

**THE IMPLEMENTATION OF THE  
CONVENTION RELATING TO THE STATUS OF  
STATELESS PERSONS:  
PROCEDURES AND PRACTICE  
IN SELECTED EU STATES**

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## ABSTRACT

The treatment of non-refugee stateless persons varies greatly across the States of the European Union. Not much is known about it and it is disputed whether, and to what extent, national mechanisms are in line with the corresponding international obligations.

In light of the differences observed, this thesis argues that the recognition of stateless status and the related application of a basic set of rights, according to the *1954 Convention relating to the Status of Stateless Persons* (the ‘1954 Convention’), are more likely to occur when Member States incorporate specific laws and procedures. In particular, the protection of stateless persons is more effective when Member States rigorously address the issue of identification of statelessness by adopting exact provisions rather than simply modifying existing norms and making marginal changes to immigration laws. Although the 1954 Convention does not explicitly require that a procedure or specific means for determining statelessness be established, it sets forth standards of treatment which can only be put into practice if its beneficiaries have been recognised. Effective protection also necessitates taking measures to remove obstacles of general applicability and publicity of rights and procedures.

By analysing the treatment of claims for protection by stateless persons in ten European Union States that have ratified the 1954 Convention, this research contributes to the questions of whether detailed statelessness determination procedures are needed, what their constituent elements should be, how decision-makers apply the definition of ‘stateless person’, and what rights are attached to the grant of lawful status. It highlights shortcomings as well as good models of the national legal frameworks, and makes recommendations for further developments. Against this backdrop, it adds insights to the wider debate on how human rights treaties should be implemented by demonstrating that their formal incorporation into the national frameworks is desirable to ensure certainty and effectiveness of the law.

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This thesis was inspired by my experience as an immigration solicitor in a legal-aid firm in Oxford. Until May 2014, the United Kingdom did not have a specific framework for the protection of stateless persons. What had caught my attention was that, in most cases, stateless persons could not be protected as long as they were not identified as such. For instance, I represented a client that was born in Iran from Afghan refugees and came to Europe as a minor. Fifteen years later, he was still undocumented and, as neither the Afghan nor the Iranian embassy replied to requests of assistance, he was treated as a person with ‘unclear nationality’. The authorities removed him to Austria, the first European State that had contact with him. Previously, Austria had already rejected his asylum claim and left him undocumented. I could not prevent his removal and had no legal grounds to apply for legal status on his behalf. As with many other stateless persons, he was unable to enjoy basic rights such as having a legal residence, travelling, working in the formal economy, attending school, accessing health services, seeking redress through the courts, purchasing or owning property, voting, and enjoying the protection and security of a State. This first-hand experience with statelessness brought me to ask what is the treatment of stateless persons that claim protection in different European Union States. This has become the main research question of my Ph.D. thesis.

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## **AUTHOR'S DECLARATION**

I declare that the work in this thesis was carried out in accordance with the Regulations of the University of York. The work is original except where indicated by special reference in the text and no part of the thesis has been submitted for any other degree.

Any views expressed in the thesis are those of the author and in no way represent those of the University of York.

The thesis has not been presented to any other University for examination either in the United Kingdom or overseas.



## INTRODUCTION

Stateless persons are among the most vulnerable in the world. They are usually treated as foreigners by every State, including those in which they were born, in which they live, and into which they may be expelled. Stateless persons face extreme forms of exclusion that impact on their access to many basic rights which most of us take for granted. For instance, they may have problems having legal residence, travelling, working in the formal economy, seeking redress through the courts, purchasing or owning property, voting, and receiving the protection and security of a State. Frequently, stateless persons do not hold documents and as a consequence they remain outside the social systems of protection and are subject to increased chances of detention. From the human perspective, statelessness frequently leads to hardship and affects one's dignity and identity. Statelessness is also a concern for the States as it can affect the integration of people in society, contribute to discrimination and produce community tensions.<sup>1</sup> Furthermore, stateless persons do not fit within the conventional international legal order where nationality, constituting the common link between the individual and international law, establishes which State is responsible for protection.<sup>2</sup>

According to the UNHCR's estimates, there are at least 12 million stateless people globally.<sup>3</sup> However the real number is almost certainly higher as it is extremely difficult to collect comprehensive data. In several States, population figures are from registration systems, whereas in others they are from censuses or surveys. Some of the data from registration systems can be particularly unreliable, partially due to the lack of mechanisms in place to identify stateless persons or because the criteria used for registration do not comply with the international definition of a stateless person.<sup>4</sup>

Since the beginning of this century, statelessness has attracted more attention at the international level. The UNHCR's mandate in relation to statelessness has evolved and its work to address the problem has now clearly become part of its function.<sup>5</sup> Nevertheless, even the recent increased levels of activity and attention leave many issues concerning statelessness inadequately dealt with.

In Europe, many Member States have adopted measures to ensure that persons born either in their territory or abroad are not rendered stateless under their nationality laws.<sup>6</sup> The situation of being stateless is mostly linked to migration, and several problems persist, especially regarding

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<sup>1</sup> Caia Vlieks, 'A European Human Rights Obligation for the Statelessness Determination?' (Master Thesis, Tilburg University 2013) 1-4.

<sup>2</sup> Paul Weis, 'The United Nations Convention on the Reduction of Statelessness' (1962) 11(4) ICLQ 1073.

<sup>3</sup> UNHCR, 'Searching for Citizenship' <<http://www.unhcr.org/pages/49c3646c155.html>> accessed 7 September 2011.

<sup>4</sup> Mark Manly, 'UNHCR's Mandate and Activities' in Alice Edward and Laura van Waas, *Nationality and Statelessness under International Law* (CUP 2014) 88, 102.

<sup>5</sup> *ibid* 114.

<sup>6</sup> Carol A Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (2004) 22 *Refuge* 32, 37.

aliens without a nationality or the ability to prove one. In the last ten years there has been an increase in the efforts to resolve the problem of identification of statelessness. Nevertheless it is often argued that the developments made by EU States in adopting mechanisms for the protection of stateless persons remain a challenge<sup>7</sup> and a lower priority when compared to those concerning refugees. These developments have not been systematically addressed in the literature, nor has the issue of whether there is a need to harmonise the procedures determining statelessness. Given these problems, it is important to give closer consideration to how international law addresses statelessness and the efforts that have been undertaken to incorporate the relevant treaties into national legislations.

The most important instrument dealing with the protection of stateless persons is the *1954 Convention relating to the Status of Stateless Persons* (the '1954 Convention').<sup>8</sup> The process of identifying who meets the definition of a stateless person as defined in this treaty varies significantly from State to State. Where no laws or specific procedures exist to implement the identification of statelessness, States have addressed the issue on a case-to-case basis.<sup>9</sup> Even where specific laws or procedures have been adopted, it is questionable as to whether they have contributed to significant changes.<sup>10</sup> The debate continues on the requirements for qualification as a stateless person and the means for identification.

The absence of comprehensive information and cross-national research on the operation of the systems in place to determine stateless status and the protections given is a weakness at a time when a number of EU States are acceding and/or changing their policies regarding the 1954 Convention.<sup>11</sup> It is also problematic inasmuch as there is a serious lack of transparency of law and practice in this area in a number of States. Shedding light on the current practices and determining procedures and status for stateless persons is central to identifying 'good practice' or areas to improve within existing models. In turn, this will also be helpful to the process of integrating 'statelessness within the mainstream of the international human rights agenda.'<sup>12</sup>

This thesis is concerned with the treatment of applications for protection made by stateless persons in ten European Union States that have ratified the 1954 Convention.<sup>13</sup> These States are the United Kingdom, Germany, Italy, Spain, France, Hungary, Sweden, Greece, the Netherlands and the Czech Republic. The answer surveys a spectrum of issues related to the implementation of the

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<sup>7</sup> Gábor Gyulai, 'Remember the Forgotten, Protect the Unprotected' (2009) 31 FMR 48.

<sup>8</sup> The 1954 Convention is the main international legal instrument regulating the status of stateless persons and granting them fundamental rights and freedoms. *Convention Relating to the Status of Stateless Persons* (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (*Statelessness Convention*) (hereafter the '1954 Convention').

<sup>9</sup> Batchelor (n 6) 49-51.

<sup>10</sup> For instance, this applies to Spain, which adopted specific procedures, but between 2001 and 2008, only 26 applicants' claims for stateless status were approved. Gábor Gyulai, 'Forgotten Without Reason' (Hungarian Helsinki Committee 2007) 36; email from Immigration Officer to author (18 September 2009).

<sup>11</sup> UNHCR, 'State Action on Statelessness' <<http://www.unhcr.org/pages/4ff2bdff6.html>> accessed 29 July 2013; UNHCR 'Pledges 2011. Ministerial Intergovernmental Event on Refugees and Stateless Persons' (7-8 December 2011).

<sup>12</sup> European Network on Statelessness, 'Statelessness Determination and the Protection Status of Stateless Persons' (2013) 4.

<sup>13</sup> The research question of this thesis is further discussed in chapter 1. See ch 1, s 2.1.

1954 Convention: determination of statelessness on first instance proceedings, from basic aspects of structure and access, to matters of assessment of statelessness; right of appeal against rejected applications; status granted; grant of a basic set of rights attached to the recognition of status, including the right to travel documents and access to naturalisation. The thesis analyses the treatment of stateless persons not only in States that have adopted specific legislation to implement the 1954 Convention, but also in States that have not, uncovering relevant frameworks that are little known.

From a more general perspective, this thesis contributes to the debate on the implementation of human rights treaties. The problems addressed include the transformation of international human rights norms into national law and which domestic arrangements best give effect to them. In particular, it discusses whether the adoption of specific implementing legislation is desirable to ensure the effective implementation of human rights standards towards stateless persons. It should be noted that a significant proportion of the scholarship on human rights treaties is focused on the 'global' level (looking at the process of adoption of international treaties, international treaty bodies, international institutions). Thus it fails to explore whether and how treaties are eventually applied on the ground. This thesis tries to elucidate these issues.

The thesis is divided in two main parts. In the first part, it provides the background to the subject. It explains the research questions, the methodology used, and reviews the relevant literature, pointing out the main debates to which this work contributes (chapter 1). Then, as statelessness connotes lack of nationality, it briefly explores the meaning and substance of nationality, how a person can acquire and lose it, and the limits that States encounter in these matters under international law. It also looks at why being stateless is a matter deserving contemporary attention and the international community's response to statelessness (chapter 2). Moreover, it analyses the 1954 Convention's history, scope and content and often refer to the preparatory works to understand the meaning of its core provisions. This part uncovers gaps and imprecise or contentious norms that create ongoing issues at the implementation stage (chapter 3). In the second part, the thesis analyses the national legal frameworks and practices relevant for protecting stateless persons at the State level. It starts by evaluating the procedures for adjudication of claims of statelessness in light of basic principles of justice<sup>14</sup> and common barriers<sup>15</sup> in accessing such procedures. As there is no binding formal international guidance to ensure that statelessness determination procedures are adopted into national legislation evenly and consistently across States, this thesis highlights existing differences among the national systems. It also shows that specific statelessness determination procedures are critical to stateless people's protection (chapters 4 and 5). Then it considers how the States under review have incorporated, interpreted and applied the definition of 'stateless person'. It examines the experience of claimants for protection in the different States and finds that they are often excluded from official registration as stateless persons, especially where no specific implementing measures of the 1954 Convention exist (chapter 6). The

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<sup>14</sup> Regarding the meaning of 'basic principles of justice' see ch 4, s 2.

<sup>15</sup> The term 'barrier' is explained in chapter 1. See ch 1, s 2.4.

lack of registration becomes a critical issue as stateless persons do not become eligible to many of the rights and benefits of the 1954 Convention. It demonstrates that only a clear legal status granted to stateless persons as such can be linked to all the rights and benefits arising from the international provisions and bring them to a durable solution (chapter 7).

In the conclusion the thesis consolidates and summarises the analysis of the evidence and draws attention to the main findings in the different States, in light of theories on the incorporation of human rights treaties into the domestic legal systems as well. It focuses on the importance of statelessness determination as a precursor to access protection. It addresses some of the main challenges which States have to address in this context, and it recommends basic components that should be part of any model aiming to identify statelessness. Finally, it suggests areas of further research.

## CHAPTER 1: RESEARCH DESIGN, METHODOLOGY AND LITERATURE REVIEW

### 1. Introduction

This chapter explains the research questions and methodology used to answer them. It discusses the aim of the research and the challenges encountered. Furthermore, it provides definitions of important concepts that recur in the thesis. Additionally, it reviews the relevant literature to understand the different treatment that stateless persons receive when they claim protection. In particular, it considers the following areas of scholarship: (1) statelessness and the 1954 Convention relating to the Status of Stateless Persons (the ‘1954 Convention’), and (2) domestic implementation of human rights.

### 2. Research design and methodology

#### 2.1. Research questions and goals

The research question of this thesis compares how applications for protection made by stateless persons are treated in ten different European Union States that have ratified the 1954 Convention.

To answer, I have developed a framework that addresses five key aspects of the national systems: (1) the procedures to determine statelessness or grant of alternative forms of protection, (2) the application and interpretation of the definition of stateless person, (3) the grant of protected status, (4) the scope of the exclusion clauses (which is limited to Palestinians protected by the United Nations Relief and Works Agency for Palestine Refugees in the Near East - UNRWA), and (5) the main rights attached to the status granted, with particular focus on right to travel documents and access to facilitated naturalisation.<sup>1</sup> The choice of analysing the procedures to identify statelessness and the grant of legal status is based on the consideration that the 1954 Convention is silent on how to determine who is stateless and which status should be granted upon recognition. It is debated whether dedicated statelessness determination mechanisms and the grant of lawful status as stateless persons are indispensable in order for a State to comply with its obligations under the treaty.<sup>2</sup> As far as the question of definition is concerned, a persistent challenge remains even as to who is stateless, so I have included this in the thesis.<sup>3</sup> I have identified the other areas that are the object of this thesis as the most fundamental ones from a practical point of view, based on the preparatory works and the relevant literature.

To answer the main research question I also address the existence of barriers to accessing the procedures to obtain lawful status. Drawing from the literature on access to justice for vulnerable claimants, I consider whether the actual needs of stateless persons are taken into consideration in

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<sup>1</sup> Carol A Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (2004) 22(2) *Refugee* 31, 50.

<sup>2</sup> UNHCR ‘Expert Meeting, Statelessness Determination Procedures and the Status of Stateless Persons (“Geneva Conclusions”)’ (December 2010) para 1; UNHCR ‘Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons’ (2014) (hereafter the ‘Handbook’) paras 8-12.

<sup>3</sup> See s 3.1 of this chapter.

different States.<sup>4</sup> Accordingly I explore:

- (a) the cost, delays and complexity of the procedures,
- (b) the availability of legal advice and representation,
- (c) the availability of interpreters,
- (d) the effective opportunity to appeal,
- (e) additional problems in accessing the procedures and lack of relevant information available to stateless persons, especially for those in immigration detention.

Three important limitations of this research should be noted. First of all, I confine myself to the initial stage of the statelessness determination process. Thus, I mention the right of appeal only in as far as it relates to the initial administrative process.<sup>5</sup> Secondly, I do not provide a detailed analysis of the full range of highly specialised human rights treaties that could be applicable to stateless persons. Some stateless persons could benefit from the International Covenant on Civil and Political Rights<sup>6</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>7</sup> and the Convention on the Rights of the Child<sup>8</sup> and a number of other regional human rights instruments, such as the European Convention of Human Rights<sup>9</sup> and its related jurisprudence.<sup>10</sup> The decision

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<sup>4</sup> Mauro Cappelletti and Bryant Garth, 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27(2) BLR 189; Ellen H Greiper, 'Stateless Persons and their Lack of Access to Judicial Forums' (1985) 11 BIJL 439; Stephen H Legomsky, 'An Asylum Seeker's Bill of Rights in a Non-Utopian World' (2000) 14 GILJ 619; Ab Currie, *A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns* (Department of Justice, Canada, 2005); Roderick A Macdonald, 'Access to Justice in Canada Today: Scope, Scale, and Ambitions' in Julia Bass and others (eds), *Access to Justice for a New Century: the Way Forward* (Law Society of Upper Canada 2005); Christine Coumarelos, Zhigang Wei and Albert Z Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas, Access to Justice and Legal Needs* (Law and Justice Foundation of New South Wales 2006); Jeremy McBride, *Access to Justice for Migrants and Asylum Seekers in Europe* (Council of Europe 2009) 7; Sheona York, 'The End of Legal Aid in Immigration - A Barrier to Access to Justice for Migrants and a Decline in the Rule of Law' (2013) 27(2) JIANL 106.

<sup>5</sup> The prospect of review encourages decision-makers to be more careful when making their decisions than they otherwise would. Legomsky (n 4) 619, 640-41.

<sup>6</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>7</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>8</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (Child Convention) (CRC).

<sup>9</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (amended) [1950] ETS 5 (ECHR).

<sup>10</sup> Stateless persons can also rely on the enforcement procedures and mechanisms in place under universal and regional human rights instruments. Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2009) 406. As far as the ECHR, it should be mentioned that article 3, providing for protection against torture or degrading treatment or punishment, has already been recognised as an ultimate remedy for persons who are being removed from one country to another without any country taking measures to regularise their situation. In the case of *Harabi v. The Netherlands*, the European Commission on Human Rights determined that the repeated expulsion of an individual, whose identity could not be established, to a State where his admission is not guaranteed, breaches article 3 of the ECHR. *Harabi v. The Netherlands* (1986) 46 DR 112. In addition, article 8, which specifies that interference with family or private life must be justified on a number of grounds, is the only human rights norm, together with article 31 of the 1954 Convention, requiring that expulsion must be substantively justified (the other relevant human rights provisions are procedural). Article 8(2) states that

there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security,

not to engage with the full range of human rights treaties does not mean that they are not important.<sup>11</sup> However, they do not deal with stateless-specific concerns as the 1954 Convention does and do not provide for all the basic civil rights needed to address them.<sup>12</sup> The 1954 Convention's unique value consists in being the only treaty to formally and comprehensively address aspects of the problem of statelessness in the international legal framework.<sup>13</sup> As explained in chapter 3, besides setting forth a definition of statelessness, it establishes the international status of stateless person which attracts the application of a basic set of rights.<sup>14</sup> Additionally, it provides for specific measures, especially documentation, for stateless persons *as* stateless persons.<sup>15</sup>

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public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2009) 257.

<sup>11</sup> For instance, the ICCPR is a critical source for stateless persons as it provides for rights not mentioned in the 1954 Convention, such as the rights to life (ICCPR, art 6), and family (ICCPR art 17), freedoms of opinion and expression (ICCPR art 19) and protection from torture, inhuman or degrading treatment (ICCPR art 7) and slavery (ICCPR art 8). It also expands the right of internal freedom of movement to aliens lawfully in the State of residence by requiring treatment equal to nationals (ICCPR art 12) (the 1954 Convention requires treatment on a par with non-nationals). van Waas (n 10) 243-45.

<sup>12</sup> James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 121-22. As far as the Covenant, even if it is relevant to stateless persons, it often provides for rights on the basis of inappropriate assumptions. For example, it sets guarantees of fairness in judicial proceedings, but is silent on the right to access the legal system, thus failing to consider that aliens may not always invoke judicial remedies. *ibid* 121. See art 14 of the ICCPR and art 16 of the 1954 Convention. On this point, however, van Waas argues that the right of access to courts is 'intrinsic to the concepts of a fair hearing and equality before the courts'. van Waas (n 10) 272. Furthermore, in situations of public emergencies, governments are authorised to withdraw most of the rights provided for in the ICCPR even if this would amount to impermissible discrimination. ICCPR arts 4 and 2. The rights that cannot be withdrawn are the rights to life; freedom from torture; freedom from slavery; freedom from imprisonment for contractual breach; freedom from *ex post facto* criminal law; recognition as a person; freedom of thought, conscience, and religion. Hathaway (n 12) 121.

<sup>13</sup> Mark Manly, 'UNHCR's Mandate and Activities' in Alice Edwards and Laura van Waas, *Nationality and Statelessness under International Law* (CUP 2014) 88, 93. It should be noted that the first international attempts to regulate the issue of statelessness occurred at the end of the First World War. These resulted in the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws. Convention on Certain Questions Relating to the Conflict of Nationality Law (adopted 12 April 1930, entry into force 1 July 1937) 179 LNTS 89 (No 4137) (Hague Convention); Protocol relating to Military Obligations in Certain Cases of Double Nationality (adopted 12 April 1935, entry into force 25 May 1937) 178 LNTS 227 (No 4117); Protocol relating to a certain case of Statelessness (adopted 12 April 1930, entry into force 1 July 1937) 179 LNTS 115 (No 4138) (dealing with the nationality of a minor whose father is stateless or of unknown nationality); Special Protocol Concerning Statelessness (adopted 12 April 1930, not entered into force) C.27.M.16.1931.V. These agreements cannot be considered an adequate and complete framework to regulate issues of nationality and its absence. However, they represent a first significant step towards the recognition that the attribution of nationality is not a matter that only concerns States, but also the international community. Paolo Farci, *Apolidia* (Giuffrè 2012) 99-122.

<sup>14</sup> van Waas (n 10) 393-94.

<sup>15</sup> *ibid* 394. In addition, the value of the 1954 Convention is also apparent in the context of socioeconomic rights. The ICESCR authorises developing countries to decide the extent to which they will guarantee the economic rights of the Convention to non-nationals. ICESCR art 2(3). Moreover, it formulates socioeconomic rights in such a way to require their progressive implementation. States have therefore a wide margin of discretion in differentiating between national and non-nationals. For example, with regard to the right to work, it provides that State Parties will take appropriate steps to safeguard the right to work. ICESCR art 6. In the field of education, besides requiring equal enjoyment of free and compulsory primary education, it adds that access to secondary and higher education must be made available and accessible to all. However, poorer States may rely on the general duty of progressive implementation in the case of insufficient secondary education opportunities. ICESCR art 13. The 1954 Convention, on the other hand, does not provide for the possibility to avoid the application of socioeconomic rights because of scarce resources within the host State. Hathaway (n 12) 122-23; van Waas (n 10) 327-32. Finally, as with the ICCPR, the wording of the socioeconomic rights in the ICESCR is not specific enough to guarantee the most critical

Stateless refugees protected under the Refugee Convention<sup>16</sup> and the EU asylum *acquis*<sup>17</sup> are also outside the scope of this work as they are a distinct group of people with different protection needs and a different legal regime applicable to them.<sup>18</sup> However in this thesis I refer to the Refugee Convention for its relevance to interpreting the provisions of the 1954 Convention.<sup>19</sup>

The aim of this thesis is to contribute to the debate on the protection of stateless persons by providing a greater understanding of how the 1954 Convention is implemented in some selected European Union States and what the main barriers are when seeking protection. This thesis is helpful to identify ‘good practices’, areas to improve within existing models and key challenges in light of the applicants’ special vulnerability. It may also guide future practical developments for the protection of stateless persons. This thesis is not intended to undertake a theoretical study of the incorporation of human rights into national law. However, my investigation elucidates this problem. In particular, it addresses how the method and extent of incorporation of human rights (in this case the 1954 Convention) into the domestic legal system can eventually make a difference to people’s lives on the ground.

## ***2.2. Selection of States of the study***

The States that I choose for inclusion in the study are the United Kingdom, Germany, Italy, Spain, France, Hungary, Sweden, Greece, the Netherlands and the Czech Republic. I base my choice on some theoretical and practical considerations.

The first reason is that these are all European Union States which have reached similar standards in the development of their administrative and judicial systems. They also belong to the region of the world with the highest number of statelessness determination procedures.<sup>20</sup>

Secondly, in most of the European Union, statelessness is not a massive phenomenon, unlike in other regions of the world.<sup>21</sup>

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interests of stateless persons. For instance, its article 6 provides for State Parties to ‘recognise’ the right of everyone to social security, including social insurance. The term ‘recognise’ leaves States free to determine to what extent implement this provision. Moreover, its application to non-nationals, in particular as far as their access to a social security scheme that provides a minimum essential level of benefits, has not been clarified. *ibid* 330-31.

<sup>16</sup> A refugee is an individual outside his country of nationality or habitual residence and unable or unwilling to return there or to avail himself 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. Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention) art 1.

<sup>17</sup> In cases where the same person falls under both the Refugee Convention and the 1954 Convention, the more favourable provisions of the Refugee Convention apply. This follows from the purpose of the 1954 Convention to cover those persons that fall outside the protection of the Refugee Convention. Nehemiah Robinson, ‘Convention Relating to the Status of Stateless Persons. Its History and Interpretation. A Commentary’ (1997) World Jewish Congress 1955, Institute of Jewish Affairs, reprinted by the Division of International Protection of UNHCR, 5.

<sup>18</sup> See ch 3, s 2.

<sup>19</sup> van Waas also often refers to the Refugee Convention to interpret the 1954 Convention. van Waas (n 10).

<sup>20</sup> UNHCR, ‘States which Pledged to Establish or to Take Steps to Establish Statelessness Determination Procedures (as of 1 October 2012)’ <<http://www.unhcr.org/4ff587019.html>> accessed 29 July 2013; UNHCR, ‘Protecting People of Concern’ <<http://www.unhcr.ie/our-work-in-ireland/protecting-people-of-concern>> accessed on 10 July 2013.

<sup>21</sup> An exception is that of Latvia and Estonia, as hundreds of thousands of Russian-speakers lack a nationality, have strong ties to these countries, and they are usually considered as an *in situ* stateless



Thirdly, I select these States on the basis of having different models of incorporation of international law into the national legal systems.<sup>22</sup> Two of these States, the UK and Sweden, have adopted systems of legislative incorporation. All the others (Spain, Italy, France, Germany, Greece, the Czech Republic, the Netherlands, Hungary) have systems of automatic incorporation.

The fourth reason is that I want to analyse States that have adopted specific legislation on statelessness procedures and status (the UK, Spain, Hungary)<sup>23</sup>, those that have only a few provisions on the determination of statelessness (France, Italy)<sup>24</sup>, as well as those that have no specific legislation (Sweden, Germany, Greece, the Czech Republic, the Netherlands).<sup>25</sup> Among the latter, I include States whose systems of protection are especially little known (Sweden, Germany, Greece, the Czech Republic, the Netherlands). I exclude States that have recently pledged or announced to make imminent changes to their statelessness determination systems.<sup>26</sup> The only exception is the Netherlands, which made such an announcement in September 2014, after I had collected the data.<sup>27</sup>

Finally, I choose States geographically spread in the Continent, and include Southern and Northern European States, as well as at least one European State from the Eastern block (i.e. Hungary).

From this selection, I expect to be able to show the range of variation in the treatment of claims of protection of stateless persons and key challenges in States that are all relatively homogeneous. In addition, while focusing on ten States, I hope to address the concerns of other States that are faced with the issue of protecting stateless persons. What is found in the States under review, in arguments and in practice, may have wider resonance. Furthermore, by using these examples, I aim to provide useful insights and perspectives that may assist in the development of key minimum procedural and substantive rights for the implementation of the 1954 Convention and human rights treaties in general.

### **2.3. Research methods**

A number of scholars argue that one cannot only consider domestic legislation to determine whether States are implementing human rights norms.<sup>28</sup> They maintain that ‘the study of legal

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population. *In situ* stateless populations usually require naturalisation or recognition of a nationality as a solution. Other European Union States, such as Germany, also have stateless persons that can be considered as living in their own country, but on a small scale. Gábor Gyulai, ‘Statelessness in the EU Framework for International Protection’ (2012) 14 EJML 280.

<sup>22</sup> See s 3.2.1 in this chapter.

<sup>23</sup> Gábor Gyulai, ‘The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime’ in Alice Edwards and Laura van Waas, *Nationality and Statelessness under International Law* (CUP 2014) 120-23.

<sup>24</sup> Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (n 1); Gyulai (n 21).

<sup>25</sup> UNCHR, ‘State Action on Statelessness’ <<http://www.unhcr.org/pages/4ff2bdf6.html>> accessed 29 July 2013.

<sup>26</sup> Ireland, Austria and Belgium are among these States. UNHCR, ‘States which Pledged to Establish or to Take Steps to Establish Statelessness Determination Procedures (as of 1 October 2012)’ <<http://www.unhcr.org/4ff587019.html>> accessed 29 July 2013; UNHCR, ‘Protecting People of Concern’ <<http://www.unhcr.ie/our-work-in-ireland/protecting-people-of-concern>> accessed on 10 July 2013.

<sup>27</sup> Stans Goudsmith (Commissioner with the Netherlands Institute for Human Rights) (Presentation, The First Global Forum on Statelessness, The Hague, 15 September 2014).

<sup>28</sup> Linda Camp-Keith, ‘Human Rights Instruments’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford*

norms is most fruitful if tested against the hard facts of [...] life on the ground.<sup>29</sup> For instance, Linda Camp-Keith discusses that future studies should examine the translation of international treaties into domestic realities not only through domestic statutory changes, but also through the creation of infrastructures, training, public awareness campaigns and government support of NGOs.<sup>30</sup> She also suggests that researchers should address domestic threats and legal and institutional constraints that affect implementation.<sup>31</sup>

Against this background my thesis explores a range of implementing legal and non-legal measures, including legislative and regulatory provisions, judgments that have interpreted and clarified the treaty provisions, measures to raise awareness of treaty provisions, training of professionals.<sup>32</sup> It also takes into account barriers and challenges that affect protection and current national practices.

According to a list of standard questions that I prepared for each State, I tried to collect the data in a structured and uniform manner and compared specific issues across the different systems.<sup>33</sup> First I carried out the document analysis (legislation, judicial decisions, and doctrinal views). As a complementary source, I took into consideration the work of the UNHCR and non-governmental organisations. When gaps were left, I filled them with information obtained from national informants.<sup>34</sup> By adopting this mixed empirical-legal method to answer the research question, I acknowledge that my study is not an orthodox comparative law project.<sup>35</sup> However, I consider it the most appropriate given the limited access to the data (the literature in some States is under-developed and accessible only to local experts) and the aim to understand both problems within legal systems and best practices.<sup>36</sup>

The technique of using national informants was successfully chosen in several prior empirical studies and has a number of advantages.<sup>37</sup> It enables comparisons within a defined group

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*Handbook of Empirical Legal Research* (OUP 2010) 371; Tom Ginsburg and Gregory Shaffer, 'How Does International Law Work?' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 781; Roger Blanpain, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (11th edn, Kluwer Law International 2014) ch 1, ss 5, 8.

<sup>29</sup> Hathaway adopts the same method to study refugee law. Hathaway (n 12) xiii.

<sup>30</sup> Camp-Keith (n 28) 371.

<sup>31</sup> *ibid* 372.

<sup>32</sup> Olga Avdeyeva, 'When Do States Comply with International Treaties? Policies on Violence against Women in Post-Communist Countries' (2007) 51(4) ISQ 877; Camp-Keith (n 28) 333.

<sup>33</sup> Vernon Valentine Palmer (ed), *Mixed Jurisdictions Worldwide. The Third Legal Family* (2nd edn, CUP 2012) 17.

<sup>34</sup> Expert interviews can be done after the main data collection. Uwe Flick, *An Introduction to Qualitative Research* (4th edn, Sage 2002) 168; Robert K Yin, *Case Study Research. Design and Methods* (4th edn, Sage 2008) 98-101.

<sup>35</sup> It should be noted that it is difficult to find a widely accepted definition of qualitative research. Nevertheless there is agreement that 'it is socially concerned, examines phenomena in their social settings (if field work is being undertaken) and considers those phenomena in context.' Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 927, 929.

<sup>36</sup> *ibid* 927, 932-35, 948.

<sup>37</sup> This method has been used both in legal and social policy studies. See eg Anita Böcker and Elspeth Guild, *Implementation of the Europe Agreements in France, Germany, the Netherlands and the UK: Movement of Persons* (Platinum Publishing Limited 2002) 5; VV Palmer, 'From Lerotholi to Lando: some Examples of Comparative Law Methodology' (2005) 53 AJCL 261; Barry J Rodger, 'Art 234 and Competition Law: A Comparative Analysis' (2008) 15(2) MJECL 149. See also Tony Eardley, Jonathan Bradshaw and others,

of jurisdictions on particular questions of law as ‘each informant is an expert in the field of enquiry in their own country, easing the task of collection and validation of data, and helping with interpretation of cultural context.’<sup>38</sup> Moreover, national informants can provide fine technical detail as far as the application of rules.<sup>39</sup> Alexander Bogner and Wolfgang Menz discuss that experts have ‘technical process oriented and interpretive knowledge referring to their specific professional sphere of activity’.<sup>40</sup> Thus expert knowledge consists in systematised and accessible specialist knowledge, as well as practical knowledge.<sup>41</sup>

For my thesis, I identified the national informants through the literature, specialised networks on statelessness<sup>42</sup> and professional contacts. I ensured that all the informants are legal professionals and established experts on statelessness in their own country.<sup>43</sup>

I explained the national informants of the scope and nature of the study in advance by providing them with information in writing.<sup>44</sup> Particularly helpful in the recruiting process was stating that my research would be shared with the UNHCR and the European Network on Statelessness.

Each national informant provided material on their own country through an interview or a questionnaire<sup>45</sup>, depending on their preference, in a timeframe that started in the last two months of

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‘Social Assistance in OECD Countries: Synthesis Report’ (1996) Research Report, No 46 (University of York, Department of Social Security); Patricia Thornton and Neil Lunt, ‘Employment Policies for Disabled People in Eighteen Countries: A Review’ (SPRU 1997); Patricia Thornton, *International Research Project on Job Retention and Return to Work Strategies for Disabled Workers: Key Issues* (1998); Anne Corden, ‘Comparing Child Maintenance Systems: Conceptual and Methodological Issues’ (2001) 4(4) *IJSRM* 291; Christine Skinner and Jacqueline Davidson, ‘Recent Trends in Child Maintenance Schemes in 14 Countries’ (2009) 23(1) *IJLPF* 25.

<sup>38</sup> Corden (n 37); Alexander Bogner and Wolfgang Menz, ‘Introduction: Expert Interviews. An Introduction to a New Methodological Debate’ in Alexander Bogner, Wolfgang Menz and Beate Littig (eds), *Interviewing Experts* (Palgrave Macmillan 2009) 2.

<sup>39</sup> Corden (n 37).

<sup>40</sup> Alexander Bogner and Wolfgang Menz, ‘The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction’ in Alexander Bogner, Wolfgang Menz and Beate Littig (eds), *Interviewing Experts* (Palgrave Macmillan 2009) 54. By ‘technical knowledge’, it is meant knowledge that is more systematic and specific in its content (eg gained through educational qualifications) in contrast to everyday knowledge (eg information about operations and events governed by rules that are specific to a field, bureaucratic competences, etc). By ‘process knowledge’ it is not meant specialised knowledge in the narrow sense. It is knowledge gained through practical experience of the individual’s context of action (eg inspection of and acquisition of information about sequences of actions, interaction routines, organisational constellations, and past or current events, etc). By ‘interpretative knowledge’ it is meant knowledge that represents the individual’s subjective orientations, rules, points of view and interpretations. It demonstrates that expert knowledge is heterogeneous. *ibid* 52-53.

<sup>41</sup> *ibid* 52-54.

<sup>42</sup> Eg the European Network on Statelessness <<http://www.statelessness.eu/>> accessed 7 Oct 2014.

<sup>43</sup> Appendix 1 lists the national informants.

<sup>44</sup> The national informants were also provided with a consent form to sign.

<sup>45</sup> The main difference between an interview and a questionnaire is that in the former it is the interviewer who asks the questions and records the respondent’s answers according to an interview schedule, whereas in the second, the replies are recorded by the respondents themselves. This distinction is important for strength and weaknesses of the two methods. In the case of questionnaires, one advantage is that they save time, but one of the disadvantages is that the opportunity to clarify issues is lacking. So it is important that questions are clear as there is no one to explain their meaning, and that are developed in an interactive style. Ranjit Kumar, *Research Methodology* (2nd edn, Sage 2005) 126. As far as the advantages of interviews, they are considered more appropriate for complex situations; to collect in-depth information (it is possible to obtain more information by probing); supplementing information and explaining questions. *ibid* 131. On the other side, interviews are time-consuming; the quality of the data depends on quality of the interaction between the interviewer and the interviewee; the quality of the data depends on the quality of the interviewer (it can be

2013 and ended in September 2014. The questions included semi-structured and open-ended questions that left space for discursive responses.<sup>46</sup> When I drafted the questionnaires I tried to make them easy to read. I started with background questions, then grouped them into themes, and placed the open ended ones at the end. Furthermore, I asked the national informants to respond to two fictitious vignettes (short stories about the circumstances of stateless persons who seek stateless status). The national informants answered each vignette, suggesting how their system would deal with a stateless person that seeks protection, in the light of some variables, and what outcome they considered would be likely. 'The vignette technique presents real-life situations in meaningful social circumstances, and the respondents offer observations and interpretation from within their natural context.'<sup>47</sup> Several scholars discuss the use of vignettes in cross-national social research.<sup>48</sup> In general, this approach is recognised as giving a useful insight into the studies of issues in different States. However, one of its limitations is that 'assumptions have to be made by the informant where real determinations would involve discretionary decisions.'<sup>49</sup> Also, the vignettes include a limited number of variables, compared to complex situations in real life.<sup>50</sup>

Regarding the interviews, these did not last longer than 45 minutes and I attempted to establish guided conversations.<sup>51</sup> I asked for the national informants' permission to take written notes and I then drew up a document from each interview in which I recorded the conversation. I asked the national informants if they wished to check the interview data for approval.

Upon analysing the answers, if necessary to clarify any issue, I followed up with short focused interviews or additional written questions. When national informants found matters outside their own expertise they referred me to a colleague of their choice to provide full material. If these national experts were contacted for a very limited number of questions, the communications with them were in the form of e-mails or telephone conversations.

Overall there was good response to my study. All national informants were keen to be involved in the research and even provided me with additional material to read if available in English or other languages that I know. As the national informants and I share the same professional background, I was treated as a colleague, and on occasions we exchanged information on issues and had engaging discussions. This was important to prevent the common situation in which there is a division of roles during interviews, where the researcher consults the expert, and there was a more emphatically horizontal interaction.<sup>52</sup>

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affected by experiences, skills and commitment of the interviewer); researchers may introduce their bias in framing questions. *ibid* 132.

<sup>46</sup> Skinner and Davidson (n 37) 27.

<sup>47</sup> Corden (n 37).

<sup>48</sup> See eg Haluk Soydan, 'Using the Vignette Method in Cross-Cultural Comparisons' in Linda Hantrais and Steen Møgen (eds), *Cross-National Research Methods in the Social Sciences* (Pinter 1996) 120-28; Susan Tester, 'Comparative Approaches to Long-Term Care for Adults' in Jochen Clasen (ed), *Comparative Social Policy: Concepts, Theories And Methods* (Wiley-Blackwell 1999) 136-58.

<sup>49</sup> Anne Corden, *Making Child Maintenance Regimes Work* (Family & Parenthood: Policy & Practice 1999) 31.

<sup>50</sup> *ibid*.

<sup>51</sup> Yin (n 34) 106.

<sup>52</sup> Bogner and Menz, 'The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction' (n 40) 59. This strategy addressed one possible critique surrounding the use of

For the UK, I was able to collect most of the information from documents and the interviewee had a very limited role. Unlike the other national informants, due to his institutional role this interviewee considered me as a possible critic so some of his answers were cautious or reflected the government's position on the issues. Nevertheless the interview was helpful to gather data and establish further contacts.

The main problems with the collection of data from the national informants arose in the cases of Sweden and Germany. For Sweden, I had to integrate a large proportion of the information obtained from the key national informant with that from other national informants because his answers were so concise (in part due to English not being his first language) that they did not allowed me to fully understand how the system works in practice. Similarly for the data on Germany, the language was sometimes a problem and I had to use an interpreter that helped me to communicate with the national informants.

In general, however, I can conclude that by using national informants as sources of information and elucidation of facts, the high level of specialist interaction had a productive effect for the detailed data collection.

Once I obtained the data from the national informants, I analysed it, especially against the documentary data, and I organised it thematically. When possible, I corroborated the same data with multiple sources.<sup>53</sup>

I systematically compared the material by summarising components of national systems and problems of access and then compared them in tabular form, showing patterns and groupings among States and interactions among the barriers. I finally organised the material thematically in the text.<sup>54</sup>

During the overall data collection, I encountered the major problems in relation to systems that do not have specific statelessness determination procedures and do not recognise statelessness as a protection ground. The main research challenges that came to light concerned: (1) the low levels of general awareness or knowledge of statelessness (especially in Sweden and Greece), (2) political sensitivities surrounding some stateless populations (in particular regarding the Palestinians), (3) the absence of basic data in some States (i.e. in Greece and Sweden)<sup>55</sup>, (4) the tendency to include statelessness issues within refugee law and, in some States, the rare and episodic case-law<sup>56</sup>, (4) confidentiality issues relating to ongoing cases which constrain the publication of data, (5) a persistent challenge even on the question of definition: who is stateless? (6) as far as Germany, the wide variation on how administrations and courts deal with claims of

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experts and which points to weaknesses caused by the communication being actively guided and the interviewer occasionally intervening to lead it. Udo Kelle and Christian Erzberger, 'Integration Qualitativer und Quantitativer Methoden. Methodologische Modelle und ihre Bedeutung für die Forschungspraxis' (1999) 51 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 509; Bogner and Menz, 'The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction' (n 40) 44.

<sup>53</sup> This method is called 'data triangulation'. Yin (n 34) 116-18.

<sup>54</sup> To analyse the data, I used the classical content method. See Webley (n 35) 940-41.

<sup>55</sup> Mark Manly and Laura van Waas, 'The State of Statelessness Research. A Human Rights Imperative' (2014) 19(1-2) *TLR* 6.

<sup>56</sup> Catherine-Amélie Chassin, 'Panorama du Droit Français de l'Apatride' (2003) 19(2) *RFDA* 326.

stateless persons which required more efforts to collect the data than elsewhere. Therefore, for some States with no statelessness determination procedures I was able to obtain more comprehensive and detailed information (i.e. Germany, the Netherlands, the Czech Republic) than for others (i.e. Greece and Sweden).

#### ***2.4. Definitions of important concepts***

In this thesis the term ‘implementation’ refers to the measures that States adopt to make international treaties effective into the national legal frameworks: the passage of primary and secondary legislation, creation of specific statelessness determination procedures, the removal of obstacles that prevent access to procedures and rights, and the adoption of other policy measures, including raising awareness of statelessness, organising training sessions, securing access to legal aid.<sup>57</sup>

By ‘statelessness determination procedures’, it is meant ‘any mechanism that aims to identify whether a person has a nationality, and which this is, or is stateless’.<sup>58</sup>

The word ‘stateless person’ refers to the *de jure* definition set forth in article 1 of the 1954 Convention, which is discussed in detail in chapters 3 and 4.

By ‘legal status’ or ‘lawful status’, it is meant the lawful residence status granted to a stateless person on grounds other than statelessness, and by ‘stateless status’ the lawful residence status granted to a stateless person because found to be stateless.

By ‘barriers’, it is meant the obstacles preventing access to the procedures to determine claims for protection made by stateless persons.<sup>59</sup>

In relation to the 1954 Convention, the words ‘basic set of rights’ are used to mean the civil, social, economic, and cultural rights that are to be enjoyed by stateless persons according to the treaty.

The term ‘harmonisation’, in this thesis, means the approximation of domestic law to the standards of the 1954 Convention and the UNHCR *Handbook on the Protection of Stateless Persons*.<sup>60</sup>

The words ‘national’ or ‘citizen’ are used interchangeably, although some literature has specified that they may have a different meaning.<sup>61</sup>

The terms ‘deportation’, ‘removal’, and ‘expulsion’ have different meanings in the States under review and sometimes the literature uses them in a confusing manner, switching from one to

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<sup>57</sup> Kal Raustiala and Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’ in Walter Carlsnaes, Thomas Risse and others (eds), *Handbook of International Relations* (Sage Publications 2006) 538-58.

<sup>58</sup> Caia Vlieks, ‘Strategic Litigation: an Obligation for Statelessness Determination Under the European Convention on Human Rights?’ (2014) Discussion Paper 09/14 (European Network on Statelessness) 3.

<sup>59</sup> Cappelletti and Garth (n 4); Allan C Hutchinson, *Access to Civil Justice* (Carswell 1990); Emmanuel Breen, *Évaluer la Justice* (Presses Universitaires de France 2002); Currie (n 4); Macdonald (n 4) 510; Coumarelos, Wei and Zhou (n 4).

<sup>60</sup> UNHCR ‘Handbook on Protection of Stateless Persons’ (n 2). See ch 3, s 5.

<sup>61</sup> See ch 2, s 2.

another.<sup>62</sup> When these terms are used in the thesis, they have the same connotation as in the national legal systems. In brief, ‘deportation’ refers to two possible procedures on the basis of a deportation order to return to the State of origin. One procedure may involve voluntarily leaving the State within a time limit (i.e. in the Czech Republic,<sup>63</sup> Hungary<sup>64</sup> and Germany<sup>65</sup>). The other procedure may involve forcible return to the State of origin if the alien (1) has committed some specified crimes (i.e. in Germany,<sup>66</sup> the Czech Republic<sup>67</sup>, Hungary,<sup>68</sup> the Netherlands<sup>69</sup>, and the UK<sup>70</sup>), or (2) represents a danger to public security (in the Czech Republic<sup>71</sup>, Germany<sup>72</sup>, Hungary<sup>73</sup> and the UK<sup>74</sup>). The term ‘removal’ is used in France<sup>75</sup>, Greece<sup>76</sup>, the Netherlands<sup>77</sup>, Sweden<sup>78</sup> and the UK<sup>79</sup> and it refers to a procedure on the basis of which an order to leave the State is issued. It may concern individuals who leave voluntarily and cooperate with the authorities. It may also

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<sup>62</sup> This is a very complex area of law and I can only briefly refer to it here.

<sup>63</sup> Act No. 326/1999 on the residence of foreign nationals in the Czech Republic and amending certain laws (Foreign Nationals Act Foreign Nationals Act) (unofficial tr) s 50a.4; EC, ‘Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries’ (HOME/2010/RFX/PR/1001) (2013) 69-70.

<sup>64</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (unofficial tr, Ministry of Interior. Hungarian National Contact Point of the European Migration Network, 2012) s 65.1d.

<sup>65</sup> Language Service of the Federal Ministry of the Interior (tr), Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, last amended by Article 3 of the Act of 6 September 2013 (Federal Law Gazette I, 3556).

<sup>66</sup> *ibid*; § 3(2) Recognition of refugee status of the Asylum Procedure Act. Language Service of the Federal Ministry of the Interior (tr), Asylum Procedure Act (AsylVfG), last amended by Article 4 of the Act of 22 November 2011 (Federal Law Gazette I, p 2258).

<sup>67</sup> Bohuslav Halfar, ‘Czech Supreme Court on Deportation’ in Alexander J Bělohávek and Aděžda Rozehnalová, *Czech Yearbook of International Law - Public Policy and Ordre Public* (Juris Publishing 2012) 217-18.

<sup>68</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (unofficial tr, Ministry of Interior. Hungarian National Contact Point of the European Migration Network, 2012) s 65.1a; Act IV of 1978 on the Criminal Code (unofficial tr).

<sup>69</sup> EMN, ‘Ad-Hoc Query on Deportation (Expulsion) and Removal of Foreign National Prisoners’ (2009) 5.

<sup>70</sup> Non-EEA nationals who receive a custodial sentence of 12 months or more are deported from the UK to their country of origin. *ibid* 9.

<sup>71</sup> See Foreign Nationals Act (n 63).

<sup>72</sup> § 59.1 and 59.2 Act on the Residence, Language Service of the Federal Ministry of the Interior (tr), Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, last amended by Article 3 of the Act of 6 September 2013 (Federal Law Gazette I, 3556).

<sup>73</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) (n 67) ss 42.6d, 65.1a and c.

<sup>74</sup> EMN (n 69) 9.

<sup>75</sup> EC (n 63) 158.

<sup>76</sup> The Greek legislation distinguishes between ‘return’ and ‘removal’. The law states that “‘removal’ means the enforcement of the obligation to return, namely the physical transportation of a third country national out of the Greek territory.” Official Gazette of the Hellenic Republic, Volume A, Number 7, ‘Law No 3907. On the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC “on common standards and procedures in Member States for returning illegally staying third country nationals” and other provisions.’ (unofficial tr) (Law 3907/2011) art 18.1e. The term ‘return’ is used in the Greek legislation to mean a decision referring to aliens who must leave because they have illegal status and can opt to do so voluntarily within a time-limit. *ibid* arts 18.1c, d, and 21.

<sup>77</sup> EC (n 63) 267.

<sup>78</sup> *ibid* 330-31.

<sup>79</sup> Ss 62.2 and 62.3 of ‘Chapter 62 – Re-entry Bans’ based on paras ‘A320 and 320(7B) of the Immigration Rules which set out the general grounds on which entry clearance or leave to enter the United Kingdom is to be refused.’ UK Government, ‘Chapter 62 – Re-entry Bans’ <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270043/chapter62.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270043/chapter62.pdf)> accessed 6 January 2015.

involve people who do not cooperate and are forcibly returned (1) if their application for asylum is rejected,<sup>80</sup> and/or (2) have remained illegally in the State<sup>81</sup>, (3) they are trying to avoid removal<sup>82</sup>, (4) they pursued criminal activities,<sup>83</sup> or (5) represent a threat to public order<sup>84</sup>. Additionally, removal is used when the alien has committed some categories of crimes such as illegal stay (i.e. in Sweden<sup>85</sup>, the Netherlands<sup>86</sup>, and the UK<sup>87</sup>).

The term ‘expulsion’ refers to the return of aliens when they committed crimes punishable by imprisonment (in France<sup>88</sup>, Germany<sup>89</sup>, Greece<sup>90</sup>, Spain<sup>91</sup>, and Sweden). It is also used in Italy<sup>92</sup> and Spain<sup>93</sup> to mean a procedure on the basis of which an order to voluntarily or forcibly leave the State is issued.

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<sup>80</sup> For Sweden, see EC (n 63) 331; for Greece, see Law 3907/2011 (n 76) art 18.1e; for a general overview see EC (n 63) 360-62.

<sup>81</sup> Ministry of Security and Justice, Repatriation and Departure Service, ‘Voluntary Departure’ <[http://english.dienstterugkeerenvertrek.nl/Repatriation\\_and\\_Departure/Voluntary\\_departure/](http://english.dienstterugkeerenvertrek.nl/Repatriation_and_Departure/Voluntary_departure/)> accessed 6 January 2015; EC (n 63) 331; for the UK: over-stayers or illegal entrants with no lawful leave to remain in the UK (including failed asylum-seekers).

<sup>82</sup> France: Code de l’entrée et du séjour des étrangers et du droit d’asile abroge et remplace l’ordonnance n° 45-2659 du 2 novembre 1945 relative aux conditions d’entrée et de séjour des étrangers en France ainsi que la loi n° 52-693 du 25 juillet 1952 relative au droit d’asile (Code de l’entrée et du séjour des étrangers et du droit d’asile) art L 511-1-II-3d [Code on the entry and residence of foreigners and right of asylum abrogated and replaced by ordinance n 45-2659 of 2 November 1945 on the conditions of entry and residence of foreigners in France as well as law n 52-693 of 25 July 1952 on the right of asylum (code on the entry and residence of foreigners and right of asylum) art L 511-1-II-3d]; Sweden: (SFS 2005:716) (SFS 2009:1542) Act amending the Aliens Act (Regeringskansliet tr, official tr) ch 10, s1.

<sup>83</sup> Sweden: Act amending the Aliens Act (n 82) ch 10, s 1.

<sup>84</sup> France: Code de l’entrée et du séjour des étrangers et du droit d’asile (n 82) art 511-1-II-1; Greece: Law 3907/2011 (n 76) art 23.1.

<sup>85</sup> In Sweden, irregular stay constitutes a crime. Sweden: Act amending the Aliens Act (n 82) ch 20, s 1.

<sup>86</sup> An alien who is declared as ‘unwanted’ and remains illegally in the Netherlands, commits a crime. VreemdelingenWet 2000 (VW 2000) [Aliens Act 2000] art 67; Wetboek van Strafrecht (WvSr) [Criminal Code] art 197.

<sup>87</sup> Any person convicted of a criminal offence by UK courts and liable for either removal or deportation under the Immigration Act 1971, c 77 (as amended).

<sup>88</sup> Code de l’entrée et du séjour des étrangers et du droit d’asile (n 82) arts L 521-L 522, L 541.

<sup>89</sup> The general provisions contained in the Residence Act on expulsion apply to aliens who are held in detention. Expulsion places an obligation on the foreigner to leave the country (arts 50.1, 51.1 no 5), at the same time as constituting a prohibition to re-enter and take up residence once more (arts 11.1, 14.1, 15.1). Expulsion implies a danger to public security and order for special or general preventive reasons. § 11.1, 14.1, 15.1, 50.1, 51.1(5) Language Service of the Federal Ministry of the Interior (tr), Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, last amended by Article 3 of the Act of 6 September 2013 (Federal Law Gazette I, 3556).

<sup>90</sup> In the case of illegal entry/exit of the Greek territory, expulsion can be ordered. Law 3386/2005 (GG A 212) Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory, as amended by Laws 3448/2006 (GG A 57), 3536/2007 (GG A 42), 3613/2007 (GG A 263), 3731/2008 (GG A 263), 3772/2009 (GG A 112) and 3801/2009 (GG A 163) (unofficial tr) arts 76, 83. See also: EMN (n 63) 5.

<sup>91</sup> Ley 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (BOE-A-2000-544) (Ley 4/2000) [Law 4/2000 of 11 January on the rights and freedoms of aliens in Spain and their social integration (BOE-A-2000-544)] arts 57.7-57.8.

<sup>92</sup> DLgs 25 luglio 1998, n 286 (Testo unico sull’immigrazione) [Legislative decree 25 July 1998, n 286 – Unified text on immigration] arts 13, 15-16. Usually the expulsion order bans a person to re-enter for a period of 3 or 5 years. L’Altro Diritto – Centro di Documentazione, Università di Firenze – ‘La Disciplina delle Espulsioni nell’Ordinamento Italiano - Capitolo II’ <<http://www.altrodiritto.unifi.it/ricerche/migranti/dimauro/cap2.htm>> accessed 10 February 2015.

<sup>93</sup> Ley 4/2000 (n 91) arts 57.9, 63 bis. (2).



### 3. Literature review

#### 3.1. Studies on statelessness and the 1954 Convention

Generally, the literature shows that statelessness is an issue that States do not want to deal with and often tend to deny or ignore. Statelessness is a politically sensitive topic involving questions related to State's sovereignty. Statelessness is still considered as an anomaly at the national level<sup>94</sup>, an exception, as a principle of public international law is that everyone has a nationality.<sup>95</sup>

Between end of the 1800s and first decades of 1900s, some scholars such as Martitz, Von Bar, Zitelmann, even refused to recognise that statelessness was a legally relevant fact, as international law recognised the possibility to change nationality but not its absence.<sup>96</sup> This was in line with the classical opinion that international law only deals with States, and not with individuals. 'As the stateless does not belong to any State, he does not exist from the point of view of international law.'<sup>97</sup> Some authors of this period even blamed the stateless, considering them responsible for their own situation.<sup>98</sup>

Following the creation of the United Nations' system and the adoption of the 1954 Convention relating to the status of stateless persons, the study of statelessness evolved from that of nationality laws, to debates arguing that statelessness is a relevant fact in international law.<sup>99</sup> Paul Weis was one of the first authors to make such a claim.<sup>100</sup> In his book *Nationality and Statelessness in International Law*, Weis addresses the substance, functions and consequences of the lack of a nationality in international law.<sup>101</sup> Weis takes an innovative position in maintaining that there is an international concept of nationality independent of and superior to municipal law. This argument is based on the element of international protection that States owe to their nationals and the right of nationals to be admitted to their State.<sup>102</sup> Particularly valuable is also Weis' systematic examination of the conditions under which nationality can be withdrawn and granted within the limits of international law.<sup>103</sup> Weis concludes his analyses by pointing out that whereas in the past nationality was viewed largely as a privilege conferred by the State, it is increasingly regarded as an instrument to guarantee the rights of the individual at the national and international level. At the same time, he finds that there is no right to a nationality under international law<sup>104</sup>, and anticipates that progress in this area will be slow. Some of his final considerations concern the

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<sup>94</sup> Paolo Farci, 'Apolidia: un Fenomeno Conciliabile con le Leggi dello Stato Italiano?' (2013) 42(3) *Diritto e Pratica Tributaria* 1227, 1229.

<sup>95</sup> *ibid* 1227-28. See ch 1, ss 2-5.

<sup>96</sup> Ernst Zitelmann, *Internationales Privatrecht* (Leipzig 1897) vol 1, 176-77; Carl Ludwig von Bar, *Lehrbuch des internationalen Privat- und Strafrechts* (Enke 1892).

<sup>97</sup> Farci, 'Apolidia: un Fenomeno Conciliabile con le Leggi dello Stato Italiano?' (n 94).

<sup>98</sup> Francois Laurent, *Droit Civil international* (Bruylant-Christophe & Cie 1880) 379; Laurent *Droit International Privé* (Bruylant-Christophe & Cie 1880) vol III, 435-36; Antoine Pillet, *Traité Pratique de Droit International Privé* (Allier Pére & Fils 1923) 253; Albert Geouffre de Lapradelle et Jean-Paulin Niboyet, *Répertoire du Droit International* (Librairie du Recueil Sirey 1929) vol 3, 558-59; de Lapradelle et Niboyet, *Répertoire du Droit International* (Librairie du Recueil Sirey 1931) vol 9, 286.

<sup>99</sup> This is also the UNHCR's view. UNHCR 'Handbook' (n 2) para 122.

<sup>100</sup> Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff and Noordhoff 1979).

<sup>101</sup> See ch 2, ss 2-5.

<sup>102</sup> See ch 2, s 4.

<sup>103</sup> See ch 2, ss 5-6.

<sup>104</sup> Weis (n 100) 249-50.

Refugee Convention and the 1954 Convention without, however, thoroughly analysing them.

Laura van Waas' *Nationality Matters* further develops and updates Weis' work. Besides addressing the relevance of nationality in international law, she reviews the causes of statelessness, including 'modern' ones, such as forced migration.<sup>105</sup> She focuses on the two distinct, yet complementary, conventions specifically devoted to this issue: the 1954 Convention and the 1961 Convention on the Reduction of Statelessness. In relation to my thesis it is important that she thoroughly establishes the present relevance of the 1954 Convention in light of the recent developments of human rights law and argues that the 1954 Convention is able to evolve with time.<sup>106</sup> She contends that a new definition of statelessness and a new Convention to protect stateless persons are not necessary, but she recommends the adoption of international guidelines on the determination of statelessness to ensure individual protections.<sup>107</sup> She examines the 1954 Convention provisions in detail and distinguishes between civil and political rights on the one hand, and economic, social, and cultural rights on the other hand, with additional focus on those dealing with the specific needs of the stateless. Van Waas' book is one of the most well-documented contributions to the study of statelessness that has been recently written, providing an in depth assessment on the content of international norms governing statelessness, and I thus often refer to and discuss it in this thesis. However, one of the limitations of her work is that the presentation of norms is sometimes more descriptive than analytical. In addition, some of her comments are now outdated as there have been a number of developments both at the international and national level to identify statelessness.<sup>108</sup>

Another relevant publication is van Waas and Alice Edwards' *Nationality and Statelessness under International Law*<sup>109</sup> which updates the previously mentioned works on the relationship between the legal aspects of nationality and the phenomenon of statelessness. Several chapters of this book highlight that the major gaps in knowledge concern the understanding of national procedures for the identification of statelessness. They also address the main points of debate in this area, such as the meaning of 'stateless person'.

Indeed, the definition of 'stateless person' is one of the most discussed issues in the literature on statelessness. After the dissolution of the Soviet Union and the Republic of Yugoslavia, Carol Batchelor and other scholars began to criticise the 1954 Convention's definition of statelessness which is too narrow and limiting because it excludes those persons whose citizenship is practically useless.<sup>110</sup> For instance, David Weissbrodt and Clay Collins claim that 'the problem with the *de*

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<sup>105</sup> van Waas considers sources of statelessness that were overlooked when the 1961 Convention on the Reduction of Statelessness was adopted. On the opposite, Weis only discusses 'traditional' causes of statelessness, strictly sticking to those addressed in that Convention. See ch 2, s 6.

<sup>106</sup> See van Waas (n 10) 390-95.

<sup>107</sup> It should be noted that after the publication of van Waas' book, UNHCR adopted guidelines and the Handbook on the determination of stateless status. See ch 2 s 11 of this thesis

<sup>108</sup> For instance, UNHCR adopted the 'Guidelines on the Protection of Stateless Persons.'

<sup>109</sup> Alice Edwards and Laura van Waas, *Nationality and Statelessness under International Law* (CUP 2014).

<sup>110</sup> Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(1-2) IJRL 156, 173-74; David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons' (2006) 28(1) HRQ 251; some NGOs, such as Equal Rights Trust, support this view; Equal Rights Trust, *Unravelling Anomaly. Detention, Discrimination, and the Protection Needs of Stateless Persons* (2010) 52-80.

*jure* definition of statelessness is that it excludes those individuals who might technically have a nationality and yet are not able to obtain or enjoy the concomitant benefits and protections.’<sup>111</sup> They suggest that a person may be *de facto* stateless even inside the State of their ineffective nationality.<sup>112</sup> Other commentators, including van Waas, however, criticise this view. First, they note that under human rights law, the right to a nationality is distinct from the rights attached to nationality, and the violation of one does not entail the violation of the other. For instance, a State could violate the rights that must be granted to nationals without actually violating the right to nationality.<sup>113</sup> The non-enjoyment of rights attached to nationality does not constitute *de facto* statelessness but violation of other human rights.<sup>114</sup> If this argument is not accepted, then the following questions would arise and would need to be clarified: (1) the rights attached to nationality that are relevant for determining *de facto* statelessness (whether only the rights specifically provided for under international human rights law, or additional rights provided for under municipal law should be considered),<sup>115</sup> and (2) to what extent such rights have to be violated.<sup>116</sup> Second, the situation of a person whose nationality is disputed by one or more States, and that of a person unable to prove his nationality, are matters of *identification* of statelessness.<sup>117</sup> Van Waas argues that identification matters do not require a new definition of statelessness or a new protection framework.<sup>118</sup> She contends that new arguments on *de facto* statelessness not only do not serve any useful purpose, but they may even create confusion.<sup>119</sup> According to van Waas,

It would be more fruitful to concentrate efforts on the implementation of the existing definition of statelessness – on the *identification* of statelessness – as well as on measures to ensure that states honour their human rights commitments to their nationals so as to preclude the problem of *ineffective* nationality.<sup>120</sup>

Van Waas however does not engage in a study of how States implement the definition of statelessness and how States comply with the international obligations with regard to the 1954 Convention.

The identification of statelessness is the other key topic of debate in the area of statelessness.

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<sup>111</sup> Weissbrodt and Collins (n 110).

<sup>112</sup> Lindsey N Kingston also supports this view: a person has an effective nationality only if he enjoys the full range of human rights. Lindsey N Kingston, ‘Statelessness as a Lack of Functioning Citizenship’ (2014) 19(1-2) TLR 127.

<sup>113</sup> This is the case of dictatorships where all nationals, except for an ethnic group, are denied the right to a passport, the right to vote, and the right to take part in the civil and political life. Hugh Massey, ‘UNHCR and de Facto Statelessness’, Legal and Protection Policy Research Series, LPPR/2010/01 (UNCHR April 2010) 37-38.

<sup>114</sup> See ch 2, s 3.

<sup>115</sup> For a discussion on the content of Nationality, see Weis (n 100) and ch 2, s 3.

<sup>116</sup> Massey (n 113) 37-40; van Waas (n 10) 24.

<sup>117</sup> van Waas (n 10) 25; Massey (n 113) 40-45.

<sup>118</sup> van Waas (n 10) 25.

<sup>119</sup> *ibid* 26-27; Massey (n 113) 27-28, 36-40; Alison Harvey, ‘Statelessness: the “de Facto” Statelessness Debate’ (2010) 24(3) JIANL 257; Guy Goodwin-Gill, Lecture at Short Course on Statelessness, Refugee Studies Centre (Oxford, UK, April 2010); Jason Tucker, ‘Questioning de Facto Statelessness by Looking at de Facto Citizenship’ (2014) 19(1-2) TLR 276.

<sup>120</sup> van Waas (n 10) 27.

It raises such questions as what type of procedure should be followed, which would be its constituent elements, what facts should be taken into consideration, what evidence is required to establish nationality or its absence, and which law should be applied to prove absence of nationality. The issue of identification of statelessness has only recently been recognised as an issue requiring separate attention from that of its definition. Some writers stress that the protection of stateless persons often fails because of deficient or non-existent identification norms.<sup>121</sup> On the other side, despite statelessness being a legal fact, towards which States have corresponding legal obligations, some States often compare stateless persons to refugees, or to irregular migrants, ignoring the specific needs of this population.<sup>122</sup> Some States argue that specific statelessness determination procedures are not needed, as stateless persons may qualify for legal status under other residence permits.<sup>123</sup>

Concerning the types of procedures that should be followed, van Waas argues that a harmonised approach should be taken at the national level.<sup>124</sup> She recommends that the United Nations High Commissioner for Refugees (UNHCR) adopts a common handbook on the question of identification of statelessness, which includes a number of principles relating to establishing the burden of proof of nationality, how it should be implemented in practice<sup>125</sup>, and sources of proof to establish statelessness which she bases in large part on Weis' suggestions<sup>126</sup> (i.e. content of domestic nationality law; information provided by States; passport; official data collection; witness testimony).<sup>127</sup>

In line with van Waas, other commentators point out that the lack of uniformity and clarity as to the qualification and determination of statelessness are among the most problematic aspects of the current approach to statelessness in law and policy.<sup>128</sup> For instance, Batchelor maintains that a number of areas related to the protection of stateless persons which could benefit from EU harmonisation encompass identification procedures, conditions for granting lawful stay, mutual recognition of travel and identity documents and outcomes of the decisions on status determination.<sup>129</sup> Batchelor does not however address whether or not the EU has competence to

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<sup>121</sup> Katja Swider, 'Protection and Identification of Stateless Persons through EU Law' (July 2014) Amsterdam Centre for European Law and Governance Working Paper Series 2014-05, 7.

<sup>122</sup> Chassin (n 56) 324. It should be noted that during the preparatory works of the Refugee Convention and the 1954 Convention, there were several debates on the difference between stateless persons and refugees. See ch 3, ss 2, 3.

<sup>123</sup> For example, this is the position of the Czech government. Telephone interview with Alexandra Dubova, Immigration Lawyer, Organizace pro pomoc uprchlíkům, o.s. (Prague, Czech Republic, 2 January 2014).

<sup>124</sup> van Waas (n 10) 402-03.

<sup>125</sup> *ibid* 431-32.

<sup>126</sup> van Waas recognizes that Weis led the way to many concrete means to prove a person's nationality, which is thereby relevant to also prove statelessness. See Weis (n 100) ch 7, s 4.

<sup>127</sup> van Waas (n 10) 431-32.

<sup>128</sup> See eg Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (n 110) 156; Roberto Panozzo, 'Cenni Sulla Condizione dell' Apolide nel Diritto Internazionale e nell' Ordinamento Giuridico Italiano' (2004) 3 *Lo Stato Civile Italiano* 174; Léon Evers and Gerard-René de Groot, 'Staatloos of van Onbekende Nationaliteit of Nationaliteit in Onderzoek?' (2011, on file with UNHCR) in UNHCR 'Mapping Statelessness in the Netherlands' (2011) 19.

<sup>129</sup> Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (n 1) 31-58.

legislate in this area. More recent academic publications advocate for soft-law measures on statelessness, as they argue that there is no EU competence to pass relevant legislation.<sup>130</sup>

Overall the literature on statelessness has grown significantly in recent years, but there are only a few, non-comprehensive legal writings on the treatment of stateless persons in individual European States, which are usually in the format of journal articles and NGOs' reports<sup>131</sup>, and very few comparative studies, which do not engage in an in depth analysis or theoretical considerations. Furthermore, the research exploring and interpreting international standards and domestic norms relevant to statelessness mainly deals with States that have adopted some implementing legislation.<sup>132</sup> Very little is known of the treatment of stateless persons in States with no specific statelessness determination procedures.<sup>133</sup>

Previous comparative research on statelessness determination procedures shows a number of different models and types of legal status granted and a variety of administrative or judicial decision-makers involved.<sup>134</sup> Gábor Gyulai explicitly distinguishes five models: (1) stateless-specific mechanisms based on clear procedural rules (Spain and Hungary), (2) stateless-specific mechanisms without clear procedural rules but based on generally agreed practices (France), (3) stateless-specific mechanisms without clear procedural rules and without generally agreed practices (Italy), (4) non-stateless-specific mechanisms where there are grounds to obtain status for impossibility to enforce expulsion (Germany), (5) neither stateless-specific mechanisms nor grounds to obtain status for impossibility to enforce expulsion (the majority of States).<sup>135</sup> Gyulai, in line with the UNHCR<sup>136</sup>, argues that specific statelessness determination frameworks facilitate access to the recognition of stateless status as they have (or should have) a number of provisions

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<sup>130</sup> Gyulai, 'Statelessness in the EU Framework for International Protection' (n 21) 284, 294-95; Tomás Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (2010) 51(4) *Acta Juridica Hungarica* 303.

<sup>131</sup> Holger Hoffmann, 'Welche Rechte Haben Staatenlose?' (2004) 10 *Asylmagazin* 5; Alessandro Marazzi, *L' Apolidia e il suo Accertamento Giudiziario* (G. Giappichelli 1958); Panozzo (n 128) 174; Stefano Emauele Pizzorno, 'Il Riconoscimento dello Status di Apolidia' (2003) *NGCC* 312; UNHCR and Asylum Aid, 'Mapping Statelessness in the UK' (2010); Gábor Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (Hungarian Helsinki Committee 2010); UNHCR 'Mapping Statelessness in the Netherlands' (2011).

<sup>132</sup> Carol A Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7(2) *IJRL* 232; Batchelor, 'UNHCR and Issues Related to Nationality' (1995) 14(3) *RSQ* 91; Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (n 110) 156; Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (n 1); Batchelor, 'Transforming International Legal Principles into International Law: The Right to a Nationality and the Avoidance of Statelessness' (2006) 25(3) *RSQ* 8; Manly and van Waas (n 55) 3, 5.

<sup>133</sup> Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (n 1) 31; Gyulai, 'Statelessness in the EU Framework for International Protection' (n 21) 279; Gyulai, 'The Determination of Statelessness and the Establishment of Statelessness-Specific Protection Regime' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness Under International Law* (CUP 2014) 116-43.

<sup>134</sup> Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (n 1) 31; Gyulai 'Statelessness in the EU Framework for International Protection' (n 21) 279-80.

<sup>135</sup> Gyulai, 'The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime' (n 133) 120-23.

<sup>136</sup> UNHCR 'Handbook' (n 2) paras 8-10.

specifically designed for the needs of the stateless.<sup>137</sup> In addition, they raise awareness of the problem of statelessness. He discusses that some States with non-statelessness-specific protection statuses may in practice offer some protection to stateless persons, for instance by granting ‘tolerated’ or ‘humanitarian’ status.<sup>138</sup> However such statuses are usually based on the impossibility of leaving the country and usually offer less favourable conditions with regard to residence status, social and economic rights and in providing a long-term solution than stateless status.<sup>139</sup>

Gyulai maintains that the proper institutional framework to determine statelessness should include a centralised and specialised decision-maker (possibly the same authorities in charge of asylum determinations). The procedural framework, he suggests, should guarantee: a personal hearing, which constitutes the most adequate mean to collect oral evidence; an effective judicial review; reasonable timeframes for decision-making; regulation of the relationship between asylum procedures and statelessness determinations, as many first seek protection through asylum; shared burden of proof between the applicant and the decision-maker; lower burden of proof given the evidentiary issues that arise in connection to proving lack of nationality.<sup>140</sup> His recommendations however do not add much to those contained in the UNHCR Handbook<sup>141</sup> and his survey of the States that have implemented the 1954 Convention is quite superficial. Additionally Gyulai does not address how the definition of ‘stateless person’ has been interpreted in different States.

In light of the reviewed literature, it emerges that gaps that need to be addressed involve how the definition of statelessness, its identification and the protection provided to those that claim to be stateless are implemented at the national level. In particular, empirical studies could try to understand what happens on the ground for persons that claim to be stateless.

### ***3.2. Studies on the implementation of human rights treaties***

The implementation of the 1954 Convention at the national level involves critical questions that are common to other human rights treaties and therefore I turn to the scholarship in this area.<sup>142</sup>

In this century, human rights are widely accepted as the ‘idea of our time’.<sup>143</sup> The conceptual arguments on their relevance are over and the focus has shifted to the issue of their implementation. The key contemporary challenge concerns the failure of some States to change internal practices

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<sup>137</sup> Gyulai, ‘The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime’ (n 133) 120-23.

<sup>138</sup> Gyulai, ‘Statelessness in the EU Framework for International Protection’ (n 21) 289.

<sup>139</sup> *ibid.*

<sup>140</sup> Gyulai, ‘The Determination of Statelessness and the Establishment of Stateless-Specific Protection Regime’ (n 133) 133-41.

<sup>141</sup> UNHCR ‘Handbook’ (n 2). This is discussed in ch 3, s 5.

<sup>142</sup> Studies on the public international law of money, trade and intellectual property agreements generally rely on compliance mechanisms (i.e., market forces, costs of retaliatory non-compliance) which do not exist in human rights law, and therefore I exclude them from the relevant literature. Oona Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111(8) YLJ 1935, 1938; Lucas Eduardo F A Spadano, ‘Cross-Agreement Retaliation in the WTO Dispute Settlement System: an Important Enforcement Mechanism for Developing Countries?’ (2008) 7(3) WTR 511.

<sup>143</sup> Christof H Heyns and Frans Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’ (2001) 23(3) HRQ 483.

following the adoption of human rights treaties.<sup>144</sup>

There is now a substantial body of literature examining the gap between international human rights law and domestic laws. However, this literature does not usually address the disjuncture between the abstract level of norms and how they are practically translated into national level.<sup>145</sup> This area of scholarship tends to examine the impact of human rights norms on the practices of developing countries<sup>146</sup>, or international environmental treaties in developed countries.<sup>147</sup> There is agreement that it is inherent difficult assessing whether a State can be said to have effectively implemented an international legal obligation.<sup>148</sup> This is due to the imprecision of the terminology used in standard-setting conventions; the variety of legal systems and practices of States; the role of discretion in the State's choice of means to enact treaty obligations; and finally the possibility that the State may be entitled to avoid responsibility by providing an 'equivalent alternative' to the required result.<sup>149</sup>

In the context of the Refugee Convention, Guy Goodwin-Gill and Jane McAdam argue that implementation can take a variety of forms depending on the nature of the obligation and *the State's approach to the incorporation of international law into the domestic legal framework*. For instance, States may choose to formalise international obligations through enacting legislation, adopt national mechanisms which deal with specific human rights claims, or otherwise ensure that State agents are obliged to respect certain norms. However, the principle of *of pacta sunt servanda*, a fundamental tenet of international law, requires performing treaty obligations in good faith<sup>150</sup>, and

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<sup>144</sup> *ibid*; see also Sheldon Leader, 'Deriving Concrete Entitlements from Abstract Rights' in Geoff Gilbert, Francoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011) 1-12.

<sup>145</sup> Alexander Betts and Phil Orchard (eds), *Implementation and World Politics. How International Norms Change Practice* (OUP 2014) 1-2. Very few empirical studies have been carried out regarding national practices following ratification of human rights treaties. Denis Galligan and Deborah Sandler, 'Implementing Human Rights' in Simon Halliday and Patrick Delbert Schmidt (eds), *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 25.

<sup>146</sup> Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University 1998); Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999); Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile. Janus-Faced Humanitarianism* (Berghahn Books 2005).

<sup>147</sup> See eg Edith Brown Weiss and Harold K Jacobson, 'A Framework for Analysis' in Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 1998); Oran R Young, *The Effectiveness of International Environmental Regimes. Causal Connections and Behavioral Mechanisms* (MIT Press 1999); David Victor, Kal Raustiala and Eugene Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press 1998).

<sup>148</sup> Brown Weiss and Jacobson (n 147) 4-5; David Victor, Kal Raustiala, Eugene B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments. Theory and Practice* (MIT Press 1998); Brian Gorlick, 'Human Rights and Refugees: Enhancing Protection Through International Human Rights Law' (2000) 69(2) NJIL 117, 129-30; Hathaway (n 142) 1935; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 528-30.

<sup>149</sup> Brown Weiss and Jacobson (n 147) 4-5; Gorlick (n 148); Bradnee W Chambers, 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Law' (2003-2004) 16 GIELR 501; Goodwin-Gill and McAdam (n 148) 528-29.

<sup>150</sup> The principle of *of pacta sunt servanda* is expressed as follows in art 26 of the Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

limits the discretion of a State party in selecting a system for implementation.<sup>151</sup> ‘The test for good faith is an objective one as it looks to the practical effect of State action, not its intent or motivations.’<sup>152</sup> A State lacks good faith not only when it does not follow the black letter law of the treaty, but also when it avoids or diverts obligations which it accepted or when it does indirectly what it cannot do directly.<sup>153</sup> Measures that have the effect of barring access to procedures may not only breach international human rights and refugee law, but also the principle of good faith.<sup>154</sup> While there are no provisions in the Refugee Convention that oblige States to process asylum seekers’ claims within their borders, providing access to courts and grant status to recognised refugees reinforces the object and purpose of the treaty by assuring the ‘widest possible exercise of (...) fundamental rights and freedoms’.<sup>155</sup>

Goodwin-Gill does not give more guidance on what is effective implementation, but stresses that it involves procedures to identify the beneficiaries of protection, and some measures of protection against laws of general applicability that affect refugees, such as requirements of lawful residence to make an application.<sup>156</sup> Other studies on the implementation of the Refugee Convention deal with refugee status determination procedures, their constituent elements, and focus on individual protections.<sup>157</sup> For instance, Susan Kneebone, sharing the same views of Goodwin-Gill, engages in an empirical analysis of the most important factors for respecting the Refugee Convention, which include *its level of incorporation in the national legal framework*, the provision of neutral hearings at the administrative level and the development of a legal culture of respect for the rights in question.<sup>158</sup>

I therefore take these studies into consideration to analyse the implementation of the 1954 Convention, its incorporation into the national legal frameworks and the gaps between laws and practice.

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<sup>151</sup> Goodwin-Gill and McAdam (n 148) 387; Abdul Ghafur Hamid and Khin Maung Sein, *Public International Law. A Practical Approach* (3rd edn, Sweet and Maxwell Asia 2011) ch 2, s 8.4.1.

<sup>152</sup> Goodwin-Gill and McAdam (n 148) 387. Goodwin-Gill adds that the test to apply should be ‘whether, in light of domestic law and practice, including the exercise of administrative discretion, the state has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.’ What it is meant by reasonable efficacy and efficient implementation depends on the results in fact. Guy Goodwin-Gill, ‘The Process and Rights of Asylum Seekers’ in Karen Musalo, Jennifer Moore, Richard A Boswell (eds), *Refugee Law and Policy. A Comparative and International Approach* (4th edn, CAP 2011) 923. See also Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 425-30.

<sup>153</sup> Goodwin-Gill and McAdam (n 148) 387.

<sup>154</sup> *ibid* 388.

<sup>155</sup> Goodwin-Gill and McAdam (n 148) 389; Preamble of the Refugee Convention. Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention).

<sup>156</sup> Goodwin-Gill (n 152) 922.

<sup>157</sup> Hélène Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Martinus Nijhoff 1995); Niraj Nathwani, *Rethinking Refugee Law* (Brill Academic Publishers 2003); Legomsky (n 4) 619, 635-41; Gregor Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers 2005); Thomas Robert, ‘Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined’ (2006) 8 EJML 79-96; Martin Jones and France Houle, ‘Building a Better Refugee Status Determination System. Introduction’ (2008) 25(2) *Refugee* 3; Matthew E Price, *Rethinking Asylum: History, Purpose, Limits* (CUP 2009).

<sup>158</sup> Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law. Comparative Perspectives* (CUP 2009) 1.



### ***3.2.1. The traditional theories on the incorporation of human rights treaties into the domestic legal framework***

Several scholars argue that the way in which human rights are incorporated into national law is one of the most important factors determining whether they are really brought home and seen as part of the domestic legal framework.<sup>159</sup>

The traditional approach to the incorporation of international law, including human rights treaties, into domestic law is based on the distinction between monist and dualist theories.<sup>160</sup> Generally, the dualist theory contends that the rules of international and national law exist separately and one cannot overrule the other. This is due to the different nature of inter-state and intra-state relations, and the different legal structures of the State and between the States: they have different sources and subjects; both are supreme within their own sphere.<sup>161</sup> The two systems are not in conflict because they are completely separate and international law forms part of domestic law only if it has been adopted by a formal legislative act of Parliament.<sup>162</sup> The incorporation of international law involves creating a national framework for the enjoyment of the rights in question and procedures that can be used in cases of rights violations.<sup>163</sup> In contrast to this view, the monist theory maintains that there is a unitary system of law, with international law being an element within it, and alongside other branches of domestic law. The two systems are not totally separate and, in order to avoid conflicts, priority must be given to one over the other. Most scholars argue that international law should be given priority.<sup>164</sup> Ratified Conventions are part of domestic law without requiring additional legislation.<sup>165</sup>

Depending on the influence of the dualist or monist theory<sup>166</sup>, some States have adopted the method of legislative incorporation (the UK and the Scandinavian States, for example)<sup>167</sup> or of automatic incorporation (preferred by most European States) of international law.<sup>168</sup>

It is debated which technique of incorporation is a better method of incorporating human rights treaties in national law. For instance, Reiff prefers a system of legislative incorporation

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<sup>159</sup> See eg Goodwin-Gill and McAdam (n 148) 528-29; Henry J Steiner, Philip Alston, Ryan Goodman (eds), *International Human Rights in Context. Law, Politics, Moral* (3rd edn, OUP 2007) 1087-124; Kneebone (n 158) 1.

<sup>160</sup> Malcolm N Shaw, *International Law* (5th edn, CUP 2002) 121-24; Philip Sales and Joanne Clement, 'International Law in Domestic Courts: the Developing Framework' (2008) 128 LQR 388. The monist and dualist theories were developed after World War I, when theories of jurisdiction and non-intervention, which were used to separate international law and national law into two clearly different spheres, were considered inadequate. Virginia Leary, *International Labor Conventions and National Law* (Martinus Nijhoff Publishers 1982) 150.

<sup>161</sup> Leary (n 160) 165.

<sup>162</sup> *ibid* 165.

<sup>163</sup> Andrew Clapham, 'The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights' in Philip Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (OUP 1999) 95, 157.

<sup>164</sup> Leary (n 160) 165; Shaw (n 160); Sales and Clement (n 160).

<sup>165</sup> Shaw (n 160); Sales and Clement (n 160).

<sup>166</sup> Leary (n 160) 151. See also Kaye Holloway, *Modern trends in Treaty Law* (Stevens and Sons 1967) 238.

<sup>167</sup> Leary (n 160) 151.

<sup>168</sup> Following World War II, the trend became more towards the adoption of automatic incorporation of international law in national constitutions. This found its basis in the lesson learned from the Nazi regime and the idea that automatic incorporation would be more effective in ensuring the application of international treaties than that of legislative incorporation. *ibid* 151.

because it provides certainty as to whether or not treaty norms are incorporated in national law.<sup>169</sup> On the other hand, others argue in favour of that of automatic incorporation. For example, Wright prefers to delegate the power to apply international treaties to the courts rather than partisan debates in the Congress or State legislators.<sup>170</sup> Wright underlines that the judicial application of treaties tends to emphasise the objectivity of international law, and takes them away from the political aspects of international relations.<sup>171</sup>

It is also debated whether, in systems of automatic incorporation, formal legislative codification of human rights 'is a necessary component of a legal infrastructure of a rights-respecting legal culture.'<sup>172</sup> International human rights institutions and advocates, as well as a number of scholars, stress the need for adopting national legislation to effectively implement universal standards.<sup>173</sup> The argument for the domestic implementation of human rights is based on the view that this creates a legal environment in which they are more likely to be complied with, by making specific outcomes as legal imperative rather than discretionary choices left to decision-makers.<sup>174</sup> David Kinley points out that legislative implementation of human rights treaties is always necessary because the greatest responsibility for the protection of human rights and civil liberties should be with the elected representatives rather than the judiciary.<sup>175</sup> The Parliament has also a preventive influence over the executive and the passage of human rights laws is a means to ensure that they are taken seriously.<sup>176</sup> Implementing legislation may force a review of other relevant provisions and provide a standard of critique of new policies and laws.<sup>177</sup>

By contrast, one of the arguments against the codification of rights is that it is not necessarily grounded in practical experience.<sup>178</sup> The enactment of laws *per se* may not address causes of human rights violations.<sup>179</sup> In this sense, Roy Bhasker emphasises that human rights depends upon the transformation of structures and institutions rather than just the adoption of laws.<sup>180</sup> Another

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<sup>169</sup> According to Reiff, the main problem in systems of automatic incorporation is to determine whether treaty provisions are self-executing or not. If such an aspect of a treaty provision is being disputed, Congress should adopt a comprehensive enforcing statute. Henry Reiff, 'The Enforcement of Multipartite Administrative Treaties in the United States' (1940) 34 AJIL 661, 669, 678.

<sup>170</sup> Lawrence Preuss, 'The Executing of Treaty Obligations Through Internal Law' (1951) PASIL 101; Leary (n 160) 158-59.

<sup>171</sup> Quincy Wright, 'National Courts and Human Rights. The Fuji Case' (1951) 45 AJIL 62, 82-89; Leary (n 160) 159. A similar position has been taken by other scholars. See eg Pierre Pescatore, 'Rapport Luxembourgeois' in 'Deuxième Colloque International de Droit Européen (La Haye 24-26 October 1963)' (N.V. Uitgeversmaatschappij W.E.J. Tjeenk Willink 1966) 137, 143.

<sup>172</sup> Luke McNamara, *Human Rights Controversies. The Impact of Legal Form* (Routledge-Cavendish 2007) 2.

<sup>173</sup> McNamara (n 172).

<sup>174</sup> *ibid.*

<sup>175</sup> David Kinley, 'Parliamentary Scrutiny of Human Rights: a Duty Neglected?' in Philip Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (OUP 1999) 158.

<sup>176</sup> *ibid* 158, 184.

<sup>177</sup> Leary (n 160) 137, 157; Andrew Byrnes, 'And Some Have Bills of Rights Thrust Upon Them: Hong Kong's Bill of Rights Experience' in Philip Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (OUP 1999) 318, 390.

<sup>178</sup> McNamara (n 172) 3.

<sup>179</sup> Christine Chinkin, 'International Law and Human Rights?' in Tony Evans (ed), *Human Rights Fifty Years On: a Reappraisal* (MUP 1998) 105-06; Christopher Cviic and Katarina Tomaševski, *Development Aid and Human Rights Revisited* (St. Martin's Press 1993).

<sup>180</sup> Roy Bhasker, *Philosophy and the Idea of Freedom* (Blackwell 1991) 76.

perspective is that of some governments, which argue that detailed implementation of human rights may not be necessary if current practice already matches the objectives of the treaties in question.<sup>181</sup> Along this line, Pierre Cornil criticises the insistence on the adoption of implementing legislation when the national legal system clearly sets forth that international treaties prevail over national law in case of conflict. He argues that such a position would undermine the monist theory.<sup>182</sup> It would question the good faith of States who accept in their Constitution, their jurisprudence and their practice the supremacy of the rule of international law. States may cease to believe in it themselves and embrace again the thesis of absolute national sovereignty. Governments are easily ready to believe that ratified treaties do not prevail over national law.<sup>183</sup> The fate of international law depends on the attitude of these States. Such attitude is outlined in their constitutions and it is therefore important that these constitutional provisions are applied with scrupulous attention.<sup>184</sup>

### ***3.2.2. Recent theories on the incorporation of human rights into national law***

Several contemporary authors such as Virginia Leary, Henry J. Steiner, Denis Galligan and Deborah Sandler, criticize the monist and dualist theories as outdated and focusing too much on rules.<sup>185</sup> With time, the boundaries between international and national law have become even less clear-cut<sup>186</sup> and the dualist theory overlooks that today the two systems regulate the same subjects, interact and sometimes clash. For instance, international law may not be part of the domestic law (in the sense that it does not give rise to a right or obligation which can be enforced in court), but it may assist in the interpretation of national law and thus be of legal relevance.<sup>187</sup> On the other hand, the monist theory overestimates the degree of unity that exists between the two systems. International law does not always reach directly into national legal systems. For example, Leary's study clearly shows that the effective application of treaties in national law requires further action even in systems of automatic incorporation.<sup>188</sup> Systems of automatic incorporation require that States address problems arising from the often lack of publicity given to the treaty provisions and the uncertainty resulting from conflicts between laws and treaty provisions (even when the legal system provides that treaty provisions prevail).<sup>189</sup>

International law scholars have thus expanded the theoretical discussion, which now includes

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<sup>181</sup> Leary (n 160) 4, 138-48; Tony Evans, 'International Human Rights Law as Power/Knowledge' (2005) 27(3) HRQ 1046-68; Katja Swider, 'Statelessness Determination in the Netherlands' (May 2014) Amsterdam Law School Research Paper No 2014-33.

<sup>182</sup> Pierre Cornil, 'Le Rôle de la Commission d'Experts de l'OIT dans le Contrôle de l'Application des Conventions Internationales du Travail' (1970) 1 RBDI 265, 270-73.

<sup>183</sup> *ibid.*

<sup>184</sup> Cornil (n 182); Leary (n 160) 139-41.

<sup>185</sup> Eg see Leary (n 160) 164-65; Galligan and Sandler (n 145); Henry J Steiner, Philip Alston, Ryan Goodman (eds), *International Human Rights in Context. Law, Politics, Moral* (3rd edn, OUP 2007) 1109.

<sup>186</sup> After World War II, with the adoption of the United Nations (UN) and a number of human rights treaties, including the Refugee Convention and the 1954 Convention, international law did start dealing with areas formerly only within the jurisdiction of States. Leary (n 160) 150-51.

<sup>187</sup> Steiner, Alston, Goodman (n 185) 1109.

<sup>188</sup> Leary (n 160) 165.

<sup>189</sup> *ibid* 137.

whether international law is incorporated through ‘rules’ or ‘process’. This debate is extensive, and I can only briefly refer to it here.

Broadly, recent research on the incorporation of human rights has been focusing on the interaction of several national and international actors, decision-making processes, and their impact on the national legal systems.<sup>190</sup> For instance, Nergis Canefe considers the incorporation of international law as ‘a complex deliberative process’<sup>191</sup>, in which several interests conflict and actors, including the State, come together.<sup>192</sup> Rosalyn Higgins argues that international law is not only made of a body of rules.<sup>193</sup> Rules are important but the application of international law is a process which involves practices and decision-making.<sup>194</sup> Harold Koh has created a theoretical framework, called ‘transnational legal process’, for studying the way in which transnational and international norms are internalised by domestic legal systems over time.<sup>195</sup> This framework focuses on the idea that norms are incorporated into a legal system in more complicated ways than simply the formal rules or policies enacted by States. Koh argues that norm internalisation occurs through a wide number of actors (i.e. foreign governments, international institutions, transnational corporations, non-governmental organisations, private litigants, opinion shapers, and lawyers), and is not State-driven. Eventually the norm becomes internalised into domestic structures through executive, legislative and judicial mechanisms or some combination of the three.<sup>196</sup>

On the other hand, emphasis on rules is still placed by legal positivists, who conceive law ‘as commands emanating from a sovereign’.<sup>197</sup> Among them, Tom Campbell<sup>198</sup> argues that the success

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<sup>190</sup> Myres S McDougal, ‘The Impact of International Law upon National Law: a Policy-Oriented Perspective’ (1959) 26(4) SGLR 25; Leary (n 160) 166; Geoff Gilbert, ‘Law and Human Rights rather than International Human Rights Law’ in Geoff Gilbert, Françoise Hampton and Clara Sandoval (eds), *Strategic Visions for Human Rights. Essays in Honour of Professor Kevin Boyle* (Routledge 2012) 19-34.

<sup>191</sup> Nergis Canefe, ‘The Fragmented Nature of the International Refugee Regime and its Consequences: a Comparative Analysis of the Applications of the 1951 Convention’ in James C Simeon (ed), *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony* (CUP 2010) 200.

<sup>192</sup> *ibid.*

<sup>193</sup> Rosalyn Higgins, *Problems and Process. International Law and How We Use it* (Clarendon Press 1994) 2.

<sup>194</sup> Higgins’ view assumes that decision-makers are not simply finding the rule and applying it, but also making choices between different arguments. *ibid* 2-3.

<sup>195</sup> Harold Koh, ‘Transnational Legal Process’ (1996) 75 NLR 1u; Harold Koh, ‘The 1998 Frankel Lecture: Bringing International Law Home’ (1998) 35 HLR 623; Harold Koh, ‘New International Legal Process’ (1999) 93(2) AJIL 334.

<sup>196</sup> Koh refers to executive internalisation through acts of the President and therefore this aspect of his theory is strictly linked to the American Constitutional and legal framework. However the ideas of judicial and legislative internalisation are more broadly applicable: ‘Judicial internalisation can occur when domestic litigation provokes judicial incorporation of human rights norms either implicitly, by construing existing statutes consistently with international human rights norms, or explicitly, through what I have elsewhere called “transnational public law litigation”.’ Harold Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 YLR 2657. By transnational public law litigation, Koh means cases in which United States federal courts enforced norms of international human rights law against their abusers. ‘Legislative internalisation occurs when domestic lobbying embeds international law norms into binding domestic legislation or even constitutional law that officials of a noncomplying government must then obey as part of the domestic legal fabric.’ *ibid.*

<sup>197</sup> Higgins (n 193) 7. Higgins also cites John Austin’s statement that

Every positive law (or every law simply and strictly so-called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme. In other words, it is set, directly or indirectly, by a monarch or sovereign member, to a person or persons in a state of subjection to its author.

of human rights treaties depends on their general statements being transformed into practical expressions, using specific terms.<sup>199</sup> The meaning and purpose of each right has to be clarified, and so do any duties and exceptions and limitations.<sup>200</sup> Furthermore, new rules have to be placed into the framework of existing legislation.<sup>201</sup> This means that they ‘must be cast in a form which can generate both effective executive action and a basis for legal argument concerning their violations. Beyond this, many rights require state commitment to, and finance for, definable policy objectives (...)’.<sup>202</sup>

Jack Donnelly argues that national law is critical to assure that the State is the protector rather than the violator of human rights. He stresses ‘heavy reliance on law’ and that ‘law ought to be central to the struggle for human rights.’<sup>203</sup> He believes that the appeal of law is in its definitions of standards, its normative functions and its enforcement mechanisms.<sup>204</sup> Furthermore, law presents advocates with potent and authoritative legal norms with which to base claims.<sup>205</sup>

By and large, even scholars that criticise the hegemonic position of law in the human rights discourse do not reject its important role. They see ‘legalisation’ of human rights as a problem of balance, and not of alternatives. Law is one of the various factors of social life that contribute to guarantee rights and protections

#### 4. Conclusion

The study of statelessness initially emerged as the study of nationality laws, leading over time to the exploration of international standards and of domestic norms relevant to statelessness. The study of statelessness has not yet established itself as a field in its own right, unlike, for instance, refugee law or international human rights law.<sup>206</sup> Yet, it deals with several fundamental questions, including the interactions between States, the limitations of the human rights framework, the incorporation of international law into the national legal systems, and access to justice for vulnerable claimants.

Recent studies have focused on the protection of stateless persons and the 1954 Convention, but they have not thoroughly explored how its standards have been implemented at the national level. This thesis analyses how claims for protection made by stateless persons are treated in ten

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Higgins (n 193) 7-8, citing John Austin, *Lectures on Jurisprudence Or the Philosophy of Positive Law* (Jersey City, F.D. Linn & Company 1875) 203. See also Hans Kelsen, *General Theory of Law and State* (HUP 1949).

<sup>198</sup> Tom Campbell, ‘Introduction: Realizing Human Rights’ in Tom Campbell and others (eds), *Human Rights: From Rhetoric to Reality* (Basil Blackwell Press 1986).

<sup>199</sup> *ibid.*

<sup>200</sup> *ibid.* 3.

<sup>201</sup> He recognizes that the risk in positivizing human rights often means limiting them, for instance, by introducing limitations to their scope, restrictive definitions. Nevertheless, this is necessary for human rights to have effect. *ibid.* 5.

<sup>202</sup> Campbell (n 198) 5.

<sup>203</sup> Jack Donnelly, ‘The Virtues of Legalization’ in Saladin Meckled-García and Başak Çali (eds), *The Legalization of Human Rights. Multi-Disciplinary Perspectives on Human Rights and Human Rights Law* (Routledge 2006) 67.

<sup>204</sup> *ibid.* 67-78.

<sup>205</sup> *ibid.*

<sup>206</sup> Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness Under International Law* (CUP 2014) 1.

European Union States. It tries to understand the procedural frameworks pertaining to the protection of stateless persons, how the definition of stateless person is applied and what legal status and rights are attached to a grant of legal status. This thesis takes into consideration the practical difficulties that stateless persons face in the context of status determination in light of being a vulnerable group. It analyses States that have adopted specific legislation to determine statelessness and implement the 1954 Convention, those that have only few scattered provisions and those that have not, to identify the variations in terms of the protection afforded. Finally, this thesis discusses the relevance of adopting specific implementing legislation in States that have different systems of incorporation of international law into the domestic legal framework and explores to what extent it matters for practice.

## CHAPTER 2: THE PROBLEM OF STATELESSNESS AND THE INTERNATIONAL RESPONSE

### 1. Introduction

Statelessness, or the lack of recognition as a national of any State, is closely linked to the questions of content and regulation of nationality. The study of statelessness therefore requires an exploration of the meaning of nationality, the minimum set of rights associated with it under international law, how nationality is determined and what are the limits on a State's discretion in conferring it.<sup>1</sup> This chapter provides an overview of these matters, which are crucial to trace the causes of statelessness<sup>2</sup> and establish whether a person is in fact stateless and in need of international protection. This chapter also shows that statelessness is an issue of significant importance deserving contemporary attention and explains the international community's response to the problem, with particular attention on the UNHCR's role and activities, and the institutional responses in Europe.

### 2. The definition of nationality

Nationality is a concept of both municipal and international law.<sup>3</sup> For the purpose of *municipal law*, nationality implies a specific relationship between the national and the State of nationality, conferring mutual rights and duties on both. Such rights and duties are often spelled out in a State's constitution and tend to include civil freedoms and entitlements.<sup>4</sup> In the *Nottebohm* case, the International Court of Justice (ICJ) held that '[N]ationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.'<sup>5</sup>

As a concept of *international law*, nationality refers to the bond between a national and a State which creates duties upon States towards other States, such as the duty to readmit one's own nationals from abroad.<sup>6</sup> This relationship also confers upon the State of nationality some discretionary rights, such as the right to exercise international protection of its nationals in relation

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<sup>1</sup> Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 2.

<sup>2</sup> Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2009) 31.

<sup>3</sup> The subject of nationality has been thoroughly treated by writers and therefore this chapter only briefly reviews it. See eg Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff and Noordhoff 1979); Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(1-2) IJRL 156; van Waas (n 2).

<sup>4</sup> Weis (n 3) 59. The duties of loyalty to the State and military service are among the possible duties that nationals have to fulfil. Tomas Hammar, *Democracy and the Nation State* (Avebury 1990) 30; van Waas (n 2) 217-20.

<sup>5</sup> *Nottebohm Case (Liechtenstein v. Guatemala)* (second phase) [1955] ICJ Rep 23, 4. The ICJ ruling concerned primarily the question of a State's duty to afford diplomatic protection. This case was brought by Liechtenstein against Guatemala arguing that the latter State was treating one of its nationals contrary to international law. It was dismissed by the ICJ *inter alia* on the basis of Mr Nottebohm lacking a *genuine link* with the State of Liechtenstein, as claimed by Guatemala. The Court upheld the principle of 'effective nationality', providing this frequently cited passage.

<sup>6</sup> Weis (n 3) 59.

to other States.<sup>7</sup> The next section will look at these aspects more fully.

The term ‘nationality’ in international law, may be both wider and narrower than its meaning in municipal law, although they often coincide. Persons may be considered as nationals under international law, but not nationals under municipal law.<sup>8</sup> On the other hand, others may not be looked as nationals of a State under international law, while may be deemed nationals under municipal law.<sup>9</sup>

The term ‘citizenship’ is frequently used synonymously with nationality. The terms however emphasise two different aspects of State membership: citizenship stresses the national, whereas nationality the international aspect. Under the laws of most States, citizenship implies full membership of the State, including possession of political rights. Some States distinguish between different classes of members (nationals and subjects) and thus while every citizen is a national, not every national is necessarily a citizen.<sup>10</sup>

### 3. The substance of nationality

It is debated whether there is a minimum substantive content of nationality under international law and the answer has been related to the assessment of whether a person is stateless.<sup>11</sup> According to the UNHCR, for purposes of international law, what rights and obligations are inherent to the status of nationality and distinctions made by municipal law between classes of nationals, are immaterial. The issue of diminished rights for some groups of nationals concerns violations of other human rights obligations, but does not change one’s nationality status.<sup>12</sup> The only exception is when provisions of municipal law deny the essential functions of nationality in international law: *the right to return to and reside in the State’s territory*,<sup>13</sup> and *the right to receive international*

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<sup>7</sup> David Weissbrodt and Clay Collins, ‘The Human Rights of Stateless Persons’ (2006) 28(1) HRQ 59. International protection is based on the notion that ‘whoever ill-treats a citizen indirectly injures a state’. Statement by Emer de Vattel, considered the father of the doctrine of State responsibility that is the foundation for the exercise of diplomatic protection, as cited in Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Kluwer International 2001) 35; also cited in van Waas (n 2) 219.

<sup>8</sup> This was the case of the Cayuga Indians in Canada who were not British subjects. Weis (n 3) 60.

<sup>9</sup> This was the case of the German Jews during the German National-Socialist regime. They were regarded as German nationals, but not as citizens: they neither enjoyed protection nor the right of sojourn. *ibid.*

<sup>10</sup> Weis (n 3) 6. Unless otherwise indicated, the terms ‘national’ and ‘citizen’ are used synonymously in this thesis. In English, the term ‘subject’ is used as a synonym for national. *ibid.* 4-5; Hammar (n 4) 34-35, 37.

<sup>11</sup> Alice Edwards, ‘The Meaning of Nationality in International Law: Substantive and Procedural Aspects’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 11, 30. This issue was debated during the UNHCR’s consultations on the status of stateless persons. UNHCR ‘The Concept of Stateless Persons under International Law (“Prato Conclusions”)’ (May 2010).

<sup>12</sup> UNHCR ‘Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons’ (2014) (hereafter the ‘Handbook’) para 53.

<sup>13</sup> This right is recognised by the Universal Declaration of Human Rights (adopted 10 December 1948, entered into force 23 March 1976) 999 UNTS 302 art 13(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 12(4); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 arts 5(d)(i)-(ii); the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto as amended by Protocol No 11 [1963] ETS No 155 art 3. In its General Comment 27 of 1999 the UN Human Rights Committee (the body responsible for supervising the application of the International Covenant on Civil and Political Rights) stated that



protection.<sup>14</sup>

The *right to return to and reside in the State's territory* becomes relevant under international law when a national is expelled to another State which has not consented to admit him, or when a State is prevented from returning a foreigner to their State of nationality. In these cases, the foreign State may require from the State of nationality not to carry out the expulsion, or to admit their national on the basis of the duty of the State to grant the right to reside to its nationals. Thus this duty of admission towards nationals becomes a duty towards other States and an obligation under international law.<sup>15</sup> Whether denying a national readmission to his State of nationality would consequently lead to the person being stateless under international law will depend on each specific case and must be considered in light of all relevant facts.<sup>16</sup>

*International protection* is generally defined as 'the right of the state to intervene on behalf of its own nationals if their rights are violated by another state for the purpose of obtaining redress.'<sup>17</sup> This protection is also called 'diplomatic' protection and, according to Weis, it is

different from the *internal, legal* protection which every national may claim from his State of nationality under its municipal law, i.e., the right of the individual to receive protection of his person, rights and interests from the State. International diplomatic protection is a right of the *State*, accorded to it by customary international law, to intervene on behalf of its own nationals, if their rights are violated by another State, in order to obtain redress.<sup>18</sup>

A State may deny international protection without withdrawing nationality status. Such denial is rarely explicit and it can be deducted by the State's inactions.<sup>19</sup> Often, refusal of international protection coincides with that of internal legal protection, i.e. refugees and stateless persons.<sup>20</sup>

While, in line with Paul Weis and Alice Edwards, I focus only on these two main elements of nationality under international law, it should be noted that other authors have claimed that there are additional components.<sup>21</sup>

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The right of a person to enter his or her own country recognises the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality) (...).

Human Rights Committee 'General Comment 27. Freedom of movement (Art.12)' (18 October 1999) 67th session UN Doc CCPR/C/21/Rev.1/Add.9, para 19.

<sup>14</sup> Weis (n 3) 6.

<sup>15</sup> Weis (n 3) 46.

<sup>16</sup> Edwards, 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects' (n 11) 11, 36.

<sup>17</sup> *ibid* 31.

<sup>18</sup> Weis (n 3) 33.

<sup>19</sup> *ibid* 44.

<sup>20</sup> *ibid* 44.

<sup>21</sup> For instance, Shearer also includes State responsibility for nationals, allegiance, right to refuse extradition, determination of enemy status in wartime and exercise of jurisdiction. Ivan A Shearer (ed), *Starke's International Law* (22th edn, Butterworths 1994) 309.

As far as the content of nationality under municipal law, Weis and Edwards point out that it can vary from State to State<sup>22</sup> and that, from the perspective of the citizen/national, it normally involves entitlements to rights, services and social benefits. Therefore not being a national of any State means encountering a number of practical obstacles. Typically, stateless persons cannot participate in the affairs of the State through the right to vote, to be elected and to work in public service.<sup>23</sup> They also have difficulties in obtaining documents, accessing the courts, finding lawful employment, receiving health care, entering into contracts and owning property. Moreover, they often experience prolonged and unwarranted imprisonment due to their frequent irregular immigration status.<sup>24</sup> They may serve time in criminal detention in States that criminalise immigration offences. They may also spend long periods in immigration detention while State authorities try to resolve the question of their expulsion.<sup>25</sup>

#### **4. The limits on States' power concerning nationality matters**

##### ***4.1. The right to a nationality under international law***

A few provisions of international law deal with the *individual's right* to a nationality: article 15 of the 1948 Universal Declaration of Human Rights defines it as a goal without imposing an obligation by saying that 'everyone has the right to a nationality' and 'no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'. Article 5 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination provides that States have to guarantee without distinctions the right to a nationality.<sup>26</sup> Article 20 of the 1969 American Convention on Human Rights not only sets forth that every person has the right to a nationality, but attempts to make a concrete step forward from the previous instruments by adding that 'every person has the right to the nationality of the state in whose territory he was born if he does not have

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<sup>22</sup> Weis (n 3) 6; Edwards, 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects' (n 11) 11, 30.

<sup>23</sup> However the extent to which political rights are exercised by nationals has varied over time and from State to State. van Waas (n 2) 219. For example, besides British citizens, also Commonwealth citizens and citizens of the Irish Republic who reside in the UK are entitled to vote at UK Parliamentary. The Electoral Commission, 'Who Can Vote?' (September 2006) <[http://www.electoralcommission.org.uk/\\_\\_data/assets/electoral\\_commission\\_pdf\\_file/0017/13274/0906whocanvote\\_23253-6144\\_\\_E\\_\\_N\\_\\_S\\_\\_W\\_\\_.pdf](http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144__E__N__S__W__.pdf)> accessed 1 November 2011.

<sup>24</sup> According to the UNCHR detention is 'confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.' UNHCR 'UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (February 1999); Weissbrodt and Collins (n 7) 268. Cycles of detention occur when after release from detention upon reaching the maximum time-limit of detention allowed by law, a person is detained again the next time he comes into contact with the immigration authorities (for instance if the person is arrested while engaging in unauthorised work). Practice in regard to administrative detention changes from State to State and ranges from non-detention (Brazil) to 32 days (France) to six months (Hungary) to no time-limit (the UK). Equal Rights Trust, *Unravelling Anomaly. Detention, Discrimination, and the Protection Needs of Stateless Persons* (2010) 138-40.

<sup>25</sup> For the detaining States one of the biggest challenges is the impossibility or extreme difficulty in removing stateless persons, as other States may also be unwilling to receive them. However they may come to such a conclusion only after several failed attempts to establish the nationality of the person concerned and when it becomes clear that administrative detention does not serve its purpose anymore (i.e. carry out the removal). Release may be affected by non-cooperation of the States concerned, when they refuse or fail to identify or readmit a national. Weissbrodt and Collins (n 7) 267-69.

<sup>26</sup> International Convention on the Elimination of All Forms of Racial Discrimination (n 13) art 5.

the right to any other nationality<sup>27</sup>.

Kay Hailbronner, Hans-Georg Maaßen and Günter Renner note that even if the wording of these provisions could refer to a personal right of the individual, the related statements are still very cautious and refer above all to the inter-State aspect and duty to avoid statelessness.<sup>28</sup> Thus, the International Law Commission regarding the effects on nationality of State succession states

While the concept of the right to a nationality and its usefulness in situations of State succession was generally accepted, it would nevertheless be unwise to draw any substantive conclusions therefrom, having in mind the very preliminary stage of the discussion on this issue (...) It would nonetheless be difficult to object to the view that the right to a nationality embodied in article 15 of the Universal Declaration of Human Rights must be understood to provide at least a moral guidance for the legislation on citizenship when new States are created or old ones resume their sovereignty.<sup>29</sup>

The *Explanatory Report* to the European Convention on Nationality interprets the right to nationality as a positive formulation of the duty to avoid statelessness:

The principle of a right to a nationality is included in the Convention because it provides the inspiration for the substantive provisions of the Convention which follow, in particular, those concerning the avoidance of statelessness. This right can be seen as a positive formulation of the duty to avoid statelessness (...).<sup>30</sup>

Finally, the European Court for Human Rights pointed out that an arbitrary refusal of nationality might raise issues under article 8 of the European Convention on Human Rights if it impacts on an individual's private life, although it does not guarantee the right to a nationality as such.<sup>31</sup>

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<sup>27</sup> American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 (1967) reprinted in Basic Documents pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992).

<sup>28</sup> Kay Hailbronner, Hans Georg Maaßen und Günter Renner, *Staatsangehörigkeitsrecht* (5th edn, CH Beck 2010) I.G.I.6. In addition, it should be noted that article 24 of the 1966 International Covenant on Civil and Political Rights and article 7 of the 1989 Convention on the Rights of the Child spell out the right for every child to acquire a nationality, which is different from the right to a nationality, as it requires evidence of attachment to a State. International Covenant on Civil and Political Rights (n 13); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (Child Convention).

<sup>29</sup> Vaclav Mikulka 'Second Report on State Succession and its Impact on the Nationality of Natural and Legal Persons' (17 April 1996) Special Rapporteur Extract from the Yearbook of the International Law Commission: (1996) vol II(1) UN Doc A/CN.4/474, para 19.

<sup>30</sup> Council of Europe, European Convention on Nationality. Explanatory Report [1997] ETS No 166 para 32.

<sup>31</sup> *Karashev v. Finland* ECHR 1999-II 31414/96 (finding that the refusal to recognise the claimant as a Finnish national was not arbitrary and could not be considered as sufficiently serious to raise an issue under article 8. The claimant and his family were no longer threatened with expulsion, his family obtained residence permits and alien passports, and similar documents could be obtained for him).

#### 4.2. Procedural guarantees to the right to a nationality

International law has no comprehensive and binding rules on the acquisition and loss of nationality. It has been recognised that questions of nationality are *prima facie* within the reserved domain of domestic jurisdiction.<sup>32</sup> This rule is codified in the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which states that ‘it is for each State to determine under its law who are its nationals.’<sup>33</sup> However, it adds a limit by specifying that ‘this law shall be recognised by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality.’ For example, States cannot denationalise their nationals in order to expel them as ‘non-citizens’. Nevertheless, if the effects of such denationalisation are internal ‘only’ international law has little to say.<sup>34</sup> In this area, while largely acknowledging that the application of nationality law was a matter of domestic jurisdiction, the Permanent Court of International Justice pointed out that the limits on States’ discretion are set by international law.<sup>35</sup>

In the last 50 years, the development of human rights obligations has further constrained the view that nationality falls within the exclusive jurisdiction of individual States.<sup>36</sup> Today, the most widely accepted position regarding the attribution and deprivation of nationality favours human rights over claims to State sovereignty.<sup>37</sup> Some scholars even claim that ‘being human is the right to have human rights’, regardless of nationality.<sup>38</sup> They argue that several human rights principles derived from treaties or general principles of customary international law purposefully diminish the importance of nationality to prevent that statelessness or status as a non-citizen are used as a basis for discrimination and breach of fundamental human rights. For instance, these principles include: (i) the prohibition on the arbitrary deprivation of nationality<sup>39</sup> (generally involving the withdrawal of a person’s nationality for a non-legitimate purpose and not in compliance with the principle of proportionality);<sup>40</sup> (ii) non-discrimination in nationality matters;<sup>41</sup> (iii) the duty to avoid

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<sup>32</sup> *Nationality Decrees Issued in Tunis and Morocco (Great Britain v France)* [1923] PCIJ Series B No 4.

<sup>33</sup> Convention on Certain Questions Relating to the Conflict of Nationality Law (adopted 12 April 1930, entry into force 1 July 1937) 179 LNTS 89 (No 4137) (Hague Convention) art 1.

<sup>34</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 459.

<sup>35</sup> *Nationality Decrees Issued in Tunis and Morocco* (n 32). The dispute was between Great Britain and France as to whether the Nationality Decrees issued in Tunis and Morocco (French Zone) on 8 November 1923 and their application to British nationals was, by international law, only a matter of domestic jurisdiction. The Court held that the dispute was not, by international law, solely a matter of domestic jurisdiction because, although questions of nationality are within the reserved domain of States, the right of a State to use its discretion is nevertheless restricted by obligations which it may have taken towards other States.

<sup>36</sup> *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-American Court of Human Rights Series A No 4 (19 January 1984) para 32; van Waas (n 2) 39.

<sup>37</sup> UNHCR and IPU ‘Nationality and Statelessness: a Handbook for Parliamentarians’, Handbook for Parliamentarians No 11 (2005) 9; van Waas (n 2) 39.

<sup>38</sup> Weissbrodt and Collins (n 7) 248.

<sup>39</sup> Universal Declaration of Human Rights (n 13) art 15. Other relevant provisions include American Convention on Human Rights (n 27) art 20; Arab Charter on Human Rights (entered into force 15 May 2008) reprinted in 12 International Human Rights Reports 893 (2005), art 29.

<sup>40</sup> Edwards, ‘The Meaning of Nationality in International Law: Substantive and Procedural Aspects’ (n 11) 26.

<sup>41</sup> For instance, this is stated in Article 9 of the 1961 Convention on the Reduction of Statelessness (it prohibits the deprivation of nationality on racial, ethnic, religious or political grounds). Convention on the

statelessness.<sup>42</sup>

On the other hand, some scholars point out that the human rights system did not intend to entirely eliminate the need of a nationality.<sup>43</sup> Indeed, certain rights can be exercised only in relation to the State of citizenship. For example, international law guarantees political rights only to nationals.<sup>44</sup> Moreover, diplomatic protection still remains strictly linked to nationality, and international tribunals have dismissed claims where the bond of nationality was not present or insufficiently proven.<sup>45</sup>

In conclusion, the right to a nationality under international law is framed mainly as a procedural right, with provisions relating to the grounds for the acquisition of nationality and its deprivation or loss.<sup>46</sup> The next sections address some of these grounds.

## 5. Grounds for the attribution of nationality

The attribution of nationality reflects factors which indicate an established link between the individual and the State. The most commonly used criteria to attribute nationality under municipal law are place of birth, descent, residence, family ties, language and ethnicity. While many combinations of such factors are possible, most States tend to emphasise place of birth (*jus soli*), descent (*jus sanguinis*) or residence (*jus domicili*).<sup>47</sup>

According to the *jus soli* principle, nationality is acquired at birth by virtue of being born on the territory of the State.<sup>48</sup> On the other hand, the *jus sanguinis* principle confers nationality to a child at birth if one or both of his parents are nationals of that State themselves.<sup>49</sup> Then again, *jus domicili* recognises the bond that a person develops with a state following a period of habitual or permanent residence, which is the most common ground for naturalisation.<sup>50</sup> However, *jus domicili* alone is not the only basis to qualify for naturalisation. States have adopted a number of additional

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Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175. It is also stated in article 5(d)(iii) of the 1965 Convention on the Elimination of Racial Discrimination (it prohibits the deprivation of nationality on the basis of race, colour, descent or national or ethnic origin). Moreover, it has been recognised to be a *jus cogens* norm of international law. Edwards, 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects' (n 11) 26.

<sup>42</sup> This is stated in several agreements which include: the Convention on Certain Questions Relating to the Conflict of Nationality Laws (n 33) (arts 8, 13) and the Convention on the Reduction of Statelessness (n 41). Edwards (n 11) 28.

<sup>43</sup> van Waas (n 2) 222-25.

<sup>44</sup> See eg International Covenant on Civil and Political Rights (n 13) art 25.

<sup>45</sup> See *Dickson Car Wheel Co. (USA) v. United Mexican States* [1951] UNRIIAA vol. IV (Sales No 1951.V.1.) 678. In the case of *Dickson*, the international arbitration panel held that a stateless person could not be beneficiary of diplomatic protection and even stated that 'A State [...] does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.' van Waas (n 2) 381.

<sup>46</sup> Edwards, 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects' (n 11) 11, 16.

<sup>47</sup> William Samore, 'Statelessness as a Consequence of the Conflict of Nationality Laws' (1951) 45(3) ASIL 476; Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (n 3) 157.

<sup>48</sup> This principle has been adopted by immigration States of the New World, because it was seen as a way to solidify the bond between new arrivals and settlement in the place chosen by the parents. Edwards (n 11) 16.

<sup>49</sup> This is the preferred doctrine of many emigration States (mainly European, Asian and Arab States) as a way to retain allegiance of populations that move abroad. van Waas (n 2) 32-33.

<sup>50</sup> *ibid* 33-34.

rules aiming at testing allegiance in new ways (i.e. via language tests and/or financial means).<sup>51</sup> A person can also create a bond with a State through marriage with or adoption by a national and qualify for a citizenship application on this basis.<sup>52</sup>

These modes of nationality acquisition are subject to some exceptions which are considered legitimate exercise of a State's discretion as long as they do not breach the international law principles discussed in the previous section. Compared to *jus sanguinis* and *jus soli* rules, the provisions to qualify for naturalisation remain more untouched by international law and remain more within the discretion of States.<sup>53</sup>

The criteria for the attribution of nationality are usually outlined in the State's legal instruments which make provisions for nationality. Those that do not receive nationality under the operation of any State's law are stateless persons.<sup>54</sup>

## 6. Common causes of statelessness

As a consequence of the autonomy of States to adopt their own nationality regulations, statelessness may be the *intentional effect* of conflict between domestic legislation of two or more States. For instance, a child born to parents who are nationals of a State that grants nationality *jus soli* on the territory of a State that grants nationality *jus sanguinis* fails to acquire any nationality at birth.

Statelessness may also be the *direct result of a State's policy*. For example, statelessness can be the effect of gender-based discrimination when citizenship laws are based exclusively on patrilineal descent and a child is born out of wedlock or the mother is married to a non-national who cannot transmit his nationality.<sup>55</sup> This is the case of children born to Jordanian mothers and non-citizen Palestinian fathers.<sup>56</sup>

Furthermore, nationality can be *lost, forfeited or renounced*.<sup>57</sup> One common cause of loss of nationality is the prolonged residence of an individual in a foreign State, seen as allowing the connection with the State to lapse and forfeiting the legal bond. Some States consider such a situation as a form of voluntary renunciation of nationality rather than the withdrawal of citizenship.<sup>58</sup> As the revocation of nationality for those taking up residence abroad does not coincide with taking up a new nationality, statelessness may be a consequence. Closely related to

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<sup>51</sup> Edwards, 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects' (n 11) 19; see ch 7, s 5.

<sup>52</sup> van Waas (n 2) 34.

<sup>53</sup> Edwards, 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects' (n 11) 18.

<sup>54</sup> Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (n 3) 156, 171.

<sup>55</sup> Alice Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women' (August 2009) UNHCR, Legal and Protection Policy Series, POLAS/2009/02, 36-40.

<sup>56</sup> Brad K Blitz, 'Statelessness, Protection and Equality' (September 2009) Forced Migration Policy Briefing 3, Oxford Refugee Studies Centre 14.

<sup>57</sup> Sometimes it is not possible to draw a clear line differentiating between these situations. van Waas (n 2) 78-81.

<sup>58</sup> In some instances, this loss of nationality can be prevented by registering the intention to remain a national at the local embassy. However, individuals are not always informed of this procedural protection. van Waas (n 2) 404.

loss of nationality is deprivation of nationality<sup>59</sup>, which occurs as a punitive measure for engaging in acts that are considered disloyal to the State (for instance, serving in the military forces of a foreign State, committing acts which are in contravention with vital interests of the State, a prison sentence within a certain period after naturalisation).<sup>60</sup> Deprivation of nationality can also occur through denaturalisation, when nationality was acquired by fraud.

Moreover, a person can be deprived of citizenship *through mass denationalisation by decree*, usually connected to discriminatory policies targeted towards a particular group. The Nuremberg Laws, which stripped Jews in Germany and Austria of their citizenship, are among the most famous. Another example is the 1962 Syrian decree that withdrew citizenship to Syrian Kurds.<sup>61</sup>

*State succession*<sup>62</sup> is the most frequent and serious source of statelessness when the issue is not properly and comprehensively addressed, the policies of the States concerned are not harmonised, or the exclusion of particular population groups from the grant of nationality is due to discriminatory regulations.<sup>63</sup>

*Deficient civil registration systems*, in particular with regard to the registration of births and marriages, may also cause statelessness. A child may be born with the right to a nationality but may be unable to prove it, because he was not registered or issued with a birth certificate.<sup>64</sup> It is estimated that lack of access to birth registration affects about 51 million newborn babies annually. The most affected regions are South-Asia and Sub-Saharan Africa where more than a half of all births are unregistered.<sup>65</sup> A family bond newly created through marriage may have an impact on both the spouse's and children's nationality, and the non-registration or lack of marriage certificate may be a source of statelessness.<sup>66</sup>

*Modern migration patterns*, which bring about a large intermingling of persons across

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<sup>59</sup> It may be difficult to draw the line between loss and deprivation of nationality as the terms are sometimes used interchangeably. One possible means of differentiation is to refer to loss of nationality in cases of automatic withdrawal of nationality *ex lege*, and to deprivation of nationality when it occurs at the initiative of the State party according to the law. van Waas (n 2) 34.

<sup>60</sup> *ibid* 34.

<sup>61</sup> As of January 2006, it was estimated that as many as 300,000 Kurds had been rendered stateless. *ibid* 99.

<sup>62</sup> State succession describes the transfer of territory or sovereignty. It has been defined as 'the replacement of one State by another in the responsibility for the international relations of territory'. Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3 art 2; Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession [2006] ETS No 200 art 1.

<sup>63</sup> For example, in the early 1990s, the dissolution of the Soviet Union and the Yugoslav Federation left hundreds of thousands stateless. van Waas (n 2) 121-30.

<sup>64</sup> The causes for non-registration may be due to parental inaction or governmental practices. Usually, the importance of birth registration is underestimated in face of problems that are more immediate and tangible. For instance, this is the case of societies facing severe economic difficulties, and States at war. Birth registration may be seen as a mere legal formality, with little relevance for the development of the child, including access to health care and education services. The registration procedure itself may be too complex and bureaucratic, or the legislative framework inadequate or even non-existent. In many States, it may be too costly for parents as they may have to pay for registration and/or the issuing of a certificate. Parents may also have to travel to the nearest registration office from a remote area. UNICEF 'Birth Registration: Right from the Start' (vol 9, March 2002). Birth registration of persons belonging to national minorities, indigenous groups, migrants or displaced communities is the most troublesome. van Waas (n 2) 154.

<sup>65</sup> These statistics refer to the period between 2000 and 2007. Plan International, 'Facts and Figures' <<http://plan-international.org/birthregistration/the-campaign/facts-and-figures>> accessed 3 September 2011.

<sup>66</sup> Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women' (n 55) 41.

borders, exacerbate the above causes of statelessness.<sup>67</sup> Migrants that are particularly vulnerable to statelessness are irregular migrants, victims of trafficking<sup>68</sup>, refugees, and displaced persons<sup>69</sup>. These groups of migrants have in common that they are often in breach of immigration laws and are generally unwanted. They raise policy questions on migration management and control. They also raise questions on the attribution of nationality and coordination of citizenship laws. For instance, they make the view that ties with a State for having lived there most of the time and shared a common national identity as grounds to obtain citizenship losing importance.<sup>70</sup>

## 7. Irregular migration as a cause of statelessness

The status of irregular migrants, including refugees, victims of trafficking and displaced persons, can have a detrimental impact on the enjoyment of a nationality.<sup>71</sup> For example, as explained in the above section, migrants may lose their citizenship through revocation of nationality due to long-term residence abroad or for failure to comply with some formal requirements to acquire a new nationality after State succession that took place during their absence. The typical situation that irregular migrants experience is *lack of access to an alternative nationality*, as almost all States require a person to have had a minimum period of lawful residence in their territory as a prerequisite.<sup>72</sup> The children of irregular migrants may also be ineligible for *jus soli* citizenship

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<sup>67</sup> van Waas (n 2) 36.

<sup>68</sup> Article 3(a) of the Anti-Trafficking Protocol defines Trafficking in Persons as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Anti-Trafficking Protocol).

<sup>69</sup> According to paragraph 2 of the Introduction of Guiding Principles on Internal Displacement, internally displaced persons are

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 generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

UNESC 'Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.2, para 2.

<sup>70</sup> van Waas (n 2) 163-64.

<sup>71</sup> *ibid* 167-71.

<sup>72</sup> *ibid* 167-71. An exception to the general rule that requires lawful residency in the territory of a State before applying for an alternative nationality is the Israeli Law of Return (1950). This law grants every Jew, wherever they may be, the right to go to Israel as an *oleh* (a Jew immigrating to Israel) and become an Israeli citizen. Israeli citizenship becomes effective on the day of arrival in the State or of receipt of an *oleh's* certificate, whichever is later. Israel Ministry of Foreign Affairs, 'Acquisition of Israeli Nationality' (20 August 2011) <[http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2001/8/Acquisition%20of%20Israeli%20Nationality](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/8/Acquisition%20of%20Israeli%20Nationality)> accessed 28 October 2011.



when one of the additional requirements is that their parents have lawful immigration status.<sup>73</sup> These children may inherit their parents' immigration status and rely only on the State of their parents' nationality to obtain *jus sanguinis* nationality. This may create statelessness when there are limitations by law on the transmission of nationality.<sup>74</sup> Irregular immigration status may also have an effect on registering a child's birth or obtaining his birth certificate. On one side, parents may be scared about exposing themselves to the authorities of the State of residence. For example, in Germany the registry offices have to forward relevant data on foreign residents to the immigration authorities.<sup>75</sup> On the other side, the State of residence may not even allow the birth registration, either by specifically prohibiting it or by requesting too burdensome formalities.<sup>76</sup>

In States with no asylum law or other specific protection provisions, victims of trafficking and refugees are treated as irregular migrants.<sup>77</sup> In others, their presence may be tolerated for humanitarian reasons, but no legal status is granted.<sup>78</sup> Even in States with asylum laws, for victims of trafficking there is less certainty to obtain protection than for refugees.<sup>79</sup> When these vulnerable migrants obtain lawful stay, the status acquired may not lead to eligibility to apply for the nationality of the host State. Today there is a preference to grant refugees and victims of trafficking with temporary protection, which does not provide a path to citizenship.<sup>80</sup> For instance, the European Union's minimum requirements for Member States in this area provide that they must offer to refugees a three-year-period of temporary protection, which can be extended.<sup>81</sup> Children of refugees and the internally displaced are particularly likely to encounter problems with birth registration as host States are often unwilling to facilitate birth registration and even more reluctant to grant nationality to refugee children born on their soil. For example, children born in Iran to the millions of Afghans who fled their country during the Soviet occupation have not been registered in their host State. The subsequent civil war in Afghanistan exacerbated this situation.<sup>82</sup>

Being undocumented does not mean being stateless. Yet, the lack of personal documents

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<sup>73</sup> This is the case of the United Kingdom. UKBA, 'If you Were Born in the UK or a Qualifying Territory' <<http://www.ukba.homeoffice.gov.uk/britishcitizenship/othenationality/Britishcitizenship/borninukorqualifyingterritory/>> accessed 28 October 2011; Maarten P Vink and Gerard-René de Groot, 'Birthright Citizenship: Trends and Regulations in Europe' (EURO Citizenship Observatory 2010). Other States, such as the United States, grant *jus soli* citizenship regardless of the parents' immigration status. U.S. Citizenship and Immigration Services, 'U.S. Citizenship' <<http://www.uscis.gov/us-citizenship>> accessed 4 September 2014.

<sup>74</sup> van Waas(n 2) 170; Blitz (n 56) 14.

<sup>75</sup> Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act) of 20 June 2002 (official tr) art 87(2).

<sup>76</sup> van Waas (n 2) 153-57.

<sup>77</sup> In particular, this occurs in numerous Asian and Middle Eastern States that are not parties to the 1951 Convention Relating to the Status of Refugees. UNHCR, 'State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol' (2011) <<http://www.unhcr.org/3b73b0d63.html>> accessed 6 September 2011.

<sup>78</sup> Some States, such as Syria, Pakistan and Jordan, which have not signed the 1951 Convention Relating to the Status of Refugees, temporarily tolerate refugees as long as the international community provides humanitarian assistance. See UNHCR, 'Country Operations Plans' <<http://www.unhcr.org/pages/49e456f96.html>> accessed 6 September 2011.

<sup>79</sup> Very few States have specific protection systems for victims of trafficking.

<sup>80</sup> Matthew E Price, *Rethinking Asylum. History, Purpose, and Limits* (CUP 2009) 165-69.

<sup>81</sup> Council Directive (EC) 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (Qualification Directive) art 24.

<sup>82</sup> UNICEF (n 64) 11.

may create situations of statelessness. For instance it may be impossible to claim nationality *jus sanguinis* when the parents are unable to prove their nationality.<sup>83</sup> Displaced persons, refugees and victims of trafficking are particularly subject to losing their personal documentation during their journeys. Some of them may not have had time to take their documents prior to the flight, or may have destroyed them in the hope not to be sent back to the State of origin. Smugglers may take their documents.<sup>84</sup> In the event of massive refugee flows, documents and civil records may be destroyed, making it impossible to obtain proof of nationality. It may become extremely difficult to obtain documents from abroad or secondary proof of nationality, especially after having left the State of birth or last residence for many years.<sup>85</sup> It should be noted that in some cases, when stateless persons leave their usual place of residence to find protection, displacement may not be the cause but the consequence of statelessness.<sup>86</sup>

## 8. Magnitude of statelessness worldwide

Statistics on statelessness are incomplete and unreliable because this population is often out of reach. Moreover, there is little official information recorded.<sup>87</sup> There is also a lack of consensus on whom to include when counting stateless persons. While the debate on the definition of statelessness will be discussed further in chapter 6 it is worth mentioning that it is generally accepted that those who are not considered as nationals by any state under its laws (*de jure* stateless) should be counted. However, there is disagreement on whether many millions of people who have not been formally denied a nationality but who are unable to prove it, or despite documentation do not effectively enjoy many human rights that other citizens enjoy (*de facto* stateless) should be included.<sup>88</sup> Counting *de facto* stateless is even more difficult than counting *de jure* stateless.<sup>89</sup>

According to the UNHCR *de jure* statelessness affects approximately 12 million people worldwide.<sup>90</sup> Of those stateless, 50 per cent are women. However, informal statistics indicate that in those States that operate discriminatory nationality laws, women make up between 51-78 per cent of the stateless population.<sup>91</sup>

Statelessness is particularly acute in South East Asia, Central Asia, Eastern Europe, the Middle East and various States in Africa. Latin America has the lowest incidence of people with no

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<sup>83</sup> van Waas (n 2) 178-81.

<sup>84</sup> Weissbrodt and Collins (n 7) 263-64.

<sup>85</sup> van Waas (n 2) 180-81.

<sup>86</sup> *ibid* 247.

<sup>87</sup> Carol Sawyer and Brad K Blitz (eds), *Statelessness in the European Union. Displaced, Undocumented, Unwanted* (CUP 2011) 141.

<sup>88</sup> The definition of statelessness is considered in depth in chapters 3 and 6. For commentators that have addressed the issue, see eg Carol A Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7(2) *IJRL* 232-33; van Waas (n 2) 19-27; Sawyer and Blitz (eds), *Statelessness in the European Union. Displaced, Undocumented, Unwanted* (n 87) 281-83.

<sup>89</sup> A discussion on the distinction between *de facto* and *de jure* statelessness can be found in chapters 3 and 6.

<sup>90</sup> UNHCR, 'Searching for Citizenship' <<http://www.unhcr.org/pages/49c3646c155.html>> accessed 7 September 2011.

<sup>91</sup> Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women' (n 55) 39.

nationality because most of the States of that region grant citizenship according to the *jus soli* principle. The States with the greatest numbers of stateless people, for which estimates are known, are Estonia, Iraq, Kenya, Latvia, Myanmar, Nepal, Syria and Thailand.<sup>92</sup>

## 9. Magnitude and causes of statelessness in Europe

In Europe statelessness affects as many as 679,000 persons. Of them, the Roma and are the largest community of concern.<sup>93</sup> The other most numerous group is that of Palestinians. The majority of the 200,000 Palestinians in Europe are stateless holders of refugee travel documents. There is no clear legal analysis on the status of stateless Palestinians in Europe who are not refugees. They have difficulty applying for asylum and many remain without legal status.<sup>94</sup>

In the last two decades, the former Yugoslavia and former Soviet Union geo-political changes, migration, and discriminatory policies towards the Roma population have been the main causes of statelessness in Europe.<sup>95</sup>

Specifically, State succession in the former Yugoslavia and Soviet Union and the determination of nationality status within States emerging from dissolution impacted not only the States concerned, but also those to which individuals traveled or with which had links. While most cases of statelessness have been resolved in these regions, tens of thousands of people still remain without a nationality or at risk of becoming stateless.<sup>96</sup>

Large numbers of residents, including children, remain non-citizens in Latvia and Estonia.<sup>97</sup> In Slovenia several thousand persons, among them many Roma, became victims of the 1992 erasure of non-Slovene residents from the Register of Permanent Residents.<sup>98</sup> Many of them had moved from other parts of Yugoslavia before the dissolution of the Federation, and had permanent residency in Slovenia. They had missed the prescribed six-month period to apply for Slovenian citizenship for various reasons and remained stateless. For example those born in Slovenia did not know that they had to apply, as they thought that they were already Slovenian citizens. Others

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<sup>92</sup> UNHCR, 'Searching for Citizenship' (n 90).

<sup>93</sup> The International Observatory on Statelessness, 'Europe Overview' <<http://www.nationalityforall.org/europe>> accessed 8 September 2011. The Roma population in Europe is estimated to be of eight million. Maureen Lynch, 'Lives on Hold: the Human Cost of Statelessness' (Refugees International 2005) 40; UNHCR, 'Global Trends 2012: Persons under UNHCR's Statelessness Mandate (Table 7)' <[http://www.unhcr.org/globaltrends/2012GlobalTrends\\_0913.zip](http://www.unhcr.org/globaltrends/2012GlobalTrends_0913.zip)> accessed 20 February 2015. It should be noted that this estimate refers to stateless persons in the States of the Council of Europe. In the States of the European Union, stateless persons are estimated to be about 400,000. *ibid.*

<sup>94</sup> Lynch (n 93).

<sup>95</sup> Information on the number of Roma residents in each State and how many of them are stateless varies. Katherine Southwick and Maureen Lynch, 'Nationality Rights for All. A Progress Report and Global Survey on Statelessness' (Refugee International 2009); Carol Sawyer and Brad K Blitz, 'Statelessness in the European Union' in Sawyer and Blitz (n 87) 6.

<sup>96</sup> UNHCR, 'UNHCR Launches Campaign to Combat Statelessness' (25 August 2011) <<http://www.unhcr-centraleurope.org/en/news/2011/unhcr-launches-campaign-to-combat-statelessness.html>> accessed 7 September 2011.

<sup>97</sup> Yevgeny Kryshkin, 'Latvia and Estonia Discriminate against Non-Citizens' *The Voice of Russia* (26 February 2010) <<http://english.ruvr.ru/2010/02/26/4852056.html>> accessed 11 October 2011.

<sup>98</sup> Commissioner for Human Rights, Council of Europe, 'Many Roma in Europe are Stateless and Live Outside Social Protection' (6 July 2009) <<http://www.unhcr.org/refworld/docid/4a7023c72.html>> accessed 11 October 2011.

applied for citizenship but they were rejected on security grounds.<sup>99</sup> Despite the Slovenia's parliament passed a law that gave permanent resident status to thousands of the 'erased' in 2010, many are still in the process of becoming nationals.<sup>100</sup> Croatia and 'the former Yugoslav Republic of Macedonia' also adopted restrictive laws, which made access to nationality very difficult. This hit Roma people in particular. The Kosovo conflict led to a large displacement of Roma people primarily to Serbia, Bosnia and Herzegovina, Montenegro and 'the former Yugoslav Republic of Macedonia' but also to other States outside the region. One consequence was that those who had migrated to other parts of Europe have remained in limbo: they have not been accorded a nationality either by their new State of residence<sup>101</sup> or by the new States which had emerged in the areas where they had previously lived.

The de-federation and division of Czechoslovakia in 1992 also left thousands of Roma in a precarious situation as their citizenship was challenged and questioned by both successor states (the intention was that Roma should move to Slovakia).<sup>102</sup> The discriminatory law that was adopted was, however, amended after interventions from the Council of Europe and the international community in 1999. Thereby the main part, though not all, of the problem was finally resolved.<sup>103</sup>

Besides geo-political changes, modern migration patterns, as explained in the former section, have raised statelessness issues in Europe.<sup>104</sup> Moreover, many EU States are now increasingly required to make determinations on nationality – or statelessness – of persons on their territory, often within the context of asylum cases and expulsions.<sup>105</sup> Very few States have legislated formal procedures to this end, including integrating determination of statelessness into existing administrative procedures. A single case may thus reach different outcomes depending on where the claim for statelessness is lodged, but not much is known on such variations, especially in States that have not adopted specific laws.

## **10. The international community's response to statelessness**

After the creation of the United Nations in 1945, the most important efforts in the area of statelessness have been the adoption of the 1954 Convention relating to the Status of Stateless

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<sup>99</sup> European Roma Centre, 'The Erasure: Administrative Ethnic Cleansing in Slovenia' (29 October 2003) <<http://www.errc.org/cikk.php?cikk=1109>> accessed 11 October 2011.

<sup>100</sup> Open Society Foundations, 'Building Open Society in the Balkans (1991–2011)' (2011) <[http://www.soros.org/resources/articles\\_publications/publications/open-society-western-balkans-20111004/open-society-western-balkans-20111004.pdf](http://www.soros.org/resources/articles_publications/publications/open-society-western-balkans-20111004/open-society-western-balkans-20111004.pdf)> accessed 23 October 2011.

<sup>101</sup> For instance, a recent report by the UNICEF indicates that in 2010, nearly 10,000 Roma were legally obliged to leave Germany and go to Kosovo. Nearly 40 percent of them were stateless, and as many as 50 percent were children. Almost two-thirds of those children were born and educated in Germany. In January 2010 the Federal Government advised that the number of deportation orders amounted to 667. Of these, 245 people, or 37 percent of the total, were registered as living in a family. UNICEF, 'Integration Subject to Conditions' (2010) <[http://www.unicef.org/kosovo/RAEstudy\\_eng\\_web.pdf](http://www.unicef.org/kosovo/RAEstudy_eng_web.pdf)> accessed 5 November 2011; Deutsche Welle, 'Amnesty Report Condemns EU Roma Deportations' (28 September 2010) <<http://www.dw-world.de/dw/article/0,,6051742,00.html>> accessed 5 November 2011.

<sup>102</sup> Blitz, 'Statelessness, Protection and Equality' (n 56) 13.

<sup>103</sup> Commissioner for Human Rights, Council of Europe, 'States Should Put an End to Roma Statelessness' (6 July 2009) <<http://www.egovmonitor.com/node/26092/print>> accessed 23 October 2011.

<sup>104</sup> Sawyer and Blitz, 'Statelessness in the European Union' in Sawyer and Blitz (n 87) 6.

<sup>105</sup> UNHCR 'Statelessness Determination Procedures and the Status of Stateless Persons ("Geneva Conclusions")' (December 2010).

Persons (the ‘1954 Convention’)<sup>106</sup> and the 1961 Convention on the Reduction of Statelessness (the ‘1961 Convention’). The first ensures stateless persons fundamental rights and will be discussed in detail in chapter 3. The second focuses on decreasing statelessness.<sup>107</sup> This was drafted with the aim of allowing persons that would otherwise be stateless to acquire a nationality. In particular, the 1961 Convention provides norms to resolve statelessness when it is created at birth by conflicts of laws.<sup>108</sup> Additionally, it provides that contracting States must adopt provisions to ensure that a person cannot lose his citizenship without gaining another.<sup>109</sup>

In the first half-century following their adoption, the Statelessness Conventions were ratified by a small number of States as priority was given to issues of refugee flows over statelessness.<sup>110</sup> In part, this was due to nationality still being largely regarded as a sovereign matter and statelessness as an internal rather than international problem, blocking discussion at any level.<sup>111</sup> It was not until the early 1990s that the Statelessness Conventions saw a resurgence of interest. One factor was the disintegration of the former Soviet Union and Republic of Yugoslavia, which created new grave situations of statelessness in Europe and frictions between the States concerned. Another factor was the 2004 enlargement of the EU, when Baltic States with a considerable number of stateless became Members of the Union.<sup>112</sup> Finally, new nationality disputes emerged in the context of a growing number of elections held in African States.<sup>113</sup> Despite an increase rate of accessions, the Statelessness Conventions’ actual implementation still remains limited.<sup>114</sup>

As of the 5th of September 2014, 82 States were parties to the 1954 Convention,<sup>115</sup> and 60 were parties to the 1961 Convention.<sup>116</sup> Moreover, half of the States parties to the 1954 Convention have exercised their right to submit either a declaration or reservations to its text upon ratification.<sup>117</sup>

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<sup>106</sup> Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (Statelessness Convention) (hereafter the ‘1954 Convention’) art 1(1).

<sup>107</sup> Weissbrodt and Collins (n 7) 247.

<sup>108</sup> Convention on the Reduction of Statelessness (n 41) arts 1-4; Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (n 88) 257.

<sup>109</sup> Convention on the Reduction of Statelessness (n 41) arts 5-8; Weissbrodt and Collins (n 7) 247.

<sup>110</sup> By 1980, the Refugee Convention had 76 signatory States, whereas the 1954 Convention had 31 and the 1961 Convention only 9. van Waas (n 2) 17.

<sup>111</sup> *ibid* 15-19.

<sup>112</sup> Tamás Molnár, ‘Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order’ (2010) 51(4) *Acta Juridica Hungarica* 293.

<sup>113</sup> van Waas (n 2) 15-19.

<sup>114</sup> van Waas (n 2) 19; Chris Nash, ‘Networking for Change. The Development of the European Network on Statelessness and Perspectives on Developing other Regional and Global Statelessness Coalitions’ (2014) 19(1-2) *TLR* 212-13; UNHCR ‘Preventing and Reducing Statelessness: the 1961 Convention on the Reduction of Statelessness’ (2014); UNHCR, ‘Key for Protecting the Stateless’ <<http://www.unhcr.org/pages/4a2535c3.d.html>> accessed 16 October 2011.

<sup>115</sup> Within Europe, Poland, Malta, Estonia, and Cyprus are not parties to the Convention. UNTC, ‘Convention relating to the Status of Stateless Persons’ <[http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTS\\_ONLINE&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&lang=en](http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTS_ONLINE&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&lang=en)> accessed 9 July 2012.

<sup>116</sup> UNTC, ‘Convention on the Reduction of Statelessness. Signatory States, Declarations and Reservations’ (2010) <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-4&chapter=5&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en)> accessed 9 July 2012; UNTC, ‘Convention relating to the Status of Stateless Persons’ (n 115); UNHCR, ‘2011 Regional Operations Profile – Europe’ <<http://www.unhcr.org/pages/4a02d9346.html>> accessed 16 October 2011.

<sup>117</sup> However reservations are not permitted to art 1 (definition), art 3 (non-discrimination), art 4 (religion),

## 11. The UNHCR's role and activities concerning statelessness

The United Nations Commissioner for Refugees (UNHCR) is the United Nations (UN) agency mandated for stateless persons. In 1974, in readiness for the entry into force of the 1961 Convention in 1975, the UN General Assembly requested the UNHCR to assume temporarily the responsibilities stated in article 11 of the 1961 Convention, of a body to which 'a person claiming the benefit of the Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.'<sup>118</sup> In 1976, such a role was extended indefinitely.<sup>119</sup> The UNHCR's responsibility for stateless persons was however overlooked for a long time, as refugee and internal displacement issues received most of the attention.<sup>120</sup> Progressively, though, the UNHCR's implementation of its mandate on statelessness has expanded. In 1995, the UNHCR's Executive Committee requested the UNHCR to promote accession to the 1954 and 1961 Conventions and to provide technical and advisory services regarding the implementation of nationality legislation to interested States.<sup>121</sup> This was based on the consideration that several key provisions of the two Conventions are worded in a particularly complex manner and had been interpreted differently.<sup>122</sup>

In the last two decades, the UNHCR's policy and activities in the field of statelessness have expanded to the point where it stands in the UNHCR's Executive Committee's Conclusion No. 106 of 2006 on 'Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons'.<sup>123</sup> This was a turning point, as the Conclusion provided details on how the UNHCR had to carry out its mandate. Most of the Conclusion is focused on operational responses to statelessness, which include studies in regions where there are information gaps, support to States to raise awareness of citizenship campaigns, and establishment of programs to protect stateless persons.<sup>124</sup> Recently, the UNHCR has even stated that it may conduct statelessness determination

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art 16(1) (access to courts), and arts 33-42 (final causes). 1954 Convention (n 106).

<sup>118</sup> UNGA Res 3274(XXIX) Question of the establishment, in accordance with the Convention of Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply (10 December 1974) 29th Plenary Meeting UN Doc A/RES/3274(XXIX); UNHCR, 'Stateless – UNHCR Actions' <<http://www.unhcr.org/pages/49c3646c16a.html>> accessed 10 September 2011. It should be noted that during the preparatory works, States expressed concerns regarding article 11 as the specific functions of the agency were not defined. However, it was undisputed that the agency had to dialogate with State parties to ensure that their domestic legislation would comply with the 1961 Convention. In addition, the agency could assist individuals that have been wrongfully denied a nationality. Batchelor, 'Stateless Persons: Some Gaps in International Protection' (n 88) 257-58.

<sup>119</sup> UNGA Res 31/36 Question of the establishment, in accordance with the Convention of Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply (30 November 1976) 83rd Plenary Meeting UN Doc A/31/342; Carol A Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (2004) 22(2) *Refuge* 35.

<sup>120</sup> Mark Manly, 'UNHCR's Mandate and Activities' in Alice Edward and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 88, 92.

<sup>121</sup> UNHCR 'Prevention and Reduction of Statelessness and Protection of Stateless Persons' (20 October 2005) EXCOM Conclusions UN Doc No 78 (XLVI) - 1995; see also UNGA Res 50/152 (9 February 1996) 50th session UN Doc A/RES/50/152; van Waas (n 2) 418-19; UNHCR, 'Stateless – UNHCR' (n 118).

<sup>122</sup> Manly (n 120) 88, 95.

<sup>123</sup> UNHCR 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons' (6 October 2006) UN Doc No. 106 (LVII) – 2006.

<sup>124</sup> Manly (n 120) 88, 90. Identification involves gathering information on statelessness, its scope, causes and consequences. Prevention means addressing the causes of statelessness and promote accession to the 1961

itself for both individuals and/or groups and, in a very few cases, resettle stateless persons.<sup>125</sup>

In the last five years, statelessness has become one of the UNHCR's core budget activities.<sup>126</sup> The UNHCR is improving awareness and interest in statelessness, cooperating with an increased number of actors, and prioritizing the improvement of statelessness procedures.<sup>127</sup> Importantly, in 2012, the UNHCR published Guidelines concerned with the definition of a stateless person,<sup>128</sup> procedures for determination of statelessness<sup>129</sup> and the status of stateless persons under national law.<sup>130</sup> These Guidelines were the result of a number of expert meetings which were attended by the most known jurists in the field. Their completeness made them the first comprehensive work in which several issues related to statelessness were coordinated and dealt with. They propose reasonable solutions aimed at protecting stateless persons, but at the same time they take into consideration States' interests.<sup>131</sup> In 2014, the UNHCR adopted the *Handbook on the Protection of Stateless Persons* which replaced the Guidelines.<sup>132</sup> The text of the Handbook replicates the Guidelines' content with only minimal changes, principally to address minor gaps identified since publication of the Guidelines and to update references to other UNHCR publications.

In summary, the UNHCR's mandate and activities in the area of statelessness have continued to evolve and now have become a central part of what it does. Particularly significant has been the publication of the Guidelines and the Handbook as far as the development of the 1954 Convention's standards.

## 12. Institutional responses to statelessness in Europe

For several decades the Council of Europe<sup>133</sup> has played an active role in addressing statelessness.

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Convention. Reduction refers to supporting legislative changes and improvements to procedures to allow stateless people to acquire a nationality and help individuals take advantage of these changes. Protection involves intervening to help stateless people to exercise their rights and promote accession to the 1954 Convention relating to the Status of Stateless Persons. UNHCR 'Action to Address Statelessness. A Strategy Note' (March 2010) 15-16. See also UNHCR 'Conclusion on the Return of Persons Found not to be in Need of International Protection' (10 October 2003) EXCOM Conclusions UN Doc No. 95 (LIV)-2003, para (v). As of July 2012, UNHCR has resettled about a dozen of stateless persons. UNHCR 'Report on the Annual Consultations with Non-Governmental Organizations' (Geneva 2012).

<sup>125</sup> UNHCR 'Action to Address Statelessness' (n 124) 15-16.

<sup>126</sup> In 2010, UNHCR allocated US\$38.5 million to its statelessness operations, approximately three times the expenditure in 2009. Brad K Blitz, 'Policy Responses and Global Discourses on the Rights of Non-Citizens and Stateless People' in Sawyer and Blitz (n 87) 118-21. The budget for 2011 further increased to USD 63 million. UNGA 'Note on International Protection: Addendum, Note on Statelessness. Report of the High Commissioner' Executive Committee of the High Commissioner's Programme, 62nd session (2011) UN Doc A/AC/96/1098/Add.1.

<sup>127</sup> UNGA 'Note on International Protection' (n 126).

<sup>128</sup> UNHCR 'Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons' (20 February 2012) UN Doc HCR/GS/12/01.

<sup>129</sup> UNHCR 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person' (5 April 2012) UN Doc HCR/GS/12/02.

<sup>130</sup> UNHCR 'Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level' (17 July 2012) UN Doc HCR/GS/12/03.

<sup>131</sup> Giulia Perin, 'Lacune Normative ad Alto Costo Umano: l'Apolidia in Italia' (2012) 3 DIC 70, 83-84.

<sup>132</sup> UNHCR 'Handbook' (n 12).

<sup>133</sup> The Council of Europe, based in Strasbourg, was founded on 5 May 1949 by 10 States. Now it has 47 Member States. Its mission is to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. See Council of Europe, 'The Council of Europe in Brief - Who We Are' <<http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en>> accessed 12 October 2011.

The Council of Europe adopted two treaties to approach problems that followed State dissolutions and successions: the 1997 Convention on Nationality<sup>134</sup> and the 2006 Convention on the Avoidance of Statelessness in relation to State Succession.<sup>135</sup> Both treaties contain general principles, rules and procedures for the effective enjoyment of a nationality in Europe.<sup>136</sup> So far only 20 Council of Europe Member States have ratified the 1997 Convention on Nationality. Moreover, only six States have ratified the 2006 Convention on the Avoidance of Statelessness in relation to State Succession.<sup>137</sup> In the area of consular and diplomatic protection, the 1967 Council of Europe Convention on Consular Functions represents a positive development. Its article 46(1) extends to a consular officer of the State where a stateless person has his habitual residence the possibility to provide protection. This Convention entered into force on 11 June 2011, after the minimum number of five ratifications was reached.<sup>138</sup>

In 2009, the Council of Europe adopted Recommendation CM/Rec (2009)13 on the nationality of children.<sup>139</sup> The recommendation contains measures to reduce statelessness of children, including provisions for children born on the territory of a State to foreign parents, and registration at birth even if their parents are irregular migrants. The Council of Europe has also made a number of public statements to raise awareness on statelessness in Europe.<sup>140</sup>

As far as the European Union, nationality matters remain within the jurisdiction of the Member States<sup>141</sup> and the majority of commentators argue that there is no legal basis in the

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<sup>134</sup> European Convention on Nationality [1997] ETS No 166.

<sup>135</sup> Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (n 62).

<sup>136</sup> The concept of facilitated naturalisation for the stateless is also included in the Council of Europe's Committee of Ministers' recommendation on the 'Avoidance and Reduction of Statelessness'. Council of Europe, Committee of Ministers, Recommendation No. R (99) 18 of the Committee of Ministers to Member States on the avoidance and reduction of statelessness [1999] No R (99) 18, s IIB. In this recommendation, the cost and complexity of procedures, the required period of lawful residence and knowledge of the official language are addressed. However, all these provisions require stateless persons to acquire lawful residency, which is neither guaranteed under the 1954 Convention nor under other human rights instruments. van Waas (n 2) 370.

<sup>137</sup> Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (n 62); Commissioner for Human Rights, Council of Europe, 'No One Should Have to be Stateless in Today's Europe' (9 June 2008) <[http://www.coe.int/t/commissioner/Viewpoints/080609\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/080609_en.asp)> accessed 11 October 2011; Commissioner for Human Rights, Council of Europe, 'The Rights of Stateless Persons must be Protected' (17 December 2010) <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1722017>> accessed 11 October 2011.

<sup>138</sup> The Convention has been ratified by Georgia, Greece, Norway, Portugal and Sweden. Council of Europe, Treaty Office, European Convention on Consular Functions [1967] ETS No 061, Status of 29/9/2014 <<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=061&CM=8&DF=29/09/2014&CL=ENG>> accessed 29 September 2014; Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (n 112) 296-97.

<sup>139</sup> Council of Europe, Committee of Ministers, Recommendation CM/Rec(2009)13 of the Committee of Ministers to Member States on the Nationality of Children [2009] CM/Rec(2009)13.

<sup>140</sup> Commissioner for Human Rights, Council of Europe, 'No One Should Have to be Stateless in Today's Europe' (n 137); Thomas Hammarberg, Commissioner for Human Rights, Council of Europe, 'Many Roma in Europe are Stateless and Live Outside Social Protection' (6 July 2009) <[http://www.coe.int/t/commissioner/viewpoints/090706\\_en.asp](http://www.coe.int/t/commissioner/viewpoints/090706_en.asp)> accessed 11 October 2011; Commissioner for Human Rights, Council of Europe, 'The Rights of Stateless Persons must be Protected' (n 137).

<sup>141</sup> Article 20 of the Treaty on the Function of the European Union (TFEU) provides that 'every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'. The competence to regulate nationality matters has remained within the power of the Member States, which is also explicitly expressed in



founding Treaties for adopting specific legislation focusing specifically on the protection of the stateless.<sup>142</sup>

The Community legislator has addressed statelessness only in an indirect manner, mainly with the emerging *acquis communautaire* in the field of asylum<sup>143</sup> and immigration law, or in connection to fundamental freedoms.<sup>144</sup> Some legal instruments treat stateless persons as third-country nationals (e.g. the EU readmission agreements<sup>145</sup>), and some grant them rights similar to EU citizens (e.g. the EU social security legislation).<sup>146</sup>

Regarding the definition of statelessness, EU law adopts the internationally accepted definition of article 1 of the 1954 Convention.<sup>147</sup> The identification of statelessness and the implementation of the 1954 Convention remain a highly uncoordinated area of immigration law and policy<sup>148</sup>, leaving a stateless person subject to different treatment across the EU. Developments of EU law that should be mentioned, as they have enriched the rights of stateless persons, concern the areas of social security and the right to travel within the territories of the Member States. In

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Declaration no 2 annexed to the Treaty of Maastricht on nationality of a Member State [1992] OJ C191/1; Theodore Konstadinides, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality from the Perspective of EU Citizenship' (2010) 35(3) ELR 401, 413-14.

<sup>142</sup> Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (n 112) 304; Molnár, 'Moving Statelessness Forward on the International Agenda' (2014) 19 (1-2) TLR 198; Gabór Gyulai 'Statelessness in the EU Framework for International Protection' (2012) 14 EJML 284. Of a different opinion is Katja Swider, 'Protection and Identification of Stateless Persons through EU Law' (July 2014) Amsterdam Centre for European Law and Governance Working Paper Series 2014-05, 7. Swider argues that Title V Chapter 2 of the TFEU, which equates stateless individuals with third-country nationals, on which the EU has legislated extensively, provides the basis to establish a common legal framework for the treatment of stateless persons in EU Member States. *ibid* 12.

<sup>143</sup> Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1; Qualification Directive (n 81); Council Directive (EC) 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13; Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

<sup>144</sup> Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (n 112) 300.

<sup>145</sup> Readmission agreements aim to facilitate the forcible return of non-nationals with no legal status to the State they originated from or transited through. Readmission agreements do this by setting forth procedures for the identification and return of persons. Goodwin-Gill and McAdam (n 34) 407-08. Some readmission agreements treat stateless persons as third-country nationals. In this context, 'third-country national' means any person who holds a nationality other than that of the State party to the readmission agreement or one of the Member States. For instance, this is the case of the readmission agreement between the EU and Pakistan. Council Decision (EU) 2010/649 of 7 October 2010 on the conclusion of the Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation [2010] OJ L 287/50. The UNHCR field offices may be involved in the readmission of stateless persons. According to the UNHCR readmission agreements must ensure: respect for human rights during and upon return; issuance of travel documents, identity documents and inclusion in civil registries; recognition of a right to lawful residence. UNHCR 'Action to Address Statelessness' (n 124) 16.

<sup>146</sup> Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (n 112) 293, 304.

<sup>147</sup> See eg Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1, art 1(h); Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (n 112) 300. The definition of stateless person will be further discussed in ch 3 s 3.

<sup>148</sup> Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (n 119); van Waas (n 2) 404.

particular, Regulation (EC) No. 1408/71, implementing article 24(1)-(3) of the 1954 Convention, lays down equal treatment for stateless persons with *residence* within one Member State and nationals of the Member States in social security matters, including maternity and sickness benefits, invalidity benefits, old age benefits, unemployment benefits.<sup>149</sup> As far as the right to travel within the EU, Regulation no. 1932/2006/EC<sup>150</sup> introduces a compulsory visa exemption for stateless persons recognized by other EU Member States when they want to travel to other Member States for short-term stay.<sup>151</sup>

Concerning the European Parliament's activities in the area of statelessness, it has recently been raising awareness and putting the issue on its political agenda.<sup>152</sup> In 2009, it adopted a non-legislative resolution on the situation of fundamental rights in the EU, which included a recommendation on member States to ratify the 1954 and 1961 Conventions.<sup>153</sup>

Overall, more efforts need to be done at the European level to improve the situation of stateless persons. Although there are some promising political signs, which focus on undertaking the relevant international obligations by all Member States, they show no urgency in setting up a EU-level framework.<sup>154</sup> Taking into consideration that political will does not exist yet in this regard, possible actions for the European Union could involve increasing the visibility of stateless persons in statistics and studies, mainstreaming statelessness in different policies (i.e. non-discrimination, human rights, gender discrimination, asylum, external relations), and raising awareness on different policy levels.<sup>155</sup>

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<sup>149</sup> Council Regulation (EC) 1408/71 on the application of social security schemes (n 147), arts 2-50; Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (n 112) 300. The word 'residence' refers to 'habitual residence'. Council Regulation (EC) 1408/71 on the application of social security schemes (n 147), arts 1(h), 2. Article 11 of the Implementing Regulation provides that where there is a difference of views between two or more Member States about the determination of the residence of a person to whom Regulation No. 1408/71 applies, they shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of the relevant facts, which may include: the duration and continuity of presence on the territory of the Member States concerned; and the person's situation. Should an agreement not be reached, the person's intention, as it appears from such facts and circumstances, especially the reasons that led him to move, shall be considered to be decisive for establishing the actual place of residence. Implementing Regulation (EC) 574/72 [1972] OJ L 74/1; Robin CA White, 'The New European Social Security Regulations in Context' (2010) 17(3) JSSL 144, 150-51. It should be noted that the Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1 replaced Council Regulation (EC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2, but the content remained almost identical. Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (n 112) 300.

<sup>150</sup> Council Regulation (EC) 1932/2006 amending Regulation (EC) 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 [2006] OJ L 405/23.

<sup>151</sup> *ibid* art 1(1)(b). The innovative element of these rules is that they cover all recognised stateless persons, and not only those under the 1954 Convention.

<sup>152</sup> Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (n 112) 300.

<sup>153</sup> European Parliament resolution 14 January 2009 on the situation of fundamental rights in the European Union 2004–2008 (2007/2145(INI)) [2009] P6\_TA(2009)0019 art 50.

<sup>154</sup> Tamás Molnár, 'What Role for the EU in Protecting Stateless People and Avoiding Statelessness? Stocktaking of Current EU Migration Law and New Tendencies' (Presentation at Migration Policy Conference, The Hague, The Netherlands, 10 December 2013).

<sup>155</sup> *ibid*.

### 13. Conclusion

The chapter observed that there is no agreed substantive minimum content of nationality under international law, in part because it is mainly dependent on the domestic conditions and legislations.<sup>156</sup> Generally, problems with the enjoyment of human rights in the State of nationality do not mean that a person is stateless under municipal or international law. However, each State of nationality has (i) a duty to admit his nationals and allow them to reside within its territory, and (ii) a discretionary right to provide diplomatic protection to its own nationals.<sup>157</sup>

It was noted that nationality matters by and large remain within the exclusive jurisdiction of States and international law provides some limited guidance as far as the attribution and deprivation of nationality. In this regard, international law establishes that States cannot arbitrarily deprive an individual of nationality; may not discriminate in matters regarding conferral or deprivation of nationality; and have a general duty to prevent statelessness.

This chapter has also shown that nationality and statelessness are closely linked.<sup>158</sup> For instance, gaps in nationality laws or their discriminatory application can be a cause of statelessness. Additionally, the research briefly looked at the magnitude of statelessness and the international community's efforts for the elimination of statelessness and the protection of stateless persons. It established that statelessness is a concern not only for the individual but also for the States and the international community as it impacts on the enjoyment of several human rights and aspects of life and prevents the integration of people into society. Yet, several issues related to statelessness are not adequately addressed, especially at the European level. Provisions of EU law only provide sporadic rules for the protection of stateless persons.

Finally, this chapter introduced the 1954 Convention as the main treaty dealing with the marginalization of stateless persons by granting them a basic set of rights and recognizing the status of 'stateless person'. The next chapter of this thesis will analyse the origin, scope and content of this Convention. It will explore how it plays an important role in enhancing respect for the human rights of stateless persons.<sup>159</sup> At the same time, it will highlight its weaknesses and focus on issues that were discussed during the preparatory works and still emerge as problematic at the implementation stage.

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<sup>156</sup> Edwards, 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects' (n 11) 42.

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.* 27.

<sup>159</sup> UNHCR (n 12) 9.

## **CHAPTER 3: THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS**

### **1. Introduction**

The 1954 Convention is the main international instrument containing special provisions for the protection of stateless persons and providing them with fundamental rights and freedoms, including documentation, administrative assistance, access to the courts and naturalisation. This chapter analyses the 1954 Convention's historical background, scope, the intricate way in which it attributes and classifies rights, and its key provisions. Particular attention is devoted to the drafting process, which reveals the political compromises that have led to the adoption of the definition of statelessness and other norms, fleshing out problems relating to the identification of statelessness, and a number of weaknesses that impact on the effectiveness of this instrument to the present time. Clarifying the 1954 Convention's scope and content is important in exploring how States implement it within their legal systems and in assessing the gap between international law and national practices.

### **2. History of the 1954 Convention relating to the Status of Stateless Persons**

After World War II, millions of people had become displaced or were living in a territory of a different State from that of birth. Some of them had lost their nationality as a consequence of denationalisation decrees or State succession. The international community was faced with the issue of which rights these persons had, who was responsible for them, and on whom they could rely on for protection. As a consequence, in 1948, the Economic and Social Council (UNESCO) of the newly formed United Nations commissioned a study on the situation of stateless persons and what measures might be taken to accord them protection.<sup>1</sup> This resulted in *A Study on Statelessness*, which included both stateless persons<sup>2</sup> and refugees,<sup>3</sup> and divided the analysis between issues of status and elimination of statelessness.<sup>4</sup> Based on this study, the UNESCO established an *Ad Hoc* Committee on Statelessness and Related Problems to determine whether a new international instrument was needed to ensure protection to refugees and stateless persons and, if so, to prepare the draft of a convention.<sup>5</sup> The *Ad Hoc* Committee proposed the text of a draft refugee convention and a protocol on stateless persons. This protocol would have extended the application of a number of provisions of the refugee convention, *mutatis mutandis*, to stateless persons who were not refugees.<sup>6</sup>

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<sup>1</sup> UNESCO Res 116 (VI) (D) (1-2 March 1948) UN Doc E/777.

<sup>2</sup> UNESCO 'A Study of Statelessness' (1 August 1949) UN Doc E/1112; E/1112/Add.1, 7.

<sup>3</sup> UNESCO 'A Study of Statelessness' (n 2) 8.

<sup>4</sup> Such a division remained locked into the form of the 1954 Convention relating to the status of stateless persons and the 1961 Convention on the reduction of statelessness. Carol A Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7(2) IJRL 232, 241-42.

<sup>5</sup> UNESCO Res 248 (IX) B (8 August 1949) 325th Plenary Meeting UN Doc E/OR(IX)/Suppl. No. 1.

<sup>6</sup> UNESCO, UN Ad Hoc Committee on Refugees and Stateless Persons 'Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950' (25 August 1950)

In December 1950, the General Assembly of the United Nations (UNGA) decided to convene a Conference of Plenipotentiaries to complete the draft convention relating to the status of refugees and the draft protocol on stateless persons.<sup>7</sup> In 1951, such a conference adopted only the Convention relating to the Status of Refugees (the Refugee Convention) and referred back to the appropriate organs of the United Nations the draft protocol on statelessness for more detailed study.<sup>8</sup> Consideration of the draft protocol was delayed due to the time pressure as a consequence of the imminent liquidation of the International Refugee Organisation (IRO)<sup>9</sup> and the need to set up an agency dealing specifically with refugees.<sup>10</sup> Moreover, it became obvious that the rights granted to refugees under the Refugee Convention could not be identical to those envisaged for stateless persons as their legal situations were different and a protocol could not easily reflect such differences.<sup>11</sup> In this regard, the Belgian delegate argued that whereas refugees deserved special benefits, 'stateless persons as a class, although there were deserving cases among them, could not be said to merit privileged treatment' compared to that reserved to other aliens.<sup>12</sup> For example, an individual who had been deprived of his nationality as a result of having committed treason should not necessarily be entitled to the special benefits of refugee status. He felt that 'by granting stateless persons the travel document issued to refugees, which was acquiring increased standing and prestige, the value of that document, and thus the interests of refugees themselves, would be jeopardised.'<sup>13</sup> The position of some other Governments (i.e. the Danish, Swedish, Norwegian Governments) was similar to that of the Belgian Government and an agreement on the draft protocol could not be reached at that time.<sup>14</sup>

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UN Doc E/AC.32/8; E/1850. The UNESC revised the draft convention and returned it to the Ad Hoc Committee for further review, before sending it to the General Assembly of the United Nations, UNESC Res 319 B III (XI) (11 August 1950) 11th Session UN Doc E/1818. The International Law Commission's work resulted in the report 'Nationality, Including Statelessness'. Manley O Hudson 'Report on Nationality, Including Statelessness' (21 February 1952) Special Rapporteur Extract from the Yearbook of the International Law Commission: (1952) vol II UN Doc A/CN.4/50; Hugh Massey, 'UNHCR and de Facto Statelessness', Legal and Protection Policy Research Series, LPPR/2010/01 (UNCHR April 2010) 9-11.

<sup>7</sup> UNGA Res 429 (V) Draft Convention relating to the Status of Refugees (14 December 1950) 325th Plenary Meeting UN Doc A/RES/429(V).

<sup>8</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (25 July 1951) 189 UNTS 137. In 1952, the General Assembly asked the Secretary-General to circulate the draft protocol to States for comments on which provisions of the 1951 Refugee Convention they would be prepared to apply to stateless persons. The General Assembly requested the Economic and Social Council to study the comments received and prepare a text that might be opened for signature following the entry into force of the Refugee Convention. UNGA Res 629 (VII) Draft protocol relating to the status of stateless persons (6 November 1952) 391st Plenary Meeting UN Doc A/RES/629(VII).

<sup>9</sup> The International Refugee Organisation was a temporary specialised agency of the United Nations that, between its formal establishment in 1946 and its termination on 15 February 1952, assisted refugees and displaced persons in many States of Europe and Asia who either could not return to their States of origin or were unwilling to return for political reasons. It was succeeded by the Office of the United Nations High Commissioner for Refugees. Constitution of the International Refugee Organisation (adopted 15 December 1946, entry into force 20 August 1948) 18 UNTS 3; UNESC 'A Study of Statelessness' (n 2) 31- 32.

<sup>10</sup> Batchelor, 'Stateless Persons: Some Gaps in International Protection' (n 4) 232, 242-49.

<sup>11</sup> UNGA Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Record of the Thirty-first Meeting' (29 November 1951) UN Doc A/CONF.2/SR.31; Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2009) 225-27.

<sup>12</sup> UNGA Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Record of the Thirty-first Meeting' (n 11) para 2.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid* para 13.

A Second Conference of Plenipotentiaries on the Status of Stateless Persons, which took place from September 13-23, 1954<sup>15</sup>, decided that it was more appropriate to adopt an independent convention dealing with stateless persons.<sup>16</sup> It appeared that the parties to the document on stateless persons might be different from those that signed the Refugee Convention and this would create the awkward situation of forcing them to refer to a document which they had not adopted.<sup>17</sup> Another consideration was that, while the expression *mutatis mutandis* was common in practice, it left too much discretion to States in applying the Refugee Convention to stateless persons and therefore there would be no uniformity in its application.<sup>18</sup> Finally, the Protocol, as an independent document, was incomplete as it was missing the clauses regarding its coming into force.<sup>19</sup> For practical reasons, the final version of the Refugee Convention remained the starting point in deciding which rights were to be granted to stateless persons. Nevertheless, in many instances articles were modified, added or omitted, with the result that the treatment of stateless persons differs from that of refugees.<sup>20</sup> In light of the 1954 Convention's history, its understanding is therefore dependent on the analysis on the relevant articles of the Refugee Convention and of the reasons for the changes.<sup>21</sup>

### **3. The definition of stateless person under article 1(1) the 1954 Convention**

A core provision of the 1954 Convention is its article 1(1) which provides the internationally accepted definition of statelessness: 'The term "stateless person" means a person who is not considered as a national by any state under the operation of its law.'<sup>22</sup>

The definition of 'stateless person' was widely discussed during the preparatory works and remains

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<sup>15</sup> The deliberations of the full Conference appear in UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Conference of Plenipotentiaries on the Status of Stateless Persons' Summary Records UN Doc E/CONF.17/SR. 1-15 (13-23 September 1954) (hereafter 'SR. 1-15'). Various delegations submitted proposals and amendments which appear as documents E/CONF.17/L.1 to L.10; L.12 to L.14; L.16 to L.21; L.25 to L.28. UN Doc E/CONF.17/L.1 to L.10; L.12 to L.14; L.16 to L.21; L.25 to L.28 (13-23 September 1954). See Nehemiah Robinson, 'Convention Relating to the Status of Stateless Persons. Its History and Interpretation. A Commentary' (1997) World Jewish Congress 1955, Institute of Jewish Affairs, reprinted by the Division of International Protection of UNHCR, 3.

<sup>16</sup> The Conference adopted the Convention relating to the Status of Stateless persons on 28 September 1954. Final Act of the United Nations Conference on the Status of Stateless Persons (28 September 1954) 360 UNTS 117.

<sup>17</sup> Robinson (n 15) 3. It should be noted that the situation of referring to a document which some States had not adopted, occurs with the 1967 Refugee Protocol. The Protocol is not an amendment to the Refugee Convention, but an independent instrument. The Protocol incorporates the Refugee Convention's provisions by reference and States can ratify or accede the Protocol without becoming a party to the Convention. Protocol relating to the Status of Refugees (adopted 31 January 1967 entry into force 4 October 1967) 606 UNTS 267 art I(1). The Protocol extends the Refugee Convention to all refugees by eliminating the Convention's temporal and geographical limitations (the scope of the Convention is limited to persons who became refugees as a result of events occurring before 1 January 1951. Moreover, States were allowed to introduce a declaration according to which the words 'events occurring before 1 January 1951' meant 'events occurring in Europe' prior to that date). Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (hereafter the 'Refugee Convention') art 1(B)(1). James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 110-11.

<sup>18</sup> See eg the World Jewish Congress Submission UN Doc E/CONF.17/NGO/1; Robinson (n 15) 3.

<sup>19</sup> Robinson (n 15) 4.

<sup>20</sup> *ibid* 1, 4; van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 227.

<sup>21</sup> Robinson (n 15) 1.

<sup>22</sup> Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (hereafter the '1954 Convention').

subject of intense debate. All suggestions relating to the definition were thought as liberal because were worded in general terms<sup>23</sup> and only required lack of nationality.<sup>24</sup>

The 1954 Convention does not specify what is meant by ‘nationality’, but according to the UNHCR the term should be considered consistent with its the traditional understanding under international law (i.e. a ‘formal link of political and legal character between the individual and the State’).<sup>25</sup>

There is agreement that the definition of stateless person encompasses all those who lost their nationality automatically as a result of the application of the law or by an act of the authorities.<sup>26</sup> Nevertheless one issue that often arises in practice is whether a person must be considered as a national *at the time* the case is examined.<sup>27</sup> In particular, there may be situations in which a stateless person may be eligible to obtain a nationality and the issue becomes whether he should be required to make good faith attempts towards it. According to the UNHCR *Handbook on the Protection of Stateless Persons*, an individual’s nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention.

The question to be answered is whether, at the point of making an article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, he or she cannot be considered as a national (...).<sup>28</sup>

However, it is unknown how a claimant in this situation would be treated in different States.

### ***3.1. De jure and the facto statelessness in the context of article 1(1) of the 1954 Convention***

The definition of statelessness in article 1(1) of the 1954 Convention has been labeled as *de jure* statelessness because it has to be assessed with reference to the operation of a State’s law.<sup>29</sup> According to the UNHCR, this requires analysis of both the letter of the law and its application.<sup>30</sup> The characteristics and substance of a particular person’s nationality are irrelevant. However it is acknowledged that there may be a fine line between being recognised as a national but not being

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<sup>23</sup> Robinson (n 15) 10. For instance, the British representative stated that ‘when the members of the conference had discussed the definition of a stateless person they had shown a liberal spirit and had been prepared to extend the benefits of the proposed instrument to as many persons as possible’. UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR.7, 3.

<sup>24</sup> UNHCR ‘Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons’ (2014) (hereafter the ‘Handbook’) para 52.

<sup>25</sup> *ibid.*

<sup>26</sup> Robinson (n 15) 10; Carol A Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (2004) 22(2) *Refugee* 31, 36.

<sup>27</sup> See ch 5, s 1.1.

<sup>28</sup> UNHCR ‘Handbook’ (n 24) para 50.

<sup>29</sup> As each State decides which persons are its nationals, the assessment of nationality requires applying the law of the State concerned.

<sup>30</sup> UNHCR ‘Handbook’ (n 24) paras 22-56.

treated as such, and not being recognised as a national at all. The former situation is connected with the rights attached to nationality, whereas the second with the right to nationality itself.<sup>31</sup>

Whether only stateless persons *de jure* or also stateless persons *de facto* should fall under the 1954 Convention and their respective definitions were among the most contested questions of the drafting process.<sup>32</sup> In the end, it was decided to apply the 1954 Convention only to *de jure* stateless persons. The drafters wanted a clear definition of statelessness to avoid confusion.<sup>33</sup> Moreover, the drafters were concerned that if the *de facto* definition was included, the number of signatories might decrease and reservations be made leading to a variety of legal positions in the application of the Convention.<sup>34</sup>

Reference to *de facto* stateless persons appears only in the Final Act, where it *recommends* granting *de facto* stateless persons (referred to as persons who *renounced the protection of the State of which they were nationals and whose reasons for doing so are considered valid*) ‘the treatment which the Convention accords to *de jure* stateless persons’.<sup>35</sup> The inclusion of this recommendation was largely due to the concern that some States may become party to the 1954 Convention but not to the Refugee Convention, and therefore the 1954 Convention could provide for the protection of *de facto* stateless refugees.<sup>36</sup> This recommendation is however of little relevance today as it is difficult to find a category of persons who have valid reasons for renouncing the protection of the State of their nationality which would justify protecting them as stateless. For example, the renunciation of nationality to avoid military service, to repudiate the State of nationality due to disagreement with government policies, or to sever the ties with the State of nationality to try a new life in another State, are not reasons that would be considered as valid for implementing the recommendation in the Final Act.<sup>37</sup> Indeed, *the only reason that the Conference identified as valid was if the individual in question was a refugee*, i.e. a person outside his State of nationality and *unwilling* to avail himself of the *protection* of that State owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>38</sup>

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<sup>31</sup> UNHCR ‘The Concept of Stateless Persons under International Law (“Prato Conclusions”)’ (May 2010) 2; Handbook (n 24) para 53. See ch 2, s 3.

<sup>32</sup> Eg see UN Doc E/CONF.17/L.6 in Nehemiah Robinson, ‘Convention Relating to the Status of Stateless Persons. Its History and Interpretation. A Commentary’ (1997) World Jewish Congress 1955, Institute of Jewish Affairs, reprinted by the Division of International Protection of UNHCR, 3; UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR.2; SR.10, 11-15; SR. 11, 5-8; SR.13, 5-16; SR.14; Robinson (n 15) 7.

<sup>33</sup> David Weissbrodt and Clay Collins, ‘The Human Rights of Stateless Persons’ (2006) 28(1) HRQ 245, 253.

<sup>34</sup> Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (n 4) 232, 248.

<sup>35</sup> UN Doc E/CONF. 17/L.35 (n 15); Final Act of the United Nations Conference on the Status of Stateless Persons (6 June 1960) 360-9 UNTS 118, 122; UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR. 10, 9-15; SR. 14, 2-7; Robinson (n 15) 12.

<sup>36</sup> Belgian proposal in UN Doc E/CONF.17/L.3, in Robinson (n 15) 8; UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR. 14, 6.

<sup>37</sup> Massey (n 6) 21.

<sup>38</sup> It should be noted that the definition of article 1A(2) of the Refugee Convention includes also persons *unable* to avail themselves of such protection. This category is not covered by the recommendation in the Final Act of the 1954 Convention since only unwillingness to accept protection can be associated to renunciation. *ibid* 19; Refugee Convention (n 17) art 1A(2). However, van Waas seems confusing these categories and she states that the recommendation in the Final Act of the 1954 Convention covers persons



Finally, most States have been more reticent on acceding to the 1954 Convention than the Refugee Convention and therefore stateless refugees will more likely be protected under the latter instrument.<sup>39</sup>

In conclusion, the 1954 Convention sets out a clear definition of stateless person. Its recommendation in the Final Act is the only grey area remaining ‘where the notion of “de facto statelessness” lingers, namely with respect to a person who is *outside* their country of nationality’<sup>40</sup> and is unwilling invoke its diplomatic or consular protection.<sup>41</sup>

### **3.2. Issues of proof and statehood**

The drafters were aware of the difficulty in establishing statelessness because it is ‘a negative concept and therefore difficult to prove and define. In simple words, a stateless person would be a person who possesses no nationality, but the lack of nationality must be provable and proven.’<sup>42</sup> Nevertheless, the negative aspect of the definition was maintained.

The preparatory works do not show in detail how the conference viewed the issue of proof. The Commentary to the text of the 1954 Convention suggests that given the liberal definition of statelessness in article 1, ‘whenever proof is available that the person in question does not possess the nationality of any state, he is a “stateless person” within the meaning of the Convention.’<sup>43</sup> Moreover, it adds that

it certainly was not the intention of the conference to require a formal proof from states with which the person had no intimate relationship. This would reduce the proofs to the country of origin and/or former permanent residence. Once these countries have certified that the person is not a national of theirs, they would come within the definition of article 1. If, however, no such certification could be obtained because the relevant authorities refuse to

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that cannot invoke diplomatic or consular protection. Laura van Waas, ‘The UN Statelessness Conventions’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness Under International Law* (CUP 2014) 64, 81.

<sup>39</sup> Massey (n 6) 20-21. As of 5 October 2014, the number of State Parties to the Refugee Convention was 145 and to the 1967 Protocol 146. The number of State Parties to both the Refugee Convention and the 1967 Protocol was 145. UNTC, ‘Convention relating to the Status of Refugees’ <[https://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg\\_no=V~2&chapter=5&Temp=mt\\_dsg2&lang=en](https://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mt_dsg2&lang=en)> accessed 5 October 2014; UNTC, ‘Protocol relating to the Status of Refugees’ <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en)> accessed 5 October 2014. At the same time, only 83 States were Parties to the 1954 Convention and 61 to the 1961 Convention on Reduction of Statelessness. UNTC, ‘Convention relating to the Status of Stateless Persons’ <<https://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsgno=V~3&chapter=5&Temp=mtdsg2&lang=en>> accessed 5 October 2014; UNTC, ‘Convention on the Reduction of Statelessness’ <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-4&chapter=5&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en)> accessed 5 October 2014; UNHCR, ‘Maps - Parties to the 1954 Convention relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness – Europe’ <<http://www.unhcr.org/4d553fd0f.html>> accessed 11 October 2011; UNHCR, ‘2011 Regional Operations Profile – Europe’ <<http://www.unhcr.org/pages/4a02d9346.html>> accessed 16 October 2011.

<sup>40</sup> van Waas, ‘The UN Statelessness Conventions’ (n 38) 64, 81.

<sup>41</sup> *ibid.*

<sup>42</sup> Robinson (n 15) 10; UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR. 4, 4.

<sup>43</sup> Robinson (n 15) 10.

issue it or do not reply to inquiries, the State of residence is expected to accept other proofs, either documentary (for instance, papers showing that the person lived as a foreigner in the country of his origin) or reliable witnesses.<sup>44</sup>

The UNHCR has clarified that the enquiry into whether someone is stateless must be limited to the States with which a person enjoys a relevant link, in particular by birth, descent, marriage, or habitual residence.<sup>45</sup> In addition, the enquiry necessitates looking at the question of ‘State’.<sup>46</sup> In situations where a State does not exist under international law, a person’s relationship with that entity is moot and therefore he is *ipso facto* stateless.<sup>47</sup> The meaning of ‘State’ in article 1(1) should be based on the criteria generally deemed necessary for a State to exist in international law, as set out in the Montevideo Convention on Rights and Duties of States, and the non-violation of *jus cogens* norms.<sup>48</sup>

The Montevideo Convention sets out that ‘the state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States.’<sup>49</sup> Moreover, it provides that whether or not an entity is considered as a State by other States is indicative, but not determinative, of whether it has achieved statehood.<sup>50</sup> Formal recognition is an official confirmation of a factual situation, which has some practical consequences as to the relations between the recognising and the recognised State, but it is not a necessary element of statehood.<sup>51</sup>

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<sup>44</sup> *ibid* 11.

<sup>45</sup> UNHCR ‘Handbook’ (n 24) para 18.

<sup>46</sup> UNHCR ‘The Concept of Stateless Persons under International Law’ (n 31) 2, 4-5; UNHCR ‘Handbook’ (n 24) paras 18-21.

<sup>47</sup> UNHCR ‘The Concept of Stateless Persons under International Law’ (n 31) 2, 4-5; UNHCR ‘Handbook’ (n 24) para 17. It should be noted that this thesis uses the word ‘he’ to refer to stateless persons. However it is acknowledged that women can be among stateless persons as well.

<sup>48</sup> *Jus cogens* is a peremptory norm of international law from which no derogation is permitted. The prohibition of recognising entities as States when they have come into being through violation of a *jus cogens* norm, although they may be effective entities, has now reached universal validity. This is highlighted by its insertion in article 41(2) of the Articles on the Responsibility of States for Internationally Wrongful Acts: ‘No State shall recognize as lawful a situation created by a serious breach [of an obligation arising under a peremptory norm of general international law], nor render aid or assistance in maintaining that situation.’ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1) (2001); Cedric Ryngaert and Sven Sobrie, ‘Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia’ (2011) 24(2) LJIL 467, 471, 473; Eileen Denza, ‘European Practice on the Recognition of States’ (2011) 36(3) ELJ 321, 333-34. See also Montevideo Convention on Rights and Duties of States, art 11, stating the obligation not to recognise territorial acquisitions or special advantages obtained by force. For instance, Israel meets all the requirements of statehood, yet it is not recognised as a State by some Arabic States which have held Israel responsible for violations of international law. Convention on Rights and Duties of States (adopted 26 December 1933, entry into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) art 11; see UNHCR ‘Handbook’ (n 24) paras 18-21.

<sup>49</sup> Montevideo Convention (n 48) art 1. Doctrine and jurisprudence have addressed these matters in detail, but it is outside the scope of this study to further examine them. For the purpose of this thesis, it is important the fact that these criteria have been accepted as the normative starting point rather than their interpretation. See Cedric Ryngaert and Sobrie (n 48) 470-74.

<sup>50</sup> Montevideo Convention (n 48) art 3; UNHCR ‘The Concept of Stateless Persons under International Law’ (n 31) 4-5; UNHCR ‘Handbook’ (n 24) para 20.

<sup>51</sup> Whether recognition is an essential requirement for statehood is a question that has long been debated. The

The question of the existence of a Palestine State is worthy of attention because, as explained in chapter 2, Palestinians represent one of the largest groups of stateless persons in Europe.<sup>52</sup> However, to maintain this thesis within limits<sup>53</sup>, it is sufficient to mention that the recognition of Palestine involves complex legal and policy issues and

pending further developments in the peace process, the status of Palestine as a State in the sense of international law (having a permanent population, a defined territory, government and the capacity to enter into relations with other States, including full membership of international organisations), remains undetermined.<sup>54</sup>

Within Europe, Sweden has become the latest to recognise Palestine as a State, joining Iceland, the Czech Republic, Hungary, Malta and Poland.<sup>55</sup> As a consequence of having different positions regarding whether or not Palestine exists under international law, one should expect that article 1(1) determinations differ from State to State and that decision-makers are likely to follow their State's official stance on whether a State exists.

### ***3.3. Exclusion from article 1 of the 1954 Convention***

Article 1(2) of the 1954 Convention contains some exclusion grounds from its protection. They specify who is considered to either not need or not deserve it.<sup>56</sup> To keep this thesis within reasonable boundaries, only its clause (i) is analysed. Clause (i) is of particular concern to stateless Palestinians and keeps raising problems of interpretation and application at the individual case level when they seek protection.<sup>57</sup> Specifically, it excludes from its scope 'persons who are already receiving protection or assistance from another agency of the United Nations other than the United Nations Commissioner for Refugees so long as they are receiving such protection or assistance'. The Refugee Convention contains a similar exclusion clause in article 1D, so by analogy its interpretation is considered highly persuasive.

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constitutive theory, which supports the idea that an entity becomes a State only when it is recognised, is the minority view. The constitutive theory raises issues such as 'how many recognising states are needed before an entity "transforms" into a state and whether the decision to recognise should be based on facts, norms, geopolitical considerations, or a combination of factors.' Cedric Ryngaert and Sobrie (n 48) 469-70.

<sup>52</sup> See ch 2, s 9.

<sup>53</sup> The focus of this work is not on recognition of States but on statelessness.

<sup>54</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 461, fn. 219; Malcolm N Shaw, 'The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law' (2011) 9 (2) JICJ 301, 306-09, 319-20.

<sup>55</sup> Paul Scruton and others, 'Which Countries Recognise Palestine Already? – Interactive' *The Guardian* (20 September 2011) <<http://www.guardian.co.uk/world/interactive/2011/sep/20/palestinian-state-israel-un-interactive>> accessed 7 January 2012; Ishaan Tharoor, 'Map: the Countries that Recognize Palestine as a State' *The Washington Post* (7 November 2014) <<http://www.washingtonpost.com/blogs/world-views/wp/2014/11/07/map-the-countries-that-recognize-palestine-as-a-state/>> accessed 9 February 2015.

<sup>56</sup> The exclusion grounds include persons with respect to whom there are serious reasons for considering that they have committed a crime against peace or a serious non-political crime. For a discussion on these exclusion grounds, see Geoff Gilbert, 'Exclusion and Evidentiary Assessment' in Gregor Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers 2005) 161-77.

<sup>57</sup> This is also due to the uncertainty of the political situation and the international standing of Gaza and the West Bank. Goodwin-Gill and McAdam (n 54) 161.

Articles 1(2)(i) of the 1954 Convention and 1D of the Refugee Convention were drafted with the mandate of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) in mind.<sup>58</sup> One frequent issue that arises is whether these articles apply only to Palestinians who were receiving protection and assistance when the Conventions were opened for signature or some other date, and whether they also apply to descendants of such Palestinians and Palestinians displaced by later events. In the context of article 1D, the UNHCR recently clarified that the Refugee Convention prescribes two groups as falling within it.<sup>59</sup> These are, first, Palestinian refugees who were displaced from that part of Palestine that became Israel and who have been unable to return there;<sup>60</sup> and also Palestinians who are ‘displaced persons’<sup>61</sup>, and who have been unable to return to the Palestinian territories occupied by Israel in 1967.<sup>62</sup> Included in these two groups are also the descendants of the persons that were displaced.<sup>63</sup>

Another question is what are the legal consequences of the application of these clauses. Article 1D, unlike article 1(2)(i) of the 1954 Convention, adds that when the UNRWA’s protection or assistance has ceased for any reason, the person shall *ipso facto* be entitled to the benefits of the Convention. With regard to the effects of the application of article 1D, the UNHCR’s view is that persons actually receiving or eligible to register to receive the UNRWA’s protection or assistance are generally excluded from the protection of the Refugee Convention.<sup>64</sup> Only if the UNRWA’s protection has ceased and objective reasons justify why a Palestinian refugee cannot return to the UNRWA’s areas of operations,<sup>65</sup> he is automatically entitled to the benefits of the Convention. The Court of Justice of the European Union in *El Kott*<sup>66</sup> pointed out that the national authorities shall assess the reasons for departure from the UNRWA’s areas of operations when applying the second

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<sup>58</sup> UNRWA was created in 1949 to assist Palestinians displaced from the conflict in Palestine from 1 June 1946 to 15 May 1948. UNRWA’s mandate was later expanded. Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendation for Harmonization’ (n 26) 37.

<sup>59</sup> UNHCR ‘Note on UNHCR’s Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection’ (May 2013).

<sup>60</sup> These are ‘Palestine refugees’ within the sense of the General Assembly Resolution 194 (III) of 11 December 1948 and subsequent UNGA Resolution. UNGA Res 194 (III) Palestine - Progress Report of the United Nations Mediator (11 December 1948) 186th Plenary Meeting UN Doc A/RES/194 (III).

<sup>61</sup> Essentially two groups of Palestinian ‘displaced persons’ have been displaced from the Palestinian territory occupied by Israel since 1967: (i) Palestinians originating from that territory; and (ii) ‘Palestine refugees’ who had taken refuge in that territory prior to 1967. The territory concerned comprises the West Bank, including East Jerusalem, and the Gaza Strip. UNGA Res 2252 (ES-V) Humanitarian assistance (4 July 1967) 1548th Plenary Meeting UN Doc A/RES/2252 (ES-V).

<sup>62</sup> UNGA Resolution 2452 (XXIII)A called for the return of the ‘displaced persons’, as reiterated by subsequent UNGA resolutions on an annual basis. Goodwin-Gill and McAdam (n 54) 159. UNHCR ‘Note on UNHCR’s Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive’ (n 59) 2-3; UNGA Res 2452 (XXIII) A Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (19 December 1968) 1749th Plenary Meeting UN Doc A/RES/2452(XXIII)(A-C).

<sup>63</sup> UNHCR ‘Note on UNHCR’s Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive’ (n 59) 4-5.

<sup>64</sup> Refugee Convention (n 17) art 1D, para 2.

<sup>65</sup> These reasons include threats to physical safety and freedom, the authorities’ refusal of re-admission or renewal of travel documents and other practical barriers. UNHCR ‘Note on UNHCR’s Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive’ (n 59).

<sup>66</sup> Case C-341/11 *El Kott and Others v Hungary* [2012] OJ C46/8, paras 65, 82(1), 56–58.

sentence of article 1D.

It is for the competent national authorities of the Member State responsible for examining the asylum application made by such a person to ascertain, by carrying out an assessment of the application on an individual basis, whether that person was forced to leave the area of operations of such an organ or agency, which will be the case where that person's personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency.<sup>67</sup>

As article 1(2)(i) of the 1954 Convention does not have such a second sentence, and there is neither international guidance on its application, nor any academic debate, it is unclear how the national authorities interpret the reasons for cessation of the UNRWA's protection or assistance in this different context.

The lack of discussion on this point seems to have its explanation in what are typically considered to be the consequences of the exclusion clause, which involve fewer nuances for stateless persons than for refugees. When stateless persons cannot be expelled, the typical situation that they experience is to remain illegally in the jurisdiction of the host State. This may impact their enjoyment of several civil and socio-economic rights but they would not normally face persecution.

#### **4. Overview of the content of the 1954 Convention relating to the Status of Stateless Persons**

On acquisition of stateless status, the 1954 Convention provides for the application of a basic set of civil and socio-economic rights, including religious freedom, access to courts, property, education, employment, freedom of speech, social security, housing, freedom of movement.<sup>68</sup> Some of these substantive rights can be classified as 'special measures' for the stateless which are 'necessitated by their very status'.<sup>69</sup> These special measures for the stateless are grouped in chapter 5 under the title 'Administrative Measures' and include article 25 on administrative assistance, article 26 on freedom of movement, article 27 on identity cards, article 28 on travel documents, article 31 on protection from expulsion, and article 32 on naturalisation.

The rights in the 1954 Convention are granted on a gradual scale, depending on the degree of attachment between the stateless person and the State.<sup>70</sup> There are 'five levels of attachment', which, starting from the weakest are: *being subject to the State's jurisdiction*<sup>71</sup>; *physical*

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<sup>67</sup> *ibid* para 82.

<sup>68</sup> For a detailed discussion of these rights, see van Waas, *Nationality Matters: Statelessness under International Law* (n 11); Paolo Farci, *Apolidia* (Giuffrè 2012) 137-79.

<sup>69</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 359. In the context of the Refugee Convention, these special measures have been described as 'standards applicable to refugees as refugees'. Goodwin-Gill and McAdam (n 54) 510-24.

<sup>70</sup> The system of granting rights in accordance to the level of attachment to the State is similar to that adopted by the Refugee Convention. van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 229-30.

<sup>71</sup> In some circumstances, a person is under the control and authority of a State without being physically

*presence*<sup>72</sup>; *lawful presence*<sup>73</sup>; *lawful stay*<sup>74</sup>; and *durable residence*<sup>75</sup>. The meaning of these terms is debated. According to the UNHCR, for stateless persons to be ‘lawfully present’ in a State, their presence must be authorised by the authorities. This includes situations where the presence is known and not prohibited. Applicants for stateless status who enter into a determination procedure should be considered to be ‘lawfully in’ the territory of the State.<sup>76</sup> The ‘lawfully staying’ requirement implies a longer presence in a territory than the ‘lawfully present’ one. Short periods of stay authorised by the State may suffice as long as they are not transient visits.<sup>77</sup> Rights accorded to stateless persons who are ‘habitually resident’ or ‘residing’ require stable residence of a certain duration. Commentators have interpreted these terms differently,<sup>78</sup> although there is agreement that they imply less than permanent residence or domicile.<sup>79</sup> According to Goodwin-Gill and McAdam, they imply ‘some degree of security, of status, of entitlement to remain and return...’ They add that “‘Habitual residence’ and even “‘residence’” alone involve an analysis of elements of facts and intention’.<sup>80</sup>

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present in its territory. For instance, this would be the case of a State that exercises *de facto* control and authority in a territory without having lawful jurisdiction. Hathaway (n 17) 160-171. Rights such as access to courts (art 16) and education (art 22) are guaranteed to those that fall under this category. 1954 Convention (n 22) arts 16, 22.

<sup>72</sup> For instance, a stateless person falling under this category is entitled to identity papers (art 16) and freedom of religion (art 22). 1954 Convention (n 22) arts 16, 22.

<sup>73</sup> This should allow, for example, freedom of movement within the State (art 26). 1954 Convention (n 22) art 26.

<sup>74</sup> This level of attachment is required for articles 17 (wage-earning employment) and 28 (travel documents). Hathaway (n 17) 679-81.

<sup>75</sup> This level of attachment is required in article 7(2) of the 1954 Convention, which states that after three years of lawful residence in a contracting State, stateless persons are exempted from legislative reciprocity. It is also required in article 14 on artistic and industrial rights, and article 16(2) on matters pertaining to access to the courts (the specific term used in articles 14 and 16 is that of ‘habitual residence’). 1954 Convention (n 22) arts 7(2), 14, 16(2).

<sup>76</sup> UNHCR ‘Handbook’ (n 24) para 135.

<sup>77</sup> *ibid* paras 135-37.

<sup>78</sup> With respect to the Refugee Convention, Hathaway categorises ‘habitual residence’ under ‘lawful stay’. Hathaway (n 17) 186-190. The term ‘habitual residence’ is ambiguous. Neither the commentary on the 1954 Convention nor the preparatory works clarify whether ‘habitual residence’ implies lawful status. States are therefore allowed to interpret this term narrowly. The phrase ‘habitual residence’ appears also in article 1A(2) of the Refugee Convention to identify the State with respect to which a stateless person might establish his refugee status. In this context, the drafters did not give much attention to the exact meaning of the phrase. In fact, the *Ad Hoc* Committee simply observed that these words refer to a State in which the refugee had resided. UNESC, Ad Hoc Committee on Refugees and Stateless Persons, ‘Report of the Ad Hoc Committee on Statelessness and Related Persons (Lake Success, New York, 16 January to 16 February 1950)’ (17 February 1950) UN Doc E/1618; E/AC.32/5; Goodwin-Gill and McAdam (n 54) 526. The UNHCR’s Handbook states that ‘habitual residence’ or ‘residence’ has to be understood as stable, factual residence. This is applicable to stateless persons who have been granted permanent residence and also those without a residence permit who are settled in the State for several years and who expect to continue to reside there. UNHCR ‘Handbook’ (n 24) paras 138-39.

<sup>79</sup> ‘The exercise of the right was not made dependent on ‘permanent residence’ or on ‘domicile’ because it was felt that it was a too far-reaching concept for the enjoyment of civil rights.’ Robinson (n 15) 34, 37. The term ‘domicile’ is subject to different interpretations in common law and civil law countries and reference must be made to the laws of the reception country. In common law countries, domicile is determined with reference to the country of birth. Domicile of birth cannot be lost unless a new domicile is acquired. This involves the acquisition of residence in fact in a new place and the intention to permanently live there. Goodwin-Gill and McAdam (n 54) 526, fn 110. In civil law countries, domicile is established with reference to the concept of ‘habitual residence’. During the preparatory works, no clear definition of domicile was ever agreed to. Hathaway (n 17) 216.

<sup>80</sup> There are different conceptions of ‘residence’ for different purposes. For example, in municipal law, certain benefits as social security or protection from deportation may require a certain period of residence,

As far as the levels of protection or ‘standard of treatment’ offered, the 1954 Convention distinguishes the following three: (i) *as favorable as accorded to aliens generally in the same circumstances*,<sup>81</sup>; (ii) *as favorable as accorded to nationals*<sup>82</sup>, (iii) and *absolute rights*<sup>83</sup>, which are not contingent upon the treatment of any other group.

There is no logical correlation between the level of attachment required for the entitlement to one of the rights in the 1954 Convention and the standard of treatment offered. For example, absolute rights are accorded to stateless persons at each level of attachment. However, lawful presence and lawful stay provide for entitlement for more rights.<sup>84</sup> Only a few of the rights of the 1954 Convention can be invoked by a stateless person simply by being present in the jurisdiction.

As the focus of this thesis is on selected issues of implementation of the 1954 Convention, especially determination of stateless status, and not on the content of the substantive rights, I do not provide an overview of all of them.<sup>85</sup> I only discuss the special measures for the stateless mentioned above as they afford protection in areas that are usually accorded only to nationals and cannot be found in other international instruments.<sup>86</sup>

#### ***4.1 Administrative assistance, documentation and diplomatic protection***

One of the special needs of the stateless that is addressed by the 1954 Convention is that of documentation. Stateless persons are often without identity and travel documents and for them this means being unable to prove their identity and their immigration status. In some States, aliens without appropriate documentation are subject to detention.<sup>87</sup> Moreover, stateless persons do not often have the possibility of turning to their State of origin for help in obtaining documents or seeking diplomatic protection. Even when stateless persons hold some rights, they need to have proof of these or they are of little value to them.<sup>88</sup> The need for the stateless to hold documents and receive administrative assistance, as central to their dignity and integrity, was recognised by the

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while others such as citizenship require evidence of greater attachment. Goodwin-Gill and McAdam (n 54) 527-28.

<sup>81</sup> This applies, *inter alia*, to the right to engage in wage-earning employment (art 18), the right to housing (art 21), or the right to choose the place of residence and to move freely within the country (art 26).

<sup>82</sup> This applies eg to the right to elementary education (art 22) and social security (art 24).

<sup>83</sup> For instance, the right to identity papers in article 27, access to courts in article 16, and naturalization in article 32 of the 1954 Convention are absolute rights. Many of the absolute rights do not have a counterpart in the treatment of aliens or nationals as many of them are specifically tailored to the situation of the stateless. van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 231.

<sup>84</sup> The level of attachment required and of protection offered were probably independently deliberated and determined in relation to each right and there is no overall logic to their system. *ibid* 229-31.

<sup>85</sup> In addition, whilst the general provisions are not unimportant for the protection of stateless persons, they can also be found in other international norms.

<sup>86</sup> The UNHCR recognises that the provisions of identity papers and travel documents and administrative assistance make the 1954 Convention to retain its significance as they are not addressed elsewhere in international human rights law. To keep this work within reasonable boundaries, articles 29 on fiscal charges and 30 on transfer of assets will not be discussed although they are grouped under the ‘special measures’ for the stateless. These articles provide for treatment on terms similar to those accorded to other aliens in the same situation and therefore they do not add any different protection from that provided for under article 7. It should be noted that van Waas does not discuss them within the ‘special measures’ for the stateless and only briefly cites them in the context of general civil and political rights. van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 282, 359 fn 3.

<sup>87</sup> UNHCR ‘Identity Documents for Refugees’ (20 July 1984) UN Doc EC/SCP/33, paras 2-3.

<sup>88</sup> Hathaway (n 17) 614.

drafters and reflected in articles 25, 27 and 28 of the 1954 Convention.<sup>89</sup>

Article 25 of the 1954 Convention allows stateless persons to receive services and obtain documents by the State of residence.<sup>90</sup> Article 25 is not applicable to identity papers and travel documents since articles 27 and 28 specifically deal with them.<sup>91</sup> Article 27 of the 1954 Convention states that '[t]he Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document.' Thus this article sets forth an absolute right to an identity document for stateless persons and the level of attachment required is that of physical presence. This article attracted some discussion in the conference as there were different opinions regarding the level of attachment required between the stateless person and the State to qualify for such papers, what these papers actually were and what their nature was.<sup>92</sup> The 'identity papers' provided for by article 27 are only for internal use, as opposed to the 'travel documents' for journeys abroad. 'Identity papers' certify the identity of a stateless person and, in States with a passport system, they are a substitute for a 'domestic' passport.<sup>93</sup> This article does not have any effect on the right of the contracting States to control the admission and sojourn of aliens into their territories. In other words, whereas unlawfully present stateless persons may obtain identity papers, these documents do not provide them with a right to stay in the country.<sup>94</sup>

Article 28 of the 1954 Convention states that stateless persons *lawfully staying* in their territory and wishing to travel outside of their territory, have the right to obtain a Convention Travel Document (CTD).<sup>95</sup> The issuance of a CTD can be refused only if there are 'compelling reasons of national security or public order'.<sup>96</sup> Moreover, article 28 adds that States have discretion to issue CTD to stateless persons who are not lawfully staying in their territory.<sup>97</sup>

There was considerable opposition in the conference to the inclusion of this article. Among the issues raised, it was pointed out that it would be confusing to issue stateless persons with travel documents similar to those issued to refugees, and that article 28 created a mandatory obligation, which States did not want.<sup>98</sup> On the other hand, the British representative argued that article 28 was one of the most important in the whole Convention and that its elimination would be undesirable.<sup>99</sup> Paragraph 1 of the 'Schedule to article 28' states that the CTD indicates that the holder 'is a stateless person under the terms of the Convention.'<sup>100</sup> So, besides facilitating international travel

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<sup>89</sup> Goodwin-Gill and McAdam (n 54) 512.

<sup>90</sup> Habitual residence or lawful residence is not required. Robinson (n 15) 48; van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 376.

<sup>91</sup> These articles will be specifically analysed in the following pages.

<sup>92</sup> Robinson (n 15) 49.

<sup>93</sup> 'The Convention does not prescribe the nature of the identity papers. They may be temporary or final; they need not be official papers in the sense used in Europe and may simply consist of a document showing the identity of the refugee.' Robinson (n 15) 50.

<sup>94</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 374.

<sup>95</sup> 1954 Convention (n 22) art 28.

<sup>96</sup> *ibid.* The word 'compelling' introduces a restriction upon 'reasons of national security and public order'. Therefore, only very serious cases would fall under the latter concept. Robinson (n 15) 50-52.

<sup>97</sup> 1954 Convention (n 22) art 28.

<sup>98</sup> Eg see UNESC, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR.11, 9, 13, 14; SR. 9, 12-18; SR.11, 10-11; Robinson (n 15) 50-52.

<sup>99</sup> Robinson (n 15) 50-52.

<sup>100</sup> 1954 Convention (n 22) sch to art 28, para 1, s1.



by requiring that contracting States recognise the validity of the travel document issued under the 1954 Convention<sup>101</sup>, the CTD constitutes evidence of stateless status and it should also help to obtain the privileges of such status abroad.<sup>102</sup> Holding a CTD does not have any effect on States' authority to decide on their immigration laws and policies.<sup>103</sup> In principle, the CTD entitles the holder to re-enter into the territory of the State that issued it (as long as it is valid and there is no specific statement to the contrary).<sup>104</sup>

Paragraph 16 of the Schedule also states that '[t]he issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not *ipso facto* confer on these authorities a right of protection'<sup>105</sup> Thus the 1954 Convention allows the authorities of a State to exercise diplomatic protection if they so desire and the States in which the stateless person travels do not object thereto.<sup>106</sup> It should be noted that during the 1954 Conference, a Belgian proposal was designed to expressly grant diplomatic protection to stateless persons traveling abroad.<sup>107</sup> This would introduce an authorisation to ensure diplomatic protection which the other parties would have to respect. Although such a proposal received some support, the majority rejected it because of concerns that it might lead to serious problems, particularly in connection with the protection of *de facto* stateless persons and interfere with bilateral consular conventions.<sup>108</sup>

#### ***4.2. Expulsion and freedom of movement***

As explained in section 3 of chapter 2, the right to enter and to reside in a State is strictly linked to the substance of nationality. Therefore the stateless have no automatic right to enter and reside anywhere and their freedom of movement is severely limited.

Article 31 of the 1954 Convention makes the right to remain relatively secure once lawful status has been obtained, as it limits the circumstances in which expulsion may take place. It also

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<sup>101</sup> 1954 Convention (n 22) sch to art 28, para 7.

<sup>102</sup> It should be noted that the equivalent Schedule to the Refugee Convention does not specify that the CTD should also indicate the possession of refugee status. However, in practice, the CTD issued to refugees has become evidence of refugee status. Hathaway (n 17) 851; van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 373.

<sup>103</sup> 1954 Convention (n 22) sch to art 28, para 14.

<sup>104</sup> *ibid* para 13; van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 373, fn 70.

<sup>105</sup> 1954 Convention (n 22) sch to art, para 16.

<sup>106</sup> The Refugee Convention contains a similar paragraph. However, the Stateless Persons Conference added the words '*ipso facto*' in the second phrase on the basis of a Belgian amendment. UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR.11, 18; Robinson (n 15) 57-58; van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 382-83.

<sup>107</sup> The proposal read as follows: 'Each Contracting State shall be entitled to ensure the protection of both the property and the person of stateless persons domiciled or resident in its territory.' UN Doc E/CONF 17/L.13 (n 15).

<sup>108</sup> With respect to *de facto* stateless persons, the Norwegian delegate pointed out that there was the danger that the State of residence and a third State may not agree on the reason why a *de facto* stateless person had left the State of origin. As far as the interference with bilateral consular conventions, the French delegate argued that the Belgian proposal would amend the rules of international protection on which they were based. The Belgian delegate replied that bilateral consular conventions had been concluded with many States from which refugees were coming from, and that had not prevented the application of the Refugee Convention. He therefore did not see why legal difficulties which had not arisen in the case of refugees should be foreseen in the case of stateless persons. UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR.11, 5-8.

adds procedural safeguards to strengthen the protection against expulsion.<sup>109</sup> In particular, article 31 provides that, once lawful status is granted, '[c]ontracting States shall not expel a stateless person lawfully in the territory save on grounds of national security or public order.'<sup>110</sup> A person is considered a threat on grounds of 'national security' when its presence or actions 'give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host State's most basic interests, including the risk of an armed attack on its territory or its citizens or the destruction of its democratic institutions.'<sup>111</sup> While States have discretion to interpret this test, the exception to expulsion must have an objective justification. There is no requirement though that a person has been convicted or charged with a crime.<sup>112</sup> For 'public order' to be a ground of expulsion, a stateless person must have committed a serious crime, caused severe offence to social norms or must have obstinately refused to abide by the laws.<sup>113</sup> Whereas 'national security' primarily addresses threats emanating from outside the host State, 'public order' was understood as focusing on internal security.<sup>114</sup>

Article 31(2) ensures that procedural safeguard be in place in cases of expulsion, by requiring States to reach a decision in accordance with due process of law and allowing stateless persons the opportunity to answer, produce evidence, be represented by legal counsel, and seek review of this decision.<sup>115</sup>

If expulsion does take place, according to article 31(3), the contracting State should not act immediately after a final decision has been reached, but must leave reasonable time for the stateless person to seek legal admission to another country.<sup>116</sup> During such time, the contracting State may adopt measures as deemed necessary. This means that a stateless person may be subject to immigration detention.<sup>117</sup>

As far as the right of freedom of movement within the territory of a State, stateless persons are commonly subject to traveling restrictions, which may affect the right to access courts,

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<sup>109</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 250.

<sup>110</sup> This article reproduces the wording of article 32 of the Refugee Convention. At first there was opposition in the Stateless Persons Conference to the inclusion of such a provision in the Convention as it limits the principle that each State is competent to expel at any moment any alien from its territory. As far as the interpretation of the word 'lawfully', it should include stateless persons who had lawfully entered a State whose permission to stay had not elapsed or those who have entered the country unlawfully and had subsequently obtained permission to stay. It cannot be considered expulsion the situation of a stateless person who was admitted to a Contracting State on a temporary basis with a travel document issued by another Contracting State, if refused permission to stay there beyond the authorised period. 1954 Convention (n 22) art 31; Robinson (n 15) 60-61.

<sup>111</sup> 1954 Convention (n 22) art 31; Hathaway (n 17) 679; see also van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 250.

<sup>112</sup> Of contemporary relevance, for example, is the case of expulsions based on terrorist acts or membership in terrorist organisations. Hathaway (n 17) 679.

<sup>113</sup> *ibid* 679-81; van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 250-51.

<sup>114</sup> Hathaway (n 17) 679-81.

<sup>115</sup> 1954 Convention (n 22) art 31(2). The opportunity to seek review of the decision can be limited by compelling reasons of national security. This article does not necessarily mean a court decision and the law may provide for an administrative procedure. 'Due process of law' means that a decision be reached only as provided for in the law in force in the given State. Robinson (n 15) 62.

<sup>116</sup> 1954 Convention (n 22) art 31(3).

<sup>117</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 241-51.

healthcare, birth registration.<sup>118</sup> Therefore, article 26 of the Convention was conceived with the aim to address such issues, by providing that lawful stateless persons have the right to move freely within the State territory and choose their place of residence. Specifically, article 26 of the 1954 Convention states that ‘each contracting state shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.’<sup>119</sup> The protection guaranteed by this article is limited by the requirement of lawful immigration status and, even in the case of lawful immigration status, by the standard of treatment, which is the same as for other non-nationals. During the Conference, this provision did not attract any particular discussion and it was considered sufficient because the freedom of choosing one’s place of residence and of movement were assumed to be normally granted to all aliens.<sup>120</sup> However, certain restrictions to stateless persons’ right of freedom of movement exist in practice.<sup>121</sup>

The 1954 Convention does not contain the equivalent to article 33 on *non-refoulement* of the Refugee Convention.<sup>122</sup> The 1954 Convention is also silent as to whether lawful stay should be granted to a person while his stateless status is being assessed, and once status has been assessed.<sup>123</sup> It therefore leaves States parties free to treat stateless persons as any other non-nationals and subject them to regular domestic immigration laws. This means that an individual may remain in a clandestine situation for a significant period. It also means that an individual may be removed to the State of his former residence before his claim has been decided. Finally, there is nothing in the 1954 Convention to prevent penalties for unlawful entry or presence, as in article 31 of the 1951 Refugee Convention.<sup>124</sup> Lack of lawful admission is, however, not a bar to obtain stateless status under the 1954 Convention.

### 4.3. Naturalisation

The prospect of naturalisation is an indispensable tool in addressing the special needs of the stateless as it lifts them out of this vulnerable group by addressing their lack of nationality.<sup>125</sup> The protections offered through the 1954 Convention were indeed envisaged as temporary measures until a nationality is obtained. So, its article 32, which offers a durable solution by considering

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<sup>118</sup> For instance stateless people may be required to live in camps. This is the case of the stateless Bihari in Bangladesh. van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 241-42.

<sup>119</sup> 1954 Convention (n 22) art 26.

<sup>120</sup> UNGA, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 15) SR. 8, 2; Robinson (n 15) 49.

<sup>121</sup> 1954 Convention (n 22) art 32. For instance, stateless persons may need permission to go to restricted areas. Robinson (n 15) 49.

<sup>122</sup> In the Final Act of the Conference which adopted the 1954 Convention a resolution was made not to include an article equivalent to article 33 of the Refugee Convention because the *non-refoulement* principle was deemed to be a generally accepted principle. Final Act of the United Nations Conference on the Status of Stateless Persons (n 35) 122, 124; van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 248.

<sup>123</sup> Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendation for Harmonization’ (n 26) 42-43.

<sup>124</sup> Refugee Convention (n 17) art 31(1).

<sup>125</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 360.

access to naturalisation, is perhaps the most critical substantive provision.<sup>126</sup>

Article 32 of the 1954 Convention provides that

[t]he Contracting States shall as far as possible facilitate the assimilation and naturalisation of stateless persons. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.<sup>127</sup>

Thus, the 1954 Convention does not provide for a right to acquire a nationality, and only makes a *recommendation to facilitate* the naturalisation of stateless persons residing in their territories. Furthermore, it does not mention other ways to acquire a nationality, such as automatically by operation of law or through simple procedures of registration, declaration or option.<sup>128</sup> The 1954 Convention does not give any guidance on naturalisation procedures. The expedition of such procedures and their costs are left to the discretion of States. It also does not specify which pre-conditions for eligibility for naturalisation may be reasonable.<sup>129</sup> However, when States do not allow the possibility of acquiring citizenship without a good faith explanation, they would be in breach article 32.<sup>130</sup> Importantly, this article applies to all stateless persons and does not require lawful status to be applicable.

## 5. The UNHCR Handbook on the Protection of Stateless Persons

The 1954 Convention is silent as far as the matter of identification of statelessness and the general human rights framework does not add much to it.<sup>131</sup> The most significant guidance is found in the recent UNHCR *Handbook on the Protection of Stateless Persons*<sup>132</sup> although this is not a binding instrument.

The Handbook supports the adoption of procedures for determining whether an ‘individual’ is a ‘stateless person’ in migratory contexts, advises on the modalities of creating them, leaving discretion to States according to their administrative structure, resources, and size of the stateless population.<sup>133</sup> It recognises that some States may combine statelessness and refugee status determinations, but it stresses that confidentiality for asylum seekers must be respected.<sup>134</sup> It shows a preference for centralised procedures, as they are more likely to develop decision-makers’

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<sup>126</sup> *ibid* 364.

<sup>127</sup> This article did not provoke any discussion in the Conference. Robinson (n 15) 64.

<sup>128</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 365.

<sup>129</sup> These mechanisms usually require meeting only basic conditions for eligibility compared to the more stringent ones in naturalisation procedures. *ibid* 362-63, 366.

<sup>130</sup> 1954 Convention (n 22) art 32. van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 365; Hathaway (n 17) 989.

<sup>131</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 403.

<sup>132</sup> UNHCR ‘Handbook’ (n 24); see ch 2, s 11.

<sup>133</sup> Statelessness in non-migratory contexts should be addressed with international standards and State practice based on reduction of statelessness. In such cases, ‘States might be advised to undertake targeted nationality campaigns or nationality verification efforts rather than statelessness determination procedures’. Nationality verification procedures assist individuals when they have difficulties obtaining proof of their nationality. Such procedures often involve an accessible, simple and straightforward process for documenting nationality, including the nationality of another State. UNHCR ‘Handbook’ (n 24) paras 8-10, 58-61.

<sup>134</sup> UNHCR ‘Handbook’ (n 24) paras 66, 78-82.

expertise.<sup>135</sup> It emphasises that access to the procedures must be ensured, and no time limit shall be set, although it does not specify that they must be free of cost.<sup>136</sup>

The Handbook addresses evidentiary issues, and recommends introducing a shared burden of proof between the applicant and the decision-maker.<sup>137</sup> The standard of proof should be as that for refugee status determinations, namely to establish the case to a 'reasonable degree'.<sup>138</sup> The applicant is expected to fully cooperate and his testimony and credibility are particularly important, especially where certain kinds of evidence are not available (including identity and travel documents, documents regarding the applications to acquire nationality, responses by States on enquiries regarding the applicant's nationality, birth and marriage certificates, school certificates, sworn testimony of neighbours or people aware of the nationality).<sup>139</sup>

The Handbook underlines providing a minimum set of rights pending the determination of status, such as refraining to remove the individual while a claim is pending<sup>140</sup> and using detention only if necessary, reasonable, proportionate and in a non-discriminatory manner.<sup>141</sup> Furthermore, it adds that a person determined to be stateless should be granted a right of residence, as only such permission would fulfill the object and purpose of the treaty.<sup>142</sup>

Particularly relevant is the recommendation to grant status on a *prima facie* basis when it is apparent that there is objective evidence that individuals belonging to some groups meet the definition of stateless person under article 1 of the 1954 Convention.<sup>143</sup> This would avoid undertaking full individual status determinations and thus allow quick resolution of cases and help judicial economy.

In summary, the Handbook is a step forward at the international level in the identification of statelessness. However, it is not clear to what extent the standards recommended by the UNHCR in this Handbook are to be afforded deference by the States. In the field of refugee law, traditionally, there is a practice of giving particular weight to UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*<sup>144</sup>, although it is not treated as a source of legal obligation.<sup>145</sup>

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<sup>135</sup> *ibid* para 66.

<sup>136</sup> *ibid* paras 68-70.

<sup>137</sup> *ibid* para 89.

<sup>138</sup> *ibid* para 91.

<sup>139</sup> *ibid* paras 83-86, 90, 93-94.

<sup>140</sup> Statelessness determination procedures should have suspensive effect on removal. *ibid* para 72. In addition, the appropriate status for individuals awaiting the determination of their statelessness should at least entitle to all rights of the 1954 Convention based on lawful presence. As the 1954 Convention's rights are formulated similarly to those in the Refugee Convention, the UNHCR also recommends that individuals awaiting a determination of statelessness receive the same treatment as asylum seekers whose claims are being considered in the same State. *ibid* paras 145-46.

<sup>141</sup> *ibid* paras 112-15.

<sup>142</sup> UNHCR 'Handbook' (n 24) para 145; 1954 Convention (n 22) art 1.

<sup>143</sup> *ibid* paras 108-11.

<sup>144</sup> UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (reissued 2011) UN Doc HCR/1P/4/ENG/Rev.3.

<sup>145</sup> Hathaway (n 17) 118. Standards adopted by the UNHCR's Executive Committee (States Members of the agency's governing body), while not matters of law, have strong political authority. *Ibid* 114-18. For example, this is the case of the UNHCR's 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', which is a comprehensive analysis of the main concepts of refugee law.

## 6. Conclusion

The 1954 Convention is the cornerstone of the international protection for stateless persons. It formally and specifically introduces statelessness in the international legal framework, gives a definition of statelessness, and establishes the international status of stateless person which attracts the application of a basic set of rights.<sup>146</sup> It provides for specific measures, especially documentation, for stateless persons *as* stateless persons.<sup>147</sup> These rights address and respond well to the ‘special needs’ of the stateless (except for the area of diplomatic protection).<sup>148</sup>

On the other side, the wording of the ‘general rights’, which are offered at different ‘levels of attachment’ to the State and at different ‘standards of treatment’, are among its greatest flaws. Specifically, the 1954 Convention attributes most of the ‘general rights’ to stateless persons that are lawfully present or lawfully resident in the State’s territory. In addition, it sets forth a contingent standard of protection for most of them.<sup>149</sup> A close analysis of the preparatory works showed that whereas some of these provisions did not attract too much debate as far as their application to stateless persons, others were modified or added with respect to the text of the Refugee Convention. Overall, the amendments resulted in a deterioration of the protection offered, as stateless persons were perceived to deserve less favourable treatment than refugees.<sup>150</sup>

Other issues that impact on the 1954 Convention’s effectiveness include the lack of effective enforcement mechanisms<sup>151</sup> and of binding provisions on the identification and determination of statelessness. Identification of statelessness on the basis of the definition in article 1 of the 1954 Convention ‘as a precursor to setting in motion all the guarantees that accompany that status’<sup>152</sup> is not addressed. As a consequence, States have wide discretion regarding its implementation and it is debated whether and what type of procedures should be adopted. Importantly, this discretion impacts on who is found to meet the legal definition of article 1. How this gap in international law results in variations of treatment depending on the State where a claim for protection is lodged is the object of the next chapters. In particular, the differences in implementation of the 1954 Convention, with focus on procedures to identify stateless status, the definition of stateless person,

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<sup>146</sup> See eg Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (n 26) 34-35; van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 393-94; UNHCR ‘Handbook’ (n 24) 1-2.

<sup>147</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 394.

<sup>148</sup> See ch 2, s 3. See also van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 380.

<sup>149</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 390-91.

<sup>150</sup> *ibid* 390.

<sup>151</sup> Only two articles indirectly refer to the enforcement of the 1954 Convention. One is article 34, which states that disputes arising between Parties to the Convention on the interpretation or application of the 1954 Convention can be referred to the International Court of Justice for settlement. However, this article has never been applied. The other is article 33, which obliges State Parties to ‘communicate to the Secretary General of the United Nations the laws and regulations which they may adopt to ensure the application’ of the 1954 Convention. Nevertheless, this article was not conceived with a supervisory mechanism in mind and it mainly stems from the right of every State Party to a convention to be informed of its application by other parties. van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 231-32. Unlike the Refugee Convention, there is no duty on State Parties to cooperate with UNHCR on the supervision of the application of the 1954 Convention. See, by contrast, article 35 of the Refugee Convention. Refugee Convention (n 17) art 35.

<sup>152</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 11) 395.

and selected rights attached to the status granted, will be discussed

## CHAPTER 4: PROCEDURES TO DETERMINE STATELESSNESS

### 1. Introduction

Chapter 3 has shown that one of the main challenges of implementation of the 1954 Convention is inherent to the identification of statelessness.<sup>1</sup> International law does not provide any binding guidance on how to determine statelessness. Moreover, statelessness determination is a difficult subject for many States because it is hard to establish whether a person is truly stateless. Not all people without identity documents are stateless. Sometimes people have lost their identity documents on purpose in the hope of obtaining some status in the State of arrival. In other cases, people are genuinely stateless and have lived all their lives in States that have never issued documents to them and have problems in establishing their identity.<sup>2</sup> Occasionally statelessness is a very politically sensitive topic as it requires assessing whether or not a State exists under international law, and liaising with foreign authorities on whether a person is a national or is admissible somewhere else.<sup>3</sup> As a consequence, there are different approaches to the identification of statelessness in the States under review.

This chapter focuses on legislation, case-law and practices that States have adopted to determine who is stateless according to article 1 of the 1954 Convention. Emphasis is on the first instance procedure. After briefly addressing which should be the essential elements of determination procedures, this chapter analyses the main implementation models of the 1954 Convention that I have developed.

By ‘model’ I mean a ‘distinctive way of approaching a given problem’<sup>4</sup> (in this case the implementation of the 1954 Convention). By showing ‘how a given “model” functions in one or more countries’, it is possible ‘to get a panoramic view of the different ways in which similar problems are solved, how one’s system relates to these models, and to note differences, similarities and trends.’<sup>5</sup> So ‘models provide a conceptual framework for the comparative analysis of various diverse issues...’<sup>6</sup> It is acknowledged that all ‘models are by definition suggestive caricatures and simplifications departing from reality’.<sup>7</sup> However even if the descriptive utility of models is questioned, it is argued that they have a heuristic value. The models can assist to understand the reality by providing a framework for the comparative analysis of diverse issues.<sup>8</sup>

Depending on the implementation level of the 1954 Convention, I group the States under three broad models. The categorisation is not based on theoretical grounds but rather on an

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<sup>1</sup> Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2009) 402.

<sup>2</sup> See ch 2, ss 6-7.

<sup>3</sup> See ch 3, s 2.2.

<sup>4</sup> Roger Blanpain, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (11th edn, Kluwer Law International 2014) ch I, 8.

<sup>5</sup> *ibid.*

<sup>6</sup> Marian Damaska, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study’ (1972 – 1973) 121 UPLR 507, 577; Clíodhna Murphy, *Immigration, Integration and the Law. The Intersection of Domestic, EU and International Legal Regimes* (Ashgate 2013) 14-15.

<sup>7</sup> Damaska (n 6).

<sup>8</sup> *ibid* 577-78.



empirical choice, which considers the degree of detailed legislative or regulatory provisions that States have adopted.

As mentioned in chapter 1, section 3.1, Gyulai provides the only other explicit categorisation of stateless determination procedures and protection mechanisms in the literature. In particular Gyulai distinguishes (1) stateless-specific mechanisms based on clear procedural rules (Spain and Hungary), (2) stateless-specific mechanisms without clear procedural rules but based on generally agreed practices (France), (3) stateless-specific mechanisms without clear procedural rules and without generally agreed practices (Italy), (4) non-stateless-specific mechanisms where there are grounds to obtain status for impossibility to enforce expulsion (Germany), and (5) neither stateless-specific mechanisms nor alternative forms of protection (the majority of States). Gyulai adds that there is a positive shift towards categories one and two. To support this statement, Gyulai makes the example of the recent case n. 7614 of 4 April 2011 of the Italian Cassation Court concerning the procedural modalities to be followed in statelessness cases. He maintains that this decision clearly indicates that a centralised procedure should be followed.<sup>9</sup>

However I have decided not to follow Gyulai's classification because he does not provide a reliable explanation, based on theoretical considerations or empirical data, to justify it. Gyulai explains that the classification is based on research into State practice, but does not elaborate further on the elements that he takes into account for this categorisation. I argue that Gyulai makes an over-classification of the existing determination procedures and some of his statements are incorrect. First of all, there is no need to distinguish between systems that have provisions to stay on the grounds that it is impossible to leave the country and those that do not have them. Provisions that allow staying on the grounds that it is impossible to leave are mainly concerned with immigration control and non-removability and do not constitute specific implementation of the international obligations. They may be helpful to stateless persons as they often cannot be removed anywhere, but their protection needs are usually not taken into consideration. Moreover, from the data that I collected, the only State under review that does not have provisions for impossibility to leave is Greece. Second, there is no need to distinguish within systems that have a stateless protection mechanism but no clear procedural rules those that are based on consensus and those that are not. The data show that several issues remain unresolved in all States with no clear procedural rules for the determination of statelessness. Indeed, in France several cases proceed to the appeal stage and are settled by the courts, showing that the protection mechanisms are not generally agreed upon, contrary to Gyulai's claim. Finally, the decision of the Italian Cassation Court n. 7614 of 4 April 2011 is concerned with the type of judicial procedures to be followed to determine statelessness and clarifies that the civil courts have competence and that the Ministry of Interior has to be a necessary intervening party. This decision is not concerned with the centralisation of procedures and does not support the argument that there is a trend towards them. It

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<sup>9</sup> Gábor Gyulai, 'The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime' in Alice Edwards and Laura van Waas, *Nationality and Statelessness under International Law* (CUP 2014) 120-23; Corte Cass 4.4.2011, n 7614.

should also be noted that the statement that there is a positive shift towards categories one and two is imprecise and probably Gyulai meant that there is a shift towards categories two and three.

Therefore I follow the classification that I have mentioned above, and cluster under the first model States with specific legislative or regulatory provisions and a detailed procedural framework: Spain, Hungary, and the UK. Under the second model I gather States that clearly recognise stateless status as grounds for protection but have no detailed legislative or regulatory provisions, and in which there is an authority, either administrative or judicial, that has competence for recognising that an individual is stateless: Italy and France.<sup>10</sup> Under the third model, which is discussed in the next chapter, I include States with no specific provisions to determine statelessness: Germany, Greece, Sweden, the Czech Republic, and the Netherlands. Usually, in these States with no specific recognition procedure for stateless persons, the matter of statelessness arises ‘in asylum procedures, or as a subsidiary question when applications for residence permits or travel documents are made.’<sup>11</sup> It also arises when the authorities try to remove a person with unlawful status to another State, but there is no place to send them to.

For each State, I consider the national authorities competent to deal with claims of statelessness and I analyse the procedures to be followed by stateless persons from the moment that they lodge a claim until they are authorised to remain or exercise the right of appeal. I also take into account issues of access to the procedures which are related to the vulnerability of stateless persons and which therefore require a particular protection-oriented framework.<sup>12</sup> Finally, I briefly explore whether the international protection standards and the related procedures are improved by any visibility means that States have adopted.<sup>13</sup>

It should be noted that there are different administrative structures and judicial systems in the selected States, which make a difference to outcomes of claims for protection.<sup>14</sup> In addition, the matter of whether States are unitary or federal will influence where responsibility for decision-making is situated. This may lead to differences not only between States, but also within them.<sup>15</sup>

## **2. Essential elements of the procedures**

It is debated whether specific status determination procedures are needed and, if so, what would be their constituent elements. International law does not say much with respect to the procedural aspects of due process,<sup>16</sup> but the UNHCR recommends that States parties to the 1954 Convention

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<sup>10</sup> European Network on Statelessness, ‘Statelessness. Determination and the Protection of Stateless Persons’ (2013) 6-7.

<sup>11</sup> Carol A Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (2004) 22(2) *Refuge* 39.

<sup>12</sup> Gyulai, ‘The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime’ (n 9) 123.

<sup>13</sup> Linda Camp-Keith, ‘Human Rights Instruments’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 371; Gyulai, ‘The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime’ (n 9) 125.

<sup>14</sup> This is so despite the States under review have reached an analogous level of development as far as their administrative and judicial systems. See ch 1, s 2.2.

<sup>15</sup> This is, eg, the case of Germany.

<sup>16</sup> See also ch 3, ss 4-5. Goodwin-Gill (n 20) 533; Martin Jones and France Houle, ‘Building a Better

put a stress on formal procedures for the determination of stateless status, and provides guidance in its *Handbook on the Protection of Stateless Persons* (the 'Handbook').<sup>17</sup> However, the UNHCR Handbook is not binding, and States have wide discretion as far as the adoption of procedures implementing the 1954 Convention. For instance, some States, like the Czech Republic and Germany argue that even in the absence of specific statelessness determination procedures, their legal system permits the direct application of international treaties and they have other provisions that adequately protect stateless persons in compliance with the 1954 Convention.<sup>18</sup>

As the protection of stateless persons shares a number of common characteristics with that of refugees, additional guidance can be found in the existing asylum procedures and the related literature.<sup>19</sup> So, in the similar context of the Refugee Convention, Goodwin-Gill stresses that States' discretion, as far as the treaty's implementation, is limited by the principle of effectiveness of obligations.<sup>20</sup> Whereas legislative incorporation may not itself be expressly required, effective implementation involves not only procedures to identify the beneficiaries of protection but also some measures of protection against laws of general applicability, such as requirements of residence, to make an application.<sup>21</sup> It also entails facilitating the conditions of applicants while their claims are pending as they are closely connected to the ability to pursue their claims. For instance, these may include the prohibition of the use of immigration detention and the grant of right to work and receive benefits while a decision is pending.<sup>22</sup> Goodwin-Gill notes that it is difficult to apply an easy formula to determine whether implementation is sufficient and adequate.<sup>23</sup> The effectiveness of the adopted measures depends both on the overall efficiency of the State's general administrative and judicial system and on the problems with which that system is faced.<sup>24</sup> Goodwin-Gill and McAdam argue that the fact that a State treats refugees differently from other migrants is not sufficient to conclude that it provides effective protection. A refugee may be sufficiently protected where he enjoys fundamental human rights common to citizens and other foreigners, a due process of law is guaranteed, and an appeal review mechanism dealing with refusals of refugee status is in place.<sup>25</sup>

According to Legomsky, some principles of justice are so essential that they should always be respected in asylum procedures.<sup>26</sup> Such principles should include 'an adequate opportunity for

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Refugee Status Determination System' (2008) 25(2) *Refugee* 3.

<sup>17</sup> UNHCR 'Handbook on the Protection of Stateless Persons' (2014) (hereafter the 'Handbook'); see ch 3, s 5.

<sup>18</sup> Telephone interview with Alexandra Dubova, Immigration Lawyer, Organizace pro pomoc uprchlíkům, o.s. (Prague, Czech Republic, 2 January 2014); email from Dr. Roland Bank to author (4 April 2014).

<sup>19</sup> Gyulai, 'The Determination of Statelessness and the Establishment of a Stateless-Specific Protection Regime' (n 9) 124.

<sup>20</sup> Guy Goodwin-Gill, 'The Process and Rights of Asylum Seekers' in Karen Musalo, Jennifer Moore and Richard A Boswell, (eds), *Refugee Law and Policy. A Comparative and International Approach* (4th edn, CAP 2011) 922.

<sup>21</sup> *ibid*; ch 1, s 3.1.

<sup>22</sup> This is argued in the case of asylum seekers. Karen Musalo, Jennifer Moore and Richard A Boswell (n 23) 921.

<sup>23</sup> Goodwin-Gill (n 20) 922.

<sup>24</sup> Goodwin-Gill and McAdam (n 16) 528.

<sup>25</sup> *ibid* 529.

<sup>26</sup> Stephen H Legomsky, 'An Asylum Seeker's Bill of Rights in a Non-Utopian World' (2000) 14 *GILJ* 619,

advance preparation of one's case, suitable adjudicators, a fair opportunity to be heard, and a right of review.<sup>27</sup> The principle of having an adequate opportunity to for preparing one's case involves receiving reasonable assistance of counsel, and having the opportunity to gather the necessary documents in support of the claim.<sup>28</sup> The principle of having an opportunity to be heard entails a fair chance to explain the case in person and address any misunderstandings, adequate interpretation, a reasonable opportunity to present evidence and fair rules on the standard and burden of proof,<sup>29</sup> written reasons for refusal, adequate length of the procedures, and assistance of counsel.<sup>30</sup> Given the scope of this thesis, I do not attempt to treat any of these elements exhaustively but in the next sections I will provide an overview of how they are applied in the context of claims for protection made by stateless persons.

### **3. Model one: statelessness as a protection ground and specific procedures**

In Spain, Hungary and the UK statelessness is a specific protection ground, and specific legislative or regulatory provisions implement the 1954 Convention. In Spain, Law 4/2000, as amended by Law 8/2000 (Aliens' Law) provides that the Minister of Interior will recognise as stateless those foreigners who meet the requirements of the 1954 Convention and grant status accordingly. The procedure is regulated by Royal Decree 865/2001 of 20 July 2001.<sup>31</sup> In Hungary, Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (hereinafter Aliens Act) and Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (hereinafter Government Decree 114/2007) specifically deal with statelessness determination procedures and stateless status. In the United Kingdom, the new procedure was incorporated into the Immigration Rules on 6 April 2013 (HC 1039, 6 April 2013). In practice, the Immigration Rules must be considered together with the relevant Home Office Policy Guidance<sup>32</sup>, which is binding on the administration.

Other general provisions relevant to the determination of statelessness are contained in the aliens' legislation and in administrative laws of these States.

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635.

<sup>27</sup> *ibid.* Other scholars mention similar principles in the context of asylum procedures. Hélène Lambert, *Seeking Asylum. Comparative Law and Practice in Selected European Countries* (Martinus Nijhoff 1995) 20-21, 47-48; Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile. Janus-Faced Humanitarianism* (Berghahn Books 2005) 80, 92, 94-98; Musalo, Moore, Boswell (n 22) 921-1095. See also text to ft 138 in ch 1.

<sup>28</sup> Legomsky (n 26) 635.

<sup>29</sup> The standard of proof should not be onerous and should reflect 'a conscious comparison of the "disutility" of the various types of errors.' An erroneous grant of asylum may allow to stay in the host State without a reasonable justification. On the opposite, an erroneous denial of asylum can bring refugees back to their persecutors. Given the serious possible consequences, 'the standard of proof should not be set unnecessarily high. *ibid.* 640.

<sup>30</sup> *ibid.* 637.

<sup>31</sup> Real Decreto 865/2001, de 20 de julio, por el que se aprueba el Reglamento de reconocimiento del estatuto de apátrida (BOE-A-2001-14166) [Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons (BOE-A-2001-14166)] (Real Decreto 865/2001).

<sup>32</sup> Immigration Rules (HC 1039, 6 April 2013) (as amended); Home Office, UK Visas and Immigration, 'Stateless Guidance. Applications for Leave to Remain as a Stateless Person' (1 May 2013) VI.00 (Stateless Guidance). This kind of policy guidance is not approved by Parliament, being an internal administrative tool to assist decision-makers to apply the law. The Home Office Guidance on statelessness is very detailed and several of its sections follow the UNHCR Guidelines on Statelessness.

In Spain the procedure is in two phases. During the first phase, the Office for Asylum and Refuge (*Oficina de Asilo y Refugio* - OAR) makes a recommendation to the Ministry of Interior regarding the resolution of the case and submits an individualised decision with a rationale. The Ministry of Interior then takes the final decision, usually in accordance with OAR's.<sup>33</sup> In the UK, statelessness determination is delegated to the Statelessness Unit in Liverpool, within the asylum authority.<sup>34</sup> In Hungary, the authority dealing with statelessness determination is the alien-policing branch of the Office of Immigration and Nationality (OIN) (*Bevándorlási és Állampolgársági Hivatal*), which is divided into seven regional directorates.<sup>35</sup> Here, the centralisation of cases occurs to some extent at the regional level as within each directorate a limited number of decision-makers (usually one or two) are in charge of statelessness applications. This arrangement facilitates specialisation, but does not prevent divergence between certain practices.<sup>36</sup> Similarly, decision-makers in the UK are specialised, and this provides a good opportunity to accumulate knowledge and practical experience in determining statelessness.<sup>37</sup> On the other hand, in Spain the national informant reports lack of specialisation of the administration not only in statelessness, but in administrative law in general.<sup>38</sup>

A procedural framework that allows for the joint determination of refugee status and statelessness is in place in Hungary<sup>39</sup>, whereas in the United Kingdom stateless status is intended to be a residual category.<sup>40</sup> Although not stated in the rules, stateless status was conceived for those persons who have not been granted asylum or permits on other grounds.<sup>41</sup> In Spain, the application for stateless status and for asylum cannot be jointly made since they are two different procedures from both a legislative and procedural aspect. It is possible to apply to both simultaneously but it is likely that priority will be given to the asylum over the statelessness claim as the protection offered

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<sup>33</sup> Real Decreto 865/2001 (n 31) arts 2, 8-9; Telephone interview with Arsenio Cores, Immigration Lawyer (Madrid, Spain, 11 December 2013).

<sup>34</sup> Interview with Rob Jones, Head of Asylum Policy Office, The Home Office (London, 6 August 2013).

<sup>35</sup> There is a Regional Directorate in Budapest and six others in the main cities (Gyor, Székesfehérvár, Debrecen, Szeged, Miskolc, and Pécs). Telephone interview with Tamás Molnár, Head of Unit, Unit for Migration, Asylum and Border Management, Department of EU Cooperation, Ministry of Interior [of Hungary] and Assistant Professor in the Corvinus University of Budapest (Budapest, Hungary, 16 December 2013); Gábor Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (Hungarian Helsinki Committee 2010) 21. The competent office is established in base of the applicant's place of accommodation, stay or residence. Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s 159(1) in Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (unofficial tr, Ministry of Interior. Hungarian National Contact Point of the European Migration Network, 2012) (hereafter 'Government Decree 114/2007 (V. 24.)') Tamás Molnár, 'Statelessness Determination Procedure in Hungary' (2013) 4 *Asiel & Migrantenrecht* 271-72.

<sup>36</sup> Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 21.

<sup>37</sup> European Network on Statelessness (n 10) 9-10.

<sup>38</sup> Cores, interview (n 33).

<sup>39</sup> Government Decree 114/2007 (V. 24.) (n 35), s 160 (1); Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 16.

<sup>40</sup> Alison Harvey, 'The UK's New Statelessness Determination Procedure in Context' (2013) 27(4) *JIANL* 294, 297.

<sup>41</sup> *ibid.*

under the refugee Convention is stronger than that under the 1954 Convention.<sup>42</sup>

### *3.1. Main features of the procedures*

One of the defining features of systems under model one is that the authorities take decisions along a number of clear rules and that certain procedural rights are embodied in the provisions.

As far as initiating the procedures, the Spanish implementing decree sets out that stateless status may be decided upon written submissions by the applicant and made to any police office, Offices for Foreigners across the country, or the OAR. The application must include a clear and detailed explanation of the facts, and in particular of the place of birth, parents' ties with other relatives that have a nationality, place of habitual residence in another State, and time spent there. Identity and travel documents must be attached and if they are not available an explanation should be provided.<sup>43</sup> The OAR may initiate the procedure *ex-officio* when it has knowledge of facts, data or information indicating that a person is stateless.<sup>44</sup> However it is reported that it is unclear whether this actually occurs.<sup>45</sup> In the UK, the applicant starts the procedures by mailing an application form to the Home Office in Liverpool. Similarly in Spain, the application must include detailed information on the applicant and his alleged statelessness.<sup>46</sup>

In Hungary, it is easier to make the application than in the other two States because it can be made either in writing or verbally.<sup>47</sup> In the latter case, the authority must prepare a written record of the statement, which helps applicants to overcome a number of formalities.<sup>48</sup> Furthermore, the Hungarian regulation obliges the immigration authorities to provide information on the possibility of applying for stateless status, and the rights that can be acquired, to any person whose potential statelessness arises in any migration-related procedure.<sup>49</sup> Given that stateless persons are sometimes unaware or unable to comply with all the formalities to make an application, Hungarian law is thus particularly helpful to facilitate access to protection.

Concerning the possibility to explain the case in person, applicants for stateless status have an automatic right to an interview in Hungary. In the UK this right is more limited as the determining authority is allowed to refuse an interview '...if there is sufficient evidence of statelessness, including previous findings of fact established during the asylum claim (for example) and the individual is eligible for leave to remain on this basis.'<sup>50</sup> In practice, not all applicants that

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<sup>42</sup> Email from Valeria Cherednichenko to author (24 December 2013).

<sup>43</sup> Real Decreto 865/2001 (n 31) art 3.

<sup>44</sup> *ibid* art 2.

<sup>45</sup> Cores, interview (n 33).

<sup>46</sup> UK Government, 'Apply to stay in the UK as a Stateless Person' <<https://www.gov.uk/stay-in-uk-stateless>> accessed 15 March 2014.

<sup>47</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s 76(1) in Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (unofficial tr, Ministry of Interior. Hungarian National Contact Point of the European Migration Network, 2012) (hereafter 'Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals').

<sup>48</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (n 47) s 76(2).

<sup>49</sup> *ibid* s 22 (2).

<sup>50</sup> Home Office, UK Visas and Immigration, 'Stateless Guidance' (n 32) para 2.2.

have been refused stateless status have been interviewed, especially in cases where denial was based on legal grounds rather than facts.<sup>51</sup> In addition, there are no arrangements for interviewing persons in immigration detention.<sup>52</sup> In Spain, this right is not guaranteed under the regulation, which does not provide for an individual interview.<sup>53</sup> The shortfall in such cases is that key information may be missed, as facts might best be collected directly through an individual interview with the applicant than through written submissions.

On the positive side, important safeguards in all three States are the right to a free-of-charge service of an interpreter at interviews and the absence of fees to lodge the applications.<sup>54</sup>

### ***3.2. Burden and standard of proof***

As far as the opportunity to present evidence and principles of proof in the context of statelessness, chapter 3 section 1.2 discussed that these are complex matters. The applicant has to prove that he is not a national of any State and often is not in possession of the required documents.<sup>55</sup>

It is problematic that the Spanish regulation does not mention the burden of proof. Additionally, it does not give much guidance on other evidentiary issues and only stipulates that the authority is responsible to assess the claim, while the applicant is obliged to cooperate in the process. It adds that while carrying out its investigative function, the OAR may request as many reports as it deems appropriate from the central administrative bodies as well as from any other national or international entity.<sup>56</sup> Similarly, the UK Home Office Guidance states that caseworkers should make reasonable efforts to assist the applicant in establishing the necessary evidence, whether by research or enquiry<sup>57</sup>. However, in practice, the shared burden of proof is not always applied.<sup>58</sup> As far as the standard of proof, the civil standard of the balance of probabilities applies (i.e. more likely than not).<sup>59</sup> This is contrary to the recommendation of the UNHCR Handbook, which sets forth that the applicant shall establish to a reasonable degree that he is not considered a national of any country under the operation of its law.<sup>60</sup>

On the other hand, the Home Office Guidance provides detailed rules on gathering and assessing evidence, including the types of proof that should be examined, such as passports, language analysis, and information provided by foreign authorities.<sup>61</sup>

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<sup>51</sup> Author's conversations with UK practitioners and policy-makers, First Global Forum on Statelessness (The Hague, Netherlands, 15-17 September 2014).

<sup>52</sup> Jones (n 34).

<sup>53</sup> Real Decreto 865/2001 (n 31) art 7.

<sup>54</sup> Jones (n 34); Molnár, interview (n 35); Cores, interview (n 33).

<sup>55</sup> See ch 1, s 3.1; ch 3, s 3.2.

<sup>56</sup> Real Decreto 865/2001 (n 31) art 8(3).

<sup>57</sup> Home Office, UK Visas and Immigration, 'Stateless Guidance' (n 32) para 3.2.

<sup>58</sup> Author's conversations with UK practitioners and policy-makers, First Global Forum on Statelessness (n 51).

<sup>59</sup> UNHCR 'Handbook' (n 17) para 91.

<sup>60</sup> The Home Office Guidance justifies this by stating that 'the issues to be decided justify a higher standard of proof than the reasonable likelihood required to establish a well-founded fear of persecution in asylum claims, where the issue is the threat to life, liberty and person.' Home Office, UK Visas and Immigration 'Stateless Guidance' (n 32) para 3.2

<sup>61</sup> Home Office, UK Visas and Immigration, 'Stateless Guidance' (n 32) para 3.3.

Hungarian law has the best provisions of all. It sets an explicitly lower standard of proof, inspired by a similar provision in the State's asylum legislation, by stipulating that the applicant shall prove to a reasonable degree or substantiate his claim,<sup>62</sup> in particular in relation to: (a) where his place of birth is located; (b) where his previous permanent or habitual residence is located; and (c) the nationality of his family members and parents.<sup>63</sup> In practice, some decisions apply the lowered standard of proof, whereas others do not.<sup>64</sup> While in principle the primary duty to substantiate the claim is on the applicant,<sup>65</sup> the determining authority, upon request, shall provide administrative assistance in the establishment of facts through Hungarian diplomatic representations.<sup>66</sup> Furthermore, decision-makers are bound by the obligation of fully establishing the facts and circumstances of the case *ex-officio* under general rules of administrative procedures.<sup>67</sup> It is reported that, indeed, decision-makers often contact the consular representations to prove whether or not a nationality exists.<sup>68</sup>

Hungarian law includes another important safeguard as far as proving statelessness as it allows applicants to submit foreign-language documents without an official translation and an *apostille*, which would normally be a standard requirement under administrative procedural law.<sup>69</sup> Hungarian law also provides further useful guidance as to the types of evidence that can typically be considered in the process of decision-making: country of origin's nationality laws, information provided by the UNHCR, foreign authorities, Hungarian diplomatic representations abroad, and evidence by the applicant.<sup>70</sup>

### **3.3. Formal conditions to make the application**

All three States have provisions that impact on claiming stateless status. None of these exclusion clauses are found in the 1954 Convention and, arguably, they are in breach of the international obligations.<sup>71</sup>

Spain has a formal timeline to submit the claim for statelessness: the application must be made within a month of entry into the country, except when the applicant has a limited period of leave, in which case it must be presented before its expiration. When the delay is due to causes behind the applicant's control, the one-month-period to present the application will start from when

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<sup>62</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (n 47), s 79(1).

<sup>63</sup> *ibid* s 79(1); Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 25-26.

<sup>64</sup> It is difficult to assess the standard of proof applied in administrative or judicial decisions as in most of them the standard of proof is not discussed in detail. Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 25.

<sup>65</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (n 47), s 79(1).

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid*; Act CXL of 2004 on the General Rules of Administrative Procedures and Services (unofficial tr), s 3(2)(b).

<sup>68</sup> Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 24.

<sup>69</sup> Government Decree 114/2007 (V. 24.) (n 35) s 164(2).

<sup>70</sup> *ibid*.

<sup>71</sup> The UNHCR's Handbook states that such barriers do not find any basis in the 1954 Convention and they may arbitrarily exclude people from protection. UNHCR 'Handbook' (n 17) paras 69-70. For further discussion on this point, see ch 8, s 2.



such causes have ended. When the applicant has been illegally in the country for more than one month, or when he is subject to an expulsion order, the case shall be presumed manifestly unfounded and this shall be taken into consideration at the time of making the decision.<sup>72</sup> In practice, the one-month time limitation is often used to refuse a case along with other reasons for rejection.<sup>73</sup> The national informant reports that if this were the only cause of rejection, it would probably not be applied. The national informant explains that this rule has a copy in the asylum regulations. However, whereas the delay in making an asylum application is relevant with respect to the evaluation of the applicant's credibility, it is not in the context of statelessness. In most cases, a person remains stateless even if he makes a delayed application for protection.<sup>74</sup>

In Hungary, the applicant must have lawful status as a condition to make an application. According to the Minister of Justice and Law Enforcement, by introducing this restriction the law-maker intended to prevent foreigners from submitting a *mala fide* claim for stateless status with the sole purpose of delaying their expulsion.<sup>75</sup> Nevertheless, this argument fails to consider that lack of lawful status is a frequent characteristic of statelessness. Stateless persons often hold no travel documents and for them it is impossible to obtain a visa to travel.<sup>76</sup> The administration has usually strictly interpreted this requirement, and some litigation has followed. On 23 February 2015 the Constitutional Court quashed the lawful status requirement as of 30 September 2015 (to allow the legislator enough time to make the necessary amendments) on the grounds that it is in breach of the State's international obligations.<sup>77</sup>

In the UK, Article 403 of the Immigration Rules states that to be recognised as a stateless person, applicants must not be admissible to their country of former habitual residence or any other country. Given that the statelessness determination procedure is relatively new, there is only anecdotal evidence of a few cases refused on this ground, although the exact number is unknown.<sup>78</sup>

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<sup>72</sup> Real Decreto 865/2001 (n 31) art 4.

<sup>73</sup> Cores, interview (n 33).

<sup>74</sup> *ibid.*

<sup>75</sup> Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 17.

<sup>76</sup> *ibid* 18.

<sup>77</sup> This judgment states that

the lawful stay requirement is not merely a procedural rule (as argued by the OIN), but a material one that modifies the definition of a stateless person as compared to the one included in Article 1 of the 1954 Convention relating to the Status of Stateless Persons, an article for which no reservations or modifications are allowed, and thus it unduly narrows the personal scope of the Convention (paragraphs 23 and 27 of the judgment). In the Court's view, this conclusion is further supported by the fact that under the Convention certain rights are to be accorded only to lawfully staying stateless persons, while other rights to all of them, and this distinction indicates that the drafters did not see a general need for a lawful stay condition. The Court therefore agreed with the petitioner first-instance court and the third-party interveners and quashed the lawful stay requirement as of 30 September 2015 (allowing some time for the legislator for related adjustments in other legal provisions).

Gábor Gyulai, 'Hungarian Constitutional Court Declares that Lawful Stay Requirement in Statelessness Determination Breaches International Law' <<http://www.statelessness.eu/blog/hungarian-constitutional-court-declares-lawful-stay-requirement-statelessness-determination>> accessed 2 March 2015; author's conversation with Gábor Gyulai, Information Officer and UNHCR Liaison, Hungarian Helsinki Committee, First Global Forum on Statelessness (The Hague, Netherlands, 16 September 2014).

<sup>78</sup> Author's conversations with UK practitioners and policy-makers, First Global Forum on Statelessness (n 51).

In addition it should be noted that, whereas there is no formal timeline to claim statelessness, in practice a decision-maker takes into consideration the failure to disclose all relevant facts and claims in the context of previous contacts with the authorities. Unless a reasonable explanation is given, such failure may count against the applicant.<sup>79</sup> This rule is explicitly found only in the context of asylum cases, but it is adopted in practice in claims of statelessness as well.<sup>80</sup>

### ***3.4. Protection of applicants during the procedures***

As discussed in chapter 3, one of the biggest weaknesses of the 1954 Convention is that it does not protect an applicant for stateless status while his case is being assessed.<sup>81</sup>

The provisions in Hungary and the UK do not provide for any temporary permit pending an evaluation of stateless status, nor the right to work or other financial support. In Spain, a temporary residence permit is issued on the condition that the applicant is not under an expulsion or removal procedure.<sup>82</sup> The protection that this permit grants is however limited, as it grants the right to stay but neither the right to work nor any State's support.<sup>83</sup>

Expulsion is not explicitly prohibited in any of the three States while the procedure is pending. In Hungary, this reflects the requirement of lawful stay for the submission of a claim for stateless status (i.e. as the person has already lawful stay, he does not need any support or protection against expulsion).<sup>84</sup> Furthermore, there are no specific provisions protecting stateless persons from immigration detention. Undocumented migrants are likely to be detained but in most cases released upon making an application for statelessness and pending its outcome.<sup>85</sup> The problem is that information on how to make an application for statelessness is unavailable and gathering documents is difficult in immigration detention centres given the physical barriers. There are also no provisions on how decision-makers and immigration officers could identify stateless persons in detention. In Hungary and Spain, which are signatories of the Return Directive, immigration detention cannot last longer than 18 months.<sup>86</sup> In the UK, which has opted out of the

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<sup>79</sup> Jones (n 34).

<sup>80</sup> See Immigration Rules (HC 251, 23 May 1994) (as amended) Part 11: Asylum, para 339M.

<sup>81</sup> See ch 3, s 4.2.

<sup>82</sup> Real Decreto 865/2001 (n 31) art 5.

<sup>83</sup> Valeria Cherednichenko, 'Spanish Lesson Learnt: Theory and Practice of a Functional Statelessness Determination Procedure' (Presentation, First Global Forum on Statelessness, The Hague, September 2014).

<sup>84</sup> Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 23.

<sup>85</sup> Cores, interview (n 33); questionnaire reply from Laura van Waas, Senior Researcher, Tilburg University (Tilburg, The Netherlands, 14 January 2014); questionnaire reply from Paolo Farci, Immigration Lawyer (Florence, Italy, 27 November 2013); questionnaire reply from Claire Salignat, Immigration Lawyer, Forum Réfugiés (Villeurbanne, France, 15 January 2014); Jones (n 34); Dubova, interview (n 18).

<sup>86</sup> Directive (EC) 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/89 (Return Directive), art 15. The Return Directive entered into force on 16 December 2008. All States which are bound by the Return Directive (all EU Member States except Ireland and the UK, as well as the associated Schengen States – Switzerland, Norway, Iceland and Liechtenstein) are obliged to adapt their national legislation in accordance with the provisions of the Directive. As of 15 September 2011, 19 EU Member States or associated Schengen States had notified the Commission of their full transposition of the Directive (Bulgaria, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Italy, Latvia, Malta, Portugal, Slovakia, Spain, France, Romania, Luxembourg, Slovenia, Switzerland and Norway). Four EU Member States had notified partial transposition of the Directive (Belgium, Lithuania, Sweden and The

Return Directive, there is no time-limit for administrative detention set by law and its reasonable length depends on the facts of the individual case.<sup>87</sup> Persons with unclear nationality or disputed nationality may be detained for about two years if there are issues regarding their cooperation or testimony.<sup>88</sup>

The lack of legal status with attached the right to work and/or social support for applicants is a major gap in all frameworks, and legislative intervention would be required to ensure protection during this phase.<sup>89</sup>

### ***3.5. Length of the procedures***

Spain and Hungary have stipulated an explicit and reasonable deadline for first-instance decision-making in statelessness determination. In Spain, once the procedure is started the OAR informs the applicant that his evidence must be presented within 15 days.<sup>90</sup> Upon conclusion of the investigative phase, the OAR forwards its reasoned decision through the General Directorate of Foreigners and Immigration to the Ministry of Interior.<sup>91</sup> The Ministry of Interior may reach a decision within three months.<sup>92</sup> In total, the process should not take longer than six months. In practice, the length depends on the country of origin of the claimant.<sup>93</sup> Before 2007, the average timeline to obtain a decision was about one year. Since 2007, after the Supreme Court decided a number of cases in favour of stateless persons, the administration has been taking longer to make decisions, sometimes up to as long as three years.<sup>94</sup>

In Hungary, the timeline for reaching a decision is of 60 days following the date of submission of the application.<sup>95</sup> This timeline can be extended when it is necessary to obtain information from foreign authorities that do not respond within a reasonable time.<sup>96</sup> In such cases, usually the procedure is suspended for a period up to two years.<sup>97</sup>

The UK has not set any timeline and in practice is not yet clear what is the average length to obtain a decision. According to some accounts, most cases have been pending for over a year.<sup>98</sup>

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Netherlands). In accordance with Article 4.1 of the Protocol annexed to the Treaties on the position of Denmark, Denmark chose to implement the Directive in its national law. European Commission, 'An Effective and Humane Return Policy: 8 Member States Have yet to Comply with the Return Directive' (IP/11/1097, 29 September 2011) <[http://europa.eu/rapid/press-release\\_IP-11-1097\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1097_en.htm)> accessed 24 March 2014.

<sup>87</sup> Cathryn Costello, 'Immigration Detention Under International Human Rights and EU Law' (2012) IJGLS 19(1) 257.

<sup>88</sup> The Secretary of State can detain someone only if there are reasonable prospects of removal. If it becomes apparent that the removal is not possible within a reasonable period, then the detention becomes unlawful. *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB); *R (Lumba and Mighty) v Secretary of State for the Home Department* [2011] 12 UKSC.

<sup>89</sup> Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 23.

<sup>90</sup> Real Decreto 865/2001 (n 31) art 9.

<sup>91</sup> *ibid* art 10.

<sup>92</sup> *ibid* art 11.

<sup>93</sup> Cores, interview (n 33).

<sup>94</sup> *ibid*.

<sup>95</sup> Government Decree 114/2007 (V. 24.) (n 35), s 166(3).

<sup>96</sup> Molnár, interview (n 35).

<sup>97</sup> *ibid*.

<sup>98</sup> Author's conversations with UK practitioners and policy-makers, First Global Forum on Statelessness

### 3.6. Decisions and appeals

In all three States, the applicant receives a decision with a rationale, written in the official language.<sup>99</sup> Administrative appeals are not possible against the refusal of first instance decisions on statelessness cases (except in a few cases in the UK, as explained later in this section). Accordingly, judicial review of rejected claims plays an important role. These judicial review procedures have different characteristics, which are outside the object of this study, and which reflect national frameworks and traditions. In this section I only explore how the right of review of one's claim can be exercised.

The National High Court in Madrid and the Metropolitan Court in Budapest have exclusive jurisdiction in these cases. Because of the limited number of claims, together with the special character of statelessness determination, these centralised and specialised judicial structures are able to accumulate specific expertise and deal efficiently with these matters. Additionally, these two courts have the power to both quash an administrative decision and decide on the claim for statelessness, thus expediting the length of time to reach a final decision.<sup>100</sup> In Spain<sup>101</sup> and Hungary<sup>102</sup> an additional safeguard is that there is an automatic right of judicial review. Unlike these two States, in the UK the case must be filed with the Administrative Court which is territorially competent, and the court must give permission to proceed.<sup>103</sup> Furthermore, the Administrative Court can only declare whether or not a decision is lawful, but cannot substitute it with its own and, if necessary, must resend the case back for reconsideration to the Home Office.<sup>104</sup> In Hungary, the main weakness of the judicial review system is the deadline to file the application, which is of only 15 days within receipt of the decision.<sup>105</sup> On the other hand, such deadlines are more reasonable in Spain (two months after the day of notification of the decision)<sup>106</sup> and the UK (three months from the date of the act or omission that is being challenged, although there is an obligation on the person wishing to make an application to act promptly). On the positive side, there are no filing fees to lodge a judicial review in Hungary<sup>107</sup> and Spain,<sup>108</sup> and the filing fee in

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(The Hague, Netherlands, 15-17 September 2014).

<sup>99</sup> Real Decreto 865/2001 (n 31) arts 8-9.

<sup>100</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (n 47), s 80(3); Cores, interview (n 33).

<sup>101</sup> Real Decreto 865/2001 (n 31) art 11.

<sup>102</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (n 47) s 80(1).

<sup>103</sup> Ministry of Justice, HM Courts & Tribunal Service, 'Administrative Court' <<http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court>> accessed 18 September 2014; Scottish Courts, 'About the Court of Session' <<http://www.scotcourts.gov.uk/the-courts/court-of-session>> accessed 19 September 2014; Northern Ireland, Court and Tribunals Service, Royal Courts of Justice Customer Information, '4. Queens Bench Division & HM Court of Appeal' <<http://www.courtsni.gov.uk/en-gb/aboutus/rcj/pages/royal%20courts%20of%20justice%20customer%20information.aspx#Queens>> accessed 21 September 2014.

<sup>104</sup> Ministry of Justice, HM Courts & Tribunal Service, Administrative Court, 'Applying for Judicial Review' <<http://www.justice.gov.uk/downloads/courts/administrative-court/applying-for-judicial-review.pdf>> accessed 18 September 2014.

<sup>105</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (n 47), ss 80(1)-(3).

<sup>106</sup> Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa (BOE-A-1998-16718) [Regulating Law 29/1998 of 13 July of the Contentious Administrative Jurisdiction (BOE-A-1998-16718)] art 46.

<sup>107</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (n 47) s 80(4).

<sup>108</sup> Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita (BOE-A-1996-750) [Law 1/1996 of 10 January on free legal assistance (BOE-A-1996-750)] art 2, Constitución Española (BOE-A-1978-31229) [Spanish

the UK can be waived if the person is of low-income or in receipt of legal aid.<sup>109</sup> Moreover, in all three States, those required to attend a court hearing can have an interpreter free of charge.<sup>110</sup> Finally, in States under model one, a review can also be further sought, in specific cases, but limited to legal issues.<sup>111</sup>

It should be mentioned that in the UK it is likely that attempts will be made in the future to appeal a few cases to the First Tier Immigration Tribunal.<sup>112</sup> This possibility is based on section 82(2)(d) of the Nationality Immigration and Asylum Act 2002 which states that a decision to refuse to vary a person's residence permit which results in having no permission to remain is an immigration decision subject to an appeal. This is confirmed in the Home Office Guidance on Statelessness which clarifies that 'Refusal of leave under this route does not generate a free-standing right of appeal. However, in some cases a refusal decision may generate an appeal right under the Nationality, Immigration and Asylum Act 2002 [...]'.<sup>113</sup>

The deadline to appeal to the First Tier Immigration Tribunal is only ten working days from the day that a person received the notice of decision if he is not in detention, and five working days from the day that a person received the notice of decision if he is in detention. In most cases, there will be no fee to pay to the First Tier Immigration Tribunal as appellants challenging refusal of stateless status will fall under one of the exemptions. The First Tier Immigration Tribunal has the power to decide the case directly. Against this background, while a few stateless persons will be able to benefit from the right to appeal to the First Tier Immigration Tribunal (usually only those who had lawful status when they applied to obtain stateless status), many others will be excluded as their immigration category does not allow for it.

Given the use of legal terms, formalities to comply with and the need to write in the local language, in the States under model three it is relatively difficult to lodge a judicial review application or appeal. Judicial review cases and appeals are complex to prepare and it would be difficult to proceed without legal representation.

### ***3.7. Access to legal assistance and advice***

In States under model one, legal aid is of limited availability for applicants for stateless status. Out

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Constitution (BOE-A-1978-31229)] art 119 ('La justicia será gratuita cuando así lo disponga la Ley, y, en todo caso, respecto de quienes acrediten insuficiencia de recursos para litigar').

<sup>109</sup> A fee of £60.00 is payable when an application for permission to apply for Judicial Review is lodged. A further £215.00 is payable if the claimant wishes to pursue the claim if permission is granted. Legal aid usually covers the cost of the fees. Ministry of Justice, HM Courts and Tribunals Services, 'Judicial review and costs' <<http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review>> accessed 10 January 2014.

<sup>110</sup> Molnár, interview (n 35); European Network on Statelessness (n 10) 21; Cores, interview (n 33).

<sup>111</sup> In Hungary, in specific cases, extraordinary review can be further sought with the Supreme Court, according to Act III of 1952 on Civil Proceedings, Sections 270 and 340 (2), in Spain with the Supreme Court, and in the UK with the Court of Appeals. Jones, interview (n 34); Cores, interview (n 33).

<sup>112</sup> Harvey (n 40) 313.

<sup>113</sup> Home Office, UK Visas and Immigration, 'Stateless Guidance' (n 32) para 6.1. Eg: (i) If an applicant has leave to enter or remain at the time that he made his statelessness application, but this has expired by the time that the decision to refuse leave is made; and (ii) the applicant is served with a decision to remove at the same time as his application for leave is refused. In these circumstances, appropriate appeal papers should be issued with the decision to refuse leave.

of them, the UK is the only one that does not recognise the right to free legal advice and representation on appeal, unless the case involves a judicial review. In London, the NGO Asylum Aid operates a telephone help line that is opened once a week. In addition, Asylum Aid has plans to engage in strategic litigation on stateless persons' behalf.<sup>114</sup>

In both Spain and Hungary, there are free legal services but it is difficult to find specialised lawyers.<sup>115</sup> In Spain, many stateless persons are not represented at the administrative stage. In court cases they must be represented and have the right to receive State funded legal representation.<sup>116</sup> Hungarian law is the most protection-oriented of all, as it expressly provides that the authorities have a duty to ensure that the applicant has access to legal assistance.<sup>117</sup> Applicants are entitled to State-funded legal aid, including at the administrative stage, based on the simple declaration that they are in need of legal support.<sup>118</sup> However, in practice, there are also problems in Hungary: legal aid does not cover translation and interpretation costs, which may seriously limit any actual communication between legal aid lawyers and their clients.<sup>119</sup> In addition, the fee for legal aid lawyers is extremely low, making this activity significantly underpaid and unattractive for experienced lawyers.<sup>120</sup> Finally, it seems that there is very little awareness among applicants for stateless status about the availability of State-funded legal aid. All these factors result in applicants for stateless status to infrequently use legal aid.<sup>121</sup> As a consequence, they often turn to NGOs, and especially the Hungarian Helsinki Committee, for free legal advice and representation.<sup>122</sup>

### ***3.8. Training, access to information, awareness campaigns on statelessness***

The UK Government does not organise any specific training, awareness campaigns or informational material on statelessness. However, it provides detailed information in English on the Home Office's website, including its Guidelines for decision-makers and the form to apply for stateless status. The Government has also shown to be open to consult with the UNHCR and NGOs in the process of adopting the recent regulation and checking on its application.<sup>123</sup> Asylum Aid, the UNHCR and the Immigration Practitioners' Association are actively engaged in awareness campaigns, research, and training sessions on statelessness. Asylum Aid and several other NGOs have information in English on statelessness on their websites (i.e. freemovement.co.uk, migrantsrights.co.uk).<sup>124</sup>

In Hungary there are no awareness campaigns on statelessness organised by the government. Nevertheless, there are leaflets and brochures in immigration offices and public information desks

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<sup>114</sup> Author's conversation with Chris Nash, International Protection Policy Coordinator, Asylum Aid (London, 18 June 2013).

<sup>115</sup> Cores, interview (n 33); questionnaire reply from Gábor Gyulai, Information Officer and UNHCR Liason, Hungarian Helsinki Committee (Budapest, Hungary, 20 January 2014).

<sup>116</sup> Cores, interview (n 33).

<sup>117</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (n 47), s 77(3).

<sup>118</sup> Act LXXX of 2003 on Legal Aid (unofficial tr), s 5 (2)(d).

<sup>119</sup> The vast majority of lawyers in Hungary do not speak foreign languages. Gyulai, questionnaire (n 115).

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> Jones, interview (n 34).

<sup>124</sup> Nash (n 114).

that provide information.<sup>125</sup> In addition, NGOs make statelessness a visible issue. Indeed, it was the awareness-raising activities of the UNHCR in conjunction with the Hungarian Helsinki Committee that inspired the adoption of the protection framework.<sup>126</sup> As far as regards training sessions on statelessness, the Hungarian Helsinki Committee, the UNHCR, as well as the European Network on Statelessness have organised a few in recent years.<sup>127</sup> Hungary stands out among all States of research because it has adopted a number of additional implementing policy measures. For instance, together with the UNHCR, it has developed a Quality Assurance Manual. This manual was designed to guide administrative decision-makers in light of UNHCR Guidelines on Statelessness number 1 and 2.<sup>128</sup> Hungary also organised a number of seminars, presentations and consultations on its statelessness determination procedure in other States and at the international level.<sup>129</sup>

Spain, despite being the State with the oldest statelessness determination procedure, does not organise awareness campaigns, and training on statelessness is very rare.<sup>130</sup> The Government provides some information on statelessness in Spanish on the Ministry of Interior's website.<sup>131</sup> In light of the above, stateless persons looking for information on how to make an application for protection are more likely to find it in Hungary than anywhere else. Moreover, it appears that statelessness remains a little known issue at the public level in all States. Even when it is highlighted, such as in Hungary, it mainly remains a topic among professionals.

### 3.9. Statistics

Very few cases for stateless status have been approved in all three States. In Spain, between 2006 and 2009, 94 persons were recognised as stateless, and in Hungary only 79.<sup>132</sup> In Spain most of the applications were not granted by the administration but by the courts.<sup>133</sup> It is reported that the relatively low number of recognised stateless persons in Spain is due to a restrictive interpretation of the definition of 'stateless person', which will be discussed in chapter 6, and the lack of guidance for its identification.<sup>134</sup> Last year, there was a sharp increase in the number of applications, which reached 1,142.<sup>135</sup> It appears that most of them were lodged by Sahrawis, who

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<sup>125</sup> Molnár, interview (n 35).

<sup>126</sup> The legislator showed a positive approach towards the fulfillment of international obligations. Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 35) 11.

<sup>127</sup> Molnár, interview (n 35).

<sup>128</sup> Molnár, 'Statelessness Determination Procedure in Hungary' (n 35) 276-77; ch 2, s 11.

<sup>129</sup> *ibid* 277.

<sup>130</sup> Cores reports that he gave the only seminar on the matter in Madrid about 5 years ago. Cores, interview (n 33).

<sup>131</sup> See eg Gobierno de España, Ministerio del Interior, Dirección General de la Policía, 'Documentación - Apátridas' <[http://www.policia.es/documentacion/apatridas/ap\\_sol\\_efectos.html](http://www.policia.es/documentacion/apatridas/ap_sol_efectos.html)> accessed 14 March 2014.

<sup>132</sup> UNHCR, 'Procedures for Determining Whether Individuals are Stateless: an Overview' (Seminar presentation slides from ENS kick-off seminar, Budapest 2012) <<http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS%20kick-off%20seminar%202012%20%20Statelessnes%20Determination%20Procedures.pdf>> accessed 15 March 2014.

<sup>133</sup> Cherednichenko, 'Spanish Lesson Learnt: Theory and Practice of a Functional Statelessness Determination Procedure' (n 83).

<sup>134</sup> *ibid*; see ch 6, s 5.

<sup>135</sup> This is a significant increase compared to the previous years: 479 applications were lodged in 2012, 92 in

have been struggling to obtain asylum, and are attempting to seek protection under the 1954 Convention. However there is no official data on how many of these cases were approved.

In Hungary, the low number is indicative of the lawful-status barrier that exists to submit an application. As far as the UK, there are no official statistics and it appears that there are delays in making decisions and only a small number of cases have been approved.<sup>136</sup>

#### **4. Model two: statelessness as a protection ground but no detailed procedural rules**

In France and Italy very few provisions implementing the 1954 Convention are found in national legislation. In both States general administrative law and procedure apply to regulate the determination of statelessness.<sup>137</sup> Due to this situation, some judgments have attempted to fill the gaps that the legislators have left. In France, however, the case-law specifically addressing statelessness matters is rare and difficult to access, as most of it is not published.<sup>138</sup> In Italy, the case-law has not always contributed to clarify the issues at stake, with courts divided and sometimes delivering unclear messages.

In both States, a centralised authority, with clear competence, is in charge of statelessness determination. In France, a procedure for the recognition of stateless status exists within the French Office for the Protection of Refugees and Stateless Persons (*Office Français de Protection des Réfugiés et Apatrides* - OFPRA).<sup>139</sup> In Italy, an implementing decree to the Nationality Law gives the Department for Civil Liberties and Immigration (*Dipartimento per le Libertà Civili e l'Immigrazione*) within the Ministry of the Interior the authority to recognise stateless status.<sup>140</sup> However, complex cases (i.e. if the applicant does not have the required documentation and the matter involves an examination of foreign legislation) must be addressed to the civil courts. The majority of the case-law has recognised that an applicant may choose which procedure to start.<sup>141</sup> This is a very important guarantee, given that the administrative procedure takes a long time, which is incompatible with the need of protection. Furthermore, it requires satisfying the condition of

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2011, 176 in 2010, 51 in 2009, 832 in 2008, 26 in 2007, 34 in 2006, 46 in 2005, 107 in 2004. Gobierno de España, 'Anuario Estadístico del Ministerio del Interior 2013' (2014) 142.

<sup>136</sup> Author's conversations with UK practitioners and policy-makers, First Global Forum on Statelessness (n 51).

<sup>137</sup> By contrast, asylum procedures are regulated in detail in both States.

<sup>138</sup> Catherine-Amélie Chassin, 'Panorama du Droit Français de l'Apatride' (2003) 19(2) RFDA 324, 326.

<sup>139</sup> Loi n° 52-893 du 25 juillet 1952 relative au droit d'asile [Law no 52-893 of 25 July 1952 concerning the right of asylum] (formerly named the 'law concerning the creation of an Office for the protection of refugees and stateless persons') gives OFPRA the mandate to provide for the juridical and administrative protection of stateless persons. République Française, Office Français de Protection des Réfugiés et Apatrides (OFPRA), 'Procédure' <[http://www.ofpra.gouv.fr/?xml\\_id=186&dtid\\_id=13](http://www.ofpra.gouv.fr/?xml_id=186&dtid_id=13)> accessed 27 January 2014. Within OFPRA, there is only one immigration officer dealing with statelessness claims. Magali, interview (n 139).

<sup>140</sup> DPR 12 ottobre 1993, n 572, Regolamento di esecuzione della legge 5 febbraio 1992, n 91, recante nuove norme sulla cittadinanza [Decree of the President of the Republic 12 October 1993, n 572, Implementing regulation to the Law of 5 February 1992, No 91, including new provisions on citizenship] art 17; Ministero dell'Interno, 'Approfondimento. Aporidia' (31 January 2014) <[http://www.interno.gov.it/mininterno/export/sites/default/it/temi/cittadinanza/La\\_condizione\\_di\\_apolide.html](http://www.interno.gov.it/mininterno/export/sites/default/it/temi/cittadinanza/La_condizione_di_apolide.html)> accessed 27 February 2014.

<sup>141</sup> See eg App Perugia, 20.4.2004; Trib Prato, 14.1.1997; Trib Alessandria, 19.6.2002; Trib Lucca, 16.12.2002; Giulia Perin, 'Lacune Normative ad Alto Costo Umano: l'Aporidia in Italia' (2012) 3 DIC 70, 76. It should be noted that there is no provision specifically setting forth the competence of the civil court. However such competence is arguably found in article 2697 of the Civil Code which gives the civil court general competence on matters of status.



lawful residence, which a stateless person can meet in very few cases.<sup>142</sup>

In both France and Italy, a person can make both an asylum and stateless status application simultaneously.<sup>143</sup> The applications follow different paths, and the law does not indicate any preference for either of them.<sup>144</sup> However, to protect asylum claimants, the authorities in charge of determining stateless status would not make contact with the State of origin until the asylum case was finally determined.<sup>145</sup>

#### ***4.1. Main features of the procedures***

In France and Italy, the application for stateless status must be made in writing and must satisfy a number of formal requirements. In France, the applicant must write to the OFPRA in Paris, providing biographic information and the reasons for seeking protection. The OFPRA will reply, confirming that the application has been registered, and asking the applicant to fill out and return a specific form.<sup>146</sup> This form contemplates two hypotheses. One is that the applicant has neither the nationality of their parents nor that of their State of birth. The applicant must explain the reasons for the lack of nationality in such scenarios. The other is that the applicant was deprived of their nationality. The reasons for this must be explained here as well.<sup>147</sup> The form states that the applicant has to bear the burden of proof and must prove not to have a legal bond with any State.<sup>148</sup> Unlike in Italy, the application for stateless status cannot be made to the administrative tribunal, and the OFPRA is solely competent.<sup>149</sup>

In Italy, the procedure before the Ministry of Interior in Rome is more burdensome than in France. The applicant is requested to submit an application, enclosing a birth certificate, documentation certifying lawful residence in Italy, and either documentation effectively demonstrating stateless status or a declaration to this effect by the Consulate of the State of origin or former residence. The Ministry of Interior may require additional documentation. Although there is no fee to pay to submit this application, all the documents must be legalised, which means the applicant incurring in considerable costs. The applicant does not attend an interview and the administration does not engage in any activities to assist him. The administration limits itself to certifying whether or not a person is stateless and reaches a decision on the papers provided.<sup>150</sup> If a person does not have all the documentation requested, the application is refused.

For complex cases that do not fit within the administrative procedure, according to the majority of the jurisprudence, the competent civil court is the one sitting in Rome. The problem is that such a

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<sup>142</sup> Perin, 'Lacune Normative ad Alto Costo Umano: l'Apolidia in Italia' (n 141) 76. See s 3.3 of this chapter.

<sup>143</sup> Forum Réfugiés, 'Dublin II. National Asylum Procedure in France' (2009) 3.

<sup>144</sup> However in practice, an applicant may prefer to make an application for asylum first, given that he would be able to obtain greater protection than if he was granted stateless status. Emails from Giulia Perin to author (20 and 21 March 2014).

<sup>145</sup> *ibid.*

<sup>146</sup> République Française, Service Public Française, 'Apatridie: Étrangers Concernés et Procédure' <<http://vosdroits.service-public.fr/particuliers/F15401.xhtml#N100E6>> accessed 18 October 2013.

<sup>147</sup> Denis Seguin, *Guide du Contentieux du Droit des Étrangers* (Lexis Nexis 2013) 21.

<sup>148</sup> *ibid.* 21.

<sup>149</sup> CE, 1 février 1999, n° 189527 inédit.

<sup>150</sup> Paolo Farci, *Apolidia* (Giuffrè 2012) 347.

court may be difficult to reach for persons that live elsewhere in the country, creating a barrier to access the procedures.<sup>151</sup> The exclusive competence of the civil court in Rome is justified by the fact that, according to the general rules of civil procedure, the claim must be made against the Ministry of Interior, as the opposing party, whose legal residence is in Rome and which determines the territorial competence.<sup>152</sup> The Cassation Court (*Corte di Cassazione*) addressed the analogous issue of competence in the context of asylum cases and, should it decide it on statelessness claims, there is agreement among jurists that it would reach the same outcome.<sup>153</sup> So, on this matter, explicit legislative intervention setting out the competence of the civil courts in the place of residence of the stateless applicant would be needed to facilitate pursuing one's case.

As far as the right to present evidence in person, in France, although not based on any legal provision, it is practice to interview the applicant. In Italy this is not a possibility during the administrative procedure. Whereas the French regulation explicitly stipulates that the applicant has a right to the free-of-charge service of an interpreter at interviews,<sup>154</sup> this is not the case in Italy: in the administrative procedures an interpreter is not needed, as the applicant does not have to give oral evidence. In judicial proceedings, there is the right to a hearing but the Italian government does not provide interpreters or translators at its own expense. The lawyer representing the stateless person can interpret for the client or hire an interpreter.<sup>155</sup> In cases of applicants with limited means, this is a problem given that it may affect the right to effectively present one's case.<sup>156</sup>

#### ***4.2 Burden and standard of proof***

As far as the burden of proof in Italy,<sup>157</sup> in a 2015 judgment, the Italian Cassation court stated that the burden of proof for the applicant has to be reduced.<sup>158</sup> This implies that the judge has the power and duty to search for relevant evidence to fill gaps or complement the evidence that was presented by the applicant. The Court clarified that the judge has to ask the competent foreign or Italian authorities for information and documents concerning the nationality status of the applicant and for the national regulations and practice on nationality.<sup>159</sup> Moreover, the civil court in Rome, in a 2012 decision, held that the applicant can prove his statelessness on the basis of circumstantial evidence. It is likely that other cases in the future will follow these judgments, recognising that it is

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<sup>151</sup> The Cassation Court, in its judgment of 18.6.2004 number 11441, in the context of asylum, held that the application of general provisions on the territorial competence as stated in the civil procedure code implies that the competent court is the one of the place of the respondent – i.e., the Central Administration of the State (art 25). This makes the Civil Court in Rome the competent court. Perin, 'Lacune Normative ad Alto Costo Umano: l'Apolidia in Italia' (n 141) 70, 77-78.

<sup>152</sup> Farci cites the following decisions: Trib Milano, 28.7.2010; App Perugia, 12.6.2008. Farci, *L'Apolidia* (n 150) 363-64.

<sup>153</sup> Corte Cass, 18.6.2004, n11441. This view is shared by practitioners and national experts. Farci, questionnaire (n 85); Perin, interview (n 153).

<sup>154</sup> Magali, interview (n 139).

<sup>155</sup> Farci, questionnaire (n 85).

<sup>156</sup> Legomsky (n 26) 637.

<sup>157</sup> Perin, 'Lacune Normative ad Alto Costo Umano: l'Apolidia in Italia' (n 141) 70, 77.

<sup>158</sup> Corte Cass, 3.4.2015, n 4262.

<sup>159</sup> It should be noted that in a former judgment, the Cassation Court stated that the judge, in proceedings for the recognition of stateless status, does not have the duty to investigate the case. Corte Cass, 28.6. 2007, n 14918. A number of cases followed this Cassation Court decision, among which Farci cites the following: Trib Torino 2.2.2009 e Trib Torino, 10.11.2008; App Firenze, 12.4.2011. Farci, *Apolidia* (n 150) 378-79.

inappropriate to apply general legal principles to the situation of the stateless.<sup>160</sup> In France, the opposite applies, as the burden of proof remains on the applicant and the standard of proof is high: statelessness is not presumed, and the evidence must be sufficiently precise and reliable.<sup>161</sup> The claimant has to provide evidence of the lack of a nationality, either documentary or by other means that clearly indicate statelessness.<sup>162</sup>

#### **4.3. Formal conditions to make the application**

The administrative procedure in Italy requires the applicant to have lawful residence.<sup>163</sup> Despite the law not specifying what ‘lawful residence’ means, the administration interprets it as holding both a residence permit and a certificate of residence.<sup>164</sup> Therefore it provides protection to a very small proportion of stateless persons. The judicial application must satisfy several formal prerequisites and this would be practically impossible without the assistance of a lawyer. There are also court fees to pay, unless the applicant is in receipt of legal aid.<sup>165</sup>

The administrative procedure in France does not require an applicant to meet any other formal prerequisites, such as timelines or lawful status.

#### **4.4. Protection of applicants during the procedures**

During the Italian administrative procedure, it is possible to make an application to the competent Police Office (*Questura*) to obtain a temporary residence permit.<sup>166</sup> In the Italian judicial procedure, the request for a temporary residence permit may be made to the judge who is in charge of the claim. In practice, such a request is usually approved when there are delays in reaching a decision.<sup>167</sup> These temporary permits allow the individual to work and thus are particularly

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<sup>160</sup> Perin, interview (n 153).

<sup>161</sup> Magali, interview (n 139).

<sup>162</sup> *ibid.*

<sup>163</sup> DPR 572/93 (n 140) art 17; Perin, ‘Lacune Normative ad Alto Costo Umano: l’Apolidia in Italia’ (n 141) 72.

<sup>164</sup> Only persons who have a regular residence permit can register in the lists of residents of the local town-hall. Perin, interview (n 153); see eg Comune di Milano, ‘Iscrizione Anagrafica per Cittadini Stranieri non Appartenenti all’Unione Europea’ <[http://www.comune.milano.it/portale/wps/portal/CDM?WCM\\_GLOBAL\\_CONTEXT=/wps/wcm/connect/contentlibrary/Ho%20bisogno%20di/Ho%20bisogno%20di/Residenza%20cittadinanza\\_iscrizioni%20cittadini%20extraUE\\_COPIA&categId=com.ibm.workplace.wcm.api.WCM\\_Category/IT\\_CAT\\_Bisogni\\_04/d264df00446e0194b9a5bbd36d110d8a/PUBLISHED&categ=IT\\_CAT\\_Bisogni\\_04&type=content](http://www.comune.milano.it/portale/wps/portal/CDM?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/contentlibrary/Ho%20bisogno%20di/Ho%20bisogno%20di/Residenza%20cittadinanza_iscrizioni%20cittadini%20extraUE_COPIA&categId=com.ibm.workplace.wcm.api.WCM_Category/IT_CAT_Bisogni_04/d264df00446e0194b9a5bbd36d110d8a/PUBLISHED&categ=IT_CAT_Bisogni_04&type=content)> accessed 1 April 2014.

<sup>165</sup> Court fees amount to 450 Euros. There are additional costs to bear, eg for serving documents on the parties, obtaining translations and legalization of documents. Traveling expenses to the court remain on the applicant even if he is in receipt of legal aid.

<sup>166</sup> DPR 31 agosto 1999, n 394, Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero, a norma dell’articolo 1, comma 6, del DLgs 25 luglio 1998, n 286 come modificato dal regolamento approvato con DPR 18 ottobre 2004, n 334 [Decree of the President of the Republic 31 August 1999, n 394, Implementing regulation of the unified text on immigration law and foreigner status, according to article 1, section 6, of the Legislative Decree of 25 July 1998, n 286, as modified by regulation adopted with Decree of the President of the Republic 10 October 2004, n 334]; Circolare del 7 dicembre 2006, Ministero dell’interno, Dipartimento della pubblica sicurezza, Direzione centrale dell’immigrazione e della polizia delle frontiere (Prot n 400/C/2006/401948/P/14.201) [Circular of 7 December 2006, Ministry of Interior, Department of Public Security, Headquarter of immigration and border police (Protocol number 400/C/2006/401948/P/14.201)] art 11 (1)(c).

<sup>167</sup> App Milano, 15.11.2012; Trib Roma, 6.7.2012; Perin, ‘Lacune Normative ad Alto Costo Umano:

important for stateless persons given the long times required to obtain a final decision. In France, however, an applicant for stateless status does not receive any temporary permit nor support services.<sup>168</sup> Although this lack of protection during the procedures was subject to litigation, the courts decided that stateless persons are not entitled to a temporary residence permit (unlike refugees).<sup>169</sup>

As far as the possibility of immigration detention for stateless persons, both States are signatories of the Return Directive, and thus detention cannot last over 18 months.<sup>170</sup> In France, stateless persons are not protected from detention, which can be decided in order to implement a possible expulsion measure.<sup>171</sup> In Italy, although the procedures do not have a suspensive effect, stateless persons are allowed to stay in the country until a decision is finally taken and are not usually detained during the statelessness determination procedures.<sup>172</sup> However, information on how to make an application for statelessness in detention is not normally available.

#### ***4.5. Length of the procedures***

The times to obtain a decision on a stateless claim are quite lengthy. In France, the average time ranges from one to one and a half years.<sup>173</sup> In Italy, a decree of the Ministry of Interior sets that the administrative procedure has to be concluded within 350 days. This timeline can be extended up to 895 days if the Ministry of Interior seeks the opinion of a foreign embassy or of the Ministry of Foreign Affairs in order to establish that the person does not hold a particular nationality.<sup>174</sup> In the past, some cases have been pending for longer than nine years. At present, on average, the Ministry of Interior takes a decision within two years from the start of the proceedings.<sup>175</sup> The judicial proceedings before the civil court in Rome usually last between two and three years.<sup>176</sup>

#### ***4.6. Decisions and appeals***

In France, the applicant has the right to receive a written decision in French, which either grants status or outlines the reasons for refusal.<sup>177</sup> Most frequently OFPRA merely affirms that the applicant is not registered as a national anywhere and that his nationality is unknown.<sup>178</sup>

In Italy, the applicant receives a decision with a rationale in the judicial proceedings. If the court recognises the statelessness of the applicant, it will issue a decree and notify the Provincial Police Headquarters (*Questura*). The latter, in most cases, will issue a residence permit.<sup>179</sup> In the

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l'Apolidia in Italia' (n 141) 75-76.

<sup>168</sup> Gábor Gyulai, 'Statelessness in the EU Framework for International Protection' (2012) 14 EJML 279, 291.

<sup>169</sup> Chassin (n 138) 334.

<sup>170</sup> Return Directive (n 86) art 15.

<sup>171</sup> Salignat, questionnaire (n 85).

<sup>172</sup> Farci, questionnaire (n 85); Salignat, questionnaire (n 85).

<sup>173</sup> Magali, interview (n 139).

<sup>174</sup> DM dell'Interno 18 Aprile 2000, n 142, Tabella A [Ministerial Decree of the Ministry of Interior 18 April 2000 n 142, Table A], 46; Perin, 'Lacune Normative ad Alto Costo Umano: l'Apolidia in Italia' (n 141) 76.

<sup>175</sup> Perin, 'Lacune Normative ad Alto Costo Umano: l'Apolidia in Italia' (n 141) 76.

<sup>176</sup> Farci, questionnaire (n 85).

<sup>177</sup> Magali, interview (n 139).

<sup>178</sup> Seguin (n 147) 21.

administrative procedures the applicant only receives a very short decision summarising the reasons for refusal. As about two thirds of the cases are refused on the ground that the applicant does not have legal status, the rationale often consists of stating that the applicant does not meet this condition.<sup>180</sup>

It is possible to make an appeal against the OFPRA's negative decision to the administrative court of the place of residence (*tribunal administratif*) within two months. An onward appeal can then be lodged with the Appeal Court (*Cour d'Appel*)<sup>181</sup> and the Council of State (*Conseil d'Etat*).<sup>182</sup> These courts can only quash decisions that breach the law and are not entitled to rectify them. If necessary, the courts will send the case back to the OFPRA for a new assessment.<sup>183</sup>

In Italy, the case-law has clarified that there is no right to appeal against the negative decision of the Ministry of Interior.<sup>184</sup> Consequently, in case of a negative decision, the person can only present a new request for recognition of stateless status to the civil court in Rome. Should the civil court in Rome refuse the claim, an appeal can be made within 30 days<sup>185</sup> to the Court of Appeal (*Corte d'Appello*) in Rome, which could either confirm the decision or quash it and reach a different outcome. A further appeal is possible within 60 days to the Cassation Court, but only for matters relating to the correct application of the law.<sup>186</sup>

#### **4.7. Access to legal assistance and advice**

State-funded legal assistance is available in both States for court proceedings, subject to meeting income and lawful residence requirements.<sup>187</sup> In particular, in Italy, by law, a stateless person has the right to receive legal aid if he resides lawfully in the territory of the State.<sup>188</sup> Nevertheless, the majority of the case-law also extends this right to persons with unlawful status.<sup>189</sup> The main problems concern the availability and quality of legal aid, which varies considerably depending on

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<sup>179</sup> Perin, interview (n 153)

<sup>180</sup> *ibid.*

<sup>181</sup> In this case, the appellant must argue that the decision of the Administrative Tribunal is not well-founded and cannot present the same argument that he had made before. Chassin (n 138) 327.

<sup>182</sup> The Council of State decides on legal issues and exact application of facts. The appeal must be made according to precise requirements set by law. For instance, if the appeal is not signed by a lawyer, it cannot be filed. *ibid* 328.

<sup>183</sup> Asylum cases (also decided by the OFPRA) have more favourable provisions: the National Asylum Court, a specialized court, is competent in dealing with judicial review, and besides quashing the administrative decision, it has the power to grant protection. Gyulai, 'Statelessness in the EU Framework for International Protection' (n 168) 279, 290.

<sup>184</sup> Corte Cass, 9.12.2008, n 28873, later confirmed by subsequent decisions. Farci, questionnaire (n 85).

<sup>185</sup> Codice di procedura civile, 28 ottobre 1940, n 253 (come modificato) [Code of civil procedure, 28 October 1940, n 253 (as amended)] art 325.

<sup>186</sup> *ibid*; Corte Suprema di Cassazione, 'Le Funzioni della Corte di Cassazione' <<http://www.cortedicassazione.it/Cassazione/Cassazione.asp>> accessed 27 February 2014.

<sup>187</sup> Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique modifié par Loi n°99-515 du 23 juin 1999 - art

5 JORF 24 juin 1999 [Law no 91-647 of 10 July 1991 on legal aid as modified by law n 99-515 of 23 June 1999 – art 5 JORF 24 June 1999] (Loi n° 91-647 du 10 juillet 1991) art 2; Salignat, questionnaire (n 85); Katia Bianchini, 'Legal Aid for Asylum Seekers: Progress and Challenges in Italy' (2011) 24(2) JRS 390.

<sup>188</sup> DPR 30 maggio 2002, n 115 (Testo unico delle disposizioni legislative e regolamentari in materia di 'spese di giustizia (Testo A)' [Unified text of laws and regulations in matter of 'judicial expenses (Text A)'] art 90.

the region where an applicant resides.<sup>190</sup> In many Italian cities CARITAS, trade unions and other organisations attempt to fill the gap in legal assistance and help immigrants in administrative procedures.<sup>191</sup>

In France applicants for stateless status who do not have a residence permit are excluded from legal aid for their appeal procedure as the relevant provision only foresees this right for lawfully and habitually resident third-country nationals.<sup>192</sup> Applicants for stateless status, unlike asylum seekers, are not mentioned among the exceptions from this rule,<sup>193</sup> and most of them are therefore not eligible to State's free legal representation.

In all French cities there are centres that provide legal advice (*points d'accès au droit*)<sup>194</sup> and that may involve assisting in writing the letter to request the application form from OFPRA, filling out the application form, and referring clients to legal aid lawyers. The expertise and quality of lawyers varies from centre to centre.<sup>195</sup> There are also a few NGOs that attempt to address some unmet legal needs.<sup>196</sup>

#### ***4.8. Training, access to information, awareness campaigns on statelessness***

There are no awareness campaigns in either country. In Italy, the Association for Legal Studies on Immigration (*Associazione per Studi Giuridici sull'Immigrazione* - ASGI) organises some training on statelessness and, along with some NGOs (i.e. *Progetto Melting Pot*) provides information on statelessness in Italian on their website.<sup>197</sup> The Ministry of Interior's website has some information in Italian on the administrative procedure, but does not mention anything on the judicial determination of statelessness.<sup>198</sup> Free information is given at the various offices set up to assist immigrants (*uffici stranieri* or *sportelli immigrati*) established by almost all the 8,000 Italian municipalities.<sup>199</sup>

In France, very few NGOs are involved in training on statelessness (i.e. *Terre d'Asile*).<sup>200</sup> At French Universities, within Masters in Immigration Law and Human Rights, there may be one

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<sup>189</sup> In these cases, to access legal aid, the person is exempt from providing a number of documents such as the Italian Tax Code for himself and his family. The Constitutional Court has held that in these cases, it is sufficient that the person states on his application for legal aid his name, last name, place and date of birth and State in which he is normally liable to pay taxes. Corte Cost, 14.5.2004, n 144.

<sup>190</sup> Bianchini (n 187).

<sup>191</sup> These are dedicated offices that provide advice to immigrants. Perin, interview (n 153)

<sup>192</sup> Loi n° 91-647 du 10 juillet 1991 (n 187) art 3.

<sup>193</sup> However if the applicant is placed in detention, the residence permit requirement is not applicable, and he can therefore benefit from legal aid to challenge the detention decision. Salignat, questionnaire (n 85).

<sup>194</sup> Magali, interview (n 139).

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.*

<sup>197</sup> Perin, interview (n 153); see also eg ASGI, 'Apolidia' (Scheda pratica a cura di Giulia Perin e Paolo Bonetti (Aggiornata al 12.02.2009) <[http://old.asgi.it/home\\_asgi.php%3Fn=documenti&id=321&l=it.html](http://old.asgi.it/home_asgi.php%3Fn=documenti&id=321&l=it.html)> accessed 27 February 2014; Progetto Melting Pot Europa, 'Apolidia - Sufficiente una Prova Indiziaria per Riconoscerla' (a cura dell'Avv. Matteo Megna) <<http://www.meltingpot.org/Apolidia-Sufficiente-una-prova-indiziaria-per-riconoscerla.html#.VPLZkEK1KII>> accessed 27 February 2014.

<sup>198</sup> Ministero dell'Interno, 'Approfondimento. Apolidia' (31 January 2014) <[http://www.interno.gov.it/mininterno/export/sites/default/it/temi/cittadinanza/La\\_condizione\\_di\\_apolide.html](http://www.interno.gov.it/mininterno/export/sites/default/it/temi/cittadinanza/La_condizione_di_apolide.html)> accessed 27 February 2014.

<sup>199</sup> These are dedicated offices that provide advice to immigrants. Perin, interview (n 153)

<sup>200</sup> Magali, interview (n 139).

lecture on statelessness.<sup>201</sup> Inside the OFPRA, there is little or no training.<sup>202</sup> The OFPRA's website provides information in French on statelessness.<sup>203</sup>

#### *4.9. Statistics*

In France, 163 new applications were made in 2012.<sup>204</sup> In Italy, from 1998 to 2011, 640 applications were presented through the administrative procedures, of which only six were approved.<sup>205</sup> There are no statistics on cases of statelessness decided by the Italian courts, as there is no special system for their registration.

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<sup>201</sup> *ibid.*

<sup>202</sup> *ibid.*

<sup>203</sup> *ibid.*

<sup>204</sup> Salignat, questionnaire (n 85).

<sup>205</sup> Perin, 'Lacune Normative ad Alto Costo Umano: l'Apolidia in Italia' (n 141) 72.

## 5. Tables: essential procedural guarantees in States under models one and two

**Table 1: essential procedural guarantees in States under model one**

	<b>Hungary</b>	<b>Spain</b>	<b>UK</b>
Centralised decision-maker?	No	No	Yes
Joint statelessness/asylum procedures?	Yes	No	No
Temporary permit granted?	No	Yes (only right to stay)	No
Specific evidence rules?	Yes	No	Yes
Right to individual interview?	Yes	No	Yes, if refusal is considered
Right to interpreter?	Yes	Yes	Yes
Written reasons for refusal?	Yes	Yes	Yes
Specific legal barriers to apply?	Yes, lawful status (declared unconstitutional)	Yes, 1-month timeline after entry or expiry of stay	Yes, must not be admissible to the State of formal habitual residence
Length of procedures	Up to 3 years if problems with identification or evidence from foreign authorities	60 days from submission of claim. Can be suspended for about 2 years if evidence is required from foreign authorities	No reliable data
Right of review?	Yes	Yes	Yes
State-funded legal assistance?	Yes	Yes, on appeal	Yes, on judicial review cases
Additional implementing measures by the State?	Yes	No	No



**Table 2: essential procedural guarantees in States under model two**

	<b>France</b>	<b>Italy</b>
Centralised decision-maker?	Yes	Yes
Joint statelessness/asylum procedures?	No detailed provisions. Possible in practice	No detailed provisions. Possible in practice
Temporary permit granted?	No	Yes in the administrative procedure. Usually yes in case of delays in the judicial procedure
Specific evidence rules?	No	Clarified by courts
Right to individual interview?	No provisions, but usually applicants are interviewed in practice	Not for the administrative procedure. Yes, right to a hearing in judicial procedure
Right to interpreter?	Yes	No
Written reasons for refusal?	Yes	Yes
Specific legal barriers to obtain protection?	No	Yes, lawful residence in the administrative procedure
Length of procedures	Not set by law. Usually 1 or 1 and 1/2 year	The administrative procedure must be concluded within 350 days (extendable up to 895); judicial procedures may take 2/3 years
Right of review?	Yes	Not for administrative procedure. Yes for the judicial procedure
State-funded legal assistance?	No	Yes for the judicial procedure and on appeal
Additional implementing measures by the State?	No	No

## 6. Conclusion

This chapter has shown that Hungary and the UK provide detailed, complex and formal stateless status eligibility procedures, with guarantees similar to those for refugee applications.<sup>206</sup> The Hungarian and UK procedures take into consideration the vulnerability and special needs of the stateless on several matters, for instance regarding the right to have the case adjudicated by specialised decision-makers and securing an interpreter at interviews. Nevertheless, one significant barrier in the UK is that it is possible to exclude from protection those who are admissible in a State of former residence, regardless of whether or not they will be protected there. A weakness in Hungarian law is the requirement of lawful stay to apply for stateless status, which however has just been declared unconstitutional because in breach of the 1954 Convention.<sup>207</sup> Spain, despite being considered by the existing literature as a good example,<sup>208</sup> does not appear as such in light of the information gathered: the provisions on burden and standards of proof do not provide enough guidance to decision-makers and the one-month timeline to make the application, although not applied in practice if it is the only ground to refuse a case, complicates access to protection and creates uncertainty of the law.<sup>209</sup>

States under model two, although providing protection to some stateless persons, have several gaps in national legislations. The courts have addressed a few of them, but they have not always secured all essential procedural elements and effective implementation of the 1954 Convention. For instance, it is significant that in France the courts have held that applicants for stateless status do not have the right to a temporary residence permit while their cases are pending, leaving them in a vulnerable situation during the time necessary to reach a decision. In Italy, only lawfully resident stateless persons can pursue the administrative procedure. The case-law has clarified that an application for recognition of stateless status can also be made, regardless of a claimant's immigration status, to the civil court. However, in this case general principles of civil procedure apply, which may not be sufficient to meet the special needs of the stateless (for instance, interpreters are not guaranteed). Although the case-law has provided some explicit guidance on some issues,<sup>210</sup> others remain unsettled and it is unclear how future judgments will deal with them.

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<sup>206</sup> Molnár, 'Statelessness Determination Procedure in Hungary' (n 35) 271.

<sup>207</sup> Gyulai, 'Hungarian Constitutional Court Declares that Lawful Stay Requirement in Statelessness Determination Breaches International Law' (n 77); Gyulai, 'Statelessness in the EU Framework for International Protection' (n 168) 293.

<sup>208</sup> *ibid* 287, 291-92.

<sup>209</sup> *ibid* 292.

<sup>210</sup> This was discussed in s 4.1 above.

## **CHAPTER 5: PROCEDURES AND PRACTICE IN STATES WITH NO PROVISIONS TO IDENTIFY STATELESS PERSONS**

### **1. Introduction**

In Greece, Germany, Sweden, the Czech Republic and the Netherlands there are no specific legislative or regulatory provisions to determine statelessness. In these States, the question of statelessness often arises when a person's asylum claim is rejected and permission to remain is sought on other grounds. The issue of statelessness may also arise, although less frequently, in the context of naturalisation, for persons who are lawful residents, and travel document applications.<sup>1</sup>

As these States have not adopted any legislation on specific statelessness determination procedures, it also follows that there are no designated decision-makers specifically dealing with cases of status of stateless persons.<sup>2</sup> Possibly because there is no specific procedure for the determination of statelessness, in all these States the authorities tend not to issue a specific decision on the question of whether the individual is stateless. In Greece, however, foreigners who become stateless while lawful residents, and who unable to leave, may benefit from article 84 of Law 3386/2005.<sup>3</sup> Under this provision, a special Committee is set up to give an opinion to the Secretary General of the Region on the objective impossibility of presenting a valid passport.<sup>4</sup>

All States under model three ensure procedural guarantees connected to administrative procedures<sup>5</sup>, but to what extent they actually provide protection in light of the special needs of stateless persons is questionable and will be analysed in the following sections. In Greece, particular concerns arise regarding access to procedures and protection for all irregular migrants, not only stateless persons.<sup>6</sup>

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<sup>1</sup> For instance, in Greece, statelessness is considered by article 26 of the Law on Greek Citizenship, which deals with cases of disputed nationality. Questionnaire reply from Erika Kalatzi, Immigration Lawyer (Athens, Greece, 22 December 2013).

<sup>2</sup> For instance, in Germany, the local aliens' authorities make determinations on residence permits and 1954 Convention Travel Documents. Unlike for asylum claims, there is no centralised and specialised authority making such decisions.

<sup>3</sup> Law 3386/2005 (GG A 212) Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory, as amended by Laws 3448/2006 (GG A 57), 3536/2007 (GG A 42), 3613/2007 (GG A 263), 3731/2008 (GG A 263), 3772/2009 (GG A 112) and 3801/2009 (GG A 163) (unofficial tr).

<sup>4</sup> A special three-member Committee is set up within the Ministry of Interior, Decentralization & e-Government. By decision of the Minister the Committee is composed of: (a) an assessor of the State Legal Counsel in the Ministry of Interior, Decentralization & e- Government, as Chairman, (b) the Head of the competent Department within the Ministry of Interior, Decentralization & e- Government, and (c) an official from the Asylum Office proposed by the Director. An official from the competent Department, Directorate of Migration Policy within the Ministry of Interior, Decentralization & e-Government is appointed as rapporteur. Kalatzi, questionnaire (n 1).

<sup>5</sup> Carol A Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendation for Harmonization' (2004) 22(2) *Refugee* 41.

<sup>6</sup> International Federation of Red Cross and Red Crescent Societies, 'An Update on the Situation of Irregular Migrants in Greece' (2012) 11.

## 2. Grounds to obtain lawful status for stateless persons

Analysing all forms of stay for which a stateless person could potentially qualify is beyond the scope of this thesis. Besides the possibility to obtain status under the Refugee Convention, stateless persons may qualify to remain in a State on other grounds. For instance, they may be able to stay if they face serious harm as expressed in article 2(e) of the Qualification Directive.<sup>7</sup> In other cases, they may be allowed to remain for compassionate reasons such as age, health or family ties.<sup>8</sup> In addition, they may be permitted to remain for practical reasons, such as the inability to obtain travel documents. In this thesis I only explore provisions of residence permits that may be obtained because it is impossible to leave the country due to practical obstacles, as stateless persons often found themselves in such a situation. These provisions do not technically constitute implementation of the 1954 Convention since they are not based on the States' international obligations. Their chief function is to provide a practical measure for those that cannot be removed.

Applications for a residence permit on the grounds that it is impossible to leave the country can be made in the Czech Republic, the Netherlands, Germany, and Sweden, but not in Greece. What such applications have in common is that they require applicants to prove that they have made all possible attempts to leave and obtain their documents.

Specifically, in the Czech Republic, visas for exceptional leave to remain (also called 'tolerated stay') are granted by the Department of Asylum and Migration Policy, within the Ministry of the Interior, to a foreign national when obstacles beyond his control prevent him from leaving the country or when his departure is impossible because he would face danger of real harm in the country of origin.<sup>9</sup>

In the Netherlands, stateless persons who are unable to return to the country of origin and whose asylum application has been rejected may apply for a residence permit under the 'no-fault' procedure to the Immigration and Naturalisation Service (*Immigratie en Naturalisatie Dienst* - IND).<sup>10</sup> Even if statelessness is accepted, it does not automatically lead to a no-fault residence

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<sup>7</sup> Article 2(e) defines as a 'person eligible for subsidiary protection' a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his country of origin, or in the case of a stateless person, to his country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country. Council Directive (EC) 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (Qualification Directive). Complementary forms of protection have already been subject of several studies. See eg Ruma Mandal, 'Legal and Protection Policy Research Series. Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")' PPLA/2005/02 (UNHCR 2005); Jane McAdam, 'Complementary Protection and Beyond: How States Deal with Human Rights Protection' (2005) Sydney Law School Research Paper No 06/18, New Issues in Refugee Research Working Paper No 118; Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).

<sup>8</sup> Sometimes health or family reasons may be linked to an international protection need, such as under articles 3 or 8 of the European Convention on Human Rights. Mandal (n 7); McAdam, 'Complementary Protection and Beyond: How States Deal with Human Rights Protection' (n 7).

<sup>9</sup> Helena Hofmannová, 'Legal Status of Stateless Persons in the Czech Republic' (2013) 1 TLQ 66; telephone interview with Alexandra Dubova, Immigration Lawyer, Organizace pro pomoc uprchlíkům, o.s. (Prague, Czech Republic, 2 January 2014).

<sup>10</sup> Art 3.4(1)w in conjunction with art 3.6(1a) of the Aliens Act. Vreemdelingenbesluit 2000 (Vb 2000) [Aliens Act 2000]; UNHCR 'Mapping Statelessness in the Netherlands' (2011) 18, 42.

permit<sup>11</sup>, as there are burdensome requirements to satisfy and which are further discussed in the next section.

In Germany, provisions that are relevant to stateless persons are those concerning the ‘suspension of deportation’ or ‘toleration’ certificate (*Duldung*) and the temporary residence permits for obstacles to leaving the country (*Aufenthaltserlaubnis*). The local Aliens Offices, in each of the 16 German Federal States, are the competent authorities dealing with these matters.<sup>12</sup> Unlike asylum claims, the administrative competence is decentralised, and thus local laws and practice change from State to State. Toleration is mainly issued to failed asylum seekers who are unwilling or unable to leave the country.<sup>13</sup> Pursuant to section 60a of the Residence Act, the local Aliens Office can issue a toleration certificate if the deportation of an individual is impossible for legal or factual grounds. Factual grounds include undetermined nationality, and lack of cooperation of the State of origin. Lack of cooperation on the part of the applicant is not a bar from obtaining a toleration certificate, although it will likely prevent a residence permit from being issued.<sup>14</sup> According to section 25 of the Residence Act, a person becomes eligible to obtain a temporary residence permit when his departure is impossible in fact or in law, and the obstacle to deportation is not likely to be removed in the foreseeable future. Moreover, the applicant must not prevent his departure through fault of his own.<sup>15</sup> The residence permit should be granted if deportation has been suspended for 18 months. Nevertheless, in practice, the administrations do not always give a permit after a period of 18 months on toleration.<sup>16</sup>

In Sweden, the Migration Board<sup>17</sup> may grant a temporary or permanent residence permit if there is the impossibility to return, according to chapter 12, section 18 or section 19 of the Aliens Act.<sup>18</sup> Section 18 provides that a residence permit may be granted, after the final decision on asylum and an expulsion order has been made, and when new circumstances that entail hindrance to return to the country of origin arise. For instance, this would be the case when the country of origin is unwilling to receive the person back. Applicants must show that they did everything

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<sup>11</sup> Questionnaire reply from Laura van Waas, Senior Researcher, Tilburg University (Tilburg, The Netherlands, 14 January 2014).

<sup>12</sup> Given the decentralised administrative system, not much is known on the local Aliens Offices’ practices in this regard. Katia Bianchini, ‘On the Protection of Stateless Persons in Germany’ (2014) 19(1-2) TLR 35, 38.

<sup>13</sup> *ibid* 42. It should be noted that a person cannot make an application for a toleration certificate. It is the administration that decides to issue it in light of the facts of the case. Telephone interview with staff-member of the Department ‘Project Q – Qualification of Refugee Advice’, Non-profit Association for the Support of Asylum-Seekers (*Projekt Q – Qualifizierung der Flüchtlingsberatung, Gemeinnützige Gesellschaft zur Unterstützung Asylsuchender e.V.*) (Münster, Germany, 14 March 2014).

<sup>14</sup> Bianchini (n 12) 43.

<sup>15</sup> *ibid* 44.

<sup>16</sup> Telephone interview with staff-member in charge of vulnerable refugees, Refugee Council of Lower Saxony (*Flüchtlingsrat Niedersachsen*) (Hildesheim, Germany, 2 May 2014).

<sup>17</sup> The Migration Board is the authority responsible for assessing protection needs of stateless persons, but the Board lacks clear instructions on how to deal with them. The Aliens Act is accompanied by an implementing regulation – the Aliens Ordinance (2006) – which does not refer specifically to stateless persons other than in relation to travel documents. Sebastian Kohn, ‘Statelessness in Sweden - Changes Ahead?’ (*European Network on Statelessness*, 12 September 2012) <<http://www.statelessness.eu/blog/statelessness-sweden-changes-ahead>> accessed 7 March 2014.

<sup>18</sup> A person may also be granted subsidiary protection according to Chapter 2(a) of the Aliens Act which sets forth a provision for protection in case that in the country of origin there is a possibility of severe disturbances.

possible to leave the country (i.e. they went to their embassy and were not given travel documents)<sup>19</sup> Section 19 of the Aliens Act is less useful in the context of statelessness, as it refers to the possibility of applying for a residence permit when new circumstances for protection arise after the final decision on asylum and they could not be invoked before.

As for Greece, there are no provisions on residence permits for impossibility to leave. There are very few norms specifically applicable to stateless persons, such as article 84 of Law 3386/2005. According to this article, foreigners who became stateless while legally residing in the country may exceptionally benefit from it in the context of renewals of other residence permits. In particular, when applicants are unable to produce a valid passport or other travel documents, they may nevertheless have their residence permits renewed by the General Secretary of the Region, if they can specifically and demonstrably claim objective inability to provide such documents due to special circumstances or situations. The General Secretary of the Region will decide in accordance to the recommendation of the Ministry of Foreign Affairs and after having heard the opinion of a special Committee.<sup>20</sup> Nonetheless, the government applies this provision very rarely.<sup>21</sup> In addition, while facilitating the possibility to obtain legal residence in Greece when a person does not hold valid documents, this provision does not guarantee the possibility to travel abroad and return.<sup>22</sup> Another provision of interest relates to nationality disputes, in the context of naturalisation applications. In particular, it is set forth that the Minister of the Interior is solely competent to decide, following the concurring opinion of the Nationality Council,<sup>23</sup> upon matters such as objections by applicants against the proposal of the Naturalisation Committee concerning the ascertainment of the fulfillment of the various substantive conditions to naturalise<sup>24</sup>, and citizenship issues.<sup>25</sup>

### 3. Main features of the procedures

In States under model three, the applicants usually start the procedures in writing. However, in Sweden, there is a special safeguard, in that the Migration Board should, on its own initiative,

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<sup>19</sup> EDAL, 'Country Overview – Sweden' <<http://www.asylumlawdatabase.eu/en/content/edal-country-overview-sweden#admin%20system>> accessed 17 December 2013.

<sup>20</sup> This is special three-member Committee is set up within the Ministry of Interior, Decentralization and e-Government. The Committee is composed of (a) an assessor of the State Legal Counsel in the Ministry of Interior, Decentralization and e-Government, as Chairman; (b) the Head of the competent Department within the Ministry of Interior, Decentralization and e-Government, and (c) an official from the Asylum Office. Kalatzi, questionnaire (n 1).

<sup>21</sup> Author's conversations with experts at the European Network on Statelessness' 'Training the Trainer' event (Strasburg 22 September 2015).

<sup>22</sup> *ibid.*

<sup>23</sup> Law 3284/2004 (GG A 217) Greek Citizenship Code (consolidated version 2010) (Haris Psarras tr, unofficial tr) (Greek Citizenship Code) arts 26, 28.

<sup>24</sup> *ibid* art 5A.

<sup>25</sup> The Citizenship Council is formed through decision of the Minister of the Interior, Decentralisation and E-Governance and comprises the following members: (a) an emeritus member of the Council of State as President, (b) the General Secretary of Migration Policy of the Ministry of the Interior, Decentralisation and E-Governance, (c) a member of the Legal Council of the State, (d) a professor or an assistant professor of Private International Law as well as a professor or an assistant professor of Public International Law or of Constitutional Law at a Greek Institution of Higher Education, (e) the head of the Citizenship Directorate of the Ministry of the Interior, Decentralisation and E-Governance. Greek Citizenship Code (n 23) art 28.

assess whether there are any impediments to the removal if it cannot be carried out. Furthermore, anyone can inform the Migration Board of eventual obstacles. For example, the police may notify that it is impossible to enforce the removal to a certain country or a doctor may notify of medical reasons that prevent it.<sup>26</sup> An application can also be made in the native language of the person, although there is no guarantee that the Immigration Board will translate and consider it.<sup>27</sup>

In the Czech Republic applicants have to provide a number of documents set by law.<sup>28</sup> In addition, the application must be made in person at one of the Departments for Asylum and Migration, which is a problem for stateless persons in detention as they cannot even start the procedure.<sup>29</sup>

In the Netherlands an application for a no-fault residence permit can only be lodged after an application for asylum or a regular residence permit has been rejected, thus forcing a person to go through at least two different procedures. The application can be made by filling out a form, and lodging it in person at the Immigration and Nationality Directorate or sending it by post.<sup>30</sup> The onerous prerequisites to apply are:<sup>31</sup> (1) proving that independent attempts were made to leave the Netherlands<sup>32</sup>; (2) the International Organisation for Migration indicated that it is not able to assist the applicant in leaving due to lack of travel documents; (3) mediation by the Return and Departure Service to obtain the necessary travel documents was not fruitful; (4) showing, through objective and verifiable facts and circumstances, that the applicant cannot leave through no-fault of his own; and (5) must be residing in the Netherlands without a valid title and not meet other conditions for a residence permit.<sup>33</sup>

As far as the costs involved in making the applications, in all States under model three, there are no fees, except in the Czech Republic.<sup>34</sup> Nevertheless gathering all the necessary documents can be expensive especially if translations and authentications are required. Moreover, given the complexity of the laws, it is unlikely that applicants will be able to submit a case without proper legal assistance.

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<sup>26</sup> The Swedish Network of Refugee Support Groups (FARR), ‘Good Advice for Asylum Seekers in Sweden’ (2011) 40.

<sup>27</sup> Email from Sanna Vestin to author (17 February 2014).

<sup>28</sup> Under art 34 of the Foreign Nationals Act, the application for a visa for a stay over 90 days for leave to remain in the territory must include: (a) a travel document, if it has not expired; and (b) a certified copy of a document confirming the existence of a reason preventing to leave. If the applicant is unable to provide the latter document for reasons independent of his will, it can be replaced by an affidavit stating the reasons why he cannot leave. Act No. 326/1999 on the residence of foreign nationals in the Czech Republic and amending certain laws (Foreign Nationals Act) (unofficial tr).

<sup>29</sup> Dubova, interview (n 9).

<sup>30</sup> Ministry of Security and Justice, Immigration and Naturalization Service, ‘Asylum. Unable to Leave the Netherlands through no Fault of Your Own’ <<https://ind.nl/EN/individuals/residence-wizard/asylum>> accessed 7 August 2014.

<sup>31</sup> Vreemdelingencirculaire 2000 (B) [Aliens Act Implementation Guidelines] para B14/3.2.

<sup>32</sup> The alien must prove that he has applied to the diplomatic representation of his country, or other countries where he had a residence permit and/or countries which may be expected to give him permission to enter, and that the request to issue travel documents has not been granted. He can prove this, eg, by declarations of the relevant authorities showing that he has demonstrably applied to those diplomatic representations and stating that a request to issue travel documents has not been granted. Ministry of Security and Justice, Immigration and Naturalization Service (n 30).

<sup>33</sup> UNHCR ‘Mapping Statelessness in the Netherlands’ (n 10) 45.

<sup>34</sup> Staff member of the Department ‘Project Q – Qualification of Refugee Advice’, interview (n 13).

Concerning the right to present the case in person, the right to an interview is provided in all States<sup>35</sup> with the exception of the Czech Republic for tolerated visas,<sup>36</sup> and Sweden for cases falling under chapter 12 section 18.<sup>37</sup> At interviews, an interpreter is guaranteed in all States. The only exceptions are Germany for the administrative stage, although the applicant is allowed to take his own interpreter<sup>38</sup>, and Greece, where there is lack of interpreters, especially in the areas outside Athens. The shortage of interpreters in Greece is not limited to the administrative procedures and is extended to court proceedings as well.<sup>39</sup>

#### **4. Burden and standard of proof**

In all States under model three, except for Germany, the burden of proof rests exclusively with the applicant, who has to do whatever he can to prove his allegations and the individual facts.

The Netherlands take a particularly strict view on this, as the applicant has to show through official documents that he is stateless or prove in all possible means that he cannot reasonably leave the Netherlands and that it is not his fault (i.e. contact embassies and ask for an official statement, try to acquire official identification documents such as a passport or ID card, which is often impossible for stateless persons).<sup>40</sup>

In Sweden, the admissible evidence is broader than in the Netherlands, as there are almost no legal grounds for limiting the use of relevant proofs. However particular emphasis is placed on proving one's identity.<sup>41</sup> If there is no reason to doubt the testimony or evidence given, the applicant will be given the benefit of the doubt with respect to the facts that he is unable to prove. If there is reason to doubt the applicant's identity and his testimony is vague or contradictory, he cannot be given the benefit of the doubt.<sup>42</sup> In addition, when an impediment to removal due to a new protection need is argued, it must be explained why this was not raised before.<sup>43</sup>

In Germany, all foreigners that enter or stay in the country have a duty to provide their passports or identity papers. If an alien does not possess such a document, he has the obligation to cooperate (*Mitwirkungspflicht*) with the authorities, and to take all reasonable measures in order to provide substantive proof on identity and origin. The Alien's Authority has to continue the process on the establishment of identity on its own, while informing the applicant on all steps to take. If all measures are exhausted from both sides, the burden of proof is shared according to the distribution of responsibilities and availability of means of evidence to the parties.<sup>44</sup> Regarding the means of

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<sup>35</sup> *ibid.*

<sup>36</sup> Dubova, interview (n 9).

<sup>37</sup> Vestin, email (n 27).

<sup>38</sup> Staff member of the Department 'Project Q – Qualification of Refugee Advice', interview (n 13).

<sup>39</sup> Human Rights Watch, 'Stuck in a Revolving Door. Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union' (2008) 100-01.

<sup>40</sup> Questionnaire reply from Rombout Hijma, Immigration Lawyer (Utrecht, The Netherlands, 30 January 2014).

<sup>41</sup> See ruling of the Swedish Migration Court of Appeal (*Migrationsöverdomstolen*) MIG 2007:9.

<sup>42</sup> EMN, 'The Practices in Sweden Concerning the Granting of Non-EU Harmonised Protection Statuses' (2010) 12. See ruling of the Swedish Migration Court of Appeal (*Migrationsöverdomstolen*) MIG 2007:12.

<sup>43</sup> The Swedish Network of Refugee Support Groups (n 26) 41.

<sup>44</sup> The duty to provide documents is found in § 3 Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG) in der Fassung der



proof, the Federal Administrative Court held that the applicant must produce, for example, the following evidence:<sup>45</sup> information on the previous residence and place of birth; own name and family members' names in straight line up to great-grandparents, when these are known; evidence of an attempt to naturalisation in the State of origin, unless this is unreasonable due to discrimination or danger to life and limb; proof of identity through relatives or registries, and proof that he lived as a stateless person in the State of origin, as far as this is reasonable.<sup>46</sup>

Overall, in the majority of these States, the tendency is to adopt an approach that does not take evidentiary difficulties into account and leaves stateless persons facing serious problems to meet all the requirements. For these permits for impossibility to leave to be meaningful, more flexible and protection-oriented rules on proving the claim would be needed.

## 5. Protection of applicants during the procedures

None of the States under the third model provide for temporary status or benefits while an application is pending.<sup>47</sup> Only Sweden and Germany provide for limited benefits while the outcome is awaited. In Sweden, an applicant under chapter 12 section 18 may receive limited support in the form of accommodation, usually in refugee camps, and food, but no cash.<sup>48</sup> In Germany, a person on toleration may receive benefits under the Asylum Seekers' Benefit Act (*Asylbewerberleistungsgesetz*)<sup>49</sup> if he does not have the resources for his subsistence, especially his personal resources - primarily his own income and assets.<sup>50</sup> In addition, a person on toleration has

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Bekanntmachung vom 25. Februar 2008 (BGBl I 2008, 162), das durch Artikel 128 der Verordnung vom 31. August 2015 (BGBl I 2015, 1474) geändert worden ist [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - Residence Act]. The general principle on the burden of proof is stated in § 86 Abs. 1 S.1 VwGO. However when some facts, such as impossibility to leave, may be difficult to establish, or some documents difficult to obtain, the burden of proof is shared between the applicant and the government. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG) in der Fassung der Bekanntmachung vom 25. Februar 2008 (BGBl I 2008, 162), das durch Artikel 128 der Verordnung vom 31. August 2015 (BGBl I 2015, 1474) geändert worden ist [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - Residence Act]. See Dr. Friedrich Schoch in *Verwaltungsgerichtsordnung* § 123 recital 97 (22. EL); VGH München, Urteil v 9.07.2012 - 20 B 12.30003; BVerwG, Urteil v 16.04.1985 - 9 C 109/84, BVerwGE 71, 180ff; Prof. Michael Dawin in *Verwaltungsgerichtsordnung* § 86 recital 19 ff (22. EL).

<sup>45</sup> BVerwG, Urteil v 17.03.2004 - 1 C 1.03. The means of proof must not be cumulative.

<sup>46</sup> BVerwG, Urteil v 17.03.2004 - 1 C 1.03.

<sup>47</sup> Catherine-Amélie Chassin, 'Panorama du Droit Français de l'Apatride' (2003) 19(2) RFDA 324, 332; Gábor Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (Hungarian Helsinki Committee 2010); UNHCR 'Mapping Statelessness in the Netherlands' (n 10) 44; Kalatzi, questionnaire (n 1); telephone interview with Lacene Magali, Solicitor and Legal Trainer, France Terre D'Asile (Paris, France, 27 December 2013); Dubova, interview (n 9).

<sup>48</sup> Telephone interview with Bo Johansson, Lawyer, Swedish Refugee Advice Centre (Stockholm, Sweden, 17 December 2013).

<sup>49</sup> Asylbewerberleistungsgesetz (AsylLG) in der Fassung vom 5. August 1997 (BGBl I 1997, 2022), zuletzt geändert durch Artikel 3 des Gesetzes vom 22. November 2011 (BGBl I 2011, 2258) [Asylum Seekers' Benefits Act].

<sup>50</sup> The social welfare of the district is responsible for processing claims for benefits under the Asylum Seekers Benefits Act. The district is responsible for the housing and care of refugees and persons temporary in Germany whose deportation has been suspended. If necessary, it will take over health care costs in case of illness. Landkreis Aurich, 'Leistungen für Asylbewerber und Geduldete' <[http://www.landkreis-aurich.de/virtuelle\\_verwaltung.html?&tx\\_civserv\\_pi1\[community\\_id\]=3452&tx\\_civserv\\_pi1\[mode\]=service&tx\\_civserv\\_pi1\[id\]=108&cHash=174b139b2424bb954659f69c93a520f9](http://www.landkreis-aurich.de/virtuelle_verwaltung.html?&tx_civserv_pi1[community_id]=3452&tx_civserv_pi1[mode]=service&tx_civserv_pi1[id]=108&cHash=174b139b2424bb954659f69c93a520f9)> accessed 24 March 2014; Federal Office for Migration and Refugees, 'Basic Needs Are Provided for Asylum-Seekers' (3 May 2011) <<http://www.famr.de>>

limited access to the labour market, depending on the length of time they have been on toleration and their professional qualifications.<sup>51</sup>

Greece stands out for its ill treatment of irregular migrants and asylum seekers, which the European Court of Human Rights has found to be inhuman and degrading, and in breach of article 3 of the European Convention of Human Rights.<sup>52</sup>

In all these States, generally, although persons who started a procedure for impossibility to leave face removal at any time, this is unlikely to happen for practical reasons.<sup>53</sup> Undocumented or irregular migrants face immigration detention<sup>54</sup> up to 18 months.<sup>55</sup> In Greece the issue of detention of irregular migrants who cannot be removed (i.e. Palestinians, Somalis, Afghans or those whose nationality cannot be established) is particularly serious, as it is routinely used despite the authorities knowing that expulsion cannot be implemented.<sup>56</sup> This practice does not comply with the purpose of detention as stated in the law, that is, to carry out expulsions. In particular, article 30(4) of the Law 3907/2011 states that when a reasonable prospect of removal no longer exists, detention ceases to be justified and the person concerned shall be released immediately.<sup>57</sup> Germany, on the other hand, seems to be the State where administrative detention is the least used of all.<sup>58</sup> Immigration detention is an exception and undergoes judicial control within 24 hours of its start.<sup>59</sup> It is unlikely that the German courts will uphold immigration detention in cases of stateless persons or persons with unclear nationality.<sup>60</sup>

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bamf.de/EN/Migration/AsylFluechtlinge/Asylverfahren/Asylbewerberleistungen/asylbewerberleistungen-no-de.html> accessed 24 March 2014.

<sup>51</sup> A person who has been on toleration for more than 3 months has limited access to the labour market and can apply to receive a work permit from the Federal Employment Agency. Specifically, it is required from the employer to carry out a 'priority check' and show that there is no qualified German or EEA citizen available for the job. However, employment for the highly skilled, those in the family business, vocational training, and internships are allowed without obtaining permission from the Federal Employment Agency. After 15 months on toleration, a priority check is no longer required. After 48 months on toleration, unrestricted access to the labour market is allowed (nevertheless self-employment is not possible). §32(1)-(3),(5) Verordnung über die Beschäftigung von Ausländerinnen und Ausländern (Beschäftigungsverordnung - BeschV) vom 6. Juni 2013 (BGBl I 2013, 1499), die zuletzt durch Artikel 1 der Verordnung vom 29. Juli 2015 (BGBl I 2015, 1422) geändert worden ist [Regulation on employment of aliens – Employment Regulation].

<sup>52</sup> *M.S.S. v. Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

<sup>53</sup> Dubova, interview (n 9).

<sup>54</sup> Text to n 24 in ch 2.

<sup>55</sup> Directive (EC) 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/89 (Return Directive), art 15.

<sup>56</sup> Sharita Gruberg, 'De Facto Statelessness Among Undocumented Migrants in Greece' (2011) XVIII(3) GJPLP 533; Human Rights Watch (n 39) 34.

<sup>57</sup> Law 3907/2011 (GG A 7) Establishment of Asylum Service and Service of First Reception (unofficial tr); UNCHR 'Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau. Addendum. Mission to Greece' (2013) 23rd Session UN Doc A/HRC/23/46/Add.4.

<sup>58</sup> However there are problems in Germany too. Germany heavily relies on prisons to detain immigrants. Furthermore, responsibility for detention is at the State level rather than federal level. The decentralisation of the system makes it difficult to obtain information on detention practices. For instance, there are no statistics on immigration detention and some State authorities have refused to disclose information arguing that it is 'sensitive.' Global Detention Project, 'Immigration Detention in Germany' (October 2014) <<http://www.globaldetentionproject.org/countries/europe/germany/introduction.html>> accessed 7 November 2014.

<sup>59</sup> Interview with Heiko Habbe, Immigration Lawyer, Jesuit Refugee Services Berlin (Hamburg, Germany, 9 August 2013).

<sup>60</sup> *ibid*; article 104(2) of the Constitution states that an independent court has to decide on the legality of the

## 6. Length of the procedures

In the Czech Republic and Sweden the procedures are usually quick. In the Czech Republic the Ministry of Interior should decide a case within 30 days but it can take as long as three months.<sup>61</sup> In Sweden, immigration decisions are usually taken within three months.<sup>62</sup>

In the Netherlands, by contrast, no-fault procedures can be very lengthy, and take an average of over two and a half years – more than five times the duration that is provided for by law for the procedure, which is six months.<sup>63</sup> Similarly, in Germany, the process of issuing a residence permit for impossibility to leave may take years, but no reliable data is available.<sup>64</sup> Generally, there is the suspicion that a person can obtain documents and it is considered reasonable to request him to contact the relevant embassy, even if he is stateless.<sup>65</sup>

There is no data regarding the application of the mentioned provisions as far as Greece.

## 7. Decisions and appeals

The right to receive a decision with a rationale is guaranteed in all States, although in most cases the decisions are concise and avoid addressing statelessness.<sup>66</sup>

Both in the Netherlands and the Czech Republic, an applicant must usually exhaust administrative remedies before lodging an appeal with the courts. In the Netherlands, the administrative decision specifies whether it is possible to register an objection against a refusal. Generally, the registration of an objection must be made within four weeks of receipt of the decision. If, then, the Immigration and Naturalisation Directorate states that the objections are unfounded, it is possible to appeal against its decision to the Aliens Court within four weeks.<sup>67</sup>

In the Czech Republic there is a right to request that the decision refusing the visa be reviewed by the Commission for decision-making in matters of residence of foreigners. The deadline to ask for such a review is of 15 days from receipt of the decision. Within 30 days, the Commission must decide upon the review request, although, in practice it takes longer. If the Commission confirms the decision, an appeal can arguably be made within 30 days to the

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immigration detention. §104(2) Grundgesetz (GG) für die Bundesrepublik Deutschland vom 23.05.1949 (BGBl I 1949, 1), zuletzt geändert durch Gesetz vom 23.12.2014 (BGBl I 2014, 2438) mWv. 1.01.2015 [Basic German Law]. Immigration officers have to show that the detained person will be deported in 3 months (see §62(3)(4) Aufenthaltsgesetz (AufenthG) neugefasst durch Beschluss vom 25.02.2008 (BGBl I 2008, 162), zuletzt geändert durch Artikel 2 Abs 59 Gesetz vom 07.08.2013 (BGBl I 2013, 3154) [Residence Act]). The courts will generally not be satisfied, if there are issues of statelessness, that the detained person will be deported in such a timescale. Interview with Reinhard Marx, Immigration Lawyer (Frankfurt, Germany, 22 July 2013).

<sup>61</sup> Dubova, interview (n 9).

<sup>62</sup> Johannson, interview (n 48).

<sup>63</sup> Hijma, questionnaire (n 40).

<sup>64</sup> Telephone interviews with staff-member in charge of vulnerable refugees, Refugee Council of Lower Saxony (*Flüchtlingsrat Niedersachsen*) (Hildesheim, Germany, 2 May 2014 and 12 May 2014).

<sup>65</sup> *ibid.*

<sup>66</sup> This information was provided by all national experts of States under model three.

<sup>67</sup> Immigration and Naturalization Service, 'Register an Objection' <<http://www.ind.nl/en/Residence-Wizard/other-information/register-and-objection/Pages/default.aspx>> accessed 6 November 2013.

administrative court.<sup>68</sup> However, according to one legal doctrine, visa decisions cannot be appealed with the administrative court because there is no legal right for such a visa.<sup>69</sup>

In Sweden, there is no right of appeal against the refusal of an application made for impossibility to leave for practical impediments under chapter 12 section 18.<sup>70</sup> If new issues of protection, under chapter 12 paragraph 19 were raised,<sup>71</sup> the most common scenario is that the Migration Board would not consider them as new circumstances and so there would be no right of appeal. Only if the Migration Board agrees to engage in a new assessment on the grounds that there are different protection needs,<sup>72</sup> but finally its decision is negative, the decision can be appealed to the migration court.<sup>73</sup> In this case the deadline to appeal is within 21 days of receiving the negative decision.<sup>74</sup> In Germany, the deadline to appeal to the administrative court against the refusal of a residence permit is usually 14 days of notification of the decision.<sup>75</sup> Generally, the administrative courts will take between six months and two years to reach a decision.<sup>76</sup>

In the States under this model, with the exception of the Czech Republic, the courts can reverse the decision besides quashing it.<sup>77</sup> For administrative review of decisions, there is no fee to pay.<sup>78</sup> In States where court fees must be paid there are, however, exemptions for this type of proceedings or for those with no financial means or in receipt of legal aid. In States under model three, the appeal process for these cases is considered accessible only with the help of a lawyer.

## **8. Access to legal assistance and advice**

There is no State-funded legal aid for irregular migrants at the administrative stage<sup>79</sup>, except in limited cases in Sweden and Germany. In Sweden, counsel shall be appointed, when lack of legal

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<sup>68</sup> Dubova, interview (n 9).

<sup>69</sup> *ibid.*

<sup>70</sup> The Swedish Network of Refugee Support Groups (n 26) 42.

<sup>71</sup> See ch 4, s 4.2.

<sup>72</sup> The Swedish Network of Refugee Support Groups (n 26) 41.

<sup>73</sup> *ibid.* 42. A decision by a Migration Court can be appealed to the Migration Court of Appeal within three weeks of the day the decision was issued or three weeks of the day the complainant was served with the decision. The Migration Court of Appeal requires leave to appeal to hear the case. Leave to appeal is granted only if the case is significant to guide the application of the law, or there are other exceptional grounds for hearing the appeal. EMN (n 42) 12-13.

<sup>74</sup> Asylum Information Database, 'Subsequent Applications. Sweden' <<http://www.asylumineurope.org/reports/country/sweden/subsequent-applications>> accessed 11 November 2014.

<sup>75</sup> Bundesamt für Migration und Flüchtlinge (BAMF), 'Das deutsche Asylverfahren - ausführlich erklärt. Zuständigkeiten, Verfahren, Statistiken, Rechtsfolgen' (2012) 45.

<sup>76</sup> Staff member, Refugee Council of the Lower Saxony, interview (n 64) (12 May 2014).

<sup>77</sup> Swedish Migration Board, 'If the Migration Board has Refused your Application for Asylum' <[http://www.migrationsverket.se/info/447\\_en.html](http://www.migrationsverket.se/info/447_en.html)> accessed 10 November 2013; Staff member of the Department 'Project Q – Qualification of Refugee Advice', interview (n 13).

<sup>78</sup> This information was provided by all national experts of States under model three.

<sup>79</sup> Zivilprozessordnung (ZPO) in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl I 2005, 3202; I 2006, 431; I 2007, 1781), zuletzt geändert durch Artikel 1 des Gesetzes vom 10. Oktober 2013 (BGBl I 2013, 3786) [Code of Civil Procedure], art 114; Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz - BerHG) vom 18. Juni 1980 (BGBl I 1980, 689), zuletzt geändert durch Artikel 2 des Gesetzes vom 31. August 2013 (BGBl I 2013, 3533) [Act on legal advice and representation for citizens with low incomes - Legal Advice Act]; under section 4 of this latter law, an application for advisory aid must be made. The Local District Court of the place where the person has his general place of jurisdiction decides on such requests. If the person has no general place of jurisdiction, the Local District Court where a need for advisory aid arises has jurisdiction. The application can be made either

assistance is presumed, in proceedings concerning deportation, enforcement of an expulsion order, and rejection of legal status.<sup>80</sup> In addition, irregular migrants become entitled to State-funded legal aid if the Migration Board agrees to review a case under chapter 12 section 18.<sup>81</sup> In all other cases, there are some NGOs that may assist. The problem in Sweden appears to be more with the quality of the lawyers, which is reported to range from excellent to poor, than their availability.<sup>82</sup> Moreover, there is no specialisation of lawyers on statelessness matters, partially due to the low legal aid fees which do not give incentives for thorough preparation of cases. For instance, one of the national informants reports that many lawyers do not even understand the difference between a Palestinian refugee and a stateless Palestinian.<sup>83</sup>

In Germany, there are no specific provisions for stateless persons to receive legal aid, but they can qualify to receive it under general laws.<sup>84</sup> One of the conditions to obtain legal aid is registration in the local residents' registries,<sup>85</sup> which do not include irregular migrants. However, they include people on toleration.<sup>86</sup> Refugee Councils<sup>87</sup>, the NGO ProAsyl<sup>88</sup> and other NGOs provide legal assistance to foreigners, including stateless persons.

In the Netherlands, in principle legal aid is possible for appeals, but applicants must contribute at least 196 Euros.<sup>89</sup> Moreover, very few people are awarded legal assistance for appeals

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orally or in writing. The person shall indicate the facts of the case for which advisory aid is requested. The personal and financial circumstances of the person shall be credible. If the applicant directly addresses a lawyer for advisory aid, the application can be made afterwards.

<sup>80</sup> (SFS 2005:716) (SFS 2009: 1542) Act amending the Aliens Act (Regeringskansliet tr, official tr), ch 18.

<sup>81</sup> Vestin, email (n 27); The Swedish Network of Refugee Support Groups (n 26) 49.

<sup>82</sup> Johannson, interview (n 48).

<sup>83</sup> Telephone interview with Birgitta Elfström, Jurist, Former decision maker of the Swedish Migration Board (Varberg, Sweden, 17 February 2014).

<sup>84</sup> Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz - BerHG) vom 18. Juni 1980 (BGBl I 1980, 689), zuletzt geändert durch Artikel 2 des Gesetzes vom 31. August 2013 (BGBl I 2013, 3533) [Act on legal advice and representation for citizens with low incomes - Legal Advice Act].

<sup>85</sup> In addition, a person must show to be financially in need of assistance. In court proceedings, he must also show that his case has sufficient prospects of success and is not frivolous. Zivilprozessordnung (ZPO) in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl I 2005, 3202; I 2006, 431; I 2007, 1781), zuletzt geändert durch Artikel 1 des Gesetzes vom 10. Oktober 2013 (BGBl I 2013, 3786) [Code of Civil Procedure], II art 114; see Armin Schoreit and Ingo Michael Groß, *Beratungshilfe, Prozesskostenhilfe, Verfahrenskostenhilfe* (11th edn, CF Müller 2012) 127, recital 2.

<sup>86</sup> Generally, irregular migrants can apply for legal aid. However, as everybody else, they need to provide evidence (e.g. documents related to income, address, rental agreement) which they do not want to or cannot provide because they (a) fear to be deported or (b) do not have these papers. It should be noted that the Courts can inform the Aliens' authorities about their illegal stay. Melanie Köbler, Tobias Mohr and Heiko Habbe, 'Aufenthaltsrechtliche Illegalität. Beratungshandbuch 2013' (3rd edn, Deutsches Rotes Kreuz and Caritas 2012) 65-67, 79-81; §87(1) and (3) Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG) in der Fassung der Bekanntmachung vom 25. Februar 2008 (BGBl I 2008, 162), das durch Artikel 128 der Verordnung vom 31. August 2015 (BGBl I 2015, 1474) geändert worden ist [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - Residence Act]; Telephone interview with the Executive Director of the Refugee Council North Rhine-Westphalia (*Flüchtlingsrat Nordrhein-Westfalen*) (Bochum, Germany, 14 March 2014).

<sup>87</sup> Refugee Councils (*Flüchtlingsräte*) are independent registered societies. They receive funding from donations, memberships, the Federal and local States, and the EU. They also receive support from voluntary work. In each Federal Land there is one Refugee Council. 'Die Landesflüchtlingsräte' <<http://www.fluechtlingsrat.de/>> accessed 20 March 2014; 'Flüchtlingsrat Schleswig-Holstein e.V.' <<http://www.frsh.de/fileadmin/pdf/falter2013/frsh-selbstdarstellung-2013h-web.pdf>> accessed 12 August 2014.

<sup>88</sup> Pro Asyl, 'Über uns' <<http://www.proasyl.de/de/ueber-uns/>> accessed 20 March 2014.

<sup>89</sup> This amount is deducted from the subsidy the lawyer receives and has to be paid by the applicant directly

of no-fault permits.<sup>90</sup> Some lawyers work pro-bono and some NGOs, such as *Vluchtelingenwerk*, assist persons in contacting the relevant embassies to obtain documents. It is doubtful whether, in the specific cases of stateless people, this system of legal services is sufficient, mainly because there is no statelessness determination procedure and therefore no dedicated route for assisting stateless people. It is also unclear whether these actors have sufficient knowledge of statelessness to provide specialised assistance.<sup>91</sup>

In the Czech Republic, it is possible to request the court to appoint an attorney free of charge to represent at the appeal stage, provided that the applicant does not have sufficient financial means.<sup>92</sup> However, foreign nationals can obtain free legal aid only in proceedings regarding applications for international protection but not visas or residence permits.<sup>93</sup> Additionally, very few lawyers have experience with the asylum procedure, and even fewer with other procedures under the Foreign Nationals Act. So statelessness is a domain of very few of them.<sup>94</sup> A few NGOs provide limited legal assistance, but they cannot meet all the legal needs.

Lack of legal assistance for irregular migrants and asylum seekers is a serious problem in Greece. Under Presidential Decree 90/2008, government funded legal assistance covers only representation at the administrative court.<sup>95</sup> The few legal aid and pro-bono lawyers are swamped with work and mainly based in Athens. A handful of structures are periodically set up to provide assistance, for instance funded under UNHCR or EU projects, but they cannot satisfy the demand for legal services.<sup>96</sup>

## 9. Training, access to information and awareness on statelessness

There are no training courses or awareness campaigns on statelessness in the States with no statelessness determination procedures. The Netherlands is the only exception: the Statelessness Programme at Tilburg University aims to promote academic learning, training, research, and public awareness on statelessness.<sup>97</sup> Recently, the Netherlands Institute for Human Rights has held a seminar on statelessness and published a report on the issue.<sup>98</sup> In addition, the Dutch government

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to the lawyer. If the application is a second application, the lawyer will be paid - for the application and administrative appeal - only 200 euro in case of a rejection, and up to 800 Euros in case of a granted residence permit. Raad voor Rechtsbijstand, 'Inkomen, vermogen en eigen bijdrage: normen 2014' <[http://www.rvr.org/nl/subhome\\_rz/rechtsbijstandverlener,Inkomensgrenzen.html#inkomensnormen](http://www.rvr.org/nl/subhome_rz/rechtsbijstandverlener,Inkomensgrenzen.html#inkomensnormen)> accessed 27 February 2014.

<sup>90</sup> Email from Igna Oomen to author (27 February 2014).

<sup>91</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 91)

<sup>92</sup> AIM, 'International Protection Procedure in the Czech Republic' <[http://www.migrace.com/docs/130815\\_leta-uk\\_a3\\_aj-finalcteni.pdf](http://www.migrace.com/docs/130815_leta-uk_a3_aj-finalcteni.pdf)> accessed 12 November 2013.

<sup>93</sup> Dubova, interview (n 9).

<sup>94</sup> *ibid.*

<sup>95</sup> EDAL, 'Country Overview - Greece' (19 November 2013) <<http://www.asylumlawdatabase.eu/en/content/edal-country-overview-greece#Legal%20Aid%20>> accessed 26 February 2014.

<sup>96</sup> UNHCR 'Observations on Greece as a Country of Asylum' (December 2009) 6-7.

<sup>97</sup> Tilburg University, 'Statelessness Programme' <<http://www.tilburguniversity.edu/research/institutes-and-research-groups/statelessness/>> accessed 26 February 2014.

<sup>98</sup> Maxim Ferschtman, 'Is The Netherlands Next to Introduce a Statelessness Determination Procedure?' (6 September 2014) <<http://www.statelessness.eu/blog/netherlands-next-introduce-statelessness-determination-procedure>> accessed 9 March 2015; author's conversations with experts, First Global Forum on Statelessness (The Hague, Netherlands, 15-17 September 2014).

organises some internal training on nationality issues for civil servants (e.g. of the municipalities) which involve some statelessness issues.<sup>99</sup>

General information on residence permits, asylum, naturalisation and other immigration law matters is provided by all States on official websites in the local language and in English.<sup>100</sup> Sweden is the only State that provides information in several other languages.<sup>101</sup> Some Swedish NGOs offer information to migrants, but very few have expertise with permits for impossibility to leave the country and statelessness.<sup>102</sup> In Germany, the Federal Migration Office for Migration and Refugees mentions some information in German and English, but it is of extremely difficult access. In addition, a very small number of NGOs provide information on statelessness in German, but mainly in the context of deportation or citizenship.<sup>103</sup>

Overall, information on permits for impossibility to leave is of difficult to obtain because it is usually limited to a few lines and mostly in the local languages. Statelessness is generally explicitly but briefly mentioned in the context of travel documents under the 1954 Convention and naturalisation. Both the public and governments are little aware of statelessness issues in States under model three.<sup>104</sup>

## 10. Statistics

It is very difficult to remain on the grounds that it is impossible to leave, as the administrations will rarely believe that this is the case and that the person made sufficient efforts to that extent.<sup>105</sup> In Germany, however, both the toleration and temporary residence permit provisions are frequently applied: at the end of 2013, toleration was granted to 416 stateless persons and 5,824 persons with unclear nationality. The residence permit for impossibility to leave the country was issued to 456 stateless persons and 1,829 persons with unclear nationality.<sup>106</sup>

In States falling under this model, it is unclear how statistics specifically count applications by stateless persons. One reason for the lack of clarity is that the registration systems confuse persons with an unknown nationality with those who are stateless.<sup>107</sup> For instance, published statistics in the Netherlands count applications by stateless persons and persons with ‘nationality

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<sup>99</sup> van Waas, questionnaire (n 11).

<sup>100</sup> Hellenic Republic, Ministry of Interior, ‘General Secretariat of Population & Social Cohesion’ <[http://www.ypes.gr/en/Generalsecretariat\\_PopulationSC/Laws/](http://www.ypes.gr/en/Generalsecretariat_PopulationSC/Laws/)> accessed 26 February 2014; Ministry of Interior of the Czech Republic, ‘Immigration’ <<http://www.mvcr.cz/mvcren/article/immigration.aspx>> accessed 26 February 2014; Ministry of Security and Justice, ‘Immigration and Naturalization Service’ <<https://ind.nl/EN/Pages/default.aspx>> accessed 26 February 2014.

<sup>101</sup> Migrationsverket, ‘The Migration Board’ <<http://www.migrationsverket.se/English/Private-individuals.html>> accessed 26 February 2014.

<sup>102</sup> Johannson, interview (n 48).

<sup>103</sup> Eg Plan Deutschland, ‘Staatenlose Kinder sind grundlegender Rechte beraubt’ (29 August 2011) <<http://www.plan-deutschland.de/news/article/staatenlose-kinder-sind-grundlegender-rechte-beraubt/>> accessed 27 November 2013.

<sup>104</sup> Kalatzi, questionnaire (n 1); Marx, interview (n 60); Dubova, interview (n 9); van Waas, questionnaire (n 11).

<sup>105</sup> Johannson, interview (n 48); Dubova, interview (n 9); Hijma, questionnaire (n 40).

<sup>106</sup> Statistisches Bundesamt, ‘Bevölkerung und Erwerbstätigkeit. Ausländische Bevölkerung. Ergebnisse des Ausländerzentralregisters 2013’ (2014) Fachserie 1 Reihe 2, 133; Bianchini (n 12) 45.

<sup>107</sup> UNHCR ‘Mapping Statelessness in the Netherlands’ (n 10) 18.

unknown' together.<sup>108</sup> In 2009, out of 14,905 first-time asylum applications, 507 (3.4 per cent) concerned persons who had no known nationality.<sup>109</sup>

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<sup>108</sup> StatLine, 'Statistics Netherlands. Population; Sex, Age and Nationality' (2 May 2014) <<http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLEN&PA=03743eng&D1=a&D2=0,127-129&D3=2-7,60,1&D4=4,1&HD=130308-1234&LA=EN&HDR=G3,G1&STB=T,G2>> accessed 9 March 2015.

<sup>109</sup> UNHCR 'Mapping Statelessness in the Netherlands' (n 10) 18.



**11. Table 3: essential procedural guarantees in States under model three**

	<b>CZ</b>	<b>GER</b>	<b>GRE</b>	<b>NL</b>	<b>SW</b>
Centralised decision-maker?	No	No	No, except for: (1) nationality disputes related to naturalisation (2) lack of valid documents for renewal of residence permit	No	No
Temporary permit while application for impossibility to leave is pending?	No	No	Not applicable	No	No
Right to individual interview?	No	Yes	Not applicable	No	No
Specific rules on the identification of statelessness?	No	No	Yes, but very limited	No	No
Specific rules of evidence b/c impossible to leave?	Yes	Yes	No	Yes	Yes
Right to interpreter?	Yes	Not guaranteed at admin stage	Yes, but problems in practice	Yes	Yes
Written reasons for refusal?	Yes	Yes	Yes	Yes	Yes
Finding of statelessness usually made?	No	Only by the courts	No	No	No
Length of procedures?	30 days, but in practice about 3 months	Residence permit should be issued after 18 months on toleration (in practice it takes years)	Not applicable	6 months, but in practice 2 and 1/2 years	3 months
Right of review?	Admin review. Disputed if there is right to appeal to the court	Yes	Not applicable	Yes	Only if MB agrees to review a case for impossibility to leave under section 19
State-funded legal assistance?	No	Yes but limitations apply	Only for appeals	Only for appeals	No
Further implementing measures by the State?	No	No	No	Very limited	No

## 12. Conclusion

States under model three are those providing the least level of protection of all as they totally lack a legal framework to identify stateless persons. Although it is recognised that States have discretion in adopting different types of statelessness determination procedures, in these cases they cannot be certainly said to satisfy the ‘international standard of reasonable efficacy and efficient implementation.’<sup>110</sup> In these States, stateless persons tend to be forced into the refugee status procedures and are dealt with in this framework, including that for humanitarian or subsidiary protection. For stateless persons with claims of persecution, asylum is the appropriate channel in which to present their cases. Nevertheless, it is not for those who do meet the refugee definition and who are left with no clear solution to tackle their lack of nationality and of legal status.<sup>111</sup> In four of these States, stateless persons may qualify for lawful status on the grounds that it is impossible to leave the country but this is usually a residual category, used when all other venues have been attempted. In addition, these procedures treat stateless persons as other irregular migrants and fail to take into consideration that they have special protection needs due to their often lack of financial means, documents, and knowledge of local language and laws. For instance, in the Netherlands, the no-fault residence permit is granted only to those that can provide official evidence in support of the application. In Sweden, the authorities take a strict approach to proving one’s identity. An additional problem shared by all the States under this model is that, without specific procedures, it remains unclear in the national statistics how many cases are unidentified. It is, therefore, impossible to determine the real magnitude of statelessness.<sup>112</sup>

Greece appears to be the State affording the least protection of all, as it does not even have provisions for impossibility to leave, and national practices are frequently not even in compliance with the existing general procedural guarantees (for instance concerning the right to provide interpreters and the unlawful use of immigration detention).

How specific formal procedures and laws go far towards securing effective implementation of the 1954 Convention<sup>113</sup> will be further analysed in the next chapter. In the next chapter it will be demonstrated how different types of statelessness determination procedures and substantive provisions implementing the 1954 Convention can affect findings of statelessness, resulting in some persons being unable to access protection. In particular, the next chapter will explore how stateless persons in similar circumstances are found to be stateless in some States and not in others. Whereas some studies have addressed different approaches to the application of the refugee

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<sup>110</sup> Guy Goodwin-Gill, ‘The Process and Rights of Asylum Seekers’ in Karen Musalo, Jennifer Moore and Richard A Boswell (eds), *Refugee Law and Policy. A Comparative and International Approach* (4th edn, CAP 2011) 922.

<sup>111</sup> Batchelor (n 5) 40.

<sup>112</sup> *ibid.*

<sup>113</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP 2007) 530; van Waas, *Nationality Matters: Statelessness under International Law* (n 91) 402-03, 407-08. In the context of international labor law treaties, Roger Blanpain argues that implementing legislation is the starting point to analyze whether international standards have been adopted into the national legal frameworks. However, Blanpain adds that it is also important to find out whether and how laws are applied and how institutions function in practice. Roger Blanpain, *Comparative Labour Law and Industrial Relations in Industrialized Market Economics* (11th edn, Kluwer Law International 2014) ch I 5, 8. See also ch 1, ss 3.1, 3.2.1.

definition at the national level,<sup>114</sup> none has so far been carried out regarding that of ‘stateless person’.

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<sup>114</sup> James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005); Goodwin-Gill and McAdam (n 113); Karen Musalo, Jennifer Moore and Richard A Boswell (eds), *Refugee Law and Policy. A Comparative and International Approach* (4th edn, CAP 2011).

## **CHAPTER 6: THE IMPLEMENTATION OF THE DEFINITION OF STATELESS PERSON**

### **1. Introduction**

As explained in chapter 3, the definition of ‘stateless person’ involves several issues of interpretation.<sup>1</sup> The literature reveals that persistent challenges remain as far as who is considered stateless under article 1 of the 1954 Convention, especially regarding persons who have no claim to asylum but nonetheless are without an effective nationality or whose nationality cannot be definitively established.<sup>2</sup>

Although it is acknowledged that findings of statelessness vary from State to State, not much is known on the actual implementation of article 1 of the 1954 Convention.<sup>3</sup> This chapter aims at exploring and discussing common and meaningful selected issues of interpretation and application of the definition of stateless person in the States under study. Firstly, it looks at whether article 1 of the 1954 Convention has been incorporated into the national legal systems. Secondly, it analyses whether a person who could easily acquire a nationality is likely to be considered stateless. This issue often arises in practice and States adopt a variety of approaches to it. Thirdly, it examines the treatment of stateless Palestinians and the application of the exclusion clause for persons that receive protection from agencies of the United Nations aside from the UNHCR.<sup>4</sup> Fourthly, it considers the treatment of persons whose nationality is disputed.<sup>5</sup> These last two matters were among the most contentiously debated ones that arose during the preparatory works of the 1954 Convention<sup>6</sup> and remain unresolved. Finally, in the conclusion, it analyses how different types of statelessness determination procedures and substantive provisions can impact on findings of statelessness.

### **2. The implementation of the definition of stateless person in national law**

The definition of ‘stateless person’ in article 1 of the 1954 Convention<sup>7</sup> is incorporated into the nationality laws of the States under study, except from the Czech Republic and Sweden. Specifically, in the Czech Republic stateless persons are not recognised as a separate category from other ‘foreign nationals’. A ‘foreign national’ is a natural person who is not a Czech national<sup>8</sup>,

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<sup>1</sup> See ch 3, s. 3.

<sup>2</sup> See text to n 110 in ch 1.

<sup>3</sup> Carol A Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (2004) 22(2) *Refugee* 31.

<sup>4</sup> See ch 3, s 3.3.

<sup>5</sup> See ch 3, s 3.1.

<sup>6</sup> See ch 3, s 3.

<sup>7</sup> Article 1 of the 1954 Convention defines a stateless person as ‘a person who is not considered as a national by any State under the operation of its law.’ *Convention Relating to the Status of Stateless Persons* (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (*Statelessness Convention*) (hereafter the ‘1954 Convention’) art 1.

<sup>8</sup> Pursuant to Act No. 40/1993 Coll. to regulate the acquisition and loss of citizenship of the Czech Republic

including a national of the European Union.<sup>9</sup> Thus the definition of stateless person under Czech law lacks the significant feature of this status: that such a person is not a national of any State under the operation of its law.<sup>10</sup> In Sweden, the Aliens Act only incorporates the definition of refugee and stateless refugee of the Refugee Convention. As Sweden is a dualist country and has not adopted any law implementing article 1 after having ratified the 1954 Convention, this article is not part of the national legal framework.<sup>11</sup>

The wide acceptance of article 1 of the 1954 Convention in municipal law does not however mean that it is interpreted and applied in the same way in all the jurisdictions. Some States, especially those under model three, avoid making findings of statelessness and categorise stateless persons as ‘persons with unclear nationality’.<sup>12</sup> The next sections will explore some significant variations in national legislation and practice on selected issues relating to article 1.

### **3. The treatment of stateless persons that can easily obtain a nationality**

One significant issue regarding the application of article 1 concerns whether those who appear to be eligible for a citizenship, but who must lodge an application, are found to meet the definition of stateless person. The UNHCR *Handbook on the Protection of Stateless Persons*, paragraph 26, states that in non-automatic modes of acquisition of nationality, as an act of the individual or of a State authority is required before the change in nationality status takes place, States should recognise the person to be stateless. The UNHCR takes a slightly different approach as far as the reacquisition of a former nationality: in such a case a person should make attempts towards this end. The State only needs to provide a temporary permission during the time required to obtain the nationality. If the time limit has been reached, and readmission or reacquisition of nationality has not materialised, the State should then issue the status generally accorded upon recognition of statelessness.<sup>13</sup>

According to Batchelor, in order to safeguard against statelessness, a person must be considered as a national *at the time* the case is examined. She argues that it is not sufficient to be eligible to apply for citizenship, as the acquisition of nationality is not always automatic but rather discretionary.<sup>14</sup> A discretionary grant of nationality, by definition, presumes that a State can grant its nationality, but can also reject an application on a number of different grounds which are open to interpretation. When discretion exists, only after the application has been approved and

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as amended by Act No. 272/1993 Coll., Act. No. 140/1995 Coll., Act No. 139/1996 Coll., Act No. 194/1999 Coll., Act No. 320/2002 Coll., and Act No. 357/2003 Coll. (unofficial tr).

<sup>9</sup> Act No. 326/1999 on the residence of foreign nationals in the Czech Republic and amending certain laws (Foreign Nationals Act) (unofficial tr) s 1(2).

<sup>10</sup> Helena Hofmannová, ‘Legal Status of Stateless Persons in the Czech Republic’ (2013) 1 TLQ 55, 67.

<sup>11</sup> Telephone interview with Bo Johannson, Lawyer, Swedish Refugee Advice Centre (Stockholm, Sweden, 17 December 2013). Regarding the implementation of international law in dualist States, see ch 1, s 3.2.1.

<sup>12</sup> For instance, in the Czech Republic, official statistics refer to the category of stateless person. However they refer to cases where the individual declared not to have the nationality of any State, without having undergone an assessment. Hofmannová (n 10) 67.

<sup>13</sup> UNHCR, ‘Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons’ (2014) (hereafter the ‘Handbook’) paras 158-60.

<sup>14</sup> Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (n 3) 37.

nationality conferred, the individual can be considered a national of that State.<sup>15</sup>

Among the States under review only the UK, in its Home Office Guidance, explicitly addresses the implications of a future entitlement to nationality in line with the UNHCR Handbook and Batchelor's interpretation and in favour of a stateless person:

The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country in question...if an individual is partway through a process for acquiring nationality ... he or she is not a national for the purposes of Article 1(1).<sup>16</sup>

The gaps in Hungarian and German legislation on this issue have been filled by the courts,<sup>17</sup> which have adopted an approach in line with that of the UK's. For example, the German Federal Administrative Court forcefully stated that even if a stateless person could eliminate their statelessness in a reasonable way, they are not forced to do so by the 1954 Convention. They have no such obligation.<sup>18</sup>

By contrast, the other States adopt a narrow interpretation on this issue. In Spain, normally, the person would not be found to be stateless, neither by the administration nor by the courts, if they could obtain a nationality through a non-automatic mode of acquisition.<sup>19</sup> In France the administration would usually require a person to make attempts to obtain the other possible nationality.<sup>20</sup> The courts would check the causes of statelessness and whether they are independent from the person's will.<sup>21</sup> In the context of asylum seekers' claims, it is significant that the case-law required North Korean applicants to try to obtain South Korean nationality by approaching the

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[T]he fact that an individual does fit the category of persons who, with reference to the law, is normally granted nationality does not mean that that a particular person was granted such status, as there may always be exceptions to the legislation, variances between the written word and the implementation of the law, or inadvertent actions on the part of either the individual or the State which result in a failure to acquire nationality. Thus, consultations with the State concerned are imperative for verification of nationality status.

Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(1-2) IJRL 156, 171.

<sup>16</sup> Alison Harvey, 'The UK's New Statelessness Determination Procedure in Context' (2013) 27(4) JIANL 294, 301.

<sup>17</sup> For Germany see VGH Baden-Württemberg 16.02.1994, NVwZ 1994, 1233; BVerwG 16.07.1996, DVBI 1997, 177-178; VG Regensburg, Gerichtsbescheid v 17.01.1997 - RO 2 K 96.0069; VG Stuttgart, Urteil v 26.09.2002 - 11 K 4536/01; VG Schleswig-Holstein, Urteil v 7.02.2007 - 1 A 130/04; VG München, Gerichtsbescheid v 15.05.2007 - M 7 K 05.159, M 7 K 06.545. For Hungary, the information was provided through a telephone interview by Tamás Molnár, Head of Unit, Unit for Migration, Asylum and Border Management, Department of EU Cooperation, Ministry of Interior [of Hungary] and Assistant Professor in the Corvinus University of Budapest (Budapest, Hungary, 16 December 2013)

<sup>18</sup> BVerwG 16.07.1996, DVBI 1997, 177-178. Other judgements held that an administrative decision that requires an alien to eliminate his statelessness through naturalization is void. VGH Baden-Württemberg 16.02.1994, NVwZ 1994, 1233; VG Karlsruhe 26.2.2003 - 5 K 2350/02.

<sup>19</sup> Telephone interview with Arsenio Cores, Immigration Lawyer (Madrid, Spain, 11 December 2013).

<sup>20</sup> Telephone interview with Lacene Magali, Solicitor and Legal Trainer, France Terre D'Asile (Paris, France, 27 December 2013).

<sup>21</sup> Denis Seguin cites the following cases : CE, 21 novembre 1994, n° 147194; CE, 17 mars 1999, n° 160895; CE 29 décembre 2000, n° 216121. He also adds that the courts clarified that stateless status will not be granted to those that have voluntarily renounced to a nationality. CE, 21 novembre 1994, n° 147193; CAA

embassy before they could be given protection.<sup>22</sup> Only when it became obvious that it was impossible to obtain South Korean nationality, the practice of requiring such attempts stopped.<sup>23</sup> Similarly, in Italy, the trend of the recent case-law is that a person cannot be stateless if he can opt to acquire a nationality. The courts reason that, in these cases, statelessness would not depend on an objective fact independent from the interested person, but from a choice and so international protection is not deserved.<sup>24</sup> In contrast, some previous Italian cases recognised stateless status even if the cause of statelessness depended on the freewill of the interested person not to acquire a nationality.<sup>25</sup>

In the Czech Republic and the Netherlands a person that may obtain a nationality would probably not be granted any permission to remain if his argument was based on impossibility to leave the country.<sup>26</sup> For Greece there is no easily accessible data on how the authorities would deal with this situation.<sup>27</sup>

So, clear legislative intervention clarifying when a person is considered stateless would be needed in all States (except in the UK).

#### **4. The treatment of Palestinian cases**

It is often acknowledged that for Palestinians it is common not to be allowed to return to their place of origin, and for them statelessness is even more a significant problem than the refugee aspect.<sup>28</sup> Nevertheless, there is no unified standard of treatment for them and their rights and access to services vary drastically from State to State. This is amplified by the application, on the part of many States, of the exclusion clause of article 1(2)(i) of the 1954 Convention.<sup>29</sup>

Given the complexity of the subject, informants were asked to report on what might happen in a hypothetical case (vignette)<sup>30</sup> concerning a Palestinian from the West Bank seeking protection. Thus, I present the summary of the original vignette.

*The vignette depicts the case of X, a Palestinian originating from the West Bank. X was born in Palestine and is 30 years of age. He leaves the West Bank and enters the country illegally. His asylum application is refused because the authorities do not believe that he faces persecution upon return. He then makes a claim for protection claiming that he is stateless. The issues that the authorities will face are whether: (1) he will likely meet the definition of article 1 of the 1954*

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Bordeaux, 19 juillet 1999, n° 98BX00688. Denis Seguin, *Guide du Contentieux du Droit des Étrangers* (Lexis Nexis 2013) 22.

<sup>22</sup> See eg the case of the CNDA, 23 décembre 2009, n° 636547/08017005.

<sup>23</sup> Magali, interview (n 20).

<sup>24</sup> Eg Farci cites a decision of the Tribunal in Genova: Trib Genova, 13.12.2010. Paolo Farci, *Apolidia* (Giuffrè 2012) 376.

<sup>25</sup> Eg Farci cites a decision of the Tribunal in Ancona: Trib Ancona, 13.6.1950. Farci, *Apolidia* (n 24) 376.

<sup>26</sup> Telephone interview with Alexandra Dubova, Immigration Lawyer, Organizace pro pomoc uprchlíkům, o.s. (Prague, Czech Republic, 2 January 2014); questionnaire reply from Rombout Hijma, Immigration Lawyer (Utrecht, The Netherlands, 30 January 2014).

<sup>27</sup> Questionnaire reply from Erika Kalatzi, Immigration Lawyer (Athens, Greece, 22 December 2013).

<sup>28</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (OUP 1998) 195.

<sup>29</sup> See ch 3, s 1.2.2.

<sup>30</sup> Regarding the use of vignettes, see text to n 48 in ch 1.

*Convention; (2) the answer to the first question would be different if, after his birth, he and his family had migrated to Jordan; (3) he will likely be excluded from protection under article 1(2)(i) of the 1954 Convention?*<sup>31</sup>

In States under models one and two, X is likely to be found to meet the definition of article 1 of the 1954 Convention.

In States falling under model three, the administrations avoid making a finding of statelessness whenever possible. The impracticality of return may, however, become the key question for claiming other residence permits, such as for humanitarian protection or impossibility to leave the country.<sup>32</sup> Sweden adopts a particularly strict position on this matter. With regard to Palestinians from the Gulf States, the Migration Board and the Appeals Board take the view that neither the general situation of Palestinians in the Gulf States, nor the difficulties in returning there, justify the granting of residence permits in Sweden. As far as the return of Palestinians from Iraq, the Swedish authorities have concluded that it is not generally impossible to return Palestinians to Iraq.<sup>33</sup> In relation to the return of Palestinians from the Occupied Palestinian Territories, Swedish authorities take the position that it is generally possible to return Palestinians to the Gaza Strip.<sup>34</sup> Similarly to Sweden, in Greece it is likely that X will remain in a situation of limbo.<sup>35</sup>

In Germany, the courts are more open to making findings of statelessness and granting protection than the administration.<sup>36</sup> In particular, most courts have found Palestinians without another nationality to be *de jure* stateless according to article 1 the 1954 Convention.<sup>37</sup> Although the Federal Administrative Court did not purposely address whether a Palestinian nationality exists,<sup>38</sup> some lower administrative courts found that there is neither a Palestinian State under international law nor a Palestinian nationality.<sup>39</sup> In any case, both the Federal Administrative Court and the High Administrative Court in Berlin held that an ‘unclear nationality’ in legal terms is not possible.<sup>40</sup> They stressed that if the investigation on the existence of a nationality cannot be

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<sup>31</sup> As explained in ch 3, s 3.3, art 1(2) refers to those that are at present receiving protection or assistance from the UNRWA as long as they continue to receive such assistance.

<sup>32</sup> See ch 5, s 2.

<sup>33</sup> However, the Iraqi Embassy in Sweden has informed some Palestinians that if they have been out of Iraq for more than six months, they will not be entitled to Iraqi travel documents. BADIL Resource Center for Palestinian Residency and Refugee Rights, *Closing Protection Gaps: a Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention. Jurisprudence Regarding Article 1D 2005-2010* (2nd edn, 2011) 63.

<sup>34</sup> The practice with regard to stateless Palestinians is that if they have obtained a permanent residence permit they are entitled to apply for travel documents. If they are registered with the UNRWA, or are entitled to be registered with the UNRWA, or are holders of travel documents from Lebanon or Syria, they will be entitled to apply for travel documents under the 1951 Refugee Convention. *ibid* 64.

<sup>35</sup> Kalatzi, questionnaire (n 27).

<sup>36</sup> Germany is a civil law country and therefore the administration is bound by court decisions only in the individual case brought against it.

<sup>37</sup> BVerwG, Urteil v 23.02.1993 – 1 C 7.91, 9-10; BVerwG, 23.02.1993, BVerwGE, 92, 116, 119-120 mwN; OVG Berlin, Urteil v 18.04.1991 – 5 B 41.90; BVerwG, Beschluss v 17.07.1987 – 1 B 23.87.

<sup>38</sup> BVerwG, Urteil v 23.02.1993 – 1 C 7.91, 9-10; BVerwG, 23.02.1993, BVerwGE 92, 116, 119-120 mwN.

<sup>39</sup> VG Aachen, Urteil v 1.03.2001 – 4 K 3022/99; VG Aachen, 1.03.2001, InfAuslR, 2001, 338; VG Saarland, Urteil v 24.11.2006 – 5 K 97/05; OVG Niedersachsen, Beschluss v 21.04.2004 – 11 LA 61/04.

<sup>40</sup> BVerwG, 12.02.1985, NVwZ, 1985, 589; BVerwG, 15.10.1985, NVwZ 1986, 759; OVG Berlin, Urteil v 18.04.1991 – OVG 5 B 41.90; VG Berlin, Urteil v 12.06.1985 – 11 A 655.84; VG Berlin, 12.06.1985,



concluded, the person in question is stateless.<sup>41</sup>

The second question of the vignette illustrates the situation where a Palestinian may have acquired Jordanian nationality or some kind of protection.<sup>42</sup> In Spain, the UK, Hungary, France and Germany, the Czech Republic and the Netherlands an additional assessment will be made as to whether X acquired Jordanian nationality or residence rights and whether his return is possible there.<sup>43</sup> In Italy, the treatment that X will receive depends on the procedure that he initiated. In the judicial procedure for statelessness determination, it will probably make no difference that X had migrated to Jordan as neither the judges nor the government lawyers have the specialised knowledge to distinguish these cases from those of people who only lived in the West Bank.<sup>44</sup> On the other hand in the administrative procedures the decision is likely to be made after having obtained the opinion of the experts in the Foreign Affairs Ministry, who usually engage in research.<sup>45</sup>

In Sweden, whether X is a citizen of Jordan or stateless is irrelevant: only his need of protection on humanitarian grounds or the risk of persecution will be considered.<sup>46</sup>

As far as the last question is concerned, it involves whether it is likely that a stateless Palestinian is excluded from protection under article 1(2)(i) of the 1954 Convention because he falls under the UNRWA's mandate.<sup>47</sup> The answer seems to be mostly dependent on the State's policy regarding the treatment of Palestinian refugees. In favour of stateless Palestinians, Spain<sup>48</sup>, the Czech Republic<sup>49</sup> and Italy do not apply article 1(2)(i). However, in Italy, this seems to be due to the lack of specialised knowledge of the judges and government lawyers rather than to a policy choice. One of the national informants has underlined that he is not aware of any case-law or of any administrative decision dealing with the issue.<sup>50</sup> By contrast, Spain has a well-defined policy on this matter: once the UNRWA confirms registration of an applicant, Spain will usually grant

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InfAuslR 1985, 237-238; VG Berlin, Urteil v 24.02.1988 - 23 A 341.87; VG Berlin, 24.02.1988, InfAuslR 1988, 174, 176.

<sup>41</sup> BVerwG, 12.02.1985, NVwZ 1985, 589; BVerwG, 15.10.1985, NVwZ 1986, 759; Katia Bianchini, 'On the Protection of Stateless Persons in Germany' (2014) 19(1-2) TLR 35, 39, 49.

Currently, in Jordan, only Palestinian refugees from the 1948 war have Jordanian nationality. However, other Palestinian refugees from the Gaza Strip enjoy the right to employment and education on par with Jordanian nationals. In Jordan, Palestinian refugees are probably better treated than in other countries of the Arab world.

Reem Salahi, 'Reinterpreting Article ID: Seeking Viable Solutions to the Palestinian Refugee Anomaly' (2008) 1 BJMEIL 127, 145.

<sup>43</sup> Cores, interview (n 19); Molnár, interview (n 17); Magali, interview (n 20); Dubova, interview (n 26); Hijma, questionnaire (n 26).

<sup>44</sup> Telephone interview with Giulia Perin, Immigration Lawyer (Padova, Italy, 6 December 2013).

<sup>45</sup> *ibid.* For the difference between the two procedures, see ch 4, s 4.1.

<sup>46</sup> Johannson, interview (n 11).

<sup>47</sup> See ch 3, s 3.3.

<sup>48</sup> Cores explained that the exclusion clause does not apply in Spain. Cores, interview (n 19)

<sup>49</sup> Dubova, interview (n 26).

<sup>50</sup> Questionnaire reply from Paolo Farci, Immigration Lawyer (Florence, Italy, 27 November 2013). As far as asylum cases, it seems that the authorities recognise Palestinian refugees *ipso facto* without requiring evidence of a well-founded fear of persecution. However, court decisions only discuss the final outcomes of cases, and arguments are not mentioned. Therefore it is difficult to establish in which cases Palestinians are recognised under art 1D. BADIL (n 33) 47.

asylum.<sup>51</sup> Cases of Palestinians from the Occupied Territories who are not registered with the UNRWA are usually granted humanitarian protection on their own merits, as the administration considers these claims based on the situation of generalised violence in the area.<sup>52</sup> In the Czech Republic, the issue of impossibility to leave due to statelessness is relevant in the context of ‘tolerated stay’. In such a context, the Czech authorities do not apply the exclusion clause.<sup>53</sup>

In Germany, several cases that have addressed this issue<sup>54</sup> are in line with the interpretation of the Court of Justice of the European Union in *El Kott*.<sup>55</sup> According to the German Federal Administrative Court, the concerned person does not need to actually receive the UNRWA’s protection and assistance at the time of the decision on his claim based on the 1954 Convention. What is decisive is that he belongs to the category of people whose support falls under the UNRWA, which comprise:<sup>56</sup> (1) people who are still registered with the UNRWA and have left the area of the UNRWA’s operations<sup>57</sup>, including those that cannot return or have lost the authorisation to return due to lapse of time, as long as the impossibility to return does not depend on their will<sup>58</sup>, and (2) those forced to leave or whose return is affected by unforeseeable circumstances that have arisen during the stay abroad.<sup>59</sup> In the latter case, a person may even qualify for protection on asylum or humanitarian grounds.<sup>60</sup>

In Hungary, there is no specific guidance on this in the context of statelessness and one of the national informants has stated that he has no knowledge of any case where article 1(2)(i) was applied.<sup>61</sup> For asylum cases the principles of the *El Kott* judgment are followed in administrative and judicial decisions. It is likely that if this issue arises in statelessness claims the same principles would apply. Regarding France, the decision number 318356 of the *Conseil d’État* (22 July 2010) should be mentioned. This case involved an asylum applicant from Palestine who left Jordan and

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<sup>51</sup> Art 1D is applied automatically by the administration. Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria (BOE-A-2009-17242) [Law 12/2009 of 30 October 2009 regulating the right to asylum and subsidiary protection (BOE-A-2009-17242)], art 8.1(a).

<sup>52</sup> In Spain, there are very few cases of Palestinian refugees coming from other countries outside the UNRWA’s area of operation. In these cases, the Spanish authorities usually check if the person can receive effective protection in the relevant State. BADIL (n 33) 59.

<sup>53</sup> Act No. 326/1999 Coll., On the residence of foreigners in the Czech Republic and amending certain Acts (Foreign Nationals Act, FNA) (unofficial tr), s 33.

<sup>54</sup> BVerwG, 21.01.1992, BVerwGE 89, 296, 302-304; BVerwG, Urteil v 21.01.1992 - 1 C 18.90; BVerwG, 21.01.1992, InfAusIR 1992, 161, 163-164; BVerwG, 23.02.1993, BVerwGE 92, 166, 120; BVerwG, 23.02.1993, InfAusIR 1994, 35.

<sup>55</sup> Case C-341/11 *El Kott and Others v Hungary* [2012] OJ C46/8.

<sup>56</sup> BVerwG, Urteil v 21.01.1992 - 1 C 18.90; BVerwG, Urteil v 21.01.1992, InfAusIR 1992, 161.

UNRWA’s protection depends on the agreement of the State in which it operates and on whether the Palestine refugee still has the right to return to and reside in that State. The departure itself does not automatically make a person to qualify for international protection.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.* In this case, the Federal Administrative Court noted that the claimant was registered with the UNRWA. Whether she actually receives concrete help from THE UNRWA is irrelevant. When she came to Germany, the UNRWA could not provide protection for her anymore. However she could return to Lebanon until 8 October 1988 and obtain the UNRWA’s protection again. She did not use that opportunity and by staying in Germany beyond this date she had chosen losing the UNRWA’s protection. Therefore the Court found that the 1954 Convention was not applicable and dismissed the claim.

<sup>59</sup> BVerwG, Urteil v 21.01.1992 - 1 C 18.90; BVerwG, Urteil v 21.01.1992, InfAusIR 1992, 161.

<sup>60</sup> *ibid.*; Bianchini (n 41) 41-42.

<sup>61</sup> Questionnaire reply from Gábor Gyulai, Coordinator of the Refugee Programme and Trainer, Hungarian Helsinki Committee (Budapest, Hungary, 20 January 2014).

this could be relevant for statelessness claims by analogy. According to this decision, if a person left the UNRWA's areas of protection or assistance the reasons that led to their departure must be checked: they are entitled to protection only if they were forced to leave. If someone left voluntarily the area of the UNRWA's protection and assistance without checking whether they could return, they are not entitled to refugee status as a consequence. They are entitled to refugee status only if they cannot return due to one of the grounds of the Refugee Convention.

In the UK, in line with the interpretation of the similar article in the Refugee Convention, it seems that stateless Palestinians do not come within the scope of the 1954 Convention if they are already given the protection and assistance of the UNRWA. They may come within the scope of the 1954 Convention if they have not received that assistance, or have ceased to receive assistance for reasons beyond their control and independent of their volition.<sup>62</sup> At the moment there is no additional specific guidance on this and decisions have been inconsistent.<sup>63</sup> As of 22 August 2013, 15 Palestinians had made applications for stateless status. One had withdrawn the application and two had been rejected. The rejections relied on the findings of immigration judges in prior claims for asylum that the person was not from the Occupied Territories and the lack of further evidence against these findings. Thus they did not establish that they were inadmissible to their country of former habitual residence.<sup>64</sup> According to more updated but anecdotal evidence, some Palestinians have been granted stateless status, but in other cases discretionary leave to remain, with decisions avoiding findings on statelessness.<sup>65</sup>

In Sweden, article 1D of the Refugee Convention is not applied in the refugee status determination procedures, but is applied once a Palestinian has been granted permanent residence and claims the rights of the Refugee Convention, such as the right to obtain a travel document.<sup>66</sup> The Swedish authorities consider that if a Palestinian has obtained permanent residence, the UNRWA's assistance has ceased. Thus article 1D ensures that the refugee is entitled to travel documents and other benefits of the Refugee Convention.<sup>67</sup> The Swedish authorities do not usually check whether a person has left the UNRWA's areas of protection by his free will or not, as it is usually accepted that they are displaced because of war. After *El Kott*, it is unclear how the administration will deal with cases of persons who left the UNRWA's areas of operation by their free will (i.e. for family reunion).<sup>68</sup> With regard to other Palestinians who have been granted a

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<sup>62</sup> Home Office, UKBA, 'Operational Guidance Note, Occupied Territories OGN v4' (19 March 2013).

<sup>63</sup> At the time of writing, the Home Office is reviewing its Guidance Note on art 1D. The main source of its position on this was the Operational Guidance Note on the Occupied Palestinian Territories of 19 March 2013.

<sup>64</sup> Harvey (n 16) 304.

<sup>65</sup> As a response, representatives filed judicial reviews challenging the failure to make a finding of statelessness. These cases are still pending. Author's conversations with UK practitioners and policy-makers, First Global Forum on Statelessness (The Hague, The Netherlands, 15-17 September 2014).

<sup>66</sup> BADIL (n 33) 62.

<sup>67</sup> *ibid.*

<sup>68</sup> It is possible that the *El Kott* case will direct all the Migration Board's asylum sections and all the Courts. Before the *El Kott* case, a family reunion case of a UNRWA-registered Palestinian would get refugee status and refugee travel document. Telephone interview with Birgitta Elfström, Former Decision-Maker of the Swedish Migration Board (Varberg, Sweden, 17 February 2014); email from Birgitta Elfström to author (20 February 2014).

permanent residence permit in Sweden, but who were not registered or entitled to be registered with the UNRWA and who did not hold Syrian or Lebanese travel documents, the Appeals Board held that they are entitled to travel documents under the 1954 Convention.<sup>69</sup>

In the Netherlands, Palestinian asylum seekers' claims are assessed both in relation to whether they can return to the UNRWA's area of operation and enjoy its protection.<sup>70</sup> If that is not the case, the authorities will assess the claim under the normal criteria in article 1A(2) of the 1951 Refugee Convention. Stateless persons who have not been granted asylum can apply for a no-fault permit if they can prove that they are stateless and that the authorities in their country of former habitual residence will not issue travel documents for their return. However, it is very difficult to obtain such permits because the Dutch authorities often take the view that usually other States allow the return of their inhabitants.<sup>71</sup>

There is no easily accessible information on this matter for Greece, but the national informant states that in the context of asylum, since 2010, article 1D is applied in accordance to the UNHCR's interpretation.<sup>72</sup>

So the interpretation and application of article 1 of the 1954 Convention varies greatly, with some States granting Palestinians different categories of stay on impossibility to leave or humanitarian grounds, without necessarily making a finding as to their nationality status. The possible exclusion from protection under article 1(2)(i) further creates uncertainty and may leave stateless persons in a legal limbo. Of course, the primary cause of these issues is the failure of the international community to reach a lasting political solution to the problems posed by an absence of a Palestinian State.<sup>73</sup> However, lack of legislative guidance, inconsistencies of interpretation and abstruse positions of decision-makers only further hinder the status and protection of stateless Palestinians. In addition, the recent judgment of *EL Kott* further complicates the interpretation of the exclusion clause.<sup>74</sup> This decision, when interpreting the second sentence of article 1D of the Refugee Convention, requires the assessment of the reasons of departure and whether return is possible. The words of the second sentence in article 1D are not reproduced in the text of article 1(2)(i) of the 1954 Convention. Arguably such assessment is not necessary in the context of the 1954 Convention. Given the different outcomes of claims for protection made by the stateless Palestinians, I agree with Batchelor that in this area 'States may benefit from reviewing approaches with an eye to harmonisation.'<sup>75</sup>

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<sup>69</sup> The practice with regard to stateless Palestinians is that when they have obtained a permanent residence permit they are entitled to apply for travel documents. If they are registered with the UNRWA or entitled to be registered with the UNRWA or holders of travel documents from Lebanon or Syria, they will be entitled to apply for travel documents under the 1951 Refugee Convention, as explained. BADIL (n 33) 64.

<sup>70</sup> The Minister of Alien Affairs and Integration has issued guidelines regarding recognition of Palestinian refugees. Sub-chapter 2.2 (Exclusion Grounds of the 1951 Refugee Convention) of Aliens Circular C1/4.2.2 (Admission Grounds), in BADIL (n 33) 49.

<sup>71</sup> BADIL (n 33) 50.

<sup>72</sup> Kalatzi, questionnaire (n 27); see text to 65 in ch 3.

<sup>73</sup> Salahi (n 42) 127-28.

<sup>74</sup> See text to n 67 in ch 3.

<sup>75</sup> Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (n 3) 37.

## 5. Disputed nationality: the treatment of Eritrean/Ethiopian cases

Both the preparatory works of the 1954 Convention<sup>76</sup> and the literature review<sup>77</sup> show that cases of ineffective nationality were, and still are, among the most debated questions in the area of statelessness.

The lack of an effective nationality causes a particular problem for those individuals who are outside of their State of origin and cannot obtain assistance or documents to return. So the question that arises is whether they are stateless and should obtain international protection. Batchelor believes that if a person is unable to obtain an effective nationality due to administrative obstacles, then he may fairly be considered *de facto* stateless.<sup>78</sup> She argues that the resolution attached to the 1961 Convention on the Reduction of Statelessness and the Final Act of the 1954 Convention recommend that persons who are *de facto* stateless should as far as possible be treated as *de jure* stateless, to enable them to acquire an effective nationality.<sup>79</sup> However several scholars and experts point out that cases of ineffective nationality are often confused with *de facto* statelessness cases.<sup>80</sup> I agree with van Waas that the question of whether these individuals are *de jure* or *de facto* stateless is somewhat redundant and that the main issue is that of identifying them as stateless through appropriate procedures and well-defined means of evidence.<sup>81</sup> For example, rules would be needed to clarify whether and at what point the absence of replies from the foreign authorities regarding request of assistance in obtaining travel documents or in recognising a person as a national would weight in identifying statelessness. Through such rules, cases that have been traditionally labeled as of *de facto statelessness* may fall within the *de jure* definition of statelessness.<sup>82</sup>

To explore how the States under study deal with cases of ineffective nationality, when the nationality is disputed and/or a person cannot return, I use another vignette. In this hypothetical case, the effective link with the State of origin becomes questionable. As an example, I choose the situation that may occur with persons of Ethiopian or Eritrean origins. It is outside the scope of this thesis is to explain the long and complex history of Eritrea and Ethiopia, and so I only mention that the conflicts and tensions in these States have created a lot of confusion regarding national identity for several thousands of people. In addition, there is severe lack of country of origin information on the current treatment of Eritreans in Ethiopia and Ethiopians in Eritrea, and particularly on the nationality issues surrounding the situation since the cessation of hostilities.<sup>83</sup> Very little is also

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<sup>76</sup> See ch 3, s. 3.1.

<sup>77</sup> See text to n 110 in ch 1.

<sup>78</sup> Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (n 15) 172-74.

<sup>79</sup> See ch 3, s 3.1.

<sup>80</sup> See text to ns 113-117 in ch 1.

<sup>81</sup> Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2009) 26-27.

<sup>82</sup> *ibid* 26.

<sup>83</sup> In 2004 Ethiopia introduced a 'one-off' registration of resident Eritreans, allowing some individuals to obtain Ethiopian nationality if they did not hold Eritrean nationality, but excluding many others. Among the issues, it appears that the Authority in charge has no defined administrative or legal framework to handle the cases. In addition, it is unknown whether people of Eritrean origin outside Ethiopia have succeeded in obtaining nationality and returning. Louise Thomas, 'Refugees and Asylum Seekers from Mixed Eritrean-Ethiopian Families in Cairo. "The son of a snake is a snake"' (2006) FMRS Report 11-12.

known of the problems that those of mixed Eritrean-Ethiopian parentage<sup>84</sup> face, as they are not normally considered separately from those 'full' Eritreans or Ethiopians.<sup>85</sup> For them it may be extremely difficult or impossible to prove their nationality, especially if they are abroad. The literature reports an attitude of some Eritrean and Ethiopian embassies to be at best obstructive to people of mixed parentage who apply for passports or recognition, often refusing assistance outright or knowingly imposing impossible conditions.<sup>86</sup> For these individuals, it can therefore hardly be said that they enjoy the rights and protection of a nationality according to international law.<sup>87</sup> Of course, the confusion may also occur over the nationality of a person because of his own contradictory statements, but this scenario is not considered in the vignette. The summary of the vignette is the following:

*Z is a migrant originating from Ethiopia. Following the succession of Eritrea from Ethiopia, Z migrated and entered illegally into the State under consideration. It is unclear whether Z's nationality is Eritrean or Ethiopian. Z has made an application to the national authorities of both Ethiopia and Eritrea only to find that more evidence is requested. Despite his efforts, he is unable to provide any evidence on his nationality. After two years, neither the Eritrean nor the Ethiopian authorities give a definite answer as to whether Z is one of their nationals. During these two years, Z cooperated with the immigration authorities by providing statements, signing documents, undergoing interviews trying to establish his nationality. The first question is whether or when such long delays will be considered as amounting to a denial of recognition of nationality, even without a definite answer from the foreign officials. The second question is whether Z will receive any protection or permission to remain in the State.*

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<sup>84</sup> In summary, both Eritrean and Ethiopian law provide for acquisition of nationality on the basis of *jus sanguinis* from either or both parents. Therefore, people of mixed Eritrean-Ethiopian parentage can be nationals of either country through their parents. However, neither Ethiopia nor Eritrea allows dual nationality. If a person born to an Ethiopian parent acquires another nationality at birth, then he would be considered an Ethiopian subject. In order to be considered an Ethiopian citizen, he would have to renounce his other nationality and be naturalised. The Eritrean nationality law provides that anyone eligible for citizenship by birth or naturalisation and who wishes to acquire Eritrean citizenship, must make an application for a certificate of citizenship. The Eritrean system requires three Eritrean witnesses, holding a valid Eritrean identification card or passport, to testify to the Eritrean origins of a person. Therefore, acquisition of citizenship is not automatic but relies on administrative procedures and decisions of officials. The *jus sanguinis* principle, rather than allowing people of mixed parentage the option of either Eritrean or Ethiopian citizenship, has allowed Ethiopia to claim that these individuals are Eritrean and Eritrea to claim that they are Ethiopian, thereby leaving them stateless despite being entitled to either of two citizenships. Research Directorate, Immigration and Refugee Board of Canada 'Eritrea: Procedures for Obtaining Eritrean Nationality for Persons Born outside Eritrea; whether New Nationality Legislation is Being Drafted or Enacted' (3 September 2009) ERI103223.E; Katherine Southwick, 'Ethiopia and Eritrea: Statelessness and State Succession' (2009) 32 FMR 15-16; Thomas (n 83) 14, 18.

<sup>85</sup> Research has shown that people with one Ethiopian and one Eritrean parent have often found themselves unable to obtain the protection of either Eritrea or Ethiopia. Many of those people of Eritrean origin deported from Ethiopia during the war were subsequently able to obtain Eritrean citizenship. However some were either not allowed to enter Eritrea or, after having been stripped of their Ethiopian nationality and having remained in Ethiopia, were unable to gain Eritrean citizenship. Thomas (n 83) 19.

<sup>86</sup> Maureen Lynch, 'Lives on Hold: The Human Cost of Statelessness' (Refugee International 2005) 28; Thomas (n 83) 20; John R Campbell, 'The Enduring Problem of Statelessness in the Horn of Africa: How Nation-States and Western Courts (Re)Define Nationality' (2011) 23(4) IJRL 656-66, 668.

<sup>87</sup> See ch 2, s 3.

As far as the first question, the long delays will be relevant for the case of Z and will be considered as amounting to a denial of nationality if he is making an application for stateless status or impossibility to leave the country in Hungary, the UK, the Netherlands and Czech Republic. In particular, in Hungary, it is possible that the person will be recognised as stateless if he has made good faith efforts to prove his nationality. If within a reasonable time there is no final answer from the concerned States, the immigration authorities may suspend the statelessness determination procedures for one or two years. During such time, the immigration authorities can make further enquiries with the foreign authorities. If no answer is finally obtained, the administration will conclude that the person is stateless.<sup>88</sup> Z will likely receive permission to stay as a stateless person if he meets the other requirements set by law.<sup>89</sup> In cases of disputed nationality regarding a person in immigration detention where he cannot be removed because the authorities of the State of origin are at fault, he will be freed and issued a residence permit on humanitarian grounds.<sup>90</sup> This will then give the possibility of applying for stateless status, as one of the requirements is to be lawfully in the country.<sup>91</sup>

In the UK, when the results of enquiries with national authorities are silence or refusal to respond, the Home Office Guidance at paragraph 3.4(b) states that it is a matter for judgment in the individual case as to how long it is reasonable to wait. If the States representatives have a general policy or practice of never replying to such requests, no inference can be drawn from a failure to respond. However, when a State routinely responds to such queries, a lack of response will generally provide strong evidence that the individual is not a national. Therefore persons not recognised as nationals in practice, regardless of what the nationality laws say, are *de jure* stateless according to the Home Office Guidance. The advantages of this is that ‘it avoids the trap of thinking that such persons are only “not really” (“de facto”) stateless. The way in which a State operates its nationality laws is integral to the definition of statelessness in the 1954 Convention.’<sup>92</sup> It is still to be seen, however, how the Home Office will decide these cases.<sup>93</sup>

In the Netherlands, one of the national informants believes that delays of one and a half year or two years will be relevant to consider issuing a no-fault residence permit for impossibility to leave the country, although he points out that he does not have direct experience with Ethiopian/Eritrean cases.<sup>94</sup> Similarly, in the Czech Republic, in the context of visas for tolerated stay in cases where it is impossible to leave the country, and statelessness is argued as a preliminary issue, the Ministry will likely accept such delays as one of the factors in determining statelessness. At what point the Ministry should decide on the case is not specifically regulated by law, but the principle is that he should decide within a reasonable time. What it is meant by

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<sup>88</sup> Molnár, interview (n 43).

<sup>89</sup> *ibid.*

<sup>90</sup> The humanitarian permit entitles the holder to receive some income support but no right to work. *ibid.*

<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.*

<sup>93</sup> Harvey (n 16) 301.

<sup>94</sup> Because the UK statelessness determination procedure is fairly recent, official data is unavailable and practitioners are reluctant to release information due to confidentiality matters.

<sup>94</sup> Hijma, questionnaire (n 26).



‘reasonable time’ depends on the context.<sup>95</sup>

In Italy, the case law is split on this issue and there is no unequivocal guidance. In some cases, the long delays will be considered as amounting to denial of nationality, in others not. Z may be recognised as a stateless person and receive a residence permit on this ground if his case is well prepared and argued, especially in light of the recent UNHCR Handbook.<sup>96</sup>

As explained in the previous section, while the German administration avoids addressing the issue of statelessness and categorises these cases as cases of ‘unclear nationality’, the Federal Administrative Court and the High Administrative Court in Berlin held that an ‘unclear nationality’ is legally impossible.<sup>97</sup> They clarified that if research and queries cannot bring to the conclusion on whether a nationality exists or not, the person in question is stateless.<sup>98</sup> A permanent status of ‘unclear nationality’ is contrary to international law.<sup>99</sup>

On the other hand, in Spain and France the long delays are not sufficient to establish the lack of a nationality. In Spain, independently from whether or not a State recognises a person’s nationality, the immigration authorities will consider date of birth, place of birth and the laws of nationality. If, taking into account these three variables, it appears that Z is a national of one of the two States, he will be denied stateless status.<sup>100</sup> In cases of disputed nationality, a person may receive only a ‘registration document’ (*cédula de inscripción*) for the fact of not being documented with the passport of any country. This is merely an identification document issued by the Spanish authorities. With the registration document it is possible to apply for a residence permit at a later date according to a complicated and strict procedure. However the national informant says that he does not have any reliable data on how often this option is being used.<sup>101</sup>

In France, the definition of stateless person is strictly interpreted both by the administration and the courts.<sup>102</sup> Unless the foreign authorities straightforwardly reply that a person does not have his birth registered or that he is not a national, he would not be found to be stateless and would usually receive no protection. The refusal of the national authorities to issue a visa cannot lead to a conclusion that there is a serious doubt on the nationality of a person.<sup>103</sup> The difficulties that a person may encounter with the authorities of his country are not taken into consideration to determine whether or not the nationality link exists.<sup>104</sup> Chassin explains that French law rejects the concept of *de facto* statelessness that was included in the preparatory works of the 1954

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<sup>95</sup> Dubova, interview (n 26).

<sup>96</sup> Perin, interview (n 44).

<sup>97</sup> BVerwG, 12.02.1985, NVwZ, 1985, 589; BVerwG, 15.10.1985, NVwZ 1986, 759; OVG Berlin, Urteil v 18.04.1991 - 5 B 41.90; VG Berlin, Urteil v 12.06.1985 - 11 A 655.84; VG Berlin, 12.06.1985, InfAuslR 1985, 237-238; VG Berlin, Urteil v 24.02.1988 - 23 A 341.87; VG Berlin, 24.02.1988, InfAuslR 1988, 174, 176. Nevertheless, there are a few decisions taking a different stand. For instance a recent decision of the Administrative Court in Berlin found that the claimants of Kurdish origins had ‘unclear nationality’. VG Berlin, Urteil v 1.03.2012 - 13 K 12.12.

<sup>98</sup> BVerwG, 12.02.1985, NVwZ 1985, 589; BVerwG, 15.10.1985, NVwZ 1986, 759.

<sup>99</sup> OVG Berlin, Urteil v 18.04.1991 - 5 B 41.90.

<sup>100</sup> Cores, interview (n 19).

<sup>101</sup> *ibid.*

<sup>102</sup> Catherine-Amélie Chassin, ‘Panorama du Droit Français de l’Apatride’ (2003) 19(2) RFDA 324, 329.

<sup>103</sup> *ibid.*

<sup>104</sup> See eg CE, 20 mars 2000, n° 190036 inédit: TA Paris 13/12/1995 Haque, rec. CRR 1996 p 136. Chassin, (n 102) 329.



Convention.<sup>105</sup> If there is a real doubt on the nationality of a person and the case is before the administrative court, the court must stay proceedings because of the exclusive competence of civil courts on the matter.<sup>106</sup>

As far as Greece, the national informant reports not to be able to provide a reliable answer as there is no specific statelessness determination procedure and it is unclear how the authorities deal with these cases.<sup>107</sup>

The given circumstances in the vignette are not relevant for the situation in Sweden. In Sweden, individuals in this situation have usually made an application for asylum that has been rejected and face a deportation order which forbids them from making a new protection claim for the next four years, unless new circumstances arise.<sup>108</sup> In most cases, the immigration authorities consider that practical impediments to removal depend on the fault of the person (i.e. the person does not visit his native State's embassy or does not try hard enough to obtain documents). So Z would be left with no residence permit and no right to work.<sup>109</sup> His daily allowance is also reduced or withdrawn.<sup>110</sup>

To provide effective protection it should not be assumed that a person from one State could alternatively gain the nationality of another merely because the laws of those States and the statements of officials say that they can. Further, it should be considered that the embassy of a State may not wish to provide documentary evidence that it is excluding an individual who has a theoretical right to the nationality of that State. National laws, their application and administrative practices should all be considered when determining whether a person is stateless according to article 1 of the 1954 Convention.<sup>111</sup> Individuals who are stranded somewhere in the world without the protection of an effective nationality should be able to present such evidence in weight of an assessment of statelessness. I also contend that the situation of all people such as those in this vignette be considered sympathetically with regard to the possibility of their being stateless.<sup>112</sup>

## 6. Summary and table 4

Despite eight of the ten States under study have incorporated the internationally accepted definition of stateless persons, there are divergent practices regarding its interpretation and application. Some States, especially those under model three, even avoid making findings of statelessness and categorise stateless persons as persons with unclear nationality. Alternative forms of residence permits available for impossibility to leave are, in most of the States under model three, rarely issued. The following table summarises such differences.

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<sup>105</sup> Chassin (n 102) 329.

<sup>106</sup> Code civil créé par Loi n°93-933 du 22 juillet 1993 - art 50 JORF 23 juillet 1993, art 29; Seguin (n 21) 22; Chassin (n 102) 329.

<sup>107</sup> Kalatzi, questionnaire (n 27).

<sup>108</sup> Johannson, interview (n 11).

<sup>109</sup> The Swedish Network of Refugee Support Groups - FARR, 'Good Advice for Asylum Seekers in Sweden' (2011) 43.

<sup>110</sup> *ibid.*

<sup>111</sup> Thomas (n 83) 23.

<sup>112</sup> Thomas makes a similar argument in the context of Ethiopian/Eritrean disputed cases. *ibid* 21-22.

**Table 4: implementation of article 1 of the 1954 Convention**

	<b>Czech Republic</b>	<b>France</b>	<b>Germany</b>	<b>Greece</b>	<b>Hungary</b>	<b>Italy</b>	<b>Netherlands</b>	<b>Spain</b>	<b>Sweden</b>	<b>UK</b>
Incorporation of article 1?	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Is a person that can obtain a nationality found to be stateless?	No	No	Not by the Aliens' Offices. Yes by the Courts	N/A	Yes	Case-law is divided. No according to recent decisions	No	No	N/A	Yes
Is a Palestinian likely found to be stateless?	Issue avoided. Impossibility of return relevant for tolerated visa	Yes	Issue avoided by the Aliens' Offices. Yes by the Courts	No	Yes	Yes	Issue avoided by the administration	Yes	No	Yes under the rules, but practice unclear
Is a Palestinian excluded from protection under article 1(2)(i)	Art 1(2)(i) is not applied in the context of tolerated visas	No, unless impossibility to return depends on free will	No, unless impossibility to return depends on free will	No data. In asylum cases, El Kott applies	No data. In asylum cases, El Kott applies	No	Not applicable to no-fault permits. In asylum cases, El Kott applies	No	No. Applied only in the context of travel documents	Unclear
Is a person considered to be stateless if not assisted by the State of origin to return?	No. Relevant for tolerated visas	No	Not by the Aliens' Offices. Yes by the Courts	N/A	Yes	Case law is divided.	No. However, relevant for no-fault permit	No	No. Relevant for permit on the grounds of obstacles to return	Yes if practice of authorities is to reply
Is a person with ineffective nationality granted a permit to stay?	Impossibility to return considered for tolerated visa	No	Impossibility to return relevant for toleration or permit to stay	Likely not. May be relevant for other grounds to remain	Yes, stateless status	May be granted stateless status	Yes, no fault-permit	No	Yes. Permit on the grounds of obstacles to return (ch 12 s18)	Yes

## 7. Conclusion

The overall finding is that the interpretation and application of article 1 of the 1954 Convention present great variations and difficulties, especially in States under models two and three. The same case may arrive at different results depending on the State in which the stateless person lodges the application. This lack of harmonised approach to article 1 limits the benefits of the 1954 Convention,<sup>113</sup> and creates uncertainty regarding the meaning of ‘stateless person’ and the acquisition of legal status. According to Batchelor, two are the main reasons for such different practices. The first is the absence of clear rules on the identification of cases of statelessness, which, as discussed under chapters 4 and 5, include general guidance on procedures, competence of decision-makers, and burden of proof.<sup>114</sup> The second reason concerns the definition of stateless person, which she believes too narrow, as it does not include quality and attributes of citizenship.<sup>115</sup> In Batchelor’s view, the definition in article 1 of the 1954 Convention only includes those whose statelessness could be ascertained by reference to national law.<sup>116</sup> However, it does not include persons who are ‘unable to “act” on their nationality because its effectiveness was denied to them.’<sup>117</sup>

I agree with van Waas that there is a fine line between the question of definition or substance, and the problem of identification or procedure. However, concerns on the definition of statelessness under article 1 of the 1954 Convention, which criticise it because excluding cases of *de facto* statelessness, do not require a broader definition of statelessness.<sup>118</sup> The central question is how the definition of statelessness is to be applied and what facts and evidence can be taken into account to prove the lack of a nationality. For instance, a provision clarifying that the national authorities’ lack of assistance to return to the State of origin is a relevant fact, indicating that the person is stateless, could be helpful towards this end.<sup>119</sup> Through such rules, it will become possible to determine which cases of *de facto* statelessness fall under the general definition of statelessness,<sup>120</sup> and which ones involve other types of human rights violations.<sup>121</sup> In contentious cases, only if the rights to return and stay in the State of origin and international protection are

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<sup>113</sup> Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (n 3) 35.

<sup>114</sup> van Waas (n 81) 404.

<sup>115</sup> Blitz supports this view as well. See Brad K Blitz, ‘Statelessness, Protection and Equality’ (Forced Migration Policy Briefing 3, Refugee Studies Centre, September 2009).

<sup>116</sup> For instance, there are conflicts of laws issues which might result in statelessness without any willful act, or discrimination on the part of the State. See ch I, s 6. Carol A Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (1995) 7(2) IJRL 156, 172.

<sup>117</sup> Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (n 116) 172. Of a similar view are also David Weissbrodt and Clay Collins, ‘The Human Rights of Stateless Persons’ (2006) 28(1) HRQ 245; Lindsey N Kingston, ‘Statelessness as a Lack of a Functioning Citizenship’ (2014) 19(1-2) TLR 127.

<sup>118</sup> van Waas (n 81) 24.

<sup>119</sup> Such a provision would found its rationale in the recognition that one of the essential functions of nationality in international law is the right to return to and reside in the State’s territory. The other is the right to receive international protection. Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff and Noordhoff 1979) 6. See ch 2, s 3.

<sup>120</sup> See text to ns 117- 120 in ch 1.

<sup>121</sup> van Waas (n 81) 27.

ineffective, a finding of statelessness may be the appropriate solution.<sup>122</sup>

This approach would be in line with the meaning of ‘nationality’ under international law as interpreted by Weis, Edwards, and the UNHCR.<sup>123</sup> As discussed in chapter 2, general human rights violations are not issues of statelessness, but of citizen’s rights, and would actually be better protected under different mechanisms and provisions.<sup>124</sup> These persons might be better placed to challenge the violation of their rights as citizens, than as stateless persons.<sup>125</sup> In so doing, the 1954 Convention can be strengthened to assist those it was designed to help,<sup>126</sup> and the confusion created by the terms *de jure* and *de facto* stateless person can be prevented. Additionally, this approach addresses States’ concerns of not expanding protection to undeserving people.<sup>127</sup> On this matter, the UNHCR Handbook emphasises that it must be ensured that ‘those that qualify as ‘stateless persons’ under article 1 of the 1954 Convention are recognised as such and not mistakenly referred to as *de facto* stateless persons as otherwise they may fail to receive the protection guaranteed under the 1954 Convention.’<sup>128</sup> So, if this approach is followed, the number of cases falling under the *de jure* definition may therefore be larger than was argued in the past.

Indeed, the data of this chapter has confirmed that in States that have adopted precise procedural rules to identify statelessness, such as Hungary, persons whose nationality is disputed or ineffective are found to be *de jure* stateless under article 1 of the 1954 Convention. The opposite outcome is reached in other States, such as France and Spain, where there is lack of specific evidence rules to establish the absence of one’s nationality, and decision-makers have broad discretion to interpret these gaps.

Additionally, to improve the protection of stateless persons, it would be necessary to formally incorporate article 1 into the national legal frameworks, adopt provisions clarifying its meaning and the scope of the exclusion clause (regardless of whether a State has adopted a system of legislative or automatic incorporation of international treaties). The data has demonstrated that if such measures are not taken, the 1954 Convention provisions may remain unknown to both judges and administrators who must apply the law, and to individuals who are its beneficiaries.<sup>129</sup> Furthermore, the lack of specific legislative incorporation may cause problems with the certainty of the law,<sup>130</sup> divergent court opinions,<sup>131</sup> delays to obtain protection, and resistance on the part of

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<sup>122</sup> Weis (n 119); see ch 2, s 3.

<sup>123</sup> Weis (n 119); Alice Edwards, ‘The Meaning of Nationality in International Law: Substantive and Procedural Aspects’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 11, 30. UNHCR ‘Handbook’ (n 13) para 53; see ch 2, s 3.

<sup>124</sup> van Waas (n 81) 27. See ch 3, s 4.

<sup>125</sup> Jason Tucker, ‘Questioning de Facto Statelessness by Looking at de Facto Citizenship’ (2014) 19(1-2) TLR 276, 283.

<sup>126</sup> *ibid* 284.

<sup>127</sup> Carol A Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (1995) 7(2) IJRL 232, 248; Nehemiah Robinson, ‘Convention Relating to the Status of Stateless Persons. Its History and Interpretation. A Commentary’ (1997) World Jewish Congress 1955, Institute of Jewish Affairs, reprinted by the Division of International Protection of UNHCR, 3.

<sup>128</sup> UNHCR ‘Handbook’ (n 13) para 7.

<sup>129</sup> For instance, in Italy judges and government lawyers do not usually apply the exclusion clause of article 1(2)(i) due to lack of specialised knowledge. See s 3 in this chapter. In several States under model three, failed asylum seekers from Palestine are unlikely to be found to be stateless. See s 4 in this chapter.

<sup>130</sup> For example, in Italy it is uncertain how the courts would decide on claims for protection by stateless

decision makers to apply the international standards.<sup>132</sup>

In the next chapter I will further explore how the treatment of stateless persons varies in the States under review. In particular, I will look at how, as an effect of the lack of harmonised and specialised procedures, and uniform interpretation and application of the definition of stateless person, there is a wide range of statuses and rights that follow from the recognition of claims for protection.

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persons who could opt to acquire a nationality. See s 3 in this chapter.

<sup>131</sup> In Germany there are divergent court opinions on whether or not the status of ‘unclear nationality’ is legally possible. See text to ns 97-99 in this chapter.

<sup>132</sup> In States under model three, the administrations avoid making finding of statelessness whenever possible. See s 5 in this chapter; ch 5, ss 10, 12.

## CHAPTER 7: THE EFFECTS OF RECOGNITION

### 1. Introduction

In chapter 3, it was discussed that the 1954 Convention does not require a State to grant lawful status even when a State finds a person to be stateless.<sup>1</sup> This is a serious weakness as, in the absence of specific legislative intervention, it leaves stateless persons subject to general immigration laws. The grant of lawful status is important because several rights of the 1954 Convention are attributed only to those that are lawfully staying or present in the State. So the question of which legal status is to be granted arises as an important implementation matter.<sup>2</sup>

This chapter investigates the variety of legal statuses that are granted when a person is recognised to be stateless or when it is accepted that it is impossible for them to leave the State. It also provides an overview of some of the rights attached to such statuses, and in particular the rights to work and travel documents.<sup>3</sup> As an efficient implementing model of the 1954 Convention can only be complete if it leads to a durable solution, the issue of facilitated naturalisation is taken into account and some of the conditions imposed on naturalisation applicants are considered. The analysis of such conditions is not exhaustive. Its aim is to illustrate the main barriers that stateless persons face when trying to naturalise and that specific provisions are needed to eliminate them.<sup>4</sup>

### 2. Outcome of statelessness determination: length and type of residence

A State party to the 1954 Convention is free to treat stateless persons as any other aliens and subject them to their general provisions of immigration law.<sup>5</sup> Thus a State has several options. For example, it may try to negotiate a reinstatement of the individual's nationality, particularly in cases where it was arbitrarily withdrawn. A State may decide against legalising the stay of the person concerned and seek his admission to another State. A State may also informally 'tolerate' a person without granting lawful status, or admit him for either temporary or permanent stay.<sup>6</sup>

However, only the recognition of an individual as a stateless person and the grant of lawful status trigger the 'lawfully staying' rights under the 1954 Convention, as discussed in chapter 3. These include the rights to work as accorded to aliens in the same situation, public relief as accorded to nationals, and travel documents.<sup>7</sup> It is argued that granting the right of residence for persons recognised as stateless fulfills the object and purpose of the 1954 Convention, which is to

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<sup>1</sup> See text to n 123 in ch 3.

<sup>2</sup> Carol A Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendation for Harmonization' (2004) 22(2) *Refuge* 42.

<sup>3</sup> The rights provided in the 1954 Convention are discussed in ch 3, s 4.

<sup>4</sup> Eva Mrekajova, 'Facilitated Naturalization of Stateless Persons' (2014) 19(1-2) *TLR* 211.

<sup>5</sup> Article 7(1) stipulates that, except where the Convention explicitly contains more favourable treatment, 'a Contracting State shall accord to stateless persons the same treatment as is accorded to aliens generally'. Batchelor (n 2) 41. See text to n 81 in ch 3.

<sup>6</sup> Batchelor (n 2) 43.

<sup>7</sup> See ch 3, s 4; Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (the Statelessness Convention) (hereafter the '1954 Convention') arts 17, 28.

provide them with a set of basic rights. In the context of the Refugee Convention, Guy Goodwin-Gill and Jane McAdam take a similar position. They maintain that a potential useful test to assess whether a State has effectively implemented the international obligations involves distinguishing between the grant of refugee status on the one hand, and the legal consequences of that status, on the other. The latter may include the right to residency, which attaches a number of rights such as the right to work, or only the right to be present in the territory of the State and to be eligible to a number of rights subject to discretionary power.<sup>8</sup> International obligations are effectively implemented if a person enjoys fundamental human rights common to citizens and foreign nationals.<sup>9</sup>

### **3. Right of residence in municipal law**

#### ***3.1. Right of residence in States under models one and two***

Within the States under study, those under model one and France foresee the grant of residence permits upon recognition of stateless status. Spanish legislation is the most protection-oriented of all, as it immediately grants permanent residence to recognised stateless persons. Stateless persons are issued with a card confirming the right to reside and work.<sup>10</sup> In the UK, recognised stateless persons receive a residence permit for a period not exceeding 30 months.<sup>11</sup> This permit can be renewed. An application for permanent residence as a stateless person can be made after the applicant has spent five continuous years in the UK with lawful status and was last granted permission to remain as a stateless person.<sup>12</sup> The rights attached to the residence permit include the rights to work and receive public benefits.<sup>13</sup> In Hungary, the residence permit is valid for three years. Afterwards, it can be extended for periods of one year each time.<sup>14</sup> After three years on a temporary permit, a stateless person can apply for a permanent residence permit, but he must meet a number of conditions.<sup>15</sup> While a person is on a temporary permit, the law does not provide for any accommodation or financial support.<sup>16</sup> Moreover, access to the labour market is restricted. A work permit can only be obtained if a stateless person is able to demonstrate that there is no qualified Hungarian or EEA citizen available to do the job.<sup>17</sup> Additionally, delays in issuing work

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<sup>8</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 528-29.

<sup>9</sup> *ibid* 529.

<sup>10</sup> Real Decreto 865/2001, de 20 de julio, por el que se aprueba el Reglamento de reconocimiento del estatuto de apátrida (BOE-A-2001-14166) [Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons (BOE-A-2001-14166)] (Real Decreto 865/2001) art 13.

<sup>11</sup> Immigration Rules (HC 251, 23 May 1994) (as amended) Part 14: Stateless People 405.

<sup>12</sup> *ibid* 407.

<sup>13</sup> UKBA, 'Stateless Guidance. Applications for Leave to Remain as a Stateless Person' (1 May 2013) (Stateless Guidance) para 6.1.

<sup>14</sup> Telephone interview with Tamás Molnár, Head of Unit, Unit for Migration, Asylum and Border Management, Department of EU Cooperation, Ministry of Interior [of Hungary] and Assistant Professor in the Corvinus University of Budapest (Budapest, Hungary, 16 December 2013).

<sup>15</sup> Gábor Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (Hungarian Helsinki Committee 2010) 31.

<sup>16</sup> *ibid*.

<sup>17</sup> This condition is fulfilled if: (1) the employer notified his need for labour force to the competent labour affairs authority fifteen to sixty days prior to applying for a work permit for a third-country national (specifying the necessary skills and qualifications); (2) no registered job-seeker of Hungarian or EEA



permits represent another obstacle.<sup>18</sup> However, the Hungarian Government has committed itself to remove the restriction on the right to work in the next years, as stated in the newly adopted Migration Strategy, which will be carried out between 2014 and 2020.<sup>19</sup>

In France, a stateless person receives a temporary residence permit for three years. Stateless persons have unrestricted rights to the labour market, access to health care and social benefits, as well as to all levels of education.<sup>20</sup> If a stateless person has had regular residency in France for three years, he can then apply for a residence permit which is valid for ten years.<sup>21</sup> In contrast, it should be noted that recognised refugees are given the ten-year residence permit right away.<sup>22</sup>

In Italy, the legislation does not address whether the recognition of statelessness implies the right to the grant of a residence permit. This gap has been filled in practice: in general the *Questura* grant a residence permit upon submission of the document stating recognition of stateless status issued by the administration or the courts.<sup>23</sup> Such residence permits allow stateless persons to work<sup>24</sup> and entitle them to social benefits similarly to Italian nationals.<sup>25</sup> As the law does not regulate this matter, the length of validity of the residence permit varies and depends on the discretion of the *Questura* (normally it is valid for one, two or five years). On this point, experts agree that a specific provision to harmonise the administrative practice would be needed.<sup>26</sup> The residence permit can be renewed and it is possible to apply for permanent residence after five years.<sup>27</sup>

### ***3.2. Right of residence in States under model three***

A common trend in most of the States under model three is that they have procedures to grant a form of stay on the basis that it is impossible for a person to leave their territory. While such alternative exists, it is not often used to grant residence to stateless persons – consequently, they remain in a state of legal limbo.<sup>28</sup>

In a few cases, nevertheless, these States without specific statelessness determination procedures have no alternative but to grant a form of stay. States may reach the conclusion that leaving an individual indefinitely in an illegal position is not a viable option. If a departure cannot be enforced because of statelessness a residence permit may be granted for either definite or indefinite periods. In situations where the permit is of a temporary nature, particularly if renewal is

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nationality (or spouse of a Hungarian or EEA national), having the necessary skills and qualifications, applied for the job between the date of the above notification and the application for a work permit for a third-country national; (3) the third-country national applying for the job has the necessary skills and qualifications. *ibid* 32. Some exceptions apply, for instance, if a stateless person is married to a Hungarian citizen. *ibid*.

<sup>18</sup> *ibid*.

<sup>19</sup> Molnár, interview (n 13).

<sup>20</sup> Gábor Gyulai, 'Statelessness in the EU Framework for International Protection' (2012) 14 EJML 279, 290.

<sup>21</sup> *ibid*.

<sup>22</sup> Catherine-Amélie Chassin, 'Panorama du Droit Français de l' Apatride' (2003) 19(2) RFDA 324, 336.

<sup>23</sup> Giulia Perin, 'Lacune Normative ad Alto Costo Umano: l' Apolidia in Italia' (2012) 3 DIC 70, 79.

<sup>24</sup> *ibid* 79-81.

<sup>25</sup> Batchelor (n 2) 37-38.

<sup>26</sup> Telephone interview with Giulia Perin, Immigration Lawyer (Padova, Italy, 6 December 2013).

<sup>27</sup> *ibid*.

<sup>28</sup> Batchelor (n 2) 44.



not automatic but depends on the discretion of the issuing authority, the stateless person lives in continued uncertainty until able to apply for permanent residence. This can range from a few months to a few years, depending on the State.

In the Czech Republic, Germany, the Netherlands, the status given for impossibility to leave for practical reasons either for lack of documents or the State of origin's refusal to accept the person back is that of 'tolerated stay'. Usually 'tolerated stay' comes with a number of reduced rights compared to other residence permits or forms of protection. The path to obtaining permanent residence is longer and entails going through a number of applications. For example, in the Czech Republic a visa for exceptional leave to stay (*tolerated stay*) is granted for the necessary period of time, and no longer than six months.<sup>29</sup> If the reasons preventing the person from leaving the territory continue to persist, the person can apply for a long-term tolerated visa, which is valid for one year and can be renewed under the same condition of 'persistence of reasons'.<sup>30</sup> Persons on toleration have no right to receive benefits<sup>31</sup>, but they can obtain a work permit.<sup>32</sup> According to section 68 of the Act on the Residence of Foreign Nationals, foreign nationals are entitled to stay permanently in the Czech Republic on fulfillment of a number of requirements, including five years' continuous stay<sup>33</sup> and holding a valid travel document. This latter condition is particularly problematic, as in most cases stateless persons do not have any valid travel documents.<sup>34</sup>

In Germany, toleration must be renewed frequently and does not confer any rights of residence and the obligation to leave continues to apply.<sup>35</sup> This means that a person shall take any necessary and reasonable steps to make the departure possible.<sup>36</sup> After a recent change in the law, in some circumstances a tolerated person can be granted access to the labour market.<sup>37</sup>

Some argue that tolerated stay is a form of protection for stateless persons.<sup>38</sup> Yet, toleration cannot be considered as an actual protection status. It prevents a person breaching the law, but it does not grant lawful stay and the years on it do not normally count towards the time needed to

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<sup>29</sup> Act No. 326/1999 on the residence of foreign nationals in the Czech Republic and amending certain laws (Foreign Nationals Act) (unofficial tr) s 33, para 1.

<sup>30</sup> Telephone interview with Alexandra Dubova, Immigration Lawyer, Organizace pro pomoc uprchlíkům, o.s. (Prague, Czech Republic, 2 January 2014).

<sup>31</sup> Email from Alexandra Dubova, Immigration Lawyer, Organizace pro pomoc uprchlíkům, o.s. to author (Prague, Czech Republic, 4 May 2014).

<sup>32</sup> *ibid.* People on tolerated visa receive special treatment compared to that of other aliens: they fall under one of the exceptions stipulated by law which allow gaining a work permit regardless of the job market situation. Act No. 326/1999 on the residence of foreign nationals in the Czech Republic and amending certain laws (Foreign Nationals Act) (unofficial tr) s 42g (6)a; Integrovaný portál MPSV, 'Foreigner's Procedure towards Starting Work in the Territory of the Czech Republic'

<[https://portal.mpsv.cz/sz/zahr\\_zam/zz\\_zamest\\_cizincu/zz\\_zamest\\_ciz](https://portal.mpsv.cz/sz/zahr_zam/zz_zamest_cizincu/zz_zamest_ciz)> accessed 8 April 2015

<sup>33</sup> Helena Hofmannová, 'Legal Status of Stateless Persons in the Czech Republic' (2013) TLQ 55, 69.

<sup>34</sup> Foreign Nationals Act (n 29) s70.

<sup>35</sup> Claude Cahn, 'Minorities, Citizenship and Statelessness in Europe' (2012) 14 EJML 297, 310.

<sup>36</sup> §79 Aufenthaltsgesetz (AufenthG) neugefasst durch Beschluss vom 25.02.2008 (BGBl I 2008, 162), zuletzt geändert durch Artikel 2 Abs 59 Gesetz vom 07.08.2013 (BGBl I 2013, 3154) (Residence Act); see also *ibid* §60a(1). Necessary and reasonable steps include providing travel documents or making applications for travel documents or cooperating for clarifying one's identity. If toleration is based on a legal barrier, a voluntary departure is always unreasonable. *ibid* §48, 49.

<sup>37</sup> See ch 5, s 5 and ft 51.

<sup>38</sup> Email from Dr. Roland Bank to author (4 April 2014).

naturalise.<sup>39</sup> On this point, the German courts have emphasised that the residence of a person who cannot be deported in a foreseeable time has to be regulated by the German authorities. Toleration is not an adequate instrument in a prolonged situation. If toleration is granted for long-term stay, ‘toleration here is actually a residence document in disguise.’<sup>40</sup>

The German legislation adds that when deportation has been suspended because departure is impossible in fact or in law and the obstacle is not likely to be removed in the foreseeable future, a residence permit may be issued.<sup>41</sup> Moreover, if deportation has been suspended for 18 months, the residence permit should be issued. However the toleration certificate or residence permit can be withdrawn or not extended if (1) the obstacle to departure ceases to apply, or (2) a readmission agreement between Germany and a State of former residence or even of simple transit applies.<sup>42</sup> The residence permit may be issued and extended in each instance for a maximum period of three years. It cannot be issued for longer than six months if it was issued due to the impossibility of deportation, and if the person has not been legally resident in Germany for at least 18 months.<sup>43</sup> After five years on a temporary permit, it is possible to apply for a settlement permit (*Niederlassungserlaubnis*), as long as a number of other conditions are also met.<sup>44</sup>

In the Netherlands the no-fault residence permit is valid for one year pursuant to article 3.58 (6) of the Aliens decree and can be renewed twice. A no-fault residence permit will not be renewed if new information comes to light as regards the ability of the person concerned to return to the State of origin or to legally reside in another State pursuant to article 4.2 of the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire* 2000).<sup>45</sup> After three years the holder of the no-fault residence permit becomes eligible for another residence permit for limited time (*verblijfsvergunning regulier onder de beperking ‘voortgezet verblijf’*).<sup>46</sup> The latter permit differs from the no-fault residence permit in that an employment authorisation is no longer required from

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<sup>39</sup> BVerwG, 16.10.1990, BVwerGE 87, 11, 18; VGH Baden-Württemberg, 31.03.1993, VBIBW 1993, 482-483; OVG Niedersachsen, 30.09.1998, DVBI 1999, 1219-1221. In light of these cases, it should also be noted that a person with *Duldung* is only considered ‘lawfully in’ the country for purposes of the rights of the 1954 Convention. As explained in ch 3, s 4, the protections offered under the 1954 Convention depend on the nature of the attachment of the stateless person and the host State. There are ‘five levels of attachment’, which, starting from the weakest, are: being subject to the State’s jurisdiction, physical presence, lawful presence, lawful stay, and durable residence. Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2009) 23, 229.

<sup>40</sup> BVerwG, Beschluss v 1.10.1979 - 1 C 97.76; Buchholz 402.22 Art 26 GKG Nr 1; Gerichtskostengesetz (GKG) vom 27. Februar 2014 (BGBl I 2014, 154), zuletzt geändert durch Artikel 7 des Gesetzes vom 8. Juli 2014 (BGBl I 2014, 890) [Court Fee Act]; Kay Hailbronner, Hans-Georg Maaßen, Günter Renner, *Staatsangehörigkeitsrecht* (5th edn, CH Beck 2010) I.G.IV.2.30.

<sup>41</sup> See ch 5, s 2.

<sup>42</sup> Katia Bianchini, ‘On the Protection of Stateless Persons in Germany’ (2014) 19(1-2) TLR 35. Germany has entered into readmission agreements with several States. Claudia Finotelli, *Illegale Einwanderung, Flüchtlingsmigration und das Ende des Nord-Süd-Mythos* (LIT Verlag Berlin 2006) n 381, 120; Simone Grimm, *Die Rückführung von Flüchtlingen in Deutschland* (BWW Berliner Wissenschafts-Verlag 2007) 49-146. Some of these readmission agreements are applicable to stateless persons as well.

<sup>43</sup> Residence Act (n 36) §26(1); Bianchini (n 42) 50.

<sup>44</sup> Residence Act (n 36) §9.

<sup>45</sup> Questionnaire reply from Laura van Waas, Senior Researcher, Tilburg University (Tilburg, The Netherlands, 14 January 2014).

<sup>46</sup> See *Vreemdelingenbesluit* 2000 (Vb 2000) [Aliens Decree 2000] art 3.4(1). The ‘prolonged residence’ permit is probably the closest thing to the concept of permanent residence. van Waas, questionnaire (n 45).

the administration, thus making access to the labour market easier.<sup>47</sup> Both permits allow full access to social security.<sup>48</sup>

In Sweden, a person who is found to meet the conditions of chapter 12 section 18 is in most cases granted a permanent residence permit.<sup>49</sup> A person may be granted a temporary residence permit if the obstacles to his removal are temporary. When the temporary residence permit expires, it is possible to renew it as long as there are impediments to enforcing the removal order.<sup>50</sup> A person on a temporary permit may request a permanent residence permit after five years of continuous legal residence.<sup>51</sup> Aliens who are granted permanent residence permits are allowed to work on the same terms as Swedish citizens. If they are granted a temporary residence permit, they receive a work permit valid for the same period.<sup>52</sup>

In conclusion, in the States under model three, tolerated stay is a safety net for stateless persons but it does not represent an adequate form of protection. It is not a genuine effort to comply with the obligations of the 1954 Convention. Permits for impossibility to leave provide more rights than tolerated stay, but they are not frequently issued (except in Germany), as there are several conditions to meet. Only permanent residence status can be considered a meaningful protection status as it usually allows to work, access benefits<sup>53</sup> and live in the country without time limits. However, generally, there are several requirements to satisfy to obtain permanent residence, including having secured livelihood for himself and his family, and an adequate knowledge of the local language.<sup>54</sup>

Greece is the only State with no provisions to obtain lawful stay on the grounds that a person cannot be removed. If a stateless person can remain on other basis, then he can apply for permanent residence after five years.<sup>55</sup>

#### **4. Right to a travel document**

As discussed in chapter 3, section 4.1, according to the first sentence of article 28 of the 1954 Convention, lawfully staying stateless persons have the right to a travel document which is valid for not less than three months and no more than two years. In some of the States under review, a stateless person receives a 1954 Convention travel document, whereas in others an alien's travel document.<sup>56</sup> Typically, a 1954 Convention travel document is issued in States under model one and two, when statelessness has been determined. An alien's travel document is generally issued in

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<sup>47</sup> UNHCR 'Mapping Statelessness in the Netherlands' (2011) 44.

<sup>48</sup> Questionnaire reply from Rombout Hijma, Immigration Lawyer (Utrecht, The Netherlands, 30 January 2014).

<sup>49</sup> See ch 4, s 2.

<sup>50</sup> EMN, 'The Practices in Sweden Concerning the Granting of Non-EU Harmonised Protection Statuses' (February 2010) 16.

<sup>51</sup> Hedvig Bernitz, 'Naturalization Procedures for Immigrants. Sweden' (EUDO Citizenship Observatory 2013) 4.

<sup>52</sup> EMN (n 50) 17.

<sup>53</sup> Batchelor (n 2) 43-44.

<sup>54</sup> Eg Foreign Nationals Act (n 29) s70 in the Czech Republic; for Germany, see Residence Act (n 36) §9.

<sup>55</sup> Christos Th Vardikos, 'Greece Immigration Issues 2011' (2012), 15 <[http://vardikos.com/wp-content/uploads/2012/10/VV\\_IMMIGRATION\\_ISSUES\\_GREECE2011.pdf](http://vardikos.com/wp-content/uploads/2012/10/VV_IMMIGRATION_ISSUES_GREECE2011.pdf)> accessed 25 September 2014.

<sup>56</sup> Batchelor (n 2) 39.

States under model three, when they have granted residence on other grounds, without establishing statelessness.<sup>57</sup>

In States under models one and two, obtaining a travel document is generally reported not to be a problem. There may be some fees associated with its application, but the procedures are straightforward.<sup>58</sup>

In States under model three, if a person's stateless status has not been established in an authoritative way, the rights he is entitled to, including that of a travel document, cannot be fully accessed. His statelessness can still be challenged and therefore the exact application of article 28 of the 1954 Convention is unclear. By way of example, in the Netherlands, there are anecdotal stories of people having difficulty acquiring the travel documents because they are not registered as stateless with the municipality.<sup>59</sup>

In Sweden, a travel document can be issued under article 28 of the 1954 Convention if the person was granted a residence permit on protection grounds.<sup>60</sup> The application form to obtain the travel document must be submitted along with the following documents: (1) any passport issued previously, (2) other documents confirming the applicant's identity, (3) the permanent residence permit.<sup>61</sup> If an alien has no valid passport and is unable to procure one, it will not be accepted that it is difficult or expensive. The alien will be issued an alien's passport instead of a travel document under article 28 of the 1954 Convention. The period of validity of an alien's passport is limited to no more than five years, and its territorial validity may be restricted. A provision may be entered on an alien's passport, that the holder's identity has not been confirmed.<sup>62</sup> Statelessness may be assessed by the administration for the purpose of issuing the alien's passport. However, it is unclear how the authorities make an assessment of statelessness, as there is not even a definition of it under national law.<sup>63</sup>

In the Czech Republic, in the light of the reservation that was made to article 28 of the

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<sup>57</sup> *ibid* 40.

<sup>58</sup> Real Decreto 865/2001 (n 10) art 13(2); Gyulai, *Statelessness in Hungary. The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (n 15) 35; République Française, Office Français de Protection des Réfugiés et Apatrides (OFPRA), 'Droits et Obligations' <[http://www.ofpra.gouv.fr/?xml\\_id=65&dtd\\_id=12](http://www.ofpra.gouv.fr/?xml_id=65&dtd_id=12)> accessed 29 April 2014; UKBA, 'Stateless Guidance' (n 13) Part 7; Ministero dell' Interno, Prefettura di Firenze, Regione Toscana, 'Titolo di Viaggio per Stranieri (Non Comunitario o Apolide)' <<http://www.immigrazione.regione.toscana.it/lenya/paesi/live/contenuti/percorsoguidatoai procedimenti/titolovia ggiostranieri.html?sigla=FI&p=Firenze#accesso>> accessed 2 May 2014.

<sup>59</sup> van Waas, questionnaire (n 45). All people living in the Netherlands must be registered in the municipal basic administration (GPA). Aliens who reside lawfully and who are likely to remain for longer than six months are included. The information in the registry must include a person's nationality and must be based on official documents issued by the State of origin. If such documents are unavailable, an individual can be registered as having unclear nationality or as being stateless. The GPA Operation Guidelines do not specify how the determination of statelessness occurs and they state that statelessness is rare. Unless a stateless person is able to clearly prove his lack of nationality, he will not be registered as such. Even if a person succeeds in registering as being stateless, he does not have any legal rights arising from it. UNHCR 'Mapping Statelessness in the Netherlands' (n 42) 17-18.

<sup>60</sup> Swedish Migration Board, 'Alien's Passport' <<http://www.migrationsverket.se/English/Private-individuals/Aliens-passport-and-travel-documents/Aliens-passport.html.printable>> accessed 14 February 2014.

<sup>61</sup> Swedish Migration Board, 'Travel Documents' <<http://www.migrationsverket.se/English/Private-individuals/Aliens-passport-and-travel-documents/Travel-documents.html>> accessed 14 February 2014.

<sup>62</sup> EMN (n 50) 18.

<sup>63</sup> These cases are mainly based on administrative practice. Email from Bo Johansson to author (2 January 2014).

Convention, an alien's passport is commonly issued only to stateless persons who have been granted permanent residence and who can prove that for reasons beyond their will are unable to obtain a valid travel document.<sup>64</sup> This entails showing that the embassy of the State of origin is unwilling to issue a passport. The main problem concerns obtaining permanent residence first, due to the burdensome requirements set by law. These include holding a valid travel document, which in most cases stateless persons do not have.<sup>65</sup>

In Germany, an application for a travel document has to be made to the local Alien's Office.<sup>66</sup> Generally toleration is not sufficient to meet the lawful stay prerequisite set forth in the first sentence of article 28 of the 1954 Convention.<sup>67</sup> There are several judgments involving cases in which a person applied for a travel document and the administration refused it because it was not previously established that the person was stateless. The courts have shown a more sympathetic approach to statelessness than the administration, making findings of statelessness and ordering the Alien's Office to issue travel documents.<sup>68</sup>

In Greece, a stateless persons residing lawfully in the country can apply for a travel document to the police authorities according to article 28 of the 1954 Convention.<sup>69</sup> In practice, it is issued only to stateless persons who arrive legally in Greece holding a Convention travel document and who need to replace it when they are granted a residence permit for one of the general reasons provided for in Law 3386/2005.<sup>70</sup> The national informant reports to have experience with a few cases of foreigners who became stateless while residing legally in Greece and who obtained a travel document upon proving, with documents issued by the State of their former citizenship, that they became stateless. These cases mainly concerned former citizens of the Soviet Union who had close ties with Greek citizens and/or citizens of a EU member State.<sup>71</sup> It should also be mentioned that in 1998, Greece granted several 1954 Convention travel documents and identity cards to members of the Muslim minority of Thrace, who became stateless following the withdrawal of Greek citizenship by virtue of article 19 of the Greek Citizenship Code of 1955.<sup>72</sup> According to this

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<sup>64</sup> The issuance of travel documents is governed by Ch IX of the Foreign Nationals Act, according to which the Ministry of the Interior issues an alien's passport under the following conditions: (1) at the request of a foreign national who is staying in the territory of the Czech Republic on the basis of a permanent residence permit but does not possess a valid travel document, and proves that, against his will, he is unable to acquire such a document; (2) at the request of a foreign national who is entitled to permanent residence under Section 87 (a foreign national placed into foster care by a competent authority); (3) to a foreign national enjoying temporary protection under a separate piece of legislation who does not hold a travel document; and (4) at the request of a foreign national who has been granted subsidiary protection under a separate piece of legislation but does not possess a valid travel document, and proves that, against his will, he is unable to acquire such a document. Foreign Nationals Act (n 29) s113(7); Hofmannová (n 33) 71.

<sup>65</sup> Foreign Nationals Act (n 29) s79; Dubova, interview (n 30).

<sup>66</sup> Bianchini (n 42) 35.

<sup>67</sup> *ibid* 47.

<sup>68</sup> *ibid* 46-48.

<sup>69</sup> Questionnaire reply from Erika Kalatzi, Immigration Lawyer (Athens, Greece, 22 December 2013).

<sup>70</sup> *ibid*.

<sup>71</sup> *ibid*.

<sup>72</sup> Legislative Decree No 3370/1955 Greek Nationality Code (unofficial tr) art 19; Kalatzi, questionnaire (n 69). Citizenship withdrawal from members of minorities was intended to control the Muslim minority from Thrace. Dimitris Christopoulos, 'Country Report: Greece' (EUDO Citizenship Observatory 2013) 5. According to the administration, the number of people who had lost Greek citizenship from 1955 until its abolition amounted to about 60,000. *ibid*. Article 19 was a discriminatory measure that stripped minority

article *allogenis* who had left Greek land without the intention of returning, lost Greek citizenship.<sup>73</sup> The article was abolished in 1998<sup>74</sup>, but with no retroactive effect. Furthermore, those who had been denaturalised would not have their citizenship automatically restored.<sup>75</sup> The re-acquisition of Greek citizenship became possible under the special procedure for the naturalisation of *allogenis*.<sup>76</sup> Many stateless Greeks have had their nationality restored while others have not.<sup>77</sup> The bureaucratic requirements that applicants had to satisfy were one of the main causes.<sup>78</sup>

In conclusion, although article 28 is a self-executing provision, the right to obtain a travel document is only easily accessible in States under models one and two. In States under model three, the absence of comprehensive implementing legislation regulating findings of statelessness, guiding decision-makers, and granting stateless status causes problems as far as obtaining a travel document.

## 5. Facilitated naturalisation

Naturalisation of stateless persons falls under the broader problem of the right to a nationality and citizenship laws in general.<sup>79</sup> Naturalisation is the most regulated and politicised aspect of citizenship laws.<sup>80</sup> States have diverging traditions and policies regarding the naturalisation of foreigners. In most cases, naturalisation is a costly, long and difficult process.<sup>81</sup>

As discussed in chapter 3, article 32 of the 1954 Convention provides that States shall facilitate the naturalisation of stateless persons.<sup>82</sup> In particular, States shall make every effort to

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groups of their citizenship, under the pretext that they had permanently established residence abroad. Greek Helsinki Monitor and Minority Rights Group Greece, 'Human Rights in Greece: Joint Annual Report 2000' (February 2000) para 1.3.

<sup>73</sup> Christopoulos (n 72) 5. Greek citizenship law makes a distinction between individuals of Greek Orthodox *genos* or descent, and individuals of other descent (*allogenis*). A Circular of the Ministry of 1960 specifies that

the Ministry, in its interpretation of the terms *homogenis* and *allogenis*, does not consider the racial origin of the individual as a unique criterion [...]. [T]he main criterion for the distinction between *homogenis* and *allogenis* is national consciousness [...] The individual's racial origin or national descent does not define on its own a sense of *homogenis* or *allogenis*, but constitutes a subsidiary element for appraisal in a specific judgment.

ibid 1-2. 'National consciousness' is defined as the link with the Greek nation, understood in terms of common language religion and traditions. In practice, the criteria of origin and consciousness are either employed cumulatively or the ethnic origin criterion prevails. ibid 6. The terms *homogenis* and *allogenis* are not defined as strict legal categories, but rather as flexible ideological concepts which change according to political priorities. The distinction is subject of ongoing historical and political debate. ibid 2, 5, 8.

<sup>74</sup> ibid.

<sup>75</sup> ibid.

<sup>76</sup> One of the main distinctions between naturalisation applications of *homogeneis* and *allogenis* is that applications of *homogeneis* are decided by the General Secretary of the Region of their permanent domicile, whereas applications of *allogenis* are decided by the Minister of Interior. In addition, *homogeneis* are exempted from the interview requirement. ibid 6.

<sup>77</sup> Al Jazeera World, 'Stateless' <[http://www.aljazeera.com/programmes/aljazeeraworld/2014/03/stateless-201433134453229\\_67.html](http://www.aljazeera.com/programmes/aljazeeraworld/2014/03/stateless-201433134453229_67.html)> accessed 5 May 2014.

<sup>78</sup> Greek Helsinki Monitor and Minority Rights Group Greece (n 72) para 1.3.

<sup>79</sup> See ch 2, s 4.1; ch 3, s 4.3.

<sup>80</sup> Rainer Bauböck and Sara Wallace Goodman, 'Naturalization' (2010) Policy Brief No 2 (EUDO Citizenship).

<sup>81</sup> ibid 2.

<sup>82</sup> See ch 3, s 4.3.



expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.<sup>83</sup> Article 32 of the 1954 Convention does not prevent States from offering access to facilitated naturalisation also to unlawfully present stateless persons, but does not provide further guidance on this matter.<sup>84</sup>

Contrary to the spirit of article 32, all States under review require applicants for naturalisation to have lawful residence. Furthermore, all States have introduced additional conditions to meet, such as uninterrupted residence, a minimum number of years in the country and/or holding permanent residence.<sup>85</sup>

Among States under model one and model two, Italy, France and Hungary are positive examples as far as the time that they require to naturalise. In Italy, stateless persons, similarly to refugees, can apply for naturalisation after five years of residence, which is half the waiting time according to the general rule (ten years). Likewise, in France any foreigner can apply for French citizenship after five years of lawful residence.<sup>86</sup> In Hungary, stateless persons can be naturalised after five years of having a registered domicile in the State, while the general rule is eight years.<sup>87</sup>

In States under model three, the Netherlands and Sweden should be mentioned because of the short time that they require to naturalise stateless persons: three and four years, respectively, of lawful residence. Nevertheless, in Sweden, a person who cannot prove his identity may be naturalised only if he has resided in the State for at least eight years prior to the application for citizenship. A person can build up residency that includes all periods with a residence permit, as long as the periods are contiguous, regardless of whether the permit was temporary or permanent. In any case, applicants must hold a permanent Swedish residence permit in order to obtain citizenship.<sup>88</sup> Also, in the Netherlands, a person can apply for naturalisation if he holds a non-temporary residence permit.<sup>89</sup> In practice, the provision of facilitated naturalisation is infrequently applied as statelessness is rarely identified.<sup>90</sup>

Nationality laws of most States also expect the applicants for naturalisation to meet certain economic prerequisites. For example, they may include having a home and/or sufficient income to support themselves and their families or not to be in need of support from the State.<sup>91</sup> These requirements serve to protect the social system of the State. The 1997 European Convention on

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<sup>83</sup> See 1954 Convention (n 7) art 32. Note as well that the European Convention on Nationality provides for a *right* to apply for naturalisation for lawfully resident persons. In addition, it adds that States parties shall facilitate the acquisition of nationality of stateless persons (art 6 (4) (g)) and the standard ‘waiting time’ prescribed by law before lawfully staying non-nationals can lodge an application for naturalisation cannot exceed ten years (art 6 (3)). European Convention on Nationality [1997] CETS No 166.

<sup>84</sup> See ch 3, s 4.3.

<sup>85</sup> Bauböck and Goodman (n 80) 2.

<sup>86</sup> L 5 febbraio 1992, n 91, in materia di ‘Nuove norme sulla cittadinanza’ [Law 5 February 1992, n 91, in mater of ‘new provisions on citizenship’] art 9(1)(e); Batchelor (n 2) 42 ft 109; Abdellali Hajjat, ‘Naturalization Procedures for Immigrants. France’ (EUDO Citizenship Observatory 2013) 2.

<sup>87</sup> Act LV of 1993 on Hungarian Citizenship (official tr) s 4(4).

<sup>88</sup> EMN (n 50) 18-19.

<sup>89</sup> Bauböck and Goodman (n 80) 4-6.

<sup>90</sup> van Waas, questionnaire (n 45).

<sup>91</sup> Council of Europe, Committee of Experts on Nationality (CJ-NA), ‘Report on Conditions for the Acquisition and Loss of Nationality Adopted by the Committee of Experts on Nationality on the Basis of a Draft Prepared by Mr Andrew Walmsley’ (2003) CJ-NA (2002) 1, para 31.

Nationality does not include owning property under forbidden discriminatory grounds in the attribution of nationality. Nevertheless this requirement may be particularly problematic for stateless persons, especially if it is difficult for them to obtain a work permit. Therefore, the requirement, while generally justified, should allow for some exceptions.<sup>92</sup>

A minority of States, such as Germany, Spain and the Netherlands, necessitate renunciation of a former nationality.<sup>93</sup> In both Germany and the Netherlands, it may be a problem for stateless persons demonstrating that they have no nationality, if it had not been established before.<sup>94</sup> In Spain, this requirement is loosely applied.<sup>95</sup>

One of the trends since 2000 is the introduction of language and civic knowledge tests. These are related to the goal of integrating foreigners in the host society.<sup>96</sup> Usually, these differentiations do not amount to discrimination.<sup>97</sup> Nonetheless, they should exclusively be used to integrate non-nationals and no State should use them in a biased manner to select its nationals.<sup>98</sup> The State should therefore not ‘require more than an adequate knowledge of one of its official languages.’<sup>99</sup> The word ‘adequate’ is open to different interpretations and raises several problems of implementation. It is difficult to establish the level of knowledge of grammar and vocabulary necessary to pass the language test. Some argue that the standard for naturalisation tests should be what the linguists consider sufficient to conduct a simple conversation, i.e. the knowledge of 800 words (A2 standard).<sup>100</sup> Even if States comply with the above standards, the language and other knowledge tests might still be problematic to pass for certain categories of applicants due to their age or physical or mental conditions. Language and civic tests have been reported to constitute a serious barrier to naturalisation for applicants in Hungary, France and Germany. In Hungary, the citizenship test has been criticised because it requires not only mastery of the Hungarian language, but also an in-depth knowledge of Hungarian history, literature and the constitutional system. Although only 3-10 per cent of the applicants fail at it, some argue that it sets the bar too high, and does not specify the mandatory level of knowledge of the language (as recommended by the Common European Framework for Reference for Languages).<sup>101</sup> In France, the test includes the history and ‘culture’ of France, and there is evidence that it is difficult to pass for certain

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<sup>92</sup> Mrekajova (n 4) 208-09.

<sup>93</sup> Bauböck and Goodman (n 80) 2.

<sup>94</sup> Interview with Reinhard Marx, Immigration Lawyer (Frankfurt, Germany, 22 July 2013); Interview with Heiko Habbe, Immigration Lawyer, Jesuit Refugee Services Berlin (Hamburg, Germany, 9 August 2013); van Waas, questionnaire (n 45).

<sup>95</sup> Francisco Javier Moreno Fuentes and Alberto Martín Pérez, ‘Naturalisation Procedures for Immigrants. Spain’ (EUDO Citizenship Observatory 2013) 6-7.

<sup>96</sup> However, there has been very little research to find out whether the tests are effective in achieving these goals. Bauböck and Goodman (n 80) 4.

<sup>97</sup> The European Convention on Nationality lists only ‘sex, religion, race, color or national or ethnic origin’ as prohibited discriminatory grounds. See European Convention on Nationality (n 83) art 5; Mrekajova (n 4) 206.

<sup>98</sup> Council of Europe, Committee of Experts on Nationality (CJ-NA) (n 91) 1 para 36.

<sup>99</sup> European Convention on Nationality. Explanatory Report (n 97) para 52.

<sup>100</sup> Vadim Poleshchuk, *Advice not Welcomed: Recommendations of the OSCE High Commissioner to Estonia and Latvia and the Response* (Kieler Schriften zur Friedenswissenschaft) (LIT Verlag 2001) 56; Mrekajova (n 4) 203, 206.

<sup>101</sup> Szabolcs Pogonyi, ‘Naturalization Procedures for Immigrants. Hungary’ (EUDO Citizenship Observatory 2013) 4.



applicants, above all women, who do not have enough formal education.<sup>102</sup> In Germany, the test requirement is strictly applied, not even exempting illiterate persons.<sup>103</sup>

In most States, naturalisation involves the administration's discretionary decision. The competent authorities vary, with some States having specialised bodies for the administration of citizenship, as Sweden. In many cases, local administrations are in charge of checking applications and interviewing, and the central State authorities take the decision. Naturalisation is not considered as a routine administrative decision, but a privilege and it is only granted if it is in the interest of the State.<sup>104</sup>

Processing applications for naturalisation can take a long time. In the majority of the States under review, the law does not specify a maximum time limit for deciding applications (such as in Hungary, Sweden and the UK).<sup>105</sup> In Italy, although the law sets the limit to 730 days, the average length is around five years.<sup>106</sup> In France, Hungary, and Germany applicants may have to wait up to two years.<sup>107</sup>

Naturalisation applicants also have to bear considerable costs. These may include tuition fees for language courses, costs for official translations of documents, and substantive administrative fees for processing the applications, despite article 32 stating that charges and costs of proceedings shall be reduced.<sup>108</sup> Only Spain, France and Hungary do not charge naturalisation fees.<sup>109</sup> High fees are charged in Greece and the UK (700 Euros and 906 Pounds).<sup>110</sup> Stateless persons in Greece and in the Netherlands pay reduced administrative fees.<sup>111</sup>

In all States, applicants for naturalisation must present extensive official documentation

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<sup>102</sup> Hajjat (n 86) 4.

<sup>103</sup> §10(4) Staatsangehörigkeitgesetz (StAG) in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, zuletzt geändert durch Artikel 1 des Gesetzes vom 28. August 2013 (BGBl I 2013, 3458) [Nationality Act]. The prerequisite of adequate knowledge of life in Germany is fulfilled if the foreigner passes the naturalisation test. *ibid* §10(5). An exception to the German test requirement applies to persons who are illiterate or unable to learn for health reasons. *ibid* §10(6). In this regard, the Federal Administrative Court clarified that generally illiteracy itself is not an illness or disability. BVerwG, Urteil v 27.05.2010 - 5 C 8.09 (In this case, the claimant was illiterate only because he did not go to school in Turkey). There are some forms of illiteracy that are based on an illness or disability, and in these cases the exception applies. In all the other cases, the authorities can take into consideration the fact that a person is illiterate and make a discretionary decision in his favour. §8 Staatsangehörigkeitgesetz (StAG) in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, zuletzt geändert durch Artikel 1 des Gesetzes vom 28. August 2013 (BGBl I 2013, 3458) [Nationality Act]. Bianchini (n 42) 50.

<sup>104</sup> Bauböck and Goodman (n 80) 8.

<sup>105</sup> *ibid*; Bernitz (n 51) 6.

<sup>106</sup> Guido Tintori, 'Naturalization Procedures for Immigrants. Italy' (EUDO Citizenship Observatory 2013) 4.

<sup>107</sup> Bauböck and Goodman (n 80) 8; Habbe, interview (n 94).

<sup>108</sup> See ch 3, s 4.3.

<sup>109</sup> Moreno Fuentes and Martín Pérez (n 95) 6-7; Bauböck and Goodman (n 80) 8.

<sup>110</sup> Bauböck and Goodman (n 80) 8; UK Government, Home Office, 'Fees with Effect from 6 April 2014 for

Citizenship Applications and the Right to Abode' <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/301380/Master\\_Fees\\_Leaflet\\_Apr\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301380/Master_Fees_Leaflet_Apr_2014.pdf)> accessed 14 April 2014.

<sup>111</sup> Law 3838/2010 (GG A 49) Contemporary provisions for the Greek nationality, the political participation of homogeneous and legally residing migrants and other provisions (unofficial tr), art 6; Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Immigratie Naturalisatiedienst, 'Trendrapportage Naturalisatie. Ontwikkelingen in de periode 2006-2010' (November 2011) 43; Anita Böcker and Ricky van Oers, 'Naturalization Procedures for Immigrants – The Netherlands' (EUDO Citizenship Observatory 2013) 9; Christopoulos (n 72) 12-14.

relating to their identity or other nationalities.<sup>112</sup> For instance, Sweden has strict guidelines as far as proving one's identity.<sup>113</sup> A few exceptions are possible, but in most cases an applicant should prove their identity by showing the original national passport or original identity document. If this is impossible, a close relative may attest to the applicant's identity. The passport or identity document must have been issued by a public authority in the State of origin, be of good quality, and there must be no issue as far as whether it is genuine. There must be a photo on the document, which allows the Swedish Migration Board to easily identify the applicant. If the applicant has documents which do not individually fulfill these requirements, the Migration Board may assess whether they can jointly prove the identity.<sup>114</sup>

The Czech Republic requires that documents issued by foreign authorities be presented in a 'higher authentication' form, a demanding legalisation clause, unless an international agreement stipulates otherwise.<sup>115</sup> The Ministry may excuse submitting certain documents, provided that obtaining such a document is linked to a barrier, which is difficult to overcome, and facts can be established accurately otherwise. At the same time, the Ministry of the Interior may ask the applicant to produce further documents not stipulated by law, which, in certain cases, is a point of legal controversy.<sup>116</sup>

In this context, Hungary is an exception and a good example as stateless persons are allowed to submit their expired passports, expired identity documents or marital status documents issued by another State.<sup>117</sup> Similarly, in Greece a copy of one's passport is acceptable. In addition, if a foreign national has the right to international protection as a political refugee or enjoys the status of subsidiary protection or is a stateless person and cannot present a birth certificate, it suffices to present the act of recognition of their status as a political refugee or on the grounds of subsidiary protection or any official certificate issued to stateless persons, respectively. If the alien was born

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<sup>112</sup> Hajjat (n 86) 2; Andrea Baršová, 'Naturalisation Procedures for Immigrants. Czech Republic' (EUDO Citizenship Observatory 2013) 6-7; Law 3838/2010 (GG A 49) Contemporary provisions for the Greek Nationality, the political participation of homogeneous and legally residing migrants and other provisions (unofficial tr), art 6; Tintori (n 106) 4; Böcker and van Oers (n 111) 9.

<sup>113</sup> The Migration Board has published on its website a guideline on identity documents that are considered acceptable for persons originating from Afghanistan, Iraq, Kosovo, Somalia, Eritrea and stateless Palestinians. Swedish Migration Board, 'Proven Identity' <<http://www.migrationsverket.se/English/Private-individuals/Becoming-a-Swedish-citizen/Citizenship-for-adults/Proven-identity.html>> accessed 4 September 2014.

<sup>114</sup> According to section 12 of the Act on Citizenship, the Migration Board may make exceptions if the applicant cannot prove his identity, provided that he lived in Sweden for at least eight years and the information about his identity is credible and he lacks the opportunity to obtain acceptable documents to prove the identity. The identity is considered credible if the applicant has lived in Sweden for an uninterrupted period of at least eight years, and has had the same identity throughout this period. If the applicant has changed his identity during this time, it is more difficult to make an exception to the proof of identity requirement. Bernitz (n 51) 3.

<sup>115</sup> The situation thus varies from case to case, depending on whether the Czech Republic has signed an international treaty on the recognition of documents with the State that issued the documents. If such a treaty has not been signed, the foreign document must be presented to the relevant Czech diplomatic mission for verification. If the Czech Republic and the State which issued the documents have signed a consular treaty, the verification may be performed by consuls. If the Czech Republic and the State which issued the documents have signed a treaty on legal assistance in civil law matters, it will suffice to verify the documents pursuant to the regulations of the concerned State; such documents will enjoy the status and the powers of Czech public documents. Such treaties are in force eg with Ukraine and Vietnam. Baršová, (n 112) 6-7.

<sup>116</sup> *ibid* 7.

<sup>117</sup> Pogonyi (n 101) 2.

in Greece, then it suffices to present the birth certificate. If the alien is unable to be in possession of a passport for objective reasons, they can present their residence permit.<sup>118</sup>

So all States have adopted a multitude of onerous rules related to naturalisation (knowledge testing, language proficiency, financial means, residence periods) due to political concerns and tensions over the integration of foreigners, as well as fraud. The trend, contrary to the recommendation in article 32 of the 1954 Convention, is to restrict access to naturalisation to stateless persons. The few provisions that some States have adopted specifically with regard to stateless persons are not sufficient to facilitate their acquisition of a nationality.

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<sup>118</sup> Law 3838/2010 (GG A 49) Contemporary provisions for the Greek Nationality, the political participation of *homogeneis* and legally residing migrants and other provisions (unofficial tr), art 6.

**6. Table 5: main characteristics of residence permits and facilitated naturalisation**

	<b>Czech Republic</b>	<b>France</b>	<b>Germany</b>	<b>Greece</b>	<b>Hungary</b>	<b>Italy</b>	<b>Netherlands</b>	<b>Spain</b>	<b>Sweden</b>	<b>UK</b>
Time to receive a permit for impossibility to leave or for stateless status?	3 months	1 to 1 year and a half	At least 18 months after deportation was suspended, but it takes longer	Such permits do not exist	Up to 3 years	Admin. procedure: 2 years; Judicial procedure: 2-3 years	2 and a half years	About 3 years	About 3 months	No reliable data
Maximum validity of residence permit?	1 year	3 years	3 years	N/A	3 years	5 years	1 year	Unlimited	Can be unlimited or temporary	30 months
Unrestricted right to work?	Yes	Yes	Yes	N/A	No	Yes	No	Yes	Yes	Yes
Benefits?	No	Yes	Yes	N/A	No	Yes	Yes	Yes	Yes	Yes
Right to travel document?	Only for stateless persons with permanent residence	Yes	Practice unclear	Practice unclear	Yes	Yes	Practice unclear	Yes	Practice unclear	Yes
Years to qualify for permanent residence?	5 years	3 years	5 years	5 years	3 years	5 years	3 years	N/A	5 years	5 years
Years of lawful residence to naturalisation?	5 years of permanent residence or 10 years of residence	5 years	8 years; 6 years for discretionary naturalisation	10 years	5 years	5 years	3 years**	10 years	4 years; 8 years if there is no proof of identity	5 years
Permanent residence to naturalise?	No	No	No	No	Yes	No	No	No	No	Yes

\*\*The permit must be for a non-temporary purpose, so the no-fault permit would not be sufficient. Böcker and van Oer (n 111) 4-6.

## 7. Conclusion

This chapter has shown that implementing legislation providing for the grant of lawful status upon recognition of statelessness is of particular importance given that it is essentially through this that it is possible to access the full rights and benefits of the 1954 Convention.<sup>119</sup>

In particular, this chapter has found that all States under models one and two grant a residence permit upon recognition of stateless status. All these permits ensure access to travel documents and to the labour market (with the exception of Hungary, where an application for a work permit must be made). These permits can be renewed and can lead to permanent residence. In Italy, upon the recognition of statelessness, a person is normally granted a residence permit, but its length of validity varies, and legislative intervention would be needed to harmonise administrative practices.

In States under model three, rights and benefits available to stateless persons are normally attached to the type of residence permit that is granted. The tolerated stay and temporary residence permit for impossibility to leave may be evaluated positively in order to avoid the legal limbo in which stateless persons may find themselves. On the other hand, the main negative aspects of these provisions are the following: (1) statelessness is not identified and remains a hidden problem, causing lack of awareness of decision-makers, stateless persons, legal advisors and the public in general, (2) due to the lack of public available information (including internal guidelines and policies) in some States, such as Germany, it is difficult to understand how the immigration authorities of different offices deal with statelessness when it arises in the context of other residence permits, travel documents or naturalisation applications, (3) the protection given is much more limited than that of refugees or recognised stateless persons in States under model one. Usually, these non-statelessness specific protection statuses are unable grant access to the social, economic and residence-rights of the 1954 Convention when comparing them to models with determination procedures and which follow the standards recommended in the UNHCR Handbook<sup>120</sup>, (4) they are much slower in providing a long-term solution than stateless specific protection models,<sup>121</sup> (5) they are subject to almost no international guidance, creating highly non-harmonised statuses and different treatment for stateless persons.<sup>122</sup> So these provisions do not constitute an acceptable alternative to specific implementing legislation for the protection of stateless persons.

This chapter has also discussed that, as far as accessing a durable solution, although the 1954 Convention and other international instruments recommend States to facilitate the naturalisation of stateless persons, there is little guidance on what it is meant by ‘facilitating’ naturalisation and what States should do in this regard.<sup>123</sup> In the context of refugees, according to Hathaway, this

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<sup>119</sup> Batchelor (n 2) 27-30.

<sup>120</sup> UNHCR ‘Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons’ (2014); Bianchini (n 42) 45.

<sup>121</sup> Bianchini (n 42) 46; Caia Vlieks, ‘A European Human Rights Obligation for Statelessness Determination?’ (Master thesis, Tilburg University 2013) 9.

<sup>122</sup> Cahn (n 35) 311.

<sup>123</sup> Mrekajova (n 4) 203-04.

implies dispensing ‘with as many formalities in their naturalisation process as possible so that [stateless persons] are positioned to acquire citizenship with the absolute minimum of difficulty.’<sup>124</sup> For stateless persons, this would mean to adopt provisions reducing the number of years of lawful residence, reducing the fees and associated costs to prepare an application,<sup>125</sup> allow alternative evidence where certain documents cannot be presented,<sup>126</sup> or provide that the burden of proof shifts to the State if a person objectively and in good faith cannot provide some documents.<sup>127</sup> Such provisions would be needed given that one of the main problems for stateless persons is that they may not always be in possession of the documents required, and it may be very difficult or impossible to obtain them. Asking a stateless person to presents several documents, as any other foreigner, may constitute an unreasonable impediment for naturalisation.

The few provisions that the States under review have adopted with regard to the naturalisation of stateless persons do not constitute adequate and specific implementation of article 32 of the 1954 Convention as it has been demonstrated that a number of burdensome conditions to naturalise remain.

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<sup>124</sup> James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 985-86.

<sup>125</sup> Batchelor (n 2) 42.

<sup>126</sup> van Waas, *Nationality Matters: Statelessness under International Law* (n 39) 368.

<sup>127</sup> Mrekajova (n 4) 210.

# CONCLUSION

## 1. Introduction

Based on the findings of the foregoing chapters, the first section of the ‘conclusion’ summarises the main issues related to the implementation of the 1954 Convention. Sections two to four discuss the different legal frameworks dealing with the treatment of applications for protection made by stateless persons. In particular, they highlight the variations, main challenges, and strengths of the models implementing the 1954 Convention. Section five examines the significance of the findings for the debate on the implementation of human rights treaties in general. Section six provides a set of recommendations concerning legal obligations and best practices to improve the effectiveness of the protection of stateless persons. Finally, the last section makes suggestions for further research.

## 2. Issues related to the implementation of the 1954 Convention

As discussed in chapter 3, the 1954 Convention is a crucial instrument in the protection of stateless persons as it sets forth the internationally accepted definition of ‘stateless person’. It also provides for a set of basic rights and freedoms that stateless persons should enjoy depending on their attachment to the State. However, it is proved that its protection is incomplete because it attributes most of the rights to stateless persons that are lawfully in the State’s territory. Given that stateless persons are often illegally present and the 1954 Convention does not require granting lawful status even to recognised stateless persons, this is a serious weakness. Furthermore, the 1954 Convention does not have any effective enforcement mechanisms, nor does it have any provision on the procedures for the identification of statelessness. Finally, the same definition of ‘stateless person’ is subject to different interpretations in practice.

These problems are reproduced at the domestic level and require States to adopt specific procedures to identify and grant status to stateless persons. The data of this thesis supports the view that such mechanisms are crucial, as otherwise the rights of the Convention will not be accessible.<sup>1</sup> Similarly, the Refugee Convention does not contain an explicit obligation to introduce a refugee determination procedure or to grant the status of refugee.<sup>2</sup> Nevertheless, the implicit duties to do so have been extensively accepted.<sup>3</sup> In both cases it is practically impossible to comply with the

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<sup>1</sup> Carol A Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (2004) 22(2) *Refugee* 31-32.

<sup>2</sup> In ch 3 I explained that the Refugee Convention and the 1954 Convention share a joint drafting history and several of their provisions remain similar. This means that much can be learned from the implementation of the Refugee Convention. Article 27 of the Refugee Convention, similarly, to article 27 of the 1954 Convention, requires contracting States to issue identity documents to any refugee (or stateless person in case of the 1954 Convention) in the territory. However, this article does not confer any additional right. Atle Grahl-Madsen, ‘Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)’ (2nd edn, UNHCR 1997) art 27.

<sup>3</sup> See eg UNHCR ‘Handbook on Procedures and Criteria for Determining Refugee Status (reissued December 2011) UN Doc HCR/1P/4/ENG/Rev.3 para 189. See also Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff 2006) 466-68.

Conventions if the beneficiaries of their rights are not identified and granted lawful status on the basis of their special circumstances.<sup>4</sup> This argument applies equally to both States with systems of automatic incorporation of international law into the domestic legal framework and those with systems of legislative incorporation. However, from the findings of this thesis, it emerges that the range of variations in the implementation of the 1954 Convention, even in States within the same region, go from having specific legislation to identify and protect stateless persons to no legislation at all.

### **3. The implementation of procedures for the protection of stateless persons**

#### *3.1. Comparison of procedures dealing with claims for protection*

The first observation about how the ten EU Member States implement the procedures dealing with claims for protection made by stateless persons is that progress has been made from the situation of one decade ago, when Spain was the only State in the EU with procedures to identify statelessness. Chapter 4 shows that now a small minority of other EU States, including the UK and Hungary, has statelessness determination procedures in place.<sup>5</sup> Nevertheless, it cannot be concluded that these changes are moving towards the harmonisation of procedures.<sup>6</sup> The treatment of stateless persons varies widely between the States under review, both formally and in practice, and no State can claim to have the 'right' solution in place. The low number of successful applications also allows the inference that national procedures are not adequate.<sup>7</sup>

The second observation is that States under model one (Hungary, Spain, and the UK) which have adopted formal legislation to implement the 1954 Convention, ensure more essential procedural guarantees (i.e. the right to an adequate opportunity to prepare the case, to have the case decided by suitable adjudicators, to be heard, and a right of review) than States under models two and three. In particular, the recent Hungarian and British procedures limit arbitrariness, and give confidence that cases will be considered impartially. Hungary stands out as being the State with the best framework and practice of all. The UK has some regulatory provisions and detailed policy guidance but practice seems problematic, as the British authorities have been showing a narrow attitude as far as granting stateless status.<sup>8</sup> The Spanish statelessness determination procedure provides some guidance, but it is worded in general terms and says very little as far as the burden and elements of proof.

The States under model two (France and Italy) recognise statelessness as a protection ground but have only very limited and inadequate provisions which are drafted in general terms and do not provide sufficient guidance to decision-makers.<sup>9</sup>

The States under model three (Sweden, Greece, the Netherlands, the Czech Republic, and

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<sup>4</sup> *ibid.*

<sup>5</sup> See ch 4, ss 3, 4.

<sup>6</sup> See tables 1 and 2 in ch 4, s 5.

<sup>7</sup> It is a combination of the low number of applications for protection and the higher number of stateless persons that allows this inference. See ch 4, ss 3.10, 4.10; ch 5, s 11.

<sup>8</sup> See eg in relation to the treatment of stateless Palestinians, ch 6, s 3.

<sup>9</sup> See Legomsky, ch 4, s 2.



Germany) do not have specific mechanisms for identifying statelessness and do not have designated decision-makers. Administrative instructions to decision-makers seem to even discourage the registration of statelessness. The tendency is to include stateless persons under the category of persons with ‘unknown nationality’ and treat them as asylum seekers or irregular migrants. This may be due to the fact that the procedures are not designed to identify persons in need of protection and are focused on the assessment of obstacles to return rather than the criteria to assess stateless status. Toleration and permits for impossibility to leave are considered by the governments as tools to deal with irregular migration, often in relation to persons who could not show sufficient evidence or lacked credibility and therefore did not receive refugee status. Consequently, toleration and permits for impossibility to leave do not help with the identification of statelessness and no reliable statistics on statelessness exist in these States. There is also an element of discretion and lack of clarity on how the administrations decide on applications for permits for impossibility to leave. For instance, in the Netherlands and Sweden, an applicant’s loss or lack of documents influences decision makers’ predisposition to consider the case as abusive.<sup>10</sup> Furthermore there is little or ambiguous case law related to refusals of permits for impossibility to leave. States under model three are also much slower in reaching a long-term solution than stateless-specific models, as a person may be required to apply for asylum before applying for permits for impossibility to leave.<sup>11</sup> Among the States under model three, Greece gives raise to most concerns because it does not have any grounds to legalise those whose departure is impossible. Moreover, general principles of administrative law are often disregarded in the context of other immigration procedures and very little is known on its practices regarding the treatment of stateless persons.

The third observation is that, on a comparative level, most States, including those under model one and two, share common issues:

(1) lengthy proceedings and lack of status for applicants while their cases are pending. The lack of status pending a case reflects the absence of a provision guaranteeing protection in the 1954 Convention as discussed in chapter 3.<sup>12</sup> The only exception is Italy, where, however, this is due to good practice rather than specific legislative intervention. Such a gap in protection in the States under review is a problem given that the length of time to obtain a first-instance decision is usually of one year. Even though the Czech Republic and Sweden have shorter processing times as far as the applications on grounds for impossibility to leave, in most cases these procedures are started only after an asylum claim has been refused, which adds time up;

(2) the burden of proof is on the applicant who must prove that he is not a national, according to general administrative law rules. This is difficult for stateless persons because they are frequently

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<sup>10</sup> Telephone interview with Bo Johansson, Refugee Lawyer, Swedish Refugee Advice Centre (Stockholm, Sweden, 17 December 2013); questionnaire reply from Rombout Hijma, Immigration Lawyer (Utrecht, The Netherlands, 30 January 2014). See ch 5, ss 3, 9. It is significant that States under model three grant permits on the grounds of impossibility to leave to a very limited number of applicants.

<sup>11</sup> See ch 4, ss 4.1, 4.4.

<sup>12</sup> See ch 3, s 4.2.

without documentation and can only rely on indirect evidence.<sup>13</sup> The search for information, which may require a collaborative approach with other States, is reported as lacking in most cases. Hungarian law is the only good example as it explicitly sets a lower burden of proof, providing that the applicant can prove or substantiate his claim;<sup>14</sup>

(3) there is little guidance on means of proof to identify statelessness and decision-makers generally do not look at the absence of collaboration on the part of the States concerned<sup>15</sup> (except in the UK and Hungary). The legislation of States falling under models two and three is particularly concerning as it totally ignores that stateless persons face evidentiary requirements to obtain legal status that they cannot usually fulfill. In general, the rules on the means of proof are very onerous for people that often have no documentation and are therefore unjust when applied to them;

(4) regardless of whether a statelessness determination is specifically defined in the legislation of a State or is part of a procedure to acquire a residence permit or a travel document, a right of review or appeal is generally included in all the States under study but subject to restrictive grounds. In some jurisdictions where no specific procedure exists and a discretionary power is used to grant a stay of deportation or temporary or exceptional stay, such as the Czech Republic and Sweden, there are no rights of review before a court;<sup>16</sup>

(5) there is no free legal assistance to prepare cases at the first stage of the procedures (except in Germany for irregular migrants on toleration and Hungary). At the appeal level, State-funded legal representation is usually provided and issues mainly concern its poor quality. In most cases, in France and Greece, free legal assistance is not provided on appeals either. This prevents a fair opportunity to pursue claims;<sup>17</sup>

(6) problems of access to the procedures for stateless persons in immigration detention. In particular, the amount of evidence that they are expected to provide is such that it is virtually impossible to collect it in the presence of physical barriers. For instance, in the UK, an applicant in immigration detention would not normally be interviewed.<sup>18</sup>

The fourth observation concerns cases, especially in Italy and Germany, where the judicial

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<sup>13</sup> See ch 3, ss 3.2, 4.1.

<sup>14</sup> Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (unofficial tr, Ministry of Interior. Hungarian National Contact Point of the European Migration Network, 2012) s 79(1); European Network on Statelessness, 'Statelessness Determination and the Protection of Stateless Persons' (2013) 28.

<sup>15</sup> See ch 6, s 5.

<sup>16</sup> Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (n 1) 42.

<sup>17</sup> Several studies show how, absent the provision of legal aid, refugee claimants and other marginalised groups have a demonstrably lower probability of success in the pursuit of their claims. Michael Kagan, 'Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt' (2006) 19(1) JRS 45. See also Allan C Hutchinson, *Access to Civil Justice* (Carswell 1990); Nimrod Pitsker, 'Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers' (2007) 95(1) CLR 169, 189-90; Katia Bianchini, 'Legal Aid for Asylum Seekers: Progress and Challenges in Italy' (2011) 24(2) JRS 390; Sheona York, 'The End of Legal Aid in Immigration – a Barrier to Access to Justice for Migrants and a Decline in the Rule of Law' (2013) 27(2) JIANL 106, 118.

<sup>18</sup> See ch 4, ss 3.1, 3.4.

determination of statelessness has filled the void left by the legislators.<sup>19</sup> Despite providing a solution in individual cases, judicial decisions are not appropriate to replace an administrative determination of statelessness. First of all, even if the courts apply the 1954 Convention uncertainty of the law remains as the administrators may not follow court decisions in subsequent cases, especially in civil law countries.<sup>20</sup> In part, this is due to human rights having their origin outside the national systems, and therefore lacking the legitimacy that standards generated internally have. The commitments of administrators to implement human rights standards may consequently be weak as they come into competition with strong internal practices and standards.<sup>21</sup> For instance, the administrators in Germany tend to apply the law on the books even if it conflicts with the 1954 Convention and its jurisprudence.<sup>22</sup> Despite the Federal Administrative Court and the High Administrative Court in Berlin held that the category of ‘unclear nationality’ in legal terms is not possible,<sup>23</sup> the administrators continue to use it when they cannot conclude whether a nationality exists. Accordingly, a solution is often reached only in individual cases and after costly and lengthy judicial procedures.<sup>24</sup> Secondly, in the absence of legislation, administrative and judicial practices dealing with stateless persons may vary within individual States. For example, in Germany applications for impossibility to leave or travel documents under article 28 of the 1954 Convention are within the competence of each State, and practices change among and within them.<sup>25</sup> Thirdly, in civil law countries, as there is no rule of precedent, reversals of jurisprudence exist more frequently than in common-law countries. In Italy, this has occurred in the context of cases of applicants who could reacquire a nationality.<sup>26</sup> Whereas at present such applicants are generally found not to be stateless,<sup>27</sup> some previous cases found them to be stateless even if the cause of statelessness depended on their freewill.<sup>28</sup> Fourthly, in States that adopt the automatic incorporation of international law into the domestic legal framework, such as Greece, judges may use devices to follow national legislation when there is a conflict between the two. Similarly, this occurs in States with strong principles of separation of powers, such as France. In these States judges may also restrictively use the concept of self-executing norms and require implementing legislation before

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<sup>19</sup> See ch 5, ss 4; ch 6 ss 4, 5; ch 4 ss 4.1, 4.2, 4.4, 4.7

<sup>20</sup> This is the case in Spain and Germany. Interview with Reinhard Marx, Immigration Lawyer (Frankfurt, Germany, 22 July 2013); Valeria Cherednichenko, ‘Spanish Lesson Learnt: Theory and Practice of a Functional Statelessness Determination Procedure’ (Presentation, First Global Forum on Statelessness, The Hague, The Netherlands, September 2014).

<sup>21</sup> Human rights ‘are outsiders looking in; they are not natural partners in social organisations and must compete with the powerful forces and currents’. Denis Galligan and Deborah Sandler, ‘Implementing Human Rights’ in Simon Halliday and Patrick Delbert Schmidt (eds), *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 24, 27.

<sup>22</sup> Marx (n 20); see ch 6 ss 4, 5.

<sup>23</sup> BVerwG, 12.02.1985, NVwZ 1985, 589; BVerwG, 15.10.1985, NVwZ 1986, 759; OVG Berlin, Urteil v 18.04.1991 - OVG 5 B 41.90; VG Berlin, Urteil v 12.06.1985 - 11 A 655.84; VG Berlin, 12.06.1985, InfAuslR 1985, 237-238; VG Berlin, Urteil v 24.02.1988 - 23 A 341.87; VG Berlin, 24.02.1988, InfAuslR 1988, 174, 176. See ch 6, s 4.

<sup>24</sup> See ch 4, ss 3.5, 3.6, 4.5, 4.6; ch 5, ss 7, 8.

<sup>25</sup> See text to n 12 in ch 5.

<sup>26</sup> See ch 6, s. 3.

<sup>27</sup> Eg Farci cites a decision of the Tribunal in Genova: Trib Genova, 13.12.2010, Paolo Farci, *Apolidia* (Giuffrè 2012) 376.

<sup>28</sup> Eg Farci cites a decision of the Tribunal in Ancona: Trib Ancona, 13.6.1950; Farci, *Apolidia* (n 27) 376.

they can be applied.<sup>29</sup> Sometimes, the implementation of a treaty may concern sensitive political issues, such as whether a State exists under international law, and judges may try to avoid them.<sup>30</sup>

In conclusion, what emerges is that in States under model one further specific legislative intervention is needed to adopt measures against laws of general applicability that negatively affect the possibility to pursue claims for protection. In States under models two, the procedures should be refined and set out in comprehensive legislative acts. In States under model three, legislation is needed to establish statelessness as a protection ground and specific determination procedures.

### ***3.2. Barriers to the procedures***

This thesis also reveals that stateless persons encounter more problems of access to the procedures in States under models two and three than model one. These barriers are often related:<sup>31</sup> for instance, delays are often linked to complex legal rules.<sup>32</sup> The lack of a temporary residence permit, with attached rights to economic support and work, is an obstacle for applicants whose cases may take a long time to arrive to a solution (for instance, if the case proceeds to an appeal, or the nationality is disputed and foreign authorities do not cooperate) and who have no means.<sup>33</sup> The lack of a residence permit may interfere with the possibility to receive State-funded legal assistance (for instance in France<sup>34</sup> and the Netherlands<sup>35</sup>). The difficulties related to preparing a case due to the complexity of the laws and procedures, communicating in the language of the host State and lack of legal aid at the administrative stage are exacerbated for those in immigration detention.<sup>36</sup>

However, stateless persons face problems in accessing the procedures in States under model one too. The findings of chapter 4 uncovers that States under model one have introduced restrictive and deterrent measures to limit the number of applications for stateless status. These measures include the requirements of lawful status (in Hungary), filing deadlines (in Spain), and the explicit possibility of removal to States of former residence (in the UK). These barriers prevent the effective implementation of the 1954 Convention, as they ignore the special circumstances of stateless persons, such as their frequent lack of lawful status.<sup>37</sup> The UNHCR Handbook states that such barriers do not find any basis in the 1954 Convention and they may arbitrarily exclude people

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<sup>29</sup> Virginia Leary, *International Labor Conventions and National Law* (Martinus Nijhoff Publishers 1982) 163.

<sup>30</sup> *ibid* 164.

<sup>31</sup> For instance, one way to reduce costs is to ban legal representation in some proceedings. However this may have a negative impact on the capacity of uneducated persons to present their cases. Mauro Cappelletti and Bryant Garth, 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27(2) BLR 189, 196.

<sup>32</sup> Emmanuel Breen, *Évaluer la Justice* (Presses Universitaires de France 2002); Christine Coumarelos, Zhigang Wei and Albert Z. Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas. Access to Justice and Legal Needs* (Law and Justice Foundation of New South Wales 2006).

<sup>33</sup> See ch 4, ss 3.5, 4.5; ch 5, s 6. In such cases, stateless persons' assistance mainly comes from voluntary agencies (except in Germany and Sweden, where it is possible to receive basic support). See ch 5, s 5.6.

<sup>34</sup> See ch 4, s 4.8.

<sup>35</sup> See ch 5, s 9.

<sup>36</sup> For instance, this is the case when there are complicated procedures and detailed forms to fill out. Cappelletti and Garth (n 31) 192.

<sup>37</sup> See on this point, Goodwin-Gill, as discussed in ch 4, s 2. See also text to n 77 in ch 4 (regarding the recent decision of the Hungarian Constitutional Court quashing the requirement of lawful status to make an application for statelessness).

from protection.<sup>38</sup> It also states that for procedures to be to ‘fair and efficient, access to them must be ensured.’<sup>39</sup> Therefore it can be inferred from the Handbook that any formal requirement to access the procedures is in breach of the 1954 Convention.<sup>40</sup>

### ***3.3. Reflections on the States’ breach of international obligations***

What emerges from the above is that stateless persons claiming protection do not enjoy access and the same essential rights throughout the processes,<sup>41</sup> including in States that have adopted specific statelessness determination procedures. The situation giving the greatest concern involves States under model three. Although permits for impossibility to leave can be helpful to ensure legal status to a group of persons who falls outside the protection of international law, it is an obligation that the 1954 Convention be used at its full potential first and implementing legislation adopted to identify who meets the definition of its article 1.

If Goodwin-Gill and McAdam’s argument in the context of the Refugee Convention is followed, it can be concluded that all States, although at different levels, are in breach of the obligations of the 1954 Convention and the principle of *pacta sunt servanda*, which requires performing treaty obligations in good faith.<sup>42</sup> Such a breach occurs when a State does not have specific determination procedures for the identification of stateless persons,<sup>43</sup> and when it avoids or diverts obligations which it accepted, for example by employing measures that have the effect of barring access to procedures.<sup>44</sup>

### ***3.4. Additional implementing measures***

The absence of implementing measures involving the training of professionals, awareness campaigns and diffusion of information on the main procedural modalities and the status available after a positive decision causes statelessness to remain a little known issue everywhere.<sup>45</sup> The lack of knowledge of statelessness and the possibility of seeking protection are common not only among those who could potentially benefit from it, but also among decision-makers and lawyers in Spain, Italy as far the judicial procedure is concerned, and in all States under model three. On this matter, Hungary is the only exception as it has undertaken some efforts to give publicity to the statelessness procedures.

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<sup>38</sup> UNHCR ‘Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons’ (2014) (hereafter the ‘Handbook’) paras 69-70.

<sup>39</sup> *ibid*, para 68.

<sup>40</sup> It should be noted that Goodwin-Gill considers requirements of lawful residence to access the asylum procedures to be in breach of the Refugee Convention. Guy Goodwin-Gill, ‘The Process and Rights of Asylum Seekers’ in Musalo K, Moore J and Boswell R A (eds), *Refugee Law and Policy. A Comparative and International Approach* (4th edn, CAP 2011) 922. See ch 4, s 2.

<sup>41</sup> This was shown in ch 4. See Stephen H Legomsky, ‘An Asylum Seeker’s Bill of Rights in a Non-Utopian World’ (2000) 14 GILJ 619, 635.

<sup>42</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 387. See ch 1, s 3.1.

<sup>43</sup> *ibid* 388.

<sup>44</sup> *ibid* 387.

<sup>45</sup> Linda Camp-Keith, ‘Human Rights Instruments’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 371.

#### 4. The application of the definition of ‘stateless person’

Chapter 6 shows that although the trend has been to incorporate article 1 of the 1954 Convention into the national legal frameworks of almost all the States under review (with the exception of Sweden and the Czech Republic)<sup>46</sup>, in practice it is differently applied and interpreted. This is linked to the types of procedures, rules concerning how to prove statelessness,<sup>47</sup> and whether or not substantive provisions clarifying who falls under article 1 of the 1954 Convention have been adopted.

One vignette in chapter 6 illustrates how a person with disputed Ethiopian/Eritrean nationality, who is not assisted by the authorities of either State to obtain documents and to return, is likely to be found stateless in some States and not in others.<sup>48</sup> For instance, he would likely be found stateless in Hungary but not in France and Spain. Hungary, which has precise rules on the identification of statelessness, would take into account the ineffective nationality resulting from the failure of Eritrea and Ethiopia to assist in the identification process. On the other hand, France and Spain, which lack such rules, would only refer to the concerned nationality laws and not consider the States of origin’s lack of co-operation as a relevant fact to establish statelessness.<sup>49</sup> In States under model three, it is likely that the administrative decision makers would avoid making any findings of statelessness.

Clearly, a restrictive interpretation of the definition of ‘stateless person’ (i.e. in Spain and France) or the tendency to avoid its assessment are linked to the lack of legislative guidance on standard and means of proof, which are key elements of the whole statelessness determination procedures. This conclusion is meaningful in the context of the debate on the definition of ‘stateless persons’ as well. It shows that without expanding the definition of stateless persons to include *de facto* stateless persons, stateless persons should be allowed to show *de jure* statelessness by referring to both national laws and practice.<sup>50</sup> Consequently, through definite rules it would be possible to identify which cases of *de facto* statelessness fall under cases of *de jure* statelessness, and which ones fall under other categories of human rights violations. Cases in which the substantive content of nationality (i.e. the right to return and live in a State and to receive diplomatic protection) is ineffective should be treated as cases of *de jure* statelessness.<sup>51</sup>

As far as other issues of interpretation of article 1 of the 1954 Convention, the data demonstrates that, in the absence of substantive implementing legislation, the treatment of persons who could acquire a nationality in a non-automatic mode varies widely from State to State. Hungary would usually grant protection, whereas other States would not (Czech Republic, France, the Netherlands, Spain), and others would sometimes (Italy, Germany). What emerges is that, generally, applicants are subject to broad discretion of decision makers and uncertainty of the law.

Furthermore, the other vignette of chapter 6 shows that there is no consistent application and

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<sup>46</sup> See ch 6, s 2.

<sup>47</sup> Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2009) 424-32.

<sup>48</sup> See ch 6, s 5.

<sup>49</sup> See ch 4, ss 3.2, 4.2; ch 6, s 5.

<sup>50</sup> See ch 6, ss 5, 7.

<sup>51</sup> See ch 6, ss 4, 5, 7.



interpretation of the exclusion clause in article 1(2) of the 1954 Convention.<sup>52</sup> So, a failed asylum seeker from Palestine, a State not recognised under international law,<sup>53</sup> is likely not to be found stateless in Greece and Sweden. The issue of his nationality is usually avoided in the UK, the Netherlands, the Czech Republic, and by the administration in Germany.<sup>54</sup> States that normally recognise a Palestinian applicant to be stateless, such as France, Greece, and Hungary, would however refuse his claim if he is found to fall under the UNRWA's mandate and had left its protection by freewill.<sup>55</sup> On the other hand, Spain would likely recognise a Palestinian to be stateless and not apply the exclusion clause by law.<sup>56</sup> Italy would normally find the Palestinian to be stateless. Italy would generally apply the exclusion clause in the administrative procedure and only rarely in judicial cases.<sup>57</sup>

## **5. Grant of status and enjoyment of the rights of the 1954 Convention**

Although the 1954 Convention leaves to States large discretion as far as the status granted to recognised stateless persons, the protections that it offers would be meaningless if no lawful status is granted.<sup>58</sup> Though there is no internationally recognised right to be granted lawful status in the narrow sense of formal permission to enter and remain in a State and enjoy a set of basic rights, how States respond is a matter of international law as it is connected to the good faith implementation of the treaty.

The findings of chapter 7 demonstrate that in the States under model one and two stateless persons can enjoy legal status and the rights attached to it under the 1954 Convention upon being recognised to be stateless. For instance, in States under model one and two, the issuance of a 1954 Convention travel document is usually straightforward.

In the States under model three, lawful status may (rarely) be granted only after very lengthy and complex procedures.<sup>59</sup> Of particular concern are the provisions on 'toleration' in Germany and the Czech Republic. They do not actually grant any status and the alien's situation remains dependent on the authorities' discretion. Toleration provides only limited social rights, similar to those granted to asylum seekers.<sup>60</sup> In Germany, toleration is frequently renewed and used for long periods of time. As a consequence, it prevents full integration of stateless persons into the host State.<sup>61</sup> Therefore, whereas toleration fills a void, it is clearly inadequate in terms of protection. As far as the permits granted for impossibility to leave, they require too burdensome requirements to

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<sup>52</sup> See ch 6, s 5.

<sup>53</sup> See ch 3, s 3.2.

<sup>54</sup> See ch 6, s 5.

<sup>55</sup> See ch 6, s 4.

<sup>56</sup> See ch 6, s 4.

<sup>57</sup> The application of the exclusion clause in judicial cases depends on the government's lawyer expertise in the area. See ch 6, s 4.

<sup>58</sup> The same argument is made in the context of the Refugee Convention. Guy Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25(4) IJRL 651, 653.

<sup>59</sup> See ch 7, s 5.

<sup>60</sup> Hélène Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Martinus Nijhoff 1995) 134-38.

<sup>61</sup> Claude Cahn, 'Minorities, Citizenship and Statelessness in Europe' (2014) 14 EJML 297, 311; see ch 5, s 2, 6.

meet for someone that is stateless and without documents. In light of the usually low number of people that can obtain such permits, they appear ineffective. Greece is the most problematic State as there are even no provisions to legalise those whose departure is impossible. Stateless persons who do not qualify for a permit under normal immigration laws remain undocumented, and live in insecurity and exclusion for protracted periods of time.

Generally, in States under model three, even upon grant of lawful status, the remaining provisions of the 1954 Convention may be available to stateless persons only insofar as they are available to aliens generally.<sup>62</sup> The ‘specific provisions for the stateless’<sup>63</sup> may not be applicable at all, as statelessness may have not been determined.<sup>64</sup> Permits on the grounds that it is impossible to leave the country do not assume that a person is stateless and do not require a decision maker to make any such finding. Although States with systems of automatic incorporation of international law under model three can, in theory, directly implement article 28 of the 1954 Convention, as this is a self-executing provision, if statelessness has not been established and a person’s nationality is ‘unclear’, they tend to issue an alien’s passport instead.<sup>65</sup> Clearly, whether a stateless person receives a travel document under the 1954 Convention or an alien’s passport depends on whether or not specific implementing legislation to identify statelessness has been adopted.

Similarly, whether a stateless person has access to facilitated naturalisation under article 32 of the 1954 Convention depends on whether or not he has been identified to be stateless and specific implementing legislation has been adopted. Normally, although the exact conditions to naturalise vary (for instance, there are significant differences on the length of residence required to make an application), most States set a mix of lawful residence, language, good character, and income requirements. Several documents and costly fees may also be required along with an application.<sup>66</sup> Practically, it is difficult to meet all the conditions to naturalise, even when some of them are eased with respect to stateless persons.<sup>67</sup> Furthermore, in most States, decision-makers’ discretion in naturalisation proceedings limits the possibility of challenging potential negative decisions.<sup>68</sup> In Spain and France, the recommendation to facilitate naturalisation of article 32 of the 1954 Convention, has not been implemented at all. Particular difficulties exist in Germany and the Netherlands regarding the requirement of renouncing a former nationality, if such a nationality has not been established before.<sup>69</sup> It is therefore vital to recognise that stateless persons can naturalise only if there are provisions that identify them as such, allow them to accrue a period of lawful

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<sup>62</sup> Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (n 1) 45.

<sup>63</sup> See ch 3, s 4.

<sup>64</sup> It has been discussed that it is virtually impossible to comply with the 1954 Convention if its beneficiaries are not identified and granted lawful status on the basis of their statelessness. See, for a similar argument in the context of the Refugee Convention, UNHCR ‘Handbook on Procedures and Criteria for Determining Refugee Status’ (n 3) para 189; Battjes (n 3).

<sup>65</sup> See ch 7, s 4.

<sup>66</sup> See ch 7, s 5.

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*



residence, and apply with flexibility a number of other requirements.<sup>70</sup>

## **6. General implications of this thesis for the implementation of human rights treaties**

This thesis demonstrates that implementation of human rights treaties depends, among other factors, on the system of incorporation of international law into national law<sup>71</sup>, and how the standards are stated through the enactment of laws. This, in turn, influences the treaties' interpretation and application by decision-makers and other actors involved.<sup>72</sup> For instance, the adoption of specific implementing legislation on the identification of statelessness, including rules on the burden and means of proof, determines how judges and administrators apply the definition of 'stateless person'. This is obvious especially in cases of ineffective nationality or involving the interpretation of the exclusion clause.<sup>73</sup>

The data confirms that the principal challenge of human rights concerns that standards are not translated automatically into national mechanisms upon the ratification of treaties. Some legal systems require a formal legislative act of incorporation of the treaty standards into domestic law<sup>74</sup>, otherwise they have very little effect and individuals are unable to claim their protections in administrative or judicial proceedings.<sup>75</sup> In other States, even if the human rights norms may be directly effective into the national legal system,<sup>76</sup> they may need the positive intervention of the government and administration, commitments of decision-makers, and support of institutions and civil society.<sup>77</sup> Furthermore, they may necessitate further actions to remove barriers, found in laws of general applicability, that are in conflict with them.<sup>78</sup> 'Automatic incorporation' into national law is not, in its own, a guarantee of effective domestic implementation of treaties.<sup>79</sup> In this regard, the thesis reveals that in States under model three, in the absence of specific implementing legislation and statelessness determination procedures, administrative decision-makers tend to avoid making findings of statelessness. So, despite article 28 of the 1954 Convention being directly applicable in systems of automatic incorporation, if in previous proceedings statelessness was not determined, travel documents are refused and applicants considered persons with 'unknown nationality'.<sup>80</sup> In these cases, it is possible that a person is issued with an alien's passport instead.

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<sup>70</sup> Sophie Nonnenmacher and Ryszard Cholewinski, 'The Nexus Between Statelessness and Migration' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 247, 262.

<sup>71</sup> Galligan and Sandler (n 21) 48.

<sup>72</sup> *ibid* 49.

<sup>73</sup> See ch 6, s 5.

<sup>74</sup> Malcolm N Shaw, *International Law* (5th edn, CUP 2002) 121-24; Philip Sales and Joanne Clement, 'International Law in Domestic Courts: the Developing Framework' (2008) 128 LQR 388.

<sup>75</sup> See ch 5, s 1; ch 6, s 2.

<sup>76</sup> For instance, there is agreement that art 28 of the 1954 Convention is a self-executing provision and it is directly applicable in most States under review. See ch 3, s 4.1; ch 7, s 4.

<sup>77</sup> Galligan and Sandler (n 21) 24-25.

<sup>78</sup> For instance, the requirement of lawful status to access protection or a number of rights of the 1954 Convention is an obstacle to its implementation. See also Galligan and Sandler (n 21) 45.

<sup>79</sup> Leary (n 29) 154.

<sup>80</sup> The first sentence of art 28 states that lawfully staying stateless persons have the right to a travel document. The second sentence of article 28 adds that States have discretion to issue travel documents to stateless persons who are not lawfully staying in their territory. See ch 3, s 3.1; ch 5, ss 1, 4.

Furthermore, the thesis uncovers that administrative decision-makers, such as in Germany and Spain, do not usually adhere to judicial pronouncements.<sup>81</sup> Additionally, in some States, such as France, there are signs of anxieties that the incorporation of international treaties would result in loss of sovereignty.<sup>82</sup> So, regardless of the incorporation method, explicit legal incorporation of human rights at the domestic level and the adoption of administrative measures, such as in Hungary, show to produce the best outcomes in terms of the quality of protection that is afforded. Legal implementation of international human rights in national law gives them clear status, acceptability, and publicity within the national systems.<sup>83</sup>

To arguments that this approach would undermine the monist theory, inasmuch as States may be thought not to recognise the supremacy of ratified treaties over national law<sup>84</sup>, I reply that the situation in the States that I reviewed justifies the adoption of implementing legislation. The assumption that judicial supervision affords the rights contained in a treaty is not supported empirically. This is true especially for provisions that are not self-executing. For example, judicial decisions in States of automatic incorporation have not always taken into account Convention provisions. Chapter 6 shows that this is the case in France, where the courts have strictly applied the definition of ‘stateless person’ both when a person could acquire another nationality<sup>85</sup> and in cases of disputed nationality.<sup>86</sup> In other cases, although the highest courts decided that Convention provisions applied, a long period of uncertainty preceded them as conflicting decisions of the lower courts caused confusion among administrators and individuals.<sup>87</sup> For instance, in Italy, after many years of uncertainty, the Constitutional Court eased the formal requirements that legal aid

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<sup>81</sup> Specifically, there is a problem in creating a precedent and changing administrative practices. For instance, most German courts have found Palestinians without another nationality to be *de jure* stateless according to article 1 the 1954 Convention. However the administration keeps avoiding findings of statelessness. BVerwG, Urteil v 23.02.1993 - 1 C 7.91; BVerwG, 23.02.1993, BVerwGE, 92, 116, 119-120 mwN; OVG Berlin, Urteil v 18.04.1991 - 5 B 41.90; BVerwG, Beschluss v 17.07.1987 - 1 B 23.87. See ch 7, s 4. The majority of the applications for stateless status in Spain come from persons of Western Saharan origin or Sahrawis. Most of the applications are refused, in contradiction with the Spanish Supreme Court’s jurisprudence in recent years, which has granted the status of statelessness to a considerable number of these applicants. See for instance Decisions of the Spanish Supreme Court of 20th of November 2007, 18th of July of 2008, 28th of November 2008, 19th of December 2008, 30th of October 2009 and the most recent one of 20th of September 2011. Telephone interview with Arsenio Cores, Immigration Lawyer (Madrid, Spain, 11 December 2013).

<sup>82</sup> Jacqueline Hodgson, ‘Human Rights and French Criminal Justice: Opening the Door to Pre-Trial Defence Rights’ in Simon Halliday and Patrick Delbert Schmidt (eds), *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 185-87.

<sup>83</sup> Leary (n 29) 154; Tom Campbell, ‘Introduction: Realizing Human Rights’ in Tom Campbell and others (eds), *Human Rights: From Rhetoric to Reality* (Basil Blackwell Press 1986); Jack Donnelly, ‘The Virtues of Legalization’ in Saladin Meckled-García and Başak Çali (eds), *The Legalization of Human Rights. Multi-Disciplinary Perspectives on Human Rights and Human Rights Law* (Routledge 2006) 67.

<sup>84</sup> See for instance, Cornil’s argument in text to n 182 in ch 1. Cornil believes that if the good faith of States in recognising the superiority of international law over national law is questioned, States may easily question it themselves, and will return to adopt the theory of absolute national sovereign. States too often wish that constitutional provisions stating the superiority of treaties be disregarded. As the future of international law depends in large part on the States’ attitude towards it, it is essential that the relevant constitutional provisions be applied with scrupulous. Pierre Cornil, ‘Le Rôle de la Commission d’Experts de l’OIT dans le Contrôle de l’application des Conventions Internationales du Travail’ (1970) 1 RBDI 265, 270-73.

<sup>85</sup> See ch 6, s 3.

<sup>86</sup> See ch 6, s 5.

<sup>87</sup> This is the case in Germany as far as who qualifies under art 1 of the 1954 Convention. See ch 6, ss 3, 4.

applicants have to satisfy, allowing those with unlawful status to have access to it.<sup>88</sup> Even when the courts of a State clarified the relevance of Convention provisions, the administration did not always follow them in subsequent situations, such as in Germany as far as the assessment of whether or not a person is stateless under article 1 of the 1954 Convention.<sup>89</sup> Furthermore, only a small number of cases can proceed to the appeal stage as the jurisprudence concerning the 1954 Convention is dependent on the system of judicial review, appeal and access to legal representation in each State.<sup>90</sup> It seems that the monist approach, while able to afford some adjustments through the decisions of the courts, cannot ensure the structural and systematic changes which are needed to implement the standards of treaties.<sup>91</sup>

Some commentators even argue that, from a practical point of view, the monist theory of international law would be valid only if an international legal system were superimposed, constituting a kind of generalised federalism.<sup>92</sup> In the meantime, they suggest that all international treaties must be considered having effects on national legislation according to the dualist theory. So international provisions can only be applied if they have been incorporated in the national systems by bodies having internal legislative competence.<sup>93</sup> Following a similar line of argument is the International Labour Organisation (ILO)' interpretation of the incorporation of international labour conventions into national legal systems. According to the ILO, a State complies with the obligations arising from ratification only when it completely and exactly conforms law and practice with the ratified conventions. Given the difficulties of supervision and application involved in automatic integration of international standards into national legislation (both in cases of general obligations and self-executing provisions), the ILO takes the view that, before ratification, a State should ensure that national legislation can give full effect to the international provisions. Only by following this dualist approach, the ILO believes that it is possible to properly assess to what extent there is agreement between the national and international provisions.<sup>94</sup>

Nevertheless, between the 'system of legislative incorporation' and the 'system of automatic incorporation', I agree with Leary that the latter guarantees more protection and is preferable.<sup>95</sup> For instance, the data prove that several individuals could bring cases to the German courts on the grounds that the administration was breaching the rights contained in the 1954 Convention. Despite

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<sup>88</sup> The Constitutional Court has held that it is sufficient that the person states on his application for legal aid his name, last name, place and date of birth and State in which he is normally liable to pay taxes. *Corte Cost*, 14.5.2004, n 144. See ch 4, s 3.2.

<sup>89</sup> In Germany the courts have held that the concept of unknown nationality is against international law and either a person is a national of a State or is stateless. However, the administration keeps using the category of 'unknown nationality'. See ch 6, ss 4, 5; Marx (n 20). For a similar argument in the context of labour conventions, see Leary (n 29) 139-41.

<sup>90</sup> An elaborate system of judicial review and access to legal aid nevertheless for example exists in Germany and Italy and as a consequence there are more opinions concerning claims of protection made by stateless persons. See ch 4, ss 3.6, 4.7; ch 5, s 8.

<sup>91</sup> For a similar argument in the context of the European Convention on Human Rights, see Hodgson (n 82) 185-87.

<sup>92</sup> Léon-Eli Troclet and Eliane Vogel-Polsky, 'The Influence of International Labour Conventions on Belgian Labour Legislation' (1968) 98 *ILR* 389, 411.

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid* 411-12.

<sup>95</sup> Leary (n 29) 157.

the absence of implementing legislation, these individuals were able to obtain a remedy. On the contrary, in dualist States like Sweden, the only remedy for an individual would be seeking the enactment of implementing legislation and this would deprive him of any capacity to obtain the application of international law internally.<sup>96</sup>

Regarding the issue of publicity to a treaty, it has been suggested that if the text of the treaty is included in the national code, it is not necessary to formally amend the national law in conformity with it.<sup>97</sup> However such a solution would not be sufficient to provide assistance to decision makers when they are confronted with the application of vague treaty provisions. Gyulai also argues that it is preferable to increase visibility of legislation for all the parties concerned by enacting a separate Act or adding a particular chapter in the relevant law.<sup>98</sup>

To conclude, the evidence shows that merely ratifying a treaty does not make much difference for those claiming its protections. Human rights are inaccessible if States do not adopt specific legislation taking into consideration the marginalisation of those that they should protect.

## **7. Recommendations**

Based on the above discussion, an adequate legal implementation of the 1954 Convention should be based on the following four fundamental components: (1) the adoption of specific stateless determination procedures; (2) the enactment of substantive provisions regarding the interpretation of article 1; (3) the grant of a proper protection status; (4) the offer of a solution.<sup>99</sup> As a matter of good practice, the visibility of statelessness should also be increased.<sup>100</sup> These recommendations are in line with the UNHCR's Action Plan to identify and protect stateless persons with the aim to end statelessness.<sup>101</sup>

### ***7.1. Essential elements of statelessness determination procedures***

Although it is recognised that States have wide discretion in the design and operation of procedures, as the 1954 Convention is silent on them, the UNHCR takes the position that any effective mechanism dealing with claims of protection made by stateless persons must have, as a specific objective, the determination of statelessness.<sup>102</sup>

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<sup>96</sup> Leary (n 29) ch 6.

<sup>97</sup> Cornil (n 84) 274-75.

<sup>98</sup> Gábor Gyulai, 'The Determination of Statelessness and the Establishments of Statelessness-Specific Determination Regimes' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 125.

<sup>99</sup> Gyulai suggests the adoption of similar measures, but does not address the need to clarify the meaning of article 1 of the 1954 Convention into the national legislations. *ibid* 116, 125-27.

<sup>100</sup> It should be noted that the UNHCR recommends, among the necessary elements to end statelessness, adopting specific stateless determination procedures; granting a proper protection status that permits residence and guarantees the enjoyment of basic human rights; facilitating naturalisation; improving quantitative and qualitative data on stateless populations. UNHCR 'UNHCR's Global 2014-2024 Action Plan to End Statelessness' (2014) 16-18, 24-25.

<sup>101</sup> However the UNHCR does not identify the need to adopt substantive provisions concerning article 1. It is unclear if this is due to the failure to consider the matter as a problem or to a clear strategic choice not to interfere with States' decisions about it. *ibid*.

<sup>102</sup> UNHCR 'Handbook' (n 38) para 62.

It is acknowledged that it would be difficult to meet all the procedural standards recommended in the UNHCR Handbook because it is not binding and several changes would be needed at the national level to comply with it.<sup>103</sup> Nevertheless, at least partial reforms should be undertaken, in particular with regard to guaranteeing essential procedural elements and eliminating a number of key barriers limiting access to protection for potential applicants.<sup>104</sup>

First of all, a clearly identified authority, with expertise in the field of statelessness, making an impartial and objective examination of the claim would be an intrinsic aspect of any procedure.<sup>105</sup> The determination of statelessness is a complicated task, which involves the collection and analysis of international and national laws, regulations, and practices of other States.<sup>106</sup> It also entails liaising with other States, usually through the Ministry of Foreign Affairs, and agencies, such as the UNHCR, which have expertise in this area.<sup>107</sup> As administrative decision-makers are responsible to apply the 1954 Convention at the first stage of the procedures, where most of the cases are concluded, it is important that they are competent, informed, and well trained to carry out their assessment.<sup>108</sup>

Some experts recommend a central designated authority arguing that it would increase the likelihood of consistent decisions and the equal treatment of applicants.<sup>109</sup> Having a better opportunity to develop its competence and expertise in statelessness matters, a central designated authority would reduce the risk of inconsistent decisions being taken and would aid in the collection and dissemination of country-of-origin information for similar caseloads. If this approach is followed, an applicant should be allowed to present his claim to any of the designated offices spread in the territory, which then should forward the case to the central competent authority.

However, according to Batchelor, a central authority is not necessary if decision makers adopt a collaborative approach ‘that systematises the use of existing contacts and areas of expertise within the government structure and as well as between States.’<sup>110</sup>

Second, specific rules on the burden of proof shall be adopted. Establishing statelessness is difficult because a person must prove that there is no legal bond with any relevant State.<sup>111</sup> The most obvious problem with the determination of the negatively defined status of statelessness is that it is near to impossible to prove with absolute certainty that someone is not a national of any State. So, unless the level of certainty with which statelessness is established is lowered, the statelessness definition would not be implementable in practice. Additionally, one general obstacle is that statelessness is often poorly documented. There is by definition no State that bears an

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<sup>103</sup> See ch 4, s 6; ch 5, s 13.

<sup>104</sup> See ch 4, ss 3.3, 4.3; ch 5, ss 5, 8.

<sup>105</sup> European Network on Statelessness (n 14) 9.

<sup>106</sup> Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (n 1) 41.

<sup>107</sup> *ibid.*

<sup>108</sup> Galligan and Sandler (n 21) 24-25.

<sup>109</sup> European Network on Statelessness (n 14) 9.

<sup>110</sup> Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization’ (n 1) 41.

<sup>111</sup> *ibid.* 36.

international responsibility for a stateless person, and therefore no State is obliged to supply him with identity, travel documents, or any other relevant evidence. Frequently, there would be no State willing and able to provide documentary evidence of the individuals' identity, family links or residence history. When documents are available, it is a difficult task to assess their worth.

Therefore well-defined and fair rules addressing how to prove statelessness and detailing the concrete sources of evidence relating to a person's nationality are crucial.<sup>112</sup>

The UNHCR Handbook provides that in the case of statelessness determination, the applicant shall establish to a reasonable degree that he is not considered a national of any State under the operation of its law.<sup>113</sup> The procedure should be collaborative one.<sup>114</sup> Thus, the applicant has a duty to provide a truthful account of his case and submit all evidence reasonably available. On the other hand, the determining authority should be required to obtain and present all relevant evidence reasonably available to it, enabling an objective determination of the applicant's status. Statelessness determination authorities should also give sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.<sup>115</sup> The lack of replies to inquiries regarding a person's nationality, and the cooperation of the person concerned, should be considered relevant facts.<sup>116</sup>

No blank requirement should be placed on the individual to supply specific types of documents to prove statelessness. It is desirable that any regulation contains unambiguous, but flexible standards on a broad range of legal and factual evidence which the applicant might be able to produce,<sup>117</sup> including the applicant's testimony, marriage certificate, military service record, school certificates, medical certificates, identity and travel documents of direct relatives, and record of sworn oral testimony of neighbors and community members.<sup>118</sup> The legislation should address how to contact foreign authorities and how to evaluate the information provided by them. In particular, if the State of origin does not reply within a reasonable time and the applicant makes good faith efforts to document his situation, the receptive State should assume that the person is stateless as the essential functions of nationality under international law are being denied.<sup>119</sup>

Third, to minimise mistakes and misunderstanding in the gathering of the testimony, the right to an interview or hearing with interpretation before a decision-maker shall be established.<sup>120</sup> Such an in-person witness testimony may be helpful to elicit evidence from the applicant and allow him to comment on information held by the competent authority.<sup>121</sup>

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<sup>112</sup> van Waas (n 47) 424-32.

<sup>113</sup> UNHCR 'Handbook' (n 38) para 91.

<sup>114</sup> European Network on Statelessness (n 14) 28; UNHCR 'Handbook' (n 38) para 89.

<sup>115</sup> See UNHCR 'Handbook' (n 38) paras 89-107.

<sup>116</sup> *ibid* paras 97-107; Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonization' (n 1) 37.

<sup>117</sup> UNHCR 'Handbook' (n 38) paras 83-85.

<sup>118</sup> *ibid* para 84. See ch 4, Conclusion.

<sup>119</sup> See ch 2, s 2.

<sup>120</sup> Martin Jones and France Houle, 'Building a Better Refugee Status Determination System' (2008) 25(2) *Refugee* 2.

<sup>121</sup> Lambert (n 60) 20.



Fourth, the law should require adjudicators to write reasons for their decisions. Written reasons for refusal are important because they make it more difficult for a decision-maker to reach a hurried conclusion. Moreover they assure that the process is transparent and judicial review possible.<sup>122</sup>

Fifth, an effective right to appeal against a negative first-instance decision is an essential safeguard that should be always guaranteed.<sup>123</sup> Whether the appellate body can itself grant protection under the 1954 Convention or whether it can merely quash the first-instance decision and send the matter back for reconsideration may reflect the general approach to such matters in the State's legal and administrative system.<sup>124</sup> However, providing appeal bodies with the possibility of granting protection by their own decision, such as in Hungary, Italy, Germany and Spain,<sup>125</sup> may have a number of positive effects. Such full review can help avoid lengthy appeal proceedings where cases are referred back for reconsideration several times.<sup>126</sup> Moreover, it facilitates a more in-merit examination of cases and the development of useful judicial guidance.<sup>127</sup>

Sixth, the length of proceedings should be reasonable. This is important especially because the applicant may remain in a situation of limbo, and be subject to expulsion and immigration detention during the time to reach the decision.<sup>128</sup> According to the UNHCR, the case shall be concluded within six months of his submission. However in cases in which an answer is waited from foreign authorities, the proceedings may be allowed to last up to 12 months.<sup>129</sup>

Seventh, no legal prerequisites, besides the definition of stateless person according to article 1 of the 1954 Convention, should be introduced in the national frameworks. Prerequisites such as timelines or lawful status are not found in the 1954 Convention and are against its aim and purpose, as they may exclude stateless persons from protection.<sup>130</sup>

Eighth, applicants for stateless status should be provided with legal assistance at all stages of the procedures. Despite stateless determination procedures are often formally 'non-adversarial', the complexity of immigration and nationality laws and of the procedures, compounded with the frequent lack of financial resources and of knowledge of the official language, lead to the necessity for applicants to have a legal representative.<sup>131</sup>

Finally, if an application has been made and the authorities are trying to determine whether an individual is stateless and replies from foreign States are slow, it may be necessary to provide

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<sup>122</sup> Legomsky (n 41) 640.

<sup>123</sup> European Network on Statelessness (n 14) 32-33.

<sup>124</sup> See UNHCR 'Handbook' (n 38) paras 76-77.

<sup>125</sup> European Network on Statelessness (n 14) 32-33.

<sup>126</sup> Legomsky (n 41) 640; European Network on Statelessness (n 14) 33.

<sup>127</sup> Legomsky (n 41) 640-41.

<sup>128</sup> See ch 4 ss 3.5, 4.5; ch 5, s 7.

<sup>129</sup> See UNHCR 'Handbook' (n 38) para 75. Cooperation initiatives with other States or the UNHCR, training programs, additional capacity may, for instance, help to expedite cases. European Network on Statelessness (n 14) 20.

<sup>130</sup> *ibid* 14-15.

<sup>131</sup> Ronald Sackville, *Law and Poverty in Australia* (AGPS 1975) 3; Ellen H Greiper, 'Stateless Persons and their Lack of Access to Judicial Forums' (1985) 11 BJIL 439, 444; Robert Doyle and Livy Visano, 'Equality and Multiculturalism' (1988) 3 JLSP 27; Roderick A Macdonald, 'Access to Justice in Canada Today: Scope, Scale, and Ambitions' in Julia Bass, W A Bogart and Frederick H Zemans (eds), *Access to Justice for a New Century: the Way Forward* (Law Society of Upper Canada 2005) 512-14.

for temporary stay and a number of rights attached to it while the process is underway. In any event the individual will, in most cases, remain factually present and may be left in a clandestine situation for a significant period if the procedures are lengthy.<sup>132</sup>

### ***7.2. Substantive provisions regarding the meaning and scope of article 1***

The data shows that a new definition of stateless person is not necessary, confirming van Waas' argument in this regard.<sup>133</sup> However article 1 of the 1954 Convention should be formally incorporated in the national systems and substantive provisions regarding its interpretation adopted in accordance with the UNHCR Handbook.

In particular, it would be helpful to enact provisions addressing when a person is not considered a national under a State's law and practice.<sup>134</sup> Overcoming Batchelor's criticism on the definition of stateless person as too narrow,<sup>135</sup> the UNHCR Handbook clarifies that the assessment of statelessness requires an analysis of laws, 'ministerial decrees, regulations, orders, judicial case law (in States with a tradition of precedent) and, where appropriate, customary practice'<sup>136</sup> of the State of possible nationality. In case that a State does not follow the letter of the law in an individual case, it is the assessment of facts that must prevail.<sup>137</sup>

On the matter of the possible reacquisition of a former nationality, the UNHCR Handbook specifies that an applicant should explore all options available before claiming international protection. This should not place an undue burden on the applicant and a temporary permit should be granted for the time necessary to follow the process to obtain a nationality. A time-limit should be set as far as how long procedures for the reacquisition of a nationality should reasonably last, in order to avoid leaving a person in limbo.<sup>138</sup>

Finally, it would be extremely useful to clarify the meaning of the exclusion clause. Although the UNHCR Handbook does not provide any guidance on this matter, some principles could be found in the jurisprudence of the Refugee Convention and the UNHCR Notes on the Interpretation of Article 1D of the Refugee Convention.<sup>139</sup>

### ***7.3. Legal status and offer of a solution***

Regarding the legal status to be granted to stateless persons, the UNHCR Handbook recommends that it should allow them to live legally in the State and provide the possibility to integrate.<sup>140</sup> In addition, it recommends granting a residence permit for at least two years, and preferably for a

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<sup>132</sup> In the context of asylum, it is noted that fair and expeditious procedures for determining refugee status are an important protection against detention. Goodwin-Gill and McAdam (n 42) 464.

<sup>133</sup> van Waas (n 47) 24, 27.

<sup>134</sup> UNHCR 'Handbook' (n 38) paras 13-56.

<sup>135</sup> Carol A Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7(2) IJRL 232, 256-59.

<sup>136</sup> UNHCR 'Handbook' (n 38) para 22.

<sup>137</sup> *ibid* para 23.

<sup>138</sup> *ibid* para 26.

<sup>139</sup> See ch 3, s 3.3.

<sup>140</sup> UNHCR 'Handbook' (n 38) paras 125-43.



longer duration, such as five years, to guarantee more stability.<sup>141</sup> Such permits should be renewable and, importantly, should allow reaching a durable solution with the acquisition of a nationality,<sup>142</sup> which is the only exit from the ‘statelessness cycle’.<sup>143</sup>

As far as the naturalisation requirements are concerned, they should be applied with flexibility.<sup>144</sup> Stateless persons’ access to a nationality should be facilitated with provisions reducing the number of years of residence required before applying, the amount of fees to pay, and other administrative obstacles such as strict language and financial requirements.<sup>145</sup>

#### ***7.4. Adoption of additional implementing measures***

As a matter of good practice, awareness and information on statelessness should be improved.<sup>146</sup> The possibility to receive protection, the main procedural modalities and the status available after a positive decision should be made available not only to those who could potentially benefit from it, but also for the authorities in charge of applications, as well as lawyers.<sup>147</sup> Moreover, the dissemination of information in several languages, including through targeted information campaigns, leaflets, websites, immigration detention centres, should be bettered as it can facilitate access to the mechanisms for the identification of stateless persons.<sup>148</sup> Training on statelessness should also be organised for legal professionals and decision-makers.<sup>149</sup> Statelessness should be introduced as a topic in courses on immigration and refugee law.

### **8. Prospects for future research**

This thesis tries to better understand the social reality of claims of protection made by stateless persons in selected States. However, further research could look more in depth into the treatment of stateless persons in States, such as Greece and Sweden, which still remains little known due to the difficulties of the data collection and the general lack of awareness of the issue. Additionally, a more comprehensive understanding of who is considered to meet the definition of ‘stateless person’

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<sup>141</sup> *ibid* 148.

<sup>142</sup> *ibid*.

<sup>143</sup> Gyulai, ‘The Determination of Statelessness and the Establishments of Statelessness-Specific Determination Regimes’ (n 98) 126.

<sup>144</sup> In the context of naturalisation for refugees, the UNHCR notes that the introduction of strict language tests and examinations on the history and culture of the State of refuge may penalise certain refugees, in particular elderly or illiterate persons. Similarly, requirements to demonstrate self-reliance may be difficult for certain categories of refugees to meet. The UNHCR therefore calls on EU Member States to apply flexibly such requirements to make naturalisation possible for refugees with specific needs. UNHCR ‘Note on the Integration of Refugees in the European Union’ (2007); see also Nonnenmacher and Cholewisnki (n 70) 247, 262.

<sup>145</sup> These recommendations are in line with the Council of Europe’s Explanatory Report to the European Convention on Nationality. See European Convention on Nationality. Explanatory Report [1997] ETS No 166 para 52.

<sup>146</sup> Gyulai, ‘The Determination of Statelessness and the Establishments of Statelessness-Specific Determination Regimes’ (n 98) 125.

<sup>147</sup> See eg Michael Cass and Ronald Sackville, *Legal Needs of the Poor* (AGPS 1975); Barbara A Curran, *The Legal Needs of the Public: the Final Report of a National Survey* (American Foundation 1977); Cappelletti and Garth (n 31) 181, 192.

<sup>148</sup> European Network on Statelessness (n 14) 15.

<sup>149</sup> Gyulai, ‘The Determination of Statelessness and the Establishments of Statelessness-Specific Determination Regimes’ (n 98) 125.

and who is excluded from it in EU States that I did not analyse will help ensure increased comparability of research findings. It will also help with more precise estimates as far as the number of stateless persons in each State.

Further research could deal with problems of access to the procedures for stateless persons in immigration detention in all EU States. The methodology did not focus on this group of applicants but it has become apparent that their protection needs are unmet.

Additionally, future studies could look at the possible expanded roles of the community legislator, the European Court of Human Rights and the Council of Europe in reinforcing the protection of stateless persons. In particular, debates should be stimulated on whether there is EU competence to pass legislation on the protection and identification of stateless persons.<sup>150</sup> Only one recent paper raises the argument that the EU could address the protection and identification of stateless persons through the field of migration law.<sup>151</sup> Moreover, new research could explore the question of whether the European Convention of Human Rights implicitly obliges European States to determine statelessness.<sup>152</sup> In particular it could consider whether there are any decisions of the European Court of Human Rights and national courts stating that a determination of statelessness is required when statelessness is linked to the enjoyment of fundamental human rights.<sup>153</sup>

On a more general level, new research could try to understand other factors that facilitate, as well as those that impede, the incorporation of treaties into national legal systems, besides the adoption of formal laws. Due to the scope of my thesis, I did not collect all the data necessary to test theories that conceive international law incorporated through processes rather than rules, i.e.

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<sup>150</sup> The existing literature on statelessness in EU law argues the lack of EU competence to pass legally binding legislation on statelessness. Therefore, it concludes that the potential for EU involvement with statelessness is limited to soft-law measures. See eg Gábor Gyulai, 'Statelessness in the EU Framework for International protection' (2012) 14 EJML 284. A similar opinion has been expressed by Tamás Molnár, 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order' (2010) 51(4) Acta Juridica Hungarica 304 and in 'Moving Statelessness Forward on the International Agenda' (2014) 19 1(1) TLR 198. See ch 2, s 12.

<sup>151</sup> Katja Swider argues that the EU has competence in the field of migration, and it can develop mechanisms for the identification and protection of stateless persons under those powers. Article 67(2) of the Treaty on the Functioning of the European Union (TFEU) provides that 'stateless persons shall be treated as third-country nationals'. In addition, Article 352 TFEU, the so-called 'flexibility clause' of EU competences, allows the EU to legislate for the purpose of attaining 'one of the objectives set out in the Treaties', when 'the Treaties have not provided the necessary powers'. Swider claims that, by mentioning stateless persons and equating their treatment to those of third-country nationals, the Treaty brings statelessness within the scope of its objectives. Katja Swider, 'Protection and Identification of Stateless Persons through EU Law' (July 2014) Amsterdam Centre for European Law and Governance Working Paper Series 2014-05, 10.

<sup>152</sup> At present there is no academic work and only a discussion paper on this issue. Caia Vlieks, 'Strategic Litigation: An Obligation for Statelessness Determination Under the European Convention on Human Rights?' (2014) Discussion Paper 09/14 (European Network on Statelessness). This matter could be further explored in relation to the EU's accession to the European Convention on Human Rights. EUROPA, 'European Convention on Human Rights (ECHR)' <[http://europa.eu/legislation\\_summaries/glossary/eu\\_human\\_rights\\_convention\\_en.htm](http://europa.eu/legislation_summaries/glossary/eu_human_rights_convention_en.htm)> accessed 6 February 2015.

<sup>153</sup> Some of the relevant European Convention on Human Rights' articles are: the prohibition of torture and inhuman or degrading treatment (art 3); the right to liberty and security of person (art 5); the right to a fair trial (art 6); the right to respect for private and family life (art 8); the right to an effective remedy (art 13); and the prohibition of discrimination (art 14). European Convention for the Protection of Human Rights and Fundamental Freedoms (amended) [1950] ETS 5.

the theories of McDougal, Higgins or Koh.<sup>154</sup> Further research could, for instance, look more closely at the interaction of the different actors involved and how such interaction may contribute, in practice and through phases, to the internalisation of human rights norms in systems of both automatic and legislative incorporation. This research could contribute to bring forward the debate on whether international law is incorporated through norms or process, which until now has been based more on ideological views rather than reliance on data.<sup>155</sup>

At this stage, the data that I have collected suggest that the dualist and monist theories are inadequate to fully explain the incorporation of international law into national law.<sup>156</sup> The monist and dualist theories are based on conceptions of ‘body of rules’, which do not take into account that a number of actors are involved and interrelate with international actors and processes in the creation of norms simultaneously.<sup>157</sup> In the context of statelessness, for example, the role of the UNHCR in interpreting and promoting the 1954 Convention,<sup>158</sup> of NGOs in disseminating information,<sup>159</sup> and of lawyers<sup>160</sup> in engaging in strategic litigation, support the view that the incorporation of international law occurs through several actors and processes besides the enactment of formal laws. Moreover, to further back this argument, it should be mentioned that both in Hungary and the UK, the adoption of statelessness determination procedures was preceded by studies on statelessness and advocacy by the UNHCR and civil society.<sup>161</sup>

The theories based on processes consider incorporation not only from a legal prospective, but also from a political, moral, and other non-legal contexts,<sup>162</sup> which I have not explored. They try to explain the infiltration of human rights norms into national systems even before their incorporation into formal legislative acts. They maintain that the contribution of law to the implementation of human rights does not occur in isolation from other institutions and policy processes.<sup>163</sup> In any case, they recognise that law is often important in determining outcomes.<sup>164</sup> At this point, I can only safely conclude, that the incorporation of clear standards into national legislation, setting out limitations and exceptions, is a necessary element to ensure certainty of the law, and its effectiveness.<sup>165</sup> The enactment of clear rules matters for practice as it limits the discretion of

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<sup>154</sup> Myres McDougal, ‘The Impact of International Law upon National Law: a Policy-Oriented Perspective’ (1959) 26(4) *SDLR* 25; Rosalyn Higgins, *Problems and Process. International Law and How We Use it* (Clarendon Press 1994); Harold Koh, ‘Transnational Legal Process’ (1996) 75 *NLR* 181; Harold Koh, ‘The 1998 Frankel Lecture: Bringing International Law Home’ (1998) 35 *HLR* 623.

<sup>155</sup> Paul Schiff Berman, ‘From International Law to Law and Globalization’ (2005) 43 *CJTL* 485, 542.

<sup>156</sup> Higgins (n 154) 10.

<sup>157</sup> McDougal (n 154).

<sup>158</sup> See ch 2, s 11; ch 3, s 5.

<sup>159</sup> For instance Asylum Aid had a leading role in the process that led to the adoption of statelessness determination procedures in the UK. See ch 4, s 3.8.

<sup>160</sup> For instance, in Hungary, lawyers challenged the constitutionality of the lawful presence requirement to make an application for statelessness. See ch 4, s 2.2.1.

<sup>161</sup> Telephone interview with Tamás Molnár, Head of Unit, Unit for Migration, Asylum and Border Management, Department of EU Cooperation, Ministry of Interior [of Hungary] and Assistant Professor in the Corvinus University of Budapest (Budapest, Hungary, 16 December 2013); UNHCR and Asylum Aid, ‘Mapping Statelessness in the United Kingdom’ (2011).

<sup>162</sup> Donnelly (n 83) 67, 75-76.

<sup>163</sup> *ibid* 67, 76.

<sup>164</sup> *ibid*.

<sup>165</sup> Campbell (n 83) 3.

decision-makers and creates a legal environment for lawyers and NGOs to efficiently use the 1954 Convention in individual claims.<sup>166</sup> For instance, in order to provide a real opportunity to benefit from the 1954 Convention, laws for the identification of statelessness must be adopted or further elucidated.

To further understand other factors that impact on the incorporation of treaties into national legal systems, future studies could look at the level of internalisation of the 1954 Convention provisions within the administration. This would require an in-depth analysis of administrative practices on statelessness determination in each State.<sup>167</sup> In this regard, Galligan and Sandler argue that '[T]he test for successful implementation is whether human rights standards are accepted as authoritative by national institutions and officials in such a manner that their practical actions and decisions are in compliance with them.'<sup>168</sup> Ideally, officials internalise the standards so that 'they become central to their cognitive and normative understandings.'<sup>169</sup> The socio-legal scholarship on legal consciousness and lower-level bureaucrats shows that the 'law is almost never "delivered" on the ground in the pure form that treaties, legislation, or constitutional court decisions would indicate.'<sup>170</sup> For example, some decision-makers have to cope with several social, political, organisational pressures and they develop 'routines and simplifications that economize on resources.'<sup>171</sup> Thus, the investigation into statelessness could look at it from a micro-level and the less researched aspect of decision-making.

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<sup>166</sup> Luke McNamara, *Human Rights Controversies. The Impact of Legal Form* (Routledge-Cavendish 2007).

<sup>167</sup> Koh argues that compliance programs must be adopted to ensure that administrative decision-makers internalize international law. See text to ns 195-196 in ch 1.

<sup>168</sup> Galligan and Sandler (n 21) 29.

<sup>169</sup> *ibid.* In their study on the domestic implementation of human rights, Heyns and Vilojen also stress the importance that norms are internalized into the domestic legal system. Christof H Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23(3) HRQ 488.

<sup>170</sup> Berman (n 155) 485, 498. For a summary of the literature on this point, see Susan Silbey, 'Case Processing: Consumer Protection in an Attorney General's Office' (1980) 15(3-4) LSR 849.

<sup>171</sup> Silbey (n 170) 849-50; Berman (n 155) 499.

## **APPENDICES**

### **APPENDIX 1: CASES**

#### **International Case Law**

##### **Permanent Court of International Justice/International Court of Justice**

Nationality Decrees Issued in Tunis and Morocco (Great Britain v France) [1923]  
PCIJ Series B No 4

Dickson Car Wheel Co. (USA) v. United Mexican States [1951] UNRIIAA vol. IV  
(Sales No 1951.V.1.) 669

Nottebohm Case (Liechtenstein v. Guatemala) (second phase) [1955] ICJ Rep 4

C-341/11 El Kott and Others v Hungary [2012] OJ C46/8

#### **Regional Case Law**

##### **European Court of Human Rights**

App no 30696/09 M.S.S. v. Belgium and Greece (ECtHR, 21 January 2011)

1999-II 31414/96 Karassev v. Finland ECHR

##### **European Commission of Human Rights**

46 DR 112 Harabi v. The Netherlands (1986)

##### **Inter-American Court of Human Rights**

Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica,  
Advisory Opinion OC-4/84, Inter-American Court of Human Rights Series A No 4 (19 January  
1984)

#### **National Case Law**

##### **France**

###### **CE**

CE, 21 novembre 1994, n° 147193

CE, 21 novembre 1994, n° 147194

CE, 1 février 1999, n° 189527 inédit

CE, 17 mars 1999, n° 160895

CE, 20 mars 2000, n° 190036 inédit: TA Paris 13/12/1995 Haque, rec. CRR 1996 p 136

CE, 29 décembre 2000, n° 216121

## **CAA**

CAA de Bordeaux, 19 juillet 1999, n° 98BX00688

## **CNDA**

CNDA, 23 décembre 2009, n° 636547/08017005

## **Germany**

### **BVerwG**

BVerwG, Beschluss v 1.10.1979 - 1 C 97.76

BVerwG, Urteil v 16.04.1985 - 9 C 109/84

BVerwG, Beschluss v 17.07.1987 - 1 B 23.87

BVerwG, Urteil v 21.01.1992 - 1 C 18.90

BVerwG, Urteil v 23.02.1993 - 1 C 7.91

BVerwG, Urteil v 17.03.2004 - 1 C 1.03

BVerwG, Urteil v 27.05.2010 - 5 C 8.09

### **OVG**

OVG Berlin, Urteil v 18.04.1991 - 5 B 41.90

OVG Niedersachsen, Beschluss v 21.04.2004 - 11 LA 61/04

### **VG**

VG Berlin, Urteil v 12.06.1985 - 11 A 655.84

VG Berlin, Urteil v 24.02.1988 - 23 A 341.87

VG Regensburg, Gerichtsbescheid v 17.01.1997 - RO 2 K 96.0069

VG Aachen, Urteil v 1.03.2001 - 4 K 3022/99

VG Stuttgart, Urteil v 26.09.2002 - 11 K 4536/01

VG Karlsruhe, Urteil v 26.02.2003 5 - K 2350/02

VG Bremen, Beschluss v 20.7.2006, S 4 V 307/06

VG Saarland, Urteil v 24.11.2006 - 5 K 97/05

VG Schleswig-Holstein, Urteil v 7.02.2007 - 1 A 130/04

VG München, Gerichtsbescheid v 15.05.2007 – M 7 K 05.159, M 7 K 06.545

VG Berlin, Urteil v 1.03.2012 - 13 K 12.12

## **VGH**

VGH München, Urteil v 9.07.2012 - 20 B 12.30003

## **Journals/ Gazettes**

### **BVerwGE**

BVerwG, 16.04.1985, BVerwGE 71, 180

BVerwG, 16.10.1990, BVerwGE 87, 11

BVerwG, 21.01.1992, BVerwGE 89, 296

BVerwG, 23.02.1993, BVerwGE 92, 116

### **DVBI**

BVerwG, 16.07.1996, DVBI 1997, 177

OVG Niedersachsen, 30.09.1998, DVBI 1999, 1219

### **InfAusIR**

BVerwG, 21.01.1992, InfAusIR 1992, 161

BVerwG, 23.02.1993, InfAusIR 1994, 35

VG Berlin, 12.06.1985, InfAusIR 1985, 237

VG Berlin, 24.02.1988, InfAusIR 1988, 174

VG Aachen, 1.03.2001, InfAusIR, 2001, 338

### **NVwZ**

BVerwG, 12.02.1985, NVwZ 1985, 589

BVerwG, 15.10.1985, NVwZ 1986, 759

VGH Baden-Württemberg, 16.02.1994, NVwZ 1994, 1233

### **VBIBW**

VGH Baden-Württemberg, 31.03.1993, VBIBW 1993, 482

### **Italy**

#### **Trib**

Trib Ancona, 13.6.1950

Trib Prato, 14.1.1997

Trib Alessandria, 19.6.2002

Trib Lucca, 16.12.2002

Trib Torino, 2.2.2009

Trib Torino, 10.11.2008

Trib Milano, 28.7.2010

Trib Genova, 13.12.2010

Trib Roma, 6.7.2012

### **App**

App Perugia, 20.4.2004

App Perugia, 12.6.2008

App Firenze, 12.4.2011

App Milano, 15.11.2012

### **Corte Cass**

Corte Cass, 18.6.2004, n 11441

Corte Cass, 28.6. 2007, n 14918

Corte Cass, 9.12.2008, n 28873

Corte Cass, 3.4.2015, n 4262

### **Corte Cost**

Corte Cost, 14.5.2004, n 144

### **Sweden**

#### **MIG**

MIG 2007:9

MIG 2007:12

### **United Kingdom**

R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB)

R (Lumba and Mighty) v Secretary of State for the Home Department [2011] 12 (UKSC)



## APPENDIX 2: LEGISLATION

### Treaties and other International Instruments

#### League of Nations

Convention on Certain Questions relating to the Conflict of Nationality Law (adopted 12 April 1930, entry into force 1 July 1937) 179 LNTS 89 (No 4137) (Hague Convention)

Convention on Rights and Duties of States (adopted 26 December 1933, entry into force 26 December 1934) 165 LNTS 19 (Montevideo Convention)

Protocol relating to a certain case of Statelessness (adopted 12 April 1930, entry into force 1 July 1937) 179 LNTS 115 (No 4138)

Protocol relating to Military Obligations in Certain Cases of Double Nationality (adopted 12 April 1935, entry into force 25 May 1937) 178 LNTS 227 (No 4117)

Special Protocol Concerning Statelessness (adopted 12 April 1930, not entered into force) C.27.M.16.1931.V

#### United Nations

Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3

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

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (Child Convention)

Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention)

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

Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (25 July 1951) 189 UNTS 137

Final Act of the United Nations Conference on the Status of Stateless Persons (28 September 1954) 360 UNTS 117

Final Act of the United Nations Conference on the Status of Stateless Persons (6 June 1960) 360-9 UNTS 118

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Anti-Trafficking Protocol)

Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267

Universal Declaration of Human Rights (adopted 10 December 1948, entered into force 23 March 1976) 999 UNTS 302

Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3

## **Regional Instruments**

### **Council of Europe**

Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession [2006] ETS No 200

Council of Europe, Committee of Ministers, Recommendation CM/Rec(2009)13 of the Committee of Ministers to member states on the nationality of children [2009] CM/Rec(2009)13

Council of Europe, Committee of Ministers, Recommendation No. R (99) 18 of the Committee of Ministers to member States on the avoidance and reduction of statelessness [1999] No R (99) 18

European Convention on Consular Functions [1967] ETS 61

European Convention on Nationality. Explanatory Report [1997] ETS No 166

European Convention for the Protection of Human Rights and Fundamental Freedoms (amended) [1950] ETS 5

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto as amended by Protocol No 11 [1963] ETS No 155

### **European Union**

Council Decision (EU) 2010/649 of 7 October 2010 on the conclusion of the Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorization [2010] OJ L 287/50

Council Directive (EC) 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (Qualification Directive)

Council Directive (EC) 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13

Council Regulation (EC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2

Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1

Council Regulation (EC) 1932/2006 amending Regulation (EC) 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 [2006] OJ L 405/23

Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1

Declaration no 2 annexed to the Treaty of Maastricht on nationality of a Member State [1992] OJ C191/1

Directive (EC) 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/89

European Parliament resolution 14 January 2009 on the situation of fundamental rights in the European Union 2004 – 2008 (2007/2145(INI)) [2009] P6\_TA(2009)0019

Implementing Regulation (EC) 574/72 [1972] OJ L 74/1

Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1

### **Inter-American System**

American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 (1967) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992)

### **Arabic League**

Arab Charter on Human Rights (entered into force 15 May 2008) reprinted in 12 International Human Rights Reports 893 (2005)

## **National Legislation**

### **Czech Republic**

Act No. 40/1993 Coll. to regulate the acquisition and loss of citizenship of the Czech Republic as amended by Act No. 272/1993 Coll., Act No. 140/1995 Coll., Act No. 139/1996 Coll., Act No. 194/1999 Coll., Act No. 320/2002 Coll., and Act No. 357/2003 Coll. (unofficial tr)

Act No. 326/1999 on the residence of foreign nationals in the Czech Republic and amending certain laws (Foreign Nationals Act) (unofficial tr)

### **France**

Code civil créé par Loi n°93-933 du 22 juillet 1993 - art 50 JORF 23 juillet 1993 [Civil code adopted by law n 93-933 of 22 July 1993 – art 50 JORF 23 July 1993]

Code de l'entrée et du séjour des étrangers et du droit d'asile abroge et remplace l'ordonnance n° 45-2659 du 2 novembre 1945 relative aux conditions d'entrée et de séjour des étrangers en France ainsi que la loi n° 52-693 du 25 juillet 1952 relative au droit d'asile (Code de l'entrée et du séjour des étrangers et du droit d'asile) art L 511-1-II-3d ) [Code on the entry and residence of foreigners and right of asylum abrogated and replaced by ordinance n 45-2659 of 2 November 1945 on the conditions of entry and residence of foreigners in France as well as law n 52-693 of 25 July 1952 on the right of asylum (code on the entry and residence of foreigners and right of asylum) art L 511-1-II-3d]

Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique modifié par Loi n°99-515 du 23 juin 1999 - art 5 JORF 24 juin 1999 [Law no 91-647 of 10 July 1991 on legal aid as modified by law n 99-515 of 23 June 1999 – art 5 JORF 24 June 1999]

Loi n° 52-893 du 25 juillet 1952 relative au droit d'asile [Law no 52-893 of 25 July 1952 concerning the right of asylum]

## **Germany**

Act to Control and Restrict Immigration and Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act) of 20 June 2002 (official tr)

Asylbewerberleistungsgesetz (AsylLG) in der Fassung vom 5. August 1997 (BGBl I 1997, 2022), zuletzt geändert durch Artikel 3 des Gesetzes vom 22. November 2011 (BGBl I 2011, 2258) [Asylum Seekers' Benefits Act]

Aufenthaltsgesetz (AufenthG) neugefasst durch Beschluss vom 25.02.2008 (BGBl I 2008, 162), zuletzt geändert durch Artikel 2 Abs 59 Gesetz vom 07.08.2013 (BGBl I 2013, 3154) [Residence Act]

Gerichtskostengesetz (GKG) vom 27. Februar 2014 (BGBl I 2014, 154), zuletzt geändert durch Artikel 7 des Gesetzes vom 8. Juli 2014 (BGBl I 2014, 890) [Court Fee Act]

Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG) in der Fassung der Bekanntmachung vom 25. Februar 2008 (BGBl I 2008, 162), das durch Artikel 128 der Verordnung vom 31. August 2015 (BGBl I 2015, 1474) geändert worden ist [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - Residence Act]

Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz - BerHG), vom 18. Juni 1980 (BGBl I 1980, 689), das zuletzt durch Artikel 140 der Verordnung vom 31. August 2015 (BGBl I 2015, 1474) geändert worden ist [Act on legal advice and representation for citizens with low incomes - Legal Advice Aid Act]

Grundgesetz (GG) für die Bundesrepublik Deutschland vom 23.05.1949 (BGBl I 1949, 1), zuletzt geändert durch Gesetz vom 23.12.2014 (BGBl I 2014, 2438) mWv 01.01.2015 [Basic German Law]

Language Service of the Federal Ministry of the Interior (tr), Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, last amended by Article 3 of the Act of 6 September 2013 (Federal Law Gazette I, 3556)

Language Service of the Federal Ministry of the Interior (tr), Asylum Procedure Act (AsylVfG), last amended by Article 4 of the Act of 22 November 2011 (Federal Law Gazette I, 2258)

Staatsangehörigkeitsgesetz (StAG) in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, zuletzt geändert durch Artikel 1 des Gesetzes vom 28. August 2013 (BGBl I 2013, 3458) [Nationality Act]

Verordnung über die Beschäftigung von Ausländerinnen und Ausländern (Beschäftigungsverordnung - BeschV) vom 6. Juni 2013 (BGBl I 2013, 1499), die zuletzt durch Artikel 1 der Verordnung vom 29. Juli 2015 (BGBl I 2015, 1422) geändert worden ist [Regulation on employment of aliens – Employment Regulation]

Zivilprozessordnung (ZPO) in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl I 2005, 3202; I 2006, 431; I 2007, 1781), zuletzt geändert durch Artikel 1 des Gesetzes vom 10. Oktober 2013 (BGBl I 2013, 3786) [Code of Civil Procedure]

## **Greece**

Law 3386/2005 (GG A 212) Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory, as amended by Laws 3448/2006 (GG A 57), 3536/2007 (GG A 42), 3613/2007 (GG A 263), 3731/2008 (GG A 263), 3772/2009 (GG A 112) and 3801/2009 (GG A 163) (unofficial tr)

Law 3838/2010 (GG A 49) Contemporary provisions for the Greek Nationality, the political participation of homogeneous and legally residing migrants and other provisions (unofficial tr)

Law 3907/2011 (GG A 7) Establishment of Asylum Service and Service of first reception (unofficial tr)

Law 3284/2004 (GG A 217) Greek Citizenship Code (consolidated version 2010) (Haris Psarras tr, unofficial tr)

Legislative Decree 3370/1955 (GG A 258) Greek Nationality Code (unofficial tr)

Official Gazette of the Hellenic Republic, Volume A, Number 7, ‘Law No 3907. On the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC “on common standards and procedures in Member States for returning illegally staying third country nationals” and other provisions.’ (unofficial tr)

## **Hungary**

Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (unofficial tr, Ministry of Interior. Hungarian National Contact Point of the European Migration Network, 2012)

Act IV of 1978 on the Criminal Code (unofficial tr)

Act CXL of 2004 on the General Rules of Administrative Procedures and Services (unofficial tr)

Act LV of 1993 on Hungarian Citizenship (official tr)

Act LXXX of 2003 on Legal Aid (unofficial tr)

## **Italy**

Codice di procedura civile, 28 ottobre 1940, n 253 (come modificato) [Code of civil procedure, 28 October 1940, n 253 (as amended)]

DLgs 25 luglio 1998, n 286 (Testo unico sull’immigrazione) [Legislative decree 25 July 1998, n 286 – Unified text on immigration]

DPR 12 ottobre 1993, n 572, Regolamento di esecuzione della legge 5 febbraio 1992, n 91, recante nuove norme sulla cittadinanza [Decree of the President of the Republic 12 October 1993, n 572, Implementing regulation to the Law of 5 February 1992, No 91, including new provisions on citizenship]

DPR 31 agosto 1999, n 394, Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del DLgs 25 luglio 1998, n 286 come modificato dal regolamento approvato con DPR 18 ottobre 2004, n 334 [Decree of the President of the Republic 31 August 1999, n 394, Implementing regulation of the unified text on immigration law and foreigner status, according to article 1, section 6, of the Legislative Decree of 25 July 1998, n 286, as modified by regulation adopted with Decree of the President of the Republic 10 October 2004, n 334]

DPR 30 maggio 2002, n 115 (Testo unico delle disposizioni legislative e regolamentari in materia di 'spese di giustizia (Testo A)') [Unified text of laws and regulations in matter of 'judicial expenses (Text A)']

DM dell'Interno 18 Aprile 2000, n 142, Tabella A [Ministerial Decree of the Ministry of Interior 18 April 2000 n 142, Table A]

L 5 febbraio 1992, n 91, in materia di 'nuove norme sulla cittadinanza' [Law 5 February 1992, n 91, in matter of 'new provisions on citizenship']

## **Netherlands**

Vreemdelingenbesluit 2000 (Vb 2000) [Aliens Decree 2000]

Vreemdelingendecret 2000 (B) [Aliens Act Implementation Guidelines]

Vreemdelingenwet 2000 (Vw 2000) [Aliens Act 2000]

Wetboek van Strafrecht (WvSr) [Criminal Code]

## **Spain**

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## **Sweden**

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## **United Kingdom**

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### **Secondary National Legislation**

#### **United Kingdom**

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#### **Italy**

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UNGA Res 50/152 (9 February 1996) 50th session UN Doc A/RES/50/152

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## **United Nations Economic Social Council (UNESCO)**

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### **Human Rights Committee (HRC)**

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### **United Nations International Children's Emergency Fund (UNICEF)**

UNICEF 'Birth Registration: Right from the Start' (vol 9, March 2002)

## APPENDIX 4: NATIONAL INFORMANTS

The national informants that provided the information on the treatment of claims for protection made by stateless persons in their State are:

### **Czech Republic**

Alexandra Dubova

Immigration Lawyer

Organizace pro pomoc uprchlíkům (OPU) [Mission of Organization for Aid to Refugees]

Prague

### **France**

Lacene Magali

Solicitor and Legal Trainer

France Terre D'Asile

Paris

Claire Salignat

Immigration Lawyer

Forum Réfugiés

Villeurbanne

### **Germany**

Executive Director

Flüchtlingsrat Nordrhein-Westfalen [Refugee Council North Rhine-Westphalia]

Bochum

Heiko Habbe

Immigration Lawyer

Jesuit Refugee Services

Berlin

Reinhard Marx

Immigration Lawyer

Frankfurt

Staff-member in charge of vulnerable refugees

Flüchtlingsrat Niedersachsen [Refugee Council of Lower Saxony]

Hildesheim

Staff-member

Projekt Q - Qualifizierung der Flüchtlingsberatung

[Project Q – Qualification of Refugee Advice]

Gemeinnützige Gesellschaft zur Unterstützung Asylsuchender e.V.

[Non-profit organization for the support of asylum-seekers]

Münster

### **Greece**

Erika Kalatzi

Immigration Lawyer

Attorney-at-Law (Athens Bar)

Athens

### **Hungary**

Gábor Gyulai

Coordinator of the Refugee Programme and Trainer

Hungarian Helsinki Committee

Budapest

Tamás Molnár  
Head of Unit  
Unit for Migration, Asylum and Border Management, Department of EU Cooperation  
Ministry of Interior [of Hungary] and  
Assistant Professor in the Corvinus University of Budapest Budapest

**Netherlands**

Rombout Hijma  
Immigration Lawyer  
Utrecht

Laura van Waas  
Senior Researcher  
Tilburg University  
Tilburg

**Italy**

Paolo Farci  
Immigration Lawyer  
Firenze

Giulia Perin  
Immigration Lawyer  
Padova

**Spain**

Valeria Cherednichenko  
PhD candidate  
Charles III University of Madrid  
Madrid

Arsenio Cores  
Immigration Lawyer  
Madrid

**Sweden**

Birgitta Elfström  
Former decision maker of the Swedish Migration Board  
Varberg

Bo Johansson  
Lawyer  
Swedish Refugee Advice Centre  
Stockholm

Sanna Vestin  
Chairman of the Swedish Network of Refugee Support Groups (FARR)  
Stockholm

**United Kingdom**

Rob Jones  
Head of Asylum Policy Office  
The Home Office  
London

## ABBREVIATIONS

admin	administrative
AGPS	Australian Government Publishing Service
AIM	Association for Integration and Migration
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
App	Corte d'appello [Court of Appeal]
ASGI	Associazione per Studi Giuridici sull' Immigrazione [Association for Legal Studies on Immigration]
AufentG	Aufenthaltsgesetz [Residence Act]
AUP	Amsterdam University Press
AsylLG	Asylbewerberleistungsgesetz [Asylum Seekers' Benefit Act]
BAMF	Bundesamt für Migration und Flüchtlinge [Federal Office for Migration and Refugees]
BerHG	Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen, Beratungshilfegesetz [Act on Legal Advice Aid and Representation for Citizens on Low Income, Legal Advice Act]
BeschV	Verordnung über die Beschäftigung von Ausländerinnen und Ausländern, Beschäftigungsverordnung [Regulation on employment of aliens – Employment Regulation]
BGBI	Bundesgesetzblatt [Federal Law Gazette]
BJMEIL	Berkeley Journal of Middle Eastern & Islamic Law
BLR	Buffalo Law Review
BOE	Boletín Oficial del Estado [Official Bulletin of the State]
BVerwG	Bundesverwaltungsgericht [Federal Administrative Court]
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts [Federal Administrative Court's Decisions]
BYBIL	British Yearbook of International Law
CAA	Cour administrative d'appel [Administrative Court of Appeal]
CAP	Carolina Academic Press
CE	Conseil d'Etat [Council of State]
C.E.	Constitución Española [Spanish Constitution]
CJEU	Court of Justice of the European Union
CLR	California Law Review
CNDA	Cour nationale du droit d'asile [French National Court of Asylum]
Coll	Collection of Laws ( <i>Sbírka zákonů</i> )
CRR	Commission des Recours des Réfugiés [Refugee Appeals Board]
CSC	Corte Suprema di Cassazione [Supreme Court of Cassation]
CJTL	Columbia Journal of Transnational Law
Corte Cass	Corte di Cassazione [Court of Cassation]
Corte Cost	Corte Costituzionale [Constitutional Court]
CTD	Convention Travel Document
CUP	Cambridge University Press
CZ	Czech Republic
DIC	Diritto, Immigrazione e Cittadinanza
DLgs	Decreto Legislativo [Legislative Decree]
DLJ	Duke Law Journal
DM	Decreto Ministeriale [Ministerial Decree]
DVBl	Deutsches Verwaltungsblatt [German Administrative Law Journal]
DPR	Decreto del Presidente della Repubblica [Decree of the President of the Italian Republic]

EC	European Council
ECHR	European Commission on Human Rights
EDAL	European Database of Asylum Law
EEA	European Economic Area
EIA	Ethics & International Affairs
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
EL	Ergänzungslieferung
ELR	European Law Review
EMN	European Migration Network
ETS	European Treaty Series
EU	European Union
EUDO	European Union Democracy Observatory
EWHC	High Court of Justice of England and Wales
FAC	Federal Administrative Court
FARR	Flyktinggruppernas och asylkommittéernas riksråd [Swedish Network of Refugee Support Groups]
FMR	Forced Migration Review
FMRS	Forced Migration and Refugee Studies Program
FNA	Foreign Nationals Act
GA	UN General Assembly
GER	Germany
GG	Governmental Gazette
GIELR	Georgetown International Environmental Law Review
GILJ	Georgetown Immigration Law Journal
GJPLP	Georgetown Journal on Poverty Law & Policy
GKG	Gerichtskostengesetz [Court Fees Act]
GRE	Greece
HLR	Houston Law Review
HMSO	Her Majesty's Stationery Office
HUP	Harvard University Press
HRQ	Human Rights Quarterly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ID	Identity Card
IJGLS	Indiana Journal of Global Legal Studies
IJRL	International Journal of Refugee Law
IJLPF	International Journal of Law, Policy and Family
IJSRM	International Journal of Social Research Methodology
ILC	International Law Commission
ILO	International Labour Organization
ILR	International Labour Review
IMR	International Migration Review
IND	Immigratie en Naturalisatie Dienst [Immigration and Naturalization Service]
InfAusIR	Informationsbrief Ausländerrecht [Aliens Law Newsletter]
IRO	International Refugee Organization

JIANL	Journal of Immigration Asylum and National Law
JICJ	Journal of International Criminal Justice
JLSP	Journal of Law and Social Policy
JORF	Journal officiel de la République française [Official Gazette of the French Republic]
JRS	Journal of Refugee Studies
JSSL	Journal of Social Security Law
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LQR	Law Quarterly Review
LSR	Law & Society Review
MB	Migration Board
MIG	Migrationsöverdomstolen [Migration Court of Appeal]
MJECL	Maastricht Journal of European and Comparative Law
MJIL	Michigan Journal of International Law
MUP	Manchester University Press
mwN	mit weiteren Nachweisen [with further references]
mWv	mit Wirkung von [with effect as]
NGCC	Nuova Giurisprudenza Civile Commentata
NGO	Non-governmental organisation
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NL	Netherlands
NLR	Nebraska Law Review
NVwZ	Neue Zeitschrift für Verwaltungsrecht [New Journal for Administrative Law]
NYUP	New York University Press
OAR	Oficina de Asilo y Refugio [Office for Asylum and Refuge]
OECD	Organization for Economic Cooperation and Development
OFPROA	Office Français de Protection des Réfugiés et Apatrides [French Office for Protection of Refugees and Stateless Persons]
OGN	Operational Guidance Notes
OIN	Office of Immigration and Nationality (Bevándorlási és Állampolgársági Hivatal)
OPU	Organizace pro pomoc uprchlíkům [Mission of Organization for Aid to Refugees]
OSCE	Organization for Security and Co-operation in Europe
OUP	Oxford University Press
OVG	Oberverwaltungsgericht [Higher Administrative Court]
PASIL	Proceedings of the American Society of International Law
PCIJ	Permanent Court of International Justice
QB	High Court, Queen's Bench Division (England and Wales)
RBDI	Revue Belge de Droit International [Belgian Review of International Law]
RFDA	Revue Française de Droit Administratif [French Review of Administrative Law]
RSQ	Refugee Survey Quarterly

SDLR	South Dakota Law Review
SFS	Svensk författningssamling [Swedish Code of Statutes]
SPRU	Social Policy Research Unit
StAG	Staatsangehörigkeitsgesetz [Nationality Act]
SUP	Stanford University Press
SW	Sweden
TA	Tribunal administrative [Administrative Tribunal]
TFEU	Treaty on the Function of the European Union
TLQ	The Lawyer Quarterly
TLR	Tilburg Law Review
Trib	Tribunale [Tribunal]
UDHR	Universal Declaration of Human Rights
USSR	Union of Soviet Socialist Republics
UK	United Kingdom of Great Britain and Northern Ireland
UKBA	United Kingdom Boarder Agency
UKSC	United Kingdom Supreme Court
UN	United Nations
UNDP	United Nations Development Programme
UNESC	United Nations Economic and Social Council
UNGA	United Nations General Assembly
UNHCR	United Nations Human Rights Council
UNICEF	United Nations International Children's Emergency Fund
UNRIAA	United Nations Reports of International Arbitral Awards
UNRWA	United Nations Relief and Works Agency for Palestinian Refugees in the Near East
UNTS	United Nations Treaty Series
UPLR	University of Pennsylvania Law Review
USD	United States Dollar
v	vom [of]
VBIBW	Verwaltungsblätter für Baden-Württemberg [Administrative Gazette for Baden-Württemberg]
VG	Verwaltungsgericht [Administrative Court]
VGH	Verwaltungsgerichtshof [Higher Administrative Court]
VJIL	Virginia Journal of International Law
WTO	World Trade Organization
WTR	World Trade Review
YLJ	Yale Law Journal
ZPO	Zivilprozessordnung [Civil Procedure Code]



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## Interviews and questionnaires

### Czech Republic

Telephone interview with Alexandra Dubova, Immigration Lawyer, Organizace pro pomoc uprchlíkům (Prague, Czech Republic, 2 January 2014)

### France

Questionnaire reply from Claire Salignat, Immigration Lawyer, Forum Réfugiés (Villeurbanne, France, 15 January 2014)

Telephone interview with Lacene Magali, Solicitor and Legal Trainer, France Terre D' Asile (Paris, France, 27 December 2013)

### Germany

Interview with Heiko Habbe, Immigration Lawyer, Jesuit Refugee Services Berlin (Hamburg, Germany, 9 August 2013)

Interview with Reinhard Marx, Immigration Lawyer (Frankfurt, Germany, 22 July 2013)

Telephone interview with Executive Director of the Refugee Council North Rhine-Westphalia (*Flüchtlingsrat Nordrhein-Westfalen*) (Bochum, Germany, 14 March 2014)

Telephone interview with staff-member in charge of vulnerable refugees, Refugee Council of Lower Saxony (*Flüchtlingsrat Niedersachsen*) (Hildesheim, Germany, 2 May 2014 and 12 May 2014)

Telephone interview with staff member of the Department 'Project Q – Qualification of Refugee Advice', Non-profit Association for the Support of Asylum-seekers (*Projekt Q - Qualifizierung der Flüchtlingsberatung, Gemeinnützige Gesellschaft zur Unterstützung Asylsuchender e.V.*) (Münster, Germany, 14 March 2014)

### Greece

Questionnaire reply from Erika Kalatzi, Immigration Lawyer (Athens, Greece, 22 December 2013)

### Hungary

Questionnaire reply from Gábor Gyulai Information Officer and UNHCR Liaison, Hungarian Helsinki Committee, to author (Budapest, Hungary, 20 January 2014)

Telephone interview with Tamás Molnár, Head of Unit, Unit for Migration, Asylum and Border Management, Department of EU Cooperation, Ministry of Interior [of Hungary] and Assistant Professor in the Corvinus University of Budapest (Budapest, Hungary, 16 December 2013)

### **Netherlands**

Questionnaire reply from Laura van Waas, Senior Researcher Tilburg University, to author (Tilburg, the Netherlands, 14 January 2014)

Questionnaire reply from Rombout Hijma, Immigration Lawyer, to author (Utrecht, The Netherlands, 30 January 2014).

### **Italy**

Questionnaire reply from Paolo Farci, Immigration Lawyer, to author (Florence, Italy, 27 November 2013)

Telephone interview with Giulia Perin, Immigration Lawyer (Padova, Italy, 6 December 2013)

### **Spain**

Telephone interview with Arsenio Cores, Immigration Lawyer (Madrid, Spain, 11 December 2013)

### **Sweden**

Telephone interview with Birgitta Elfström, Lawyer, Former Decision-Maker of the Swedish Migration Board (Varberg, Sweden, 17 February 2014)

Telephone interview with Bo Johansson, Lawyer, Swedish Refugee Advice Centre (Stockholm, Sweden, 17 December 2013)

### **United Kingdom**

Telephone interview with Rob Jones, Head of Asylum Policy Office, The Home Office (London, 6 August 2013)

## **Personal Communications**

### **Germany**

Email from Dr. Roland Bank to author (4 April 2014)

### **Hungary**

Conversation with Gábor Gyulai, First Global Forum on Statelessness (The Hague, Netherlands, 16 September 2014)

### **Italy**

Email from Giulia Perin to author (20 and 21 March 2014)

### **Netherlands**

Conversations with experts, First Global Forum on Statelessness (The Hague, Netherlands, 15-17 September 2014)

Email from Igna Oomen to author (27 February 2014)

**Spain**

Email from Immigration Officer to author (18 September 2009)

Email from Valeria Cherednichenko to author (24 December 2013)

**Sweden**

Email from Birgitta Elfström to author (20 February 2014)

Email from Bo Johansson to author (2 January 2014)

Email from Sanna Vestin to author (17 February 2014)

**United Kingdom**

Conversation with Chris Nash, International Protection Policy Coordinator, Asylum Aid (London, 18 June 2013)

Conversations with UK practitioners and policy-makers, First Global Forum on Statelessness (The Hague, Netherlands, 15-17 September 2014)

**International event**

Conversations with experts at the European Network on Statelessness 'Training the Trainer' event (Strasbourg, France, 22 September 2015)