remains the predominant

²³ See, for instance, L. van Waas, G.R. de Groot, K. Swider, O. Vonk, 'Practices and Approaches in EU Member States to Prevent and End Statelessness', Study for the LIBE Committee, Nov. 2015 and Addressing the human rights policy impact of statelessness in the EU's external action, European Parliament, DG for External Policies, November 2014.

²⁴ Ernst Zitelmann, *International Private Law* (Leipzig 1897) vol 1, pp. 176-177.

²⁵ See, for instance, the report of the Institut de Droit International (1936), *Statut juridique des apatrides et des réfugiés*, Rapporteur: M. Arnold Raestad, session de Bruxelles.

²⁶ UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1.

reference point for statelessness related discussions and the protection of stateless persons based on the set of rights and minimum standards it enshrines. Following the adoption of the UN statelessness conventions, scholars started to increasingly reflect on statelessness and the vulnerabilities of stateless persons. To give an example, the role of nationality in international law was considered by **van Panhuys**²⁷ as early as in 1959 and the consequences stemming from the lack of a nationality from an international law perspective were addressed by **Weis** twenty years later in 1979.²⁸

2. 2. VIEWS ON NATIONALITY AND STATELESSNESS IN LIGHT OF STATE SOVEREIGNTY

In parallel with emerging debates relating to statelessness, similar discussions evolved around the concept of nationality in light of state sovereignty. In 1951, **Arendt** considered that nation-states which used to bear the sole responsibility to ensure human rights have been weakened by transnationalism and globalization.²⁹ **Ziemele** claims that despite the fact that states have a sovereign right to decide on the conditions for the acquisition and loss of nationality, states are somehow limited by the international obligations undertaken relating to nationality, including the enforcement of their obligation to eliminate the occurrence of statelessness.³⁰ Further to this consideration, **Parra** argues that state sovereignty over nationality laws has eroded and the doctrine of sovereignty must be reconciled between nationality laws and international legal instruments to reduce and avoid statelessness, pointing out that the CJEU and international scholars increasingly view Member State sovereignty as becoming limited in terms of nationality legislation.³¹ In addition, **René de Groot** makes the incisive assumption that the ongoing changes are reflected more in the development of a distinct European law on citizenship than in the replacement of national citizenship by EU citizenship.³²

²⁷ H. F. van Panhuys (1959): *The role of nationality in international law*, Leyden.

²⁸ Paul Weis (1979), 'Nationality and Statelessness in International Law,' Sijthoff and Noordhoff.

²⁹ Hannah Arendt (1951): *The Origins of Totalitarianism*, Harcourt, New York.

³⁰ Ziemele, Ineta (2000): *State Continuity and Nationality: The Baltic States and Russia: Past Present and Future as Defined by International Law*, Martinus Nijhoff Publishers, Leiden & Boston, p. 283. (hereinafter: Ziemele 2000)

³¹ Jessica Parra (2011): *Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness*, *Fordham International Law Journal*, Volume 34, Issue 6, Article 6. (hereinafter: Parra 2011)

³² Gerard-René de Groot (2004): *Towards A European Nationality Law*, *Electronic Journal of Comparative Law*, vol. 8.3. pp. 27-30. (hereinafter: de Groot 2004)

2. 3. LITERATURE ADDRESSING STATELESSNESS AS A HUMAN RIGHTS ISSUE

Understanding the anomaly of statelessness as early as in 1968, **Hersch Lauterpacht** recommended the following provision to be included in the international human rights regime which has tremendous importance:

„Every person shall be entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent. No person shall be deprived of his nationality by way of punishment or deemed to have lost his nationality except concurrently with the acquisition of a new nationality. The right of emigration and expatriation shall not be denied.”³³

Further to Lauterpacht, **Guy Goodwin-Gill** was among the first contemporary scholars to argue for the international community to pay attention on the ambiguous situation and protection needs of stateless persons.³⁴ More than two decades ago Goodwin-Gill already pointed out to the problem that statelessness was seen by many solely as a technical problem, insisting that statelessness should be considered as a human rights issue, despite the fact that there is a distinct technical dimension to it which is inherent to the nature of this phenomenon.

As a result of the immense progress of international human rights law, this fundamental human right has been enshrined in a series of international human rights instruments, including the **Universal Declaration of Human Rights**, the **International Convention on the Elimination of All Forms of Racial Discrimination**, the **International Covenant on Civil and Political Rights**, the **Convention on the Rights of the Child**, the **Convention on the Elimination of All Forms of Discrimination against Women**, the **Convention on the Nationality of Married Women**, the **Convention on the Rights of Persons with Disabilities** and the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**. The rights of stateless persons are specifically set out in the **Convention relating to the Status of Stateless Persons** and the **Convention on the Reduction of Statelessness**.

³³ Hersch, Lauterpacht (1968): *International Law and Human Rights*, Archon Books, London, p. 346. (hereinafter: Lauterpacht, 1968)

³⁴ Guy, S. Goodwin-Gill (1994): *The Rights of Refugees and Stateless Persons*, in: KP Saksena (ed), *Human Rights Perspective and Challenges (in 1990 and Beyond)*, Lancers Books. (hereinafter: Goodwin-Gill 1994)

This progress resulted in the removal of human rights from domestic jurisdiction. Despite of this development, **Ganczer** points out that the right to a nationality as a human right continues to be affected by the fact that nationality matters continue to be subject to the *domaine réservé*.³⁵ She explains that the regulation of statelessness through the international instruments mentioned beforehand resonates with the interests of states, and even the wording of these documents remains vague allowing states to retain the regulation of nationality within their domestic regulation. Consequently, the right ensured at the international level is frequently rendered meaningless in practice.³⁶As an important contribution to these discussions, in 2016 **Lambert and Foster**³⁷ challenged the main findings of **Goodwin-Gill** set out in his work published two decades earlier,³⁸ findings that Goodwin-Gill's suggestions are still relevant today.

2. 4. LITERATURE ON STATELESS POPULATIONS IN EUROPE

In Chapter 5, I attempt to depict the diversity of stateless populations residing in Europe, without the intention of singling out particular stateless populations. For this reason, I will exemplify the regional context of statelessness and related challenges inherent to non-citizenship, Romani statelessness and statelessness resulting from gender-biased nationality laws in third countries.

Subsequent to the disintegration of the Soviet bloc, statelessness emerged as a grave consequence of state succession which produced thousands of Russian-speaking individuals who were left without the nationality of an existing state and were not recognized as nationals in the successor states of the USSR (some of which are now EUMS), also referred to as non-citizens. Non-citizenship was a largely underaddressed issue for a long time which as a grave consequence of state succession became subject to extensive academic research only recently. As I argue in this thesis, addressing the citizenship rights of non-citizens, living mainly in Latvia and Estonia should be put higher on the EU's human rights and political agenda. In light of the low naturalization rates of older non-citizens, unless Latvia introduces the automatic grant of citizenship for all non-citizens, non-citizenship will continue to persist and

³⁵ Monika Ganczer (2015): The right to a nationality as a human right? In: Hungarian Yearbook of International Law and European Law 2014. Eleven International Publishing, The Hague, pp. 15. (hereinafter: Ganczer 2015)

³⁶ Ibid.

³⁷ Michelle Foster and Hélène Lambert (2016): Statelessness as a Human Rights Issue: A Concept Whose Time Has Come, International Journal of Refugee Law, Volume 28, Issue 4, 1 December 2016, Pages 564–584. (hereinafter: Foster; Lambert 2016)

³⁸ Goodwin-Gill 1994.

each year a greater number of non-citizens shall opt for Russian citizenship, while other non-citizens permanently leave the country in pursuit of a better life, even under irregular circumstances. **Sukonova**'s argumentation on the subject confirms that this factor is greatly underestimated by the international community.³⁹

Hellborg further argues that if not granted full citizenship, non-citizens are pushed further away from the Baltic States, encouraging them to apply for Russian citizenship which provides Russia with a great pretext to intensify its involvement through claims of protection of nationals abroad and potentially intervene on behalf of its nationals which renders the Russian-speaking minorities in the 'near-abroad' a potential vehicle of destabilization of the neighboring countries of Russia.⁴⁰ According to **Dimitry Kochenov** and **Aleksejs Dimitrovs**, such attempts have recently intensified with the annexation of the Crimean peninsula which has put further pressure on the long burdened EU-Russia relations.⁴¹

The other greatly uncovered issue stemming from contemporary state disintegration in Europe is a result of the break-up of the Socialist Federal Republic of Yugoslavia (SFRY): Romani statelessness. It remains apparent in some EUMS and countries of the post-Soviet space, many of which have EU membership aspirations. According to **Sardelic**, in countries of the Western Balkans, the majority of stateless persons are members of the Romani community, essentially as a consequence of discrimination.⁴² Sardelic argues that the impeded access to citizenship of Roma cannot be attributed solely to direct occasions of ethnic discrimination, but as visible consequences of deeply rooted systemic hierarchies in the post-Yugoslav space which disproportionately affect Romani minorities whose situation has not been addressed.⁴³ According to **De Verneuil**, as states have little incentive to reduce Romani statelessness, the EU should assume a greater role in influencing the concerned states (with an EU membership perspective) to implement the international legal obligations they adhered to regarding statelessness and non-discrimination. Although countries of the Western Balkans formally

39 Liliana Sukonova (2016): Is Latvia condemning older generations to non-citizenship?, European Network on Statelessness Blog. (hereinafter: Sukonova 2016)

40 Maria Hellborg (2015): Statelessness and Nationality, The Case of Non-Citizens in Latvia, Master's Thesis in International Law, University of Uppsala. (hereinafter: Hellborg 2015)

41 Dimitry Kochenov, Aleksejs Dimitrovs (2016): 'EU Citizenship for Latvian "Non-Citizens": A Concrete Proposal', Houston Journal of International Law Vol. 38, No. 1. (hereinafter: Kochenov and Dimitrovs 2016)

42 Julija Sardelic (2015): Romani Minorities and Uneven Citizenship Access in the Post-Yugoslav Space, in Ethnopolitics, Vol. 14, No. 2. (hereinafter: Sardelic 2015)

43 Julija Sardelic (2013): Romani Minorities Caught in-between: Impeded Access to Citizenship and de facto Statelessness in the Post-Yugoslav Space, European Network on Statelessness Blog. (hereinafter: Sardelic 2013)

already chose to comply with EU standards and rules in the fields of statelessness reduction and integration of the Roma,⁴⁴ the implementation of this endeavor must be monitored. When it comes to addressing (Roma) statelessness, **Adam Weiss** (managing director of the European Roma Rights Centre) underlines to that the courts' potential is enormous in eradicating statelessness in Europe, especially that of the European Court of Human Rights and therefore considers strategic litigation a key to success to end statelessness in the continent.⁴⁵ Looking at relevant conventional instruments, we find that a regional human rights convention aiming to avoid statelessness in relation to state succession was adopted also relatively late in 2006 under the aegis of the Council of Europe⁴⁶ and demonstrates very low ratification rate among CoE Member States.

2. 5. LITERATURE ON THE ROLE OF THE EU IN ADDRESSING STATELESSNESS

Globally, the volume of academic pieces relating to the debate on statelessness has considerably increased in recent years and there is a growing number of academic, policy and discussion papers on country-specific statelessness situations in Europe as well. Nevertheless, there are few scholarly works dealing with statelessness in the EU context in a comprehensive way. As a result, the treatment of and domestic norms relating to the protection of stateless persons in EUMS remains largely unexplored with a marginal number of comparative studies in the EU context. In this regard, studies elaborated at the request of the LIBE Committee (for instance, *Practices and Approaches in EU Member States to Prevent and End Statelessness*)⁴⁷ are of great significance, as well as recent comparative scholarly works, such as Bianchioni's *A Comparative Analysis of Statelessness Determination Procedures in 10 EU States*.⁴⁸ The absence of similar works leaves room for engaging in a constructive dialogue on best practices and lessons learnt in the EU context. Additionally, academic research evaluating the implementation of international standards and domestic norms pertaining to statelessness

⁴⁴ Maylis De Verneuil (2016): Nationality: Romani; Citizenship: European, Statelessness Working Paper Series Vol. 3 2016/5. p. 11. (hereinafter: De Verneuil 2016)

⁴⁵ Adam Weiss (2015): Thoughts on Strategic Litigation: Can EU law prevent and reduce Roma statelessness in Europe? European Network on Statelessness Blog. (hereinafter: Weiss 2015)

⁴⁶ Council of Europe, Convention on the avoidance of statelessness in relation to State succession, 15 March 2006, CETS 200

⁴⁷ L. van Waas, G.R. de Groot, K. Swider, O. Vonk, 'Practices and Approaches in EU Member States to Prevent and End Statelessness', Study for the LIBE Committee, Nov. 2015.

⁴⁸ Katia Bianchini (2017): A Comparative Analysis of Statelessness Determination Procedures in 10 EU States, *International Journal of Refugee Law*, Volume 29, Issue 1, 1 March 2017, pp. 42–83. (hereinafter: Bianchini: 2017)

essentially deals with States that have adopted some implementing legislation or established a status determination procedure.⁴⁹

Furthermore, I found that there is a significant gap in the statelessness related literature on how EU law could address statelessness within and beyond its borders. Although there are policy papers and working documents that touch upon the EU's role in the eradication of statelessness in the EUMS,⁵⁰ the potential of EU law in this regard has been greatly overlooked, as well as the EU's potential role in addressing statelessness with third countries.⁵¹ Hence, at a later stage of the research process, I decided to analyze whether the EU could play an advocacy role beyond its borders to promote general principles of EU law which may relate to gender-discriminatory state practices prevalent in the MENA region. In this regard, I discovered that scholarly works are also limited when it comes to how the EU could address statelessness through, for instance, accession talks with candidate countries or through political dialogue with third countries as an integral part of its external policy framework, both at the multilateral and bilateral levels. Yet, scholarly works and NGO publications seem to share the assumption that without the establishment of consistent measures within the EU (elaboration of dedicated national statelessness determination procedures, development of minimum standards to protect and identify stateless persons throughout all EUMS); the EU's dedicated external advocacy action would not be credible.⁵²

2. 6. LITERATURE ON STATELESSNESS DETERMINATION PROCEDURES

According to **Batchelor**, evidence of previous comparative research on statelessness determination procedures shows a wide variation of different models and a wide range of administrative or judicial actors involved in the related decision-making process.⁵³ Bianchini explains that there remains a great level of uncertainty of implementing States regarding several aspects of the identification of statelessness, such as which elements status determination procedures should include, and so far, the exchange of good practices relating to national SDPs has been sporadic within the EU.⁵⁴ The article explored the state practices of EUMS that have adopted specific statelessness determination procedures, those that have

⁴⁹ See: Bianchini 2015 pp. 1-220.

⁵⁰ Ibid.

⁵¹ See: Addressing the human rights policy impact of statelessness in the EU's external action, European Parliament, DG for External Policies, November 2014.

⁵² See, e.g. *ibid.* p 22; European Network on Statelessness Submission to the European Commission Consultation on the future of Home Affairs policies: An open and safe Europe – what next?, 2014, p 5.

⁵³ Batchelor 2003 p. 31

⁵⁴ Bianchini 2017.

implemented only a few provisions to identify statelessness, and those that have no such provisions at all.

In his writing *The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime*, **Gyulai** distinguishes *five models* of statelessness determination procedures. First, there are stateless-specific mechanisms based on clear procedural rules (as in Spain and in Hungary). Second, there are stateless-specific mechanisms without distinct procedural rules which are based on generally agreed practices, for instance, in France. Third, there exist stateless-specific mechanisms without clear procedural rules and without generally agreed practices, such as in Italy. Fourth, there are non-stateless-specific mechanisms where there are grounds to obtain status for the consideration of the impossibility to enforce expulsion which is the case in Germany. And fifth, in the majority of EUMS, there are neither stateless-specific mechanisms, nor grounds to obtain stateless status for the same consideration as in Germany.⁵⁵

The solution to the manmade problem of statelessness lies primarily in addressing state approaches. **Gyulai** considers that the deprivation of nationality should be primarily regarded as a severe violation of human rights and that states' obligation to protect stateless persons originate from their obligation to respect the right to a nationality.⁵⁶ **Molnár** suggests that the issue of arbitrary deprivation of nationality has been greatly neglected by legal and socio-political literature.⁵⁷ Further to these assumptions, I found that although the prohibition of arbitrary deprivation of nationality has been addressed by related UN reports⁵⁸ and HRC resolutions,⁵⁹ its relevance in the EU relating to the situation of non-citizenship which interferes with the objective of this prohibition clause, as well as to the ongoing discussions of depriving persons suspected of terrorist acts of their nationality have been little addressed from a human rights and statelessness perspective.

⁵⁵ Gábor Gyulai (2014): *The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime*, in: Laura van Waas, Alice Edwards (eds.), *Nationality and Statelessness under International Law*, Cambridge University Press, United Kingdom, pp. 120-123. (hereinafter: Gyulai 2014)

⁵⁶ Gábor Gyulai (2007): *Forgotten Without Reason: Protection of Non-Refugee Stateless Persons in Central Europe*, chapter IV on "Stateless Status Determination", Hungarian Helsinki Committee (hereinafter: Gyulai 2007)

⁵⁷ Tamás Molnár (2015): *The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives*, *Hungarian Yearbook of International Law and European Law*, pp. 67-92

⁵⁸ Report of the UN Secretary-General of 19 December 2011, A/HRC/19/43.

⁵⁹ HRC resolution 50/152 on arbitrary deprivation of nationality.

Dual nationality constitutes another interesting concept relating to statelessness; its relevance mainly occurs when someone wishes to request another nationality, as nationality laws often provide for the automatic loss of the previously acquired nationality in such instances. According to **Ganczer**, a request by a person for another nationality cannot be interpreted as a loss of nationality on his or her own will and the principle of effectiveness may not serve as a basis for other states to declare non-recognition of nationality of concerned individuals.⁶⁰

Very few scholarly works and policy papers reflect on the gender-related aspects of statelessness when addressing this tangible issue in the EU which might as well be attributed to the sole fact that in contrast to the widespread gender-biased nationality laws existing in approximately 50 countries around the world today, these legislations are not the main cause of statelessness in Europe. Nevertheless, this does not mean that a gender-based approach may not be necessary in the European context, but on the contrary. The consistent gender-based approach and prioritization of gender equality must be prevalent not only in the nationality legislations of EUMS but especially in the implementation of the right to a nationality and enjoyment of related benefits on a basis of gender equality with a view to enhancing sustainable development, taking into account that women are at the heart of all societal transformations.

2. 7. LITERATURE ON A REGIONALLY HARMONISED STATUS DETERMINATION MECHANISM

In 2003, **Batchelor** elaborated a study on behalf of the UNHCR entitled: *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization*⁶¹ whereby she was the first author to suggest the EU to provide for the regional harmonization of national statelessness determination procedures. Building on this momentum, **the UNHCR** adopted *guidelines on statelessness in 2012*,⁶² also relating to statelessness determination and consequently the *Handbook on Protection of Stateless Persons in 2014* in order to provide interpretative

⁶⁰ Mónika Ganczer (2012): International Law and Dual Nationality of Hungarians Living Outside the Borders, *Acta Juridica Hungarica*, Vol. 53, No 4, pp. 316–333. (hereinafter: Ganczer 2012)

⁶¹ UN High Commissioner for Refugees (UNHCR), *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation*, October 2003. Written by Carol Batchelor. (hereinafter: Batchelor 2003)

⁶² Three guidelines were issued by the UNHCR in 2012: (1) on the Definition of a Stateless Person, (2) on Statelessness legal guidance for governments, civil society, the judiciary, legal practitioners, and UN staff, and (3) on the Status of Stateless Persons. These guidelines were intended to provide interpretative guidance to State Parties.

legal guidance for governments, civil society, the judiciary, legal practitioners, and UN staff on how to identify and protect stateless persons. **Radnai**⁶³ argues that the implementation of statelessness determination procedures at the national level must be regionally harmonized, emphasizing that the harmonization of standards on statelessness determination procedures at the European level would strengthen the current national efforts in the identification and protection of stateless persons.⁶⁴ She also suggests that better identification of stateless persons would also help to ensure the proper application of existing safeguards in nationality laws requiring states to grant citizenship to children born on their territory who would otherwise be stateless.⁶⁵

2. 8. LITERATURE ON THE RATIONALE OF A REGIONAL LEGAL INSTRUMENT TO ADDRESS STATELESSNESS

Radnai suggests that European states should facilitate the creation of a regional legal instrument, taking advantage of the powerful international organizations that exist in the region (the EU and the CoE). This legal instrument should serve as an incentive for States to establish statelessness determination procedures and to adopt regionally harmonized minimum standards.⁶⁶ Looking beyond the potential of EU legal instruments, **Vlieks** advocates for a legal obligation for statelessness determination to be included under the European Convention on Human Rights which would therefore serve as a great tool for strategic litigation.⁶⁷ Nonetheless, there are diverging opinions when it comes to EU competence in addressing statelessness, even within academic fields of discussion.

As **Molnár** also points out EU law only lays down sporadic rules in this regard and that there is no consensus whether the EU has competence to adopt specific legislation to protect stateless persons.⁶⁸ Nonetheless, he argues that the EU Charter of Fundamental Rights (which includes crucial provisions closely relating to statelessness through the lenses of equality and non-discrimination) does represent a powerful legal tool for their protection, as a primary

⁶³ Noémi Radnai worked as a Protection intern at UNHCR Regional Representation for Central Europe.

⁶⁴ Noémi Radnai (2017): Statelessness determination in Europe: towards the implementation of regionally harmonised national statelessness determination procedures, Statelessness Working Paper Series No. 2017/08. (hereinafter: Radnai 2017)

⁶⁵ Noémi Radnai (2018): Harmonising standards on statelessness determination in Europe, European Network on Statelessness Blog, 1 March 2018. (hereinafter: Radnai 2018)

⁶⁶ Ibid.

⁶⁷ Caia Vlieks (2014): Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?, ENS discussion paper. (hereinafter: Vlieks 2014)

⁶⁸ Tamás Molnár (2017): The Charter of Fundamental Rights and the protection of stateless people in the EU: a dormant giant?, European Network on Statelessness Blog.

source of EU law which has the same legal effect as the EU founding treaties.⁶⁹ In an earlier writing, Molnár also suggests that the EU has competence to address statelessness in the migratory context in light of the Lisbon Treaty based on Article 352 TFEU in conjunction with Article 67(2) TFEU.⁷⁰ **Swider** in her writing *Protection and Identification of Stateless Persons through EU Law* also argues that the protection and identification of stateless persons must be addressed further through EU Law, obliging EUMS to establish statelessness determination procedures for the identification and protection of stateless persons who reside in the territory of one of the EUMS.⁷¹ This assumption constitutes the basis of my academic pondering which seeks to address how the EU could oblige its Member States to advance the rights of stateless persons, a particularly vulnerable group, through EU law, while considering a human rights-based approach. In this regard, I shall argue that identification through status determination is the first step to the protection of stateless persons. Further to the need to EU-harmonization, I will also argue that the EU should adopt a directive which would oblige EUMS to put in place EU-harmonized minimum standards for the treatment of stateless persons, as well as status determination procedures as a result of which a protection status would be granted on the basis of one's statelessness.

This was also the subject of the discussion paper elaborated by the Meijers Committee back in in 2014; through the *Proposal for an EU directive on the identification of statelessness and the protection of stateless persons*, the Meijers Committee calls on the EU to establish a common legal framework for the treatment of stateless persons in EUMS. The proposal argues that the development of such rules would advance the protection of stateless persons and fill the present gap in EU law on the legal position of the stateless in the EU. In this proposal, the Committee recommends that a set of common standards should be adopted relating to (1) a fair procedure for determining whether a person is stateless; (2) the treatment of stateless persons; and to (3) the residence of stateless persons.⁷² This proposal formed the basis of my doctoral pondering.

⁶⁹ Ibid.

⁷⁰ Tamás Molnár (2014): *Moving Statelessness Forward on the International Agenda*, 19 *Tilburg Law Review*, p. 198, footnote 21.

⁷¹ Katja Swider (2014): *Protection and Identification of Stateless Persons through EU Law*, Amsterdam Centre for European Law and Governance, Working Paper Series, 2014 – 05, pp. 21-22.

⁷² Meijers Committee (2014): *Proposal for an EU directive on the identification of statelessness and the protection of stateless persons*. (hereinafter: Meijers 2014)

SUMMARIZING THE RESULTS

Building on the assumption that Member State sovereignty over nationality laws has eroded⁷³ in light of states' obligation to reduce and avoid statelessness, I attempted to collect documental evidence to justify the rationale for a legal tool adopted by EU law to provide for the identification and protection of stateless persons. To this end, I solicited a series of universal and regional human rights instruments, scholarly works addressing the need for regionally harmonized status determination mechanisms,⁷⁴ the competence of the EU and the potential of EU law in the field of statelessness within⁷⁵ and beyond its borders.⁷⁶ While the volume of academic pieces and policy papers engaging in the debate on statelessness has increased recently, there are few comparative works related to EUMS practices⁷⁷ and even less literature on the potential of EU law in terms of the protection of stateless persons in the EU. As a result, the treatment of and domestic norms relating to the protection of stateless persons in EUMS remains largely unexplored with a marginal number of comparative studies in the EU context. Furthermore, based on my empirical research I discovered that the external focus of research and policy papers on stateless persons is usually rather limited in terms of the EU's potential role in addressing the issue of statelessness as an integral part of its external policy, both at the multilateral and bilateral levels which leave room for further academic research. The solicited documents portray an immense progress in human rights law which represents a great potential for strategic litigation for the advancement of the rights of stateless persons and exemplify the constructive synergies between the variety of stakeholders involved in statelessness related policy- and decision-making (governments, the academia, non-governmental and international organizations). I found that the academia and other non-governmental actors, through their joint statements and position papers signal a very important partnership in the mainstreaming of stateless people at the regional, as well as at the global levels, considering that the produced EU documents display important primary NGO inputs on how to address statelessness in the EU context.

⁷³ Parra 2011 pp. 1676-1682.

⁷⁴ See: Batchelor 2003; three guidelines related to statelessness issued by the UNHCR in 2012; Gyulai 2014; Radnai 2017.

⁷⁵ Tamás Molnár (2017): The Charter of Fundamental Rights and the protection of stateless people in the EU: a dormant giant?, European Network on Statelessness Blog; Tamás Molnar (2014): Moving Statelessness Forward on the International Agenda, 19 Tilburg Law Review, p. 198, footnote 21.; Swider 2014.

⁷⁶ Addressing the human rights policy impact of statelessness in the EU's external action, European Parliament, DG for External Policies, November 2014.

⁷⁷ See: L. van Waas, G.R. de Groot, K. Swider, O. Vonk, 'Practices and Approaches in EU Member States to Prevent and End Statelessness,' Study for the LIBE Committee, Nov. 2015; Bianchini 2015; Bianchini 2017.

CHAPTER 3: THEORETICAL BACKGROUND

INTRODUCTION

This chapter seeks to describe the theoretical framework which was applied throughout the research process, underpinning the rationale of the research objectives, as well as of the applied human rights-based approach. Consequently, the natural rights theory and liberal political theory were employed with the aim of providing a conceptual background of my empirical pondering which served as a solid basis for the key findings to be elaborated further to the aforementioned hypotheses and other prior perceptions set out in Chapter 1.

The theoretical framework which was employed in this work implies a consistent human rights-based approach, elaborated on the basis of the natural rights theory and liberal political theory inspired by the philosophies of the first fundamental rights documents which emerged in the age of enlightenment to oppose the ideas of absolute monarchy and status quo. This gave rise to further theories and documents related to natural rights and liberties. The applied theories were chosen to justify the human rights-based approach undertaken in this research, addressing statelessness as a human rights problem. These theories were employed in order to explore how they may provide a solid conceptual background to the theoretical framework of the 1954 Convention as the main instrument relating to the protection of stateless persons which shall serve as the basis of the normative model which I shall eventually propose for an EU directive.

Human rights may be viewed as the outcome of a long philosophical debate that has taken place both in the global arena and within the European societies. Human rights are perceived as fundamental to human existence, and therefore inalienable. Further to these constitutive elements, there are competing definitions of the essence of human rights. While in **Thomas's** view, human rights constitute *"a claim that gives its possessor a kind of veto power,"*⁷⁸ **Cranston** suggests that *„human rights by definition constitute a universal moral right, something which all men everywhere at every time ought to have, something of which no man may be deprived of, and something which is owing to every human being simply because they are human.“*⁷⁹

⁷⁸ Nagel Thomas, (1979): *Mortal Questions*, Cambridge, Cambridge University Press, p.114.

⁷⁹ Maurice Cranston (1962): *What are Human Rights?*, New York, Basic Books, 1962. p. 36.

These considerations were also enshrined in the theories of the political philosophers such as *Hugo Grotius*, *Thomas Hobbes* and *John Locke*, articulated during the decades of the enlightenment era. For the purposes of this work, the natural rights theory and the liberal political theory shall be challenged with the aim of providing a theoretical framework to put the human rights approach into context in terms of statelessness as a human rights issue. These theories are considered as the main human rights theories which inspired the *rights documents*⁸⁰ and major *declarations relating to basic rights*⁸¹ which were adopted later on. These theories are based on the idea that all human beings should enjoy the same rights which resonates with modern thinking on human rights. There is a nexus between them in the sense that the liberal political theory includes the freedoms and liberties foreseen by the natural rights theory, in order to ensure the fulfillment of individual endeavors, for instance, the pursuit of happiness.

3. 1. NATURAL RIGHTS THEORY

The theory of natural rights relies on the assumption that man has inalienable rights which cannot be transferred or removed; otherwise governments could exercise totalitarian power over those who instituted them in the first place. The theory of natural rights basically implies moral perceptions, suggesting certain inalienable rights, such as the right to life and the right to liberty. The concept of natural rights originates from the concept and ideas of *natural law* which originally stems from Christian morals and values cultivated prior to the enlightenment period. These rights were considered to have been given to men by the creator and are then protected by governments chosen by men. Later the focus of this creator-based approach slowly shifted towards the belief that these rights are attributed to the fact that we are human and are not conferred by a higher power. Natural rights are therefore viewed as the inherent and original rights of men which apply equally to all men who bear these rights on the sole basis of their human nature.⁸²

⁸⁰ International and regional legal instruments providing for the protection of human rights, inter alia UN conventions and CoE Conventions.

⁸¹ See: the French and American Declarations of Human Rights and Freedoms.

⁸² The assumption that all men have natural rights as human beings has been addressed by a number of political philosophers, notably Thomas Hobbes, John Locke and Jean-Jacques Rousseau.

Hobbes introduced the theory of natural rights in his publication *The Leviathan*⁸³ explaining the right of nature as the liberty of every man to benefit from his own power led by instincts of self preservation which is part of human nature. Hobbes therefore suggests a duality of human nature, legitimizing the protection of one's rights from the aggressions of other men, as well as the exploitation of others to protect one's own rights and interests. As Hobbes argues, the state of nature in which man lived before the social contract was "*a war of every man against every man, a condition of internecine strife in which the life of man was solitary, poor, nasty, brutish and short.*" Thus, in the state of nature every person had a natural right to do anything one deemed necessary for preserving one's own life.

When moving from the *state of nature* to society, men bring their natural rights with them together with some of the authority they used to have in the state of nature but they necessarily give up some of the freedom they had to do anything to preserve their life. In this move, Hobbes asserts that respecting law is necessary to ensure personal security in a (political) society. "*For each citizen to preserve his own life, he must give absolute and unconditional obedience to the law.*" Further to this move to society, Hobbes reflected on the concept of the *social contract* used to legitimize the government instituted by men whereby men sign a social contract and abide by the laws made by society. Nonetheless, they do not give up all their natural rights, as the government is obliged to secure everyone's property, liberty, life and possessions. In his view, values such as freedom and equality associated with the essence of human rights are fundamental moral and social values which ought to be realized in any society. The primary aim of law thus lies in the protection of individual rights according to Hobbes.

Further to the ideas of Hobbes and the concept of the state of nature, **Locke** suggests that man by nature is free "*to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature,*" equal and independent as set out in his publication *The Second Treatise of Civil Government*.⁸⁴ Locke also considered that prior to organized societies a *state of nature* had existed, governed by reason and characterized by perfect freedom where men considered their own interests and each man had a set of natural rights, such as the right to life, property and liberty. These rights had to be exercised within the limits of the law of nature. Locke then explores men's move from this *state of nature* to

⁸³ Thomas Hobbes (1651): *The Leviathan, or The Matter, Forme and Power of a Common-Wealth Ecclesiasticall and Civil*, England.

⁸⁴ Thomas Locke (1689): *The Second Treatise of Civil Government*, Awnsam Churchill, England.

society governed by a civil government instituted by men where authority is secured by a central power. He claims that civil government may be established only in case the people agree to be governed. In his view, sovereignty resides in the people and therefore the people are able to dissolve a government in case it abuses the bond of trust established between the people and the government. Locke also reflects on the problems inherent to an absolute monarchy, by asserting that when a monarch becomes a tyrant it constitutes a violation of the social contract and should therefore be removed from power.

The social contract theory was further addressed by the political thinker **Rousseau**. His social contract theory was set out in his writing, *Discourse on the Origin and Foundations of Inequality among Men*,⁸⁵ reflecting on the foundations of inequality among people, whether this inequality is allowed in light of natural law and what the main challenges of the social contract are. According to Rousseau, the social contract is a consent by which the individual becomes part of the community and thus of the *general will* which he sees as the *moral will* of each citizen. He considers that law is the register of general will and the government should only be held in power until it represents the general will. Rousseau gives preference to the self-governance of the people. Rousseau's social contract theory considers that men are granted with freedom and equality by nature, but our nature has been defaced by our social experience. Rousseau suggests that in order to examine the inequalities among men, it is crucial to understand how human nature evolved over the centuries and therefore understand the driving forces of the modern man and modern society which he blames for the disruption of the state of nature.

3. 2. LIBERAL POLITICAL THEORY

Similarly to the natural rights theory, the liberal political thought was first used to resent the ideas of the absolute monarchy during the enlightenment period. The main elements of this theory lie in the ideas of equality, individual liberty and individual rights, embracing values such as pluralism, autonomy and human integrity. The essence of the liberal political theory may be viewed as an extended construct of the aforementioned natural rights theory. The predominant ideas of liberal political theory, as portrayed by political philosopher **John Gray** in his book *Liberalism*⁸⁶ are *individualism*, *universalism*, and *egalitarianism*. Individualism

⁸⁵ Jean-Jacques Rousseau (1755): *Discourse on the Origin and Foundations of Inequality Among Men*, The Bedford Series in History and Culture.

⁸⁶ John Gray (1986): *Liberalism*, Open University Press.

implies the moral worth of the individual and appraises independence and the fulfillment of their human potential (also the pursuit of happiness). Universalism claims that all human beings have some basic needs which may be fulfilled through certain freedoms relating to movement and association, without which people cannot fulfill their basic needs. Egalitarianism suggests that all human beings bear the same moral worth and the right to be treated as an equal. The right to equal treatment implies equal opportunities and rights, suggesting that there should be no discrimination against individuals based on their race, gender, belonging to minority/ethnic groups, nationality, sexual orientation, whatsoever.

SUMMARIZING THE RESULTS

A significant progress may be portrayed in terms of the gradual recognition of certain universal moral standards with a view to providing protection to people against the arbitrariness of the central power (governments, monarchs). This chapter concludes that the prominence of human rights in contemporary political debate is indisputable. It was therefore imperative to gain a whole-rounded understanding of the perception and relevant debates of human rights before putting statelessness as a human rights violation in due context. The natural rights theories proved to provide a firm theoretical basis for the analysis of the statelessness conventions as exemplified above, considering that the 1954 Convention proclaims and promotes the basic rights of stateless persons as human beings.

The conclusion may be drawn that the fundamental rights and freedoms of stateless persons are inherent to their human dignity and their needs stemming from their human nature must be fulfilled by means of certain rights and liberties which are exhaustively enshrined in the natural rights theory and the liberal political theory. In accordance with these theories, stateless persons' right to life, freedom and property, among other rights, are granted to them on the basis of their human nature, and are therefore inalienable. These rights must be granted to all human beings by virtue of their birth as human beings *regardless of citizenship or state affiliation*. This presumption coincides with not only the substance of human rights definitions and instruments, but also with the objectives of the UN statelessness conventions, as they build on the momentum that stateless persons must enjoy the basic rights enshrined in the Universal Declaration of Human Rights.

CHAPTER 4: IMPLICATIONS OF STATELESSNESS

„The stateless person does not fit smoothly into the legal administrative or social life of his country of sojourn. The provisions of international law which determine the status of foreigners are designed to apply to foreigners having a nationality. The stateless person is an anomaly and for reasons of principle or method it is often impossible to deal with him in accordance with the legal provisions designed to apply to foreigners who receive the assistance of their national authorities, and who must, in certain cases, be repatriated by the countries of which they are nationals. ... Administrative authorities, who have to deal with stateless persons, having no definite legal status and without protection, encounter very great and often insurmountable difficulties. Officials must possess rare professional and human qualities if they are to deal adequately with these defenseless beings, which have no clearly defined rights and live by virtue of good-will and tolerance.”⁸⁷

INTRODUCTION

This chapter seeks to provide a conceptual background relating to statelessness, defining important concepts that recur in this work, by exploring and reflecting on the existing categories of statelessness, understanding the anomalies surrounding the legal status and circumstances of the de iure, de facto and in situ stateless persons, those in the migratory context, elaborating on the importance of a nationality. Thereby, the nexus between statelessness and human rights shall be considered through the lenses of the practical difficulties entailed by the lack of a nationality in the enjoyment of other basic human rights. To this end, the realization of stateless persons' right to work shall be explored, reflecting on the particular difficulties of stateless women to provide a gender perspective on this issue.

4. 1. BACKGROUND

As mentioned aforehand, according to Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons, a stateless person is someone who is not recognized as a national by any state under the operation of its law. Considering that having a nationality constitutes a legal bond with a state and provides numerous rights and obligations, not having one leaves the affected individual unprotected by national legislation and therefore greatly vulnerable to human rights abuses which eventually entails the creation of legal ghosts who do not belong

⁸⁷ UN Ad Hoc Committee on Refugees and Stateless Persons, A Study of Statelessness, United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1, pp. 8–9.

anywhere. Statelessness may result from various causes, including state succession, arbitrary deprivation of nationality, ill-defined or gender-discriminatory nationality laws, displacement and forced migration, birth to a stateless parent, lack of birth registration⁸⁸ or inability to satisfy certain requirements for the acquisition of nationality.

Statelessness as a legal anomaly often prevents people from accessing their fundamental human, civil, political, economic, social and cultural rights, as human beings. The state of being stateless therefore puts these individuals in a somewhat legal vacuum and non-existence. Not having a nationality entails the legal obstruction to enjoy fundamental civil, political, economic, cultural and social rights that other people take for granted; they face extreme difficulties on a daily basis in accessing education, health care services, employment opportunities, and property rights. Simple acts considered as such by most people, including getting married, registering the birth of a newborn, opening a bank account, and travelling abroad, raise almost insurmountable challenges for stateless persons. And as they pass away, their death remains unknown to the world. For millions of people worldwide, statelessness is an everyday reality; an invisible cage of non-existence, a constant rejection from belonging somewhere. Statelessness emerges both at the individual level, as well as among ethnic minorities for numerous reasons, including ethnic and gender-based discrimination in nationality laws, ethnic discrimination being the main reason for the intergenerational statelessness prevalent in the EU and its neighborhood.⁸⁹ Stateless persons are often treated as irregular “aliens” in the country where they were born, as well as they are often subject to xenophobic attitudes, especially in case they belong to a minority group in the country of their residence.⁹⁰

The essence of the above description of statelessness provided by the first UN Report of Statelessness back in 1949 (cited above) therefore remains relevant today. Considering that having the right to a nationality is essential to the enjoyment of other basic human rights, statelessness directly interferes with other human rights, while constituting a human

⁸⁸ Although the act of birth registration in most cases does not confer nationality in itself (as nationality is usually acquired automatically at birth), it does provide vital evidence of the facts of birth (place and date of birth, name of the birth parents/father/mother), without which a child’s claim to a nationality may not be recognised by a state.

⁸⁹ For instance, many Roma and Russian-speaking minorities remained stateless as a result of ethnic discrimination in the ex-Yugoslav and ex-Soviet states, as well as in EU Member States where they migrated during or following the disintegration of the Socialist regimes.

⁹⁰ Alica Sironi (2016): The double plight of stateless migrants, European Network on Statelessness Blog.

rights violation in itself, violating the human right to a nationality. Hence, statelessness and human rights are fundamentally linked. It must be made clear that statelessness as a grave consequence of targeted state measures and other circumstances to be explained later in this work remains a man-made problem which can be and must be solved within a reasonable timeframe. Statelessness may not serve as a pretext to undermine any individual's ability to enjoy other basic rights granted to all human beings without discrimination by the Universal Declaration of Human Rights (UDHR - 1948). In spite of the fact that international human rights law has rendered the individual a subject of international law, the enjoyment of human rights must be ensured by states themselves who as State Parties have acceded to human rights conventions and therefore chose to abide by their objectives. Thus, states remain primarily responsible for addressing nationality issues and ensure the enjoyment of basic rights attached to a nationality (irrespective of having a nationality or not) for those residing in their territory.

The aforementioned first UN report on statelessness portrayed statelessness as an anomaly. This milestone document dates back to 1949, a significant time in the history of human rights; following the 1948 adoption of the Universal Declaration of Human Rights (UDHR), yet preceding the adoption of the Refugee Convention (1951) and the UN statelessness conventions (1954, 1961). Despite of the significant progress of international human rights law, and the increasing awareness and ratification rates of the UN statelessness conventions, relatively little has changed in the myriad vulnerabilities and difficulties of stateless people over the last 50 years.

More than half a century after the adoption of these landmark instruments, only a handful of countries operate a statelessness-specific protection regime, regulated in national legislation, including eight out of the twenty-eight Member States of the European Union which constitutes a major drawback from a human rights perspective, as the identification of stateless persons would be essential to their effective protection. In recent years there has been a positive shift in this regard both in Europe and other parts of the world where we witness statelessness getting higher on the human rights agenda. This is predominantly the result of the advocacy work of NGO stakeholders in the EU/Council of Europe and the UN human

rights mechanism. Nonetheless, in the absence of statelessness determination procedures,⁹¹ stateless persons are predominantly treated as undocumented asylum-seekers rendering them extremely vulnerable to human rights abuses. Also the lack of a country of nationality which would readmit them makes stateless persons non-removable. Consequently, they are disproportionately subjected to lengthy detention with little chance of being freed from there.

Figure 1: Current data on the world’s displaced people



Source: UNHCR Figures at a Glance, 2017

Statelessness affects 10-12 million people⁹² around the world of whom approximately 600,000 reside in Europe, and new cases of statelessness continue to emerge in Europe every day. On the one hand, European statelessness may be traced back to the political upheaval of the 1990s, in particular to the dissolution of the Union of Soviet Socialist Republics (USSR) and of the Socialist Federal Republic of Yugoslavia (SFRY). Noteworthy, over 80% of the total reported stateless persons in Europe reside in four countries, all successor states of the USSR: Latvia, the Russian Federation, Estonia and Ukraine. Due to positive amendments in nationality laws and proactive nationality campaigns, the number of stateless cases slowly

⁹¹ In Europe, only 10 countries have put in place functioning statelessness determination procedures, including France, Georgia, Hungary, Italy, Latvia, Kosovo (UNSCR 1244/99), the Republic of Moldova, Spain, Turkey, and the United Kingdom. See: Establishing Statelessness Determination Procedures to Protect Stateless Persons, UNHCR Good Practices Paper. p. 2. Available from: <http://www.refworld.org/pdfid/57836cff4.pdf>. (Accessed 6 May 2018)

⁹² Data reported by governments to the UNHCR were limited to 3.2 million stateless persons residing in 75 countries. See: <http://www.unhcr.org/globaltrends2016/>. (accessed 6 May 2018)

declines as a result of worldwide efforts made to establish measures which allow and facilitate the acquisition or confirmation of nationality. Only in 2016, a reported 60,800 stateless individuals acquired nationality in 31 countries, including mass stateless populations residing in Côte d’Ivoire, Kyrgyzstan, the Philippines, the Russian Federation, Tajikistan, and Thailand.⁹³ Nonetheless, the situation of stateless persons in the successor states of the former Yugoslavia should be equally addressed, considering that approx. 10,000 persons remained either stateless or at risk of statelessness due to widespread lack of documentation, including identification and travel documents.⁹⁴

Table 1: Countries in Europe with over 10.000 stateless persons

Latvia	252.195
Russian Federation	101.813
Estonia	85.301
Ukraine	35.228
Sweden	31.062
Germany	12.569
Poland	10.852

Source: Institute on Statelessness and Inclusion 2017⁹⁵

As mentioned earlier in this work, when it comes to protecting stateless persons, the EU’s mandate is often contested. Whereas the prevention and reduction of statelessness may be primarily addressed through nationality law which belongs to the competence of EUMS, the protection of stateless persons is mainly governed through migration law where the EU does have competence. This competence has been established by Article 67(2) in conjunction with Article 352 TFEU, stating that “[f]or the purpose of ... Title [V], stateless persons must be treated equally as third country nationals” which in my view may be complemented by Article 18 TFEU providing for the prohibition of discrimination on the grounds of nationality, proclaiming a self-standing prohibited ground on the basis of nationality (also enshrined in Article 21(2) of the EU Charter), as I mentioned beforehand. This gives the floor to the EU to address several of the statelessness related legal and protection challenges within any beyond

⁹³ UNHCR (2017): Global Trends – Forced Displacement in 2016, p. 49. Available from: <http://www.unhcr.org/5943e8a34.pdf>. (accessed 6 May 2018)

⁹⁴ Institute on Statelessness and Inclusion, ‘The World’s Stateless 2017,’ available at: <http://www.worldsstateless.org/continents/europe/stateless-persons-in-europe>. (accessed 6 May 2018)

⁹⁵ Ibid.

the asylum context. Based on these provisions, in the European Area of Freedom, Security and Justice common rules should apply for the treatment of third-country nationals and stateless persons. Additionally, stateless persons must enjoy equal treatment in the EU in light of the non-discrimination rules laid down by the TFEU and the EU Charter. However, Member States' practices and nationality legislation display significant differences in the treatment of stateless persons, both in terms of the availability and functioning of established statelessness determination procedures, the residence status and the protection offered to recognized stateless persons.⁹⁶ Nonetheless, EUMS bear international obligations to respect the rights of stateless persons and prevent statelessness under their international human rights treaty commitments. Most importantly, a vast majority of EU countries are State Parties to the 1954 Convention relating to the Status of Stateless Persons and many of them are State Parties to the 1961 Convention on the Reduction of Statelessness. Further to the mentioned UN statelessness conventions, the Council of Europe (CoE) and the European Union (EU) have also legislated on issues relating to the prevention of statelessness and the protection of stateless persons. Yet, most EUMS have no dedicated framework to effectively deal with stateless individuals which calls for legislative and policy reforms throughout the EU. Consequently, it remains a major challenge for those EUMS who do not operate a statelessness determination mechanism to comply with their international obligations and identify and protect stateless persons in their territory.

4. 2. DISTINCTION BETWEEN THE DIFFERENT CATEGORIES OF STATELESSNESS

When looking at the diverse context of statelessness, it must be considered that in light of the ever-evolving country-specific contexts of statelessness (nationality laws, amendments thereto, discriminative state practices, deficient birth registration practices) the profile of stateless persons in a particular country may be mixed and may change over time. However, stateless persons are historically divided into two main categories: those who have no legal nationality, the *de iure* stateless, and those who have no “effective” nationality, the *de facto* stateless. *De iure* statelessness generally occurs when the nationality law of the given country does not allow certain individuals or communities to acquire the nationality of the country. *De facto* statelessness emerges in situations where an individual is effectively denied the rights conferred to them by his/her nationality due to some form of discrimination and/or the

⁹⁶ Meijers 2014 p. 4.

inability to prove his/her nationality. International human rights law and relating protection agendas have developed on the basis of this distinction over the past sixty years.

The main distinction between the *de iure* and the *de facto* stateless is based on the understanding which dates back to the 1951 Refugee Convention, viewing the *de facto* stateless as refugees and the *de iure* stateless as a distinct group of individuals who do not fall under the 1951 Convention. Thus, the 1954 Convention was originally meant to be a Protocol to the Refugee Convention, because it was widely considered that the Refugee Convention already offered protection to the *de facto* stateless, and therefore a distinct document was vital for the protection of the *de iure* stateless. Accordingly, the Convention Relating to the Status of Stateless Persons was signed in 1954 and provided a set of basic rights for the *de iure* stateless but did not provide for the *de facto* stateless which renders the latter stateless community particularly vulnerable as they are not protected under any relating treaty as for today.⁹⁷

4. 2. 1. DE IURE STATELESSNESS

A *de iure* stateless person has been defined by Art (1) of the 1954 Convention Relating to the Status of Stateless Persons, as someone who is not considered as a national by any state under the operation of its law. There is a wide range of underlying reasons for the instances of *de iure* statelessness, including:

- (1) Conflict of nationality laws - A person may be rendered stateless at birth, as a result of conflicting nationality laws. Statelessness may emerge in situations where the nationality laws of the state whose nationality the applicant wishes to acquire requires the renunciation of the applicant's original nationality before acquiring the new one.
- (2) Discriminatory nationality laws affecting children - The children of stateless men may become stateless in states which do not permit women to transmit their nationality to their children. Orphaned, adopted and children born out of wedlock are particularly exposed to restrictive policies and laws, which may put them at risk of statelessness.
- (3) Discriminatory nationality laws affecting women – Some states do not allow women to confer their nationality to their children. In addition, some states automatically withdraw the nationality of a woman who marries a non-national man. In some situations, in case the

⁹⁷ Nonetheless, the Final Act of the 1954 Convention does recommend to include the *de facto* stateless persons in the definition of a stateless person and therefore provide them with due protection under the 1954 Convention.

state of her husband does not automatically grant her with her spouse's citizenship, she is rendered stateless.

- (4) Administrative practices – Bureaucratic burdens are barriers which may result in persons failing to acquire an effective nationality which they would otherwise be eligible to, including excessive administrative fees, unreasonable application deadlines and the failure to acquire all the necessary documents due to the lack of identity documents in the first place and/or to the lack of understanding of the administrative procedure.
- (5) State succession – State dissolution often produces situations putting groups of persons in legal limbo at high risk of statelessness, until the transition to the new citizenship laws and administrative procedures is complete.
- (6) Arbitrary deprivation of nationality – Statelessness may also arise as a consequence of racial, ethnic and religious discrimination resulting in groups of persons being denied citizenship and consequently rendered stateless. In some situations, the discriminatory deprivation of nationality on a large scale can amount to persecution and consequently give rise to refugee status. Two of the most significant *de iure* stateless communities are the Palestinians and the Rohingya of Myanmar.

4. 2. 2. *DE FACTO STATELESSNESS*

De facto statelessness is rather difficult to grasp, because its concept is based on the notion of *ineffective nationality* which has not been defined as a legal concept yet. In addition, there is no requirement of a “genuine” or an “effective” link inherent to the concept of a nationality in Article 1(1). Consequently, the concept of *de facto* statelessness has not been defined in a comprehensive manner which entails that the affected individuals who should be identified as stateless persons do not receive any state protection. Relating to the 1961 Convention, at a conference the UNHCR offered a broader definition of *de facto* stateless persons, providing that: “*There are many persons who, without being de iure stateless, do not possess an effective nationality. They are usually called de facto stateless persons.*” A most recent UNHCR paper⁹⁸ analyses the historical development of the notion of *de facto* statelessness and proposes the following definition:

⁹⁸ Hugh Massey (2010): UNHCR and De Facto Statelessness, LPPR/2010/01. p. 61.

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

De facto statelessness generally emerges in situations where (1) concerned individuals are deprived of their effective nationality; (2) where individuals belonging to ethnic minorities face unreasonable administrative challenges to acquire an effective nationality; or where (3) individuals find themselves without consular protection abroad;⁹⁹ and (4) in the events of state failure where their country of nationality becomes unable to provide for their citizens. Further to these circumstances, there are persons who lack documentation and/or recognition as a citizen in their own country. *De facto* stateless persons are effectively denied rights otherwise conferred by their nationality generally due to some form of discrimination resulting in serious difficulties to prove their habitual residence, for instance, and substantiate their nationality. *De facto* stateless populations often live in the territory of a state for generations. Nevertheless, the state refuses to recognize them as a nation-constituting entity, as its citizens. The narrow interpretation of *de iure* and *de facto* statelessness established partially by international law and widely used in policy discourses, negatively affect the protection of the stateless persons. First, by categorizing stateless persons as *de iure* or *de facto* stateless and affording protection provided by the 1954 Convention only to the *de iure* stateless, an unequal protection regime has been established over the past sixty years. Secondly, due to the diverse socio-political context, particular circumstances and everyday realities of stateless individuals, it is more difficult to adequately put stateless persons either in the *de iure* or the *de facto* stateless box, especially in case of lack of personal identity documentation.¹⁰⁰ Hence, additional categories of stateless persons have been considered; persons without an effective nationality living in

⁹⁹ This may occur in cases where there are no diplomatic relations with the country of nationality, the country of nationality has no consulate or diplomatic representation in the given state., or there is a consulate, but it does not co-operate in providing documentation or confirming the person's nationality and admission to the country of nationality. In situations where concerned individuals do not receive consular protection, they must be considered *de facto* stateless persons.

¹⁰⁰The Equal Rights Trust (2010): *Unravelling Anomaly, Detention, Discrimination and the Protection Needs of Stateless Persons*, p. 74.

their “own country”¹⁰¹ in a non-migratory context are now referred to as *in situ* stateless persons, then there are stateless individuals whose statelessness stems from a migratory context to be explained later in this chapter.

Thus, the earlier mentioned categories of stateless individuals do not reflect on the wide range of situations and circumstances of stateless persons which therefore create situations of limbo for concerned individuals and communities. However, in light of the broad and long-standing application of the terms *de iure* and *de facto* statelessness (former established by international law), it is not desirable to abort this categorization in its entirety but to apply it carefully based on the given context. In this regard, the Equal Rights Trust (ERT) argues that equal and effective protection should be offered to both *de iure* and *de facto* stateless, avoiding the discriminatory treatment of the *de facto* stateless or those whose nationality has not been established.¹⁰² This assumption is reinforced by the fact that in some instances, the status of a stateless person can be subject to temporary or permanent change, as the person finds him/herself in an IDP or a refugee situation.¹⁰³

The ERT therefore argues that the distinction between *de iure* and *de facto* statelessness should have limited applicability, and as mentioned above, should not result in the unequal and discriminatory treatment of the *de facto* stateless, or those whose statelessness is difficult to establish.¹⁰⁴ With a view to overcoming the explained challenges of identifying who is stateless, ERT suggests an alternative approach, the “*ineffective nationality*” test. It is based on the assumption that statelessness occurs when a person has no established nationality, or when his or her nationality is rendered ineffective.

Accordingly, ERT recommends a five-pronged legal test which can be applied in deciding whether a nationality is effective or not. To this end, it examines five major factors affecting the enjoyment of an effective nationality, namely recognition as a national, protection by the state, ability to establish nationality, guarantee of safe return and the enjoyment of human rights, through the following questions:¹⁰⁵

¹⁰¹ The phrase “own country” is taken from Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) and its interpretation by the UN Human Rights Committee. See: *Stewart v. Canada* CCPR/C/58/D/538/1993.

¹⁰² *Ibid.* p. 78.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* p. 82.

- (1) Recognition as a national** – Does the person concerned enjoy a legal nationality, i.e. is he or she *de iure* stateless?
- (2) Protection by the state** – Does the person enjoy the protection of his/her state, particularly when outside that state?
- (3) Ability to establish nationality** – Does the person concerned have access to documentation (either held by the state, or which is issued by the state) to establish nationality? This access may be through a consulate, or through state officials within the country of presumed nationality.
- (4) Guarantee of safe return** – Is there a guarantee of safe return to the country of nationality or habitual residence – or is there a risk of “irreparable harm”? Is return practicable?
- (5) Enjoyment of human rights** – Does an individual’s lack of documentation, nationality or recognition as a national have a significant negative impact on the enjoyment of her or his human rights?

Under this test, in case of the absence of one or more factor of an effective nationality, the individual’s nationality would be considered ineffective, in which case, concerned individuals should be recognized as stateless and be granted protection accordingly.

4. 2. 3. *IN SITU STATELESSNESS*

UNHCR reflects on the relatively unaddressed situation of *in-situ* stateless persons, referring to them as *persons without an effective nationality living in their “own country”*¹⁰⁶ *in a non-migratory context.*¹⁰⁷ *In situ* statelessness has emerged primarily as a result of state succession and the subsequent discriminative state practices. *In situ* stateless populations have long-standing ties to these countries in terms of their long-term habitual residence, residence at the time of state succession and in many cases the country of their birth. By definition, in Europe *in situ* stateless populations include non-citizens living in the Baltic successor states of the USSR, Latvia, Lithuania and Estonia, making up approximately 80% of Europe’ stateless population.¹⁰⁸

¹⁰⁶ See footnote 84.

¹⁰⁷ UNHCR Handbook on Protection of Stateless Persons, 2014. p. 25.

¹⁰⁸ Radnai 2018.

4. 2. 4. STATELESSNESS IN THE MIGRATORY CONTEXT

Statelessness may also emerge among expatriates who lose or are deprived of their nationality without having acquired the nationality of a country of habitual residence.¹⁰⁹ In addition, statelessness often results from gender-biased nationality laws that are still prevalent in almost 50 countries¹¹⁰ around the world, discriminating against women in conferring their nationality to their children on equal terms as men. Gender-discriminatory nationality laws are applied in a number of countries of the MENA region that produces immense stateless populations, including Syria, Jordan and Lebanon where nationality is conferred exclusively by the father. Many stateless individuals were equally forced to displace during the refugee crisis in the Middle East, within mixed migration movements. As an important implication of the recent crisis in Europe, there is a great number of children of (stateless) migrants and recognized refugees who were born prior or after the departure of their parents (or a single mother in the absence of the father), whose birth was either not properly registered or who were born in Member States of the EU where nationality is mostly granted on the basis of the *ius sanguinis* principle. They are therefore at high risk of statelessness in the absence of documentary evidence of their country of birth which is generally vital to secure a nationality.

It is important to highlight that protection claims of asylum seekers without an established nationality (stateless asylum seekers) are considered on the basis of the 1951 Refugee Convention, instead of the UN statelessness conventions and therefore a recognized stateless refugee must benefit from the protection provided under the 1951 Refugee Convention. Nonetheless, in these cases both the asylum and statelessness claims must be thoroughly assessed and in case of positive outcomes of the status determination both the stateless and refugee status must be explicitly recognized.¹¹¹

¹⁰⁹ UNHCR Handbook on the Protection of Stateless Persons, 2014, Geneva. p. 3.

¹¹⁰ Today 25 countries continue to deny women the right to confer nationality on their children on equal terms with men, including the Bahamas, Bahrain, Barbados, Brunei, Burundi, Iran, Iraq, Jordan, Kiribati, Kuwait, Lebanon, Liberia, Libya, Malaysia, Mauritania, Nepal, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Swaziland, Syria, Togo and the United Arab Emirates. In addition, more than 50 countries continue to deny women equal rights with men in their ability to acquire, change and retain their nationality, as well as to pass their nationality onto their non-national spouses. See: <https://equalnationalityrights.org/the-issue/the-problem>. (accessed 6 May 2018)

¹¹¹ UNHCR Handbook on the Protection of Stateless Persons, 2014, Geneva. p. 46.

4. 3. THE RIGHT TO A NATIONALITY AS A HUMAN RIGHT

Nationality embodies a compound concept with historical, social, cultural and legal connotations, as well as it substantiates a real sense of belonging on the individual level. With a view to illustrating the essence of nationality, the ICJ suggested in its landmark decision that:

*“Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties.”*¹¹²

Consequently, nationality constitutes a link between a State and an individual, on the basis of two principles; birth on the territory (*ius soli*) and descent from a national (*ius sanguinis*). This bond substantiated by nationality forms the basis of the conferral of individual rights and obligations that a State attributes to the members of its population. Blackman suggests that a distinction must be made between nationality as a legal term, suggesting the membership of a state and nationality as an ethnic term which signifies a historical relationship to a particular ethnic, racial or linguistic group.¹¹³ Nationality has an external dimension as well, with regard to the right of States to protect their nationals abroad against the abusive acts of other States by practicing diplomatic protection on behalf of their nationals. Also, States have the duty to (re-)admit their own nationals on their territory, while nationals enjoy the right to reside on and not to be expelled from the territory of the country of their nationality.¹¹⁴

From a legal point of view nationality is considered differently in the context of national and international law. Domestic law views nationality as a relationship between an individual and the state which determines the national's individual rights. Accordingly, the **right to a nationality** may be considered as the right to have rights. Chan considers that the right to a nationality encompasses the right to acquisition and retention of nationality.¹¹⁵ It was first mentioned in a non-binding regional document, the American Declaration on the Rights and

¹¹² Nottebohm Case (second phase), Judgement of April 6th, 1955: ICJ Reports 1955, p. 4.

¹¹³ Jeffrey L. Blackman (1998): State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law, Michigan Journal of International Law Volume 19 Issue 4. (hereinafter: Blackman 1998)

¹¹⁴ See Glossary, Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (eds.) (2012): Foundations of International Migration Law, Cambridge University Press, p. 444.

¹¹⁵ Chan, 1991, pp. 1-2, 3.

Duties of Man adopted in 1948, before the Universal Declaration of Human Rights.¹¹⁶ International law, on the other hand, associates nationality with state sovereignty, assuming that states have sovereignty over their nationals, as members of sovereign states who have rights and duties. Especially since the adoption of the aforementioned Hague Convention, nationality issues have been considered a domestic matter under international human rights law, attributing States the right to decide who their nationals are.¹¹⁷

Nevertheless, as mentioned beforehand in this work, Ziemele claims that even though states have a sovereign right to decide on the conditions for the acquisition and loss of nationality, they are limited by their international obligations undertaken in terms of nationality, one of which is to eliminate the occurrence of statelessness.¹¹⁸ Similarly, Parra insists that state sovereignty over nationality laws has eroded and the doctrine of sovereignty must be reconciled between nationality laws and international legal instruments to reduce and avoid statelessness, highlighting that the CJEU and other regional courts increasingly view (Member) State sovereignty as becoming limited in terms of nationality legislation.¹¹⁹ To give a non-European example, in 2005 the Inter-American Court of Human Rights further considered that:

„Although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, states’ discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions. States are particularly limited in their discretion to grant nationality by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness.”¹²⁰

¹¹⁶ Guy Goodwin-Gill was among the first contemporary scholars to argue on behalf of addressing statelessness as a human rights issue. See: Goodwin-Gill 1994.

¹¹⁷ Based on Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law (or the Hague Convention – 1930), “it is for each State to determine under its own laws who are its nationals.”

¹¹⁸ Ziemele, Ineta (2000): *State Continuity and Nationality: The Baltic States and Russia: Past Present and Future as Defined by International Law*, Martinus Nijhoff Publishers, Leiden & Boston, p. 283. (hereinafter: Ziemele 2000)

¹¹⁹ Jessica Parra (2011): *Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness*, *Fordham International Law Journal*, Volume 34, Issue 6, Article 6. (hereinafter: Parra 2011)

¹²⁰ *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Inter-American Court of Human Rights Case No 12.189, 8 September 2005.

In principle, nationality should not be a prerequisite to enjoy basic human rights; international human rights are universal, protecting all persons, regardless of their nationality or the lack thereof. Although the nationality laws of most countries actually do make a difference between nationals and non-nationals residing in their territories, international human rights norms imply a set of minimum standards which must be granted to all individuals (irrespective of having a nationality or not) in the territories of States who have acceded to the relevant human rights conventions. The right to a nationality thus constitutes a fundamental human right in itself, widely recognized by a series of core international legal instruments, including the most important United Nations conventions.

In addition, international conventions include several provisions that explicitly prohibit discrimination on grounds such as race, gender, disability or belonging to a minority group which may put concerned individuals at risk of statelessness.¹²¹ As a result of the immense progress of international human rights law, the fundamental human right to a nationality has been enshrined in a series of international human rights instruments, including the Universal Declaration of Human Rights (Article 15), providing that „[e]veryone has a right to a nationality.” This provision was invoked by other regional human rights documents as well, including the American Convention on Human Rights, the Arab Charter on Human Rights and the European Convention on Nationality. Records of relating debates during the drafting process of the UDHR suggest that the main objective of the aforementioned provision was precisely to provide protection against statelessness.¹²² Similar provisions proclaiming **the right to a nationality** were included by the following UN Conventions and regional instruments.

¹²¹ Core UN conventions reflecting on issues closely relating to the right to a nationality include the *Universal Declaration of Human Rights*, the *Convention on the Status of Stateless Persons*, the *Convention on the Reduction of Statelessness*, the *Convention relating to the Status of Refugees*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Nationality of Married Women*, the *Convention on the Rights of Persons with Disabilities* and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

¹²² Ganczer 2015 p. 29.

- **Articles 1-3 of the Convention on the Nationality of Married Women (1957)** foresee the nationality rights of women irrespective of their husband's nationality or change therein.
- **Article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965)** proclaims that *„States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law... [and to] the enjoyment of... the right to nationality.”*
- **Art. 24 (3) of the International Covenant on Civil and Political Rights (1966)** provides that *„Every child has the right to acquire a nationality.”*
- **Article 20 of the American Convention on Human Rights (1969)** declares that: *1. „Every person has the right to a nationality. 2. 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. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.”*
- **Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (1979)** provides for women's nationality rights, by providing that: *1. „States Parties shall grant women equal rights with men to acquire change or retain their nationality...” 2. „States Parties shall grant women equal rights with men with respect to the nationality of their children.”*
- **Article 7 (1) of the Convention on the Rights of the Child (1989)** claims: *„The child shall be registered immediately after birth and shall have the right to acquire a nationality...”*
- **Article 4 of the European Convention on Nationality (1997)** remains crucial in the European context, providing that *a. „Everyone has the right to a nationality;” b. „Statelessness shall be avoided”; c. „No one shall be arbitrarily deprived of his or her nationality;” d. „Neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.”*

- **Article 18 (1) of the Convention on the Rights of Persons with Disabilities (2006)** claims that "*States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities: a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability.*"
- **Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (2010)** affirms that „*Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.*"

The rights of stateless persons are specifically set out in the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, however, none of them mention stateless persons' right to a nationality, notwithstanding their objective to provide stateless persons with the protection inherent to a nationality. Looking at Europe, although the European Convention on Human Rights does not mention the right to a nationality either, it does proclaim that the protected rights should be granted to all persons residing in the territory of CoE Member States, thereby attributing less importance to nationality. This may also imply the gradual decoupling of rights only reserved to citizens.

The substantial human rights progress thus resulted in the removal of human rights from domestic jurisdiction. Despite of this development, Ganczer emphasizes that the right to a nationality as a human right remains affected by the fact that nationality matters continue to be subject to the *domaine réservé*.¹²³ She explains that the regulation of statelessness through the international instruments mentioned beforehand resonates with the interests of states, and even the wording of these documents remains vague allowing states to retain the regulation of nationality within their domestic regulation. Consequently, the right ensured on the international level is may be thus rendered meaningless in practice.¹²⁴ Ganczer finds that the primary shortcoming of the fundamental right under discussion lies in the fact that relevant documents mostly do not indicate the state that bears the obligation to provide the individual

¹²³ Ibid. p. 15.

¹²⁴ Ibid.

with a nationality which allows states to pass on the responsibility and obligation of providing a nationality to an individual.¹²⁵

States as guarantors of *nationality rights* provide their nationals, as recognized members of their society, a wide range of political, economic, social, and cultural rights. These rights include the unconditional right to enter and reside permanently in the territory of the country of nationality and to return to it from abroad at any time, as well as the right to benefit from state protection within the territory of the state of nationality, and outside of it, enjoying access to consular assistance and diplomatic protection. To give a regional example to illustrate the implications of the lack of a nationality, stemming from the denial of the automatic grant of nationality in the case of long-term permanent residents, non-citizens have no electoral rights, precisely because their countries of long-term permanent residence decided not to recognize them as constitutive members of their society. Consequently, from a human rights perspective equality and non-discrimination rights must be implemented in order for stateless persons and non-citizens not to be discriminated. As I argued earlier, statelessness should not undermine the individual's ability to enjoy other fundamental rights, enjoyed by citizens, including electoral (political) rights.

4. 3. 1. CASE STUDY: STATELESS PERSONS' RIGHT TO WORK

As outlined in this thesis, the right to a nationality is often viewed as the right to have other basic human rights, including the right to work which forms the basis of self-reliance. This subchapter therefore seeks to provide a practical example of what kind of difficulties stateless persons generally face when trying to realize their fundamental right to work in Europe.

Theoretically, the right to engage in work has been viewed as a basic human right¹²⁶ and an important element of human dignity. Nonetheless, stateless individuals' access to and enjoyment of basic civil, political, economic, social and cultural rights are often impeded, and the right to work is no exception from this ascertainment. In terms of work, in the absence of an effective nationality, stateless persons face almost insurmountable difficulties in obtaining

¹²⁵ Except the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child which compel the state of birth to provide nationality by applying the *ius soli* principle. See: Ganczer 2015 p. 30.

¹²⁶ The right to work is proclaimed by Article 23(1) of the Universal Declaration of Human Rights, as well as in Article 15 of the Charter of Fundamental Rights of the European Union. In addition, women's right to engage in decent work on an equal footing with men is further enshrined in Article 11 (1) of the Convention on the Elimination of All Forms of Discrimination against Women.

legal employment. Stateless persons, often lacking recognition in the absence and/or severe shortcomings of determination procedures are greatly excluded from the formal labour market and therefore obliged to work illegally. Thus, stateless persons are employed notably in the secondary labour market characterized by lower paying salaries, also less unionized, few career opportunities, and typically insecure employment with precarious working conditions. This leaves them highly vulnerable to human trafficking, prostitution, and hinders them from building self-reliance in the host society. This is particularly the case for female stateless persons, as it will be exemplified in the second part of this subchapter.

Even though Article 17 of the 1954 Convention acknowledges stateless persons' right to wage-earning employment, in the absence of permanent statelessness determination procedures, it remains a challenge to identify stateless persons which would be a precondition to obtain a residence permit which is generally the key document to be legally employed in EUMS. The problem lies in the challenge that even recognized stateless persons do not have an automatic right to stay in the country that carried out their status determination and their access to the labour market in EUMS greatly depends on the type of residence permit which they receive. This can put stateless persons who are not able to obtain a residence permit in a legal vacuum. Additionally, in most cases labour market access is granted under the same conditions as to third-country-nationals¹²⁷ which does not reflect on the myriad vulnerabilities of stateless persons. Nevertheless, to mention good practices, in Italy, Spain and the UK stateless persons have unimpeded access to the labour market.¹²⁸

In the absence of statelessness determination procedures in Europe, stateless persons are greatly excluded from the formal job market (in similar way as unrecognized asylum-seekers) and typically work under the table which makes them extremely vulnerable to exploitation. Their recognition as stateless persons through a dedicated procedure would therefore be essential to their protection. Nevertheless, their lack of recognition due to the absence of identification mechanisms throughout Europe and their illegal stay may not constitute a reason for denying their unimpeded access to the labour market. In addition, stateless persons'

¹²⁷ Nevertheless, in accordance with Article 67(2) TFEU, stateless persons shall be treated as third-country nationals in the European Union.

¹²⁸ EMN Inform on Statelessness in the EU, 2016, available at: <https://www.emnluxembourg.lu/wp-content/uploads/2016/11/EMN-Inform-Statelessness-in-the-EU.pdf>. (accessed 6 May 2018)

right to work in Europe should be guaranteed better under the European Social Charter which mentions stateless persons in its Appendix as follows:

“Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favorable as possible and in any case not less favorable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable to those stateless persons.”

Therefore, stateless persons should be treated equally with nationals and with nationals of other Contracting Parties relating to issues covered by the Social Charter, including *education, labour legislation, fiscal charges and access to courts.*¹²⁹ In contrast, stateless persons are generally granted a limited number of *family benefits, social security, social and medical assistance*, as well as other *basic social rights, including family benefits* in European countries.

4. 4. STATELESSNESS AND GENDER-BASED DISCRIMINATION

*Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.*¹³⁰

As mentioned in Chapter 2, there are sporadic discussions relating to the *gender-related aspects of statelessness* in the EU context which might be the case because in contrast to the emergence of statelessness stemming from gender-biased nationality laws prevalent in approximately 50 countries around the world today, such nationality laws are not the main cause of statelessness in Europe.

¹²⁹ European Social Charter European Committee of Social Rights Conclusions XX-2 (2013) General Introduction, January 2014, pp. 9-10.

¹³⁰ CEDAW, General Recommendation No. 19: Violence against Women, 1992, para. 11.

Also, as a severe shortcoming of the UN statelessness conventions to be discussed in Chapter 6, none of the two UN statelessness conventions include provisions prohibiting non-discrimination on the basis of sex or gender which affect European policy-makers as well, choosing not to consider the particular vulnerabilities of female stateless individuals. Nonetheless, I consider that a gender-based approach would be instrumental also in the European context. I find that the consistent approach and prioritization of gender equality must be prevalent not only in terms of nationality legislation but also in the implementation of the right to a nationality and the enjoyment of rights linked to a nationality, reflecting on the particular vulnerabilities of certain groups, including women and girls. The fact that in addition to their vulnerabilities stemming from the lack of an effective nationality, stateless women face further vulnerabilities inherent to their womanhood, whereby they are more exposed to gender-based violence, human trafficking and prostitution which not only violate their right to bodily integrity but also greatly hinders their social inclusion in the host society. In the absence of gender-based considerations, policy-makers fail to reflect on major factors which may contribute to perpetuate gender inequalities in certain overlooked areas, such as the employment of stateless persons in Europe.

In the following lines, I will reflect on some of my key findings on the issue identified in my article *Empowering Refugee and Stateless Women through Targeted Measures of Labour Market Integration: NGO efforts in Hungary, published by the Institute for Cultural Relations Policy on the International Women's Day in 2018*.¹³¹

Rendering migrant, refugee and stateless women active members of the workforce has been considered to be one of the main tools to enhance their social inclusion in the host society.¹³² Yet, they generally face more difficulties than refugee and stateless men in situations where they seek to be engaged in the formal labour market in many EUMS even in case they were recognized as beneficiaries of international protection (refugees, beneficiaries of subsidiary protection and stateless persons). This gender gap may be apparent in the outcomes of labour

¹³¹ Katalin Berényi (2018): *Empowering Refugee and Stateless Women through Targeted Measures of Labour Market Integration: NGO efforts in Hungary*, Human Rights Issues Series entitled 'Women's labour rights and employment perspectives in Europe', pp. 37-42. Institute for Cultural Relations Policy (ICRP), Budapest.

¹³² France Terre d'Asile, 2006, *Insertion des réfugiés statutaires: une analyse des parcours professionnels*. [online] Available at: http://www.france-terreasile.org/images/stories/publications/pdf/CduS_11-vweb-finale.pdf. (accessed 6 May 2018)

market integration statistics between male and female (stateless) refugees, adding to the already existing gender gap among the native-born population in employment rates.¹³³

Consequently, female refugees and stateless persons demonstrate significantly worse labour market outcomes, with special regard to the short and medium terms which might be partially explained by certain cultural aspects, such as the generally lower participation rates of women in their home countries.¹³⁴ Refugee, asylum-seeking, stateless, as well as economic and family migrant women are often employed in the domestic services sector, for instance, childcare, care for the elderly, and household cleaning.¹³⁵ As mentioned above, they are also more vulnerable to human rights abuses, also those affecting especially women, such as gender-based violence. Therefore, receiving states must make it a priority to help them to engage in meaningful, decent and safe employment to empower them.¹³⁶ For all these reasons, it may be suggested that an enhanced gender-based approach should be integrated into labour market policies with a view to successfully engage refugee and stateless women in legal employment by means of specific measures tailored to their needs beyond the generally applied labour market policies. Consequently, appropriate needs-based, individualized support services, mentoring and group sessions should be put in place seeking to promote their integration into the labour market and to enhance their social inclusion in the host country.¹³⁷

SUMMARIZING THE RESULTS

To conclude, all *de iure*, *de facto*, *in-situ* and *migrant* stateless persons face numerous vulnerabilities and often insurmountable challenges in their daily lives which greatly affect their human experience. Therefore, it would be key to address the shortcomings of these categorizations and provide a more inclusive definition of *de iure* stateless persons which would help to better protect the *de facto* stateless persons. This new definition of *de iure*

¹³³ Barslund, Mikkel; Di Bartolomeo, Anna; Ludolph, Lars (2017): Gender Inequality and Integration of Non-EU Migrants in the EU. CEPS, Policy Insights – Thinking ahead for Europe, 2017/06.

¹³⁴ Regina Konle-Seidl; Georg Bolits (2016): Labour Market Integration of Refugees: Strategies and good practices. Edited by European Parliament. Policy Department A: Economic and Scientific Policy. Brussels.

¹³⁵ Sansonetti, Silvia, 2016. Female refugees and asylum seekers. The issue of integration. Women's Rights and Gender Equality. Edited by European Parliament. Policy Department C: Citizens' Rights and Constitutional Affairs. Brussels.

¹³⁶ Katalin Berényi (2018): Empowering Refugee and Stateless Women through Targeted Measures of Labour Market Integration: NGO efforts in Hungary, Human Rights Issues Series entitled 'Women's labour rights and employment perspectives in Europe', pp. 37-42. Institute for Cultural Relations Policy (ICRP), Budapest, p. 38.

¹³⁷ See good practices implemented in Hungary in this regard: *ibid*.

statelessness should indeed reflect on the notion of effective nationality which lies at the center of the statelessness challenge.

Stateless individuals' access to the enjoyment of basic civil, political, economic, social and cultural rights is often impeded. In the lack of an effective nationality, stateless persons face extreme difficulties when they strive to engage in legal employment. Stateless persons, often lacking identity documentations, as well as recognition as stateless persons, are largely excluded from the formal labour market and are thus obliged to work illegally. This leaves them very vulnerable to destitution and human rights violations, especially stateless women who face multiple vulnerabilities as they are more exposed to gender-based violence, human trafficking and prostitution impeding them from becoming self-reliant in the host society. To this end, stateless persons should be provided with unimpeded access to the labour market in all EUMS without having to obtain a residence permit and irrespectively of their formal recognition as stateless persons or irregular legal status. In terms of stateless women's work prospects in EUMS, I found that individualised support services, mentoring and groups sessions may be powerful tools to integrate them successfully into the job market in Europe which would also promote equal opportunities for stateless women which would contribute to enhance gender equality and women's rights in Europe.¹³⁸

CHAPTER 5: STATELESS POPULATIONS IN EUROPE

INTRODUCTION

This section aims to explore the many faces of statelessness in Europe in light of the underlying historical reasons and contemporary challenges relating to statelessness in Europe which shall serve as a basis for the later proposed solutions to tackle the region-specific challenges of statelessness. To this end, first the unprecedented quasi-legal status of non-citizenship, apparent predominantly in the Baltic EUMS, shall be reviewed and compared to statelessness. Then the intergenerational issue of Romani statelessness prevalent in countries of Western Europe, as well as in Southeast Europe, especially in the Western Balkans, shall be explored (also from a gender perspective) and its advocacy potential will be analyzed in the context of EU enlargement. At the end of the section, in an attempt to flag the relevance and the European implications of gender-discriminatory nationality laws and practices in third countries, and to present the nexus between statelessness and the past

¹³⁸ Ibid.

refugee crisis in Europe, the particular case of stateless asylum seekers shall be explored. Although this thesis primarily focuses on the treatment of non-refugee stateless persons in the territory of the European Union, I deemed it necessary to reflect on such coherencies in order to provide a full picture of the regional context of the research subject.

5. 1. BACKGROUND

Statelessness may emerge due to diverse circumstances, in Europe this man-made problem arose predominantly as a result of state dissolutions, following the breakup of Yugoslavia, Czechoslovakia and the Soviet Union. Many of those who left the former federal states were left without the nationality of an existing state. They possessed personal documents which identified them as citizens of countries which ceased to exist. Therefore, although they settled in European countries which then became Member States of the EU and have been living there for decades, they possess no identity documents and no citizenship which would substantiate their bond with these states. As a result, thousands of non-nationals in Europe live in the legal limbo implied by the definition of statelessness. Non-nationals and stateless people are living on the margins of mainstream society in Europe, extremely vulnerable to human rights violations and remain unable to participate in society in numerous ways. From generation to generation they have minimal access to education, health care, and to work in their country of long-term permanent residence. Statelessness therefore continues to persist in Europe as a highly hidden and intergenerational phenomenon despite of all the existing international human rights instruments.

The mass statelessness or non-citizenship of Russian-speaking ethnic minorities in successor states of the Soviet Union is viewed as a form of ethnic discrimination¹³⁹ to take revenge and repress the former citizens of the USSR stripping them of nationality, whereas stateless Roma and other national minorities were fleeing racism and nationalism in the successor states of the Socialist Federal Republic of Yugoslavia looking for shelter in other European countries. During the Bosnian War and following the collapse of Tito's Yugoslavia, fueled by hatred against certain ethnic minorities, including Romani people who needed to flee their countries of long-term residence in order to survive and get a chance to lead a meaningful life in another country. To give an example, in 1991 in the newly established Slovenia ethnic

¹³⁹ Alexander Gaponenko, Vice Speaker of the Parliament of the unrepresented, Latvia, The mass statelessness in Latvia, as a form of ethnic discrimination, speech at the OSCE Parliamentary Assembly, October 2013, available at: <http://www.osce.org/odihr/106318?download=true>. (accessed 6 May 2018)

discrimination targeted mainly persons of non-Slovenian ethnicities of the former Yugoslav Republic who were ‘erased’ from all official registers and, similarly to the Baltic states, were subject to very restrictive ethnicity-based nationality laws. The affected individuals were deprived of their legal residency status and crucial social benefits inherent to it relating to housing, employment, facilitated access to nationality, pensions and access to higher education. The newly established government granted citizenship to approximately 170,000 residents who were citizens of other republics of the SFRY before the disintegration of the federal state. Nonetheless, around 30,000 individuals residing in Slovenia (originating from other parts of the former federal republic) were removed from the new country’s registry of residents in February 1992.¹⁴⁰ This state measure of positioned nation-building in a situation of state succession put many former residents of Yugoslav Republic ethnicity (other than Slovenian) at high risk of statelessness (they did not become formally stateless though). Although there was a short period of time when non-Slovenian residents could apply for citizenship, this opportunity was not publicly communicated, nor were the affected individuals informed about the potential consequences of not applying within this brief period of time (consequences of statelessness).¹⁴¹ Therefore, the impact of statelessness deriving from state disintegration or ethnic discrimination persists in several EU Member States today but the situation is particularly urging in the successor states of the former Soviet Union which are now Member States of the EU (Latvia, Estonia) and countries of the ex-Yugoslavia all aspiring to obtain EU-membership.

In addition, during the recent refugee crisis, European immigration officers often face the particular yet confusing case of stateless people seeking asylum in Europe. Consequently, stateless persons regularly face long periods of immigration detentions waiting to be recognised as persons in need of international protection. As it will be explained, although stateless refugees are protected under the 1951 Refugee Convention, the implications of their statelessness stemming from the gender-discriminatory nationality laws in the MENA region are apparent in Europe. This is because in the absence of a country of nationality and documental evidence of an effective bond between the individual and a state, their readmission to their country of residence (where they might have been born and lived all their

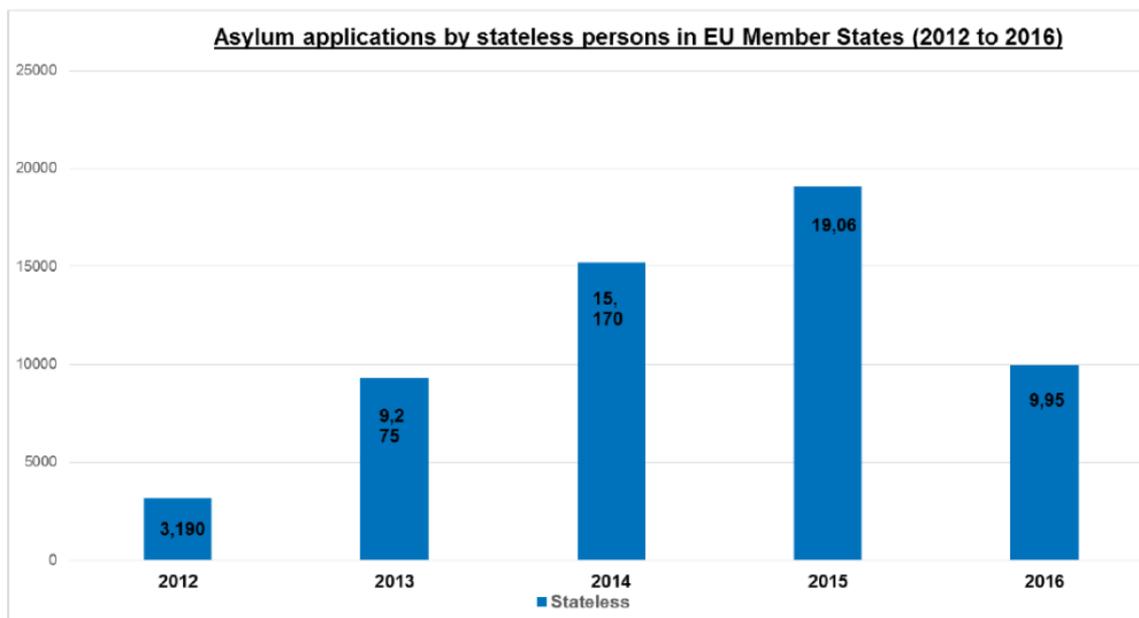
¹⁴⁰ See: UNHCR urges Slovenia to resolve the problem of its “erased cases.” Available from: <http://www.unhcr.org/news/latest/2007/2/45e3058d4/unhcr-urges-slovenia-resolve-problem-its-erased-cases.html>. (accessed 6 May 2018)

¹⁴¹ Ibid.

life prior to their departure) shall be a difficult, if not impossible endeavor for the EU after the restoration of peace in the countries now affected by conflicts.

Figure 2: Asylum applications by stateless persons in EUMS (2012-2016)

Annex 1: Asylum applications by stateless persons in EU Member States (2012 to 2016), source: eurostat.



Source: Eurostat

5. 2. NON-CITIZENSHIP IN THE BALTIC STATES OF LATVIA AND ESTONIA

*My main findings relating to non-citizenship set out extensively in this subchapter are going to be published in the upcoming issues of the **Cultural Relations Quarterly Review**, entitled „Non-citizenship in the EU: Irrelevant, a driving force for displacement or a pretext for intervention?” and of **Acta Humana Human Rights Publications**, entitled „Realising non-citizens’ right to a nationality” both in May 2018.*

A vast majority of reported stateless persons in the EU reside in the successor states of the USSR, mainly in Latvia and Estonia.¹⁴² The Baltic States became members of the United Nations in September 1991, subsequent to the cessation of the USSR in December of the same year; therefore, the Baltic States cannot be literally considered the successor states of the USSR. The Baltic States were the only three members of the United Nations that did not regain independence immediately after World War II. In 2004, Estonia and Latvia became Member States of the EU with a considerable Russian-speaking minority population who were forced to settle down in the former Baltic republics of the USSR. The Russophone community lacking an effective nationality following the disintegration of the Soviet Union constituted a quarter of the Latvian and Estonian populations at the time of EU accession.

This is due to the fact that after the split of the USSR, the Soviet citizenship lost legal effect which was not resolved by the acquisition of Latvian/Estonian nationality once independence was restored in these countries, instead interwar nationality laws were re-introduced based on the principles of *ius sanguinis* and legal continuation. Accordingly, persons who were not descendants of those who were citizens of Latvia and Estonia prior to World War II had to apply for naturalisation in order to obtain the citizenship of the newly established states. Thus, former USSR citizens and their descendants were not entitled to acquire the nationality of the newly established countries which were their long-term residence at the time of independence in 1991. This situation was perpetuated by the introduction of the status of non-citizenship, a controversial civic/legal status which constituted an unprecedented phenomenon in international law. Even though it was meant to be a temporary measure to address the situation of Russophones, a quarter century later, in Latvia 12 % of the total population, while in Estonia approx. 6 % of the population endure their life without the protection and benefits inherent to an effective nationality, in countries which are Member States of the European Union.

¹⁴² Estonia and Latvia joined the European Union with a very high percentage of mostly Russian-speaking non-citizens. Based on data provided by the Population and Housing Census in 2000, citizens of Latvia presented only 74.5 % of the total population, while in Estonia 79.9% of the population, meaning that at the time of adherence to the EU, approximately a quarter of the population of these countries were persons whose nationality has not been determined. Source: Provisional Results of the 2000 Census Population Census (2002), Central Statistical Bureau of Latvia, Riga., Statistical Yearbook of Estonia (2003), Statistical Office of Estonia, Tallinn., Statistical Yearbook of Estonia (2003), Statistical Office of Latvia, Riga.

5. 2. 1. HISTORIC BACKGROUND AND PERSISTING IMPLICATIONS OF NON-CITIZENSHIP

Following the collapse of the USSR in 1991, Latvia and Estonia regained its independence and restored extremely strict citizenship laws, leaving the sizeable population of Russian settlers inherited in the situation of state succession without a citizenship. Even though they resided legally in the successor states, Latvia and Estonia did not recognize the USSR settlers neither as citizens, nor as stateless persons but rather as individuals belonging to a new category in between citizens and the stateless.¹⁴³ In terms of state succession, both Latvia and Estonia chose to retain the legal personality of the states that, *de facto*, lost their independence in 1940 as a result of occupation by the USSR, instead of acquiring new international legal personality. This is based on the principle of *ex iniuria ius non oritur*, i.e. that illegal actions cannot create legal situations, invoked by Latvia and Estonia with regard to the Soviet occupation which they considered illegal.¹⁴⁴ Based on this consideration, the Baltic States of Latvia and Estonia re-established the inter-war republics and claimed that all events that occurred during the Soviet occupation were illegal. The choice of legal continuity had particular implications on the re-establishment of inter-war citizenship laws based on which a large proportion of the Russian speaking population of these countries fell within the vague category of non-citizenship. Although it was initially established on a temporary basis to reflect on the particular issue of former USSR settlers, the situation of non-citizens remains an unresolved issue which has been subject to broad policy debates within the Baltic societies, as well as in the international community.

¹⁴³(1) As an integral part of the restoration of independence and state-building, the *Non-Citizenship Law* was passed in 1991 which created a new legal category of people in Latvia, called the non-citizens. Further to the non-citizenship law, later in 1995 further legislation was made precisely with the aim of reflecting on the particular situation of former USSR citizens who were not eligible for automatic acquisition of Latvia's citizenship (the non-citizens). The law *On the Status of those Former USSR: Citizens who do not have the Citizenship of Latvia or that of any Other State* was adopted under which citizens of the former USSR who are not citizens of Latvia or any other country are considered neither citizens, nor foreigners, nor stateless persons in Latvia. A great proportion of the large Russian speaking population of the country falls within this vague category of non-citizens, unprecedented in public international law. Very importantly, persons who are non-citizens may not acquire the status of a stateless person under any circumstances in light of section 3(2) of the Latvian law on stateless persons.

(2) In case of Estonia's non-citizens, the core legal Act regulating the foundation of the non-citizens' status in Estonia is the Law on Aliens adopted in 1993. The law refers to both citizens of foreign states and stateless persons as 'aliens'. The Estonian legislation makes no distinction between these two categories of non-citizens. The other key statute is the Law of Refugees, which was adopted in 1997, in the same year as Estonia signed the Convention relating to the Status of Refugees of 1951 and its Protocol of 1967. The amendments to the Law on Refugees of 2003 harmonised Estonian asylum procedures with the relevant EU legislation. The Law on Granting International Protection to an Alien was adopted in 2006.

¹⁴⁴ Hellborg 2015. p. 7.

Non-citizenship is unprecedented in public international law, and therefore cannot be easily understood in the context of other legal status, including stateless persons, considering the extensive rights attributed to them which do not comply with those generally attributed for stateless persons outside of Latvia and Estonia. Thus, non-citizens cannot be seen neither as citizens, nor as stateless persons but rather as *individuals with a specific legal status, as beholders of extensive rights and international liabilities* which suggest a partially acknowledged and effective legal bond between the state and its non-citizens. Non-citizens are granted the right to acquire a travel document, to reside in the Baltic States without visa or residence permit (the right not to be expelled), to return, to have diplomatic protection abroad, to obtain Latvian citizenship through naturalization, as well as they benefit from almost the same social guarantees as Latvian citizens with regard to pensions and unemployment benefits. They are exempt from military service. In addition, non-citizens have been also granted the right to preserve their native language and culture provided that it is in line with national law. The ethno-national identity of modern Estonians, Latvians and Lithuanians was constructed primarily through the language; therefore, ethnicity and language remain the main grounds for discrimination in the Baltic States.¹⁴⁵

On the other hand, non-citizens do not benefit from long-term mobility and are precluded from participating in political life, hence, decision-making at the national level. This is based on the assumption that non-citizens constitute a potential threat to internal political stability, therefore, it is considered by the political leadership of these countries that non-citizens who do not wish to apply for naturalization should not be granted political influence generally associated with full citizenship. As a result, they enjoy no electoral rights; they can neither vote in national and EU Parliamentary elections, nor can be elected as members of parliament, government ministers, ombudspersons or MEPs. Hence, their opinion remains mostly hidden from national and European decision-makers. Non-citizens are also excluded from participating in referenda and forming political parties. They however have the chance to participate in public affairs to some extent through non-governmental organizations. To give an example, in 2012 the Latvian Non-Citizens Congress was founded, then in 2013 non-citizens formed the Parliament of unrepresented to protect and promote the interests of non-citizens and ethnic minorities living in the post-Soviet space.

¹⁴⁵ Zvinkliene 2006. p. 230.

Work-wise, non-citizens in Latvia and Estonia are excluded from occupying key professions both in the public and private sectors. Professions in the public sector which may be pursued solely by citizens range from civil servants, border control guards and judges to policemen. In the private sector non-citizens may not pursue a career as lawyers, notaries and employees of security services among other professions. Further differences between citizens and non-citizens persist in terms of property rights. For instance, in order to buy property non-citizens must obtain a special permit from the municipality. Non-citizens' access to certain types of property, such as land adjacent to border regions and lands that could be used for agricultural and forestry purposes is extremely limited. Also, non-citizens are entitled to a less share of privatized state-owned companies than citizens.¹⁴⁶

Consequently, it may be assumed that the social rights and benefits of non-citizens are very similar to those which are generally inherent to an effective nationality (potentially adding up to the enjoyment of a *de facto* citizenship) and therefore are not considerably different from those enjoyed by Latvian and Estonian citizens. Nonetheless, the substantial social benefits accorded to non-citizens in Latvia and Estonia do not indemnify non-citizens for their exclusion from key political rights and economic opportunities inherent to a (EU) citizenship. Non-citizenship is thus viewed as a tool used for historic retaliation against the former oppressors of the Balticum through the mass denationalization of ethnic Russians, regularly propagated by Russia in the international human rights arena. Non-citizenship has been associated with statelessness in the European context on many avenues as well. This perception is based on the assumptions that non-citizens and stateless persons face very similar practical difficulties in their everyday lives and that the Baltic States of Latvia and Estonia developed a unique, greatly politicized understanding of citizenship and statelessness. Latvia ratified both statelessness conventions which suggests considerable commitment to the protection of stateless persons and the reduction of statelessness, while Estonia has not signed or ratified any of the mentioned UN instruments on statelessness. Nonetheless, statelessness remains high on their political agenda which lies in the significant progress in terms of legislation and practice both in Latvia and Estonia.

¹⁴⁶ Sukonova 2016.

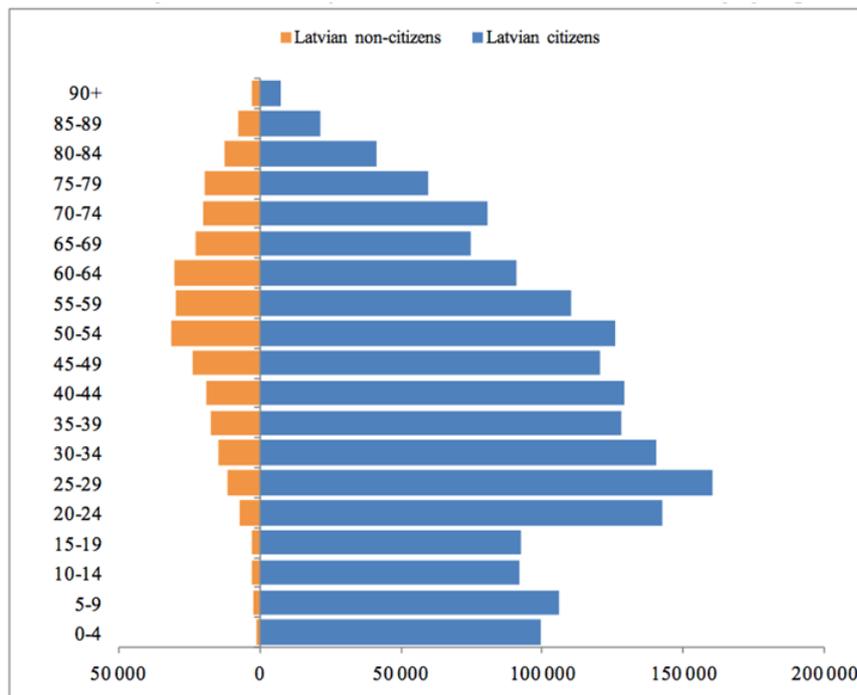
The definition of a stateless person provided by Article 1(1) of the 1954 Convention defines the term stateless person as „a person who is not considered as a national by any State under operation of its law”. This would propose to recognize non-citizens as stateless persons which the Baltic States refuse to do. Article 2 of the Convention limits its scope of application by providing that the Convention shall not apply to “*persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which attached to the possession of the nationality of that country.*” Further to this provision, Inga Reine argues that non-citizens are not to be considered as stateless persons. In case of Latvia, society consists of citizens, non-citizens, foreigners, stateless persons and refugees.¹⁴⁷

Consequently, when addressing the myriad vulnerabilities of persons without an established nationality, a clear distinction must be made between non-citizens and stateless, considering that non-citizens enjoy extensive rights as compared to stateless persons living in Latvia and Estonia. These countries have put in place statelessness protection mechanisms and their national legislation addresses the particular cases of stateless persons as a distinct group. For instance, Latvia established two distinct procedures for people without citizenship: one for stateless persons¹⁴⁸ and another procedure for non-citizens.

¹⁴⁷ Inga Reine (2007): Protection of stateless persons in Latvia, Seminar on Prevention of Statelessness and Protection of Stateless Persons within the European Union 26 June 2007 European Parliament Committee on Civil Liberties, Justice and Home Affairs.

¹⁴⁸ In the framework of the Latvian statelessness determination procedure, the applicant must file a written application and submit his/her personal identification document, birth certificate, certificate issued by a foreign competent authority that the person is not a citizen of the relevant State or a document proving that s/he cannot obtain this document and any other relevant document. After filing the application, the applicant is allowed to stay in the country. The burden of proof lies with the applicant, but in practice it is shared with the Office of Citizenship and Migration Affairs. The procedure is free of charge. The procedure is available to all stateless persons, not only to those who are legally resident in the country. In case the person has been detained because s/he is an irregular migrant without valid travel documents, the State Border Guard may assist by contacting foreign embassies to retrieve the necessary documents. A decision on granting or refusal to grant the status of a stateless person is made within three months of lodging the application. This time period may be extended up to one year. See: EMN Inform 2015.

Figure 3. Latvian citizens and non-citizens in 2014

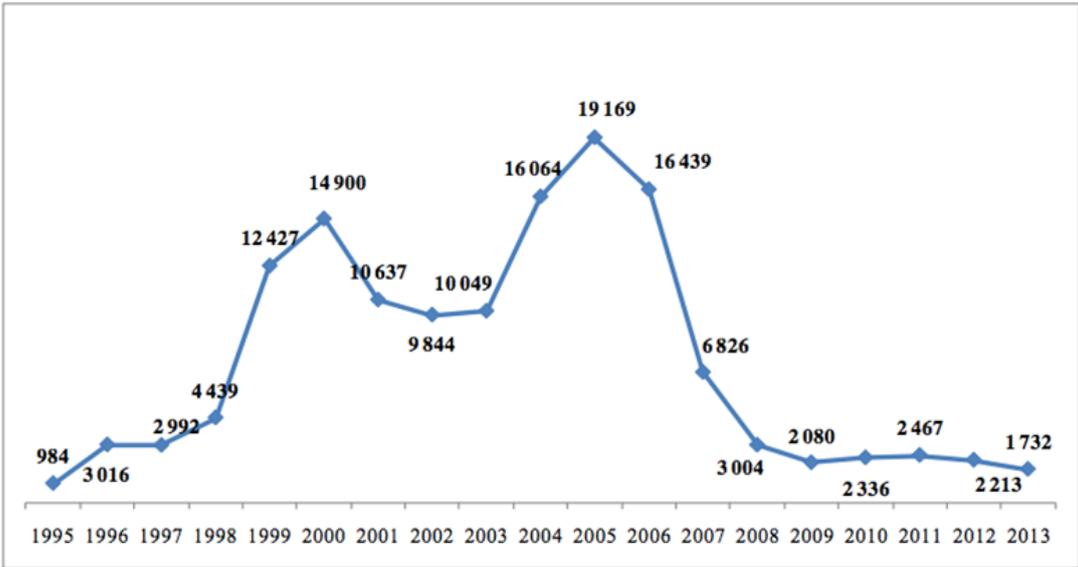


Source: statistics of Population Register collected by OCMA

Despite the fact that the citizenship laws of Latvia and Estonia allow non-citizens to become citizens through naturalization, for a long time the strict procedure greatly discouraged non-citizens from application. In addition to the regular requirements, the naturalization procedures greatly reflect on public concerns regarding the identity, loyalty and sense of belonging of former USSR citizens. For instance, in Latvia in order to apply the applicants must confirm that they have been permanent residents for at least five years, have a valid identity document, have proof of legal income, pay the application fee and sign a pledge to the state. After meeting these criteria, non-citizens apply for the naturalization procedure governed by the effective citizenship law. The procedure comprises a language exam, citizenship exams relating to the applicant's knowledge of the state's history, constitution and the national anthem. As an additional element, the applicant is also required to pledge allegiance to the state. In compliance with the objectives of the 1961 Convention, Latvia continues to encourage non-citizens to apply for citizenship both through legislative amendments facilitating naturalization and language tests while engaging in public awareness-raising campaigns. Measures promoting naturalization in Latvia with special regard to children resulted in increased naturalization rates over the course of the past years. Nonetheless, considering the long-established ties of non-citizens with their country of long-

time residence, further compelling non-citizens to apply for recognition as citizens through a naturalization procedure may not seem to be necessarily appropriate in light of the societal progress achieved in Europe and in the EU, in parallel to the advancement of the human rights agenda in this region. Latvia and Estonia should therefore grant automatic citizenship to non-citizens with due regard to their long-established ties to these countries without having to apply for it, facilitating their full integration into mainstream society.

Figure 4. Rates and dynamics of the naturalization process in Latvia (1995-2013)



Source: statistics by OCMA on naturalisation

According to the latest population census, there were 252,017 non-citizens in Latvia at the beginning of 2016 which made up 11.85% of the population,¹⁴⁹ meaning that one out of ten individuals still have no established nationality in Latvia. According to the Citizenship and Migration Affairs Office, there were 242,560 non-citizens in Latvia in early 2017. These numbers signify a great progress in light of earlier population censuses. After the introduction of the restrictive nationality law in 1991, there were approximately 720,000 non-citizens based on the population census made in 1995 when the naturalization process began. In light of Figure 4, the percentage of non-citizens has decreased each year since the 1990s. In light of the population census carried out twenty years after the introduction of the restrictive

¹⁴⁹ Population Register of Latvia, available at: http://www.pmlp.gov.lv/lv/assets/documents/statistika/IRD2016/ISVP_Latvija_pec_VPD.pdf. (accessed 6 May 2018). In 2018, based on the World Population Review, there are about 290,000 non-citizens in Latvia which represents 14% of the population. Available at: <http://worldpopulationreview.com/countries/latvia-population/>. (accessed 6 May 2018)

nationality law in 2011, there were approx. 300,000 non-citizens living in Latvia, representing 14% of all Latvian residents,¹⁵⁰ suggesting that the number of non-citizens dropped by more than half since the restoration of independence. This suggests a slow-paced but overall positive societal change within the Latvian society regarding the inclusion of the younger generation of the Russian-speaking population.

Table 2. Population of Latvia by Citizenship at the Beginning of the Year

	1999	2000	2011	2012	2013	2014	2015
%							
TOTAL	100.00	100.00	100.00	100.00	100.00	100.00	100.00
Citizens of Latvia	73.33	74.40	83.48	84.14	84.42	84.77	84.97
Non-citizens of Latvia	25.68	24.44	14.30	13.48	13.22	12.67	12.20

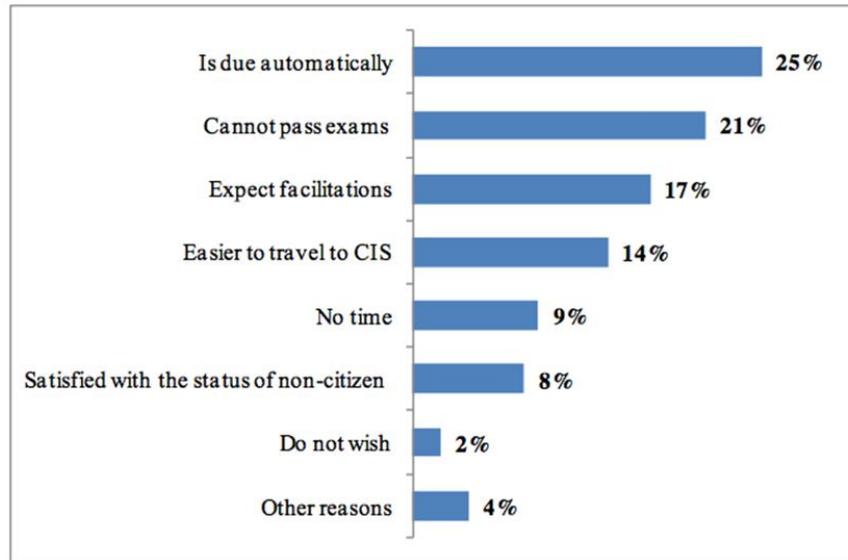
Source: Central Statistical Bureau of Latvia

Notwithstanding the attempts to decrease the number of non-citizens in the post-Soviet space, these measures did not prove to be sufficient to encourage older non-citizens (who constitute the majority of the non-citizen population according to Figure 3 to apply for naturalization. This suggests that the older generation of non-citizens attributes less importance to the acquisition of citizenship today than when independence was restored in 1991.¹⁵¹ This may be potentially explained by the underlying context that back in 1991 the newly (or re-established) nationality law prohibited dual citizenship, leaving Russian-speaking non-citizens in the dilemma of having to choose between applying for citizenship in Russia, making their status uncertain in their place of residence in Latvia and Estonia or in Estonia/Latvia breaking ties with their motherland Russia. During this time, Moscow provided passports to ethnic Russians living in the Baltic States to facilitate travel arrangements for fellow ethnic Russians stuck beyond the borders of the newly established Russian Federation.

¹⁵⁰ In light of the population Census in 2011, there were 290,660 non-citizens living in Latvia, representing 14.1% of all Latvian residents. Available at: <http://www.csb.gov.lv/en/statistikas-temas/population-census-2011-key-indicators-33613.html>. (accessed 6 May 2018)

¹⁵¹ According to the results of *Integration Monitoring 2008*, a study synthesized based on interviews with ethnic Russian non-citizens conducted in Estonia offered the following explanations for the indifference of non-citizens towards naturalisation. 1) difficulties in learning the Estonian language; 2) disinclination to apply for citizenship based on the shared consideration that they should have automatically been granted citizenship after independence was restored in Estonia; 3) preferring Russian citizenship due to better travel and business opportunities; 4) minor importance of the lack of Estonian citizenship in everyday life. See more: Vetik 2008.

Figure 5. Reasons for not applying to obtain Latvian citizenship, 2012



Source: Office of Citizenship and Migration Affairs (2012) *Coefficient and disturbing factors for obtaining Latvian citizenship*

As long-term permanent residents and as such eternal beholders of the right to reside in Latvia and Estonia, I argue that non-citizens should automatically, without having to go through the naturalization procedure, be granted citizenship at birth and at a later stage in life on equal terms with Latvian and Estonian citizens. This would subsequently entail the accordance of the same political rights and economic opportunities as Latvian and Estonian (EU) citizens and would constitute an official acknowledgement of their belonging which would also mitigate Russia's influencing power in the EUMS of the Balticum by encouraging them not to remain in their country of long-term residence.

5. 2. 2. NEXUS BETWEEN NON-CITIZENSHIP AND STATELESSNESS

The lack of an effective nationality (*de facto* statelessness) generally excludes a person from the protection of a state and a wide range of rights and benefits inherent to a nationality. Therefore, a person who is not considered as a national by any state will find him/herself vulnerable to further human rights violations. Considering that having the right to a nationality is essential to the enjoyment of *other basic human rights*, statelessness or the lack of an effective nationality directly intersects with other human rights, while constituting a human rights violation in itself, violating the right to a nationality. Statelessness can arise both in a migratory and non-migratory context. Some stateless populations in a non-migratory context remain in their "own country" of long-term residence and may be referred to as *in situ*

populations.¹⁵² Based on the context of non-citizenship in the Balticum, non-citizens may be viewed as in-between *in-situ* and *de iure* stateless persons. As mentioned beforehand, non-citizens in the Baltic States enjoy extensive rights and benefits (*de facto* citizenship), except in terms of political rights and economic opportunities which *per se* may provide a reason for non-citizens to leave the country. This is mainly because not having the chance to engage in the political and public life of the country where they reside permanently for decades, without having to apply for naturalization, entails their sense of exclusion from decision-making and estrangement from society. On the other hand, due to the fact that Russian-speaking non-citizens live literally on the margins of society (mostly close to the Russian border) they neither have the financial means, nor meaningful everyday contact with native speakers to develop proficiency in the Latvian and Estonian language.

Therefore, they are subjected to discrimination in the job market in their country of long-term residence and are therefore doomed to work under the table earning significantly less than citizens. In the absence of job opportunities, they often move to countries irregularly where they can earn a better living. While Latvian and Estonian citizens may benefit from free movement, also in terms of employment as EU citizens, non-citizens cannot work in other EUMS on an equal footing as citizens. Persons living in Latvia and Estonia holding non-citizen passports can travel visa-free to the European Economic Area, including EUMS (except to the UK and Ireland),¹⁵³ as well as to the Russian Federation only for short trips not exceeding 90 days within a period of 180 days and they need a visa to enter most third countries.¹⁵⁴ In practical terms this means that they cannot reside longer than 90 days in a foreign country, neither they can work abroad legally. This has proven to be a driving force for many to leave their country of long-term residence and work illegally in other EUMS,

¹⁵² UNHCR Statelessness Guidelines 2, paras 6-7.

¹⁵³ In case of Estonia, the non-citizen passport is often referred to as 'grey or alien's passport'. Following the adoption of the 1993 Aliens Act, the first 'grey passports' were issued to Estonian non-citizens starting from 1994. Accordingly, persons of undetermined status in Estonia are often referred to as 'holders of gray passports.' The so-called grey passport is officially named as the Estonian Alien's Passport which is a travel document that may be issued to persons who are stateless or of undetermined citizenship status residing in Estonia. The alien's passport can also be used as an identity document by the beholders. The majority of countries which provide visa-free entry to Estonian citizens with an Estonian passport do not allow visa-free entry to holders of the Estonian alien's passport.

¹⁵⁴ See the list of countries and the terms and conditions of visafree entry and stay which apply (1) for Estonian holders of alien passports, available from: <http://reisitargalt.vm.ee/kas-ma-vajan-viisat/>. and (2) for Latvian holders of non-citizens passports, available from: <http://www.mfa.gov.lv/en/component/content/article/369-domestic-news/4942-countries-to-which-latvian-passport-holders-may-enter-without-visa>. (accessed 6 May 2018)

especially in Sweden and Finland, as well as in the Russian Federation where non-citizens also benefit from long-standing family ties and their fluency in Russian.

Stemming from the absence of key political and economic rights and benefits, as mentioned earlier non-citizens may also lack crucial land and property rights which would be essential to challenge unfavorable urban or land redevelopment projects impacting their living space. In the absence of such rights, stateless communities may be denied access to legal remedies, as well as may not be provided with any resettlement allowance/assistance in such cases.¹⁵⁵ For all these reasons, the political and economic empowerment of non-citizens through the provision of additional rights and benefits enjoyed by Latvian and Estonian citizens, as well as EU citizens, shall be key to tackle the estrangement and undesired displacement of non-citizens.

Further to the definition of a stateless person, we must have due regard to Article 1(2) of the 1954 Convention as well when considering the nexus between non-citizenship and statelessness. This provision regulates the circumstances under which individuals who would otherwise comply with the definition of a stateless person are nonetheless excluded from the protection of the 1954 Convention. Article 1(2) lit. ii) provides that persons with respect to whom there are serious reasons for considering that they have committed:

- a crime against peace, a war crime, or a crime against humanity (Article 1(2) lit. ii a));
- a serious non-political crime outside the country of their residence prior to their admission to that country (Article 1(2) lit. ii b)); or
- acts contrary to the purposes and principles of the United Nations (Article 1(2) lit. ii c)), the protection of the 1954 Convention is inaccessible.

Driven by the assumption that non-citizens have been largely seen as former oppressors of the Balticum having committed unforgivable acts during the Soviet era in the eyes of the Latvian and Estonian political elite, Article 1(2) lit. ii may provide an explanation for the exclusion of non-citizens from the *ratione personae* and thus the protection of the 1954 Convention Relating to the Status of Stateless Persons. Nonetheless, the applicability of Article 1(2) lit. ii to this end may be broadly argued from a human rights point of view.

¹⁵⁵ Zara Albarazi; Laura van Waas (2016): Statelessness and Displacement, Scoping Paper, Tilburg University

5. 2. 3. POSITIVE IMPACT OF EU ACCESSION ON THE SITUATION OF NON-CITIZENS

The issue of non-citizenship translating into mass statelessness was also at the center of human rights debates preceding EU accession. Addressing the situation of non-citizens with a view to reducing statelessness initially constituted a human rights priority in the enlargement talks, but eventually was not adequately addressed in the final rounds of the accession negotiations. Due to internal pressures from EUMS, concessions were made relating to the case of non-citizens and both Latvia and Estonia joined the EU in 2004. Yet, the momentum of EU accession gave a significant impetus for both the Governments of Latvia and Estonia to address the situation of those without an established nationality living in their territory as permanent residents.

Further to the EU accession, in 2012 a referendum was initiated on the automatic grant of Latvian citizenship to non-citizens by the “For Human Rights in United Latvia” party but it was banned by the Central Elections Commission under the pretext of security reasons and insisting that it contradicted the principle of continuity guaranteed by the Latvian Constitution. Nevertheless, in order to reflect on the developments and expectations, the Saeima (Latvian Parliament) adopted the Amendments to the Citizenship Law in May 2013.

The Amendments predominantly aimed to extend the scope for dual citizenship in order to sustain ties with Latvian citizens settling down in other EUMS after EU accession, allowing having dual citizenship under certain circumstances. On the one hand, it aimed to extend the scope for dual citizenship in order to sustain ties with Latvian citizens settling down in other Member States of the EU, after the EU accession, allowing dual citizenship under certain circumstances. On the other hand, the amendments provided for the further simplification of citizenship acquisition and the naturalization process of non-citizens. The amendments provided that one parent’s consent is sufficient to register a newborn child whose parents are stateless or non-citizens as a citizen of Latvia at the time of the birth registration. Due to the amendments, the previous requirement for the parents to make a pledge of loyalty when registering citizenship of the child of a stateless person or a non-citizen was also removed. The amendments also provided that a child under the age of 15 that has not been registered as a citizen of Latvia at the time of their birth registration, can be registered as a citizen with an application submitted by one of the parents. On the basis of the Amendments the requirements touching upon the permanent residence of the applicant for the naturalization applicants was further simplified, removing the requirement for uninterrupted residence in Latvia.

Furthermore, the requirements of the Latvian language test in the naturalization procedure were standardized in a way to be in line with the requirements of the centralized language tests in educational institutions.

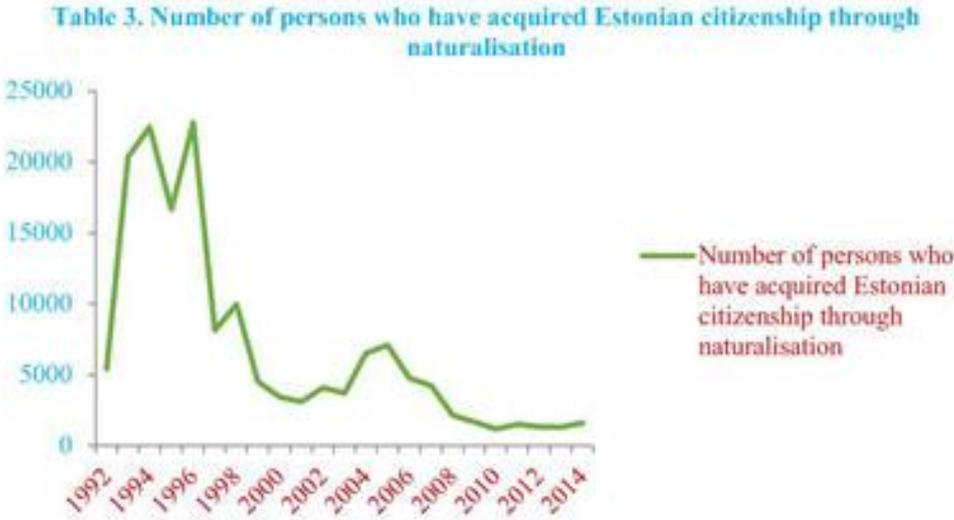
To sum up, non-nationals generally find the naturalization process rather lengthy and difficult. In light of the slow pace of naturalization of Russian-speaking non-citizens, the citizenship laws of Latvia have been amended several times to ease some of the application requirements of the naturalization procedure. Further to important amendments to the citizenship laws made since the EU accession, stateless children of non-citizen parents who were born after 1992 could acquire citizenship through a simplified procedure and non-citizen parents upon registration of their newborn can choose to register the child as a Latvian citizen but the Latvian citizenship is not given to non-citizens' children automatically upon their birth. Further to the emerging policy debates relating to non-citizenship, since late 2016 president Raimonds Vejonis has been advocating for the rights of non-citizens' newborn babies to acquire Latvian citizenship automatically at birth (unless the parents opt for the citizenship of another country). As the Latvian Parliament (Saeima) has not been interested in addressing this particular issue through the adoption of legislative amendments, president Vejonis decided to use his presidential power to initiate the adoption of the necessary legislation.¹⁵⁶ The draft law proposed by President Vejonis's sought the automatic grant of citizenship to all newborns in Latvia from June 2018, irrespective of the origins of the parents (whether they are citizens or non-citizens residing in Latvia). Notwithstanding the considerable number of supporters on behalf of the initiative (39 MPs out of the 100 MPs), the President's initiative was refused by the Saeima in September 2017.¹⁵⁷ This legislative development constitutes a significant setback in the eradication of non-citizenship; nonetheless, the initiative itself was an important step towards the eventual abolition of non-citizenship.

¹⁵⁶ Public Broadcasting of Latvia, June 2017.

¹⁵⁷ Public Broadcasting of Latvia, September 2018.

Similarly to Latvia, the Estonian Citizenship Act has been also amended several times to ease some of the application requirements of the naturalization procedure.¹⁵⁸ Building on the momentum of EU accession, in 2004 the waiting period for naturalization was reduced to six months and a simplified naturalization procedure was put in place for persons with disabilities. Stateless minors less than 15 years old who were born in Estonia after 26 February 1992 may also acquire citizenship through a simplified procedure in case both parents are stateless. This can be initiated by solely one parent, who has or have, by the time of submitting the application, legally resided in Estonia for not less than five years and who are not considered as citizens by any other state, including those with undetermined citizenship. Due to an amendment of the citizenship law made recently in 2016, newborns are automatically granted citizenship at birth unless their parents choose to opt out.

Figure 6: Number of persons who acquired Estonian citizenship through naturalization



Source: Official portal of Estonia (2015)

¹⁵⁸ For instance, the new Citizenship Act adopted in 1995 defined new criteria to be met by the applicant of the naturalisation procedure. In order to apply for naturalisation, the applicant must have been residing in Estonia before 1 July 1990 and possess a long-term or permanent residence permit at the time of submitting the application. The applicant must also (1) have a high proficiency in the Estonian language; (2) be at least 15 years old; (3) have a residence permit for at least eight years, at least five years permanently; (4) have knowledge of the Constitution and the Citizenship Act; (5) have permanent lawful income sufficient to support himself or herself and his or her dependents; (6) have a registered residence in Estonia; (g) be loyal to the state of Estonia; and, (7) take an oath of loyalty to the Republic of Estonia.

While the advantages of citizenship of an EU Member State might seem appealing, in light of Latvia's and Estonia's entry into the Schengen area in 2007 providing freedom of movement throughout Europe, also for permanent residents regardless of their citizenship (at least in theory), the importance of acquiring Latvian and Estonian citizenship has decreased. In addition, non-nationals generally find the naturalization process rather lengthy and difficult and consider the acquisition of Russian citizenship easier and more beneficial in terms of family life and business. Thus, the significant benefits associated with the acquisition of Russian citizenship, while simultaneously benefiting from residency in an EUMS have made naturalization less desirable for older non-citizens. Irrespective of the substance and technicalities of citizenship, unless Latvia introduces automatic citizenship for children of non-citizens at birth, non-citizenship continues to persist and each year a greater number of non-citizens shall opt for Russian citizenship, while other non-citizens permanently leave the country in pursuit of a better life.

In addition to the absence of crucial political rights and economic opportunities, other factors, such as foreign policy incidents or negative nationality policy shifts may also bring about the displacement of non-citizens.¹⁵⁹ To give an example, Latvia and Estonia may decide at some point (as a result of a foreign policy incident) to change its citizenship policy pertaining to the right to reside of a certain (stateless) group or the extent of entitlements of non-citizens. Such policy and/or legislative shift may directly result in the forced displacement, deportation or detention of those who have no established nationality within the state, therefore, are not adequately represented in political life and thus left out of decision-making, leaving them vulnerable to any arbitrary state measures. As a result of any similar measure, non-citizens may become internally displaced persons or even compelled to migrate to neighboring countries,¹⁶⁰ in the case of non-citizens, most probably to the Russian Federation.

Prior to the 2004 wave of EU enlargement, COM managed to make successful use of *conditionality*, making the perspective of EU membership for candidate countries conditional on the fulfillment of the Copenhagen (EU membership) criteria in full compliance with the enlisted political, economic and legislative criteria. Thereby, the EU managed to influence candidate countries' policy-making to an unprecedented extent, encouraging them to take

¹⁵⁹ Read more about the nexus between statelessness and displacement: Albarazi, van Waas (2016): Statelessness and Displacement, Scoping Paper. Available at: <https://www.nrc.no/globalassets/pdf/reports/statelessness-and-displacement.pdf>. (accessed 6 May 2018)

¹⁶⁰ Ibid. p. 15.

long-awaited measures and necessary reforms to eventually comply with the accession criteria.¹⁶¹ Having due regard to the positive legislative developments and policy debates brought about by the momentum of EU accession, I argue that the European Commission could have made even more sufficient use of its room for maneuver when it comes to the issue of non-citizenship at the negotiation table. In light of the wide support on the issue of eradicating non-citizenship in the Baltic States, I find that COM¹⁶² would have been well positioned to trigger further legislative amendments in Latvia and Estonia, potentially resulting in the automatic grant of nationality to all non-citizens, both for newborns and older non-citizens.

5. 2. 4. GEOPOLITICAL IMPLICATIONS OF NON-CITIZENSHIP IN THE EU CONTEXT

The Russian Federation has been advocating on behalf of their Russophone non-citizen compatriots residing in its *near-neighborhood* ever since the disintegration of the USSR. As I mentioned earlier, the Russian Federation issued passports to its compatriots who remained in the successor states of the Soviet Union, to maintain effective ties with them. In 2006, at the World Congress of Compatriots in St. Petersburg, in his opening remarks Russian President Vladimir Putin proclaimed that protecting Russian compatriots in the Balticum must be viewed as Russia's moral obligation.¹⁶³ This constituted a quite clear statement about the government position about Russia's involvement in the issue of non-citizenship with regard to countries of Russia's sphere of interest. Further to this statement, in 2008, a decree was issued which allowed holders of non-citizen passports who were born in the USSR before February 1992 to enter the Russian Federation visa-free. A decade later in 2017, the Russian Ministry of Foreign Affairs reaffirmed that all persons holding non-citizen passports (including those who were born after 1992) may now enter the Russian Federation without a visa and stay in the territory of Russia for not more than 90 days during each period of 180 days. This step constitutes a further gesture for Russian-speakers, however, does not provide more generous conditions than the Schengen rules which apply for third country nationals to enter and stay in the Schengen zone.

¹⁶¹ Nida M. Gelazis (2004): The European Union and the Statelessness Problem in the Baltic States, *European Journal of Migration and Law*, Vol. 6. p. 225.

¹⁶² The European Commission is mainly responsible for EU policy-making when it comes to EU enlargement. In this process, on the one hand, COM's the Directorate General for the European Neighbourhood Policy and Enlargement Negotiations (DG NEAR) is in charge of coordinating the EU position on enlargement talks with regard to neighbouring countries consulting on economic cooperation. In terms of the wider EU enlargement process, DG ENLARG, the European Commission's Directorate General for EU Enlargement is in charge.

¹⁶³ Hellborg 2015 p. 49.

Notwithstanding the number of amendments to the Latvian and Estonian citizenship laws which now allow dual citizenship, Russia has not benefited from the excessive granting of Russian citizenship to non-citizens which suggest that Russia decided not to grant all the rights and entitlements inherent to Russian citizenship to all non-citizens but rather maintain the existing status quo and the influential power gained through the advocacy efforts made on their behalf in the EUMS of its near-neighborhood that continues to belong to Russia's sphere of interest. Looking at Estonia's non-citizen population of currently 80,000 individuals, half of them have no established nationality and the other half have acquired Russian citizenship. This substantial number of naturalized Russian-speakers underpins the potential of Russia to act on behalf of its citizens residing in the Baltic EU Member States of both Estonia and Latvia. Additionally, Russia has been making advocacy efforts to address the situation of non-citizens from a human rights perspective in the international human rights arena, through the semi-annual presentation of the resolution on arbitrary deprivation of nationality before the UN Human Rights Council (HRC), as the main sponsor of the resolution, whereby Russia regularly reiterates its concern by the worrisome situation of non-citizens who were denied citizenship.¹⁶⁴ However, considering the large stateless population residing in Russia and the extent of Russia's ignorance in their regard, the authority and genuinity of Russia's main sponsorship of this resolution and Russia's overall approach towards Russophone non-citizens in the context of statelessness may be subjected to reconsideration.

Despite the increasing rates of naturalization of non-citizens, non-citizenship continues to persist in the close neighborhood of the Russian Federation. This political gap has the potential of provoking a confrontation with Russia similarly to what other neighboring countries recently endured. For example, diplomatic incidents relating to the non-citizenship issue which arose between Latvia and Russia¹⁶⁵ could still have the potential to give rise to further regional unrest in Europe in light of Russia's aggressive foreign policy behavior demonstrated in recent years, which may be best exemplified by the illegal annexation of the Ukrainian territory of the Crimean Peninsula in 2014 clearly which showed that Russia was ready to challenge the existing status quo and intervene on behalf of its compatriots which Russia unilaterally considered as a legitimate reason for intervention. Hellborg considers that

¹⁶⁴ See the most recent resolution adopted by the Human Rights Council on 30 June 2016 entitled 'Human rights and arbitrary deprivation of nationality' (HRC/RES/32/5).

¹⁶⁵ See: The Washington Post: In Latvia, fresh fears of aggression as Kremlin warns about Russian minorities, 24 Sep 2014. Available from: https://www.washingtonpost.com/world/europe/in-latvia-fresh-fears-of-aggression-as-kremlin-warns-about-russian-minorities/2014/09/26/b723b1af-2aed-44d1-a791-38cebbbdbd0_story.html?noredirect=on&utm_term=.ff2037f6eaa8. (accessed 6 May 2018)

the issue of regional stability is subject to the following dilemma: On the one hand, if Latvia and Estonia granted non-citizens with automatic citizenship, the room for maneuver for Russia to intervene in the internal affairs of the Baltic States would be restricted, nonetheless, Russophones may still be considered a potential threat to the nation. On the other hand, in case they are not granted citizenship, non-citizens are pushed further away from mainstream society in the Baltic States, orientating them to apply for Russian citizenship which would serve as an excellent pretext for Russia to intensify its involvement through claims of protection of nationals abroad and potentially intervene on behalf of its citizens.¹⁶⁶ The attempts of the Russian Federation to use the Russophone minorities residing in its 'near-abroad' as vehicles of destabilization used against the neighboring countries have been subject to wide foreign policy debates. In addition, similar attempts intensified with the annexation of the Crimean Peninsula which put further pressure on the long-burdened EU-Russia relations.¹⁶⁷ For all these reasons, addressing the unaddressed issue of non-citizens residing on the territory of the EU should move higher on the EU's political agenda.

5. 3. ROMA AND POST-YUGOSLAV STATELESSNESS IN EUROPE

"I feel bad because I am from here but they are not giving me citizenship. I feel I don't belong here. God forbid if I die, they will not bury me because I do not have documents. It's very hard for me. I have no job, but the most difficult part is that I don't have any medical insurance and I have to pay for everything myself. Once, the doctor even paid for me because I was in a really bad state. If I have a nationality I will work and I will have more money to pay for it. I am frustrated all the time. This is my biggest burden. I am born here, and I don't have a nationality." (Nadija, Romani stateless woman living in Macedonia)¹⁶⁸

5. 3. 1. BACKGROUND

UNHCR's most recent statistics indicate that approximately 10,000 people remain affected by or at risk of statelessness across Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Serbia.¹⁶⁹ The challenge in Southeast Europe emerges particularly as a result of the common lack of access to birth and identity documents, entailing the inability to substantiate one's nationality, which largely impacts Roma communities residing in these

¹⁶⁶ Hellborg 2015 p. 49.

¹⁶⁷ Kochenov and Dimitrovs 2016 p. 57; Ibid.

¹⁶⁸ Nina Murray (2017): Tackling Roma statelessness in the Western Balkans and Ukraine, ENS Statelessness Blog.

¹⁶⁹ UNHCR, Global Trends 2014.

countries who are subject to intergenerational statelessness. As it will be explained in this chapter, there has been a particular impact of Romani statelessness in some EUMS, notably in Italy where a great number of Roma migrated from the former Yugoslavia after the dismantlement of the Socialist Federal Republic of Yugoslavia where they remained without the protection of a nationality.¹⁷⁰

Roma began migrating from the former Yugoslavia in the 1960s and 1970s. Then following the death of dictator Josip Tito in 1980 Yugoslav nationalism emerged significantly rendering Romani people targets of aggression.¹⁷¹ Later during the Bosnian war great numbers of Romani people were forced to leave their country and sought shelter in other parts of Europe in the 1990s. Over generations, Roma having migrated from the ex-Yugoslav states under the circumstances of state disintegration mainly to Italy, either possessed personal documents which identified them as citizens of a country having ceased to exist or failed to comply with the technicalities of acquiring a citizenship.¹⁷² Therefore, albeit they might have been living in Italy for decades or even born there, they do not possess the citizenship of that country. Also, their newborn children who are also not registered risk losing their right to apply for citizenship one day, as that they are unable to prove their effective bond and legal residence in the country they reside in. An estimated 15.000 Romani children born in Italy find themselves in such a situation of legal non-existence.¹⁷³

As undocumented non-nationals, stateless Romani individuals living on the margins of mainstream Italian society are often criminalized and are extremely vulnerable to poverty and trafficking in human beings, as well as they are unable to participate in society in numerous ways; they are unable to legally work, benefit from free/subsidized education and health care and experience great barriers to access justice and to move freely. Their *de facto* statelessness¹⁷⁴ may be further attributed to their societal discrimination, inadequate housing circumstances, as well as the racist mindset of the majority population in EU Member States and Yugoslav successor states where the principle of *ius sanguinis* prevails in granting

170 See: ENS, Ending Childhood Statelessness: A Study on Italy, 2015.

171 Louise Osborne; Ruby Russell (2016): Stateless in Europe: 'We are no people with no nation', The Guardian.

¹⁷² In the fear of deportation they often decided not to register their children with their State of origin's Consulate, nor their place of legal residence, as a result they did not possess identity documents and/or residence permit which are essential to apply for citizenship.

¹⁷³ Report by Thomas Hammarberg, former Commissioner for Human Rights of the Council of Europe, 2011

¹⁷⁴ Generally, this term is applied for persons who reside outside of the State of their nationality and therefore, lack that State's diplomatic and consular protection and assistance.

nationality. The application of this principle greatly disregards the effective link of residents with the given state. In addition, nationality laws in these countries appear to have been drafted in a way to exclude members of ethnic minorities from citizenship.¹⁷⁵ Nevertheless, Sardelic argues that the impeded access to citizenship of Romani people cannot be only attributed to direct occasions of ethnic discrimination, but as visible consequences of deeply rooted systemic hierarchies in the post-Yugoslav space which disproportionately affect Romani minorities whose situation has not been tackled.¹⁷⁶

In addressing the problem posed by the lack of identity documents (often arising from the lack of birth registration), some European countries affected by Romani statelessness fostered proactive measures to improve Romani people's access to identity documents. While in Romania and Macedonia, mobile teams seek to reach out to affected individuals informing them about the registration process, Serbia has facilitated access to nationality for individuals without a birth certificate.¹⁷⁷ In 2012, a Memorandum of Understanding was signed between the Serbian Ministry of Public Administration and Local Self-Government, the Ombudsman and the UNHCR, bringing about the adoption of a number of amendments to the related legislative framework to address birth registration (and thus civil registration) whereby a new law was adopted introducing a procedure to facilitate determination of birth for those whose birth was not registered beforehand.¹⁷⁸ This measure constitutes an important momentum in reducing Romani statelessness and a proactive government approach addressing the lack of documentation which is worth being followed by the governments of other affected countries.

Romani statelessness is increasingly becoming subject to joint advocacy efforts at the regional level and to broad policy debates within the EU. To give an example, the *#RomaBelong* project (inspired by UNHCR's *#Ibelong* campaign raising awareness on stateless to be eradicated by 2024) is a joint initiative by the European Roma Rights Centre (ERRC), the Institute on Statelessness and Inclusion (ISI) and the European Network on Statelessness (ENS) in collaboration with partner organizations in Albania, Bosnia-Herzegovina, Macedonia, Montenegro, Serbia and Ukraine. It was launched in 2016 with the objective of addressing Roma statelessness in the EU candidate and neighborhood countries in the

¹⁷⁵ Jasminka Dedic (2007): Roma and Statelessness, European Parliament, Committee on Civil Liberties, Justice and Home Affairs.

¹⁷⁶ Sardelic, 2013.

¹⁷⁷ See the interview with Nils Muiznieks Council of Europe Commissioner for Human Rights, European Network on Statelessness homepage, 22 March 2018.

¹⁷⁸ Law on Amendments to the Law on Non-Contentious Procedure, Official Gazette of the Republic of Serbia (85/2012).

Western Balkans and Ukraine, aiming to promote international, regional and national responses to Romani statelessness.¹⁷⁹

Most recently, a conference was organized during the International Week against Racism in March 2018 in Munich, entitled “*Statelessness and Discrimination of Roma: An International Perspective.*” At the conference, the main findings of the #RomaBelong project were presented concerning the phenomenon of inter-generational statelessness among Roma populations in the Western Balkans and Ukraine. Speakers reflected on the vulnerable situation of particular groups who encounter additional hardships and discrimination, with special regard to women, children, disabled people and those with limited literacy.¹⁸⁰

5. 3. 2. GENDER DIMENSION OF ROMA STATELESSNESS

Roma women often face discrimination disproportionately as compared to men. The gender gap in the Roma community is maybe most apparent in the difficulties entailed by the inability of stateless Roma women to access free health care services which are mostly afforded for citizens who pay health insurance. It is usually provided to those who have all the necessary documents and residence status. Consequently, undocumented Roma with limited to no financial means are more vulnerable to be denied healthcare, including pregnant Romani women who not only do not receive the necessary maternity care during their pregnancy but are also compelled to give birth to their newborns at home instead of an adequate healthcare facility where mothers are generally informed how to provide for their newborns, also in terms of birth registration. Furthermore, in some of the affected countries, parents need to have photographic identity documents to register the birth of their child, for example, in Montenegro where parents must submit a hospital attestation and the mentioned identity document to register the birth of their child who is born in hospital.¹⁸¹ Thus, babies who are born outside of hospitals are more likely not to be registered which suggests that the lack of

¹⁷⁹ See more: <https://www.statelessness.eu/romabelong>. (accessed 6 May 2018)

¹⁸⁰ Kateryna Gaidei (2018): #RomaBelong – Broadening the debate on how to end Roma statelessness, European Network on Statelessness Blog, 5 April 2018. Here the mentioned debate may be viewed online.

¹⁸¹ Statelessness, Discrimination and Marginalisation of Roma in the Western Balkans and Ukraine, European Roma Rights Centre, October 2017. p. 48.

Available from: <https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/roma-belong.pdf>. (accessed 6 May 2018)

access to healthcare, as a consequence of statelessness might be as well the cause of future cases of statelessness.¹⁸²

Romani people, especially those who do not enjoy the benefits of a nationality, often live in isolation with their families where pregnant women have no choice but to give birth at home in rural and often hard-to-reach places where there is little to no chance of being informed about the necessary measures to take to properly register the birth of their child. Also they would not know about the deadlines applying for the free registration of their newborns. For instance, in Ukraine the deadline is one month; those who wish to register the birth of their babies after this deadline must pay a fee which often constitute a financial burden for the parents (or the single mother) who may not afford it in the end.¹⁸³

Therefore, the general lack of information relating to the process of birth registration has been prevalent in many Roma communities.¹⁸⁴ The failure to register the birth of Roma newborns only perpetuates the lack of identity documents and therefore the risk of statelessness. To exemplify one of the practical problems Roma women face in this regard, for example, there are reported cases where undocumented Romani women (also those giving birth) with no health insurance were provided with emergency health care services but were then obliged to pay financial compensation for their medical treatment. Unless they payed, no medical documentation was issued as a piece of evidence of birth which is a vital document to initiate the birth registration process.¹⁸⁵ Also, Roma women often face discriminative treatment when they are treated in hospitals where they do not enjoy dignity from the side of the medical staff.¹⁸⁶ Furthermore, there is a history in Europe of forced sterilization of Roma women and girls which greatly interferes with their sexual and reproductive health and rights. In such cases, the compensation of victims remains a further challenge.¹⁸⁷

In addition, Roma women and girls are disproportionately vulnerable to gender-based and domestic violence as well. Nonetheless, authorities tend to pay less attention to such instances driven by the assumption that such instances are not unusual for Roma families and thus Roma women tend not to trust authorities with their experiences of abuse as they feel

¹⁸² Ibid. p. 44.

¹⁸³ This was pointed out by Kateryna Gaidei in her presentation at the mentioned conference in March 2018.

¹⁸⁴ Statelessness, Discrimination and Marginalisation of Roma in the Western Balkans and Ukraine, European Roma Rights Centre, October 2017. p. 22.

¹⁸⁵ Ibid. p. 40.

¹⁸⁶ This was highlighted by Ms. Kateryna Gaidei at the recent conferenced mentioned aforehand.

¹⁸⁷ This was emphasized by Ms. Senada Sali at the same conference.

discriminated by the authorities themselves. This renders them largely vulnerable to violence, leaves the perpetrators unpunished and impedes abused Roma women from benefiting from seeking redress.¹⁸⁸ Also, undocumented and unregistered Roma women and girls are at heightened risk of exploitation, trafficking in human beings, gender-based violence, as well as prostitution.¹⁸⁹

5. 3. 3. CASE STUDY: ITALY

This section shall present a case study on Italy which has a significant stateless population originating from the post-Yugoslav space living in legal limbo for generations. Based on Law 91/92 many of these stateless persons of Roma descent have not been eligible to acquire Italian citizenship despite living in the country for generations. Then in 2013 a new provision came into force based on which a recent Italian court decision granted Italian citizenship to a Romani woman of Bosnian origin. This constitutes a major break-through not only at the national level but also in the European Union context in terms of mainstreaming the rights of Roma who became stateless as a direct result of forced migration, living in other EU Member States and in Yugoslav successor states all aspiring to become EU Member States.

As explained above, following the death of dictator Josip Tito in 1980, tensions between the Yugoslav republics emerged and Serbian nationalism increasingly escalated rendering national and ethnic minorities (Bosnian Muslims, Croats, Roma)¹⁹⁰ targets of aggression.¹⁹¹ During the Bosnian war many were forced to leave their country and seek shelter in other parts of Europe in the 1990s. As Sardelic underscores, following the disintegration of Socialist Federal Republic of Yugoslavia (SFRY), the principle of legal continuity was applied to avoid mass statelessness.¹⁹² Pursuant to the principle of legal continuity, the citizenship of the newly established post-Yugoslav states was granted on the basis of the former republican citizenship. However, citizen registries generally did not reflect on those Roma, for instance, who lived in informal settings failing to comply with the technicalities of

¹⁸⁸ Ibid.

¹⁸⁹ Statelessness, Discrimination and Marginalisation of Roma in the Western Balkans and Ukraine, European Roma Rights Centre, October 2017. p. 48.

¹⁹⁰ Romani minorities were never constitutionally recognised as national minorities, but were rather informally referred to as an ethnic group in most Yugoslav socialist republics and as such, they were granted fewer cultural group rights, for instance, in the field of education.

¹⁹¹ From 1992, Bosnian Serb paramilitary organizations committed systematic acts of ethnic cleansing in Bosnia-Herzegovina and Croatia in the form of massacres, rapes and expulsions of non-Serbs (mostly Bosnian Muslims, Croats and Roma).

¹⁹² Sardelic 2013.

substantiating a citizenship as they were unable to prove their habitual residence in one of the former republics thereby their former republican citizenship.¹⁹³

The possession of identity documents and/or residence permit remains to be essential to apply for citizenship in their chosen country of residence later in their life through naturalization. Therefore, albeit many of them might have been living in Italy for decades or even born there, they do not possess Italian citizenship. In addition, failing to properly register the birth of their children poses a severe risk to the latter when applying for citizenship later as adults, by not being able to prove their uninterrupted, habitual residence in the country for the period of time necessary for naturalization. This is also due to the fact that in the fear of deportation parents often decided not to register their children with their State of origin's Consulate, nor their place of legal residence.¹⁹⁴ To overcome this obstacle, Italy has put in place an effective birth registration system, ensuring that all children born on its territory may be registered, regardless of their parents' legal situation.¹⁹⁵

In the Italian context, the largest group of children at risk of statelessness is those of Roma communities coming from the SFRY. An estimated 15.000 Roma children born in Italy find themselves in such a situation of legal non-existence.¹⁹⁶ As undocumented non-nationals, generations of stateless persons originating from the SFRY have been living on the margins of mainstream Italian society. They are often criminalized and are extremely vulnerable to poverty, prostitution and trafficking in human beings, whereas they are not permitted to legally work, benefit from free/subsidized education and health care the same way as regular citizens. Their *de facto* statelessness may be further attributed to their societal discrimination, inadequate housing circumstances, as well as the excluding mindset of the majority population in EU Member States and Yugoslav successor states where the principle of *ius sanguinis* plays a predominant role in granting nationality. Based on this nationality law principle, nationality is transmitted by descent. The application of this principle greatly disregards the effective link of residents with the given state.

¹⁹³ In addition, many Roma migrated to different socialist republics without due consideration of acquiring the (republican) citizenship of the republic where they temporarily then permanently resided, in rather informal settlements.

¹⁹⁴ Elena Rozzi (2013): Out of Limbo: Promoting the right of stateless Roma people to a legal status in Italy, European Network on Statelessness Blog. (hereinafter: Rozzi 2013)

¹⁹⁵ Daniela Maccioni (2015): Ending childhood statelessness in Italy? European Network on Statelessness Blog. (hereinafter: Maccioni 2015)

¹⁹⁶ Report by Thomas Hammarberg, former Commissioner for Human Rights of the Council of Europe, 2011. p.2.

Even though Italy has one of Europe's oldest statelessness determination procedures (both an administrative and a judicial one), very few Roma have been recognized through the dedicated administrative procedure or was granted a residence permit.¹⁹⁷ Therefore, statelessness is the everyday reality of thousands of people in Italy who were left stateless generations ago and whose legal uncertainty has not been solved ever since.

Nationality legislations play a crucial role in putting concerned second- and third-generation immigrants of Bosnian and Roma descent at stake of statelessness. Relating to the acquisition to nationality Italian legislation (Law 91/1992)¹⁹⁸ provides that "*a foreigner born in Italy, who has resided legally without interruption until reaching the age of majority, becomes a citizen if (s)he elects to acquire Italian citizenship within one year of reaching that age.*"¹⁹⁹ Consequently, those who are unable to prove their legal residence in Italy cannot acquire Italian citizenship when they reach adulthood. Thereby, Italian nationality legislation does not take due account of the second- and third-generation migrant populations emerging in Italy over the course of the last twenty to fifty years which might suggest a certain extent of discrimination vis-à-vis certain minority populations,²⁰⁰ including those of Roma and Bosnian origins who immigrated to Italy during and after the Bosnian war therefore were not born in Italy.

As a result of intense policy debates in Italy starting in 2011,²⁰¹ a working group was established in 2013 focusing on the legal status of Roma under the National Roma Inclusion Strategy, engaging competent Ministries and the UNHCR, as well as reform talks started on nationality legislation favoring *ius soli*. Consequently, in 2013 Article 33 of Decree Law 69/2013 (the so-called *Decreto del Fare*)²⁰² came into force seeking to simplify and rationalize the existing procedures governed by Law 91/1992 in order to reflect better on the situation of young people of foreign origin living in Italy. Decree Law 69/2013 laid down an obligation for the authorities to inform all minors turning 18 registered at birth about their

¹⁹⁷ In order to submit an application for the recognition of the stateless status to the Ministry of Interior of Italy, applicants are required to provide evidence of their legal residence. Nevertheless, undocumented stateless persons have no means to register their residence. As a consequence, the administrative statelessness determination procedure is practically not accessible for stateless persons. See: Rozi 2013.

¹⁹⁸ Act No. 91 of 5 February 1992.

¹⁹⁹ As set out in Law No. 91 of 5 February 1992.

²⁰⁰ Elena Paparella (2016): *Second-Generation Migrant Women and the Acquisition of Italian Nationality, Gender and Migration in Italy: A Multilayered Perspective*, Ashgate Publishing Ltd.

²⁰¹ Greatly inspired by the country-specific conclusions and recommendations made by Thomas Hammarberg in relation to his visit in Italy in May 2011.

²⁰² Article 33 of decree law 69/2013.

right to acquire Italian citizenship and the procedure they have to undertake to this end. The new provision provides that „children cannot be held responsible for administrative failures of this kind that are attributable to their parents or the public administration.”

The new provision was first applied in 2016 when the Civil Court of Rome made a positive decision referring to the above-mentioned provision, and thereby, changed a previous refusal of citizenship in case of a Romani woman.²⁰³ The concerned woman of Bosnian origin was born and raised in Italy, fulfilled the conditions for Italian citizenship, yet was first refused to obtain Italian citizenship on the basis that she only managed to acquire a residence permit as a juvenile, suggesting that she was not “legally resident” since birth as required by Law 91/1992.²⁰⁴ Nevertheless, by applying Article 33 of Decree Law 69/2013, the Court confirmed that the woman is indeed an Italian national. The court deemed that the authorities were disproportionately strict by rendering legal residence conditional on both uninterrupted registered residence and continuous possession of a residence permit, referring to international principles deriving from international legal instruments dealing with the rights of the child and found that a “constitutionally oriented” interpretation of the 2013 provision must apply retroactively in this case.²⁰⁵

Despite the important policy and legislative changes introduced by the Decree Law 69/2013, children who were born and habitually resided in Italy until reaching the age of majority (18 years old) but not hold a regular permit of stay for the period required by law for filing the application to acquire citizenship, still face difficulties in applying.²⁰⁶ In order to facilitate the acquisition of Italian citizenship of concerned second-third generation migrants and solve the

²⁰³ Ruling N. 1369/2016 of the Civil Court of Rome.

²⁰⁴ The same year, the Italian Citizenship Law 91/1992 itself was subject to an amendment bill. On October 13, 2015 the Lower House of the Italian Parliament approved it. Then On 26 November 2015, a bill was submitted to the Senate concerning the procedure for determining the status of stateless persons in the Prefectures – Territorial Government Offices. The main changes concern a) the possibility to request the status of stateless person for anyone who is in Italy, even if they are residing irregularly; b) the issuance by Police Authorities of a residence permit "pending the outcome of the recognition procedure"; c) the possibility for applicants with both regular and irregular status to submit selfcertifications concerning their personal details and the length of their stay in Italy when making their applications. See., Compilation of the joint COM & LU EMN NCP ad-hoc query on statelessness (Part 1), launched on 4 May 2016.

²⁰⁵ Garbin, N. and Weiss, A. (2016): An Italian Recipe for Reducing Childhood Statelessness, European Network on Statelessness Blog.

²⁰⁶ In order to lodge an application for the acquisition of Italian citizenship at the competent Municipality, in fact, registration at the local population register office is always required, which can be carried out only in case of possession of a regular permit of stay. Accordingly, the application of all those persons who cannot be enrolled in the population register office is declared inadmissible by the municipal Citizenship Office.

problem of holding a regular permit of stay, Maccioni suggests that a permit of stay based on the right to respect for private and family life could be issued to those who are entitled to apply for citizenship.²⁰⁷

These rulings constitute a significant impetus for Italian judges to leverage better their investigative power to adequately substantiate stateless applicants' personal circumstances engaging in collaborative efforts to verify all potential evidence pertaining to the applicant's statelessness thereby lowering the burden of proof of the applicant. Further to these rulings, in the very same year, the Italian Citizenship Law 91/1992 itself was subject to an amendment bill. On October 13, 2015 the Lower House of the Italian Parliament approved it. Then in November 2015, a bill was submitted to the Senate concerning the procedure for determining the status of stateless persons in the Prefectures – Territorial Government Offices. The main changes touch upon the possibility to request the status of stateless person for anyone who is in Italy;²⁰⁸ the issuance of a residence permit "*pending the outcome of the recognition procedure*"; c) the possibility for applicants with both regular and irregular status to submit self certifications concerning their personal details and the length of their stay in Italy when making their applications.²⁰⁹

5. 3. 4. *POTENTIAL OF EU ENLARGEMENT AND THE COE*

Having seen the important developments in the decreasing number of non-citizens living in the Baltic (now) Member States of the EU, entailed by their EU accession and the recent examples of state measures to tackle birth registration in countries of the Western Balkans, I argue that the EU enlargement process²¹⁰ represents a powerful opportunity to strengthen human rights efforts in this region, including the eradication of statelessness of affected Romani populations in countries of the Western Balkans who wish to join the European Union in the future, having considerable stateless populations.

²⁰⁷See Maccioni 2015.

²⁰⁸ Even in case they are residing irregularly in Italy.

²⁰⁹See Compilation of the joint COM & LU EMN NCP ad-hoc query on statelessness (Part 1), launched on 4 May 2016.

²¹⁰ The accession criteria (also referred as the Copenhagen criteria) are the minimum conditions all candidate countries must comply with in order to become a member state. First, the political criteria involve stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. Secondly, the economic criteria include a functioning market economy and the capacity to cope with competition and market forces. Thirdly, candidate countries must demonstrate sufficient administrative and institutional capacity to effectively implement the *acquis* and ability to take on the obligations of membership.

Before being admitted to join the European Union, candidate countries need to attest that they are in compliance with a series of accession criteria, for instance, stable democratic institutions, the rule of law, human rights and respect for and protection of minorities. In this process, the EU could address the prevention and reduction of statelessness with countries with EU membership aspirations, especially countries of the Western Balkans in the framework of the accession negotiation rounds. Political criteria of EU accession include issues relating to human rights, as well as respect for and protection of minorities. The gradual progress made in the reduction of statelessness could be continuously monitored by the European Commission and included in the annual report adopted by COM in the framework of its *Annual Enlargement Package*, reflecting on its position on EU enlargement with regard to each candidate country based on detailed assessments of the country-specific situations, suggesting guidelines on reform priorities. Once candidate countries proved their readiness and full compliance with the accession criteria, the consent of the EU institutions, EUMS and EU citizens are still required before they can join the circle of EUMS.

This would open a new chapter in their approach towards nationality and would also encourage them to eventually accede to the UN statelessness conventions. Bringing about long-awaited statelessness related policy measures and legislative amendments would then create a firm basis for strategic litigation on behalf of stateless persons with a view to granting nationality to non-nationals in the enlarged EU. Although the fundamental rights of Roma are regularly addressed by COM recommendations to the Western Balkan countries, the significance of issues perpetuating Romani statelessness continue to be underestimated and thus are insufficiently addressed in these country reports. Regrettably, looking at the most recent COM Strategy on the Western Balkans entitled '*A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*,' it is apparent that it does not say a work on statelessness relating to fundamental right, it only provides that „*decisive efforts are needed to protect minorities and fight discrimination, notably against the Roma...*”²¹¹

²¹¹ A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, adopted by the European Commission on 6 February 2018, pp. 4-5. Available from: https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf. (accessed 6 May 2018)

Considering that this EU strategy does not elaborate on this very fundamental human rights issue in a targeted regional approach, I find that we can hardly view it as a truly credible enlargement perspective for and enhanced EU engagement with the Western Balkans, as the title would otherwise suggest. Additionally, the related *Action Plan*²¹² says nothing about the Roma, the need for addressing the general lack of documentation among marginalized (Roma) communities or to eradicate statelessness in the candidate countries under consideration. I find that not explicitly setting out this human rights priority which has great relevance in this region is indeed a missed opportunity.

Further to the potential inherent to EU enlargement, the membership of countries of the Western Balkans in the Council of Europe (CoE) provide a further room for maneuver, considering that being a Member of the CoE requires States to join the European Convention on Human Rights (ECHR) which protects the fundamental rights of stateless persons based on Article 1, providing that: “...*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention...*” Consequently, the ECHR could be used as a powerful tool for human rights litigation relevant for stateless Romani people in the affected countries of the Western Balkans.

5. 4. STATELESSNESS IN EUROPE AS A RESULT OF BIASED NATIONALITY LAWS

“Undocumented and with no proof of their nationality, many Syrian refugee children face a dangerous and uncertain future due to the risk of statelessness.” UN High Commissioner for Refugees (UNHCR), November 2014

5. 4. 1. BACKGROUND

Many Syrians fleeing the horrors of the ongoing war face particular vulnerabilities beyond their inability to return to their motherland for an indefinite time which has been a warzone for 7 years now. Many of them did not have a nationality prior to their departure from the Syrian Arab Republic, as a result of gender-discriminatory nationality laws which are in place in Syria and in other MENA countries²¹³ where nationality is dependent on the father. Their statelessness may have even been an additional driving force in their displacement. This may sound as a marginal circumstance for some interlocutors but gender-discriminatory nationality

²¹² Available from: https://ec.europa.eu/commission/sites/beta-political/files/annex-communication-credible-enlargement-perspective-western-balkans_en.pdf. (accessed 6 May 2018)

²¹³ The MENA region comprises Algeria, Bahrain, Egypt, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, the Occupied Palestinian Territories, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates (UAE) and Yemen.

laws have the potential to put a whole generation of Syrian children at high risk of statelessness. Children born to refugees in exile are particularly vulnerable to statelessness,²¹⁴ often facing severe problems in securing a nationality. It is therefore particularly important that refugee receiving states have safeguards²¹⁵ in place to ensure that stateless children born in their territory acquire a nationality.²¹⁶

Further to the unspeakable realities of statelessness in the lives of the affected individuals, in the Syrian context it must be pointed out that it shall not only prevent Syrian children from accessing their fundamental rights (including the right to education) but also impede them from post-conflict repatriation to Syria and from asserting their Syrian citizenship upon return. This would have a long-lasting effect on the EU, by facing the challenge to integrate Syrian non-nationals in need of international protection beyond refugees.²¹⁷ Therefore, considering this tangible nexus between statelessness and the recent refugee crisis which I reflected in my earlier writing,²¹⁸ the EU has an undisputable interest to prevent and reduce statelessness. This engagement must be predominant not only in its territory but also beyond it with a view to mitigating the implications of the refugee crisis in Europe and its neighborhood.

5. 4. 2. GENDER-BASED DISCRIMINATION IN NATIONALITY LAWS

As explained in Chapter 4 of this thesis, statelessness may occur as a result of a variety of reasons but in the case of Syrian refugees seeking protection in neighboring countries and in Europe, gender-biased nationality laws are mostly to blame. In Syria, Jordan and Lebanon, nationality is conferred exclusively by the father. Consequently, in the absence of the father, Syrian mothers may not even register the birth of their child who will therefore not acquire a nationality which will put them at high risk of statelessness. At a time when Syrian fathers go

²¹⁴ European Council on Refugees and Exiles - ECRE (2017): The right to a nationality of refugee children born in the EU and the relevance of the EU Charter of Fundamental Rights. p. 2.

²¹⁵ (1) Full safeguard implies that the law contains a safeguard that covers all otherwise stateless children born on the territory and is in compliance with international law. (2) Partial safeguard means that the law contains a safeguard for otherwise stateless children born on the territory that falls short of the standard set by international law.

²¹⁶ See: European Network on Statelessness (2015): No Child Should be Stateless.

²¹⁷ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting Legal Principles to the MENAT Region to Tackle Childhood Statelessness, Statelessness Working Paper Series No. 2016/5, Institute on Statelessness and Inclusion. p.1.

²¹⁸ Katalin Berényi, Statelessness and the refugee crisis in the EU, Forced Migration Review, Issue 53, Refugee Studies Center, University of Oxford, 2016, pp. 69-71.

missing, are killed or their whereabouts are simply untraceable under the horrific circumstances of the recent crises, the birth of their children may not be registered in the absence of the father which would provide them with documentary evidence of their country of birth which is key when securing a nationality. Additionally, a child can also be stateless in case the father is stateless, if there is no proof that the father is a national of the country concerned, if the child is born out of marriage, or if the marriage was not registered. Furthermore, deficient birth registration practices in the countries hosting Syrian refugees show severe shortcomings which also put newborns at risk of statelessness. These circumstances put a generation of Syrian children at high risk of statelessness being unable to claim their nationality rights in their motherland after peace was restored in the Syrian Arab Republic.

Prior to the beginning of the Syrian crisis in 2011, statelessness was already a major human rights issue in Syria concerning the Kurdish minority²¹⁹ As a result of an arbitrary census carried out in 1962 many Kurds lost their nationality and became stateless.²²⁰ This arbitrary measure constitutes a severe violation of a distinct international human rights norm, namely the prohibition of arbitrary deprivation of nationality.²²¹ Then in 2011, President Assad issued a decree allowing one group of stateless persons (*'the foreigners'*) to restore their nationality through naturalization. A great number of the newly-naturalized Syrian Kurds and the remaining stateless population (*'the unregistered'*) shortly after the issuance of the presidential decree became either internally displaced within Syria or in neighboring countries as stateless refugees. Nonetheless, there is a significant difference between stateless refugees and those with an established nationality when it comes to readmission to post-conflict Syria. Unless their nationality is established until their return, a generation of Syrians will be awaiting to be readmitted to their motherland, rendering the restabilization of the post-war

²¹⁹ L Tas: Stateless Kurds and their multiple diaspora, IMI Working Papers Series 2016, No. 125, January 2016, p 1-21.; L Tas: How international law impacts on statelessness and citizenship: the case of Kurdish nationalism, conflict and peace, International Journal of Law in Context, Volume 12 / Issue 01 / March 2016, pp. 42-62.

²²⁰ After 1962 two groups of stateless persons emerged; the 'foreigners' and the 'unregistered'.

²²¹ Tamás Molnar (2015): The Prohibition of Arbitrary Deprivation of Nationality under International Law and European Law: New Perspectives, Hungarian Yearbook of International Law and European Law, Eleven Publishing, The Hague, 2015, pp. 67-92.

country very difficult.²²² Hence, addressing the avoidance of statelessness with the affected countries would be vital with regard to the recent crisis.²²³

As mentioned aforehand, the refugee crisis has put children born in exile into Syrian fatherless female-headed families at high risk of statelessness in countries of the MENA region, such as Jordan, Lebanon and Egypt. In the neighboring countries hosting Syrian refugees, very similar gender-discriminatory nationality laws,²²⁴ deficient birth registration practices²²⁵ and the *ius sanguinis* principle prevails leaving newborns without a nationality and substantial proof of their parental lineage, effective territorial link and legal bond to the Syrian Arab Republic. Syrian babies born outside their home country, acquiring a birth certificate that provides evidence of the name of the Syrian father is absolutely crucial, regardless of the country where they are actually born.

Thus, apart from the shortcomings of biased national legislations explained above, addressing *birth registration practices* applied in MENAT countries of concern hosting millions of Syrian refugees are an absolute prerequisite to address childhood statelessness in the region. Failing to provide Syrian newborns with appropriate *birth certificates*²²⁶ contributes to the creation of new cases of statelessness. These provisions gain additional importance in case of children born to (stateless) refugees, considering that in the absence of appropriate birth registration they are legal ghosts being extremely vulnerable to early marriage, trafficking in human beings, destitution, and homelessness.²²⁷

²²² Addressing the human rights policy impact of statelessness in the EU's external action, DG External Policies, 2014, p. 42.

²²³ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting Legal Principles to the MENAT Region to Tackle Childhood Statelessness, Statelessness Working Paper Series No. 2016/5, Institute on Statelessness and Inclusion. p. 3.

²²⁴ Yet it must be pointed out that Turkish nationality law is not gender-discriminatory, as children who are born either to a Turkish mother or a Turkish father (in or out of wedlock) acquire Turkish citizens at birth.

²²⁵ The Jordanian, Lebanese, and Syrian nationality law *acquis* requires marriage certificates as well prior to registering a baby, along with a birth notification from a hospital, doctor/midwife.

²²⁶ Birth certificates help to confirm a child's nationality by providing proof of birth. Thus, problematic birth registration practices, similarly to biased nationality laws, directly prevent children from acquiring their right to a nationality, provided under international law, by creating a lack of due evidence of the facts of birth.

²²⁷ Birth registration in Turkey: Protecting the future for Syrian children, Refugees International (2015).

In the Hashemite Kingdom of Jordan, the 1954 on Nationality (last amended in 1987) grants nationality to all persons born of a Jordanian father and to all persons born of a Jordanian mother and a stateless father.²²⁸ In addition, the law gives nationality to all Palestinians who were resided in the Hashemite Kingdom of Jordan between December 20, 1949, and the issuance of the law in 1954.²²⁹ This provision excluded a great number of Palestinian refugees from Jordan nationality. Nevertheless, in 2015 Jordanian authorities started to grant some privileges to children of Jordanian women married to non-Jordanian men (also Palestinians), including free education and access to health services in government institutions, as well as provision of Jordanian ID card and driving license.²³⁰ Also, in order to address the challenge of registering the birth of Syrian newborns in the Hashemite Kingdom of Jordan, the government established civil registry departments and courts in refugee camps which proactive approach yet has to reach refugees outside the camps.

Decree No. 15 on Lebanese nationality adopted almost a hundred years ago in 1925 also inclines the children of Lebanese women marrying non-Lebanese men to live as foreigners in the country where they were born. Between 2010 and 2013, three nationality-law proposals were submitted to the Lebanese parliament but were not even considered.²³¹ This negative attitude may be partly attributed to the fear shared by many Lebanese that Palestinian refugees marrying Lebanese women shall be naturalized as Lebanese citizens, thereby, increasing considerably the number of Sunni Muslims within the country where is a sensitive Sunni-Shi'i balance. Nonetheless, the consideration of maintaining the existing status quo may not be a hindering factor in removing gender-based discrimination from nationality laws.

The Turkish citizenship law also lays notably on the *ius sanguinis* principle, despite of some provisions relating to the acquisition of Turkish citizenship based on the principle of *the ius soli* principle as well,²³² to reflect on Turkey's international obligations to avoid

²²⁸ Article 3 paras. 3-4.

²²⁹ Article 3 (2).

²³⁰ Jordan Events of 2015, Human Rights Watch, available at: <https://www.hrw.org/world-report/2016/country-chapters/jordan#49dda6>. (accessed 6 May 2018)

²³¹ M Saidi (2015): Lebanon's sexist citizenship law hurts mothers and babies, Al Jazeera, available at: <http://america.aljazeera.com/opinions/2015/5/lebanons-sexist-citizenship-law-hurts-mothers-and-babies.html>. (accessed 6 May 2018)

²³² This principle of nationality law refers to the 'right of the soil' constituting the right of any individual born in the territory of a state to nationality.

statelessness.²³³ Consequently, children born in Turkey, who do not acquire any other citizenship through their parents by birth, shall acquire Turkish citizenship, if the child is born from stateless mother and father or he/she cannot acquire the citizenship of his/her parents in light of the nationality law provisions of the state of the parents' nationality. Nonetheless, the deficient refugee registration practices employed in Turkey are insufficient to provide newborns with adequate proof of parental lineage that could effectively support their claim to Syrian citizenship once peace was restored in the country. There are, however, government efforts to address this shortcoming in Turkey. For, instance, it is now possible to apply for an *international birth certificate in Turkey*, by submitting a newborn's birth report to the local population department during a difficult, lengthy and costly procedure which makes it even more difficult for Syrian parents to document the birth of a child and legally link the child to a Syrian father.²³⁴

Even though both Syria²³⁵ and Lebanon²³⁶ have included extensive safeguards against statelessness further to Article 1 of the 1961 Convention providing that states must incorporate safeguards in their nationality laws to prevent statelessness at birth and later in life. Nonetheless, in practice these safeguards are poorly implemented in these countries.²³⁷ Further to these challenges, the due implementation of the aforementioned CRC and CEDAW Conventions would be instrumental in the fight against statelessness²³⁸ in terms of gender-discriminatory nationality laws. First, Article 7 of the Convention on the Rights of the Child (CRC), the most widely ratified UN instrument, obliges governments to fulfill the right of every child to acquire a nationality which is key to eradicate childhood statelessness. Second, the CEDAW addresses some of the causes of statelessness prevalent in the MENA region by advocating for *equal nationality rights* in Article 9(1),²³⁹ providing for the *conferral*

²³³ As set out in Article 8 of Turkish Citizenship Law.

²³⁴ Sarnata Reynolds and Tori Duoos, Refugees International: A Generation of Syrians Born in Exile Risk a Future of Statelessness, ENS blog entry, 15 July 2015.

²³⁵ Article 3 d) of Decree No. 276. on Syrian Nationality.

²³⁶ Article 1 of Decree No. 15 on Lebanese Nationality.

²³⁷ Stateless Kurds in Syria, Illegal Invaders or victims of a nationalistic policy?, KurdWatch, 2010, p. 16

²³⁸ <http://www.institutesi.org/ourwork/genderequality.php>. (accessed 6 May 2018)

²³⁹ Article 9(1) CEDAW: „States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”

of nationality on equal terms with men in Article 9(2),²⁴⁰ as well as dealing with marriage and family relations in Article 16(1).²⁴¹ Although Jordan ratified the CEDAW Convention already in 1992, it maintains certain reservations, relating to Article 9(2) and Article 16 (1) (d) and (g). Similarly, although Lebanon ratified the CEDAW Convention in 1997, it chose to maintain reservations pertaining to Article 9(2), and Article 16(1) (d) and (g). At the time of accession to the CEDAW Convention, Turkey also made certain reservations relating to articles on family relations (not in line with the provisions of the Turkish Civil Code).²⁴² Nonetheless, it also made statelessness related declaration of great importance, setting out that: "Article 9, paragraph 1 of the Convention is not in conflict with the (...) provisions of the Turkish Law on Nationality, relating to the acquisition of citizenship, since the intent of those provisions regulating acquisition of citizenship through marriage is to prevent statelessness."

In 1999, Turkey decided to withdraw its reservations made upon accession with regard to Article 15 (2) and (4), and Article 16 (1) (c), (d) but maintained its reservation and declaration made with respect to Article 9(1) of the Convention.²⁴³

Figure 7: Countries that discriminate against mothers in their ability to pass in nationality to their children



²⁴⁰ Article 9(2) CEDAW provides that, „States Parties shall grant women equal rights with men with respect to the nationality of their children.”

²⁴¹ Article 16(1) CEDAW proclaim that: „States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations (...)”

²⁴² In particular, Article 15 (2) and (4), Article 16 (1) (c), (d), (f) and (g), Article 29 (1), Article 29 (2).

²⁴³ The reservation and declaration made with respect to Article 29 and Article 9 continue to apply.

The implications of gender-discriminatory nationality laws in the EU lie in the fact that the EU may not be able to return those without an established nationality when peace is restored in Syria. In the meantime, stateless asylum seekers who meet the criteria set out in Article 1 of the 1951 Convention Relating to the Status of Refugees – including those who did not have a nationality prior to their departure – shall be protected under the 1951 Convention (not the statelessness conventions). While the statelessness conventions have not been ratified by every EUMS, the 1951 Refugee Convention boasts universal ratification in the EU, whereby EUMS are obliged to provide protection to stateless persons who qualify for the refugee status in their territory. While the prevention and reduction of statelessness are mainly governed through the nationality laws of EUMS in the EU, the protection of stateless persons may be addressed through migration law, where in light of the Lisbon Treaty the EU potentially has competence, as well as through the lenses of equality and non-discrimination in accordance with the EU Charter of Fundamental Rights. Thus, the EU should address statelessness related protection challenges within the asylum context in its territory. As I argue in this thesis, the elaboration of regionally harmonized status determination procedures would help EUMS to provide identical or at least very similar protection regimes to recognized stateless persons, preventing the pull factor implied by the benefits of already existing procedures in EUMS.²⁴⁴

SUMMARIZING THE RESULTS

Statelessness may emerge as a result of a variety of reasons; in Europe the most common reason is state succession, as a result of which populations who have been living in their „own country” since birth and for generations, including non-citizens living in North Europe, as well as stateless Romani people residing in the post-Yugoslav space in Southeast Europe. Although non-citizens enjoy extensive social rights and benefits generally linked to a nationality, they do not benefit from vital political rights and economic opportunities which would be essential to their welfare and social inclusion. The political and economic empowerment of non-citizens would allow them to participate in society in a more meaningful way and to benefit from rights generally attributed to EU citizens, including those relating to free movement within the EU, especially the right to work in other EUMS on an equal footing as Latvian and Estonian (EU) citizens and vote in European Parliament elections. This would also prevent them from leaving their country of long-term residence

²⁴⁴ Katalin Berényi: Statelessness and the refugee crisis in the EU, *Forced Migration Review*, Issue 53, Refugee Studies Center, University of Oxford, 2016, p. 69.

under irregular circumstances, in the quest of better-paying working opportunities (they are disproportionately discriminated in the job market and hardly speak Latvian and Estonian). I argue that unless non-citizens are granted automatic nationality (and major political and economic rights inherent to it), they are inclined to migrate to other EUMS and to (their motherland) Russia to lead a more meaningful life and earn a better living. I found that the long burdened Baltic-Russian relations have the potential to further destabilize Russia's near neighborhood, a part of the post-Soviet space which now constitutes EU territory. In light of Russia's aggressive foreign policy endeavors under the pretext of protecting ethnic Russians in the close neighborhood of the EU, I argue that the issue of eradicating non-citizenship in the Baltic EUMS should be moved higher on the EU's political agenda. This would be vital to prevent the Russian Federation from using the Russian-speaking minorities as a vehicle to influence the internal affairs of the neighboring countries, some of which are now EUMS.

Having revealed the challenges of post-Yugoslav statelessness in Europe, it may be concluded that Italy with a considerable stateless Romani population has recently strived to address the legislative gap relating to the anomaly of statelessness in its territory. This may provide an incentive for, on the one hand, nationality legislations in Croatia, Slovakia, the Czech Republic, and Slovenia, all having residents of former Yugoslav republics who were left stateless after the dissolution of Yugoslavia. On the other hand, successor states in the post-Yugoslav space with EU membership aspirations and considerable stateless population (especially countries of the Western Balkans)²⁴⁵ could also build on the momentum generated by the Italian approach to open a new chapter in their approach towards nationality and eventually accede to the statelessness conventions.

Statelessness related problems, including extreme difficulties in securing a nationality for children born on the way to Europe, are apparent also in the context of the past refugee crisis. Although statelessness in the migratory context is not an explicit focus of my work, I considered that the region-specific underlying reasons of statelessness prevalent in most countries of origin where asylum seekers come from and their implications in Europe is instrumental to reflect comprehensively on the research subject. Although the regional challenges and various profiles of statelessness need different approaches, status determination must lie in the center of protection approaches both in terms of *in situ* stateless populations, and stateless asylum seekers.

²⁴⁵ Including Macedonia, Montenegro, Serbia, Albania, Bosnia and Herzegovina and Kosovo.

CHAPTER 6: INTERNATIONAL HUMAN RIGHTS REGIME RELATING TO STATELESSNESS

INTRODUCTION

This chapter strives to explore the UN conventional framework relating to the right to a nationality with a view to reflecting on the multifold international human rights obligations states must comply with when addressing nationality issues, exploring relevant general principles relevant to international law, to provide a framework for the regional human rights regime to be addressed in Chapter 7 and Chapter 8.

6. 1. UNIVERSAL HUMAN RIGHTS REGIME RELATING TO THE RIGHTS OF STATELESS PERSONS

The importance of joining UN conventions from a human rights perspective lies in the fact that by ratifying human rights treaties, State Parties become bound by them under international law, whereby the implementation of treaty provisions implying the realization of human rights standards become legally binding on State Parties. In doing so, States must comply with their human rights obligations and implement these standards, for instance, concerning the grant and loss of nationality.²⁴⁶ In order to monitor the advancement of the implementation of 10 landmark UN conventions to be discussed in this chapter, treaty bodies were set up which may call upon States to respond to allegations, adopt decisions and articulate due recommendations. The Committees normally meet in Geneva and hold three sessions per year. Thus, governments of countries which have ratified the core UN conventions are required to report to, and appear before the UN treaty bodies periodically to be examined on their progress in the implementation of treaty provisions relating to the realization of the given rights in their territory. Treaty bodies therefore definitely have power to influence those UN Member States which have acceded to the treaties but failed to comply with them during their implementation. The Committees may conduct country inquiries and adopt general comments interpreting treaty provisions. Consequently, even though states have broad discretion when it comes to granting and withdrawing nationality based on the Hague Convention, this discretion becomes limited when they join human rights conventions which produce international human rights obligations on behalf of the individual (as a subject of international law) which State Parties to the conventions must comply with.

²⁴⁶ The UN has assisted to the negotiation and conclusion of more than 70 human rights treaties and declarations mainstreaming the rights of vulnerable groups such as women, children, stateless persons, persons with disabilities, and minorities.

6. 1. 1. CONVENTION ON CERTAIN QUESTIONS RELATING TO THE CONFLICT OF NATIONALITY LAWS (1930)

During the 1920s, it was common to make no distinction between stateless persons and refugees, both groups considered as to be without any state protection. Nonetheless, nationality issues relating to multiple nationalities, loss of nationality upon marriage, and statelessness beyond the refugee context, remained of concern to the international community. Consequently, the League of Nations adopted the Hague Convention at the Conference for the Progressive Codification of International Law in 1930 to settle certain issues produced by the conflict of nationality laws. The importance of the Hague Convention lies in the fact that state sovereignty over nationality issues stems precisely from this Convention.²⁴⁷

Article 1 states that *“It is for each state to determine under its own laws who are nationals (...) In so far as it is consistent with international conventions, international customs, and the principles of law generally recognized with regard to nationality,”* while Article 2 provides that *“any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that state.”*

Chapter III on the nationality of married women provides for the limitation in the number of cases of dual nationality and statelessness arising from marriage. For instance, Article 8 provides that the loss of the wife’s nationality shall be conditional upon her acquiring her husband’s nationality. Therefore, even if the Convention included provisions touching upon the nationality of married women, it did not provide for the enforcement of married women’s nationality rights to be viewed on an equal footing as men. Consequently, the International Women’s Suffrage Alliance launched a telegram campaign in 1931 to put pressure on the League of Nations to readdress the issue of married women’s nationality rights and encourage states to include the legal protection of the citizenship rights of women who married someone from outside their country or nationality in their nationality laws.

²⁴⁷ In addition to the Hague Convention, the *Protocol relating to a Certain Case of Statelessness* was also adopted by the 1930 Conference for the Progressive Codification of International Law at The Hague on 12 April 1930. It entered into force on July 1st 1937. It has been ratified or acceded to by Australia, Brazil, Burma, Colombia, Chile, China, Great Britain and Northern Ireland, India, the Netherlands, Pakistan, Poland, Salvador and the Union of South Africa. League of Nations, *Protocol Relating to a Certain Case of Statelessness*, The Hague, 12 April 1930, No. 4138. Vol. 179 LNTS p. 115. Further to this Protocol, a Special Protocol Concerning Statelessness was also adopted at the mentioned conference. It has been ratified by nine States only and entered into force quite late on 15 March, 2004. It addresses particular issues relating to statelessness, such as the specific obligations of the previous State of nationality. League of Nations, *Special Protocol Concerning Statelessness*, The Hague, 12 April 1930, United Nations, Treaty Series, vol. 2252, p. 435.

These advocacy efforts were widely supported by other women's rights organizations from around the world. Further to the campaign, advocacy efforts of women's rights groups and the awakening dialogue on equal nationality rights, the **Convention on the Nationality of Married Women** was adopted by the United Nations General Assembly (UNGA) in 1957.

In line with the original objectives, the aim of the Convention was to protect married women's right to retain or renounce citizenship on an equal footing as men, irrespective of marriage, divorce or the husband's decision to change nationality. This also resonates with Ganczer's view that a request by a person for another nationality cannot be interpreted as a loss of nationality on his or her own will.²⁴⁸ The Convention thus allows women to adopt and retain the nationality of their husband depending on the woman's own decision. Most importantly, Article 1 states that „*Woman's nationality not to be automatically affected by marriage to an alien*”, while Art. 2 provides that the „*Acquisition or renunciation of a nationality by a husband not to prevent the wife's retention of her nationality*”. In addition, in light of Article 3 State Parties should put in place „*Specially privileged nationality procedures to be available for wives to take the nationality of their husbands*”. As of 2018, only 74 states have ratified the Convention.²⁴⁹ The low ratification rate suggests limited commitment of state with regard to the particular case of equal nationality rights of married women. The next important milestone in equal nationality rights, also in terms of the nationality rights of married women, shall be the adoption of the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** in 1979 which shall be thoroughly discussed later in this chapter.

6. 1. 2. UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), THE RIGHT TO A NATIONALITY

When the Universal Declaration of Human Rights (UDHR) was adopted in 1948, a new world order was envisioned, in which the rights enumerated within the Declaration were seen as to be inherent to the humanity of all human beings by virtue. This marked the beginning of the international human rights regime which obligates states to promote and protect the human rights of all individuals (as newly established subjects of international law), irrespective of where they are, whether they reside in a country legally or illegally and whether they have a

²⁴⁸ Mónica Ganczer (2012): International Law and Dual Nationality of Hungarians Living Outside the Borders, *Acta Juridica Hungarica* 53, No 4, pp. 316–333

²⁴⁹The Convention has been denounced by the ratifying states of Luxembourg, Netherlands, and United Kingdom.

nationality or not. The right to equality and non-discrimination are therefore at the heart of the founding principles of human rights law. Most importantly, Article 15(1) of the UDHR proclaims that „**Everyone has the right to a nationality**. Plain and simple. It implies the right of each individual to acquire, change and retain a nationality. Nonetheless, statelessness remains prevalent all around the world, as the most serious violation of this right; the right to a nationality which is a fundamental human right.

Moreover, Article 15(2) explicitly provides that *no one should be arbitrarily deprived of his or her nationality, nor denied the right to change his nationality*. Gyulai considers that the deprivation of nationality should be primarily considered as a severe violation of human rights and that states' obligation to protect stateless persons originate from their obligation to respect the right to a nationality.²⁵⁰ State acts of arbitrary deprivation of nationality effectively place the affected persons in legal limbo preventing them to enjoy their fundamental human rights, making them more vulnerable to human rights abuses exposing them to poverty, social exclusion, and limited legal capacity. In such cases, the affected persons become non-citizens to the state that deprived them of their nationality (either possessing another nationality, and consequently becoming aliens in their homeland, or becoming stateless).²⁵¹ Molnár argues the magnitude of denationalization around the world affecting a number of racial, religious and ethnic minorities requires the concerted action of the international community to discourage concerned states from such arbitrary state actions.²⁵²

6. 1. 3. CONVENTION RELATING TO THE STATUS OF REFUGEES (1951)

In the aftermath of World War II, displaced persons were high on the international agenda. At its first session in 1946, the UNGA recognized not only the urgency of the problem, but also considered that “*no refugees or displaced persons who have finally and definitely expressed valid objections to returning to their countries of origin shall be compelled to return.*”²⁵³ Therefore, the UN decided to create a temporary, initially non-operational agency and to complement the new institution with revised treaty provisions on the status of refugees which became the United Nations High Commissioner for Refugees (hereinafter: the UNHCR).

²⁵⁰ Gyulai 2007.

²⁵¹ UN HRC resolution 20/5 of 16 July 2012 (OP7)

²⁵² Tamás Molnár (2015): The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives, Hungarian Yearbook of. International Law and European Law, pp. 67-92

²⁵³ UN GA resolution 8 (I) of 12 February 1946.

The 1951 Refugee Convention is the core legal document that forms the basis of universal refugee protection. The Convention, which entered into force in 1954, is by far the most widely ratified treaty relating to refugees, ratified by 145 States Parties so far, which implies that the international community is highly committed to the protection of refugees. Article 1A, para. 2 of the Convention, together with its 1967 Protocol provides a definition of the term ‘refugee’ as „*any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion*”. This provision therefore makes a distinction between and covers both refugees with and without a nationality, including stateless refugees. This has major implications on the aftermath of the recent refugee crisis where asylum seekers with or without a (n effective) nationality both arrive to Europe in the quest for safety and international protection. Therefore, in the particular case of stateless asylum seekers the Refugee Convention shall be applicable, instead of the statelessness conventions.

The Convention outlines the rights of displaced persons, as well as the legal obligations of State Parties to protect them. The key principle of the Convention is *non-refoulement* which, further to Art. 14(1) of UDHR providing that “*Everyone has the right to seek and to enjoy in other countries asylum from persecution*”, proclaims that a refugee should not be returned to a country where s/he would face serious threats to their life or freedom. This principle has since been applied by customary international law. Although the risk of persecution is central to the refugee definition, “persecution” *per se* is not defined in the Refugee Convention. Articles 31 and 33 refer to those whose life or freedom “was” or “would be” threatened, meaning the threat of death, the threat of torture, or cruel, inhuman or degrading treatment or punishment. The Convention requires that the persecution which is feared by the affected individual must be for reasons of “*race, religion, nationality, membership of a particular social or political opinion*” which recalls the language of non-discrimination first applied in the UDHR, enlisting individuals and groups which may be subject to refugee protection. It is widely assumed that persons fleeing armed conflict are not in fear of being persecuted, but rather are fleeing indiscriminate violence and as such, they do not meet the criteria to qualify for a refugee status enlisted by the Refugee Convention. Nonetheless, it has more recently been argued that where conflicts are rooted in ethnic, religious or political differences,

persons belonging to those groups who are victimized or targeted would also qualify as refugees under the 1951 Convention.²⁵⁴

A major shortcoming of the Convention is that the aforementioned article does not require that the Convention rights be secured to individuals without discrimination as to *sex or gender*²⁵⁵ beyond the mentioned persecution grounds which leaves refugee women vulnerable to gender-based discrimination under the protection of the Refugee Convention.²⁵⁶ Although Article 1A (2) does not explicitly refer to ‘gender’ as a ground of persecution, it may be assumed that it may influence the type of persecution or harm suffered. The refugee definition, if properly interpreted, therefore may cover gender-related claims.²⁵⁷

According to the Convention and the 1967 Protocol, the UNHCR serves as the ‘guardian’ of the Refugee Convention and its 1967 Protocol. Therefore, State Parties agreed to cooperate with UNHCR in ensuring that the rights of refugees are respected and protected in compliance with the provisions of the Convention. In practice, State Parties regularly consult the UNHCR in the policy- and decision-making process in refugee issues, where the UNHCR provides guidance on questions relating to, for instance, status determination procedures.²⁵⁸

6. 1. 4. CONVENTION ON THE STATUS OF STATELESS PERSONS (1954)

The UNGA convened a Conference of Plenipotentiaries to draft an international treaty on refugees and stateless persons in 1951. The Convention Relating to the Status of Stateless Persons (hereinafter: the 1954 Convention) was originally meant to be drafted as a Protocol to the 1951 Refugee Convention. However, the protection needs of stateless persons remained subject to further negotiations leading the way to a separate treaty on the status of stateless persons. In 1953, the International Law Commission produced a Draft Convention on the Elimination of Future Statelessness, and a Draft Convention on the Reduction of Future

²⁵⁴ The UNHCR, Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees, Geneva, Apr. 2001, para. 21.

²⁵⁵ Gender mainly refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. See: UNHCR Guidelines on Gender-Related Persecution.

²⁵⁶ This is of great importance in terms of countries which have not ratified the CEDAW Convention.

²⁵⁷ Guidelines on Gender-Related Persecution, para. 6.

²⁵⁸ For instance, its Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (2011) and Handbook on Protection of Stateless Persons (2014) are regularly consulted when putting in place dedicated identification procedures.

Statelessness. The ECOSOC approved both drafts, then in April 1954 it adopted a resolution²⁵⁹ to convene a Conference of Plenipotentiaries with a view to regulating the status of stateless persons by an international agreement covering stateless persons who are not refugees and therefore do not fall within the scope of the 1951 Refugee Convention. As an outcome of the conference, it adopted the 1954 Convention on 28 September 1954 which entered into force on 6 June 1960. It establishes a framework for the international protection of stateless persons and has been the most comprehensive codification of the rights of stateless persons. Similarly to the 1951 Refugee Convention, the 1954 Convention explicitly excludes individuals upon serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, or a serious crime abroad.

The *Preamble* begins by referring to the Charter of the United Nations and the Universal Declaration of Human Rights. Then Article 1(1) of the 1954 Convention provides the *definition of a stateless person*²⁶⁰ and therefore creates an autonomous protection status with a view to providing stateless persons with basic human rights. This implicitly constitutes an obligation for State Parties to identify stateless persons which is a precondition for their protection. *Article 3* refers to the prohibition of discrimination on the grounds of *race, religion* and *country of origin*, affirming the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, ensuring stateless persons the widest possible exercise of these basic rights. Equality and non-discrimination shall also serve as the basis of my doctoral pondering. *Articles 13-16* refer to the rights of the individual, including a stateless person's right to movable and immovable property, industrial property, artistic rights, rights of association, access to courts, gainful employment, housing, public education, public relief. These rights may be seen as civil and political rights ensuring individuals' freedoms and ability to participate in the civil and political life of the state without discrimination on an equal footing as nationals. *Articles 25-28* (Administrative assistance) provide for stateless persons' right to enjoy the rights relating to freedom of movement, as well as to identity papers and travel documents. The aim of the 1954 Convention is most apparent in terms of Articles 12-32, establishing a set of minimum rights to be provided to stateless persons, suggesting a relatively high standard of treatment inherent to the accordance of the rights providing for:

²⁵⁹ Resolution 526 A (XVII) of 26 April 1954.

²⁶⁰ Article 1(1): „For 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.”

- **juridical status** (personal status, property rights, right of association, and access to courts);
- **gainful employment** (wage-earning employment, self-employment, and access to the liberal professions);
- **welfare** (housing, public education, public relief, labour legislation, and social security);
- **administrative measures** (including administrative assistance, freedom of movement, identity papers, travel documents, fiscal charges, transfer of assets, expulsion, and naturalization).²⁶¹

In addition, the Convention establishes the following **minimum standards of treatment**, based on which stateless persons must be treated:

- irrespective of the treatment afforded to citizens or other aliens;
- the same way as nationals;
- as favourable as possible (not less favourable than that accorded to aliens generally);
- the same way as aliens generally.²⁶²

Even though the Convention does not explicitly provide for a state obligation to put statelessness determination procedures in place, it puts forward minimum standards of treatment which can only be put into practice in case its beneficiaries have been recognised in some way. Thus, for the proper implementation of the aforementioned protection status, State Parties of the 1954 Convention should be obliged to implement domestic legislation putting in place statelessness specific protection mechanisms, providing for a statelessness determination procedure and a distinct protection status according to the national context. A statelessness determination procedure (SDP) serves to examine whether an individual is stateless and is indeed not considered as a national by any State under the operation of its law. The significance of SDPs lies in the potential that in case it results in the conclusion that the individual is identified as stateless, s/he shall be eligible to be granted the rights provided in the 1954 Convention. However, the identification itself is only of declarative nature and does not constitute the right in itself to benefit from the protection status.²⁶³

²⁶¹ UNHCR Handbook on the Protection of Stateless Persons, 2014, Geneva. p. 46.

²⁶² Ibid.

²⁶³ Gábor Gyulai (2014): The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime, in: Laura van Waas, Alice Edwards (eds.), *Nationality and Statelessness under International Law*, Cambridge University Press, United Kingdom, p. 132.

For all the above-mentioned reasons, the 1954 Convention gives a good headstart for the protection of stateless persons. Nonetheless, it demonstrates substantial weaknesses as well.

- Despite of the fact that the Convention establishes a set of minimum rights for stateless persons that are generally inherent to a nationality, it does not articulate the right to a nationality itself;
- The Convention does not require States to establish statelessness determination procedures which would be a first step to recognition and therefore protection;
- The Convention does not explicitly prohibit the penalisation of illegal entry, unlike the Refugee Convention of 1951 (Art. 31);²⁶⁴
- The Convention does not provide for the prohibition against refoulement (*non-refoulement*) which leaves stateless persons vulnerable to expulsion and forced return to their country of habitual residence;
- The Convention does not set up a supervisory body to monitor the situation on statelessness on a global level. In light of Article 33 stating that it is the responsibility of the State Parties to adopt domestic legislation in order to fulfil their international commitments, the Convention is not self-executive;
- The Convention does not explicitly require State Parties to grant recognised stateless persons the right of residence, nonetheless, granting them the right to remain and reside on the territory of the given state which would be a material requirement to be able to enjoy the rights accorded to stateless persons by the Convention. In addition, is a prerequisite to the grant of residence permit which is generally a vital document required to work legally in Europe. Thus, the grant of would fulfil the object and purpose of the treaty;²⁶⁵
- Civic implications of statelessness, for instance, relating to divorce, have not been reflected in the Convention;²⁶⁶

²⁶⁴ Gábor Gyulai (2015): Hungarian Constitutional Court declares that lawful stay requirement in statelessness determination breaches international law, European Network on Statelessness Blog

²⁶⁵ UNHCR Handbook on the Protection of Stateless Persons, 2014, Geneva. p. 52.

²⁶⁶ Katja Swider: Protection and Identification of Stateless Persons through EU Law, Amsterdam Centre for European Law and Governance, Working Paper Series, 2014 – 05, pp. 21-22.

- The Convention only applies to the *de iure* stateless. As explained in Chapter 2, the limited scope of the Convention is the result of an early position which equated the *de facto* stateless with refugees, while viewing the *de iure* stateless as a distinct group.
- This entailed that a large group of *de facto* stateless who do not qualify for refugee status and *in-situ* stateless persons who have resided in their own country which does not recognise them as nationals were excluded from the protection of the 1954 Convention.

At the time of writing, the Convention was joined by 23 Signatory and 89 State Parties, including 24 EUMS. It is important to note that out of the 89 State Parties only 14 States²⁶⁷ have put in place functioning statelessness-specific protection regimes in their national legislations. Although the Convention has a fairly high ratification rate, many signatories have included declarations, reservations and objections upon ratification, accession or succession which are of paramount importance in terms of the implementation of the Convention in these countries.

In conclusion, although the Convention was drafted at an early stage of the development of the international human rights regime and therefore presents significant shortcomings, the Convention does provide an excellent protection basis for the protection of the rights of stateless persons, suggesting practical solutions for State Parties to address the particular needs of stateless persons. However, it must be viewed in light of the considerable development of the international human rights regime. The identified gaps of the Convention thus justified the elaboration and conclusion of the 1961 Convention on the Reduction of Statelessness which was adopted precisely in an attempt to reflect on the protection gaps of the 1954 Convention. At the time of writing, the 1954 Convention was signed and ratified by 24 EUMS with the exceptions of Cyprus, Estonia, Malta and Poland.

Noteworthy, the ENS Statelessness Index, launched recently in April 2018, provides extensive information on statelessness, including about how implementation of the 1954 Convention progresses in European countries, especially in terms of the determination of statelessness, the grant of legal status, and access to basic economic and social rights.

²⁶⁷ France, Georgia, Hungary, Italy, Latvia, Kosovo, Moldova, Spain, Turkey, United Kingdom, Costa Rica, Ecuador, Mexico and the Philippines.

6. 1. 5. CONVENTION ON THE REDUCTION OF STATELESSNESS (1961)

The Convention on the Reduction of Statelessness was signed in August 1961 and entered into force in December 1975. In many ways, it complements the objectives of the 1954 Convention. Its conclusion was the result of long negotiations on how to prevent and avoid statelessness further to what was agreed in the 1954 Convention. As it sought to reflect on issues that the 1954 Convention failed to, the 1961 Convention is mostly seen as the main international instrument which sets out rules for the *conferral and non-withdrawal of citizenship to prevent cases of statelessness* and for the *facilitated naturalisation of stateless persons*.

It also provides important *procedural safeguards against childhood statelessness*, as it requires State Parties to establish safeguards in their nationality laws to prevent statelessness at birth by requiring them to grant citizenship to children born on their territory, or born to their nationals abroad, who would otherwise be stateless. To prevent statelessness in such cases, States may either grant nationality to children automatically at birth *ex lege* or later in life upon application. The Convention also sets out *important safeguards to prevent statelessness resulting from the loss or renunciation of nationality and state succession*. The Convention also sets out the very limited number of situations where states can deprive a person of his or her nationality, especially in case it would leave them stateless, such as demonstrating disloyalty to the state or displaying behaviour that is considered seriously prejudicial to the vital interests of the state.

Nonetheless, similarly to the 1954 Convention, the 1961 Convention also presents important shortcomings, for instance, as it does not explicitly oblige State Parties to offer protection to stateless persons. The 1961 Convention has an even lower ratification rate than the 1954 Convention which shows a limited extent of international commitment to addressing jointly the reduction of statelessness. It has been ratified by only 70 State Parties, including 20 EUMS²⁶⁸ which limits the global implementation of important treaty provisions which would have a crucial impact on the lives of the affected persons. In addition, although Art. 1 of the Convention requires its State Parties to grant nationality to stateless children born on their

²⁶⁸ Six EUMS (EL, EE, CY, MT, PL, SI and ES) have not yet acceded to it, FR signed this Convention but has not yet ratified it. See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=en. (accessed 6 May 2018)

territory either at birth *ex lege*, or later in life upon application, not all EUMS who are State Parties to the Convention comply with this provision which may be viewed as a direct violation of their international obligations.

Among EUMS, by the time of writing, 20 EUMS have ratified the 1961 Convention.²⁶⁹ Among the non-signatories, only Cyprus has expressed the intention to accede to the Convention. Cyprus introduced a bill to this effect in 2011 and is currently awaiting the conclusion of an internal consultation of the Members of Parliament.²⁷⁰ Five EUMS (EE, FR, PL, SI and ES) reported that they do not intend to accede to the 1961 Convention. According to the Estonian National Contact Point of the European Migration Network, the Convention is partially in conflict with Estonian Citizenship Law which is based on the *ius sanguinis principle* and the Convention foresees granting citizenship to a person born on its territory who would otherwise be stateless (*ius solis*) which the Government of Estonia finds problematic to support.

In light of the explanation given by the French Contact Point of the EMN to the referred ad hoc query, France which has signed but not ratified the Convention, wishes to retain the possibility of withdrawing French nationality if considered necessary. However, when signing this Convention, France has already agreed to comply with the purpose of the Convention. Also, following the signature of the Convention a new law was adopted on nationality on 16 March 1998, including a provision which prohibits any decision of deprivation of nationality if this implies that the person becomes stateless. Therefore, France's abstention from ratifying the Convention is not necessarily consistent with its law-making measures.

Poland considers that accession would put stateless persons in a privileged position in comparison to foreigners already legally residing in Poland. Slovenia has reservations to the application of Article 12 of the Convention. Also, its current legislation reflects on most provisions of the Convention and under certain circumstances provides easier conditions for the acquisition of citizenship. Spain points out that the effective Spanish law protects children

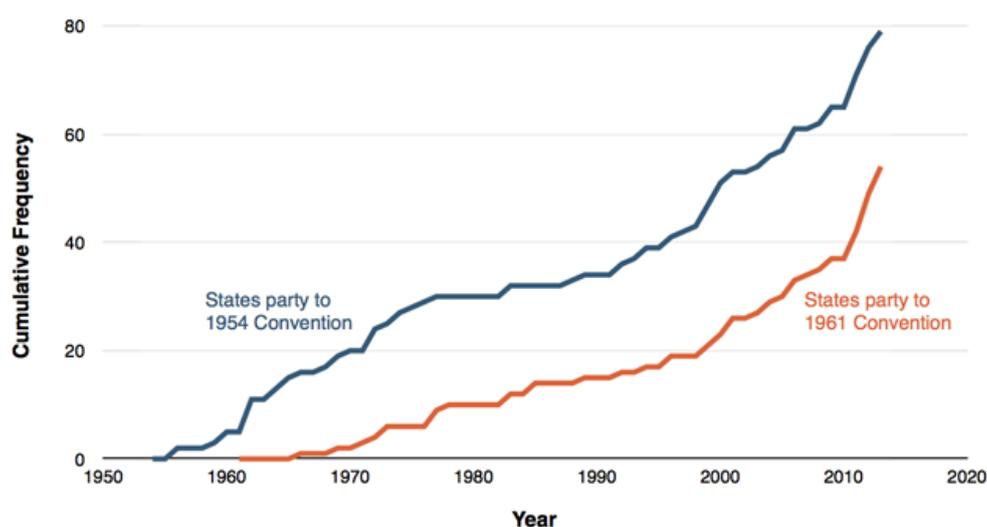
²⁶⁹ Seven EUMS (EL, EE, CY, MT, PL, SI and ES) have not yet acceded to it, while FR signed it but has not yet ratified it.

²⁷⁰ Compilation of the joint COM & LU EMN NCP ad-hoc query on statelessness (Part 1), launched on 4th May 2016.

born stateless in the country which is in line with the objectives of the Convention. According to article 17 c) of the Spanish Civil Code „those born in Spain of foreign parents if both of them should be without nationality or if the legislation of neither parents should grant a nationality to the child” are Spanish by birth.

As mentioned earlier, in my efforts to reveal the progress in the accession and implementation of the 1954 and 1961 Conventions, the Statelessness Index provided me with extensive information.

Figure 8: Accession to the 1954 and 1961 Conventions



Source: United Nations University 2014

6. 1. 6. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)

After the horrors of World War II, a broad consensus emerged among the international community on the urgent need for placing the individual human being under the protection of the international community. This is due to the experience that protective state mechanisms at the domestic level alone did not provide sufficiently stable safeguards to avoid atrocities committed against specific ethnic/minority groups, and so national governments have the potential to fail in their duty to ensure the survival and well-being of their citizens. Therefore, state actors decided to entrust the envisaged new international organisation with the role of guarantor of upholding human rights on a global level.

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly in December 1966 and entered in force from in March 1976. The ICCPR is one of the two treaties which give legal force to the UDHR (the other being the International Covenant on Economic, Social and Cultural Rights). The Covenant obliges State Parties to respect the civil and political rights of individuals, including freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom from slavery and forced labour, arrest, detention and imprisonment, freedom of movement, thought, conscience and religion, speech, association and assembly, rights to due process and the right to a fair trial, family rights, children's rights, the right to a nationality, political rights and those relating to equality and non-discrimination.

The advancement of the implementation of the ICCPR is monitored by the UN Human Rights Committee which reviews reports of State Parties on how the rights protected under the ICCPR are being implemented. In terms of child protection, Article 24 (3) is of great importance, setting out that *every child has the right to acquire a nationality*. This provision shall be extended with important safeguards by the adoption of the Convention on the Rights of the Child later in 1989.

6. 1. 7. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1965)

The adoption of the CERD Convention was preceded by the adoption of GA resolution 1780 which solicited the Economic and Social Council to ask the Commission on Human Rights (CHR) to prepare a draft declaration, as well as a draft convention on the elimination of all forms of racial discrimination. As a result, in 1963 the Sub-Commission on Prevention of Discrimination and Protection of Minorities submitted a draft declaration on the elimination of all forms of racial discrimination to the Council adopted by the GA in the same year.

In 1964, the Sub-Commission prepared the draft convention, which was submitted to the Commission on Human Rights and the Economic, the Social Council, and eventually to the UN General Assembly which adopted the CERD Convention in December 1965 (entered into force in January 1969). The Convention obliges its State Parties to condemn and eliminate racial discrimination, promoting a culture of understanding among all races. The Convention establishes a Committee on the Elimination of Racial Discrimination which is to report

annually to the General Assembly, primarily on measures undertaken by State Parties with a view to advancing treaty provisions. The CERD Convention also establishes an individual complaints mechanism which has led to the development of jurisprudence on the implementation of CERD. Article 1 of the Convention defines *racial discrimination* as:

„any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Although distinctions made based on citizenship (meaning between citizens and non-citizens) are specifically excluded from the definition, as well as positive discrimination policies and other measures taken to address inequalities, Art 5(d) of the CERD proclaims States' obligation to guarantee *racial equality in the enjoyment of the right to a nationality*.

6. 1. 8. CONVENTION TO REDUCE THE NUMBER OF CASES OF STATELESSNESS (1973)

Convention No. 13 to Reduce the Number of Cases of Statelessness was adopted by the International Commission on Civil Status (ICCS)²⁷¹ in September 1973. Among its efforts to reduce the number of statelessness in the Member States of the ICCS, it has a particular provision (Article 1) to avoid cases of childhood statelessness. Article 1 provides that:

„A child whose mother holds the nationality of a Contracting State shall acquire that nationality at birth if he or she would otherwise have been stateless. However, where maternal filiation becomes effective as regards nationality only on the date when such filiation is established, the mother's nationality shall be acquired by the child, if still a minor, on that date.”

Consequently, a child whose mother is a national of a State Party to the Convention shall be granted the right to obtain the nationality of her mother in case the child would be born stateless otherwise. Nonetheless, in cases where the mother herself is stateless, the

²⁷¹ The ICCS is an intergovernmental organisation whose aim is to facilitate international co-operation in civil-status matters and to improve the operation of national civil-status departments. To this end, it keeps an up-to-date documentation on legislation and case-law setting out the law of the Member States, provides those States with information and expertise, carries out legal and technical studies, prepares publications and drafts Conventions and Recommendations. Based on Article 2 of the Rules, any State Party to the Convention for the Protection of Human Rights and Fundamental Freedoms or the ICCPR may become a member of the Commission. The following States are presently members of the organisation: Belgium, France, Greece, Luxembourg, Mexico, the Netherlands, Poland, Spain, Switzerland and Turkey.

Convention does not provide for the grant of nationality for the child who is born on the territory of the State Party. Therefore, in State Parties where nationality is granted based on the principle of *ius sanguinis*, the children of the stateless mothers shall be themselves also at high risk of statelessness.

6. 1. 9. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979)

The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the UNGA by its resolution 34/180 on 18 December 1979 and entered into force on 3 September 1981. CEDAW is viewed as the most important universal, legally binding international instrument aimed at the elimination of all forms of gender-based discrimination against women. Even though a number of human rights treaties had provided for the equal enjoyment of human rights on an equal footing between men and women, its rationale is justified by the continuing disparities between men and women.

The Convention provides a broad definition of discrimination against women as “*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*” as set out in Art 1. This definition includes also instances of indirect discrimination against women which may occur in cases where seemingly neutral legal provisions or policies which do not originally aim to discriminate against women lead to situations where the enjoyment of rights by women is affected disproportionately.

The Convention exceeds the simple provision of guarantees of equal protection in international instruments which predated it, setting out measures for the achievement of equality between women and men. It establishes a treaty body, entitled the Committee on the Elimination of Discrimination against Women (CEDAW) for the purpose of considering progress made in its implementation. The Committee’s primary means of considering progress in the realisation of rights covered by CEDAW is through the assessment of country reports submitted by State Parties reflecting on the legislative, judicial, administrative and other measures which they have adopted to give effect to the provisions of the Convention. Considering that today in more than 30 countries around the world, women are still unable to

pass on their nationality; Article 9 of the UN Convention has crucial importance in the avoidance of childhood statelessness.

It proclaims that „*States Parties shall grant women equal rights with men to acquire, change or retain their nationality...*” and that *States Parties shall grant women equal rights with men with respect to the nationality of their children*”. These provisions are of great importance for women to be able to *acquire, change, retain and transmit their nationality onto their children*. Despite the fact that CEDAW enjoys wide ratification by MENA countries as well, several withdrawals were made in relation to its mostv instrumental provisions. For a long time the Committee scarcely addressed the issue of displaced and stateless women in its concluding observations relating to State Party reports, general recommendations, reports of fact-finding inquiries, and its ‘views’ (decisions) on individual communications²⁷². Then in November 2014 the CEDAW Committee adopted its *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*²⁷³ in order to explain the scope and meaning of core provisions of the CEDAW and clarify the importance of issues relating to the gender-related aspects of refugee status, asylum, nationality and statelessness of women, as they arise in the process of implementation of the CEDAW.

With a view to addressing these shortcomings through the adoption of this general recommendation, the Committee aimed to provide guidance to State Parties on legislative, policy and other appropriate measures to ensure the implementation of their obligations stemming from the Convention regarding non-discrimination and gender equality relating to refugee status, asylum, nationality and statelessness of women. In section V the Committee aims to explore how gender equality and non-discrimination principles are implemented by State Parties with regard to women’s right to a nationality, including the right to acquire, change or retain their nationality and to confer their nationality on their children and spouses. Some of its most important general comments (GC) touching upon the application of the principle of gender equality relating to statelessness shall be explained in the following lines.

²⁷² Alice Edwards (2009): Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination against Women, Background paper prepared for a joint United Nations High Commissioner for Refugees and the UN Committee on the Elimination of Discrimination against Women seminar.

²⁷³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32.

GC51 reaffirms that the Convention constitutes a significant tool to prevent and reduce statelessness, as it disproportionately affects women and girls in terms of their nationality rights. Thus, the Convention requires due implementation of women's equality in enjoying the right to a nationality which is key to enjoy other fundamental rights as contributing members of society. Nationality often constitutes a prerequisite for the enjoyment of other basic human rights, therefore, the promotion and implementation of the right of every woman to acquire, retain or change their nationality on an equal basis as men, regardless of marriage or divorce, proclaimed by Article 9 of the Convention remains crucial. The lack of a nationality puts women and girls at high risk of statelessness and other situations of vulnerability, including trafficking in human beings.

GC52 points out that the Convention allows women to transmit their nationality to their children under the same conditions as their husbands, irrespective of their country of residence or actual stay. GC53 highlights that stateless women and girls are often marginalized and may be denied access to social benefits and free movement, as well as the rights to education, health care or employment. GC54 reaffirms that nationality laws may discriminate directly or indirectly against women through legislative provisions that seem to be gender neutral may in reality have a disproportionate and negative impact on the enjoyment of the right to a nationality by women. In many cases, women cannot transmit their nationality neither to their children, nor to their foreign husbands. Therefore, gender-based discrimination in nationality laws continues to have a detrimental impact on the enjoyment of the human rights by women. GC54 also emphasizes that gender inequality persisting in the nationality laws and practices in many countries may lead to the statelessness of women.

GC56 provides for the importance of birth registration in terms of the enjoyment by women and their children of the right to a nationality, because instances of indirect discrimination, cultural practices and poverty often make it impossible for mothers, especially unmarried mothers, to register their children on an equal basis as fathers. Failure to register a child's birth may impair or nullify the child's effective enjoyment of a range of rights, including the right to a nationality, to a legal identity and to be recognised as a person of legal capacity. GC58 points out that the significant number and nature of reservations made by some State Parties to Article 9 of the Convention may undermine the enforceability of the key treaty provisions. Nonetheless, the right to a nationality and non-discrimination articulated by other international human rights instruments underpins the rationale of equal nationality rights to be

enjoyed by women which may also call into question the justifiability and legal effect of such reservations made by certain State Parties.

Beyond the instrumentability of General Recommendations, the *individual complaints procedure* of the CEDAW Committee grants avenues for displaced and stateless women to access justice. This has been very helpful for refugee/stateless women, as they did not have the chance to benefit from any formal complaints procedures under the 1951 Convention and/or its 1967 Protocol, or under the statelessness conventions, apart from writing letters of complaint to the UNHCR in case of human rights breaches.²⁷⁴ Further to this, lodging an individual communication by a rejected female asylum-seeker whose asylum claim was denied on the basis of a refusal to recognise her fear of gender-related forms of persecution or because sex/gender has not been recognised as a ground to asylum in the relevant national procedure, as potential candidates for individual complaints to the CEDAW Committee. Women refugees living in the territory of State Parties where there are no statelessness determination procedures in place could also lodge individual communications to the CEDAW Commission, as well as those women who have no possibility in the domestic context to challenge discriminatory nationality laws which do not allow them as mothers to confer their nationality to their children.²⁷⁵

6. 1. 10. CONVENTION ON THE RIGHTS OF THE CHILD (1989)

The Convention on the Rights of the Child was adopted by the UN General Assembly on 20 November 1989²⁷⁶ and entered into force in September 1990. It is the most widely ratified UN Convention and the main legal instrument on the protection of children, setting out their civil, political, economic, social, health and cultural rights. In addition to the protection provided by the CRC, three optional protocols were adopted over time, reflecting on recent socio-political developments. The first one restricts the involvement of children in military conflicts, the second prohibits the sale of children, child prostitution and child pornography, while the third provides for the communication of complaints.

²⁷⁴ Alice Edwards (2009): Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination against Women, Background paper prepared for a joint United Nations High Commissioner for Refugees and the UN Committee on the Elimination of Discrimination against Women seminar.

²⁷⁵ Ibid.

²⁷⁶ The adoption of the CRC marked the 30th anniversary of the UN Declaration of the Rights of the Child.

According to Article 1 of the Convention, a child means “*every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.*” Thus, the Convention aims to reflect on the child-specific needs and rights. It proclaims that State Parties must act in the best interests of the child. The CRC Convention embodies predominantly four principles. First, Article 3 proclaims that *the best interests of the child shall be a primary consideration in all actions affecting children.* Second, according to Article 2 *there shall be no discrimination* on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status. Third, Article 6 provides that *States Parties recognise that every child has the inherent right to life* and shall ensure to the maximum extent possible the survival *and development* of the child. And fourth, *children shall be assured the right to express their views freely* in all matters affecting them, their views being given due weight in accordance with the child’s age and level of maturity (Article 12).

The Convention thus sets out a number of fundamental rights reflecting on the need for protection from abuse, exploitation and neglect and the importance of the physical and intellectual development of the child. It gives particular attention to the role of the family in providing care to the child, to the special protection needs of children deprived of their family environment and those of asylum-seeking and refugee children.²⁷⁷ Beyond the four general principles and relating to the last one mentioned by the UNHCR, *Article 7 (1)* of the Convention specifically provides that: “*The child shall be registered immediately after birth and shall have the right to acquire a nationality*” which has the most relevance in the reduction and avoidance of child statelessness around the world. Further to the avoidance of childhood statelessness, the treaty body of the CRC, namely the Committee on the Rights of the Child (CRC) is instrumental which shall be demonstrated in practical terms in the following lines. The Committee on the Rights of the Child provides authoritative guidance on and monitors the implementation of the CRC by State Parties. By convening General Days of Discussion and adopting General Comments, the Committee helps to deepen the understanding of state obligations under the CRC in light of treaty provisions. The Committee periodically reviews state performance through a reporting process and receives individual complaints relating to violations of the CRC in states which have acceded to the Third Optional Protocol.

²⁷⁷ UNHCR Guidelines on Determining the Best Interests of the Child, p.14

The Committee has yet to dedicate a General Day of Discussion or General Comment to the question of, for instance, children's right to a nationality, which would help to foster a better understanding of how states may realise this right through their law and policy in compliance with the guiding principles of the CRC. Since its establishment in 1993, a total of 128 state party reports, submitted by European states, have been considered by the Committee. The Committee has adopted Concluding Observations relating to children's right to a nationality in respect of 42 countries – a total of 62 relevant recommendations in all – equivalent to almost a third of these reviews. At the global level, 438 state party reports have been reviewed and 140 countries received recommendations relating to the right to a nationality. Recommendations to European states on this issue therefore account for some 30% of all recommendations.

The Committee's engagement in childhood statelessness has been most apparent over the past years, adopting relevant recommendations in its Concluding Observations in respect of more than 50% of European state party reports.²⁷⁸ Only in 2016, the CRC Committee issued several concluding observations which included explicit recommendations in relation to children's right to a nationality. During its 71st session (January 2016) a total of 6 countries received 8 recommendations in relation to children's right to a nationality. The content of the recommendations considered several causes of childhood statelessness, including gender discrimination in conferral of nationality to children, loss of nationality, and restrictions in acquisition of a nationality for children who are expelled from their country of birth or born to non-citizens. Moreover, the Committee recommended various measures on how to realise children's right to a nationality and prevent statelessness to 8 states, including amending nationality legislation, carrying out data collection projects and ratifying relevant conventions relating to statelessness. At the 73rd session (September 2016), a strong set of recommendations on protecting children's right to a nationality were addressed in the Concluding Observations to Saudi Arabia and to South Africa, for instance. Later during its 76th session in September 2017, the CRC Committee's Concluding Observations included 4 recommendations on nationality, birth registration and statelessness issues which were addressed to 3 countries.²⁷⁹

²⁷⁸ ENS report, *No Child Should Be Stateless*, 2015, pp. 7-8.

²⁷⁹ Information provided by monthly bulletins synthesized and distributed by the Institute on Statelessness and Inclusion (ISI).

6. 1. 11. INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (1990)

The main objective of the Convention is to foster respect for migrants' human rights, not only as workers, but also viewing them as human beings. The Convention does not create new rights for migrants but aims to strengthen equality of treatment, and the same working conditions as nationals. The Convention stems from the recognition that all migrants should have access to a minimum degree of protection, while recognising that regular migrants have the legitimacy to claim more rights than irregular immigrants. Yet it points out that the fundamental human rights of irregular migrants must be respected under any circumstances.

From a statelessness point of view, Article 7 and Article 29 have significant implications on the nationality rights of migrant workers and their family members. Article 29 protects the rights of migrant workers and their families regardless of:

"sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth, or other status", while Article 29 states that *"each child of a migrant worker shall have the right to a nationality."*

6. 1. 12. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2006)

The Convention on the Rights of Persons with Disabilities was adopted by the UNGA in December 2006 and entered into force in May 2008. The Convention aims to promote and protect the rights and dignity of persons living with disabilities. State Parties to the Convention are obliged to promote, protect, and ensure the full enjoyment of human rights by persons with disabilities on an equal footing as other nationals. The Convention has served as the major catalyst in the global movement aiming to view persons with disabilities as full and equal members of society. Persons with disabilities often face situations of vulnerability; therefore, the protection inherent to a nationality and in the many rights stemming from it would be crucial for them to fully enjoy their fundamental human rights. To this end, full compliance with Article 18 on the liberty of movement and nationality remains crucial, as it sets out extensive provisions relating to the enjoyment of their right to a nationality, linking the enjoyment of the right to a nationality with the liberty of movement to a large extent.

Article 1(1) provides that „*States Parties shall recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities: (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability; (b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement; (c) Are free to leave any country, including their own; (d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.* In addition, Article 2 sets out a provision on the avoidance of statelessness of children with disabilities, proclaiming that „*Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.*”

6. 2. GENERAL PRINCIPLES RELEVANT TO INTERNATIONAL LAW

According to Article 38 (1c) of the ICJ Statute, one source of international law is the “*general principles of law recognised by civilized nations.*” These general principles of law consist of legal principles accepted by all nations in *foro domestico*, recognized in their national law.²⁸⁰ They were inducted from the legal reasoning of national courts and applied first by domestic courts before international courts resorted to them to fill in gaps. General principles of law include, for instance, the principles of good faith, estoppel, equity and human rights. Further to the *Corfu Channel* case, *United Kingdom v. Albania* in 1949, the International Court of Justice found that elementary considerations of humanity are binding as customary international law.²⁸¹ These general principles of law gave room for the emergence of general principles applicable in certain branches of public international law, for instance, the respect of human rights, and the legal principles of equality and non-discrimination in international human rights law. There are thus principles stemming from the jurisprudence of international courts which became embedded in international human rights law and customary law. General principles relevant to international law potentially relating to statelessness and nationality may

²⁸⁰ John George Phillimore (1856): *Principles and Maxims of Jurisprudence*, John W. Parker and Son, West Strand, London; Permanent Court of International Justice, Advisory Committee of Jurists, *Proces-Verbaux of the Proceedings of the Committee June 16 – July 20 1920*, p. 365.

²⁸¹ *Corfu Channel* case (*United Kingdom v. Albania*), Judgment of April 9th 1949, ICJ Reports, p. 22.

include *the rule of law, proportionality, legal certainty, subsidiarity, solidarity* and the principle of *an effective link*. Nonetheless, they must be distinguished from human rights as such. General principles essentially contribute to the interpretation of human rights law by providing guidelines for judges in contested cases, therefore, general principles play an important role in the application of human rights.

Despite the fact that general principles are not human rights, there is a certain overlap with regard to some principles, for instance, with the principles of *non-discrimination, gender equality, protection of minorities, free self-identification, equality before the law* and *effective remedies* which have evolved into human rights over time. In addition, there are some norms of international law which are seen as hierarchically superior;²⁸² these norms constitute a principle of customary international law viewed as peremptory in nature, taking precedence over any other obligations, being binding on all States and can only be overridden by another peremptory norm.²⁸³ The discrimination of racial discrimination or the right to self-determination may be both considered as such, for example. To exemplify how general principles relate to statelessness, I will now reflect on the prohibition of discrimination and the principle of an effective link.

The prohibition of discrimination due to ethnicity, race, religion, language or political opinions constitutes a limitation to a state's decision to grant or withdraw nationality. The principle of non-discrimination can be concluded from several articles in different human rights treaties. As mentioned above, Article 1(3) in ICERD prohibits any state party to discriminate against a certain nationality while deciding if citizenship or naturalisation should be granted to that person. Art. 9 in the 1961 Convention states that citizenship cannot be deprived based on a person's ethnicity, race, religion or political opinion. In addition, Art. 2 in the UDHR provides that "*everyone is entitled to all the rights and freedoms set fourth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*" The norm of non-discrimination can also be found in Article 26 ICCPR where it states that "*all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*" According to Blackman, this article is the most instrumental in terms

²⁸² Rebecca Wallace (2002): *International Law*, Sweet and Maxwell, p. 33.

²⁸³ UNHCR Guidelines on Statelessness No. 1: *The Definition of a Stateless Person in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons*, p. 4.

of nationality issues, since the article applies autonomously to all acts of state legislation, including legislation concerning nationality. Also, the ILC emphasised that the norm of non-discrimination in Article 26 of the ICCPR is applicable to all states, by international law, also applying to nationality matters.²⁸⁴ For all these reasons, it may be assumed that the right to equality and non-discrimination has the character of *ius cogens*.

The general principle of an *effective link* derives from the recognition that in order for an individual to request citizenship from a state, there has to be some kind of link between the state and the individual, such as birth or residency in the state in question.²⁸⁵ To give an example, Latvia has argued that it did not permit automatic citizenship to all USSR settlers due to the fact that they had an effective link to other successor states of the Soviet Union, rather than to Latvia, which is why Latvia required former USSR settlers to complete a naturalisation process, including knowledge of the Latvian language, the country's history, constitution and anthem. Given the history of Russian aggression, Gelazis argues that Latvia may be justified in its demand that the USSR settlers not only break the political ties to Russia but also commit themselves to their adoptive country.²⁸⁶

6. 2. 1. *THE NOTTEBOHM CASE*

The Nottebohm case was the first landmark case of the ICJ relating to statelessness where the Court had to make a stand on how it views nationality. Nottebohm was a German citizen by birth who lived in Guatemala for more than 30 years and who shortly after World War II began decided to apply for the citizenship of Liechtenstein which he considered as a neutral country. Nottebohm had no ties with Liechtenstein and intended to continue to reside in Guatemala. Nonetheless, Liechtenstein approved Nottebohm's application for naturalisation and thus Nottebohm travelled to Liechtenstein for a brief stay to arrange the paperworks. Upon his return to Guatemala, Nottebohm was first refused to be readmitted to the country as a German national and his Liechtenstein citizenship was not acknowledged either. Eventually, he managed to return to Guatemala in 1940 and further pursue his business activities. Then in 1943 when Guatemala declared war on Germany Mr. Nottebohm was removed from Guatemala and his property was confiscated as well. At this point, Liechtenstein stepped in

²⁸⁴ Blackman 1998 pp. 1183-1185.

²⁸⁵ Nonetheless, it may not be confused with the term of 'effective nationality' explained earlier on p. 48 and the nexus between having an effective nationality, the right to a nationality, non-citizenship and statelessness on p. 75.

²⁸⁶ Gelazis, N.M., "The European Union and the Stateless Problem in the Baltic States", pp. 234-235.

and instituted proceedings before the ICJ to oblige Guatemala to recognise Nottebohm as its national and claimed restitution and compensation for the misconduct of Guatemala against its national and for the confiscation of Mr. Nottebohm's property. As a response, Guatemala challenged the validity of Nottebohm's citizenship and the competence of Liechtenstein to act on behalf of Nottebohm in the first place, whereby Guatemala filed its preliminary objection to the Court's jurisdiction but the Court rejected Guatemala's objection in a first Judgment in 1953.²⁸⁷ Two years later in a second Judgment,²⁸⁸ the Court considered that Liechtenstein's international claim was not well-founded for reasons relating to Mr. Nottebohm's nationality.²⁸⁹

In its ruling, the ICJ held that *nationality is a legal bond which has as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.*²⁹⁰ Thereby, the Court recognised the importance of social rights, and the relevance of a genuine bond or connection to the state granting naturalisation, relating to cases where citizenship is a decisive factor. An “*effective link*” may be substantiated by birth, residence or descent and it has appeared in the nationality laws of many countries since then. The Court confirmed that nationality issues remain to be addressed within the exclusive competence of states and thus it was in the power of Liechtenstein, as a sovereign state, to decide on the rules relating to the acquisition of its nationality and to confer its nationality by naturalisation to any individual in accordance with its domestic legislation.

However, the problem that the Court needed to address was beyond the domestic nationality legislation of Liechtenstein, even though the naturalisation of Mr. Nottebohm was a legal act carried out by Liechtenstein in the exercise of its national jurisdiction. Instead, the Court had to decide on whether this act had an international effect to be addressed further, whether the naturalisation of Mr. Nottebohm is an act which can be meaningfully invoked in the case against a state (in this case Guatemala) and whether Liechtenstein is entitled to exercise its diplomatic protection on behalf of Mr. Nottebohm against another state (Guatemala)?

²⁸⁷ Nottebohm case, Preliminary objection, Judgment of November 18th, 1953: I.C.J. Reports 1953, p. III.

²⁸⁸ Judgment of 6 April 1955.

²⁸⁹ See further textual details: <http://www.icj-cij.org/en/case/18>. (accessed 6 May 2018)

²⁹⁰ Nottebohm Case (second phase), Judgement of April 6th, 1955: ICJ Reports 1955, p. 23.

Based on the facts of the case, the Court held that there was no genuine connection between the concerned individual, Mr. Nottebohm, and the claimant State (Liechtenstein) which naturalised Mr. Nottebohm as its citizen to assume the diplomatic protection of Mr. Nottebohm against the other State in question (Guatemala). This means that according to the Court, the right of diplomatic protection arises only in cases where there is a genuine link between the individual and the state which may be well substantiated. The Court found that the ultimate objective of Mr. Nottebohm with the naturalisation was to acquire the citizenship of a neutral state in time of war. Noteworthy, the Court was greatly influenced by two factors when it rendered its judgment. First, an authentic letter was presented which was issued by the German Foreign Office in 1939 proclaiming that it may be in Germany's interests that some of its citizens acquire foreign nationality and for this reason their request for denationalisation, as well as their subsequent renaturalisation later on shall be facilitated and viewed favorably. This may or may not explain why Mr. Nottebohm was keen to apply for naturalisation in Liechtenstein. Secondly, Mr. Nottebohm was mentioned as an active member of the Nazi Party in Germany and as such was put on the British and US blacklist of those whose entry is forbidden.

The ruling of the Nottebohm case has been criticised over this principle arguing that it has also given some states the opportunity to refuse to recognise some individuals as nationals, due to the absence of a social element which could constitute an effective link. Nonetheless, reflecting back on the Latvian narrative, as a result of considering the effective link between Russian-speaking non-citizens and the state of Latvia, non-citizens were given increased protection against the threat of removal from their long-term place of residence, rendering them eternal beholders of the right to reside in the territory of Latvia which substantiates the importance of this general principle. Additionally, it must be emphasized that although the ICJ made reference to *the effective link principle*²⁹¹ which was articulated with regard to the acknowledgement of a State's competence to provide diplomatic protection to its national against another State, it did not explicitly recognize the right to a nationality as a fundamental human right itself.

²⁹¹ It may be necessary to point out that the effective link principle and the earlier discussed principle of effective nationality are not identical terms.

SUMMARIZING THE RESULTS

Having explored the landmark UN conventions relating to nationality and statelessness, it is apparent that the right to a nationality, the prohibition of arbitrary deprivation thereof and the prohibition of discrimination constitute major human rights, all enshrined in the UDHR which inspired all other human rights instruments which have been adopted in the past 70 years. Treaty provisions touching upon nationality oblige State Parties of landmark conventions to consider the consequences of statelessness and therefore seek to avoid it, if possible. The UDHR remains instrumental in addressing statelessness, as drafters of regional (including European) conventions also considered its treaty provisions as a basis of human rights protection. Further to the analysis of the statelessness conventions, globally I find that they constitute an adequate basis for the protection framework for stateless persons in international law. Nonetheless, their ratification rates are not pre-eminent (especially with regard to the 1961 Convention) and many State Parties (affected by statelessness) made substantial reservations concerning key treaty provisions greatly undermining the enforceability of the objectives of the conventions. Thus, more States must be encouraged to accede to the statelessness conventions and State Parties should be inclined to revisit the issue of lifting their reservations. In light of the identified shortcomings of the conventions, the role and interpretation of nationality issues of international and regional courts shall be instrumental in addressing cases of statelessness, and other universal and regional instruments relating to statelessness must also be made use of to succeed in strategic litigation addressing cases of statelessness.

CHAPTER 7: REGIONAL PROTECTION THROUGH COE INSTRUMENTS

INTRODUCTION

In this section, for the purposes of this work a regional focus shall be applied to explore the European legal framework addressing statelessness. Thus, first the related conventions adopted within the context of the Council of Europe (CoE) shall be addressed, precisely because they form the basis of the human rights related EU legislation. To this end, the 1950 European Convention on Human Rights (CoE), the relevant case law of the European Court of Human Rights ((ECtHR), the 1995 Framework Convention for the Protection of National Minorities, the 1996 European Social Charter, the 1997 European Convention on Nationality (ECN) and the 2006 European Convention on the Avoidance of Statelessness in Relation to State Succession shall be addressed in depth.

7. 1. COE CONVENTIONS

Following the disintegration of the Soviet Union a new Europe emerged where thousands of people lived without an existing nationality which provided a clear rationale for creating new regional legislation. In Europe, the Council of Europe (CoE) has been very active in establishing standards in the field of nationality law. In the European context, the CoE provides an excellent platform for adopting regional conventions which may support and complement the implementation of already existing universal human rights obligations proclaimed by international conventions.

7. 1. 1. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

„Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” (Article 2 of the ECHR)

The ECHR has played an instrumental role in the development of the regional human rights protection regime operating across Europe whereby the ECHR constitutes an important tool as a landmark document adopted in the aftermath of World War II, shortly after the adoption of the UDHR, aiming to avoid mass atrocities and human rights violations in the future. The Convention largely builds on the objectives of the UDHR with the ambition to exceed them. It also serves as the regional human rights instrument giving effect to certain rights stated in the UDHR, for instance, when it comes to ensuring individuals the possibility of applying to courts for the enforcement of their rights.²⁹²

Through the ECHR, the CoE protects the basic human rights of stateless persons who belong to the *ratione personae* of the Convention in light of Article 1 proclaiming that “*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*”. Therefore, it provides a powerful tool for strategic litigation and a firm basis for the EU Charter of Fundamental Rights which was greatly inspired by the ECHR. Similarly to the UDHR, the ECHR embraces basic rights which also

²⁹² Glossary of the European Migration Network 3.0, 2014

apply to stateless persons, including the *prohibition of torture and inhuman or degrading treatment or punishment* (Art. 3), *the right to liberty and security* (Article 5), *the right to respect for private and family life* (Art. 8), *the right to an effective remedy* (Article 13) and *the prohibition of discrimination* (Art. 14).

Unlike Article 15 of the UDHR, the ECHR does not explicitly recognize the right to a nationality, nor does it refer to statelessness or nationality in any of its provisions. Nevertheless, the Convention claims that the enlisted rights should be granted to all persons residing in the territory of CoE Member States, attributing less significance to nationality itself which marks the beginning of the gradual decoupling of rights only reserved to citizens.²⁹³ Even though drafters of the ECHR did not include the right to a nationality, the European Court of Human Rights (ECtHR), the supervisory mechanism of the ECHR and its Protocols established by the Convention, ruled on several cases relating to the right to a nationality.²⁹⁴ Leading legal practitioners thus point out that the ECtHR has enormous potential in eradicating statelessness in Europe and therefore consider that engaging in strategic litigation with the Court shall be key to end statelessness in the continent.²⁹⁵

The power of the ECHR lies precisely in the fact that it may be enforced by State Parties who pledge to acknowledge and comply with the jurisdiction of the ECtHR.²⁹⁶ Article 46(1) of the ECHR proclaims that the Contracting Parties agree to abide by the final judgment of the Court in any case to which they are parties.²⁹⁷ According to an ENS discussion paper,²⁹⁸ the jurisprudence of the ECtHR could encourage further strategic litigation based on Articles 3, 5, 8, 13 and 14 which may together establish an obligation for State Parties to the ECHR to determine statelessness and also to put in place dedicated procedures.

²⁹³ Claude Cahn (2012): Minorities, Citizenship and Statelessness in Europe, *European Journal of Migration and Law*. p. 306.

²⁹⁴ See *Andrei Karassev and family v Finland* App no 31414/96 (ECtHR 12 January 1999); *Kuric and others v Slovenia* App No 26828/06 (ECtHR 26 June 2012); *ECtHR, Genovese v Malta* App no 53124/09 (ECtHR 11 October 2011).

²⁹⁵ Weiss 2015.

²⁹⁶ Radnai, 2017, *Statelessness determination in Europe: towards the implementation of regionally harmonised national statelessness determination procedures*, *Statelessness Working Paper Series No. 2017/08*. (hereinafter: Radnai 2017) p.7.

²⁹⁷ *Ibid.*

²⁹⁸ Vlieks 2014.

To provide an example, Article 3 provides that “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*” This provision might encompass more than physical suffering; it may be considered in light of the mental suffering stemming from the uncertainty faced by unidentified stateless persons, as a result of being ignored by their respondent state. Refusing to identify the affected individuals for a prolonged period of time which would be indispensable to their protection causes further suffering for the affected individuals.²⁹⁹ This experience faced by many stateless persons naturally triggers severe distress and anxiety, as well as fear of expulsion in light of the lack of status determination. Therefore, in cases where statelessness determination would be key to prevent the prolonged or acute mental suffering of an affected individual, a state obligation for urgent status determination could be imposed.

Cases of expulsion of stateless persons may be a further breach of Article 3 when applying the principle of *non-refoulement* in a migratory context for refugees who may be stateless persons as well. Since stateless persons are often members of vulnerable groups that are denied citizenship in their home countries based on their ethnicity or religion, for instance, they are often subject to systematic discrimination, destitution, persecution, and lack of health care and education. Therefore, it is vital to consider the prohibition of *refoulement* under Article 3 in case there are substantial grounds to believe that the person concerned would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which s/he would be returned.

Stateless persons are at particular risk of arbitrary detention as well which may also be considered as a breach of Article 3 in conjunction with Article 5. The latter provision pertains to the right to liberty and security setting out an exhaustive list of grounds for arbitrary arrest or detention.³⁰⁰ If a person is not a national of any country, s/he will not be necessarily able to be returned or be readmitted to the country of nationality or of habitual residence, therefore, shall be subjected to immigration laws. Thus, stateless persons with unknown nationality remain more vulnerable to arbitrary detention with little hope of release or within a reasonable time. This uncertain situation along with the lengthy and indefinite detention periods further

²⁹⁹ Ibid.

³⁰⁰ Detention under Article 5(1)(f) of the ECHR is arbitrary if it is not carried out in good faith, if the detention is not closely connected to the detention ground(s), if the place and conditions of detention are not appropriate, and when the length of the detention exceeds the reasonably required amount of time for the purpose pursued. See: *A. and Others v the United Kingdom* App No 3455/05 (ECtHR 19 February 2009) para. 164.

raise the issue of inhuman or degrading treatment which results in the violation of Article 3, which may also imply an implicit obligation to identify stateless persons who are subject to unlawful detention in deportation proceedings. An early recognition of a person's statelessness may therefore prevent further unlawful detention (unlawful, because a stateless person may not be subject to expulsion) and would help to secure the release of the stateless person from detention.³⁰¹

Article 8 obliges states to refrain from interferences in private and family life. Relating to statelessness, amongst others³⁰², the case of *Karashev v. Finland*³⁰³ constitutes a landmark momentum in the ECtHR's jurisprudence on statelessness. In this case, the Court found that although the right to a nationality as such is not guaranteed by the ECHR, such act of arbitrary denial of citizenship may constitute a violation to Article 8 considering the impact of such denial on the private life of the affected individual. The Court's jurisprudence relating to nationality and statelessness shall be further explored in the next subchapter.

Article 13 sets out the right to an effective remedy, providing that:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

This article aims to provide a mechanism at the national level through which individuals may obtain legal reparation in compensation of violations of their rights based on the provisions of the ECHR. Related to statelessness, one of the most important provisions of ECHR is Article 14 which guarantees the enjoyment of ECHR rights without discrimination, by providing that:

³⁰¹ The Equal Rights Trust (2010): *Unravelling Anomaly, Detention, Discrimination and the Protection Needs of Stateless Persons*.

³⁰² See more cases reflecting on Article 8 of the ECHR: *Kafkasli contre la Turquie*, Commission Européenne des Droits de l'Homme, Requête No. 21106/92 Rapport de la Commission, 1 Juillet 1997.; *Slivenko and Others v. Latvia*, European Court of Human Rights, Application no. 48321/99, Decision as to the admissibility of 12 January 1999.; *Slivenko v. Latvia*, European Court of Human Rights, Application no. 48321/99, Grand Chamber Judgment of 9 October 2003.; *Sisojeva and Others v. Latvia*, European Court of Human Rights, Application no. 60654/00, Grand Chamber Judgment of 15 January 2007.; *Kaftailova v. Latvia*, European Court of Human Rights, Application no. 59643/00, Grand Chamber Judgment of 7 December 2007.; *Shevanova v. Latvia*, European Court of Human Rights, Application no. 58822/00, Grand Chamber Judgment of 7 December 2007.; *Kuduzović v. Slovenia*, European Court of Human Rights, Application no. 60723/00, Decision as to the admissibility of 17 March 2005. Part the Law, 2.); *Kurić and Others v. Slovenia*, European Court of Human Rights, Application no. 26828/06, Chamber Judgment of 13 July 2010. para. 353.; *Kurić and Others v. Slovenia*, European Court of Human Rights, Application no. 26828/06, Grand Chamber Judgment of 26 July 2012.

³⁰³ *Karashev and Family v. Finland*, App no 31414/96, Council of Europe: European Court of Human Rights, 12 January 1999.

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Even though Article 14 does not mention explicitly the prohibited ground of nationality, it does prohibit discrimination based on association with a national minority. In this context, it may be argued that in order to avoid discrimination in the enjoyment of human rights provided under the ECHR, the identification of groups which may be subject to such discrimination (including stateless persons) constitutes a prerequisite to their protection. This may thus provide a conceptual basis for strategic litigation for a legal obligation for statelessness determination to be enforced under the European Convention on Human Rights.³⁰⁴ In addition, Article 14 may be also violated by discriminatory state practices against stateless persons and non-citizens, through instances of discrimination based on (non)-nationality.³⁰⁵ Therefore, the situation of non-citizens and stateless persons in the EU should be primarily addressed through the lenses of the right to equality and non-discrimination.

7. 1. 2. FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

The CoE Framework Convention for the Protection of National Minorities was adopted in November 1994 and entered into force in February 1998. The Convention constitutes the first legally binding multilateral instrument designed to protect national minorities and thus may be used as a powerful tool for the protection of the rights of persons belonging to national minorities in countries of the Western Balkans who are all members of the Council of Europe. Considering that stateless persons are mostly members of national and ethnic minorities, the Framework Convention may be used for human rights litigation on their behalf in Europe.

National minorities often face instances of discrimination when it comes to education, employment, housing and experience impeded access to health care, justice and even citizenship. Thus, the Framework Convention draws upon these challenges arising from discrimination, setting out national minorities’ rights in the aforementioned areas. As an important shortcoming, the Convention does not provide a definition of a ‘national minority’

³⁰⁴ Vlieks 2014. p. 2.

³⁰⁵ See footnote 131. p.23.

in the lack of agreed language on this term among CoE members.³⁰⁶ State Parties are thus accorded a great scope to translate the Convention's provisions to their country-specific context and decide which groups of individuals they wish to consider as national minorities within their respective territory providing them with the rights protected under the Framework Convention. In their decision, State Parties must take due regard to general principles of law and those relating to international law (to be further explored in the next chapter). Accordingly, Article 3 proclaims the principle of free self-identification which implies that it remains the duty of individuals to decide whether they wish to be viewed as members of a national minority group. Regrettably, the Framework Convention does not set out nationality rights for national minorities or mention the importance of providing them with identity documents.

In order to monitor the implementation of the Convention and arbitrary state actions excluding minorities from the protection of the Framework Convention an Advisory Committee was put in place. The Advisory Committee has dealt with the situation of stateless minorities, with special regard to the Roma in its recent country opinions, for instance concerning the situation in Serbia,³⁰⁷ highlighting concerns of the implementation of the aforementioned memorandum of understanding between national and international actors aiming to provide Roma with greater assistance in the process of late registration of births. Notwithstanding its noble goals, the Framework Convention has been ratified by only 39 State Parties which greatly limits its enforceability in Europe.

7. 1. 3. THE EUROPEAN SOCIAL CHARTER

The European Social Charter was adopted under the aegis of the CoE in 1961 and revised in 1996. It guarantees fundamental social and economic rights further to the civil and political rights guaranteed by the ECHR. The Charter protects a broad range of basic human rights related to employment, housing, health, education, social protection and welfare. While it aims to protect the social rights of vulnerable persons based on the principle of non-discrimination, including elderly people, children, people with disabilities and migrants, it

³⁰⁶ As a matter of fact, the definition of the term 'minority' also lacks international consent. Nonetheless, the Glossary of this dissertation includes a definition retrieved from the IOM Glossary on Migration.

³⁰⁷ Third Opinion on Serbia, June 2014. ACFC/OP/III(2013)006. para. 75.

Available from:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008c6a>. (accessed 6 May 2018)

does not explicitly mention the stateless among its *ratione personae* that are thus insufficiently protected under the Charter.

Nonetheless, the Appendix provides the following provision concerning stateless persons:

“Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable to those stateless persons.”

Stateless persons are generally granted *family benefits, social security, social and medical assistance*, as well as other *basic social rights* enshrined in the 1954 Convention by the State Parties of the Charter. In order to monitor compliance with the Charter, the European Committee of Social Rights was established. In a recent document, the Committee restated that refugees and stateless persons were accorded equal treatment with nationals and with nationals of other Contracting Parties which must be guaranteed to stateless persons as defined by the 1954 Convention in terms of issues covered by the Social Charter and for which the 1954 Convention requires the same treatment as accorded to nationals, including *education, labour legislation, fiscal charges and access to courts*.³⁰⁸ Considering that most of the social rights in the EU Charter of Fundamental Rights are based on the relevant articles of the Charter, this living document serves as a major reference point in EU law as well.

7. 1. 4. THE EUROPEAN CONVENTION ON NATIONALITY

The European Convention on Nationality (ECN) was adopted by the CoE in 1997 and entered into force in March 2000. According to Article 2 (a) of the ECN, *nationality constitutes a legal bond between an individual and the state* which has been a core definition of the concept of nationality widely considered by the international community. Unlike the ECHR, the ECN sets out very important objectives in the European context pertaining to the reduction of statelessness, also inspired by the adoption and objectives of the 1961 Convention. As a result, a number of provisions address the avoidance and reduction of cases of statelessness.

³⁰⁸ European Social Charter European Committee of Social Rights Conclusions (2013) General Introduction, January 2014, pp. 9-10.

Although Article 3 of the ECN provides that „*Each State shall determine under its own law who are its nationals,*” Article 4 limits the scope of this provision and repeats the message of Article 15 UDHR by proclaiming that „*The rules on nationality of each State Party shall be based on the following principles: a. everyone has the right to a nationality b. statelessness shall be avoided; c. no one shall be arbitrarily deprived of his or her nationality; d. Neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse*”. The enforcement of these provisions is instrumental in the prevention and avoidance of statelessness.

Article 5(1) is also of paramount importance in terms of non-discrimination to be prevalent in nationality legislation. Art. 6 provides for the access to nationality for stateless children who would otherwise be stateless. In this regard, the adoption of the ECN brought about important development in terms of childhood statelessness. Unlike the 1961 Convention, the ECN allows access to be the naturalised after five years of lawful and habitual residence while a child is still a minor. Also, while the 1961 Convention allows State Parties to reject an application for having committed serious crimes which constitutes a threat for the national security, the ECN does not permit rejection of the application based on this ground. As a further milestone, Article 6(4)(g) requires the *facilitation of the naturalisation of stateless persons living in the territory of State Parties* which article many European countries choose to comply with and proved to be instrumental in reducing cases of statelessness in Europe. Further to the 1961 Convention, Art. 7 and 8 of the ECN provide an exhaustive list of acceptable grounds for loss of nationality.³⁰⁹ Yet, Article 7(3) underpins that grounds of loss may not cause statelessness except in the case of Article 7(1)(b) proclaiming that: “*Acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant*”. This restriction considerably reduces cases of statelessness. The grounds mentioned in Article 7(4) and (5) 1961 Convention, which may cause statelessness, cannot do so under the ECN. To date, only 12 EUMS have acceded this ECN

³⁰⁹ Including voluntary acquisition of another nationality; acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant; voluntary service in a foreign military force; conduct seriously prejudicial to the vital interests of the State Party; lack of a genuine link between the State Party and a national habitually residing abroad; where it is established during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled; adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.

and are therefore bound by this Convention (Austria, Bulgaria, Czech Republic, Denmark, Finland, Germany, Hungary, the Netherlands, Portugal, Romania, Slovakia and Sweden).

In the following lines, two recent examples shall be mentioned reflecting on relevant efforts recently made by the Parliamentary Assembly of the CoE making use of the ECN. In 2014 it adopted Resolution 1989 (2014) on the *access to nationality and the effective implementation of the ECN*, whereby it recalled that the right to a nationality is protected under the ECN. It further called on Contracting States to put in place status determination procedures in compliance with the relevant UNHCR guidelines, and to recognise persons who meet the definition of a stateless person according to Article 1(1) of the 1954 Convention as stateless persons.³¹⁰ Then exactly two years ago in March 2016, the Assembly issued *Resolution 2099 (2016) on the need to eradicate statelessness of children*, urging Contracting States to establish statelessness determination procedures, aiming to ensure that all stateless persons residing in the territories of the Contracting States can be identified, duly protected and eventually be naturalised.³¹¹

7. 1. 5. THE EUROPEAN CONVENTION ON THE AVOIDANCE OF STATELESSNESS IN RELATION TO STATE SUCCESSION

As explained earlier in this thesis, state succession can lead to the emergence of wide-scale statelessness. The European Convention on the avoidance of statelessness in relation to State succession, adopted by the CoE in 2006, therefore builds upon the ECN by providing more detailed rules to be applied by States with a view to preventing and reducing the number of cases of statelessness arising from State succession. According to Article 1(a), state succession means the replacement of one State by another in the responsibility for the international relations of territory. Most importantly, the Convention proclaims the right to a nationality by concerned individuals, by setting out that „*Everyone who, at the time of the State succession, had the nationality of the predecessor State and who has or would become stateless as a result of the State succession has the right to the nationality of a State concerned.*” (Art. 2.)

³¹⁰ Council of Europe Parliamentary Assembly Recommendation 1989 (2014) on access to nationality and the effective implementation of the European Convention on Nationality (9 April 2014)

³¹¹ Council of Europe Parliamentary Assembly Resolution 2099 (2016) on the need to eradicate statelessness of children (4 March 2016)

Further to this right, Article 3 states that States shall take all appropriate measures to prevent persons from becoming stateless as a result of the succession, while Article 4 includes a non-discrimination clause to be applied for cases relating to state succession. In order to prevent cases of childhood statelessness resulting from state succession, Art. 10 provides that states shall grant nationality at birth to children born following State succession on their territory to a parent who, at the time of State succession, had the nationality of the predecessor State if that child would otherwise be stateless. The Convention provides an excellent basis for protection against statelessness arising from state succession; however, it has only been ratified by seven States at the time of writing, including four EU Member States; Austria, Hungary, Luxembourg and the Netherlands³¹² which delimits the scope of its regional enforcement.

7. 2. CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATING TO STATELESSNESS

From a law-making perspective, courts play a major role in inducing national developments when ruling on contentious nationality cases, because they often address legal gaps relating to an individual's statelessness and by doing so they often make important precedents which have the potential to bring about important policy changes also at the national and regional levels. Through their statelessness related jurisprudence, international, regional and domestic courts have defined nationality as:

- “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties”;³¹³
- “the political and legal bond that links a person to a given State and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from the State.”³¹⁴

Both definitions emphasize the integral role played by an effective nationality in providing security, protection and grounding to a person's life. Significantly, nationality entitles the citizen to the diplomatic protection of his/her state when staying in another country.

³¹² https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/200/signatures?p_auth=2mJ5vsOT. (accessed 6 May 2018)

³¹³ See Nottebohm Case (second phase), Judgement of April 6th, 1955: ICJ Reports 1955, 4. p. 23.

³¹⁴ Castillo Petruzzi et al. Case, Inter-American Court of Human Rights, [ser.C] No. 52, 30 May 1999.

The ECtHR was established as the supervisory body of the ECHR on the basis of Article 19 of the ECHR in 1959 in Strasbourg, France.³¹⁵ The Convention entrusts the ECtHR with ensuring the enforcement and implementation of the ECHR and its protocols by the contracting states of the CoE. The Strasbourg Court's main objective is to guarantee a minimum standard of protection of fundamental rights in Europe. Its jurisdiction has been recognised by all 47 CoE Member States. Contracting parties to the ECHR have incorporated the Convention into their own national legal systems through the means of constitutional provisions, statutes and judicial decisions. Most importantly, the Court hears applications alleging that a Contracting State has breached the human rights provisions protected under the ECHR. Application may be submitted by an individual, a group of individuals or of the other Contracting States respectively or jointly. Applications lodged by individuals constitute the majority of cases heard by the Court. Further to these allegations, the ECtHR issues judgements and advisory opinions.³¹⁶

As mentioned aforehand, the Court has addressed a number of questions closely relating to nationality and statelessness, having ruled on several cases in which stateless persons were the complainants. In its jurisprudence to be presented in the next paragraphs, it often gave primary consideration to the full enjoyment of human rights of individuals, irrespective of having a nationality or not, easing the gap between nationals and non-nationals. Most importantly, the ECtHR has recognised nationality as an integral part of a person's social identity, to be protected as such as an important element of private life – a right that is also to be laid down later in the EU Charter of Fundamental Rights. Therefore, the ECtHR plays a crucial role in protecting and advocating for the fundamental rights of stateless persons in Europe, as well as in the avoidance of statelessness and the protection of stateless persons.³¹⁷ In early cases relating to nationality issues, the Court found that it was essentially the

³¹⁵ In parallel to the European Court of Human Rights, the European Commission of Human Rights was set up as a special tribunal in 1954 on the basis of the ECHR which until the entry into force of Protocol 11 of the ECHR to provide a platform for individuals to apply to the Commission with individual inquiries which in case considered the given case to be well-founded would refer the case to the European Court of Human Rights on the individual's behalf. This implied that individuals did not have the opportunity to directly apply to the European Court of Human Rights until Protocol 11 came into force in 1998, putting an end to the European Commission of Human Rights, enlarging the Court and its mandates, and providing individuals direct access to the Court. See cases referred to the Court by the Commission:

³¹⁶ The Committee of Ministers may request the Court to deliver an advisory opinion relating to the interpretation of the ECHR.

³¹⁷ The Equal Rights Trust (2010): *Unravelling Anomaly, Detention, Discrimination and the Protection Needs of Stateless Persons*.

prerogative of States to decide on matters related to nationality and related complaints do not fall within the scope of the ECHR.³¹⁸ Then the accession of new states to the ECHR following the dissolution of the USSR in 1990-1991 led to an important shift in the jurisprudence of the ECtHR and a sharp increase in applications lodged to the Court.

The first landmark case relating to issues on nationality in Europe was the case of *Genovese v. Malta*.³¹⁹ In this case, the applicant had British nationality but also sought to acquire Maltese citizenship further to his father who was a Maltese citizen. However, he learned that he could not acquire Maltese citizenship, as he was born out of wedlock and therefore was not entitled to acquire Maltese citizenship by descent from his Maltese father. Under Maltese law at the time, only the mother was able to pass on her nationality to the child if the child was born out of wedlock. This actually constitutes a form of ‘reversed’ gender discrimination in nationality law.³²⁰ Therefore, he filed an application to the ECtHR complaining that the Maltese domestic legislation on nationality was discriminatory. The Government of Malta argued that there was no violation of Article 8, because the father had rejected his son.

Nonetheless, the Court considered the notion of private life more broadly and found that there had been a violation of Article 14 (non-discrimination article) in conjunction with Article 8 (the right to family life), arguing that the denial of citizenship had a negative impact on the applicant’s ‘social identity’ under Article 8:

„Even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person’s social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant’s social identity was such as to bring it within the general scope and ambit of that Article.”³²¹

³¹⁸ European Commission on Human Rights, 22 May 1995, *Kafkasli c. la Turquie*, Application No. 21106/92. European Commission on Human Rights, 2 September 1996, *Slepčik v. the Netherlands and the Czech Republic*, Application No. 30913/96, European Commission on Human Rights, 21 May 1996, *Zeibek v. Greece*, Application No. 34372/97

³¹⁹ *Genovese v. Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011 para. 33.

³²⁰ Sebastian Kohn (2011): ECHR and citizenship: The case of *Genovese v. Malta*, *Statelessness Blog* (hereinafter: Kohn 2011)

³²¹ *Ibid.*

The court ruling in this case may have far reaching implications for the application of discriminatory domestic provisions or in cases where principles to avoid statelessness are not implemented.³²² This case also proves that although the right to a nationality is not included in the Convention *per se*, there are circumstances under which denial or deprivation of nationality might raise issues under Article 8 relating to non-discrimination³²³. The essence of the case *Genovese v. Malta* was reconfirmed in the cases of *Sylvie Mennesson v. France*³²⁴ and *Francis Labassee v. France*,³²⁵ both concluded by the Court in June 2014 whereby it was decided that aspects relating to one's social identity need to affect the nationality position of children born from international surrogacy arrangements. It was considered by the Court that the inability of the genetic father to establish paternity of a child born out of a surrogacy arrangement which would result in the child acquiring another nationality was a breach of the child's right to identity.

Further to Article 8 of the ECHR concerning the right to private and family life, I would like to shed light on the very recent *Hoti v. Croatia*³²⁶ case whereby the ECtHR concluded crucial findings relating to the residence rights of stateless persons. Nonetheless, it must be pointed out that unlike the *Genovese v. Malta* case where nationality was considered in the context of private life, this decision did not concern the applicant's right to a nationality or whether he should be granted citizenship but his right to have stable residence.

Mr. Hoti was born in Kosovo which became an integral part of the Soviet Federal Republic of Yugoslavia (SFRY) where his Albanian parents were granted political asylum at the time. At the age of 17, Mr. Hoti moved to Croatia and has been staying there ever since 1979 without having managed to regularize his status there. Official documents issued by the SFRY suggest that Mr. Hoti is Albanian/Kosovar national which, however, was not confirmed by national authorities. Mr. Hoti's birth certificate produced in Kosovo serves as documentary evidence of the applicant's statelessness, stating that Mr. Hoti has no nationality. Therefore, after the restoration of independence in Croatia, Mr. Hoti applied for the citizenship of the country of

³²² Waas van, L, "Fighting Statelessness and Discriminatory Nationality Laws in Europe", p. 254.

³²³ Kohn 2011.

³²⁴ *Sylvie Mennesson v. France*, Application no. 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014

³²⁵ *Francis Labassee v. France*, Application no. 65941/11, Council of Europe: European Court of Human Rights, 26 June 2014

³²⁶ *Hoti v. Croatia*, Application no. 63311/14, Council of Europe: Court of Human Rights, 26 April 2018.

his long-time residence, Croatia, but his application was rejected due to his inability to provide a foreign travel document or to renounce his (non-existing) foreign nationality.

Having due regard to the established facts explained above, the Court held that statelessness was a relevant fact in this case which substantiated the Court's view that Croatia violated Article 8 of the ECHR, as Mr. Hoti did not enjoy the right to stable residence which interferes with his human right to private and family life. The Court declared Mr. Hoti stateless and condemned Croatia for not fulfilling its statelessness-related international obligations relating to the case of Mr. Hoti, challenging Croatia why the applicant's statelessness was not proactively established in due course. Noteworthy, the considered documentary evidence (birth certificate) can hardly be considered as such with legal certainty which entails that in this case the Court considered statelessness such a relevant factor that it was willing to reduce the standard of proof when decided on whether Mr. Hoti was indeed stateless. This also suggests that when it comes to status determination, the burden of proof should be shared between the applicant and the given state. Additionally, with regard to the mentioned inability to comply with the requirements of naturalisation in Croatia, the Court highlighted that stateless persons cannot be rightly expected to fulfill such documentary requirements which is also set out in Art. 6 of the 1954 Convention which Croatia chose to ratify.³²⁷

Further to non-citizenship and statelessness, the case of *Andrejeva v Latvia*³²⁸ presents a telling example of discrimination based on (non-) nationality, mentioned beforehand. Andrejeva was a non-national of Latvia holding a permanent residence status. Based on the Latvian State Pensions Act, solely periods of work undertaken in Latvia could be taken into account when calculating the pensions of Latvian non-citizens, unlike citizens. As Ms. Andrejeva had been employed from 1973 to 1990 by employers based in Ukraine and Russia, her pension was calculated solely in respect of the time she had worked before and after that period in Latvia. She petitioned at the ECtHR under Article 14 of the Convention for miscalculating her retirement pension based on her lack of nationality. Mrs. Andrejeva argued that even though she was living in Latvia all her life as a non-citizen, due to the lack of nationality her pension was calculated on a different basis from that of Latvian citizens, and therefore she receives a much lower sum than Latvian citizens. In its ruling, the Court found a

³²⁷ See more: Katja Swider (2018): Hoti v. Croatia – a landmark decision by the European Court of Human Rights on residence rights of stateless persons, European Network on Statelessness Blog, 3 May 2018.

³²⁸ *Andrejeva v. Latvia*, Appl. No. 55707/00, Council of Europe: European Court of Human Rights, 18 February 2009.

violation of Article 14 of the ECHR on the mentioned grounds, taking into consideration that the applicant was not a national of any state (para.88). This suggests that the differential treatment of non-citizens (who even though are not viewed as stateless persons, have no effective nationality) in terms of social security requires reasonably justified grounds. This judgment proves that under Article 14 of the ECHR, statelessness can be taken into consideration when deciding on cases relating to discrimination based on nationality.

More recently, the ECtHR ruled on a case where a stateless person was detained unlawfully in the framework of an immigration proceeding. As mentioned beforehand, generally where a third-country national is expelled from a host country to the country of his or her nationality, that country is obliged to readmit its national. In case of stateless persons, by definition, there is no country of nationality which could be enforced to readmit the concerned person. This has been a major challenge for European law-makers and judges due to the fact that in such cases, expulsion may not be applied and putting the affected individuals in situations of lengthy detention would be clearly unlawful based on the detention related articles of the ECHR. This difficult issue was first and foremost addressed by the ECtHR in the case of *Kim v Russia*.³²⁹

Mr. Kim was born in the Uzbek Soviet Socialist Republic during the Soviet era. By 1990, he moved to St Petersburg. Therefore, at the time of the disintegration of the USSR, Mr. Kim did not acquire the nationality of the newly established Russian Federation and therefore became a stateless person. Mr. Kim was detained in the Russian Federation for applying for identity documents for which he was convicted. As he was registered as a resident and national of Uzbekistan, he was detained by the Russian authorities before his expulsion to Uzbekistan. During the first months of his detention the Russian authorities did not solicit the competent authorities in Uzbekistan to substantiate his nationality. During the time of his detention, Mr. Kim had no access to a meaningful judicial review of his detention, therefore, was not informed of the effective date of his release from detention neither. Later, the Uzbek authorities, having been chased by Mr. Kim's lawyers, confirmed that Mr. Kim was not recognised by them as an Uzbek national. Therefore, he was only released when the regular two-year time limit for detaining persons for expulsion was reached. Throughout the detention

³²⁹ Kim v. Russia, Application no. 44260/13, Council of Europe: European Court of Human Rights, 17 July 2014.

period he was kept under poor and overcrowded circumstances in a facility which was designed for short-term detention.

At a later stage, Mr. Kim solicited the ECtHR arguing that the conditions of his detention constituted a violation under Art. 3 of the ECHR, as a result of the inhuman and degrading treatment he had been subjected to. Mr. Kim claimed that the circumstances of his unlawful detention constituted a violation of Article 5(4) of the Convention as he had no access within a reasonable time to an effective judicial review procedure to enable him to attempt to enforce his release. Mr Kim further argued that his detention was unlawful by referring to Art. 5(1)(f), as although he was detained for the purposes of deportation/expulsion, his detention was arbitrary as insufficient efforts had been made to secure his admission to Uzbekistan, leading to an extended period in detention.

The Court consented with all these arguments and ruled in favor of Mr. Kim in these regards. The ECtHR held that the applicant had no meaningful access to any procedure to challenge his detention, and that he had remained in detention, even though his expulsion could not be secured. According to the Court, the domestic authorities did not undertake the necessary measures in Mr. Kim's case with due diligence. Since he could not be expelled to a third country as a stateless person, Russian authorities should have accelerated the related proceedings to ensure protection of his right to liberty but failed to do so which resulted in the prolonged time of his detention. Having expressed concern over Mr. Kim's irregular immigration position stemming from his stateless status, the Court found that he was at risk of further persecution. The ECtHR therefore held that Russia needed to take appropriate measures to provide for procedures in order to prevent the applicant from being re-arrested and detained for offences resulting from his status as a stateless person. Most importantly, the Court held that Russia should put in place a mechanism which allows individuals to initiate proceedings for the examination of the lawfulness of their detention pending expulsion in order to avoid violations of article 5(4) of the Convention. In addition, the Court considered that Russia should take the appropriate measures to limit detention periods to the extent that they remain reasonable to the ground of detention applicable in an immigration context.

From a statelessness viewpoint, it is important that the Court understood the myriad vulnerabilities faced by Mr. Kim as a stateless person in host countries and the difficulties deriving from his stateless status. It reveals the room for litigation through human rights instruments also in states which are not bound by the standards of protection provided by the

statelessness conventions. The judgment also justifies the value in assessing a person's statelessness at an early stage of detention irrespective of the existence of a statelessness determination procedure.³³⁰

In September 2016, the European Court on Human Rights brought to light a very similar case pertaining to the removal of a stateless person from Russia to Syria where the respondent state was again Russia. In the *A.A. v. Russia* case,³³¹ the applicant was a stateless person of Palestinian origin born in Syria. In June 2016 a district court found the applicant guilty of breaching the rules relating to the stay of foreign nationals in Russia. The Court found that the applicant had not applied for asylum according to the established procedure, therefore ordered his administrative removal and placed him in detention pending his removal. The applicant appealed against this judgment, but his appeal was refused. The applicant argued under Articles 2 and 3 of the ECHR that if he was to be removed to Syria, he would face inhumane treatment, even death and/or torture. The applicant claimed that under the prohibited grounds relating to detention enshrined in the Convention his detention pending administrative removal is unlawful and arbitrary and that there is no effective procedure available to him whereby he may challenge the continuation of his detention. The case is still ongoing at the time of writing, yet the precedent of *Kim v Russia* gives hope for similar outcoming of the case encouraging Russia to take appropriate measures for the avoidance of detention of stateless persons pending expulsion.

SUMMARIZING THE RESULTS

To conclude, under the aegis of the CoE, the ECHR appeared to be the most powerful tool for strategic litigation, not only based on its essence but also due to the fact that the other CoE instruments directly touching upon statelessness have been ratified by a marginal number of States which considerably undermines their enforcement. Yet from a legislative point of view they would provide a firm basis for protection. Although the obligation of establishing statelessness determination procedures (SDPs) is not proclaimed by any of the examined CoE conventions in an explicit manner, the identification of stateless persons would be key to guarantee their basic rights protected under these instruments which might imply a state obligation to identify stateless persons through status determination mechanisms.

330 Adrian Berry (2014): *Kim v Russia – The unlawful detention of stateless persons in immigration proceedings*, European Network on Statelessness Blog (hereinafter: Berry 2014)

331 *A.A. v. Russia* Application no. 35675/16, Council of Europe: European Court of Human Rights, 13 September 2016.

Additionally, although the ECHR does not explicitly recognize the right to a nationality, in contrast to Art. 15 of the UDHR, it claims that the enlisted rights should be granted to all persons residing in the territory of CoE Member States, attributing less significance to nationality itself. Also, the European Court of Human Rights (ECtHR) ruled on several cases relating to the right to a nationality which renders the ECHR an excellent tool for strategic litigation with regard to individual cases of statelessness.

CHAPTER 8: REGIONAL PROTECTION THROUGH EU LAW RELATING TO STATELESSNESS

INTRODUCTION

In this chapter the EU legislative framework shall be explored with special regard to the TFEU and the EU Charter on Fundamental Rights with a view to exploring the relevant legislative framework of a potential directive seeking to reflect better on the identification and protection of stateless persons and those at risk of statelessness in Europe to be discussed in Chapter 11.

The law of the European Union is a unique legal order which brings an added value and primacy to domestic legal systems, currently binding on 28 Member States.³³² When the Lisbon Treaty entered into force in December 2009, the European Union gained legal personality with a distinct legal order which is to be viewed separately from international law,³³³ however, not irrespective of the already binding international obligations of EUMS, including those implied by the CoE. EU law has a direct and indirect effect on the laws of its Member States and, once incorporated (if necessary) and in force, becomes part of the domestic legal order of each EUMS. The EU therefore constitutes a distinct source of law. The EU legal order and the sources of EU law may be divided into *primary sources* (the Treaties and general principles of EU law), *secondary legislation* (acts issued by EU institutions based on the primary sources). Within the EU legal order there is a hierarchy

³³² On 29 March 2017, the United Kingdom invoked Article 50 of the TEU, engaging in an irreversible procedure of leaving the EU. As the procedure has not been absolved by the time of writing, this thesis refers to the United Kingdom as part of the EU, as EU law applies to the UK until the procedure of leaving the EU is finalized.

³³³ The distinction of EU law predates the adoption of the Lisbon Treaty in light of the concept of autonomy of EU law. See Cases 26/62 Van Gend en Loos (1963) which provided for the principle of direct effect of EU law and 6/64 Flaminio Costa v. Enel (1964) which established the primacy of EU law (Community law at the time) over the national laws of the Member States; Tamas Monar (2016): The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States, in: Szabo Marcell, Varga Reka, Lantos Petra Lea (szerk), Hungarian Yearbook of International Law and European Law 2015, The Hague, Eleven International Publishing, pp. 433-459.

headed by the primary sources. Due to the legal personality, the EU now has the mandate to conclude international agreements which are subjected to primary legislation within EU law based on Article 218 TFEU. Provisions regarding the status of stateless persons are found both in primary and secondary EU law; however, there is no explicit obligation for statelessness determination under the aegis of the European Union law.

8. 1. PRIMARY SOURCES OF EU LAW RELATING TO HUMAN RIGHTS

Primary sources of EU law include EU treaties and general principles of EU law. In addition, following the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights was given the same power as the Lisbon Treaty within the mentioned hierarchy and therefore has the same legal effect as the EU founding treaties.

8. 1. 1. EU TREATIES

Although none of the founding treaties of the European Communities mentioned fundamental rights, in its case law the European Court of Justice (ECJ) gradually viewed fundamental rights as unwritten primary sources of Union law. In 1993 when the *Treaty on European Union (TEU)* entered into force creating the European Union, the jurisprudence of the European Court of Justice (which then became the Court of Justice of the European Union) was codified in accordance with **Article F (2)** of the TEU, whereby the ECHR also became embedded in the EU legal system as a source of fundamental rights to be considered as general principles of Union law, by proclaiming that:

„The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

Then in 2009, the Treaty of Lisbon (*amending the TEU and the TFEU*) entered into force bringing about a legal obligation for the EU to accede to the ECHR under Article 6 (2), aiming to the gradual creation of a single European legal space (to be discussed later in this work) which would provide a comprehensive framework for human rights protection in Europe, bringing an end to the multiplication of protection regimes in Europe.

In terms of migration and statelessness, European heads of states have not agreed yet to conclude any EU treaty that would mandate the EU to deal with issues pertaining to nationality, not to mention statelessness. Therefore, the EU's competence is often contested when it comes to statelessness. It remains a general view that nationality matters remain outside of the competence of the EU. However, according to Molnár the EU's competence has been established by Article 67(2) in conjunction with Article 352 of the Lisbon Treaty stating that:

„It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.”

In his recent writing, Molnar considers that the EU Charter of Fundamental Rights, having the same legal effect as, for instance, the TFEU, provides a further tool for the EU to address the fundamental rights of stateless person, enshrined in the Charter, through the lenses of non-discrimination and the protection from arbitrary detention.³³⁴ He underscores that the potential of this provision has been largely unexplored.³³⁵ Radnai further suggests that the EU's competence to address statelessness as a migration issue was underpinned by Article 79 (2) TFEU under the common migration policy of the EU.³³⁶

Further to the perennial issue of EU competence to deal with stateless persons, I recommend to explore the potential of Article 18 TFEU (previously Article 12 of the TEU), providing for the prohibition of **“any discrimination on the grounds of nationality.”** Having due regard to the fact that with Article 12 the primary concern of the legislator of the TEU was to ensure that all nationals and EU citizens would be treated equally within the scope of the Treaties, thereby preventing nationality-based discrimination among Union citizens, I find that it may provide indirectly for the protection of stateless persons through the prohibition of discrimination on the grounds of nationality. For instance, I find that the consistent denial of the automatic grant of nationality for members of certain minority/ethnic groups, including Russophone non-citizens living in Europe who used to be Soviet nationals and have long-

³³⁴ Tamás Molnár (2017): EU Charter: a dormant giant? European Network on Statelessness Blog.

³³⁵ Tamás Molnár, ‘The EU Charter of Fundamental Rights and the protection of stateless persons in the EU’, presentation held at the conference Addressing Statelessness in the European Union, 18 January 2017, Brussels. Available from: https://www.emnluxembourg.lu/wp-content/uploads/2017/01/FRA_EU-Charter-and-statelesspeople_EMN-ENS-UNHCR-conference_18.01.2017.pdf. (accessed 6 May 2018)

³³⁶ Radnai 2018.

established ties with certain EUMS (Latvia and Estonia) constitutes a violation of Article 18.³³⁷ Therefore, I recommend that it is time for the CJEU to rely on Article 18 in cases involving third-country nationals and stateless persons, and for human rights lawyers to make use of this provision in litigating on behalf of stateless persons.

The jurisprudence of the CJEU on nationality-based discrimination³³⁸ is not as extensive as the case law of the ECtHR on the same matter.³³⁹ Nonetheless, EU's accession to the ECtHR remains high on the agenda (as it will be explained in detail later in this chapter), implying that EU law shall be interpreted in a way to be consistent with the ECHR, the case law of the ECtHR remains important. Accordingly, the jurisprudence of the ECtHR³⁴⁰ would be embedded in the jurisprudence of the CJEU, the relevant case law could be considered as points of reference for the CJEU. In light of the jurisprudence of the ECtHR, instances of discrimination on the grounds of nationality remain rather apparent in the case of third-country nationals who are treated differently from citizens of the EU (in some cases, additional fees apply for third country nationals).³⁴¹ I argue that notwithstanding the original intention of the legislator, Article 18 TFEU may provide a potential legal basis for the protection of stateless persons who generally suffer from the lack of an effective nationality and thus are subject to discrimination on the grounds of the lack of a nationality. This provision (ex Article 12 TEU) was intended to guarantee the prevalence of the principle of equal treatment allowing for the free movement of individuals and workers (latter provided by Article 45 TFEU) within the territory of the Union which is largely seen as one of the most

³³⁷ I will discuss this issue further later in this chapter when it comes to the non-discrimination clause proclaimed by the EU Charter which also sets out nationality as a self-standing prohibited ground.

³³⁸ See: C-149/79 *Commission v Belgium* (No 1), Judgment of the Court of 26 May 1982; C-293/83, *Gravier*, Judgment of the Court of 13 February 1985; C-39/86 *Sylvie Lair*, Judgment of the Court of 21 June 1988; C-2/74 *Reyners v. Belgium*, Judgment of the Court of 21 June 1974; C-145/09 *Tsakouridis*, Judgment of the Court of 23 November 2010; C-36/74 *Walgrave v. Koch*, Judgment of the Court of 12 December 1974; C-59/85 *Netherlands v. Reed* Judgment of the Court of 17 April 1986; C-184/99 *Rudy Grzelczyk v. Centre* of 20 September 2001.

³³⁹ See: *Gaygusuz v. Austria*, Application No 17371/90, Council of Europe: European Court of Human Rights, Judgment of 16 September 1996; *Zeibek v. Greece*, No 46368/06, Council of Europe: European Court of Human Rights, Judgment of 9 July 2009, *Koua Poirrez v France*, Application No 40892/98, Council of Europe: European Court of Human Rights, Judgment of 30 September 2003; *Moustaquim v. Belgium* Application No 12313/86, Council of Europe: European Court of Human Rights, Judgment of 18 February 1991.

³⁴⁰ Article 14 provides that: „the enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Nationality therefore constitutes a forbidden ground for making a distinction between nationals.

³⁴¹ See C-293/83, *Gravier*, Judgment of the Court of 13 February 1985.

significant rights of EU citizens. Therefore, Article 18 was meant to ensure that the right to free movement of workers coming from diverse backgrounds (including third-country nationals) within the EU who based on the prohibition of discrimination on the grounds of nationality (provided by Article 18) may enjoy due protection, not being subjected to double-standards as compared to other EU citizens.³⁴²

8. 1. 2. THE EU CHARTER OF FUNDAMENTAL RIGHTS

As the bill of rights of the EU, the Charter of Fundamental Rights of the EU (hereinafter: the Charter) declares all the values and fundamental rights and freedoms protected in the EU in a formal EU document, set out in 54 Articles (7 Chapters), with a view to strengthening the protection of fundamental rights in the light of recent changes of society and social progress and scientific and technological development.³⁴³ The Charter *does not establish new rights*, but assembles existing rights that were previously addressed by international legal instruments and thus makes them more visible. The Charter reaffirms all the rights as they result from the European Convention on Human Rights, the Social Charters adopted by the EU and by the CoE, those established by the jurisprudence of the Court of Justice of the EU and of the European Court of Human Rights, as well as other rights resulting from the common constitutional traditions of EUMS and other sources of international human rights law.

As primary EU law, compliance with the Charter shall be monitored by the CJEU and in case of non-compliance action for annulment shall be initiated before the CJEU. Noteworthy, the entry into force of the EU Charter did not provide for the amended role of the ECHR in the EU legal system, serving as a source of fundamental rights protection. In addition, as mentioned beforehand, the Treaty of Lisbon did provide a legal obligation for the EU to join the ECHR under Article 6(2) of the TEU.

The Charter was initially proclaimed at the Nice European Council in December 2000 and after being amended, it was re-proclaimed in 2007. Nonetheless, the sole proclamation did not render the Charter legally binding. It became legally binding on EU institutions and EUMS with the Treaty of Lisbon entering into force in December 2009. Through this act, the Charter gained the importance of primary EU law having *the same legal effect as the EU founding*

³⁴² Richard Ball (2013): *The Legitimacy of the European Union Through Legal Rationality: Free Movement of Third Country Nationals*, Routledge, p. 238. Relevant case law of the CJEU shall be presented later in this chapter.

³⁴³ Preamble of the Charter.

treaties. This constituted great potential for the implementation of a set of individual rights to be enjoyed by every individual residing in the EU Member States, regardless of nationality, the lack thereof, and immigration status.

Based on the charter provisions, everyone is entitled to enjoy *human dignity, the right to life, the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, the right to family life, non-discrimination, the rights of the child, or the right to an effective remedy, a minimum set of fundamental rights*.

The Charter's legal effect on EU institutions and Member States only applies when they implement EU law as proclaimed by Article 51 (1), for instance, when EUMS adopt or apply a national law which implements an EU directive or in cases where EUMS' authorities apply an EU regulation directly. In these cases, the Charter provides normative guidance for interpreting secondary sources of EU law. The Charter thus does not extend EU competences beyond those which were accorded to it in the founding treaties. Article 53 provides for the level of human rights protection, proclaiming that:

„Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”

Article 54 may as well offer protection for stateless persons, as a number of human rights instruments articulate the right to a nationality, starting with the UDHR. As for the cases where the Charter does not apply, the protection of fundamental rights is guaranteed under the constitutions of EUMS and international instruments they have acceded to. As mentioned above, the Charter essentially builds on the European Convention on Human Rights (ECHR) taking due note of the societal changes which have taken place in the past five decades. Similarly to the ECHR, the Charter does not contain a provision ensuring the right to a nationality; nonetheless, some provisions include explicit references to the right to a nationality which has great relevance in terms of statelessness. For instance, Article 24 provides that *“children shall have the right to such protection and care that is necessary for*

their well-being” and that *the best interests of the child “must be a primary consideration” in all actions relating to children.* The protection implied by this provision of the Charter may only be guaranteed to children, if they enjoy state protection inherent to a nationality which they must be granted automatically at birth. Also, with regard to the previous chapter, the ECtHR has recognized nationality as an integral part of a person’s social identity, protected as an element of private life,³⁴⁴ a right also enshrined in Article 7 of the EU Charter. The Charter also protects a number of citizen’s rights (Title V), relating to EU citizenship which rights are dependent on having the nationality of one of the EUMS.³⁴⁵ Very importantly, the Charter advances the non-discrimination traditions established by the UDHR and fostered by the ECHR in Europe, by providing in its Article 14 that:

„The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Building on this provision, the EU Charter also enshrines the fundamental right to non-discrimination as follows:

„Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

We can see that the Charter’s non-discrimination article complies with Article 14 of the ECHR and includes *further prohibited grounds* (such as age, sexual orientation, disability and genetic features). In addition, Article 21(2) explicitly mentions the prohibition of discrimination based on nationality as a self-standing prohibited ground, yet with possible limitations thereto. *Article 21(2)* provides that *any discrimination on grounds of nationality shall be prohibited* within the scope of application of the Rome Treaty and the Lisbon Treaty, namely the prohibition of discrimination based on nationality or the lack thereof. Also, not granting nationality for members of certain minority/ethnic groups also contradicts to the principle of non-discrimination (Article 21) of the Charter. To give an example, as I mentioned earlier, non-citizenship constitutes a human rights violation on three levels,

³⁴⁴ European Court of Human Rights (2011) *Genovese v. Malta*, Application No. 53124/09.

³⁴⁵ ENS working paper ‘No Child Should Be Stateless, 2015, p. 9

including the right to a nationality, as a result of the consistent denial of nationality (their nationality has been retained; although they are long-term residents, they must apply for naturalization in order to become nationals) and the prohibition of discrimination (rationale: membership of a national minority). Molnár argues that considering that Article 21(2) has not been applied yet by the EU Court to third country nationals or stateless persons, it has a major potential to strengthen the protection of stateless persons.³⁴⁶

Having considered the potential of the TFEU and the EU Charter, further to Molnár who suggested that EU competence may have been established by Article 67(2) in conjunction with Article 352 TFEU, **I suggest considering the legal basis potentially established by Article 18 TFEU (underpinned by Article 21(2) of the EU Charter) in conjunction with Article 67(2) TFEU**, allowing for the prohibition of discrimination on the grounds of nationality which has particular implication on the free movement of non-nationals, including stateless persons who in light of Article 67(2) must be treated as third country nationals. The application of Article 18 TFEU may be **reinforced by Article 21(2) reaffirming nationality as a self-standing prohibited ground** (which again has not been applied by the CJEU for cases, involving TCNs or stateless persons). Nonetheless, Article 21 shall be further explored later in this chapter.

8. 1. 3. GENERAL PRINCIPLES OF EU LAW

Despite the fact that none of the founding treaties of the European Communities mentioned fundamental rights, in its jurisprudence the European Court of Justice (ECJ) began to consider fundamental rights as general principles of Community law constituting unwritten primary sources of Union law. The ECJ therefore started to refer to the common constitutional traditions of EUMS, as well as to international treaties joined by EUMS, with special regard to the ECHR. General principles of EU law thus provide for certain core values that the EU deems important to promote within its borders with a view to fostering them in its Member States. These values are generally shared by the international community at large and may be translated into international norms which evolved over time, including the respect of human rights and the rule of law. These norms inspired the emergence of widely accepted general principles of EU law, including *proportionality, legal certainty, gender equality, equality before the law, non-discrimination, subsidiary, equity, good faith, solidarity, effective*

³⁴⁶ Tamás Molnár (2017): EU Charter: a dormant giant? European Network on Statelessness Blog

remedies, respect for human rights, including the rights of persons belonging to minorities; all having due relevance to statelessness. Statelessness as a human rights issue intersects not only with other EU human rights priorities but with most of the aforementioned general principles of EU law as well. For instance, relating to the principle of proportionality of state actions rendering populations stateless, touching upon gender-discriminative nationality laws in the light of the principle of non-discrimination and gender equality, as well as considering the principle of legal certainty in cases of determining statelessness.³⁴⁷

8. 2. SECONDARY SOURCES OF EU LAW RELATING TO STATELESSNESS

Secondary sources of EU law are issued by EU institutions in the exercise of the powers conferred to them by the primary law sources, conferring them legal basis for issuing secondary acts, either with a legislative or non-legislative purpose. The legal acts of the EU are listed in Article 288 TFEU. They are *regulations, directives, decisions, recommendations and opinions*. EU institutions may adopt legal acts of these kinds only if they are empowered to do so by the Treaties. In the following lines, I will seek to reflect on some of the existing directives and regulations touching upon the situation of stateless persons.

- 1) *Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*. This directive most importantly defines stateless persons as potential beneficiaries of international protection.
- 2) *Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof until the time of writing has not been applied in practice*.
- 3) *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals* (Return Directive) sets out a number of standards for the detention pending removal of third country nationality and stateless

³⁴⁷ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.5.

persons. It obliges states to consider international norms with special regard to the respect for family life, the best interest of the child and the principle of *non-refoulement* when implementing the Directive, as well as it imposes important procedural and substantive safeguards, such as the right to appeal against or seek review of removal decisions.

4) *Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004/38/CE)* is limited in scope to EU citizens and their family members irrespective of nationality which also deals with the prohibition of discrimination on grounds of nationality under EU law in multiple paragraphs.

5) *Council Regulation (EC) No 1932/2006 of 21 December 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.* The EU Visa Regulation brought about a new type of *automatic visa exemption for stateless persons recognized by EUMS*, providing that „A Member State may exempt from the visa requirement: (b) recognized refugees and stateless persons if the third country where they reside and which issued their travel document is one of the third countries listed in Annex II.”

Further to the mentioned legislative tools, the recently elaborated European citizens' initiative entitled *MinoritySafePack* must also be mentioned. It has the potential to urge the European Commission to suggest EU legislative amendments which would guarantee equal treatment for stateless persons with EU citizens whereby it provides an opportunity for persons without an established or effective nationality to seek protection from discrimination based on their minority background under the non-discrimination provisions of the Charter.³⁴⁸

8. 3. COUNCIL CONCLUSIONS ON STATELESSNESS: AN ENHANCED ROLE OF THE EMN

As a landmark momentum in addressing statelessness at the EU level, the Justice and Home Affairs Council adopted its conclusions on statelessness on 3-4 December 2015. In its conclusions, the Council and the EUMS “*Acknowledge the importance of identifying stateless persons and strengthening their protection thus allowing them to enjoy core fundamental rights and reducing the risk of discrimination or unequal treatment.*” The council conclusions may therefore also serve as a normative basis for the equal treatment of stateless persons in

³⁴⁸ Tamás Molnár (2017): EU Charter: a dormant giant? European Network on Statelessness Blog

the EU. In its conclusions, the Council mandated the *European Migration Network*³⁴⁹ (EMN) as a platform for exchange of information and good practices, whereby the Council decides to:

- *“Invite the Commission to launch exchanges of good practices among Member States, using the European Migration Network as a platform;*
- *Invite Member States' national contact points to actively participate in that platform providing all relevant information with a view to ensuring that it will be a useful instrument in order to achieve the objectives of reducing the number of stateless people, strengthening their protection and reducing the risk of discrimination.”*

The EMN Steering Board approved the establishment of the **EMN Platform on Statelessness** under the joint coordination by the LU EMN NCP and the European Commission on 11th May 2016. As the Council Conclusions were adopted during the Luxembourg Presidency of the EU, where Luxembourg made tremendous advocacy efforts in the field of statelessness, the EMN platform is to be coordinated by the LU EMN NCP. In order to operationalize the aforementioned platform, an **EMN Statelessness working group** was established on 15th June 2016 with the participation of the LU, EE, HU, IE, LV, NL and SE National Contact Points. Since then the working group has been providing information to EUMS and other stakeholders relating to best practices concerning statelessness.³⁵⁰

Further to the conclusions, EUMS were consulted on the scale and challenges of statelessness in the respective EUMS by means of three ad-hoc queries³⁵¹ and three EMN regional roundtables, including a multi-stakeholder conference in Brussels in January 2017 with a view to drafting a policy inform reflecting on the challenges of statelessness in Europe. EUMS collaborated with the UNHCR and the ENS in the consultation process. Eventually in October

³⁴⁹The European Migration Network is an EU-funded network operating under the aegis of the European Commission (established by Council Decision 2008/381/EC adopted on 14th May 2008 which was amended by Regulation 516/2014, establishing the AMIF) with the aim of providing up-to-date, objective, reliable and comparable information on migration and asylum for institutions of the European Union plus authorities and institutions of the Member States via their National Contact Points. It provides a complex platform for expert discussions and exchanges of good practices through ad-hoc queries which greatly inspire national legislations on migration.

³⁵⁰ See EMN Platform on Statelessness Progress Report, November 2017.

³⁵¹ Including the one on Recognition of Stateless Persons: This EMN document sheds light on the implementation of the 1954 Convention relating to the Status of Stateless Persons by 23 European States: EU Member States were asked to provide information on having a statelessness determination procedure in place, the rights and status granted to recognised stateless persons and statistics on the number of people applying and being recognised as stateless in the past five years.

2016, the policy inform on statelessness³⁵² was presented to the Permanent Representations of the EUMS at the Permanent Representation of Luxembourg. Its key findings concluded that there is no homogeneity among EUMS as regards the procedures they apply to determine statelessness, including *dedicated administrative determination procedures; general administrative procedure or inside another administrative procedure; ad-hoc administrative procedures; and judicial procedures.*

At the mentioned multi-stakeholder conference (EMN, UNHCR and ENS) held in Brussels in January 2017 with a view to assessing the statelessness related developments and challenges in the EU following the adoption of the statelessness conclusions, stakeholders agreed on important findings. At the conference, it was stressed that in order to further eradicate statelessness a practice-oriented approach would be necessary concerning vulnerable stateless individuals in each EUMS. In addition, there is concern of the vulnerability of children in the statelessness context, including with regard to the disappearance of unaccompanied minors who arrive to Europe. The conference also touched upon the challenges arising from the fact that there is no common statelessness determination procedure among EUMS. Stakeholders further suggested that there should be a clear differentiation between the Statelessness Determination Procedure (SDP) and the asylum procedure in order for the SDP not to be misused by rejected asylum seekers in order to delay their return to their countries of origin.

In order to address the findings of the EMN Inform (to be discussed in the next chapter) and considerations, a *proposed action plan* was presented by EMN LU NCP at the joint hearing on statelessness in June 2017. It foresees the coordination with NGOs and international organizations of the implementation of a mapping exercise identifying vulnerable stateless persons in EUMS. As a major step towards the identification of stateless persons in Europe, it also envisages to foster and develop a common approach by which EUMS can work towards introducing or improving statelessness determination procedure at the national level. Furthermore, it reaffirmed that the platform will contribute to the development of non-binding guidelines to assist EUMS in addressing statelessness through the exchange of good practices.³⁵³

³⁵² EMN Inform on Statelessness in the EU, October 2016, available at: <https://www.emnluxembourg.lu/wp-content/uploads/2016/11/EMN-Inform-Statelessness-in-the-EU.pdf> .(accessed 6 May 2018)

³⁵³ Presentation of Adolfo Sommarribas, state representative of EMN LU NCP. Available from: <http://www.europarl.europa.eu/cmsdata/123281/adolfo-sommarribas-emn.pdf> .(accessed 6 May 2018)

In the light of the recent outcomes, the EMN provides an excellent platform for policy discussions. It will continue to serve as an EU-level platform for the exchange of best practices to avoid statelessness, primarily engaging EUMS policy-makers. Nonetheless, in order to help policy- and decision makers at the EU and at EUMS levels, the EMN should also engage migration, statelessness and human rights experts in relevant discussions within the EMN. This would require the enhanced engagement of international organizations, non-governmental organizations and the academia among other interested stakeholders from EU institutions.

First and foremost, the extensive research and advocacy work of the *European Network on Statelessness* (ENS) must be considered, also due to the regional focus of the expert network. As mentioned above, the ENS was consulted extensively during the elaboration of the EMN policy informs. The European Network on Statelessness (ENS) is a network of non-governmental organizations, academic initiatives, and individual experts committed to address statelessness in Europe, established in 2012. The ENS undertakes its advocacy work through conducting and supporting legal and policy development, awareness-raising and capacity building activities in the field of statelessness.

To present an example of the advocacy work of the ENS, in the framework of its awareness-raising campaign, ENS has launched a 'StatelessKids' campaign which seeks to end childhood statelessness across Europe seeking to gain the support of EU citizens for the petition. Further to this goal, in November 2016 the ENS presented a petition calling on European leaders to act to end childhood statelessness in Europe, lodged to the EP's Petition's Committee and the Parliamentary Assembly of the CoE (PACE) on behalf of more than 22,000 signatories. As a result, the European Parliament held a joint hearing on the issue in June 2017 where after the presentation of EMN LU NCP, Katja Swider, an individual member of the ENS held a presentation on the practices and approaches in EUMS to prevent and end statelessness.

In her presentation, Swider stressed the importance of both soft law (visibility, coordination, information exchange), as well as of judicial and legislative action. Swider suggested for EUMS to consider enhancing the promotion of naturalization of stateless persons in light of Art. 32 of the 1954 Convention which foresees that:

“The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”

Further to this treaty provision, Swider recommends that EU institutions could play a major role in encouraging EUMS to comply with this treaty obligation and in facilitating discussions about common obstacles experienced in the naturalization of stateless persons in the EU and solutions thereto. In her speech, Swider argues that addressing statelessness is not solely about granting a nationality to a stateless person but also about granting a migratory/protection status to regularize the affected person’s situation. As the EU does have competence in migration issues, it does have competence to address statelessness in the migratory context. With reference to 67 TFEU, Swider claims that stateless persons are migrants, also if they never crossed any international borders. As a migration issue, within this competence, the EU has the mandate to legislate on conditions of residence, on status determination, as well as statelessness in the context of returns to countries of origin etc.

To conclude, Swider argues that EU could take active part in *shaping policy strategies on statelessness through soft law, by educating statelessness through EU judicial control of rules on acquisition and loss of citizenship, and through protecting stateless persons through legislative action on statelessness as an EU migratory status.*³⁵⁴

In addition, ENS regularly publishes timely and high-impact statements and position papers as well, whereby it articulates strong messages for European decision-makers, for instance, relating to EUMS Presidency of the EU on addressing statelessness in Europe.³⁵⁵ Before Bulgaria assumed the EU Presidency on 1 January 2018, in December 2017, ENS put forward a joint statement for the Presidency where it pointed out that there have been very few visible follow-up actions after statelessness was discussed at a SCIFA meeting which was held during the Maltese Presidency in 2017.

³⁵⁴ Katja Swider, Presentation on Practices and Approaches in EU Member States to Prevent and End Statelessness, June 2017, available from: <http://www.europarl.europa.eu/cmsdata/123282/k-swider.pdf>. (accessed 6 May 2018)

³⁵⁵ ENS Statement to Bulgaria’s Presidency of the European Union on Addressing Statelessness in Europe, Dec 2017, available from: <https://www.statelessness.eu/news-events/news/ens-statement-bulgaria-s-presidency-european-union-addressing-statelessness-europe>. (accessed 6 May 2018)

The ENS Statement highlights that the Bulgarian Presidency will need to assume a leadership role in working with the European Commission, the EMN and other stakeholders to finally trigger concrete measures to better protect stateless persons, and to prevent childhood statelessness in Europe. Moreover, the statement sets out four policy recommendations for Bulgaria during its EU Presidency. First, ENS recommends for the Presidency to follow up on the December 2015 Council Conclusions by *tabling statelessness at SCIFA and/or other meetings and accelerate the exchange of good practices through the EMN platform*. Secondly, ENS encourages the Presidency to urge all EUMS to introduce dedicated statelessness determination procedures.

Thirdly, ENS recommends the Presidency to encourage EUMS in their national practice to ensure that all children born on their territory regardless of their legal status or their parents' identity documents are registered and ensure that all children acquire nationality where they would otherwise be stateless. And fourth, the Presidency should promote the accession to the two UN Statelessness Conventions and their implementation by all 28 EUMS.

8. 4. THE CJEU AND THE ECtHR: TOWARDS A SINGLE EUROPEAN LEGAL SPACE?

The Court of Justice of the European Union (CJEU) is an EU institution which was established with the aim of ensuring that primary EU law (especially the EU treaties and the EU Charter) is interpreted and applied in the same way by EUMS and EU institutions, and to settle legal disputes between national governments of EUMS and EU institutions. The European Court of Justice (ECJ) was established in 1952 and is based in Luxembourg. The Court functions as the Constitutional and Supreme Court of the European Union.

As an EU institution, the Court is not related to the ECtHR; nonetheless, all EUMS are Member States of the CoE and have signed the ECHR. In 1993 the Maastricht Treaty entered into force and the ECJ became known as the Court of Justice of the European Union (CJEU) and provided, amongst others, that the CJEU is bound by the jurisprudence of the ECtHR, as if it was part of the EU's legal system.³⁵⁶ In addition, as mentioned beforehand, the human

³⁵⁶ See p. 153. Article F(2) of the Maastricht Treaty proclaimed: „*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*”

rights principles articulated by the ECHR became part of the general principles of EU law which are binding on all EUMS. This naturally entailed the creation of a judicial dialogue between the Luxembourg and Strasbourg where the state of play has been subject to exciting developments. First in 2009, a major turning point took place in the judicial cooperation between the CJEU and the ECtHR when the Treaty of Lisbon (amending the TEU and the TFEU) took effect. Thereby, the EU Charter of Fundamental Rights became legally binding on the EU, whilst the EU itself was expected to sign the ECHR based on the mentioned Article 6(2) TFEU, considering that all EUMS are party to the ECHR and thanks to the Treaty of Lisbon it now has the legal capacity to sign the ECHR. For the sake of clarity relating to this overlap, Article 6(2) of the Treaty on European Union provides lucid guidance:

„The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

Therefore, Article 6(2) TEU provides a legal obligation for the EU to accede to the ECHR, obliging EU institutions and EUMS to respect human rights as set out in the ECHR, while respecting general principles of Union law. The undeniable aim of this provision was the eventual creation of a single European legal space providing a unified framework for fundamental human rights protection in Europe, avoiding the proliferation of protection regimes in Europe. *Protocol (No 8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms* has further relevance when addressing human rights protection in Europe. It provides that while acceding to the ECHR, the EU must comply with the specific characteristics of the Union and Union law, with special regard to the specific arrangements for the EU's participation in the control bodies of the ECHR and the mechanisms ensuring that proceedings initiated by non-Member States and individual applications are adequately addressed to Member States and/or the EU (Art 1). Article 2 further proclaims that accession of the Union to the ECHR will not affect the competences of the Union or the powers of its institutions in any way.

Further to the legal obligation for the EU to join the ECHR, a draft accession agreement was negotiated between the CoE and EU Member States which reached consensus by April 2013. At this point, COM requested the CJEU to deliver an Opinion on the compatibility of the draft accession agreement with EU law, in compliance with Article 218 (11) of TFEU. On 18 December 2014, the infamous *Opinion 2/13* was delivered by the CJEU proclaiming that the accession of the EU to the ECHR on the basis of the draft agreement would be incompatible with Article 6(2) and the related Protocol No. 8 of the TEU.³⁵⁷

Having invoked the explained Protocol 8 pertaining to Article 6(2) of the TEU (with special regard to Article 2.), the Court precluded the EU from joining the ECHR. The Luxembourg Court considered that: “*the autonomy enjoyed by EU law... requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU.*”³⁵⁸ The CJEU found that the agreement did not provide for sufficient protection of the EU’s specific legal arrangements and the CJEU’s exclusive legislation, as the advisory opinion (co-respondent) mechanism³⁵⁹ envisaged by Protocol 16 to the ECHR would interfere with the autonomy and effectiveness of the preliminary ruling procedures prescribed by the TFEU. Therefore, the Court held that the accession agreement had the potential to undermine the autonomy of EU law, by interfering with the specific characteristics of the EU and EU law, adversely affecting the competences of the EU and the power of its institutions (the CJEU). In practical terms, the Court made it clear that in case the EU was subject to an external control by the ECtHR, this control must comply with the *special characteristics and autonomy of EU law*. This momentum brought some setback in the Strasbourg-Luxembourg relationship, demonstrating that the objective of human rights protection is pursued for as long as it does not undermine the EU law.³⁶⁰ Since then, there have been indications that the accession agreement may be renegotiated in the future³⁶¹ which remains subject to the political will of the EUMS and the CJEU.

³⁵⁷ CJEU, Opinion 2/13 of 18 December 2014, EU:C:2014:2454.

Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CV0002&from=EN>. (accessed 6 May 2018)

³⁵⁸ Ibid. para. 170.

³⁵⁹ This mechanism was aimed to preserve the specific characteristics of EU law, by impeding the ECtHR from reviewing issues relating to the division of internal competence of the EU.

³⁶⁰ Dean Spielmann (2017): *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbours after the Opinion 2013?*, Brussels. p. 4. Available from: http://www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf. (accessed 6 May 2018)

³⁶¹ In its 2016 Work Programme, COM reiterated its intention to further engage with stakeholders on the accession agreement, taking into consideration Opinion 2/13 which statement was repeated in COM’s 2017

I find that the state of play in this issue (whether the EU should accede to the ECHR) has not been significantly affected by Opinion 2/13, considering Article 6 of the EU where the legislator clearly provides a legal obligation for the EU to accede to the ECHR. Lenaerts further argues that accession is imperative for the EU which constitutes a distinct domestic legal order and self-referential legal order whose ultimate rule of recognition are the Treaties and the Charter, stemming from the common constitutional traditions of the Member States and the ECHR.³⁶² Lanaerts also underscored the mutual influencing power of the EU Charter of Fundamental Rights and the ECHR on the interpretation of one another, allowing for the creation of synergies between the CJEU and the ECtHR, joining efforts to advance human rights protection in Europe.³⁶³

8. 5. RELEVANT CASE LAW OF THE CJEU

Although the EU's competence in nationality issues has been contested before, the mere fact that EUMS nationality remains the gateway to EU citizenship has allowed the EU to consider EUMS' nationality policy in cases where the enjoyment of the benefits of EU citizenship are at stake, especially in the context of statelessness. Having discussed the CJEU's jurisprudence related to the prohibition on grounds of nationality,³⁶⁴ I would like to further refer to the *Micheletti judgment*³⁶⁵ dating back to 1992. In this case, the freedom of establishment flowing from Union citizenship was considered in case of a dual (Argentinean-Italian) national. Looking at the factual background of the case, the claimant Mr. Mario Micheletti was born in Argentina and based on the *ius sanguinis* principles; he obtained Italian nationality after his Italian parents and therefore became a Union citizen. Consequently, Mr. Micheletti held dual Italian-Argentinean nationality. Mr. Micheletti pursued dental medicine studies in Argentina

Work Programme. In light of the Council Conclusions adopted in October 2017 on the application of of the EU Charter, the Council also remains dedicated to the case of EU accession to the ECHR. See: <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr>. (accessed 6 May 2018)

³⁶² Koen Lenaerts: The ECHR and the CJEU: Creating Synergies in the Field of Human Rights Protection, Speech at the Solemn hearing for the opening of the Judicial Year 26 January 2018. p. 2. Available from: https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf. (accessed 6 May 2018)

³⁶³ Ibid.

³⁶⁴ See: C-149/79 *Commission v Belgium* (No 1), Judgment of the Court of 26 May 1982; C-293/83, *Gravier*, Judgment of the Court of 13 February 1985; C-39/86 *Sylvie Lair*, Judgment of the Court of 21 June 1988; C-2/74 *Reyners v. Belgium*, Judgment of the Court of 21 June 1974; C-145/09 *Tsakouridis*, Judgment of the Court of 23 November 2010; C-36/74 *Walgrave v. Koch*, Judgment of the Court of 12 December 1974; C-59/85 *Netherlands v. Reed* Judgment of the Court of 17 April 1986; C-184/99 *Rudy Grzelczyk v. Centre* of 20 September 2001.

³⁶⁵ C-369/90. *Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria*, Judgment of the Court of Justice of the EU (Grand Chamber) of 7 July 1992.

and after graduation, he decided to settle down and start his own dentistry in Spain. First, he obtained a temporary residence permit for 6 months. Before its expiration, Mr. Micheletti applied for a permanent residence permit to settle down but his claim was refused with reference to Article 9 of the Spanish Civil Code. It provided that in case of dual nationals, in case one of the possessed nationalities is not Spanish, the nationality which is that of the country of the individual's most recent residence (where the claimant resided before arrival to Spain) must be prioritized over the other one. In this case, it was then the Argentinean nationality. Mr. Micheletti turned to the CJEU claiming that as an Italian national and therefore a Union citizen, he is fully entitled to enjoy the freedom of establishment in any Member State of the European Community under Article 43 of the EC Treaty (Freedom of Establishment).

The CJEU held that '*under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.*' Furthermore, the CJEU considered that in case of dual nationals, '*it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.*'³⁶⁶

Thus, although other EUMS may be interested whether there is a genuine connection between the individual and the Member State which recognized him/her as its national, they may not interfere with the rules of the acquisition and loss of Member State nationality (a gateway to Union citizenship). Accordingly, once a Member State, *having due regard to Community law*, grants nationality to an individual, another Member State may not interfere with this decision.

Two decades later in the *Zhu and Chen v. Secretary of State for the Home Department case*,³⁶⁷ further to the right of residence of a child possessing the nationality of an EUMS and and her mother not possessing EUMS nationality, similar findings were articulated. Proceedings were initiated by Kunqian Catherine Zhu, an Irish national, and her mother, Man Lavette Chen, a Chinese national against the Secretary of State for the Home Department concerning the latter's rejection of applications by Catherine and Mrs. Chen for a long-term permit to reside in the UK. Looking at the factual background of the case, Mrs. Chen entered the UK when she was six months pregnant, arrived in Northern Ireland and gave birth to her

³⁶⁶ Para. 10.

³⁶⁷ See C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department, Judgment of the Court of 19 October 2004.

daughter. Subsequently, they settled down in the UK. Under Irish law, her daughter had Irish nationality and thus enjoyed the benefits of EU citizenship, including the freedom of movement within the EU. Considering that Catherine was at an age where children are still financially and emotionally dependant on their parent(s), granting her the right to free movement and to reside in another EUMS would have entailed the grant of the same benefits to her mother, Mrs. Chen as well.

Similarly to the *Machinetti* case, the CJEU again considered that EUMS are compelled to recognize other EUMS nationalities and „*it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.*”³⁶⁸ The CJEU further held that: „*Article 18 EC and Council Directive 90/364 on the right of residence confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor’s primary carer to reside with the child in the host Member State.*”³⁶⁹ Consequently, the CJEU found that both Catherine (Irish national) and her non-EU national mother must be granted the right to reside in the host Member State (the UK). As a result, with a view not to depriving the child from her free movement rights, her mother was granted the same rights as well.

The *Kaur case*³⁷⁰ concerned the acquisition of UK and therefore Union citizenship, having to decide whether Mr. Kaur was a national of the United Kingdom of Great Britain and Northern Ireland and therefore citizen of the Union. The 1982 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term nationals was annexed to the Final Act of the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities, and thus must be taken into account when determining the scope of the Treaty *ratione personae*. Based on this declaration, Mr. Kaur was not regarded a national

³⁶⁸ Para. 39.

³⁶⁹ Paras. 33, 36-37, 47.

³⁷⁰ C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur*, Judgment of the Court of 20 February 2001.

of the UK but as a quasi-citizen holding a special form of ex-colonial legal status. In order to acquire Union citizenship, Mr. Kaur challenged the rationale of his ex-colonial legal status and solicited the CJEU. The Court held that it was in the power of the UK to reject to grant Mr. Kaur full nationality, considering that the applicable ex-colonial rules had been previously set out annexed in the UK accession documents to the Communities.³⁷¹ Therefore, Union citizenship never really came into question for quasi-citizens like Mr. Kaur, considering that it could only be conferred on nationals of Member States. Therefore, in this case the CJEU decided not to interfere with the sovereign decision of the UK (EUMS) with regard to its domestic rules relating to the acquisition of Member State citizenship, despite the fact that it would have entailed the acquisition of Union citizenship as well for the claimant.

At this point, I would like to reflect on joined cases which were referred to the CJEU on the margins of the past refugee crisis brought about the civil war in Lebanon in the 1980s when a great number of affected individuals from Lebanon were seeking asylum in Europe, touching upon social security accorded for migrant workers in Germany, including refugees and stateless persons.³⁷² The common denominator between the cases of *Mrs. Khalil and her husband*, *Mr. Chaaban and his wife*, *Mr. Osseili* and *Mr. Nasser* is not only that they had to flee their country of residence (Lebanon) but also that after having arrived in Germany in the 1980s, they all applied for asylum and were rejected; under German law, they were all viewed as stateless persons. The Court ruled that:

*„Workers who are stateless persons or refugees residing in the territory of one of the Member States, and members of their families, cannot rely on the rights conferred by Regulation No 1408/71, as amended and updated by Regulation No 2001/83, where they are in a situation which is confined in all respects within that one Member State. Such is in particular the case where the situation of a worker has factors linking it solely with a non-member country and one single Member State.”*³⁷³

Therefore, the Court denied the right to intra-European social security for refugees and stateless persons residing in one of the EUMS, excluding non-EU nationals from benefits accorded by Regulation 1408.

³⁷¹ Including the 1972 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term nationals, annexed to the Final Act of the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities which was amended a decade later but its provisions relevant for the case at hand remained unchanged. See paras. 23-27.

³⁷² C-95/99 to C-98/99 and C-180/99, Judgment of the Court of 11 October 2001.

³⁷³ OP 2.

In 2010 the CJEU's ruling in the *Rottmann v. Freistaat Bayern* case³⁷⁴ further proved that EUMS's nationality policies are not entirely beyond the competence of EU institutions, suggesting that there may be certain constraints EUMS's rules relating to acquisition and loss of their nationality. In this case, the CJEU was referred for a preliminary ruling on proceedings that concerned a decision withdrawing EUMS nationality, granted through naturalization which would have resulted in the loss of EU citizenship inherent to EUMS nationality. The CJEU was asked to consider the compatibility with EU law of a decision to withdraw a nationality acquired by fraud, with the result that the applicant would be left stateless and no longer enjoying the benefits of EU citizenship. This was the first landmark case to rule on EUMS autonomy on nationality issues.

To provide a brief background on the case, Dr. Janko Rottman who was originally an Austrian national by birth transferred his residence to Germany after a national warrant had been issued against him for being suspected of serious fraud on an occupational basis in the exercise of his profession. After moving to Germany, Dr. Rottmann applied for naturalization and following a positive decision, a naturalization document was issued for him by Freistaat Bayern. However, during the naturalization procedure he failed to mention that he was subject to judicial investigation in Austria. When the German authorities discovered that Dr. Rottmann had acquired naturalization by deception, the Freistaat Bayern withdrew the naturalization with retroactive effect. As a result of the fraudulent naturalization process, he did not only lose his newly acquired German citizenship, but his Austrian nationality as well, in accordance with the relevant Austrian legislation based on which he automatically lost his original nationality upon acquisition of the new one.³⁷⁵ Additionally, under German citizenship law, naturalization requires the prior renunciation of any previous nationality. Consequently, when Dr. Rottman was naturalized in Germany as a German national, he simultaneously lost his Austrian nationality. With his German and Austrian nationalities, Dr. Rottmann also lost the benefits inherent to an EU citizenship. Dr. Rottmann appealed at the German courts against the decision and lost. After another appeal, the case was referred to the CJEU further to Dr. Rottmann's argument that the denaturalization also deprived him of his EU citizenship, and therefore constituted an interference with his rights covered by EU law.

³⁷⁴ C-135/08. *Janko Rottmann v Freistaat Bayern*, Judgment of the Court of 2 March 2010.

³⁷⁵ Paragraph 27(1) of the Law on nationality provides: 'Any person who acquires foreign nationality at his own request, or by reason of a declaration made by him or with his express consent, shall lose his Austrian nationality unless he has expressly been given the right to retain [it]'.

First, the Court evoked relevant provisions of international human rights instruments,³⁷⁶ including Article 3 of the Council of Europe's Convention on Nationality, providing that:

„1. Each State shall determine under its own law who are its nationals. 2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality.”

The Court concluded that the deprivation of nationality which was acquired through fraud cannot be viewed arbitrary; even if it entailed that the person becomes stateless, and therefore allowed for the withdrawal of the naturalization by the competent German authorities at their discretion (para. 31-32). The Court also concluded that Dr. Rottmann does not at present satisfy the conditions for immediate recovery of Austrian nationality in light of Austrian legislation (para. 31).³⁷⁷ However, the Court also held that the decision to withdraw the affected individual's nationality must take due regard to the *principle of proportionality* through the application of a proportionality test thoroughly considering the consequences and effects of the decision in terms of EU law (para. 55-59). The CJEU therefore considered that general principles of EU law may indeed influence the autonomy and sovereignty of EUMS in regulating the grounds for the acquisition and loss of nationality, where the decision affects rights and guarantees protected by EU law. Therefore, such decisions are subjected to judicial control in light of EU law and may only take effect when the judicial decision can no longer be challenged (para. 48). Finally, in his opinion,³⁷⁸ Poiares Maduro Advocate General highlighted the reciprocity between the acquisition of nationality and the exercise of the rights and duties that arise from the Treaty (para. 17).

³⁷⁶ Similarly to Article 8(2) of the 1961 Convention on the Reduction of Statelessness allowing for the deprivation of nationality obtained by misrepresentation or fraud even in cases where the individual would be left stateless, Art. 7 of the 1997 European Convention on Nationality (ECN) also allows for the loss of nationality acquired by means of fraudulent act, false information, or concealment of any relevant fact attributable to the applicant even if it results in the concerned person becoming stateless. Although both instruments include measures of procedural protection, they do not prohibit statelessness as a result. See: Berry 2014

³⁷⁷ Under Austrian law, the loss of foreign nationality acquired by naturalisation, whether occurring *ex nunc* or *ex tunc* in the legal order of the State of naturalisation, does not automatically mean that the person who lost his Austrian nationality because he acquired that foreign nationality will retroactively recover his Austrian nationality.

³⁷⁸ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=72572&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1028168>. (accessed 6 May 2018)

In order to exemplify the CJEU's jurisprudence relating to Article 18 TFEU, I wish to briefly touch upon three cases. First, in the *Gravier case*³⁷⁹ the CJEU considered that unequal treatment on the basis of nationality must be viewed as discrimination prohibited by Article 7 TEU which in this case occurred in the conditions of access to vocational training falling within the scope of the TEU. The Court considered that students from other EUMS must be treated in the same way as students who are nationals of the host Member State not only concerning relevant fees but also particular advantages pertaining to the access to vocational training.

*Case C-300/04 Eman and Sevinger*³⁸⁰ the CJEU most importantly held that Article 18 seeks to ensure that „*comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment can be objectively justified.*”³⁸¹

With regard to *Case 39/86 Sylvie Lair*,³⁸² in its ruling the CJEU proclaimed that Article 18 ensures the equal treatment of all residents of the EU in case the situation is regulated by EU law, finding that: „*In those circumstances and by virtue of Community law as it now stands, however, no obligation incumbent upon a Member State to accord absolutely equal treatment to the nationals of other Member States and its own nationals can be inferred from the general prohibition of discrimination laid down in Article 7 of the EEC Treaty in a hypothetical case where those particular aspects of the prohibition of discrimination are not applicable because the foreign student has not yet been engaged in regular employment in the host country.*”³⁸³

We can thus conclude that so far Article 18 has been mainly applied by the CJEU in relation to the rights relating to the freedom of movement of workers.³⁸⁴ Nonetheless, this does not mean that Article 18 may not be applied for the protection of stateless persons who may be discriminated based on the grounds of nationality, as a result of being consistently denied it (stemming from the non-automatic grant of nationality for non-citizens who have long-established ties with their country of long-term residence).

³⁷⁹ C-293/83, *Gravier*, Judgment of the Court of 13 February 1985. p. 593.

³⁸⁰ C-300/04 *Eman and Sevinger*, Judgment of the Court of 12 September 2006.

³⁸¹ Para. 57. See: (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 63, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95).

³⁸² C-39/86 *Sylvie Lair*, Judgment of the Court of 21 June 1988.

³⁸³ Report of the Hearing, Case: *Ibid.* p. 3175.

³⁸⁴ See also: C-59/85 *Netherlands v Reed*, Judgment of the Court of 17 April 1986.

SUMMARIZING THE RESULTS

We have seen that fundamental human rights protection in Europe translates into a multi-level protection system engaging domestic courts, the ECtHR and the CJUE, all interacting at the same time within an overlapping European legal space.³⁸⁵ When it comes to nationality issues the EU's mandate remains a perennial issue. Nonetheless, in light of the discussed articles of the TFEU, underpinned by the EU Charter, the situation of persons without an effective nationality (both stateless persons and non-citizens) in the EU could be addressed through the lenses of the right of everyone to equality and non-discrimination where the EU, as explained beforehand, does have competence. This competence is again established mainly by the TFEU (where I recommend to discover the potential of Article 18 in conjunction with Article 67 (2) TFEU) which constitutes primary EU law and is underpinned by the EU Charter (Articles 21-22) which has the same legal effect as the founding treaties.

In light of the social progress that took place in the past 50 years since the adoption of the ECHR, it is a major shortcoming from a human rights point of view that the Charter does not enshrine the right to a nationality among the enlisted fundamental rights protected under the Charter. Nonetheless, it largely builds on the existing human rights conventions and thus provides a high-potential tool for strategic litigation on behalf of stateless persons. In addition, considering that all EUMS are Member States of the CoE and have signed the ECHR, the ECJ should refer to the extensive jurisprudence of the ECtHR in terms of statelessness viewing the ECHR (which provides for the right to a nationality) as a main reference point in this regard. For all these reasons, there would be a legal basis for the EU to legislate with regard to stateless persons by adopting an EU directive. I find that an EU directive would be technically an ideal legislative tool, having the potential to implement the objectives and non-discrimination provisions of the EU Charter which is a primary source of EU law, reflecting on the mentioned council conclusions as well.

³⁸⁵ Koen Lenaerts: The ECHR and the CJEU: Creating Synergies in the Field of Human Rights Protection, Speech at the Solemn hearing for the opening of the Judicial Year 26 January 2018. p. 19.

CHAPTER 9: STATELESSNESS DETERMINATION PROCEDURES IN THE EU

„Destitution, detention, lack of access to health care or education, the impossibility of marrying a loved one or registering the birth of a child. These are just some of the many problems faced by stateless people around the world, especially when their existence is ignored and their basic human rights are denied. It is vital that States formally identify stateless individuals, ensuring that they are able to enjoy the full range of human rights.”
(António Guterres, 2014)³⁸⁶

INTRODUCTION

This chapter shall explore the EUMS’ approach towards statelessness determination and the existing status determination procedures in Europe and the relevant issues relating to an exemplary model for status determination procedure. To this end, two country-specific contexts shall be reviewed in light of recent shifts in related legislation and the new elements which were put in place as a result. To this end, the Hungarian and the Italian statelessness regime shall be explored with a view to suggesting some key findings in relation to the good practices identified through the two case studies.

9. 1. BACKGROUND

Referring to the words of the UN High Commissioner for Refugees, the identification of stateless persons residing on EUMS territory would be instrumental for those who meet the criteria of the definition of a stateless person set out in the 1954 Convention to be able to acquire a protection status and thereby enjoy fundamental rights and freedoms as human beings and be ultimately naturalized in EUMS. Later in this work, I will reflect on whether the elaboration of common elements for an EU-harmonized statelessness determination procedure along with a distinct protection status would be a viable solution from a law-making point of view. Consequently, the suggested legally binding legislative tool would bring about the implementation of an EU-harmonized procedure which would not only challenge the existing procedures but would also oblige EUMS to establish such procedures based on common standards. This would cease the pull factor of dedicated procedures as well. As mentioned, the profile of statelessness vary among EUMS which is why EUMS’ considerations and approaches to stateless persons differ significantly which must be

³⁸⁶ A personal appeal from the UN High Commissioner for Refugees, Statelessness determination procedures: Identifying and protecting stateless persons, UNHCR, 2014, available from: <http://www.refworld.org/pdfid/5412a7be4.pdf>. (accessed 6 May 2018)

addressed in a way to find a common framework which would serve to identify stateless persons both in the migratory and non-migratory context, including the *in situ* stateless to ensure that they enjoy a wide range of basic human rights until they acquire the protection provided by a nationality.

*„The first step towards addressing statelessness is to identify stateless populations, determine how they became stateless and understand how the legal, institutional and policy frameworks relate to those causes and offer possible solutions.“*³⁸⁷

A statelessness determination procedure (SDP) is a mechanism for determining whether an individual is stateless. It constitutes a procedural arrangement for ensuring the protection of stateless persons. Although the 1954 Convention does not prescribe a particular means for determining statelessness, State Parties must identify who qualifies as a stateless person under Article 1 of the Convention in order to be able to grant them the standard of treatment enshrined in the 1954 Convention. In addition, such procedures may further assess the size and composition of stateless populations on the territory of a state which has particular relevance when dealing with asylum seekers and permanent resident populations who do not have the effective nationality of the given state (non-citizens).³⁸⁸ The identification and documentation of stateless individuals regularize the individual's stay on the territory of the EUMS, granting them a set of fundamental rights which provide them the opportunity to meaningfully engage in the society of the host country where they reside.³⁸⁹ This would also reduce the security risks inherent to the marginalization and frustration induced by the lack of belonging, as well as the risk of being arbitrarily detained.³⁹⁰

The identification of stateless persons may take place in procedures which are not specifically designed for this purpose. While some EUMS have put in place SDPs, others refuse to do so arguing that their domestic legislation allow for the direct application of the 1954 Convention, and other provisions in their national legislation adequately protect stateless persons residing on their territory. Notwithstanding the fact that identification mechanisms along with SDPs have not been perceived in the same way in Europe, it is recommended to share a common understanding of what we mean by statelessness determination procedures (SDPs). To suggest

³⁸⁷ UN High Commissioner for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008.

³⁸⁸ UNHCR: *Statelessness Determination: Identifying and Protecting Stateless Persons*, Geneva, 2014. p. 5. Available from: <http://www.refworld.org/pdfid/5412a7be4.pdf>. (accessed 6 May 2018)

³⁸⁹ Ibid.

³⁹⁰ Ibid.

a potential approach for interpretation, the European Network on Statelessness (ENS) refers to SDPs in case they are *effective, and their operation is formalized in law*.³⁹¹

Statelessness determination procedures generally assist State Parties to the 1954 Convention in meeting their international commitments under the Convention. According to the UNHCR's position, dedicated statelessness determination mechanisms are indispensable for a State Party to the 1954 Convention to fulfill its protection obligations (and therefore its international obligations) under this convention.³⁹² The importance of putting in place such procedures lies in the fact that the lack of determination mechanisms may have harmful effects on both the affected individuals (prolonged unlawful detention, destitution, social marginalization, etc.) and the state itself (security risks, social tensions, etc.).³⁹³

The UNHCR considers that statelessness determination procedures may not be relevant in terms of certain stateless populations in a non-migratory context who remained in their "own country" (*in situ* populations) because of their long-established ties to the given countries.³⁹⁴ Indeed, in the case of *in situ* stateless persons, the best solution would be the automatic grant of nationality or by means of an accelerated and facilitated naturalization procedure, promoted by targeted nationality campaigns. Nonetheless, until such legislation is put in place for non-citizens in Europe, it would be key for EUMS with non-citizen populations (who may be viewed *in situ* stateless persons) to establish status determination procedures whereby the affected individuals may benefit from protection based on the granted protection status, until they are naturalized as nationals. The following assessment therefore reflects on the identification and protection of both groups of stateless persons (in the migratory and non-migratory contexts) with strong, weak or non-existing ties with the host country where they reside based on the simple consideration of whether they have an effective nationality or not.

At the EU level, the significance of council conclusions on statelessness adopted in December 2015 must be underscored, whereby the JHA Council and EUMS "*Acknowledge the importance of identifying stateless persons and strengthening their protection thus allowing them to enjoy core fundamental rights and reducing the risk of discrimination or unequal treatment.*" Accordingly, several states have recently taken positive steps in this respect.

391 European Network on Statelessness, Statelessness determination and the protection status of stateless persons (2013), available at: <http://www.refworld.org/pdfid/53162a2f4.pdf>. (accessed 6 May 2018)

392 UNHCR Statelessness Guidelines 2, Para 1.

393 ENS summary guide on statelessness determination and the protection status of stateless persons, 2013. p.8. Available from: <http://www.refworld.org/pdfid/53162a2f4.pdf>. (accessed 6 May 2018)

394 See: UNHCR Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons, p.25.

However, given the currently low number of existing determination and protection models, States often face difficulties when looking for good practices or examples to comply with. In this regard, the key findings of the ENS summary guide on statelessness determination procedures and a statelessness-specific protection status,³⁹⁵ the UNHCR good practices paper on statelessness determination procedures,³⁹⁶ as well as all relevant UNHCR Guidelines³⁹⁷ have an instrumental role. Although the 1954 Convention does not provide a positive obligation for State Parties to put in place statelessness determination mechanisms, as I mentioned beforehand, such an obligation remains implicit in the objectives of the Convention, considering that the identification of stateless persons proved to be a prerequisite for providing them appropriate treatment and protection, including secure residence and a wide range of basic rights.

Historically, statelessness-determination procedures may be divided into three main categories. Initial efforts made by France (1952) and Italy (1970s) to establish a dedicated procedure may amount to the *first generation* of dedicated procedures. These mechanisms present severe shortcomings, nevertheless, provide important reference for other EUMS to elaborate similar procedures and protection standards. *Second-generation* identification procedures have been put in place by EUMS between 2000-2011, such as Spain (2001), Latvia (2004), Hungary (2007) and Mexico (2007). These were inspired by the French and Italian models, yet reflect on the socio-economic considerations of nation-states, which, also in light of the recent refugee crisis in Europe, seem to be hesitant to identify and provide for the protection of stateless persons, especially in the migratory context. *Third-generation* procedures constitute those which largely build on the good examples of procedural elements and legal context of the second-generation procedures after 2011, including those in Moldova

³⁹⁵ See footnote 355.

³⁹⁶ Establishing statelessness determination procedures to protect stateless persons, Good Practices Paper, 2016; <http://www.refworld.org/pdfid/57836cff4.pdf>. (accessed 6 May 2016) Statelessness Determination: Identifying and Protecting Stateless Persons, Geneva, 2014. p. 5.

Available from: <http://www.refworld.org/pdfid/5412a7be4.pdf>. (accessed 6 May 2018)

³⁹⁷ 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, HCR/GS/12/01, 20 February 2012, UNHCR Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, HCR/GS/12/02, 5 April 2012 (hereinafter UNHCR Statelessness Guidelines 2), UNHCR Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, 17 July 2012 2012, HCR/GS/12/03 (hereinafter UNHCR Statelessness Guidelines 3), UNHCR Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, HCR/GS/12/04, 21 December 2012

(2012), Georgia (2012), Philippines (2012), United Kingdom (2013), and Turkey (2016).³⁹⁸ Although Greece, Slovakia and Switzerland have provided for the protection of stateless persons in their domestic legislation, are yet to establish dedicated procedures. In Belgium, despite the fact that there are no specific legal provisions for the determination of statelessness, courts assume the responsibility to determine an individual's statelessness.³⁹⁹

The *fourth-generation* of dedicated procedures are those which have been most recently or are currently put in place in Latin-American countries, for instance, in Costa Rica and Ecuador where statelessness has been historically disregarded. In addition, partially built identification mechanisms have been put in place in Brazil and Peru, in the sense that although the law foresees a protection status for stateless persons, the SDP itself has not been elaborated yet. Therefore, a renaissance of the issue of statelessness may be observed in these Latin-American countries where governments appear to be very open-minded and keen to collaborate with the UNHCR, the Americas Network on Nationality and Statelessness⁴⁰⁰ (ANNS) and other relevant international stakeholders who advise them in their policy- and law-making process.

Also, the UNHCR has elaborated draft articles for advising interested State Parties entitled *Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalisation*⁴⁰¹ in 2017 to be addressed further in the next chapter. Consequently, the newly established mechanisms in Latin American countries largely build on these articles which at least technically, provide excellent platforms for the identification of stateless persons which may lead to a legal status that permits residence and guarantees the enjoyment of basic human rights, and facilitate naturalization.⁴⁰²

³⁹⁸ The classification serves to demonstrate the regional progress of status determination procedures which was inspired by my interview with Mr. Gábor Gyulai in December 2017.

³⁹⁹ UNHCR (2016): Establishing statelessness determination procedures to protect stateless persons, Good Practices Paper, p. 2. Available from: <http://www.refworld.org/pdfid/57836cff4.pdf>. (accessed 6 May 2018)

⁴⁰⁰ For more information: <http://www.americasns.org/>. (accessed 6 May 2018)

⁴⁰¹ United Nations High Commissioner for Refugees (UNHCR), UNHCR Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalisation 25 May 2017

⁴⁰² These national developments were identified as a result of a personal interview with Gábor Gyulai, held on 18 December 2017, who was personally engaged in some of the relating consultations with interested State Parties as a founding member and chair of the European Network on Statelessness.

9. 2. STATELESSNESS DETERMINATION IN THE EU

Based on the considerations of ENS explained above, at the time of writing 10 European countries have functioning SDPs in place, including *France, Georgia, Hungary, Italy, Latvia, Kosovo (UNSCR 1244/99), the Republic of Moldova, Spain, Turkey, and the United Kingdom*⁴⁰³. *Partially built* statelessness-specific protection systems—where the law foresees a protection status, but the SDP has not been elaborated yet—include *Belgium, Slovakia, and Switzerland*. When it comes to the European Union, seven of its Member States (FR, HU, IT, LV, LU, ES and UK) have a dedicated determination procedure put in place. Hungary and Spain are the only two EUMS which have established legislation creating dedicated statelessness determination procedures to provide for a separate stateless status, while a majority of EUMS (AT, BE, HR, CZ, EE, FI, DE, IE, LT, MT, NL, PL, SK, SI, SE) do not have a specific administrative determination procedure for stateless persons. Belgium and Bulgaria⁴⁰⁴ have indicated an intention to establish a specific determination procedure, and the Netherlands is also currently drafting one. Thus, it may be concluded that there is no common model of administrative procedure for the determination of statelessness amongst EUMS. Some EUMS use general administrative procedures, an administrative practice or apply the determination procedure within other administrative procedures (i.e. relating to citizenship, residence permit, international protection procedures or *ex-officio*). The specific administrative or judicial determination procedures that have been developed in FR, HU, IT, LV, LU, ES and UK also show great variations.

The recently launched EMN inform, synthesizing the inputs received from the EUMS relating to statelessness determination⁴⁰⁵ similarly concluded that there is no homogeneity among EUMS as regards the procedures they apply to determine statelessness, including dedicated administrative determination procedures; general administrative procedure or inside another administrative procedure; ad-hoc administrative procedures; and judicial procedures. It suggests that in the majority of EUMS there is no direct link between the determination of statelessness and the issuance of a specific residence permit. Thus, in principle, the individual who has been recognized as stateless does not have an automatic right to stay in the country

⁴⁰³ UNHCR (2016): Establishing statelessness determination procedures to protect stateless persons, Good Practices Paper, pp. 2-3.

⁴⁰⁴ Valeria Ilareva (2016): Bulgaria is introducing a statelessness determination procedure. Or is it? <https://www.statelessness.eu/blog/bulgaria-introducing-statelessness-determination-procedure-or-it>. (accessed 6 May 2016)

⁴⁰⁵ EMN Inform on Statelessness in the EU, 2016, available at: <https://www.emnluxembourg.lu/wp-content/uploads/2016/11/EMN-Inform-Statelessness-in-the-EU.pdf>. (accessed 6 May 2018)

that carried out the statelessness determination. Only a few EUMS grant a residence permit to an individual as a consequence of his/her recognition as a stateless person. In the large majority of EUMS, recognized stateless persons must apply for a residence permit on other grounds if they wish to regularize their status. In some cases, this can be complicated because recognized stateless persons may not fulfill the criteria (i.e. they do not have the financial means or cannot meet the evidence requirements).

In addition, the inform found that generally access to the labour market, education and training as well as health care and social aid does not depend on the determination of statelessness but on the residence permit that the stateless person can obtain. This can place stateless persons who are not able to obtain a residence permit in limbo. Also, most EUMS facilitate the access to nationality for children born stateless on their territory. In most EUMS the principle of *ius soli* applies for granting nationality at birth to children born stateless in the country. Most EUMS not applying the *ius soli* principle at birth facilitate the acquisition of nationality via naturalization at a later stage (e.g. NL). However, in most EUMS there are gaps in the applicable legislation meaning that some children who are born stateless on their territory cannot have access to nationality.

The EMN Inform also uncovered that there is no specific determination procedure for stateless unaccompanied minors that would take account of the specific vulnerabilities of this group. Most EUMS that have a determination procedure for adults apply it to unaccompanied minors without adapting it in any way. Nevertheless, in most cases a guardian is appointed to accompany the child and in those EUMS with a dedicated statelessness determination procedure, legal aid is provided (except in LV and UK). However, the burden of proof during the determination procedure remains with the child, as in the case of adult applicants. Finally, the EMN inform warns that with the exception of a few EUMS, there is mostly no provision for children born en route to the EU who arrive without a birth certificate to obtain a birth certificate or an equivalent document in the EUMS of arrival.⁴⁰⁶

Having explored the existing status determination procedures in EUMS, a number of common characteristics, good practices and similar shortcomings may be identified. An important common characteristic of the highly developed status determination procedures is that they

⁴⁰⁶ Ibid.

define statelessness as a separate ground for protection, whereas the generally agreed set of rights includes those relating to the *right to lawful residence, identity documents and certain social and economic rights*.⁴⁰⁷ Noteworthy differences between national SDPs mostly lie in the content of the *procedural framework*.⁴⁰⁸ In addition, it has been concluded that the regulation of rights and duties of stateless persons takes place predominantly *within the sphere of migration law*.⁴⁰⁹ According to Bianchini, with regard to the implementation of the 1954 Convention and status determination, the challenge lies in the fact that there remains a great level of uncertainty of implementing States regarding several aspects of the identification of statelessness, such as which elements status determination procedures should include, and so far, the exchange of good practices relating to national SDPs has been sporadic within the EU.⁴¹⁰ To this end, through the following case studies, I would like to shed light on the particular practices and related findings which have been offered by landmark court decisions in Hungary and Italy having the potential to show the way forward to other EUMS considering the establishment of dedicated procedures.

9. 2. 1. CASE STUDY 1: HUNGARY

Prior to the contemporary mass migration flows greatly affecting Hungary, as the first country of entry to the Schengen zone, the Office of Immigration and Asylum (OIA) came across relatively few stateless cases. Before 2011, applicants were mostly Palestinians or came from the former federal republics of Yugoslavia or the USSR, living in Hungary for a long time. Between 1 July 2007 (establishment of the statelessness determination procedure) and 30 September 2010, in total 109 persons applied for stateless status in Hungary, of whom 56 were recognized as stateless.⁴¹¹ This recognition rate seems remarkable from a protection viewpoint. There were also many Romani individuals among the applicants, who have been living in Hungary for a while as *de facto* stateless. Yet, Hungary did not have any particular stateless population or other historical relevance to choose to mainstream the rights and protection of the stateless. But it did have a quite vague legal framework touching upon

⁴⁰⁷ Gábor Gyulai, 'Statelessness in the EU Framework for International Protection', *European Journal of Migration and Law* 14 (2012), p. 287.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ These findings are based on the EMN Inform on Statelessness in the EU, 2016, available at: <https://www.emnluxembourg.lu/wp-content/uploads/2016/11/EMN-Inform-Statelessness-in-the-EU.pdf>. (accessed 6 May 2018)

⁴¹⁰ Bianchini 2017.

⁴¹¹ Gábor Gyulai, *Statelessness in Hungary: The protection of stateless persons and the prevention and reduction of statelessness in Hungary*, Hungarian Helsinki Committee, 2010.

statelessness⁴¹² and a firm willingness to comply with her international obligations. This positive shift was greatly inspired by the awareness-raising activities of the UNHCR and the Hungarian Helsinki Committee.⁴¹³ Hungary has been seen by many as an exemplary state actor on statelessness, being a State Party to all relevant international instruments relating to the protection of stateless persons and the reduction and prevention of statelessness.⁴¹⁴ As a state party to all these multilateral instruments, Hungary chose to comply with her international obligations provided by these instruments and therefore can no longer amend her domestic law in a unilateral way.⁴¹⁵ Hungary's reputation in this regard was further enhanced when the Government established a new self-standing statelessness determination procedure by law⁴¹⁶ which was considered as a substantial pioneer move at the time providing further incentive to other EUMS to establish similar regimes at the national level. Looking at the Hungarian procedure, it provides for guarantees comparable to those included in the refugee status determination procedure⁴¹⁷ in terms of protection needs of stateless persons. Very importantly, the procedure considers statelessness as a ground for protection in itself, providing for a *separate protection status* granted on the basis of statelessness established through the dedicated procedure.⁴¹⁸ It attributes a proactive role to Hungarian authorities (OIA) to raise awareness on how to access the procedure among potential applicants who the authorities come across through the immigration or alien policing context. With a view to

⁴¹² Act XXXIX of 2001 on the Entry and Stay of Foreigners, Section 2 (b) defined statelessness as a ground for issuing a humanitarian residence permit.

⁴¹³ The Hungarian Helsinki Committee (HHC) is one of the leading non-governmental human rights organisations in Hungary and Central Europe. Its main areas of activities focus on protecting the rights of asylum-seekers, stateless persons and other foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. The HHC is a member of the European Council on Refugees and Exiles (ECRE), the European Network on Statelessness (ENS) and is an implementing partner of the UNHCR.

⁴¹⁴ See, e.g. the 1954 UN Convention on the Status of Stateless Persons, the 1957 UN Convention on the Nationality of Married Women, the 1961 UN Convention on the Reduction of Statelessness, the 1997 European Convention on Nationality and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

⁴¹⁵ Tamás, Molnár (2013): A Government Approach to Moving Statelessness Forward on the International Agenda, European Network on Statelessness Blog.

⁴¹⁶ Act No. II of 2007 on the Entry and Stay of Third-Country Nationals (hereinafter: TCN Act).

⁴¹⁷ Tamás Molnár (2016): The Hungarian Constitutional Court's Decision on the Compatibility of the Hungarian Statelessness Determination Procedure with International Law, Hungarian Yearbook of International Law and European Law, The Hague, Eleven International Publishing, pp. 593-602.

⁴¹⁸ As one of the four non-EU harmonised protection statuses, together with the tolerated status; the victim of trafficking status; and the unaccompanied minor status. Cf. Gábor Gyulai (2009): Practices in Hungary Concerning the Granting of Non-EU-Harmonised Protection Statuses, EMN, European Commission

providing the underlying context to the Constitutional Court's decision, the Hungarian statelessness determination procedure shall be briefly explored below.

The procedure can be initiated via written or oral application by the person concerned at the regional Directorates of the OIA⁴¹⁹ where the applicant resides. The applicant must make an oral statement which is registered. S/he is entitled to use his/her mother tongue or any other language that s/he understands with the written application and/or the oral statement. In terms of related costs, the submission of the application is free of charge, while the interpretation costs and those related to legal aid are covered by the State.⁴²⁰ The legal representative of the applicant may be present during the interview and should be informed of the interview at least five days in advance. The UNHCR is granted a set of rights during the procedure as well, including that it can participate at any stage of it.

While the burden of proof lies principally on the applicant, in practice, the authority plays an active role in establishing relevant facts and provides assistance in verifying potential national ties upon request by the applicant. The law foresees a lowered standard of proof in statelessness determination, enabling the claimant to only substantiate the foundedness of her/his claim, in case proving is infeasible. With due regard to the vulnerabilities of children, *ex-officio* guardians are appointed to assist to the cases of unaccompanied children. Judicial review of administrative decisions is available; the proceeding judge is entitled both to annul the administrative decision and to grant stateless status. Upon recognition, stateless persons obtain a residence permit issued on humanitarian ground, valid for three years and renewable with one year at a time, a stateless travel document, and access to free primary and secondary education. Further to that, while the general rule is 8 years, in Hungary stateless persons may be naturalized after 5 years of having a registered domicile in the country.⁴²¹ Nevertheless, the mentioned TCN Act provided very little about stateless persons' access to the Hungarian labour market or to social entitlements, not envisaging any financial support, not even relating to health care or accommodation. In addition to these shortcomings, it does not apply to *de*

⁴¹⁹ The competent authority for conducting statelessness determination procedures in Hungary.

⁴²⁰ Nevertheless, the Hungarian Helsinki Committee also provides free legal aid to both asylum-seekers and stateless persons.

⁴²¹ Art. 29(1) lit. a) and (2) lit. a) of the TCN Act.

facto stateless persons, excluding them from the chance to be identified as stateless persons.⁴²² Since the update of the Hungarian stateless regime and establishment of dedicated procedure in 2007, Hungary has been increasingly addressing and mainstreaming the rights and protection of stateless persons and the reduction of statelessness in the international fora which was also included as a goal in a strategy document for 2009-2014.⁴²³ It provides that:

„Hungary [...] wishes to further represent the issue of the protection of stateless persons on the international plane, among others by disseminating the practical experiences gained from the exemplary Hungarian procedure for the recognition of stateless status.”

Further efforts were made by the Hungarian Presidency of the Council of the EU in May 2011 to put the issue of statelessness on the European agenda by inviting Member States to engage in discussions about the protection of stateless persons, as well as the prevention and reduction of statelessness. Following the Presidency, in November 2011 the EU Global Approach on Migration and Mobility (GAMM) was adopted which provided that: *„The EU should also encourage non-EU countries to address the issue of stateless persons, who are a particularly vulnerable group, by taking measures to reduce statelessness.”* In December of the same year, Hungary made important statelessness related pledges, aiming to strengthen Hungary’s commitment to further promote the statelessness conventions and offer to share best practices and expertise in this field. Furthermore, Hungary pledged to withdraw the declaration made with regard to Articles 23 and 24 of the 1954 Convention,⁴²⁴ ensuring the full enjoyment of the rights relating to *access to public relief, labour legislation and social security to all stateless recognised by Hungary*. Very importantly, Hungary announced that it would develop a quality evaluation and development mechanism in statelessness determination which has been set up since then. The Quality Assurance Manual was prepared by the OIA and the UNHCR's Hungary Unit and was adopted in October 2012.⁴²⁵ Quality evaluation foreseen by the Manual is implemented through in-house joint UNHCR/OIN audits

⁴²²For further details on the procedure, see Tamás Molnár (2013): Statelessness Determination Procedure in Hungary 4 *Asiel & Migrantenrech*, pp. 271-277; Judit Tóth (2012): Hungary, In D. Vanheule (ed.), *International Encyclopaedia of Laws: Migration Law*. Alphen aan den Rijn, Kluwer Law International, pp. 183-192.

⁴²³Government Strategy of Hungary for Cooperating in the Area of Freedom, Security and Justice of the EU for 2009-2014, p. 16.

⁴²⁴The declaration was withdrawn as of 3 July 2012.

⁴²⁵Tamás, Molnár (2013): A Government Approach to Moving Statelessness Forward on the International Agenda, European Network on Statelessness Blog.

of interview records and thus decisions on statelessness determination greatly rely on the Quality Assurance Manual.

Nonetheless, the exemplary Hungarian model included an unreasonable, undue and restrictive provision in the procedural framework of the related national legislation (Art. 76(1) of the TCN Act) which until the landmark Constitutional Court decision, allowed solely for lawfully staying third country nationals to apply for stateless status in Hungary. It used to read as follows:

„Proceedings aimed at the establishment of statelessness shall be instituted upon an application submitted to the alien police authority by an applicant lawfully staying in the territory of Hungary, which may be submitted by the person seeking recognition as a stateless person (hereinafter referred to as the applicant) orally or in writing.”

Thus, persons arriving and staying irregularly in Hungary were almost automatically excluded from protection, unable to gain access to the procedure. This provision was originally introduced to prevent abusive claims, submitted in bad faith with the aim of preventing removal from Hungary.⁴²⁶ Generally, unlawfully staying applicants were allowed to file a claim, however, their unlawful stay was indicated precisely as a ground for rejection of their claims in a great number of cases. By not being able to prove or regularize their lawful stay, irregularly staying applicants did not in reality get a chance to be identified as stateless persons which appeared to be a rather vicious circle for many, including genuinely stateless individuals. In addition, the OIA earlier claimed that a humanitarian residence permit issued on the grounds of an ongoing asylum procedure cannot be seen as a proof of lawful stay either, in case the asylum-seeker previously entered Hungary irregularly. Until the Court's decision, this single provision fundamentally challenged the integrity of the Hungarian protection regime as a whole. In addition, it prevented stateless persons genuinely in need of protection to be able to gain access to the dedicated procedure and be recognized as stateless persons. Furthermore, unlawful stay is not included within the list of exclusion clauses⁴²⁷ proclaimed by the 1954 Convention.

⁴²⁶In addition, the fact that certain states allowing their citizens to renounce their nationality without the prior acquisition of another nationality, may lead to fraudulent misuse of nationality by renouncing it with the objective of obtaining a protection status in another country.

⁴²⁷ The 1954 Convention shall not apply:(1) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance; (2) To persons who are recognised by the competent

ELIMINATION OF THE CONDITION OF 'LAWFUL STAY'

In September 2014, a complex individual case was referred to the Constitutional Court in a proceeding initiated in order to review an administrative decision of the OIA which had rejected the statelessness claim of an applicant born in Somalia to a Nigerian mother and a Somali father arriving to Hungary as an illegal migrant. The Hungarian Helsinki Committee and the UNHCR closely monitored the developments and participated in the case as third party interveners. In 2010, the applicant initiated his first statelessness determination procedure which was rejected by the OIA, partly because of the absence of proof of his lawful stay in Hungary which was a precondition provided by Article 76 (1) of the related Act (Act II of 2007 on the conditions of Entry and Stay of Third-Country Nationals) stating that lawful residence is a pre-requisite to the submission of such claims. Despite of continuing proceedings, the applicant initiated a second procedure by presenting new evidence, the OIA modified its previous conclusion and accepted that the applicant proved his statelessness, yet, it rejected to grant him stateless status. The initiating judge decided to submit a petition and bring the case before the Constitutional Court in the hope of the annulment of the contested provision⁴²⁸ of 'lawful stay' for breaching Hungary's international legal obligations

authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; (3) To persons with respect to whom there are serious reasons for considering that:(a)They have committed a crime against peace, a war crime, or a crime against humanity, as defined in international instruments; (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country; (c)They have been guilty of acts contrary to the purposes and principles of the United Nations.

⁴²⁸ Art. 25(1) of Act No. CLI of 2011 on the Constitutional Court (hereinafter: CC Act) which provides that '[i]f a judge, in the course of adjudication of a case in progress, is bound to apply a legal act that he/she perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, the judge shall suspend the judicial proceedings and, in accordance with Art. 24(2) lit. b) of the Fundamental Law, submit a petition for declaring that the legal act or a provision thereof is contrary to the Fundamental Law, and/or the exclusion of the application of the legal act contrary to the Fundamental Law.'

undertaken in the 1954 Convention⁴²⁹ therefore international law which would be also contrary to the provisions of the Fundamental Law.⁴³⁰

Then the moment came in February 2015 when the Constitutional Court delivered its judgment⁴³¹ declaring the precondition of 'lawful stay' set out in domestic law unconstitutional, precisely for violating Hungary's international obligations assumed in the 1954 Convention by narrowing the definition of a stateless person set out in Article 1(1) of the Convention.

The Court considered that this provision has also violated Article Q (2) of the Fundamental Law requiring full compliance between domestic law and international law. The Court pointed out that the requirement under consideration could not be seen as a procedural but as a substantial provision altering the definition of a stateless person as compared to the one included and internationally recognized in Article 1 (1) of the 1954 Convention, therefore, narrowing the personal scope of the TCN Act. The Court also confirmed that under the Convention certain rights are to be accorded solely to lawfully staying stateless persons in the Contracting States, while other rights (*inter alia* right to property, access to courts) to all of them, regardless of the lawfulness of their stay. Therefore, the Court eliminated the lawful stay requirement as of 30 September 2015.⁴³² Nevertheless, the Court refused to declare a general prohibition of application of this provision, as well as in terms of the individual case at hand. The *pro futuro* annulment⁴³³ of the provision of 'unlawful stay' was adopted with a

⁴²⁹Pursuant to Para. 10 of the Resolution: "According to the judge's motion, Article 1 of the United Nations Convention relating to the Status of Stateless Persons signed in New York on 28 September 1954, promulgated by Act II of 2002 (hereinafter: the 1954 Convention)" – in respect of which no state may make any reservations under Article 38 thereof – does not specify lawful stay in the territory of the given state as a prerequisite for determining stateless status, in contrast with Section 76(1) of the Aliens Act. Based on Section 76(1) of the Aliens Act, however, stateless status shall be refused for a person qualifying as a stateless person under Article 1 of the 1954 Convention if s/he stays in Hungary unlawfully for any reason; therefore, it needs to be seen whether the phrase "lawfully staying" in Section 76(1) of the Aliens Act is in contravention with the 1954 Convention and thus is in contravention of Articles Q (2) and XV (2) of the Fundamental Act."

⁴³⁰ Art Q(2) provides that: „In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.”

⁴³¹ Decision 6/2015 (II.25.) of the Constitutional Court on the determination whether the term „lawfully” in Section 76(1) of the TCN Act is contrary to the Fundamental Act and the annulment thereof.

⁴³² In light of the annulment, Section 76(1) of the TCN Act shall read as: „76 (1) Proceedings for the recognition of statelessness are opened upon the submission of an application to the alien police authority for the recognition as stateless by a person staying in the territory of Hungary (hereinafter: “applicant”).The application may be presented orally or in writing.”

⁴³³ Meaning that the annulment of the provision only has legal effects on future cases, therefore, does not apply retroactively.

view to ensuring legal certainty and thereby granting time for the legislator to draft new rules. The Court also highlighted that despite of the annulment of the contested provision, the act of unlawful entry and stay would not be considered lawful.⁴³⁴

The *dissenting opinions*⁴³⁵ of prominent judges make further substantial contribution to the landmark Hungarian resolution on statelessness. In addition, the *parallel statement* of reasons for supporting the majority position to adopt the resolution by Judge *Ágnes Czine* recognized the UNHCR as „*the body most able to interpret issues of international law associated with the Statelessness Convention and to explore the related practice*”.⁴³⁶ Judge Czine considered the “lawfully” phrase included in Article 76(1) of the TCN Act as „*an escape route for the authorities*.”⁴³⁷

With regard to the individual case at hand, she deems that the Court’s decision about *pro futuro* annulment is reasonable, as it ensures legal certainty, taking note of the fact that the concerned plaintiff remains to have the opportunity to submit a new application following that the resolution enters into force as of 30 September 2015.⁴³⁸ Other judicial opinions sought to reflect on whether ‘lawful stay’ is a direct violation of the Fundamental Law or maybe it is solely in conflict with an international treaty (namely the 1954 Convention). Summarizing the justification of the annulment of the contested provision of lawful stay and the essence of the dissenting opinions, it may be concluded that this decision marked indeed a milestone in Hungarian statelessness legislation from a human rights perspective; eventually, an undue obstacle was removed from the otherwise exemplary dedicated procedure which further enhances the protection of stateless persons in Hungary. It must be mentioned that the UNHCR and the Hungarian Helsinki Committee have been making tremendous efforts to advocate against this provision.⁴³⁹

⁴³⁴ C.f. Gábor Gyulai, Hungarian Constitutional Court declares that lawful stay requirement in statelessness determination breaches international law, European Network on Statelessness Blog, March 2015.

⁴³⁵ Dissenting opinions from constitutional judges dr. István Balsai, dr. Egon Dienes-Oehm, dr. László Kiss, dr. Barnabás Lenkovics, dr. Miklós Lévy, dr. Péter Paczolay, dr. Béla Pokol, dr. László Salamon and dr. András Zs. Varga relating to Resolution 6/2015 (II.25.) of the Constitutional Court of Hungary on the determination whether the term „lawfully” in Section 76(1) of the TCN Act is contrary to the Fundamental Act and the annulment thereof.

⁴³⁶ Para. 36. of the Resolution 6/2015 (II.25.).

⁴³⁷ Ibid. para. 37

⁴³⁸ Ibid. para. 38

⁴³⁹ See the Expert Opinion of the Helsinki Commission submitted to the Constitutional Court. Available (in Hungarian) from:

9. 2. 2. CASE STUDY 2: ITALY

Despite the fact that Italy has one of Europe's oldest statelessness determination procedures, very few affected individuals have been recognized through the dedicated administrative procedure.⁴⁴⁰ During the administrative procedure governed by Article 17, Presidential Decree No. 572/93, the applicant for the status determination procedure has to submit an application to the Ministry of Interior, attaching a birth certificate, documentation relating to residence in Italy and any other potentially supporting documents. The procedure can be accessed solely by those legally present in Italy. Given due consideration to the realities of undocumented stateless persons, it is clear that very few of them can comply with these requirements. Consequently, most stateless applicants have no real access to the administrative determination procedure. Despite of the higher costs of the judicial procedure (as it requires the assistance of an attorney), it remains rather accessible for stateless applicants, as well as for those not legally staying in Italy, as it is not required that the applicant holds a residence permit in Italy. For such procedures, generally the rules of the ordinary civil procedure apply, the Ministry of Interior being the defendant.⁴⁴¹ Yet, due to the lack of specific regulation, there are no provisions concerning the exact documents the applicant must file to the court in order to substantiate and acquire the recognition of his/her stateless status.⁴⁴²

ITALIAN COURT DECISION REDUCES THE BURDEN OF PROOF

The Italian Court of Cassation ruled on a case concerning the Italian statelessness determination procedure⁴⁴³ in March 2015 in a constructive lawmaking spirit, similarly to the Hungarian example. The Court of Cassation reversed a judgment made by the Court of Appeal of Rome which had rejected to recognize the status of a stateless person, a woman of Bosnian origin living in Italy since her birth. In its ruling, the Court of Cassation compared stateless persons to third country nationals who are beneficiaries of international protection, comparing the similarities between these two categories in terms of a direct implication on the burden of proof related to the applicant's lack of nationality in statelessness determination

[http://public.mkab.hu/dev/dontesek.nsf/0/28ddc0e14e5bc80bc1257d7100259a90/\\$FILE/III_1664_4_2014_Helsinki%20Bizottsag_velemenye.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/28ddc0e14e5bc80bc1257d7100259a90/$FILE/III_1664_4_2014_Helsinki%20Bizottsag_velemenye.pdf). (accessed 6 May 2018)

⁴⁴⁰ See., Rozzi, Out of Limbo: Promoting the right of stateless Roma people to a legal status in Italy, *supra* n54.

⁴⁴¹ EMN Inform on Statelessness in the EU, 2016, available at: <https://www.emnluxembourg.lu/wp-content/uploads/2016/11/EMN-Inform-Statelessness-in-the-EU.pdf>. (accessed 6 May 2018)

⁴⁴² Bittoni 2015.

⁴⁴³ No. 4262 of 3 March 2015.

procedures. In this judgment, the Court evokes the definition of a stateless person as set out in Article 1(1) of the 1954 Convention, referring to the obligation of the treatment of stateless persons stemming from this Convention. Furthermore, the Court considered that *third country nationals in the Italian territory enjoy human rights irrespective of their possession of Italian nationality*.

The Court concluded that stateless persons are entitled to apply directly for the recognition of their stateless status before a judge in civil proceedings using the more effective judicial procedure, instead of the administrative one. Very importantly, the Italian Court of Cassation considered that the similarities between stateless persons and beneficiaries of international protection suggest relevant implications on the extent of burden of proof, therefore, must be reduced also in terms of the statelessness determination procedure.⁴⁴⁴ This would imply that the judge should reach out to competent public authorities (both Italian and those of the State the applicant has effective bonds with) for the purpose of gathering substantial information and evidence on the nationality status of the applicant necessary to prove his/her nationality, by complementing the evidence presented by the applicant.

With due regard to the case at hand, the Court of Cassation found that the Court of Appeal of Rome did not take into account the overall situation of the applicant, as the Court did not verify whether the applicant could have practically obtained the nationality of Bosnia and Herzegovina. If it had verified it, the Court would have found out in due time that in light of the Law on Citizenship of Bosnia and Herzegovina the applicant had not met the requirements to apply for Bosnian citizenship. The Court of Cassation declared that the stateless applicant did not possess the Italian nationality either and provided her with the stateless status.⁴⁴⁵

While there are state concerns which might prevent States from establishing statelessness determination procedures, including whether they create a pull factor for potential claimants, whether in case of rejected asylum claims, asylum seekers might seek international protection by soliciting a statelessness determination procedure or whether they generate undesired additional costs to the already burdened migration expenses of EUMS. In Bianchini's article *A Comparative Analysis of Statelessness Determination Procedures in 10 EU States*, Bianchini explains that there remains a great level of uncertainty of implementing States regarding several aspects of the identification of statelessness, such as which elements status

⁴⁴⁴See., Bittoni, Statelessness determination procedure in Italy: who bears the burden of proof?, *supra* n63.

⁴⁴⁵ See further: *Ibid*.

determination procedures should include, and so far, the exchange of good practices relating to national SDPs has been sporadic within the EU. The article argues that only the possibility of acquiring residence rights on the grounds of statelessness permits access to all the rights enshrined in the 1954 Convention. It further suggests that specific legislation is a prerequisite for the effective implementation of the international obligations created by the 1954 Convention.⁴⁴⁶

9. 3. BEST PRACTICES OFFERED BY THE UNHCR

The UNHCR has made important contribution for States, providing them with thorough guidance on how to design status determination procedures through guidelines and handbooks, as it will be explained in the next chapter. In the following lines, the main considerations of the UNHCR relating to such procedures shall be set out.

Reflecting on the fact that some stateless persons may also be refugees,⁴⁴⁷ the UNHCR suggests that States should consider combining statelessness and refugee determination in the same procedure. This had great relevance for the recent refugee crisis in Europe, when stateless persons (who were either stateless before their departure or became stateless after it) were also fleeing their home country side by side with asylum seekers who had a nationality prior to their departure. According to UNHCR decision-makers must also take into consideration that it is generally difficult for stateless persons to substantiate their statelessness claim and provide due documentary evidence that there is no state that recognizes them as their national. In these cases, the applicant and the competent authority must cooperate effectively to obtain sufficient evidence to establish the facts and; in doing so, the authorities must consider all available sources of evidence, oral or written, of the applicant's statelessness which may include the analysis of nationality laws of third countries and the practices thereof,⁴⁴⁸ as well as reaching out to relevant third country authorities for verification. In this regard, it must be mentioned that embassies of relevant countries of origin may not be willing to cooperate on the confirmation or establishment of an individual's (who may as well be the national of their sending state) nationality.

⁴⁴⁶ Bianchini 2017.

⁴⁴⁷ UNHCR: Statelessness Determination: Identifying and Protecting Stateless Persons, Geneva, 2014. p. 5. Available from: <http://www.refworld.org/pdfid/5412a7be4.pdf>. (accessed 6 May 2018)

⁴⁴⁸ Ibid.

According to the UNHCR, a statelessness determination mechanism must be *transparent, efficient and easily available to all potentially affected migrants all around the country.*⁴⁴⁹ To this end, it is crucial that they are well-informed of the existence and availability of such procedures, through the information campaigns and legal aid, generally provided by NGOs and international refugee organizations (UNHCR, IOM). In addition, considering that the basic rights of stateless persons must be respected throughout the procedure, States need to integrate procedural safeguards in determination procedures, including (1) *refraining from removing an applicant from the territory pending the outcome of the determination process;* (2) *access to legal counsel - where free legal assistance is available, it is to be offered to applicants without financial means;* (3) *giving the applicant a right to an interview with a decision-making official;* (4) *decisions that are made and communicated to the applicant within a reasonable time, in writing, in a language they understand, and with reasons;* (5) *the right for the applicant to appeal a first instance negative decision.*⁴⁵⁰

According to a recent publication of the UNHCR which was elaborated at the time of the escalation of the refugee crisis taking place in Europe, to the experience of States which operate determination procedures there has been no apparent increase in the number of arrivals of those claiming statelessness statuses. With regard to the issue of asylum seekers whose claim was rejected and therefore may lodge a statelessness application, States with dedicated procedures came across marginal number of such cases. This is due to the fact that the majority of asylum-seekers are nationals of a state from which they fear persecution. Most of them have a country of nationality where they would be readmitted in case of a rejected asylum claim. Experience from countries that have established a statelessness determination procedure shows that very few rejected asylum-seekers go on to make a claim for statelessness status.⁴⁵¹

When it comes to the issue of additional costs potentially inherent to putting in place such procedures, in reality it does not represent any significant costs, especially if thanks to the efficiency of the procedure many stateless persons are identified and therefore are treated differently than refugees. Additional costs can be limited by locating the statelessness determination procedure within an existing government authority with related competence, such as competence in refugee status determination, thereby avoiding the creation of a new

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid. p. 6. More procedural safeguards are described in the UNHCR Handbook on Protection of Stateless Persons.

⁴⁵¹ Ibid. p. 8.

institution or administrative apparatus. Given that countries that have established a statelessness determination procedure continue to experience low numbers of applications, the costs of running the procedure are likely to remain low. By formally identifying and recognizing stateless persons, States avoid the high costs associated with failed attempts at removal and the frequent, repeat and often prolonged detention of stateless persons because of their inability to regularize their stay.⁴⁵²

SUMMARIZING THE RESULTS

The policy shifts and jurisprudence relating to nationality legislation in the examined EU Member States which have put in place statelessness determination procedures testifying the genuine dedication of 9 EUMS to comply with their international obligations stemming from their international obligations. In this regard, the mentioned amendments and court rulings addressing statelessness have great implications both in terms of preventing future cases of statelessness and duly addressing existing ones with a view to reducing statelessness in Europe. The mentioned examples prove that the establishment of an *incomplex dedicated procedure, fairly simple procedural amendments and low-cost reforms may have the potential to induce long-lasting effects on concerned stateless individuals' lives.*⁴⁵³ They further suggest firm commitment to shed light on the importance of individual statelessness determination through dedicated procedures as a first step to address statelessness and the protection needs of stateless persons.

In the presented rulings, very similar concerns were addressed by the Hungarian and Italian judges suggesting important correlations between the two statelessness regimes shedding further light on potential shortcomings and weaknesses of statelessness determination procedures, including *facilitated access to the procedure by all stateless persons, irrespective of the lawfulness of their stay, as well as reduced burden of proof for the applicant.*

Thus, with reference to the Hungarian and Italian statelessness determination procedures and recent amendments made thereto, as explored in this chapter, I would add the following considerations which may serve as best practices:

⁴⁵² Ibid. p. 8.

⁴⁵³ As suggested by UNHCR, Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness, 23 February 2015.

- Potentially affected persons should be informed about their right to initiate a status determination procedure which may result in the grant of a protection status on the basis on their statelessness, as well as about the rights and obligations inherent therein;
- Efficient referral mechanisms based on the cooperation between the regional and central authorities, as well as the competent non-governmental organizations (UNHCR, IOM);
- The procedure can be initiated via written or oral application by the affected individual, irrespective of the (il)legality of his or her stay on the territory of the given state, in a language that the applicant understands;
- While the burden of proof lies principally on the applicant, in practice, the authority should assume an active role in establishing relevant facts and provides assistance in verifying potential national ties upon request by the applicant;
- The law should foresee a lowered standard of proof in statelessness determination for the applicant, enabling the claimant to only substantiate the foundedness of her/his claim, in case proving the foundedness of the claim is infeasible for some reason, for instance, due to the lack of identity documents;
- Throughout the procedure, the applicant must have access to free legal counseling and free interpretation;
- Taking note of the vulnerabilities of children, *ex-officio* guardians should be appointed to assist to cases of unaccompanied minors;
- In-house audits should be put in place in cooperation of the competent authority and the UNHCR of interview records guarantees quality assurance for decisions on statelessness determination, and thus the elaboration of a Quality Assurance Manual in cooperation with the UNHCR is recommended;
- Judicial review of administrative decisions should be available where the proceeding judge is entitled both to annul the administrative decision and to grant stateless status;
- In case statelessness is established, a *separate protection status* should be granted to the affected individual.

In addition, the addressed shortcomings relating to the dedicated procedures may also serve as best practices for countries considering launching a statelessness determination procedure that therefore may not include similarly unreasonable restrictions (for instance, the condition of lawful stay to lodge a statelessness claim). Also, dedicated procedures generally fail to reflect sufficiently on the practical difficulties faced by *de situ* stateless persons (non-citizens in Europe) who are by definition not included in Article 1(1) of the 1954 Convention which

mainly regards *de iure* stateless. Yet, the Italian court ruling proved that statelessness determination must also have due regard to *in situ* stateless populations living in Europe.

By the time of writing, only nine Member States have put in place dedicated procedures, out of the twenty-eight which indeed leaves room for improvement. Thus, most importantly, the presented procedures and relating legislative amendments and jurisprudence set important examples for other EUMS with stateless populations and with no separate identification procedure in place. As such, nationality legislators in Latvia, Estonia, Lithuania, Croatia, Slovakia, the Czech Republic, Slovenia and Romania could build indeed on the momentum implied by the constructive, inclusive and innovative regional practices which may be subject to high level discussion at the EU level, through the EMN platform. Moreover, the explored procedures may encourage Yugoslav successor states with EU membership aspirations and considerable stateless populations (Serbia, Kosovo, Bosnia and Herzegovina, the former Yugoslav Republic of Montenegro) to open a new chapter in their approach towards nationality and eventually accede to and implement the statelessness conventions. This would potentially incline legislative changes which would eventually reduce cases of statelessness in the (enlarged) European Union.

CHAPTER 10: THE ROLE OF THE UNHCR AND OTHER REGIONAL NON-STATE ACTORS

INTRODUCTION

In this chapter, first the statelessness related mandate and work of the UNHCR shall be uncovered with the aim of clarifying the room for and significance of expert-level consultation and collaboration between government stakeholders and international non-state actors working in the field in Europe. Then the advocacy work of the European Network on Statelessness (ENS) and the Institute on Statelessness and Inclusion (ISI) shall be presented who also engage with and assist States with a view to mainstreaming the rights of stateless persons, publish statelessness related articles and organize capacity-building activities throughout Europe, constitute further key partners in statelessness related joint efforts in Europe.

10. 1. UNHCR'S MANDATE TO ADDRESS STATELESSNESS

States have broad discretion in the design and operation of statelessness determination procedures which gives them liberty to design an identification mechanism which is in line with their socio-economic and political context. One size fits all therefore does not apply for such procedures, however, lessons learnt and good practices offer an important basis for common standards and principles to consider when putting in place dedicated procedures. The UNHCR, the UN Refugee Agency has a mandate to assist States who are considering the establishment of determination procedures, or the improvement of the existing ones, providing crucial expertise in the advisory and consultation process of the policy- and law-making aspects. Collaborating with the UNHCR provides States with *easy access to statelessness related expertise and best practices* for States to build on already existing *draft articles providing for the establishment of statelessness determination*⁴⁵⁴ procedures which the UNHCR views as an initial step to be eventually naturalized. The UNHCR has a universal mandate to identify stateless persons, to enhance the prevention and reduction of statelessness and to protect stateless persons. 2006 constitutes a landmark moment when ExCom Conclusion No. 106 (LVII) was adopted concerning the identification, prevention and reduction of statelessness and protection of stateless persons.⁴⁵⁵ By the adoption of this conclusion, the ExCom of the High Commissioner's Programme:

(1) Requests UNHCR to actively disseminate information and, where appropriate, train government counterparts on appropriate mechanisms for identifying, recording, and granting a status to stateless persons;

(2) Encourages States which are not yet Parties to the 1954 Convention relating to the Status of Stateless Persons to treat stateless persons lawfully residing in their territory in accordance with international human rights law; and to consider, as appropriate, facilitating the naturalization of habitually and lawfully residing stateless persons in accordance with national legislation.

⁴⁵⁴ See: United Nations High Commissioner for Refugees (UNHCR), UNHCR Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalisation 25 May 2017.

⁴⁵⁵ UNHCR Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, No. 106 (LVII) – 2006.

This global mandate is coordinated by the UNHCR Headquarters in Geneva, in the heart of Europe, and is carried out by the UNHCR's Regional Representations operating in regional offices across the globe, including those in Europe. Regional Representations in Europe cover Western Europe (based in Brussels), Northern Europe (based in Stockholm), Central and Eastern Europe (based in Budapest) and Southeast Europe (based in Rome). There is a Protection team at every regional representation, consisting of a Senior Protection Officer, Protection Officers and Associates working together with Field Associates who operate in the field to carry out and monitor the statelessness related work assumed by the Organization. Responsibilities of Protection Officers include the technical and strategic cooperation with governmental and non-governmental stakeholders, as well as awareness-raising activities relating to the identification and protection of stateless persons. The statelessness related work of Field Associates is implemented by monitoring the situation of persons of concern to the Organization, including stateless persons, in their respective area of responsibility.

The tireless protection work and statelessness related advocacy efforts carried out by the UNHCR during the recent refugee crisis in Europe in partnership with other international organizations, national governmental and non-governmental stakeholders and in close coordination between the different regional bodies of the UNHCR must be duly applauded.

10. 2. UNHCR GUIDELINES RELATING TO STATELESSNESS

In the aftermath of this landmark ExCom conclusion and as a result of a long research and consultation process, only in 2012 the UNHCR published *four guidelines* intended “to provide interpretive legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness”. The first three Guidelines addressed issues raised by the 1954 Convention.⁴⁵⁶ In 2013, an expert meeting was held in Tunis to discuss Articles 5-9 (on loss and deprivation of nationality) of the 1961 Convention. The ‘Tunis Conclusions’ resulting from this meeting will result in the fifth and final UNHCR Guidelines.²⁸ The overall goal of these documents relating to the 1961 Convention is to provide a dynamic interpretation of the treaty obligations in light of more recent human rights treaties and other developments in

⁴⁵⁶ 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; Guidelines on Statelessness No. 2: Procedures for determining whether an individual is a stateless person; and ”Guidelines on Statelessness No. 3: The status of stateless persons at the national level.

international law. In the same year, the UNGA adopted resolution A/RES/67/149, noting the work of the High Commissioner in regard to identifying stateless persons, preventing and reducing statelessness and protecting stateless persons, and urges the Office of the High Commissioner to continue to work in this area in accordance with relevant General Assembly resolutions and Executive Committee conclusions. This GA resolution further legitimized the UNHCR's work on statelessness. In 2014, the mentioned Guidelines were replaced by the *Handbook on Protection of Stateless Persons under the 1954 Convention pertaining to the Status of Stateless Persons* and in November 2014 the UNHCR launched its *#IBelong Campaign to End Statelessness in 10 Years*.⁴⁵⁷

At the time, there were only 83 State Parties to the 1954 Convention and 61 State Parties to the 1961 Convention. There has been a sharp increase in the number of ratifications of the statelessness conventions (see Figure 8) which constitutes a great triumph for the UNHCR which has been providing States with or without a self-standing statelessness determination procedure with facilitated access to related knowledge, best practices and even draft articles providing for the establishment of statelessness determination procedures.⁴⁵⁸

Figure 9: #IBelong campaign, UNHCR



Source: UNHCR 2016

⁴⁵⁷ See: <http://www.unhcr.org/ibelong-campaign-to-end-statelessness.html>. (accessed 6 May 2018)

⁴⁵⁸ Nonetheless, in this process the proactive role of other regional actors, such as the European Network on Statelessness, the Institute on Statelessness and Inclusion, as well as national organisations dealing with children's and women's rights have been also instrumental.

Further to the success of the *#IBelong campaign*, on the 6th of October 2016 the UNHCR ExCom adopted two international conclusions, one on international cooperation and one on youth. Their importance lies in the fact that they include language highlighting the significance of continuing efforts to address statelessness in these regards. The Conclusion of the Executive Committee on international cooperation from a protection and solutions perspective emphasizes that *“international cooperation is important for States with internally displaced persons, stateless populations, as well as other people of concern to UNHCR.”* In paragraph 16, the ExCom further considers that *“the value of international cooperation to prevent and reduce statelessness and find solutions for stateless people, including through UNHCR’s Global Campaign to End Statelessness, and encourages continued efforts in this regard.”*

The Conclusion of the Executive Committee on youth underscores that *“refugee, internally displaced and stateless youth have particular vulnerabilities and are often negatively affected and can be at heightened risk due to their situation.”* Most importantly, paragraph 8 underlines:

“the urgent need to take further measures to prevent childhood statelessness and engage with and find solutions for stateless youth, including as reflected in UNHCR’s Global Campaign to End Statelessness and the 2015 ‘I am here, I belong’ report, and encourages the continuation of efforts to promote adherence to the Conventions on Statelessness, where applicable, and the taking of measures at the global, regional and national level.”

10. 3. CROSS-CUTTING WORK OF NGO STAKEHOLDERS IN THE REDUCTION OF STATELESSNESS IN EUROPE

Beyond the work of the UNHCR, the role of actors of the civic space, including NGOs, civil society and religious alliances and other non-state actors are also of paramount importance to influence States as decision-makers in the position to amend biased nationality laws and discriminatory or insufficient practices relating to statelessness. By nature, independent and unbiased non-state actors may articulate constructive comments and recommendations to the extent other governments may not, due to complex power-relations and foreign policy agendas. Therefore, it is a prerequisite that the NGO space must operate in a way that its full independence, integrity and liberty are guaranteed in every democratic country.

10. 3. 1. EUROPEAN NETWORK ON STATELESSNESS

Apart from general advocacy efforts of ENS previously mentioned, the ENS has also elaborated a policy paper '*Statelessness Determination and the Protection Status of Stateless Persons*' in 2013 paving the way to the awareness-raising of European decision-makers of the need for the elaboration of statelessness determination procedures and of a protection status granted on the basis of statelessness within the domestic context. The key findings of the policy paper greatly build on the relevant UNHCR guidelines putting them into the European context. As the main association of European statelessness experts, the ENS also advises interested European states in terms of statelessness and dedicated procedures. In addition, numerous blog entries have been posted on its Statelessness Blog on developments and good practices pertaining to statelessness determination mechanisms in Europe and elsewhere whereby it provides an excellent platform for publishing prompt inputs of experts working in the field bringing about expert discussions.

10. 3. 2. INSTITUTE ON STATELESSNESS AND INCLUSION

The other main NGO working in the field of statelessness is the Institute on Statelessness and Inclusion (ISI).⁴⁵⁹ Relating to the UN Universal Periodic Review (UPR) mechanism, for instance, ISI compiles and disseminates summary documents prior to the session, reflecting on specific statelessness issues in the countries under review, respectively, and making due recommendations. Then following the UPR session, ISI offers an overview and analysis of the recommendations made during the past session to the countries under review according to the draft reports adopted by the UPR Working Group. Working synergies between ISI and UN Member States who are committed to reduce statelessness both in Europe and globally could be improved if UN Member States were offered the draft recommendations made by ISI prior to the UPR session when they generally elaborate their recommendations to the countries under UPR review.

⁴⁵⁹ See more: <http://www.institutesi.org/>. (accessed on 6 May 2016)

SUMMARIZING THE RESULTS

Collaborating with the UNHCR provides States with easy access to statelessness related expertise and best practices for States to build on already existing draft articles providing for the establishment of statelessness determination. The ENS and ISI offer further strategic partnerships when it comes to engaging with especially European States, also assisting them related to issues of nationality and statelessness, for instance, in the UPR process, while fostering key opportunities for expert engagements.

CHAPTER 11: NORMATIVE MODEL FOR AN EU DIRECTIVE RELATING TO THE PROTECTION OF STATELESS PERSONS

INTRODUCTION

Building on the key findings and results of the thesis, in this chapter I attempt to draw a normative model, reflecting on the key elements of an EU directive relating to the protection of stateless persons in Europe which shall challenge the hypotheses mentioned at the beginning of my work.

11. 1. BACKGROUND

As I set out in Chapter 3, opinions are divided when it comes to EU competence in addressing statelessness. When it comes to nationality issues the EU's mandate is often contested. Nonetheless, in light of the aforementioned provisions of the TFEU with special regard to Articles 18 and 67(2), supported by Article 21(2) of the EU Charter⁴⁶⁰ (which has the same legal effect as the founding treaties of the EU) the situation of persons without an effective nationality (both stateless persons and non-citizens) in the EU could be potentially addressed through the lenses of equality and non-discrimination.⁴⁶¹ This assumption constitutes the basis of my doctoral research aiming to address how the EU could oblige its Member States to address the rights of stateless persons, a particularly vulnerable group, through EU law, while considering a human rights-based approach.

⁴⁶⁰ Article 21 (1) of the EU Charter of Fundamental Rights which providing an extensive list of prohibited grounds, including sex, race, colour, ethnic or social origin, generic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Article 21(2) further proclaims that: „...any discrimination on ground of nationality shall be prohibited.”

⁴⁶¹ In addition, considering that all EUMS are Member States of the CoE and have signed the ECHR, the CJEU should refer to the extensive jurisprudence of the ECtHR in terms of statelessness viewing the ECHR (which provides for the right to a nationality) as a main reference point in this regard.

As I have argued earlier in this thesis, identification of potential beneficiaries of a statelessness-specific protection status through a self-standing status determination would be key to the protection of stateless persons. Therefore, a state obligation may be considered to be inherent to the international obligations implied by the 1954 Convention and the ECHR joined by a vast majority of EUMS. Therefore, I argue that in order for EUMS to comply with their international obligations in a regionally harmonized way which would be desirable, the EU should adopt an EU directive to promote the implementation of the non-discrimination provisions of the EU Charter in a way to comply with the 1954 Convention and the existing guidelines, while reflecting on the essence of the statelessness conclusions as well, calling for the equal treatment of stateless persons.

Consequently, I recommend that the EU should adopt a directive obliging EUMS to put in place (1) EU-harmonized minimum standards of treatment with regard to stateless persons respecting a set of minimum rights, (2) a status determination procedure as a result of which (3) a statelessness-specific protection status could be granted to recognized stateless persons.

This was also the subject of the proposal elaborated by the Meijers Committee back in 2014; through the *Proposal for an EU directive on the identification of statelessness and the protection of stateless persons*, the Meijers Committee calls on the EU to establish a common legal framework for the treatment of stateless persons in EUMS. The proposal argues that there should be a common interpretation of the definition of statelessness and a minimum set of standards relating to determining statelessness.⁴⁶² The Committee argues that the development of such rules would advance the protection of stateless persons and fill the present gap in EU law on the legal position of the stateless in the EU. In this proposal, the Committee recommends that *a set of minimum standards of treatment should be adopted relating to (1) a fair procedure for determining whether a person is stateless; (2) the treatment of stateless persons; and to (3) the residence of stateless persons.*⁴⁶³

This proposal formed the basis of my doctoral pondering. One year after the submission of the proposal, in December 2015 the EU Justice and Home Affairs (JHA) Council, the ministers adopted the long-awaited 'statelessness conclusions.' Having consulted the EU legislative realm potentially be used for addressing the identification and protection of stateless persons,

⁴⁶² Meijers Committee (2014): Proposal for an EU directive on the identification of statelessness and the protection of stateless persons.

⁴⁶³ Ibid.

I consider that an EU directive would be an instrumental tool as its objectives should be implemented by each and every EUMS. My doubts relating to the adoption of an EU directive lies in the fact that EUMS political will in terms of statelessness related commitment (ratification and implementation of the statelessness conventions) may be contested. The rationale of such a directive may be subject to debate which is precisely why I undertook this academic challenge within my research. In the following lines, I will therefore seek to propose a normative model for **an EU-harmonized legal framework**, consisting of EU-harmonized minimum standards of treatment, status determination procedures, as well as an EU-harmonized protection status.⁴⁶⁴

11. 2. NORMATIVE ELEMENTS OF AN EU DIRECTIVE

Based on my research, I propose the following normative elements to be considered in the elaboration of the afore-explained EU Directive:

First, the Directive **should build on the standard of treatment required by the 1954 Convention based on Articles 12-32, establishing a broad range of civil, economic, social and cultural rights for States to accord to stateless persons**, including those relating to:

- juridical status (including personal status, property rights, right of association, and access to courts);
- gainful employment (including wage-earning employment, self-employment, and access to the liberal professions);
- welfare (including housing, public education, public relief, labour legislation, and social security);
- administrative measures (including administrative assistance, freedom of movement, identity papers, travel documents, fiscal charges, transfer of assets, expulsion, and naturalization).

⁴⁶⁴ Nonetheless, Gyulai warns against the weakening of protection standards potentially entailed by such harmonisation efforts. See: Gábor Gyulai (2012): Statelessness in the EU Framework for International Protection, *European Journal of Migration and Law* 14, p. 294.

The EU-harmonized **standard of treatment of stateless persons should:**

- Be elaborated in close co-operation with the UNHCR and the European Network on Statelessness based on the guidelines, Handbook on the Protection of Stateless Persons and draft articles elaborated by the UNHCR;
- Entail the clarification of the common understanding of the definition of a stateless person according to international law (the 1954 Convention);
- Reflect on the set of minimum rights guaranteed by the 1954 Convention (mainly the right to education, employment and housing) and the 1961 Convention (in terms of facilitated naturalization and childhood statelessness) which would apply to those EUMS as well which decided not to sign the 1954 Convention, while provide for the equal treatment of stateless persons (with EU citizens, as proclaimed by the statelessness conclusions);
- Based on the 1954 Convention, the following **minimum standards of treatment** should be considered towards stateless persons:
 - Treatment which is to be afforded to stateless persons irrespective of the treatment afforded to citizens or other aliens;
 - The same treatment as nationals;
 - Treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances; and • the same treatment accorded to aliens generally

The EU-harmonized **minimum standards on statelessness determination procedure require that the dedicated procedure:**

- Be formalized in law;
- Be transparent, efficient and easily available;
- Be gender-sensitive respecting for the specific protection needs of women;
- Provide facilitated access to the procedure to both potentially affected stateless migrants and *in situ* stateless persons in Europe, irrespective of the lawfulness of their stay;
- Be elaborated in close co-operation with the UNHCR and the European Network on Statelessness based on the guidelines and Handbook on the Protection of Stateless Persons elaborated by the UNHCR, including those on issues relating to proof in

statelessness determination procedures and the good practice guide published by the European Network on Statelessness;⁴⁶⁵

- Build on the best practices and lessons learnt identified through the European Migration Network which was mandated in late 2015 to provide a platform for such exchanges and thereby address statelessness;
- Potentially affected persons should be informed about their right to initiate a status determination procedure which may result in the grant of a protection status on the basis on their statelessness, as well as about the rights and obligations inherent therein;
- Operate an efficient referral mechanism based on the close cooperation of the local, regional and central authorities and non-governmental actors involved in the identification of stateless persons who are able to refer the affected individuals to the appropriate authority;
- Be initiated via written or oral application by the affected individual, irrespective of the (il)legality of his or her stay on the territory of the given state, in a language that the applicant understands;
- Have due regard of whether the concerned individual have an effective nationality or not, allowing for the *de facto* stateless persons to be included in the status determination procedure and thus the potential grant of a protection status (until they are naturalized);
- Imply a lowered standard of proof in statelessness determination for the applicant, enabling the claimant to only substantiate the foundedness of her/his claim, in case proving the foundedness of the claim is infeasible for some reason, for instance, due to the lack or loss of identity documents;
- The competent authority should assume an active role in establishing relevant facts and provide assistance in verifying potential national ties upon request by the applicant;
- Take note of the vulnerabilities of children whereby *ex-officio* guardians are appointed to assist to cases of unaccompanied minors;
- Respect the right to appeal against rejected applications and thus a judicial review of administrative decisions should be available where the proceeding judge is entitled both to annul the administrative decision and to grant stateless status;
- Include important procedural safeguards, including:

⁴⁶⁵ UNHCR (2014): Statelessness Determination Procedures: Identifying and Protecting Stateless Persons. pp. 5-6. Available at: <http://www.refworld.org/pdfid/5412a7be4.pdf>. (accessed 6 May 2018)

- (1) refraining from removing an applicant from the territory pending the outcome of the determination process;
 - (2) access to legal counsel - where free legal assistance is available, it is to be offered to applicants without financial means;
 - (3) giving the applicant a right to an interview with a decision-making official;
 - (4) decisions that are made and communicated to the applicant within a reasonable time, in writing, with an explanation of the grounds on which the decision was made; in a language they understand (potential need for interpretation assistance), and with reasons;
 - (5) the right for the applicant to appeal a first instance rejection of an application; and
 - (6) against childhood statelessness;⁴⁶⁶
- Entail the grant of a legal/protection status to regularize the situation of the individual in the host country.

The EU-harmonized **statelessness-specific protection status** should:

- Be elaborated based on the ENS Good Practice Guide, also touching upon the protection status of stateless persons;⁴⁶⁷
- Be granted to stateless persons identified through the determination procedure;
- Be granted to recognized stateless persons who are thereby able to claim protection based on their statelessness which should be explicitly set out as a protection ground in itself;
- Regularize the individual's stay on the territory of the EUMS as a legal status;
- Serve as a temporary measure to address the protection needs of stateless persons until they can apply for naturalization;
- Entail the grant of a basic set of rights linked to the recognition, such as the right of residence, the right to work, access to health care and social assistance, the right to travel documents and access to facilitated naturalization.

⁴⁶⁶Ibid. p.6. More procedural safeguards are described in the UNHCR Handbook on Protection of Stateless Persons.

⁴⁶⁷ European Network on Statelessness (2013): ENS Good Practice Guide on Statelessness Determination and the Protection Status of Stateless Persons.

SUMMARIZING THE RESULTS

The EU potentially has the legal basis in light of the relevant provisions of the TFEU, to adopt an EU directive providing for an EU-harmonized legal framework for stateless persons living in the EU. This legal framework would entail the creation of regionally harmonized standards of treatment, status determination procedures and a statelessness-specific protection status which should be elaborated in close cooperation with the UNHCR, the ENS and the ISI based on the existing guidelines and draft articles introduced by the UNHCR. I found that this directive would be a powerful tool to address statelessness at the EU level, as it could bring about the enforceability of common standards of treatment, status determination and protection of stateless persons which would simultaneously enhance the implementation of the 1954 Convention at the EU level.

In light of the turbulent political context, now encompassing the issue of migration and asylum, the timing of the adoption of this Directive may be contested, nonetheless, the increasing efforts of mainstreaming the statelessness challenge in Europe, constituting a relatively solvable EUMS with the potential of showing off substantial results, EUMS are gradually compelled to reconsider their political will on statelessness, the question is rather when. Nonetheless, considering that statelessness as an unquestionable anomaly has been persisting on our continent, time constitutes a key dimension and thus timely solutions are needed to break the cycle of statelessness in Europe, ensuring that within a reasonable time frame, no child will be born stateless in Europe which has long been seen as the champion continent of human rights, solidarity and diversity.

CHAPTER 12: AN EXTERNAL DIMENSION: THE EU'S ADVOCACY TOOLS TO ADDRESS STATELESSNESS WITH THIRD COUNTRIES

INTRODUCTION

*This chapter attempts to address the EU's potential in pursuing statelessness related foreign policy endeavors with third countries, by reviewing the realm of the existing policy tools which may be used to integrate statelessness in the EU's external human rights agenda. This chapter therefore attempts to assess these tools and platforms, together with those under development which could potentially influence non-EU countries with a stateless population to address the anomalies of statelessness. For the purposes of this chapter, its geographic focus is the MENA region (with a special focus on Jordan and Lebanon) and Turkey, precisely because millions of Syrian refugees are hosted in these countries. The essence and key findings of this chapter were published in a working paper I wrote entitled **Rethinking the Advocacy Tools of the EU in Exporting Legal Principles to the MENAT Region to Tackle Childhood Statelessness** by the Institute on Statelessness and Inclusion in its *Statelessness Working Paper Series on 10 December (Human Rights Day) 2016*.*

12. 1. BACKGROUND

As explained in Chapter 3, the volume and depth of research papers reflecting on the EU's potential role in addressing the issue of statelessness with third countries as an agenda item of its external human rights action is rather limited, both in terms of its bilateral and multilateral engagements. There seems to be an agreement among researchers that without the establishment of consistent measures within the EU (adoption of minimum standards of treatment to protect and identify stateless persons, elaboration of national status determination procedures in EU Member States and a protection status), the EU's credibility may be contested in this regard. Thus, the EU first has to testify its full engagement in implementing the protection of stateless persons in its territory.⁴⁶⁸ This is a prerequisite for the EU to

⁴⁶⁸ See, e.g. Addressing the human rights policy impact of statelessness in the EU's external action, European Parliament, DG for External Policies, November 2014, p 22; K Swider: Protection and Identification of Stateless Persons through EU Law, Amsterdam Centre for European Law and Governance, Working Paper Series, 2014 – 05, p 21-22; European Network on Statelessness Submission to the European Commission Consultation on the future of Home Affairs policies: An open and safe Europe – what next?, 2014, p 5.; Katja Swider, Giulia Bittoni, Laura van Waas (2016): The evolving role of the European Union in addressing statelessness, in: Laura van Waas, Melanie Khenna (eds.), 2016. Solving statelessness, Wolf Legal Publishers (WLP), pp. 375-404.

establish its credibility to legitimately advance relevant standards and statelessness related legal principles through its external engagement vis-à-vis third countries with stateless populations. The arrival of stateless asylum-seekers to Europe within the recent mixed migration flows amplified the ongoing discussions on statelessness. In terms of the wider context and rationale of this chapter, the reader may wish to refer back to Chapter 4 of this work, outlining the nexus between the mass displacement of Syrian refugees and its implications on Europe with regard to gender-discriminatory nationality laws which are in place in many MENA countries.

12. 2. POLICY DEVELOPMENTS IN ADDRESSING STATELESSNESS WITH THIRD COUNTRIES

In late 2011 the *EU Global Approach on Migration and Mobility (GAMM)* was adopted providing that: „*The EU should also encourage non-EU countries to address the issue of stateless persons, who are a particularly vulnerable group, by taking measures to reduce statelessness.*” Shortly after the adoption of the GAMM, the *EU Strategic Framework and Action Plan on Human Rights and Democracy* was adopted in June 2012 which set out among its actions the development of “*a joint framework between Commission and EEAS⁴⁶⁹ for raising issues of statelessness with third countries*” by 2014.⁴⁷⁰ Subsequently, a pledge was made by the EU Delegation calling upon EUMS to accede to the statelessness conventions.⁴⁷¹

The policy framework aiming to address statelessness with third countries was not developed by the end of 2014. Then the following *EU Action Plan on Human Rights and Democracy* for 2015-2019 was adopted laying down the objective: „*Continue to address the issue of statelessness in relations with priority countries; focus efforts on preventing the emergence of stateless populations as a result of conflict, displacement and the break-up of states.*”⁴⁷² Relating to the implementation of this engagement EUMS were also mandated to address this tangible issue further to the European Commission and the EEAS. Then in late 2015, shortly after a study on the existing practices in EUMS to prevent statelessness⁴⁷³ was published by

⁴⁶⁹ European External Action Service.

⁴⁷⁰ Action 14d of the EU Action Plan on Human Rights and Democracy (2012-2015), available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf. (accessed 6 May 2018)

⁴⁷¹ The pledge made by the Delegation of the European Union at the High-level meeting on the rule of law at the national and international levels, New York, 19 September 2012.

⁴⁷² Action 24h of the EU Action Plan on Human Rights and Democracy (2015-2019), available at: https://eeas.europa.eu/human_rights/docs/eu_action_plan_on_human_rights_and_democracy_en.pdf. (accessed 6 May 2018)

⁴⁷³ Practices and Approaches in EU Member States to Prevent and End Statelessness, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU\(2015\)536476_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU(2015)536476_EN.pdf). (accessed 6 May 2018)

the European Parliament, the Council of the European Union adopted *conclusions on statelessness*⁴⁷⁴ under the aegis of the Luxembourg Presidency. In its conclusions, the Council invited the European Commission *to launch an avenue for the exchange of information and good practices on the prevention and reduction of statelessness and protection of stateless persons* within the framework of the *European Migration Network*.⁴⁷⁵ This constituted an important momentum not only in addressing statelessness at the EU level but it also provided the EU with the opportunity to engage with third countries affected by statelessness on discourses about the good practices on the prevention and reduction of statelessness (to be) identified through the European Migration Network.

12. 3. REALM OF EU EXTERNAL HUMAN RIGHTS ACTION

Despite of the significant efforts made by the EU to address statelessness, it has not yet incorporated the advocacy efforts aiming to mainstream the rights of stateless persons in its external actions in an explicit manner. I will assert that the EU has the potential and room for man oeuvre to encourage third countries to engage in joint efforts to reduce statelessness within their own territories, to adopt amendments to biased nationality laws, as well as to sign and eventually implement the statelessness conventions.⁴⁷⁶ Additionally, the implementation of UN conventions closely relating to statelessness in the MENA region, including the CRC and the CEDAW, as well as withdrawing from the reservations made to these instruments would be instrumental as well. This would imply that they guarantee the right of every child to have a nationality (Article 7 CRC) and the right of every woman to be able to pass on their nationality to their children (Article 9 CEDAW). The due implementation of the objectives of the statelessness conventions would be a next step in this endeavor.

⁴⁷⁴ Council Conclusions available at <http://www.consilium.europa.eu/en/press/press-releases/2015/12/04-council-adopts-conclusions-on-statelessness/> (accessed 6 May 2018)

⁴⁷⁵ See p. 154.

⁴⁷⁶ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.13.

When it comes to the realm of EU foreign policy, the distinguished roles of the *High Representative of the EU for Foreign Affairs and Security Policy*⁴⁷⁷ and the *EU Special Representative for Human Rights* are of great potential, respectively, as they have the mandate to represent the EU position relating to statelessness which has been expressed on more avenues. Both high-level EU officials are mandated to engage with third countries on the occasions of high-level discussions on human rights where the issue of statelessness could be channeled. They have the opportunity to conclude joint declarations with other leaders of international/regional organizations (Council of Europe, African Union, Arab League) on the occasion of human rights events and engaging with top-level officials of the concerned state actors on nationality issues.

To provide a very practical example of how high level officials representing international organizations may engage in statelessness related talks, I would like to revisit the recent efforts of the Latvian president to end the nationality problems of children of non-citizens who are not granted automatic citizenship upon birth in light of the effective nationality laws. President Vejonis has been making tremendous advocacy efforts to end the vicious circle of non-citizenship in Latvia, in close consultation with the *Council of Europe Commissioner for Human Rights* Nils Muiznieks (who is also Latvian) on how to advance his endeavor in Latvia. Although his legislative initiative (a draft law that would allow newborns of non-citizens born after 1 June, 2018 to automatically receive Latvian nationality) was rejected by the Saeima in September 2017, it still constitutes a milestone in addressing the issue of non-citizenship in the EU.

⁴⁷⁷ The High Representative of the European Union for Foreign Affairs and Security Policy Federica Mogherini has expressed the EU position relating to a number of human rights situations, for instance, human rights violations in the context of war crimes, and crimes against humanity, including genocide.

See: [https://eeas.europa.eu/headquarters/headquarters-homepage/29285/speech-federica-mogherini-preda-report-%E2%80%93-addressing-human-rights-violations-context-war-crimes_en](https://eeas.europa.eu/headquarters/headquarters-homepage/29285/speech-federica-mogherini-preda-report-%E2%80%93-addressing-human-rights-violations-context-war-crimes_en;);

https://eeas.europa.eu/delegations/kyrgyz-republic/35329/federica-mogherini-respect-human-rights-not-option-it-obligation_en. (accessed 6 May 2018)

Her predecessor, Catherine Ashton was more engaged in the fight against statelessness. For instance, she issued a statement in February 2014 on the mass deprivation of nationality of persons of Haitian descent by the Dominican Republic. She called for the “rapid implementation of necessary measures” to protect the rights of persons of Haitian descent. Ashton has also issued several statements on the situation of the Rohingya in Myanmar, in response to the violence targeting this stateless population in 2012 and 2013. See: Addressing the human rights impact of statelessness in the EU’s human rights action, p. 24.

The Council's Working Party on Human Rights (the COHOM) also has a dominant role in supporting the Council's decision-making process relating to the EU's external human rights actions.⁴⁷⁸ Within the Council, the COHOM together with the Council's working party on fundamental rights (FREMP) are the main EU bodies to establish greater policy coherence in the EU's internal and external human rights action. Hence, the COHOM would have the mandate to make recommendations on specific external statelessness related policy actions to the Council. As mentioned beforehand, the COHOM is also in charge of drafting the EU's human rights guidelines, therefore, the COHOM could potentially put forward an EU human rights guideline touching upon the treatment of stateless persons or on statelessness determination which could be used as reference tool for statelessness advocacy with third countries.⁴⁷⁹

Building on the idea of a *statelessness guideline*, as explored earlier in this work, the European Commission could initiate the adoption of a *legally binding legal instrument, potentially an EU Directive, on issues relating to statelessness, for instance, obliging all EU Member States to put in place statelessness determination procedures*.⁴⁸⁰ This endeavor could be facilitated by the European Migration Network (DG HOME) which was mandated to address statelessness by the mentioned council conclusions in late 2015. This would be an instrumental step towards the fostering of a solid basis for the EU to address the protection of stateless persons through their status determination (as a first step to their protection). The establishment of EU-harmonized dedicated procedures could lead to enhanced external statelessness related human rights actions in the future, through the exchange of good practices and lessons learnt. In addition to the Council and the European Commission, the European Parliament could also enhance such external endeavors with third countries,

⁴⁷⁸The COHOM is in charge of the identification of relevant strategic human rights priorities and coordination of Member States' position on issues of concern in multilateral human rights fora, including the UN General Assembly (UNGA) and the UN Human Rights Council (HRC)

⁴⁷⁹ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5. p.7

⁴⁸⁰See: Katalin Berényi: Statelessness and the refugee crisis in the EU, Forced Migration Review, Issue 53, Refugee Studies Center, University of Oxford, 2016, p. 69-71; Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.7-8.

through engagements with the national parliaments of countries of concern with a view to passing amendments to biased nationality laws.⁴⁸¹

Giving due regard to the related policy areas of the diplomatic service of the EU, responsible for the external relations and strategic partnerships of the EU (EEAS), also in terms of external actions in the fields of human rights and democracy, together with migration and asylum, it is apparent that both areas directly intersect with the emergence of statelessness. EEAS means are extensive, including *guidelines* (prepared by the Council advised by COHOM) and *bilateral agreements on political dialogue and cooperation*. The EU Delegations (EUDELs) representing the EU's interests around the world, as the diplomatic corps of the EU in third countries and multilateral organizations, play a vital role in coordinating the EU policy dialogue among the diplomatic missions of the EUMS at the duty stations. In possession of a due mandate from Brussels, EUDELs based in the MENA region in countries that are particularly affected by statelessness, such as in Jordan, Lebanon and Turkey could assume additional advocacy role in channeling the EU position on statelessness through various instances. Thereby, EUDEL could release joint statements briefly reflecting on statelessness concerns on the occasion of the *International Human Rights Day*⁴⁸² or on important anniversaries of the adoption of the Statelessness Conventions. Further to country-specific statelessness concerns, heads of EUDELs, together with interested heads of missions (HoMs) could meet high-ranking government officials of the receiving state potentially engaged in nationality issues, while *EUDEL Human Rights (Gender) Focal Points* may also interact for the protection of stateless persons at the local level. Encouraging these countries to sign and align themselves with the objectives of the statelessness conventions could indeed provide an incentive to prevent and reduce statelessness in the MENA region.⁴⁸³

⁴⁸¹ To mention a positive example, the European Parliament adopted relevant resolutions concerning the situation of stateless populations in the United Arab Emirates and Bahrein. See: Resolution 2012/2842(RSP): “Whereas evidence indicates that national security is the pretext for a crackdown on peaceful activism designed to stifle calls for constitutional reform and reform on human rights issues such as statelessness”. Resolution 2013/2513(RSP): “Calls on the Bahraini authorities to ensure that the 31 Bahrainis whose citizenship was withdrawn can appeal the decision before a court, as it is clear that the revocation of the nationality of political opponents by the Bahraini authorities is contrary to international law”. Addressing the human rights policy impact of statelessness in the EU's external action, DG for External Policies, 2014, p 6.

⁴⁸² 28 September, the day of the adoption of the 1954 Convention, has been under consideration to be adopted as the international day dedicated to the fight against statelessness.

⁴⁸³ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p. 8.

12. 4. BILATERAL CHANNELS OF EU EXTERNAL HUMAN RIGHTS ACTION

The EU has been addressing the protection of the rights of stateless persons by the means of non-binding, declaratory *quasi-legal* (action plans, guidelines, communications, council conclusions, regulations and statements)⁴⁸⁴ and *legal instruments* (recommendations and opinions) relating to its external engagement with non-EU countries. Nonetheless, there remains room for man oeuvre to make use of further non-binding means in terms of both quasi-legal (joint declarations, joint statements) and legal (policy recommendations) tools, as explained above. In addition to these means, the EU disposes of *policy frameworks* which could be used to mainstream the rights of stateless persons, including *bilateral political dialogues, mobility partnerships, migration dialogues, human rights dialogues, enlargement negotiations* in light of the *EU's Global Approach of Migration and Mobility*.

Mobility partnerships (MPs) are the principle framework for bilateral cooperation between the EU and non-EU partner countries. MPs are political agreements concluded between certain EUMS and third countries setting out bilateral and multilateral projects relating to mobility, migration and asylum issues. They are based on reciprocal commitments and attempt to advance a comprehensive approach to migration management with third countries, predominantly in the EU Neighborhood. In my opinion, MPs would provide an excellent platform for statelessness related talks.⁴⁸⁵ To give a regional example, following the signature of the EU-Jordan Mobility Partnership (MP) in 2014, a technical assistance project (JEMPAS) was put in place with aiming to support the implementation of the MP with a specific focus on strengthening the capacity of the government to develop and implement the national migration policy in the Hashemite Kingdom of Jordan. Thus, this project had a great potential to advise the Jordanian government to address the rights of children born in the migratory context in Jordan who are at high stake of statelessness.⁴⁸⁶

⁴⁸⁴ These instruments do not intend to have legal effects; they rather reflect on the political position of the EU regarding issues of concern.

⁴⁸⁵ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.8-9.

⁴⁸⁶ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.9.

Migration Dialogues provide further opportunities to address statelessness bilaterally with countries of concern by fostering governmental discussions on statelessness to be addressed among migration issues and therefore enhance and diversify the international migration cooperation. The *Dialogue on Mediterranean Transit-Migration* (MTM Dialogue), the *Rabat Process* and the *EUROMED Migration III* may be proved to be excellent vehicles for engaging the MENAT countries in joint efforts to reduce statelessness, considering their distinct operational framework, agenda and thematic priorities. The MTM Dialogue provides a consultative platform engaging migration officials in countries of origin, transit and destination, including Europe and the MENA countries as well. Its scope of activities has extended to several thematic areas of irregular and mixed migration, as well as migration and development. Therefore, there would be room to include a focus on the rights of stateless refugees. In addition, the Rabat Process provides a further avenue for relevant discussions for more than 60 African and European countries, including the affected MENA countries. EUROMED Migration III is a further migration dialogue aiming to foster cooperation on migration issues between the European Neighborhood Instrument (ENI) South partner countries and EUMS, and very importantly, among themselves.⁴⁸⁷

As for formalized bilateral political dialogues, the *Human Rights Dialogues* (HRD) were established by the EU, along with specific sub-committees and groups dealing with country-specific human rights issues, such as in Jordan and Lebanon. These dialogues provide an instrumental platform for the EU to reach out to third countries of concern putting the issue of statelessness on their political agenda. To give further examples, the EU has also engaged in human rights dialogues with other regional organizations, such as the *African Union*, the *UN's Economic Commission for Africa*, the *League of Arab States*, the *Organisation of the Islamic Conference* and the *Association of South East Asian Nations (ASEAN)*. The achievements of human rights dialogues are overseen by the COHOM and the related EU position is also coordinated by COHOM which further supports the distinguished role of this thematic working party in human rights related EU foreign policy making. The EU's HRDs are coordinated in compliance with the *EU Guidelines on Human Rights Dialogues with Third Countries*.⁴⁸⁸

⁴⁸⁷ Ibid.

⁴⁸⁸ EEAS, *EU Guidelines on Human Rights Dialogues with Third Countries – Update* (2009). Available from: https://eeas.europa.eu/topics/human-rights-and-democracy_en. (accessed 6 May 2018)

With regard to HRDs, the findings of the recently ended EU-funded interdisciplinary and collaborative research project named FRAME⁴⁸⁹ must be highlighted. This research project running from 2014 to 2017 was exploring ways to foster human rights in the EU's external and internal policies and ensure consistency therein. A report elaborated under the aegis of the research project uncovered the double-standard approach of the EU towards the rights of minorities both in its external and internal policies. It found that HRDs tend to mainly touch upon aspects of human rights protection where the EU generally triumphs, while human rights issues relating to social rights, the rights of migrants and asylum seekers and the rights of national and ethnic minorities are not sufficiently discussed.⁴⁹⁰ These findings offer interesting correlations with the halfhearted approach represented insofar by the EU with regard to the lack of advocacy efforts on behalf of the rights of the stateless.

A further platform potentially used for joint advocacy efforts would be the *funding mechanism of the European Neighbourhood Instrument supporting the European Neighbourhood Policy (ENP)*. It predominantly seeks to tackle areas, such as irregular migration, human smuggling and trafficking in human beings; areas of human rights violations stateless persons are particularly exposed to, as a result of their destitution, poverty, homelessness, exploitation, as well as prolonged immigration detention. Considering that one of the areas of cooperation with ENP partner countries is explicitly the approximation of legislation and the enhancement of the UN Sustainable Development Goals (whose fifth objective is to reach gender equality), reform talks about removing gender-based discrimination from nationality laws could be directly channeled into political dialogues within the framework of the ENP.

ENI funding is notably used to enhance bilateral cooperation in these areas, in the form of ENP Action Plans which provide the political framework for setting the priorities for cooperation, an agenda of political and economic reforms with short- and medium-term objectives. For example, bilateral relations with Lebanon are implemented in accordance with the EU-Lebanon Association Agreement signed in 2002 establishing *a framework for political dialogue with a view to enhancing cooperation in the economic and social fields*. Under the ENP, the EU/Lebanon Action plan proclaims that *"the implementation of the Action Plan will*

⁴⁸⁹ See more at: <http://www.fp7-frame.eu/>. (accessed 6 May 2018)

⁴⁹⁰ Balázs Majtényi, Lorensa Sosa, Alexandra Timmer (2016): Human Rights Concepts in EU Human Rights Dialogues p. 11. Available from: <http://www.fp7-frame.eu/wp-content/uploads/2016/11/Deliverable-3.5.pdf>. (accessed 6 May 2018)

significantly advance the approximation of Lebanon's legislation, norms and standards to those of the European Union." This shall also apply for the gender-discriminatory nationality law which is effect in Lebanon. Further to the biased nationality laws, the Action Plan also sets out the *aim of promoting gender equality in various fields "including review of legislation [...] on nationality"* which resonates with the subsequent point of *"the lifting of reservations to the Convention on the elimination of all forms of discrimination against women (CEDAW) to which Lebanon is a party"*.⁴⁹¹ In light of these goals, the Action Plan shall be a major tool for the EU to support the Government of Lebanon in its efforts to further the national reform agenda, as well as to address statelessness.⁴⁹² Very importantly, reflecting on the potential of similar joint efforts to amend gender-biased nationality laws in third countries, the *EU framework for "Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External relations 2016-2020"* shall be also instrumental.

As a further potential avenue for EU external action on statelessness, the *European Instrument for Democracy and Human Rights* which operates under the aegis of EuropeAid, the European Commission's DG for international cooperation and development, may also be considered. It might have the potential to support the prevalence of the basic rights of stateless persons through the EU's external human rights action through a bottom-up approach helping the civil society actors of countries of concern to attempt to induce political reform and respect of human rights.⁴⁹³ This instrument may also provide grants to finance projects to be implemented by civil society and/or international/intergovernmental organizations, including the UNHCR which has a global mandate to protect stateless persons. The role of non-state actors in inducing change in sensitive political issues is therefore crucial, especially in the field of human rights.

⁴⁹¹Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.10.

⁴⁹² Ibid.

⁴⁹³ Addressing the human rights policy impact of statelessness in the EU's external action, DG External Policies, 2014, p 31.

Additionally, with reference to the developments in terms of non-citizenship in the Baltic EUMS, brought about by their EU accession and the recent state measures addressing birth registration in countries of the Western Balkans affected by statelessness, I find that **EU enlargement negotiations** should be conducted in a way to oblige EU candidate countries to take measures to eradicate statelessness, in their endeavor to join the European Union. As I mentioned earlier, political criteria of EU accession touch upon issues relating to human rights and the protection of minorities. Thus, the EU should compel candidate countries to address the reduction of statelessness on their territory in the framework of the negotiation rounds, with special regard to the facilitation of stateless Roma's access to documentation. The progress made in this regard would be monitored by COM and reported in COM's annual *Enlargement Package* reflecting on its standing with regard to the preparedness of candidate countries to be members of the EU family.

12. 5. PROMOTION OF EQUAL NATIONALITY RIGHTS THROUGH MULTILATERAL EFFORTS

In its efforts to amplify its commitment to prevent, reduce and eradicate statelessness, the EU may pursue advocacy efforts also in the multilateral fora. At the multilateral level, there have been collaboration efforts on statelessness between the EU, the United Nations (UN), the Council of Europe (CoE), and the Organization for Security and Co-operation in Europe (OSCE). The Lisbon Treaty was vital for the EU to pursue international engagements in light of its distinct legal personality allowing it to sign international agreements, as well as to accede to international conventions and international organizations. As a result, it has joined to more than 50 UN multilateral agreements and conventions. Considering that the UN gathers not less than 193 sovereign countries around the world (of which 47 are Members of the UN Human Rights Council (HRC)),⁴⁹⁴ including all countries affected by statelessness, including those of the MENA region, consistent inter-organizational endeavors between the EU and the UN are embraced by the EU in its external human rights action.⁴⁹⁵

⁴⁹⁴ The HRC may adopt resolutions condemning states for human rights abuses, appointing Mandate Holders to monitor and report on particular situations of concern, as well as establishing commissions of inquiry and fact-finding missions to investigate country-specific human rights abuses. Through these mechanisms, the HRC seeks to put political pressure on governments to put an end to violations in their territories.

⁴⁹⁵ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.10.

The EU is an observer within the UN system; therefore, it is not entitled to vote. Yet, in light of resolution A/65/276 adopted by the UNGA in 2011, the EU was granted a wider range of participating rights in the UN system, allowing EU representatives to present (previously circulated and approved) EU positions, to make interventions, present proposals and circulate EU communications as official documents. In the HRC, the EU position is articulated either by EUDEL or an EUMS representative making their intervention on behalf of the EU. Even though both Member and observer states of the HRC can make individual and joint statements to raise a particular issue, Members of the HRC have greater room for action, considering that they have voting rights in the HRC sessions with regard to all resolutions. Consequently, EUMS who are also Members of the HRC have more influencing power to intervene and reach out to other regional groups on behalf of the EU, for instance MENA countries, before tabling resolutions in the HRC or the Third Committee of the UNGA.⁴⁹⁶

Looking at HRC resolutions, we see that there are country-specific and thematic resolutions relating to human rights, some of which touch upon nationality issues. To give an example, in June 2016, *Resolution (A/HRC/C/L.8) on human rights and arbitrary deprivation of nationality*, was adopted without a vote whereby the Council Members and co-sponsors of the resolution reaffirmed the right to a nationality as a fundamental human right and called upon states to refrain from legislation that would arbitrarily deprive persons of their nationality on certain grounds. Through the *Resolution (A/HRC/C/L.12) relating to women's equal nationality rights*, the Council urges states to refrain from enacting or maintaining discriminatory nationality legislation, to avoid statelessness and loss of nationality, preventing vulnerability to human rights violations and abuses, decreasing the risk of exploitation and abuse, and promoting gender equality in the acquisition, change, retention or conferral of nationality.⁴⁹⁷

A series of other resolutions also include language addressing the root causes of statelessness providing opportunities to further amplify these issues within the human rights fora. For example, the resolution on the Human Rights of Migrants provided for the organization of an '*enhanced interactive dialogue*' on the human rights of migrants in the context of large movements on the margins of the 34th session of the Human Rights Council with the UNHCR included among the panelists. Considering the nexus between (forced) migration and

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

statelessness, including the challenges arising from the case of stateless asylum seekers and obstacles that undocumented migrants face in accessing birth registration for their children to secure them a nationality, this dialogue is one forum in which these issues might be further explored.⁴⁹⁸

Moreover, the *Universal Periodic Review* provides further platform for advocacy engagements for the EU and EUMS within the HRC mechanism. In the framework of the UPR cycles, UN Member States are all subject to periodic human rights reviews. During these UPR sessions, State Parties and NGOs make national statements (including specific recommendations) relating to the human rights situations of the respective countries under review. This provides an opportunity to directly address states, including those with stateless populations, and urge them directly to accede to and/or implement the statelessness conventions. Given that these recommendations are subject to high-level, ministerial consultations in the countries under review, there is certainly room for channeling an EU position reflected in a joint statement on the country-specific situation or addressed by the EUMS, respectively. As an important momentum, in 2016, ‘*Statelessness and the right to a nationality*’ was also added to the *UPR-INFO* database on UPR recommendations as one of the thematic issues to search and filter all UPR recommendations.⁴⁹⁹

The next platform of multilateral engagement is provided by the dedicated *special procedures*⁵⁰⁰ instituted under the aegis of the United Nations. Special procedures constitute *mandate holders* (special rapporteurs, independent experts, commissions of independent experts, commissions of inquiry, fact-finding missions, working groups) appointed by the UN Human Rights Council in accordance with adopted human rights resolutions. Mandate holders monitor the thematic or country-specific human rights situation they were assigned to, collect information through questionnaires and country visits and report to the UN Human Rights Council and to the UN General Assembly on a regular basis. For instance, in case of a country-specific mandate holder, in case the concerned country’s government gives its consent, the mandate holder may visit the country of concern, meet with governmental and NGO stakeholders, visit places of interest, reporting on their experiences to the Human Rights Council or the General Assembly. Very importantly, Special Procedures apply to all states,

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ Special Procedures constitute Mandate Holders (Special Rapporteur, Independent Expert, Commission of Independent Experts, Working Group) appointed by the HRC in line with related resolutions.

irrespective of their UN membership or accession to UN treaties. Therefore, they may be useful means with regard to states that have not acceded to relevant UN treaties yet.⁵⁰¹ Most countries choose to accept the recommendations of the mandate holders, others not, nonetheless, governmental stakeholders of the affected countries are generally present in the plenary sessions where the recommendations are discussed.

To suggest a personal reflection related to the work of Special Procedures on statelessness, at a recent conference in November 2016 approaching to the end of her mandate, Ms. Rita Izsák-Ndiaye, Special Rapporteur on minority issues concluded that sadly the vast majority of the conclusions and recommendations made by her predecessor in 2008 remain mostly relevant today and that she regrets that she did not have the chance to sufficiently reflect on the significant nexus between statelessness and minorities.⁵⁰²

Her successor, Prof. Fernand de Varennes who recently entered into office as the new **Special Rapporteur on minority issues**, shortly after assuming his mandate in May 2018 **disseminated a Questionnaire on the issue of statelessness, its root causes and specific conditions or barriers that result in a huge proportion of the world's stateless persons belonging to minorities**⁵⁰³ among UN Member States. **State responses to the questionnaire shall constitute the basis of his thematic report on statelessness as a minority issue to be presented at the 73rd session of the UNGA along with the special rapporteur's main findings on the issue.** This shall constitute a landmark momentum in addressing statelessness at the UN level as a minority issue in itself.

⁵⁰¹ Special Procedures relating to statelessness may include the Special Rapporteurs on Discrimination against Women in Law and Practice, on Minorities, on the Right to Education, on the rights of Indigenous Peoples, as well as on the human rights of Migrants.

⁵⁰² Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p. 11.

⁵⁰³ See: http://www.ohchr.org/Documents/Issues/Minorities/SR/CallSubmissions_May2018_EN.PDF. (accessed 11 May 2018)

Similarly, *treaty bodies*⁵⁰⁴ closely monitor the implementation of 10 landmark UN Conventions, including CEDAW and CRC, through monitoring committees. Despite of the fact that both the CRC and the CEDAW have been widely ratified by MENA countries, several reservations were made in relation to the latter's provisions as explained aforehand.⁵⁰⁵ Yet, these treaty bodies (engaging all EUMS) do have considerable power to influence those UN Member States which have acceded to the treaties but failed to align themselves with them in their implementation. The committees may conduct country inquiries and adopt *General Comments* interpreting treaty provisions.

Additionally, six of the treaty bodies (CCPR, CERD, CAT, CEDAW, CRPD, CED,) may receive petitions from individuals claiming that their rights under the relevant treaty have been violated by a State party to that treaty. They may bring a communication before the relevant committee, provided that the State has recognized the competence of the committee to receive such complaints and on the condition that national remedies have been exhausted. In case the claim is considered justified, the given treaty body may initiate country inquiries if it receives reliable information including well-justified indications of serious, grave or systematic violations of the conventions in a State Party.⁵⁰⁶ To suggest a good example of how non-state actors can contribute to the work of the treaty bodies, the *CRC Toolkit*⁵⁰⁷ was elaborated by the ISI in 2016 constitutes a great example of how NGO stakeholders can engage effectively with a UN treaty body, the CRC in this case. It provides resources, information and practical advice for civil society stakeholders on how to advocate for children's right to a nationality, when engaging with the CRC framework. Through the application of the toolkit, civil society actors get the chance to make submissions, including their input relating to children's right to a nationality.

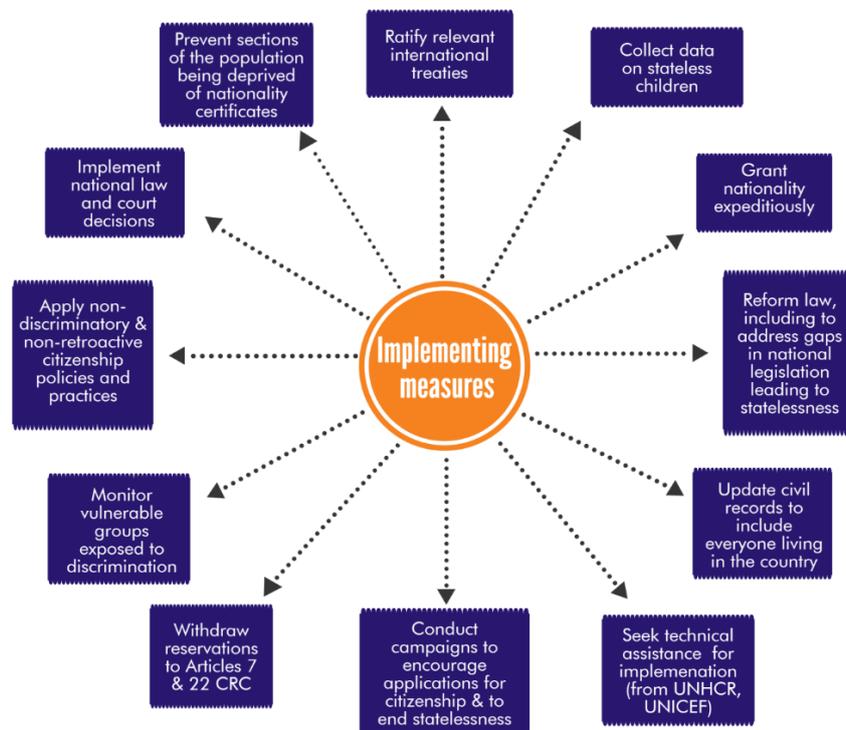
⁵⁰⁴ Treaty bodies are committees of 5 independent experts who monitor the implementation of the 10 major international human rights treaties, including the mentioned landmark Conventions CEDAW, CRC and CERD.

⁵⁰⁵ See p. 100.

⁵⁰⁶ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.12.

⁵⁰⁷ Learn more at: <https://www.statelessness.eu/blog/new-toolkit-protecting-right-every-child-nationality>. (accessed 6 May 2018)

Figure 10: Implementing measures CRC



Source: Institute on Inclusion and Nationality, 2016

Finally, the *2030 Agenda for Sustainable Development* adopted in September 2015 in the framework of the *New York Declaration* sets out 17 Sustainable Development Goals (SDGs) and 169 targets to be achieved by 2030.⁵⁰⁸ Many of them touch upon issues on discrimination, exclusion, and inequality, which closely all correlate with statelessness. *Goal 16, target 9, calls upon States to provide legal identity for all, including birth registration* which provides a powerful tool for influencing countries who present certain shortcomings in their birth registration practices, putting children at high risk of statelessness.⁵⁰⁹ Having explained the underlying context of statelessness in the MENA region, it must be recalled that statelessness is often perpetuated on a voluntary basis by the central power, applying it as a political tool to maintain the existing status quo within the respective societal order of these countries. This largely explains the lack of political will of the affected countries who are therefore counter-interested in changing the status quo. Nonetheless, to mention two positive examples from the

⁵⁰⁸ The goals are set out in paragraph 54 United Nations Resolution A/RES/70/1 of 25 September 2015.

⁵⁰⁹ Katalin Berényi (2016): *Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders*. Statelessness Working Paper Series Vol. 3 2016/5 p.12.

MENA region, Algeria and Morocco recently amended their nationality laws allowing Algerian and Moroccan women to transmit their nationality to their children born of non-Algerian and non-Moroccan fathers. These law reforms were achieved as a result of collaborative efforts of a variety of stakeholders, including women's groups and other civil society actors.⁵¹⁰ These countries display only two examples among a series of countries in the MENA region which have been considering or who are currently in the making of similar legislative reforms, making significant progress in the field of gender-discriminatory nationality laws and the resulted statelessness in the region.

SUMMARIZING THE RESULTS

As I also set out in my working paper, especially in light of its legal personality, the EU has the mandate, as well as the necessary quasi-legal and legal tools and policy frameworks to address statelessness with third (MENA) countries affected by statelessness both bilaterally (through political dialogues, mobility partnerships, migration dialogues and human rights dialogues), as well as in the multilateral fora. Making use of the extensive realm of the EU's advocacy tools, the EU could advance the existing advocacy efforts to promote some of its legal principles which may be relevant in terms of statelessness, especially gender equality which may be translated into equal nationality rights in the MENA region. In light of the explained nexus between the recent mass displacement and statelessness in Europe, I argued that it is high time for the EU to reposition its human rights agenda and address statelessness also beyond its borders. To this end, both bilateral and multilateral engagements are instrumental. I draw the conclusion that bilateral engagements must be adapted to the nature and extent of the given relations, respectively, on the basis of individual country strategies in order for the EU to make a maximum regional impact. As I concluded my working paper, *„Succeeding in this endeavor is largely dependent on the concerted willingness of stakeholders to build a strong collaboration between the EU, its Member States, other state and non-state actors of the concerned countries. Yet, its accomplishment would bring about hope to those without a Syrian nationality therefore at high risk of statelessness to be readmitted and to reintegrate into post-war Syria as citizens, ready to engage in the Syrian state-building process.“*⁵¹¹

⁵¹⁰ Preventing and Reducing Statelessness: Good Practices in Promoting and Adopting Gender Equality in Nationality Laws, UNHCR (2014).

⁵¹¹ Katalin Berényi (2016): Rethinking the Advocacy Tools of the EU in Exporting EU Legal Principles and Equal Nationality Rights to the MENAT Region to Tackle Childhood Statelessness beyond its Borders. Statelessness Working Paper Series Vol. 3 2016/5 p.13.

CONCLUSIONS AND RECOMMENDATIONS

This concluding chapter shall include my final thoughts on the research questions and main hypotheses that I attempted to challenge throughout the doctoral research process. Consequently, this final chapter includes my conclusions, scientific research findings in numerical order and my recommendations which I elaborated based on my research findings.

Statelessness is a manmade problem and it continues to prevail in Europe, including Member States of the European Union, as well as Associate Countries with an EU perspective. Statelessness constitutes a grave human rights violation in itself and as such calls for action at the EU level to trigger a positive shift to be translated into policy and legislative measures in the affected countries. The nationality rights of stateless persons living in Europe, especially *in situ* stateless persons, including non-citizens and stateless Romani people living throughout Europe, should be primarily addressed based on the rights of equality and non-discrimination enshrined by international conventions ratified by the vast majority of European countries, including Member States of the Council of Europe and the European Union, as well as Associate countries with the potential of EU accession.

This is precisely why although it remains the sovereign decision of the (Member) States who they choose to be their nationals, this sovereignty has decreased considerably in the light of the immense progress in human rights law which renders individuals subjects of international law, as beholders of rights and duties, one of which is the right to a nationality. This right was enshrined already in the Universal Declaration of Human Rights which has inspired the drafters of all other universal and regional human rights instruments, including the European Convention on Human Rights and the EU Charter of Fundamental Rights which although do not explicitly mention the right to a nationality, they both include provisions on the prohibition of non-discrimination which closely relates to not having a nationality and thus the emergence of statelessness. In order for this basic human right to be enforceable at the EU and national levels in the long haul, I argue that the identification and protection of those who do not enjoy this basic human right should be addressed by a secondary source of EU law. EUMS who are State Parties to the 1954 Convention Relating to the Status of Stateless Persons bear an international obligation to determine statelessness which is a prerequisite to implement the set of rights accorded to stateless persons which can only be accomplished if stateless persons are recognized in the first place. Considering the diverse profiles of statelessness in Europe, I find that minimum standards of treatment, identification

mechanisms, as well as a protection status should be elaborated and regionally harmonized in Europe in consultation with the UNHCR and the European Network on Statelessness.

The elaboration of such regionally harmonized minimum standards, determination procedures (SDPs) and protection status need to be subject to the adoption of a secondary source of EU law. The EU should therefore put ahead a Directive obliging EUMS to put in place strong-standing statelessness determination procedures with a view to providing comparable protection in all Member States. The rationale of the suggested directive would stem from the explored non-discrimination provisions, enshrined both in the TFEU and the EU Charter which constitute primary sources of EU law. The directive would entail the obligation for Member States to put in place statelessness determination procedures in compliance with the suggested EU-harmonized legislative framework. This framework could be elaborated in a way to reflect on the Europe-specific statelessness profiles and could be inspired by the sample draft law recommended by the UNHCR, the UN Refugee Agency which has a global mandate to protect stateless persons. The regionally harmonized minimum standards could be elaborated in light of the UNHCR's Handbook on the Protection of Stateless Persons. The regionally harmonized procedure and the minimum standards of treatment could build on the best practices illustrated in this work, as well as those which are to be identified through the European Migration Network which was mandated in late 2015 to provide a platform for such exchanges and thereby address the challenges of statelessness in the European Union.

The current level and depth of European integration therefore gives a chance to utilize the existing policy and legal frameworks related to human rights advocacy to promote the rights of stateless persons, especially the European Migration Network, as well as to rely on the extensive expertise of the European Network on Statelessness in an attempt to share best practices relating to the treatment and protection of stateless persons and inspire Member States and EU associate and partner countries to make related policy and legislative efforts.

Considering that statelessness is prevalent in many countries with an EU membership perspective, on the one hand, EU enlargement provides an excellent perspective to trigger statelessness related challenges in the candidate countries. Thereby, the EU should pursue a more ambitious foreign policy approach with these countries in the framework of the enlargement negotiations rounds which would oblige them to address the issue from an equality, non-discrimination and minority protection perspective and foster measures to counter statelessness. On the other hand, the EU should address the issue of statelessness and

of equal nationality rights with third countries as well which produce large stateless populations. This would be vital to avoid having to deal with stateless asylum seekers who face exponential vulnerabilities beyond their persecution and inability to return to their country of origin; in the lack thereof, their return and reintegration may only be conditional on the goodwill of a country of former residence.

In terms of non-citizens living in Europe, including EUMS, it has been justified in this work that non-citizenship constitutes a human rights violation by violating the right to a nationality and the right to equality and non-discrimination which are all enshrined in a series of universal and regional human rights instruments which EUMS have acceded to. Despite the extensive social rights and benefits agreed to non-citizens in Europe, in the lack of an effective nationality, I argue that their vulnerabilities greatly resemble those of stateless persons which requires the EU to address the situation of non-citizens in accordance with the aforementioned human rights violations (especially those relating to non-discrimination) and advance their rights.

Finally, the eradication of statelessness must become a key priority area of EU human rights action with a view to mitigating statelessness resulting from discriminatory state practices in third countries which produce stateless populations whose members also arrived to EU territory within the recent mixed migration flows. There is a scope for the EU to make use of the existing realm of institutional, legal and policy frameworks for concerted advocacy action to promote general principles of EU law, including gender equality and non-discrimination in order to translate them into equal nationality rights for women in the Middle East and for the Roma in countries of the Western Balkans with an EU membership perspective. The time is ripe for the EU to reconsider its political commitment and readiness to re-position its external human rights endeavors in combating urgent human rights issues with global implications, such as statelessness beyond its borders. In case of proactive and consistent inter-institutional synergies between EU actors and the political will of the Member States, the elaboration and due implementation of the envisaged framework to advocate for the rights of stateless persons with third countries shall make a tangible regional impact on the MENA countries.

To this end, it remains a prerequisite for the EU that all EUMS put appropriate nationality laws and policies in place with due regard to the rights of stateless persons that fully comply with their obligations under international law. Accordingly, the EUMS through the manifold UN Special Procedures should ultimately urge the accession of the MENA countries to the

UN statelessness conventions, the removal of gender-based discrimination in nationality laws, the adoption and implementation of safeguards against statelessness at birth, as well as should push for the withdrawal of reservations made in connection to CEDAW, especially relating to Article 9 on nationality rights. To achieve this goal, both bilateral and multilateral engagements must be ambitious. Forms and tools of engagement must comply with the nature of each concerned bilateral relation based on individual country strategies in order for the EU to have maximum regional impact and to help prevail the fundamental rights of stateless persons in the countries of concern with a view to achieving gender-equal nationality law reforms in each of the concerned twelve countries of the MENAT region, especially those hosting Syrian refugees.

Succeeding in this endeavor is largely dependent on the will and concerted efforts of stakeholders to build a strong collaboration between the EU, its Member States, other state and non-state actors, including those of the concerned countries. In the context of the deteriorating Syrian crisis, the accomplishment of equal nationality laws would bring about hope to those without an effective nationality to be readmitted and to reintegrate in post-war Syria as citizens.⁵¹² Nonetheless, these endeavors will only be credible if EU and EUMS decision-makers become more aware of the realities and underlying challenges of statelessness in Europe and reach a political agreement to genuinely address this human rights issue in the EU and in its neighborhood, putting the eradication of non-citizenship and Roma statelessness on the EU agenda.

⁵¹² Katalin Berényi, 'Rethinking the Advocacy Tools of the EU in Exporting Legal Principles to the MENAT Region to Tackle Childhood Statelessness', Statelessness Working Paper Series No. 2016/05. p.13.

NEW RESEARCH FINDINGS

In this section, I shall present my main findings touching upon the explained research questions and the challenged hypotheses, further to which I found that:

FROM AN EU LAW PERSPECTIVE

1. The EU has competence to address the vulnerable situation of stateless persons not only in the migratory but also in the non-migratory context based on Article 18 TFEU, providing that “*any discrimination on grounds of nationality shall be prohibited*” which is underpinned by Article 21(2) of the EU Charter.
2. The consistent denial of the automatic grant of nationality for members of certain minority groups (including non-citizens who used to be Soviet nationals but have long-established ties with certain EUMS and therefore cannot be expected to apply for naturalization) interferes with the objectives of Article 18 TFEU and to Article 21(2) of the EU Charter.
3. Article 18 together with Article 67(2) TFEU may serve as a potential legal basis for the adoption of an EU Directive which would oblige EUMS to put in place an EU-harmonized framework of a set of minimum standards of treatment, status determination procedure and a protection status. This would enhance the regionally harmonized implementation of the rights of stateless persons enshrined in the 1954 Convention in Europe.
4. The normative model for an EU Directive could touch upon the elements and best practices I suggested in Chapter 11. with regard to the minimum standards of treatment, the determination mechanism and the protection status and would provide for all the rights I enlisted therein.

FROM A HUMAN RIGHTS PERSPECTIVE

5. In the lack of status determination, stateless persons are greatly excluded from the formal labour market (similarly to unrecognized asylum-seekers) and tend to work under the table which makes them vulnerable to exploitation and dangerous working conditions. Female stateless persons encounter additional hardships to engage in legal and decent employment in Europe.
6. The lack of recognition due to the absence of identification mechanisms throughout Europe and the illegal stay of stateless persons may not constitute a reason to deny their unimpeded access to the labour market and therefore to enjoy their right to work enshrined in the 1954 Convention.
7. With regard to non-citizens living in Europe, including EUMS, it has been justified in this work that non-citizenship constitutes a human rights violation on two levels; first, it violates the right to a nationality, stemming from the consistent denial of the automatic grant of nationality to all non-citizens who have long-established ties with some EUMS and thus cannot be expected to apply for naturalization. Second, it violates the right to equality and non-discrimination, for instance in the labour market where they are disproportionately discriminated (that cannot occupy a series of positions in the public and private sector, their fluency in the native language is not sufficient in the job market.)
8. Considering the extensive social benefits non-citizens are entitled to in the Baltic Member States of the EU, they cannot be seen as stateless persons. Nonetheless, their everyday realities and the lack of electoral (political) rights and economic opportunities greatly resemble those of stateless persons.
9. The EU has not made full use of the human rights related UN mechanisms, including the Universal Periodic Review whereby it could encourage other Member States to make statelessness related recommendations not only to third countries but also to EU Member States affected by statelessness who refuse to accede to the UN statelessness conventions and thus encourage them to ratify and implement the UN statelessness conventions.

FROM AN EXTERNAL ACTION POINT OF VIEW

10. The EU disposes of the necessary tools, negotiating and influencing power to address statelessness in its foreign policy both at the bilateral and multilateral level, especially in the UN context and through its policy framework which is currently under development raising issues of statelessness with third countries beyond the already existing legal, quasi-legal and policy instruments.
11. Further to this potential, the EU could address the prevention and reduction of statelessness with countries with EU membership aspirations, especially the Yugoslav successor states with considerable stateless populations (countries of the Western Balkans: Serbia, Kosovo, Bosnia and Herzegovina, the former Yugoslav Republic of Montenegro, Albania) in the framework of the accession negotiation rounds touching upon state measures to comply with the political criteria of EU accession, including issues relating to human rights, as well as respect for and protection of minorities.
12. As a result of the limited economic opportunities and non-recognition, non-citizenship has been proved to be a driving force for the displacement of affected individuals, mainly to other EU Member States and to the Russian Federation.
13. Unless non-citizens are granted vital political and economic rights in the Baltic EU Member States, non-citizenship remains a potential threat to regional stability on a larger scale.

RECOMMENDATIONS

In this section, I seek to recommend actions based on my main findings explained above.

1. The CJEU should apply Article 18 in cases involving third-country nationals and stateless persons and human rights lawyers should also make use of this provision in their advocacy efforts for the protection of the rights of stateless person;
2. EUMS governments should be increasingly encouraged to accede to the UN statelessness conventions on every possible avenues, including the Universal Periodic Review process;
3. The EU should apply an enhanced rights based approach with a view to promoting the fundamental rights and protection of stateless persons;

4. The EU should adopt a directive providing for an EU harmonized legal framework for stateless persons, foreseeing a set of minimum standards for the treatment of stateless persons, EU-harmonized status determination procedures, and a distinct protection status granted on the basis of statelessness (established through the procedure) with a view to providing comparable protection throughout the European Union;
5. The human rights of stateless persons, non-citizens and persons of unidentified nationality could be advanced through the non-discrimination rights protected under the TFEU, underpinned by the EU Charter;
6. Stateless persons should be provided with unimpeded access to the labour market in the EU which would greatly enhance their social inclusion in the host country, as well as their chances of self-reliance in the long haul;
7. Appropriate needs-based, individualized support services, mentoring and group sessions should be put in place seeking to promote the integration of stateless women into the labour market and to enhance their social inclusion in the host country;
8. Stateless persons' unimpeded and automatic access to the job market should be guaranteed without having to obtain a residence permit and irrespectively of their formal recognition (as stateless persons) due to the absence and shortcomings of statelessness determination mechanisms in Europe;
9. The EU should re-position its external human rights action agenda in a way to include the fight against statelessness in bilateral and multilateral dialogues with third countries which have the potential to perpetuate statelessness in their territory;
10. To this end, the long overdue policy framework⁵¹³ to raise issues of statelessness with third countries should be eventually put into place;
11. The EU must address the prevention and reduction of statelessness with candidate countries, especially countries of the Western Balkans with considerable stateless populations in the framework of the accession negotiation rounds. In the enlargement negotiations, the EU should encourage the respective governments of the affected candidate countries to take concrete measures to facilitate the access to civil registration procedures which are often out of reach for Roma families who are disproportionately affected by the lack of documentations and are therefore at heightened risk of statelessness in these countries.

⁵¹³ This policy framework was supposed to be elaborate by 2014.

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STATELESSNESS RELATED INTERNATIONAL EVENTS I ATTENDED AND ENGAGED IN:

- *2 days Expert Workshop on the best practises to promote women's equal nationality rights in law and in practice*, May 2017, Geneva;
- *Excluded: stateless minorities in times of crisis*, Side event of the 9th session of the Forum on Minority issues, November 2016, Geneva;
- *International Conference commemorating the 60th anniversary of the 1954 Statelessness Convention*, organized by Corvinus University of Budapest and the UNHCR, June 2015, Budapest.

ANNEX

GLOSSARY

Term

Definition

acquisition of citizenship

Any mode of becoming a national, i.e. by birth or at any time after birth, automatic or non-automatic, based on attribution, declaration, option or application.

Source: EUDO Online Glossary on Citizenship and Nationality

asylum seeker

In the EU context, a person who has made an application for protection under the Geneva Convention in respect of which a final decision has not yet been taken.⁵¹⁴

Source: Derived by EMN from Art. 2(c) of Council Directive 2003/9/EC (Asylum Procedures Directive)

birth registration

A means of providing an official record of the existence of a person and the recognition of that individual as a person before the law. The act of birth registration or civil documentation is what will, in reality, make people legally visible.

Source: Resolution (A/HRC/28/L.23) on Birth registration and the right of everyone to recognition everywhere as a person before the law.

child

Every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Source: Article 1 of the Convention on the Rights of the Child

citizenship

The particular legal bond between an individual and their State, acquired by birth or naturalisation, whether by declaration, choice, marriage or other means according to national legislation. Attachment to a nation entitles one to enjoy human rights at a more tangible, effective and

⁵¹⁴ In most Member States this term is understood as a synonym to applicant for international protection following the adoption of Directive 2011/95/EU (Recast Qualification Directive) and Directive 2013/32/EC (Recast Asylum Procedures Directive).

immediate level than international human rights mechanisms provide.⁵¹⁵

Source: Art. 2(d) of Regulation (EC) No 862/2007 (Migration Statistics Regulation)

country of birth

The country of residence (in its current borders, if the information is available) of the mother at the time of the birth or, in default, the country (in its current borders, if the information is available) in which the birth took place.

Source: Art.2 (e) of Regulation (EC) No 862/2007 (Migration Statistics Regulation)

country of nationality

The country (or countries) of which a person holds citizenship⁵¹⁶.

Source: Developed by EMN (Asylum and Migration, Glossary 3.0)

country of origin

The country of nationality or, for stateless persons, of former habitual residence.

Source: Art. 2(n) of Directive 2011/95/EU (Recast Qualification Directive)

de facto statelessness

De facto statelessness is not explicitly defined in international law. Generally, *de facto* statelessness applies to persons who reside outside of the State of their nationality and therefore lack that State's diplomatic and consular protection and assistance⁵¹⁷. In other words, a *de facto stateless person* is someone "unable to demonstrate that he/she is *de iure* stateless, yet he/she has no effective nationality and does not enjoy national protection."⁵¹⁸

Source: UNHCR

effective nationality

The benefits of a nationality may be enjoyed by the individual demonstrating a genuine and effective link with the country, both within their country of nationality and outside it.

Source: UNHCR

⁵¹⁵ In the domestic legal context the use of the term 'citizenship' is preferred, while in the context of international law, the term 'nationality' must be applied.

⁵¹⁶ 1. A person may have a different country of nationality from their country of origin and /or country of birth owing, for example, to the acquisition of citizenship in a country different from their country of birth.

⁵¹⁷ Hugh Massey: *UNHCR and De Facto Statelessness*, Legal and Protection Policy Research Series 01/2010.

⁵¹⁸ UN High Commissioner for Refugees, *Nationality and Statelessness*. A Handbook for Parliamentarians, 20 October 2005, p. 11.

equality and non-discrimination *Article 19* of TFEU (ex Article 13 TEC) confers power to legislate to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In addition, *Article 21(1)* of the Charter for Fundamental Rights prohibits ‘*any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation*’. In addition, *Article 21(2)* prohibits any discrimination on grounds of nationality.⁵¹⁹

Source: TFEU, EU Charter for Fundamental Rights

EU citizen Any person having the nationality of an EU Member State. **Synonym: Union citizen**

Source: Art. 20 (1) of TFEU

European Migration Network A body established by Council Decision 2008/381/EC that serves to meet the information needs of Union institutions and of Member States’ authorities and institutions, by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policy-making in the European Union in these areas. It also serves to provide the general public with information on these subjects. The EMN has been designated by the European Council Conclusions on Statelessness of 3 and 4 December 2015 as the platform for the exchange of information on statelessness among EU Member States.

Source: Art. 1 of Council Decision 2008/381/EC (European Migration Network Decision), European Council Conclusions on Statelessness of 3 and 4 December 2015

European Network on Statelessness The European Network on Statelessness (ENS) is a network of non-governmental organisations, academic initiatives, and individual experts committed to address statelessness in Europe, established in 2012. The ENS

⁵¹⁹ However, the EU does not forbid racial and ethnic discrimination concerning immigration and nationality laws. Furthermore, equality law does allow for states to make certain legitimate distinctions between nationals and non-nationals in strictly defined exceptions. This is particularly so in the context of immigration.

pursuits its advocacy work through conducting and supporting legal and policy development, awareness-raising and capacity building activities in the field of statelessness. *Source: ENS*

gender mainstreaming

The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally.

Source: ECOSOC

internally displaced persons (IDPs) Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.

Source: UNHCR Guiding Principles on Internal Displacement

***in-situ* stateless**

Persons without an effective nationality living in their "own country"⁵²⁰ in a non-migratory context.

Source: UNHCR Statelessness Guidelines 2, Paras 6-7

Institute on Statelessness and Inclusion The Institute on Statelessness and Inclusion (ISI) is an independent non-profit organization committed to promoting the human rights of stateless persons and fostering inclusion to ultimately end statelessness. It aims to share expertise with partners in civil society, academia, the UN and governments, and to serve as a catalyst for change.

Source: ISI

international protection

In the EU context, protection that encompasses refugee status and subsidiary protection status.

Source: Derived by EMN from Art. 2(a) of Directive 2011/95/EC (Recast Qualification Directive)

ius sanguinis

The determination of a person's nationality on the basis of the nationality of their parents (or one parent or one

⁵²⁰ The phrase "own country" is taken from Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) and its interpretation by the UN Human Rights Committee.

particular parent) at the time of the target person's birth and at the time of acquisition of nationality by the target person.

Source: EUDO Online Glossary on Citizenship and Nationality

ius soli

The principle that the nationality of a person is determined on the basis of their country of birth.

Source: EUDO Online Glossary on Citizenship and Nationality

legal identity

The recognition of a person's existence before the law, facilitating the realisation of specific rights and corresponding duties. This approach very much frames legal identity as a human rights issue, making a strong connection to the right of everyone to be recognised everywhere as a person before the law. Legal identity is thereby conceived as a status, the status of having legal personhood which brings with it rights and duties. *SDG target 16.9 of the UN's recent development agenda, adopted in September 2015 provides: Provide legal identity to all, including birth registration, by 2030.*

Source: United Nations

loss of citizenship

Any mode of loss of the status as citizen of a country, voluntarily or involuntarily, automatically or by an act by the public authorities.

Source: EUDO Online Glossary on Citizenship and Nationality

minority

A non-dominant group which is usually numerically less than the majority population of a State or region regarding their ethnic, religious or linguistic characteristics and who (if only implicitly) maintain solidarity with their own culture, traditions, religion or language⁵²¹.

Source: Derived by EMN from IOM Glossary on Migration

mixed migration flow

Complex migratory population movement including refugees, asylum-seekers, economic migrants and other types of migrants as opposed to migratory population movements that consist entirely of one category of migrants.

⁵²¹ There is still no universally accepted definition of minority in international law, although a variety of international documents have attempted to define the concept of a minority. See, for example, Art. 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR).

Source: IOM Glossary on Migration, 2nd ed. 2011

naturalisation

Any mode of acquisition after birth of a nationality not previously held by the target person that requires an application by this person or their legal agent as well as an act of granting nationality by a public authority.

Source: EUDO Online Glossary on Citizenship and Nationality

non-citizens

(1) A person who has not been recognised as having these effective links to the country where he or she is located. There are different groups of non-citizens, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people.

Source: OHCHR (The rights of non-citizens)

(2) Non-citizens are former Soviet citizens and their children, not citizens of any state, provided that on July 1, 1992 they were either registered as residing in the territory of Latvia, or it was their last place of registration.⁵²² **Synonym in Estonia: persons of undetermined status**

Source: Law on the Status of Those Former USSR Citizens Who Do Not Have the Citizenship of Latvia or Any Other State

non-refoulement

A core principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.⁵²³

⁵²² In the case of Latvia, non-citizens are "citizens of the former USSR (..) who reside in the Republic of Latvia as well as who are in temporary absence and their children who simultaneously comply with the following conditions: 1) on 1 July 1992 they were registered in the territory of Latvia regardless of the status of the living space indicated in the registration of residence, or up to 1 July 1992 their last registered place of residence was in the Republic of Latvia, or it has been determined by a court judgment that they have resided in the territory of Latvia for 10 consecutive years until the referred to date; 2) they are not citizens of Latvia; and 3) they are not and have not been citizens of another state." as well as "children of [the aforementioned] if both of their parents were non-citizens at the time of the birth of the children or one of the parents is a non-citizen, but the other is a stateless person or is unknown, or in accordance with mutual agreement of the parents, if one of the parents is a non-citizen, but the other – a citizen of other country." Section 1 and Section 8, Law "On the Status of those Former U.S.S.R. Citizens who do not have the Citizenship of Latvia or that of any Other State"

⁵²³ The principle of *non-refoulement* is a part of customary international law and is therefore binding on all States, whether or not they are parties to the 1951 Convention and its Protocol of 1967. This principle is particularly relevant to stateless persons in security and immigration detention. However, the problem often

Source: Art. 33 of the 1951 Refugee Convention

refugee

Any person with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion who is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.

Source: Article 1A(2) of the 1951 Convention as amended by its 1967 Protocol

In the EU context, either a third-country national who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Art. 12 (Exclusion) of Directive 2011/95/EU does not apply.

Source: Art. 2(d) of Directive 2011/95/EU (Recast Qualification Directive)

right of asylum

The right of the State in virtue of its territorial sovereignty and in exercise of its discretion, to allow a non-national to enter and reside, and to resist the exercise of jurisdiction by any State over that individual.

Source: UNHCR International Thesaurus of Refugee Terminology

right to asylum

The right of a person to seek asylum, guaranteed with due respect by the rules of the Geneva Convention of 1951 and Protocol of 1967 relating to the status of refugees and in accordance with the TFEU.

Source: Art. 18 of the European Charter of Fundamental Rights and Art. 14 of the Universal Declaration of Human Rights.

right to a nationality

Nationality is a concept of both national and international law. The international law concept of nationality is a universally accepted set of customary principles and treaty body standards (including international human rights law) which establish certain rights and obligations to both individual and state, which are attached to nationality. Under national law, individual states may

faced by stateless persons is that even though they may benefit from the principle of *non-refoulement*, the alternative they are often afforded is one which also violates their rights – continued detention.

afford greater rights to and/or different obligations upon their citizens (such as free university education, or compulsory military or civil service). In the context of statelessness, the international law standards pertaining to nationality emerge as more important and significant than national laws due to their universal acceptance and the common minimum standard they articulate.

Source: Article 15 of the Universal Declaration of Human Rights (UDHR) states that “everyone has the right to a nationality”, and that “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”⁵²⁴

secondary movement of migrants The phenomenon of migrants, including refugees and asylum seekers, who for different reasons move from the country in which they first arrived to seek protection or permanent resettlement elsewhere.⁵²⁵

Source: Derived by EMN from UNHCR Executive Committee (ExCom) Conclusion No 58 (1989)

stateless person A person who is not considered as a national by any state under the operation of its law.⁵²⁶ The lack of a legal bond with any state has also been referred to as *de iure* statelessness.

Source: Art. 1 of UN Convention relating to the Status of Stateless Persons

third-country national Any person who is not a citizen of the European Union within the meaning of Art. 20(1) of TFEU and who is not a person enjoying the European Union right to free movement, as defined in Art. 2(5) of the Schengen Borders Code.

Source: Art. 3(1) of Directive 2008/115/EC (Return Directive) and Art. 2(6) of Regulation (EC) No 562/2006 (Schengen Borders Code)

travel document A document issued by a government or international treaty organisation which is acceptable proof of identity for the purpose of entering another country⁵²⁷.

⁵²⁴ However, the body of binding international treaties which followed the UDHR do not assert the right to a nationality in the same broad and general terms. But it should be stressed that the right itself is firmly a part of the human rights corpus, as the UDHR is now widely regarded as reflecting customary international law.

⁵²⁵ This movement is without the prior consent of the national authorities, without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation.

⁵²⁶ The definition also includes a person whose nationality is not established.

⁵²⁷ Passports and visas are the most widely used forms of travel documents. Some States also accept certain identity cards or other documents, such as residence permits.

Source: Derived by EMN from IOM Glossary on Migration, 2nd ed., 2011

UNHCR

The United Nations High Commissioner for Refugees (UNHCR) was mandated to assist stateless refugees, based on the 1951 Refugee Convention. Since the Statelessness Conventions entered into force in 1954 and 1961, a great number of GA Resolutions and Conclusions adopted by the ExCom of the High Commissioner's Programme have given UNHCR a leadership role in assisting non-refugee stateless persons as a distinct population of persons of concern.⁵²⁸ Subsequently, the GA entrusted UNHCR with a global mandate to identify, prevent and reduce statelessness and protect stateless persons, specifically requesting that the Office "provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation."⁵²⁹ *Source: UNHCR*

withdrawal of nationality

Any mode of non-automatic loss of nationality based on a decision by a public authority to deprive the target person of his or her nationality.⁵³⁰

Source: EUDO Online Glossary on Citizenship and Nationality

⁵²⁸ In 1974 the UN General Assembly designated UNHCR as the organisation to which persons claiming the benefit of the 1961 Convention may apply for examination of their claims and for assistance in presenting those claims to state authorities. In the 1990s, the UN General Assembly entrusted UNHCR with a global mandate to work to prevent and reduce statelessness and to protect stateless persons. UNHCR therefore has a mandate with two distinct elements: to address situations of statelessness which occur around the world and to assist in resolving cases which may arise under the 1961 Convention.

⁵²⁹ UNHCR therefore has a mandate with two distinct elements: to address situations of statelessness which occur around the world and to assist in resolving cases which may arise under the 1961 Convention.

⁵³⁰ The simple issue of an official notice informing the target person of the fact that he or she has lost nationality *ex lege* does not count as a decision by the public authority.

LIST OF TABLES AND FIGURES

Table 1: Countries in Europe with over 10.000 stateless persons, Source: Institute on Statelessness and Inclusion 2017. Available at: <https://www.statelessness.eu/blog/latvia-condemning-older-generations-non-citizenship>. (accessed 6 May 2018)

Latvia	252.195
Russian Federation	101.813
Estonia	85.301
Ukraine	35.228
Sweden	31.062
Germany	12.569
Poland	10.852

Figure 1: Current data on the world’s displaced people, Source: UNHCR Figures at a Glance, 2017. Available from: <http://www.unhcr.org/figures-at-a-glance.html>. (accessed 6 May 2018)

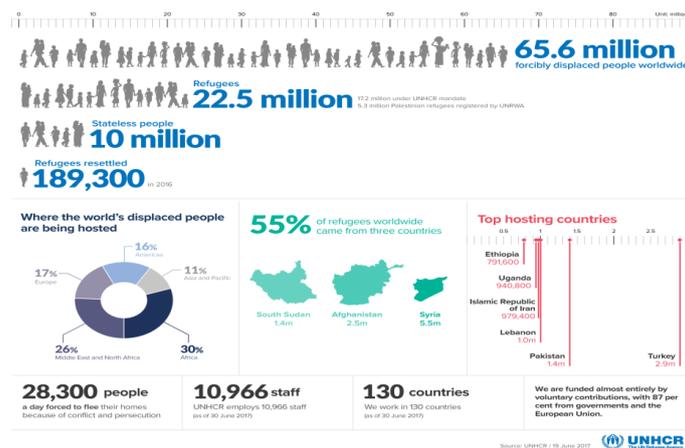


Figure 2: Asylum applications by stateless persons in EUMS (2012-2016), Source: Eurostat. Available at: <http://www.imlabs.org/statelessness-the-ignored-challenge/>. (accessed 6 May 2018)

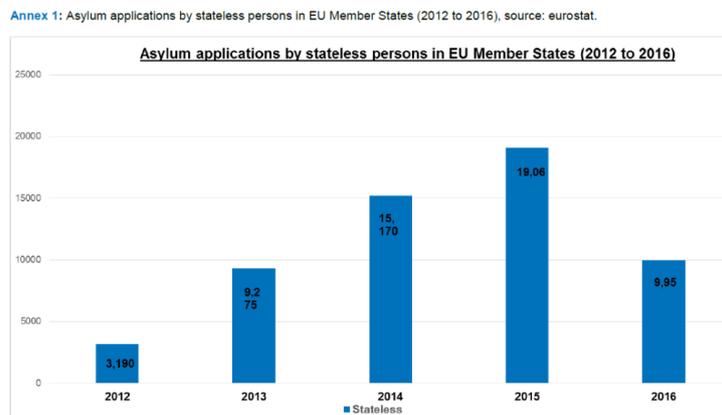
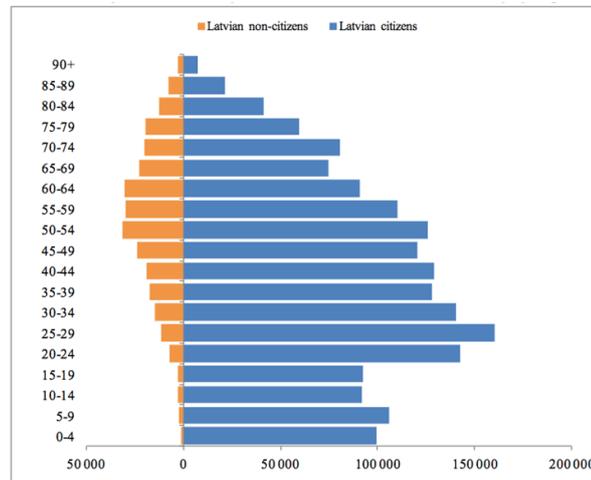
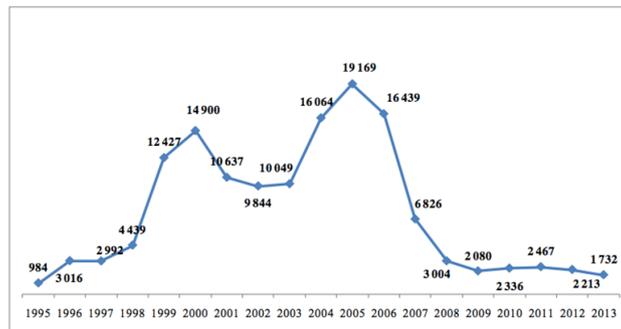


Figure 3. Latvian citizens and non-citizens in 2014, Source: Office of Citizenship and Migration Affairs / ENS Available at: <https://www.statelessness.eu/blog/latvia-condemning-older-generations-non-citizenship>. (accessed 6 May 2018)



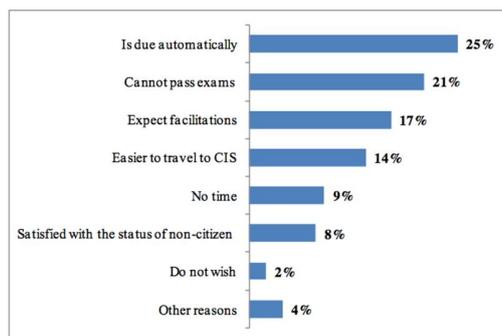
Source: statistics of Population Register collected by OCMA

Figure 4. Rates and dynamics of the naturalisation process in Latvia (1995-2013), Source: Office of Citizenship and Migration Affairs / ENS Available at: <https://www.statelessness.eu/blog/latvia-condemning-older-generations-non-citizenship>. (accessed 6 May 2018)



Source: statistics by OCMA on naturalisation

Figure 5. Reasons for not applying to obtain Latvian citizenship, 2012, Source: Office of Citizenship and Migration Affairs / ENS. Available at: <https://www.statelessness.eu/blog/latvia-condemning-older-generations-non-citizenship>. (accessed 6 May 2018)



Source: Office of Citizenship and Migration Affairs (2012) Coefficient and disturbing factors for obtaining Latvian citizenship

Figure 6: Number of persons who acquired Estonian citizenship through naturalisation 2015, Source: Official Portal of Estonia. In: Gromilova, Anna. Statelessness: challenging the 'Europeanness' in the Baltics. Revista de Stiinte Politice, no. 47, 2015, p. 268+. Academic OneFile.

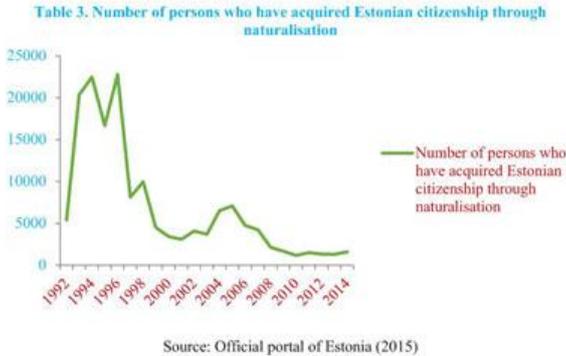


Figure 7: Countries that discriminate against mothers in their ability to pass in nationality to their children, Source: Global Campaign for Equal Nationality Rights, 2016. Available at: <https://www.theworldweekly.com/reader/view/magazine/2017-08-31/statelessness-the-worlds-hidden-catastrophe/10256>. (accessed 6 May 2018)



Figure 8: Accession to the 1954 and 1961 Conventions, Source: United Nations University 2014. Available at: <https://ourworld.unu.edu/en/what-would-it-mean-to-end-statelessness-by-2024>. (accessed 6 May 2018)

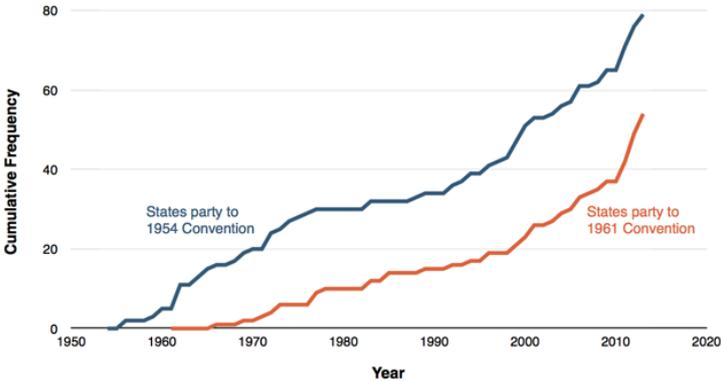
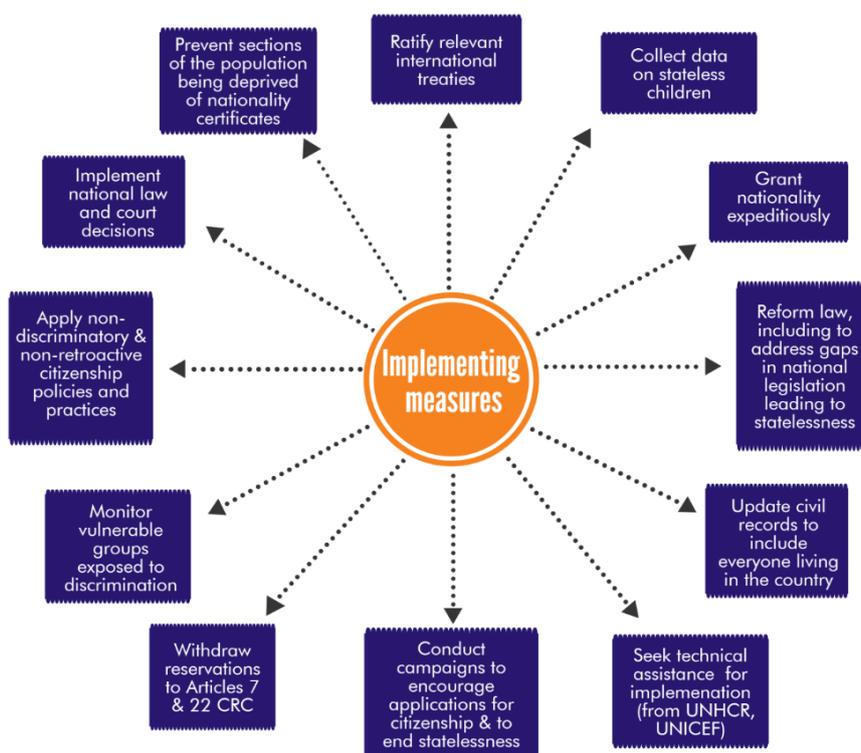


Figure 9: #Ibelong campaign, Source: UNHCR, Available at: <http://www.un.am/en/news/513>. (accessed 6 May 2018)



Figure 10: Implementing measures CRC, Source: Institute on Inclusion and Nationality, 2016. Available at: <http://www.statelessnessandhumanrights.org/crc/nationality-statelessness-under-the-crc>. (accessed 6 May 2018)



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