Protection and identification of stateless persons through EU law

Swider, K.

DOI
10.2139/ssrn.2464009
Publication date
2014
Document Version
Submitted manuscript

UNIVERSITY OF AMSTERDAM

PROTECTION AND IDENTIFICATION OF STATELESS PERSONS THROUGH EU LAW

Katja Swider

Amsterdam Law School Legal Studies Research Paper No. 2014-38

Amsterdam Centre for European Law and Governance Research Paper No. 2014-05

Protection and Identification of Stateless Persons through EU Law

Katja Swider, LL.M.

Amsterdam Centre for European Law and Governance
Working Paper Series 2014 - 05

Available for download at www.acelg.uva.nl/publications
or at the author's SSRN page

University of Amsterdam

Katja Swider is a PhD candidate at the University of Amsterdam, working on her thesis 'Identification of Statelessness in Europe', funded by the the Netherlands Organisation for Scientific Research (NWO). The author is grateful to Prof. Leonard Besselink, Dr Elaine Fahey (both University of Amsterdam), and Franz Ebert (Max Planck Institute for Comparative Public Law and International Law, Heidelberg) for very helpful comments on the earlier versions of this paper..

July 2014

Address for correspondence
Katja Swider, LL.M.
University of Amsterdam
Amsterdam Centre for European Law and Governance
P.O. Box 1030
NL – 1000 BA Amsterdam
The Netherlands
Email:k.j.swider@uva.nl

I. **Introduction**

A number of recent studies confirm that statelessness is a widespread phenomenon in the EU, which is not receiving adequate attention.[1] The lack of well-functioning statelessness determination procedures is at the root of many problems associated with statelessness in the EU. These are, in particular, the inadequate protection of stateless persons and deficiencies in the prevention and reduction of statelessness. This paper argues in favour of common EU action on the identification and protection of stateless persons by analyzing the EU competence to pass relevant legislation, and explaining the desirability for such legislation.

The UNHCR has emphasized the importance of statelessness determination procedures in recent years.[2] Many EU Member States are taking steps to improve the identification mechanisms for stateless persons. Considering the EU's potential in steering its Member States' laws and policies, it is interesting to explore the possible role of the EU in this process.

The remainder of this paper is structured as follows. Part II provides background information on the problem of statelessness from the point of view of international law, and highlights the place of statelessness in the EU laws and policies nowadays. Part III focuses on EU competence to pass legislation on the protection and identification of stateless persons. It demonstrates that the identification and protection of stateless persons falls well within the EU's established powers in the field of migration, and that Member States' sovereignty over nationality matters forms no obstacle for exercising these powers. Part IV discusses the desirability of regulating statelessness determination and setting minimum standards for the protection of stateless persons at the EU level. Among others, it argues that relevant

[1] See C. Sawyer and B.K. Blitz '*Statelessness in the European Union. Displaced, Undocumented, Unwanted*' (Cambridge University Press 2011); G. Bittoni 'Statelessness in the European Union *The Case of Cuban Migrants' Tilburg Law Review* 19 (2014), pp. 52-63. See also UNHCR research projects on statelessness in Europe, in particular 'Mapping Statelessness' reports on UK, the Netherlands and Belgium, available here: <www.refworld.org/statelessness.html>. UNHCR has an official estimate that 680,000 stateless persons live on the European continent.

[2] See UNHCR's Guidelines on Statelessness, available here: <www.refworld.org/statelessness.html>. See also country-specific studies, in particular 'Mapping Statelessness' reports on Belgium, the Netherlands, and the UK, available on the same website.

EU legislation is necessary for the optimal implementation of two UN Statelessness Conventions in the EU, and for achieving coherence with the EU's foreign policy ambitions in this field.

An important issue which this paper does not address is the political feasibility of setting common standards of access to yet another form of protection status in the EU. The Stockholm Programme which set the EU agenda on migration for years 2010-2014 for was ambitious and challenging, and perhaps has exhausted the policy makers in Brussels. Also, the growing popularity of right-wing anti-immigration political parties does not create an optimal climate for introducing new measures on protection of vulnerable groups of non-nationals. The political will is decisive in whether statelessness will be addressed on the EU level. This paper illustrates that there is a need for an EU-wide action and that the EU has relevant competence and experience to undertake such action. It is up to the world of politics to work with the available legal tools and arguments to promote change for the better.

II. **Background**

A. Statelessness in international law

Definition and its implementation in practice

The UN defines a stateless person as a person 'who is not considered as a national by any State under the operation of its law'.[3] It is a negatively formulated definition, where statelessness is described in terms of absence of the legal status of nationality. Such a definition requires further elaboration in order to be implementable in practice. Proving that one is not a national of any state in the world is virtually impossible. Therefore, when applying the definition of a stateless person to a particular individual, the concept of 'any State' needs to be narrowed down.[4] Issues may also arise as to whether a specific political entity is to be considered as a 'State'

[3] Article 1 of the 1954 UN Convention Relating to the Status of Stateless Persons.

[4] See more on the definition of a stateless person in UNHCR's Guidelines on Statelessness of 2012, in particular 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' of 20 February 2012 and Guidelines on Statelessness No. 2 'Procedures for Determining whether an Individual is a Stateless Person' of 5 April 2012, available here <www.refworld.org/statelessness.html>.

for the purposes of application of the definition.[5] Substantiating statelessness can involve evidentiary challenges. Statelessness is rarely a well-documented fact, as there are per definition no state authorities obliged to provide an individual with documentation. Therefore establishing whether an individual 'is not considered as a national […] under the operation of […] law' may require considering a wide range of legal and factual evidence.[6]

Causes of statelessness

The causes of statelessness are varied. On the technical level statelessness always results from a loss or a non-acquisition of nationality, but the root causes of this problem can be traced to a variety of factors and circumstances. These may include structural discrimination of a minority group,[7] inequality between men and women in their rights to acquire a nationality and pass it on to their children[8] and deficient birth registration mechanisms.[9] Statelessness often occurs in the context of state succession, when some of the nationals of the predecessor state fail to acquire a nationality of any of the successor states.[10] Sometimes statelessness is caused by the so-called 'conflict of laws' – an unfortunate combination of nationality laws from different states that apply to the same person, often in the context of migration and international families.[11] This is not an exhaustive list of causes of statelessness,[12] and often a specific case can be explained by more than one factor.

---

[5] This holds for people who are considered as nationals by entities that do not enjoy universal recognition as states, such as Taiwan or Palestine.

[6] See more in UNHCR Guidelines on Statelessness No. 1, paras. 16-17, and Guidelines on Statelessness No. 2, para 32, available here <www.refworld.org/statelessness.html>.

[7] For example, see C. Lewa 'North Arakan: an open prison for the Rohingya in Burma' and A. H. A. 'Kenyan Nubians: standing up to statelessness' *Forced Migration Review*, Issue 32, April 2009, pp. 11-13, pp. 19-20.

[8] See C. L. Bredbenner '*A Nationality of Her Own: Women, Marriage, and the Law of Citizenship*', University of California Press (1998).

[9] S. Heap, C. Cody 'The Universal Birth Registration campaign' *Forced Migration Review*, Issue 32, April 2009, pp. 20-22; M. Lynch, M. Teff 'Childhood statelessness' *Forced Migration Review*, Issue 32, April 2009, pp. 31-33.

[10] Mike Sanderson, 'Statelessness and Mass Expulsion in Sudan: A Reassessment of the International Law' (2014) 12 *Northwestern Journal of International Human Rights,* pp. 74-114; K. Southwick 'Ethiopia-Eritrea: statelessness and state succession' *Forced Migration Review*, Issue 32, April 2009, pp. 15-18, Joanne van Selm 'Stateless Roma in Macedonia' *Forced Migration Review*, Issue 32, April 2009, pp. 46-48.

[11] O. Vonk, M. Vink, G.-R. de Groot 'Protection against statelessness: trends and regulations in Europe' (May 2013, *EUI Working Paper*), pp. 10-11.

[12] For an example of a potential ecological cause, see H. Alexander, J. Simon 'Sinking into Statelessness' *Tilburg Law Review* 19 (Brill Nijhoff, 2014), pp. 20-25.

Consequences of statelessness

A stateless person is usually faced with a number of legal and practical problems, which may include the inability to prove his or her identity, to travel, to register marriage or partnership, to access healthcare, employment, or housing, and so on.[13] Statelessness does not have to result in a humanitarian problem, or grave violations of basic human rights. If adequate identification and protection mechanisms are in place in a specific state, stateless persons residing there can have access to basic rights, or even enjoy all the benefits available to nationals.[14] However, such mechanisms are often missing, as very few national legal systems worldwide have procedures in place to even identify stateless persons on their territories.

Addressing statelessness: identification, protection, prevention, and reduction

The UNHCR suggests tackling statelessness by setting four goals: the identification and protection of stateless persons, and the prevention and reduction of statelessness.[15]

The last three goals, namely the protection of stateless persons, and the prevention and reduction of statelessness, have been recognised in international law for many years, and even feature in treaties from before the UN era.[16] Nowadays, two UN

[13] O. Vonk, M. Vink, G.-R. de Groot 'Protection against statelessness: trends and regulations in Europe' (May 2013, *EUI Working Paper*), pp. 11-13. See also A. Hussein Adam 'Kenyan Nubians: standing up to statelessness', *Forced Migration Review*, Issue 32, April 2009, pp. 19-20; Zahra Albarazi 'No Legal Bond, No Family Life', *Tilburg Law Review* 19 (Brill Nijhoff, 2014), pp. 11-19.

[14] An example of the latter is a small stateless population originating from Moluccas islands in the Netherlands; see more in Adviescommissie Vreemdelingenzaken 'Geen land te bekennen' (Dutch Advisory Committee on Migration Affairs 'No country of one's own'), Dec. 2013, pp. 31-32.The non-citizens of Latvia and Estonia are examples of stateless populations with access to decent standard of living in their countries of residence (even though their lack of citizenship is highly controversial from the political point of view, and they lack a number of political rights). See more on non-citizens of Latvia in K. Kruma, 'Checks and balances in Latvian nationality policies: National agendas and international frameworks', in R. Bauböck, B. Perchinig, W. Sievers (eds.) '*Citizenship Policies in the New Europe*' (Amsterdam University Press, 2009), pp. 63-88.

[15] UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 6 October 2006, No. 106 (LVII), available at: <www.refworld.org/docid/453497302.html>.

[16] For example, the Hague Convention on Certain Questions Relating to the Conflict of Nationality Law of 1930, Arts. 7-9, 14-16; the Treaty between the Principal Allied and Associated Powers and Romania (Romanian Minorities Treaty) of 9 December 1919, Art. 7. See more in R. Donner '*The Regulation of Nationality in International Law*', 2nd edition (Transnational Publishers 1994), p. 154.

Statelessness Conventions are at the core of the international statelessness regime, and specifically aim to achieve these three goals. The 1954 Convention Relating to the Status of Stateless Persons focuses on the protection of stateless persons by guaranteeing them various political, social and economic rights within the jurisdictions of the contracting states. The 1961 Convention on the Reduction of Statelessness aims at preventing statelessness from occurring, and reducing the existing cases of statelessness, by setting standards regarding rules on the acquisition and loss of nationality of contracting states.

The identification of stateless persons has only recently been recognised as an issue requiring separate attention. It is closely connected to the other three goals. The protection of stateless persons often fails because of the deficient or non-existent identification practices. The reduction and prevention of statelessness can also be negatively affected by problems in the identification of stateless persons. The identification of stateless persons was therefore one of the major issued addressed in the UNHCR's set of Guidelines on Statelessness, published in the course of 2012 (hereafter, the Guidelines).[17] It needs to be pointed out that neither of the two UN Statelessness Conventions places an explicit obligation on contracting states to establish a statelessness determination procedure. The Guidelines maintain, however, that this obligation is implied in the Conventions.[18] A parallel can be drawn with the UN Refugee Convention,[19] which also does not contain an explicit obligation to establish a refugee determination procedure, but with regard to which the implicit obligation to do so has been recognised for decades already. [20] The reasoning in both cases is that it is impossible to comply with the Conventions if the beneficiaries of the rights guaranteed in them are not identified.

[17] Guidelines on Statelessness Nos. 1, 2, 3 and 4, available here: <www.refworld.org/statelessness.html>, under 'Statelessness Policy and Doctrine'. The Guidelines are not a legally binding document, but they are an official interpretation of the obligations imposed on state parties by the two UN Statelessness Conventions.

[18] See UNHCR Guidelines on Statelessness, Guideline No. 2, para 1. See also Inge Sturkenboom 'De identificatie van staatloosheid is een plicht' ('Identification of statelessness is an obligation') , *Asiel- en Migrantenrecht* 2013, Nr. 05/06 , pp. 261-265.

[19] 1951 UN Convention Relating to the Status of Refugees.

[20] See, for example, 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, as re-edited in January 1992, HCR/IP/4/Eng/REV.1, in particular para. 189.

B. Statelessness in the EU: Status Quo

The European Union refers to stateless persons in its laws, but its involvement in addressing the problem of statelessness has so far been very limited.

Article 67(2) of the Lisbon Treaty introduced the first EU treaty-level mention of statelessness, by asserting that 'stateless persons shall be treated as third country nationals'. This provision reflects one of the basic requirements of 1954 Convention Related to the Status of Stateless Persons, namely that stateless persons should be accorded the 'same treatment as is accorded to aliens generally'.[21]

Stateless persons are addressed in some of the EU legislation on immigration and asylum, but only in so far as they fall within the scope of that legislation.[22] No EU measure is specifically designed for the needs of stateless persons, such as for their identification, or for a separate protection regime on the basis of statelessness. Statelessness rarely appears on EU's policy documents and mission statements as a problem to be addressed. A few notable exceptions include a resolution by the European Parliament of 2009, where the problem of statelessness is mentioned.[23] Also, in 2012 the EU Member States pledged to the UN that those of them which have not done so yet will ratify the 1954 Convention, and will consider the ratification of the 1961 Convention.[24] While these developments indicate some interest in the issue from the EU, they are not yet a sign of a commitment to tackle statelessness at the EU level. An indication to the contrary is the recent communication from the Commission on the latter's vision regarding the future of EU migration policy, which contains no reference to statelessness.[25]

---

[21] Article 7(1) of the 1954 Convention Relating to the Status of Stateless Persons.
[22] See more in T. Molnar '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' 51 *Acta Juridica Hungarica*, pp. 300-304.
[23] European Parliament Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI)), paras 50, 105.
[24] EU Pledge to the UN of 19 September 2012, section A, para 4, available here: <www.unrol.org/files/Pledges%20by%20the%20European%20Union.pdf>.
[25] Communication from the Commission 'An open and secure Europe: making it happen', Brussels, 11th of March 2014, No. COM(2014) 154, available here: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/an_open_and_secure_europe_-_making_it_happen_en.pdf>.

The potential benefits of EU-wide action on statelessness are from time to time pointed out by researchers, and international and civil society organization.[26] In 2005 a UNHCR study on the implementation of the 1954 Convention in the EU Member States was published, pointing out a number of areas related to the protection of stateless persons which could benefit from EU harmonization.[27] These included the identification mechanisms, conditions for permitting lawful stay, mutual recognition of travel and identity documents and outcomes of the decisions on status determination, readmission to countries of previous residence, and treatment of stateless persons in Member States other than the one who granted the lawful residence. There has been, however, no follow-up on these recommendations on the EU level, and the UNHCR also seems to have stopped pursuing the issue. More recent academic publications advocate for soft-law EU measures on statelessness, assuming that there is no EU competence to pass relevant legislation.[28]

Statelessness is also a topic on the foreign policy agenda of the EU. Specifically, the EU pledged to the UN to develop a framework for raising the issue of statelessness with third countries by 2014.[29] What exactly such a framework would entail remains to be seen, but so far the EU has mainly been criticized for not doing enough to address statelessness abroad.[30] The expectation exists that with more consistent and

---

[26] G. Gyulai 'Statelessness in the EU Framework for International protection', *European Journal of Migration and Law* 14 (2012), p. 284, pp. 294-295; T. Molnar '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' 51 *Acta Juridica Hungarica*, p. 303; L. van Waas 'EU Citizenship for Stateless People?', *European Network on Statelessness Blog*, 5 November 2013, available here: <www.statelessness.eu/blog/eu-citizenship-stateless-people>.

[27] C. Batchelor 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization' *Refuge*, Vol. 22, No. 2 (2005), pp. 31-58.

[28] G. Gyulai 'Statelessness in the EU Framework for International protection', *European Journal of Migration and Law* 14 (2012), p. 284, pp. 294-295; T. Molnar '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' 51 *Acta Juridica Hungarica*, p. 303.

[29] EU Pledge of 19 September 2012, Section B, para 3.1, text available here: <www.unrol.org/files/Pledges%20by%20the%20European%20Union.pdf>.

[30] D. Kochenov 'EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic', *Journal of Contemporary European Research*, Vol. 3, Issue 2, pp. 124-140; **C. Liguori 'Dominican Republic: Stateless People are No-Rights People', Amnesty International Blog, 5 February 2014, accessible here: <**www.amnesty.eu/en/news/blog/dominican-republic-stateless-people-are-no-rights-people **>**, visited on 31 March 2014.

clear external policies on statelessness the EU could contribute to solving problems related to statelessness outside its borders.

III. EU competence to identify and protect stateless persons through legislation

The existing literature on statelessness in EU law assumes the lack of EU competence to pass legally binding legislation on statelessness, and therefore concludes that the potential for EU involvement with statelessness is limited to soft-law measures.[31] This assumption is, however, not entirely correct. It is true that Member States still retain nearly complete sovereignty on granting and withdrawing nationality,[32] and therefore the harmonization of EU rules on the reduction and prevention of statelessness through nationality laws would not be acceptable under the current treaty regime. However, the range of problems associated with statelessness goes far beyond the domain of nationality law. In particular, the protection and identification of stateless persons mainly needs to be addressed through the field of migration law. The EU has well established competence in the field of migration, and can develop mechanisms for the identification and protection of stateless persons.

A. Protection and identification of stateless persons as a migration issue

The identification and protection of stateless persons are the most pressing statelessness related objectives in the EU nowadays. This is evidenced, among others, by the recent UNHCR country case studies on statelessness in the EU, where most recommendations concern the identification and the protection of stateless persons, and only few address the issues of prevention and reduction of statelessness.[33] NGO reports and academic publications focusing on statelessness in European states also

[31] See, for example, G. Gyulai 'Statelessness in the EU Framework for International protection', *European Journal of Migration and Law* 14 (2012), p. 284. Similar opinion has been expressed by T. Molnar in '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' 51 *Acta Juridica Hungarica*, p. 304 and in 'Moving Statelessness Forward on the International Agenda', *Tilburg Law Review* 19 (2014), p. 198.
[32] See more in section B below.
[33] UNHCR Mapping Projects: '*Mapping Statelessness in the United Kingdom*' of November 2011; '*Mapping Statelessness in the Netherlands*' November 2011; '*Mapping Statelessness in Belgium*' of October 2012.

tend to emphasize protection and identification.[34] A comparative study on prevention of statelessness by Vonk and others illustrate that EU Member States already have extensive safeguards in their nationality laws against creating cases of statelessness.[35] This is not the case with the identification and protection of stateless persons, where the necessary legal frameworks are either missing, or suffer from serious deficiencies.[36]

Protection

The protection of stateless persons needs to be achieved predominantly through the domain of migration law.[37] That is not to say that all stateless persons are necessarily migrants. Some are stateless in the country they were born in, and never crossed any state borders.[38] However, even those individuals often depend on the rules of migration law for access to their rights. Nationals have an undisputed right of residence in their state, and the non-nationals, on the other hand, need a legal ground for a permission to reside. Stateless persons belong to the category of non-nationals, also if they have never 'immigrated' into the country, and therefore the regulation of their residence status and the rights attached to it falls within the sphere of migration law.

---

[34] C. Batchelor 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization' *Refuge*, Vol. 22, No. 2 (2005), pp. 31-58. K. Bianchini 'On the Protection of Stateless Persons in Germany', Tilburg Law Review 19 (2014) pp. 35-51; Adviescommissie Vreemdelingenzaken (Dutch Advisory Committee on Migration Affairs) '*Geen land te bekennen*' ('No country of one's own'), December 2013, available here: <www.acvz.org/publicaties/Advies_39-WEB-DEF.pdf>; G. Gyulai '*Forgotten Without Reason: Protection of Non-Refugee Stateless Persons in Central Europe*', (Hungarian Helsinki Committee, Budapest 2007).

[35] See O. Vonk, M. Vink, G.-R. de Groot 'Protection against statelessness: trends and regulations in Europe' (May 2013, *EUI Working Paper*), pp. 105-108. The report raises a number of concerns regarding the prevention and reduction of statelessness in Europe, but illustrates that the core legal mechanisms for achieving these goals are usually in place.

[36] Note 33 above.

[37] Some aspects of protection of stateless persons may be regulated outside of the sphere of migration law. One can argue that the ultimate form of protection that a state can offer to stateless persons is granting them the nationality of that state, which is done through nationality laws. Even though many EU Member States at least in theory facilitate access to nationality for stateless persons, the road to naturalization often takes years, and nearly always requires obtaining a legal residence permit first.

[38] See, for example, report on the stateless Roma in the Netherlands: Dokters van de Wereld '*Stateloos Maakt Radeloos. De situatie van stateloze Roma in Nederland*' (Stateless Renders Desperate. The situation of stateless Roma in the Netherlands'), (March 2010).

The most obvious way to provide protection to stateless persons is to grant them a residence permit. Persons enjoying legal residence in the EU have at least in theory access to a wide package of rights. However, protection does not always need to take the form of providing a residence permit. Stateless persons on a territory of a state may not be interested in establishing residence in that state – they may aspire to settle abroad, but be unable to organize it without state assistance. Moreover, there is no international obligation to offer every stateless person on the state's territory a right to legal residence. The 1954 Convention does not contain such a requirement. If no legal residence is offered to a stateless person, a solution involving another country which can offer the stateless person adequate protection may be appropriate. Deportations and voluntary assisted returns therefore play a role in addressing the issues of statelessness, and these also form an integral part of national and European migration policies.

Thus, the aspects of statelessness that need to be addressed through migration law are the regularization of residence of stateless persons, for example through permits on the basis of subsidiary protection, as well as the regulation of return to a previous country of residence. The EU has competence to address these issues on the basis of Title V, Chapter 2 TFEU, and has already extensively legislated on such matters in the context of asylum law.[39]

Identification

The protection of stateless persons requires their identification. If the protection takes the form of a residence status on the ground of statelessness, the mechanism for establishing statelessness is essential for access to this status. If stateless persons are not granted legal residence, it is still very important to have their statelessness formally established, since that might have an impact on the decisions relating to deportations and voluntary returns. A common EU minimum standard for the protection of stateless persons is only meaningful if the criteria for determining who is stateless are also regulated on the EU level. The situation can be compared to the

[39] Title V, Ch. 2 of the TFEU, in particular Arts. 78 and 79. See also Directives 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, 2008/115/EC of 16 December 2008 on common standards and for returning illegally staying third-country nationals, 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.

Common European Asylum System, where the establishment of the minimum standards for asylum status determination played a central role.

Treaty basis

Careful consideration needs to be given to the selection of a specific Treaty basis for EU legislation on the identification and protection of stateless persons. Article 78 TFEU regulates the procedure for adopting legislation in the field of Common EU Asylum Policy, and Article 79 TFEU empowers the EU to legislate on other forms of immigration to the EU. Statelessness is a peculiar ground for a residence permit in this context. On the one hand, the aim of such a permit would be to provide protection for an individual who is vulnerable due to the lack of a nationality bond with any state. On the other hand, stateless persons do not require same type of protection as asylum seekers, as no typical asylum concerns regarding persecution and non-refoulement are at stake. Except of course if a stateless person also happens to be an asylum seeker, in which case the asylum considerations would form the basis for protection.[40] Some EU Member States group statelessness together with asylum-related procedures, while others approach it as a non-asylum issue. In France, for example, stateless persons and asylum seekers are assisted by the same state authority, the French Office for Protection of Refugees and Stateless persons.[41] In the Netherlands, on the other hand, the residence status originally intended for stateless persons (*buiten schuld vergunning*) is grouped together with non-asylum residence statuses.[42] The wording of both TFEU articles provides sufficient flexibility to serve as a basis for EU legislation on the identification and protection of stateless persons.

Molnar suggests considering yet another legal basis for EU legislation on statelessness, namely Article 67(2) in conjunction with Article 352 TFEU.[43] As described above, Article 67(2) TFEU provides that 'stateless persons shall be treated as third country nationals'. Article 352 TFEU is the so-called 'flexibility clause' of EU competences, allowing 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

[40] See UNHCR Guidelines on Statelessness No. 2, paras. 26-30.
[41] French Office for Protection of Refugees and Stateless persons (OFPRA), see more here: <www.ofpra.gouv.fr>.
[42] Vreemdelingenbesluit (Decision implementing the Dutch Law on Foreigners) 2000, art. 3.4 (1w).
[43] See in T. Molnar 'Moving Statelessness Forward on the International Agenda', *Tilburg Law Review* 19 (2014), footnote 21 on p. 198.

powers'. It could be argued that by mentioning stateless persons and equating their status to those of third country nationals the Treaty brings statelessness within the scope of its objectives, and while no Article that provides legislative competences to the EU explicitly mentions statelessness, Article 352 can be relied on.
Article 67(2), however, can also be interpreted as reinforcing the suitability of Articles 78 or 79 as a legal basis for the legislation on the protection and identification of stateless persons. If stateless persons are to be treated as third country nationals in the context of EU law, then whenever the EU is competent to regulate certain issues relating to third country nationals it is also competent to regulate such issues in relation to stateless persons.

B. Impact on the Member States' sovereignty in the field of nationality

EU legislation on the identification and protection of stateless persons is likely to have an impact on the nationality laws and policies of Member States. The criteria for determining whether an individual is stateless may specifically affect the prevention and reduction of statelessness through nationality law. For example, if in order to reduce statelessness a Member State offers facilitated naturalization to stateless persons, the way in which an individual can substantiate his or her statelessness will affect the functioning of the provision on facilitated naturalization.[44]

Does the current EU treaty regime allow for the EU legislation to have influence nationality laws and policies of Member States in this way? In order to answer this question, a closer look at the development of the Member States' sovereignty on nationality matters within the EU constitutional order is needed.

[44] For example, the Dutch Law on Nationality ensures the right to Dutch nationality for stateless children born in the Netherlands, and facilitates naturalization for stateless persons residing in the Netherlands (Rijkswet op het Nederlanderschap (Dutch Law on Nationality) of 1984, arts. 6(1b) and 8(4)). The lack of statelessness determination procedure in the Netherlands has an adverse effect on the functioning of these provisions. See Adviescommissie Vreemdelingenzaken (ACVZ, Dutch Advisory Committee on Migration Affairs) '*Geen land te bekennen. Een advies over de verdragsrechtelijke bescherming van staatlozen in Nederland*' ('No country of one's own. An advice on the protection of stateless persons in the Netherlands as required by international conventions') of December 2013, available here: <www.acvz.org/publicaties/Advies_39-WEB-DEF.pdf>, pp. 55-56.

The EU Member States have been protective of their sovereignty on nationality since the concept of European Citizenship started gaining increasing importance. The Treaty of Lisbon contains a disclaimer to the Article on European citizenship, which reads:

> 'Citizenship of the Union shall be additional to and not replace national citizenship'.[45]

The disclaimer has been in force since the Treaty of Amsterdam in 1997, albeit with slightly different wording.[46] When the Treaty of Maastricht just introduced the concept of European Citizenship into the Treaty texts in 1992, Member States have already expressed their will to retain sovereignty on nationality matters in a number of documents.[47] The Edinburgh Decision, adopted by the Representatives of the Member State Governments meeting in the framework of the European Council to clarify the Treaty of Maastricht, affirms that '[t]he question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.'[48] Exactly the same message features in the Declaration No. 2 on nationality of a Member State, [49] annexed to the Treaty on European Union in 1992. Interestingly, this declaration has been dropped during the latest amendment of the European Union Treaties by the Treaty of Lisbon in 2009. The disappearance of the declaration from the Treaty texts has largely gone unnoticed, and the declaration is still occasionally referred to in post-Lisbon documentation.[50] However, the exclusion of the Declaration from the TFEU was not a coincidence, and needs to be seen as part of the continuing search for balance between the EU's and Member States' competences in nationality matters.

---

[45] Art. 20 (1) of the Treaty on the Functioning of the European Union.

[46] Article 8(1) of the Treaty Establishing the European Community, as amended by the Treaty of Amsterdam of 1997, which reads 'Citizenship of the Union shall complement and not replace national citizenship'. See for the commentary on the change of wording N. Nic Shuibhne 'EU Citizenship After Lisbon' in D. Ashiagbor, N. Countouris, I. Lianos (eds.) 'The European Union After the Treaty of Lisbon' (Cambridge University Press 2012), p. 139.

[47] Edinburgh Decision of 1992, OJ 1992, C 348, p. 1; Declaration No. 2 on Nationality of a Member State, annexed to the Treaty on European Union, (OJ 1992 C 191, p. 98).

[48] Edinburgh Decision of 1992, OJ 1992, C 348, p. 1.

[49] Declaration No 2 on Nationality of a Member State, annexed to the Treaty on European Union (OJ 1992 C 191, p. 98).

[50] See, for example, Opinion of the Advocate General Szpunar of 20 May 2014 in Case C-202/13 'McCarthy and others v. Secretary of State for the Home Department', para 45, footnote 24.

Even though based on the Treaty texts the EU does not have explicit competence to regulate the acquisition and loss of nationalities of Member States, the influence of EU law on nationality matters is inevitable and frequent. At the current state of development of EU law it is apparent that the EU has a strong impact on Member States' nationality laws and policies through, for example, the formation of the rights of EU citizens, the legislation on asylum and immigration, and the case law of the ECJ.

The legislation on the rights of European citizens and on asylum and immigration has an impact on the regulation of access to nationality in Member States. For example, the requirement of legal residence for a certain number of years is usually central to accessing nationality through naturalization. Individuals who derive their right to reside legally in a Member State through EU legislation may qualify for naturalization because of such legislation.[51] The case of *Zhu and Chen*[52] and the amendment of the Irish nationality law[53] which followed this judgment present an interesting example of how the EU free movement rights affected a Member State's policy on the acquisition of nationality by birth *iure soli*.

In addition, an established line of case law of ECJ requires the Member States to have 'due regard' to EU law when regulating access to their nationalities.[54] The exact meaning of what this broad concept of the 'due regard' entails is being gradually defined by the ECJ in its case law on EU citizenship. The *Rottmann* judgment[55] specified that particularly when statelessness is at stake, the ECJ is prepared to hold Member States' nationality practices to high international standards.

[51] See more in K. Swider 'Pre-Accession Changes to Residence-based Naturalisation Requirements in Ten New EU Member States', (EUI *Working Paper Series* 2010), pp. 3-4.
[52] ECJ, case C-200/02 Zhu and Chen of 19 October 2004.
[53] Irish Nationality and Citizenship Act of 2004, No. 38, Amending Irish Nationality and Citizenship Act of 1956, adopted on the 15th December 2004, entered into force on the 1st January 2005. See also Act on the Twenty-Seventh Amendment of the Irish Constitution of 24th June 2004, based on the referendum on the 11th of June 2004. See also Rostek and G. Davies, 'The Impact of Union Citizenship on national citizenship', *European Integration Online Paper*, July 2006, part 3.3.
[54] See ECJ C-369/90, Micheletti, 7 July 1992, and other judgments that followed on nationality matters within Member States, such as C-192/99, Kaur, 20 February 2001; C-200/02, Zhu and Chen, 19 October 2004.
[55] Judgment of the ECJ C-135/08, Rottmann, 2 March 2010.

Finally, as De Groot argues, Member States are bound by the general principles of the EU law when creating law and policy relating to nationality.[56] For example, EU law stands in the way of Member States passing nationality laws that violate the principle of solidarity among the Member States, the general principles of EU law relating to human rights, and the fundamental EU right of freedom of movement of persons. The dynamic development of the body of general principles of EU law may lead to other influences on the nationality laws and policies of Member States in future.

In conclusion, even though the EU does not have explicit competence to pass legislation on the acquisition and loss of nationalities of Member States, the latter's sovereignty on nationality matters is not absolute within the EU, and is routinely influenced by other EU laws and policies. Such influences do not contradict the primary legislation on which the EU is based, and have been repeatedly condoned by the ECJ. Therefore, the fact that common EU standards on the identification and protection of stateless persons may have an impact on access to Member States nationalities is by no means an obstacle for the development of such standards.

C. Subsidiarity

Even if the EU has the competence to legislate on the identification and protection of stateless persons, the principle of subsidiarity requires establishing that the EU level is the most appropriate one to pass such measures, as opposed to the national or local levels.[57] The section below discusses a number of reasons why the objectives related to the protection and identification of statelessness can best be achieved at the EU level. In particular, only a coordinated effort by the EU will avoid the 'race to the bottom' phenomenon, and moreover an EU standard is necessary for the consistent interpretation of already existing legislation that addresses stateless persons.

[56] R.-G. de Groot 'Towards a European Nationality Law' in H. Scheinder (ed.) '*Migration, Intergration and Citizenship. A Challenge for Europe's Future*' (Forum Maastricht 2005), Volume I, pp. 23-34.
[57] Article 5 TEU.

IV. Justification for EU legislation on identification and protection of stateless persons

As mentioned in the introduction, statelessness is a widespread phenomenon in the European Union, which is not handled adequately, despite the high ratification rate of the two UN Statelessness Conventions. Only very few of the EU Member States have statelessness determination procedures in place within their national systems,[58] and this has been recognized as the most urgent action point as far as statelessness is concerned.[59]

Thus, EU Member States need to improve their statelessness identification mechanisms in order to comply with their international treaty obligations in this field. However, the question remains whether the EU should get involved in this process.

Three criteria for assessing the desirability of EU legislation on statelessness are applied: achievement of best possible compliance by the Member States with their international law obligations on statelessness, coherence between the external and internal rule-making agenda of the EU, and the coherent implementation of the existing EU legislation.

A. Compliance with Member States' international obligations and avoidance of the 'race to the bottom'

The number of ratifications of both UN Statelessness Conventions among the EU Member States has increased significantly in the last decade.[60] By now all but four EU Member States ratified the 1954 UN Convention on the Status of Stateless Persons,[61] and most also ratified the 1961 UN Convention on the Reduction of

[58] R. Mandal 'Procedures for Determining Whether a Person is Stateless', Discussion paper No. 3 for the UNHCR Handbook on the Determination of Statelessness, November 2010, p. 6.
[59] Ibid.; UNHCR Mapping Projects: '*Mapping Statelessness in the United Kingdom*' of November 2011; '*Mapping Statelessness in the Netherlands*' November 2011; '*Mapping Statelessness in Belgium*' of October 2012. See also C. Batchelor 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization' *Refuge*, Vol. 22, No. 2 (2005), pp. 31-58.
[60] See latest information on the ratifications on the website of the UN Treaty Office, accessible here: <https://treaties.un.org>.
[61] The exceptions are Cyprus, Estonia, Poland and Malta.

Statelessness. There is a pending commitment from 2012 by the four EU Member States who have not yet ratified the 1954 Convention to become state parties to this legal instrument.[62] A number of EU Member States have recently established or improved mechanisms for the identification and protection of stateless persons, or have committed to taking steps in that direction in the near future.[63] Thus, a clear tendency towards establishing better statelessness protection regimes in the Member States can be observed.

Introducing EU legislation on the identification and protection of stateless persons is a necessary step in this process.

Firstly, the experience with establishing the Common European Asylum System shows that a protection regime for vulnerable groups in the EU needs to be coordinated on the EU level to avoid the so-called 'race to the bottom' effect. This effect is caused by the fear that stateless persons in the EU will choose to seek protection in the Member State which is offering the easiest access to the recognition of their status as a stateless persons, and the best subsequent protection. A Member State might therefore be tempted to have a less attractive statelessness protection regime than the neighboring state, in order to avoid attracting stateless persons who need assistance. This might eventually lead to an overall low level of protection offered to stateless persons in the EU, and possibly to violations of relevant international obligations. There is no evidence whether any significant numbers of stateless persons actually engage in such a 'forum-shopping' behavior, and whether the fears that might lead to the 'race to the bottom' are in any ways justified. However, in the context of open borders, it is the EU's responsibility to ensure that such considerations do not play a role in the domestic politics. Member States which strive to comply with their international law obligations on statelessness should not be hindered in these efforts by fears of attracting disproportionate numbers of

[62] EU Pledge of 19 September 2012 to the UN, section A, para 4, available here: <www.unrol.org/files/Pledges%20by%20the%20European%20Union.pdf>.
[63] In the UK, the new statelessness determination procedure took effect on 6 April 2013, see: <www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2013/hc1039.pdf?view=Binary>; Belgium pledged to introduce the procedure in the near future, and Hungary pledged to improve its existing procedure, see UN Ministerial Intergovernmental Event, Pledges 2011, available here: <www.unhcr.org/commemorations/Pledges2011-preview-compilation-analysis.pdf>.

stateless persons from other Member States which avoid complying with international standards.

Secondly, the EU legislation on the identification and protection of stateless persons would lead to an overall better implementation of the international norms on statelessness in the EU. EU legislation has generally a stronger legal position in the national jurisdictions than international treaty norms. Better remedies against noncompliance would be available to stateless persons whose rights are violated. Enforcing the international standards for identification and protection of stateless persons at the EU level has therefore a potential to give those standards a higher practical value.

B. EU foreign policy agenda

Two years ago the EU has pledged to the UN to 'develop a framework for raising issues of statelessness with third countries by 2014'.[64] In the past, the EU has already touched upon issues of statelessness in its relations with third states and candidate Member States, in particular in the context of pre-accession negotiations.[65] High hopes are often placed on the EU to stand up for the human rights of stateless persons, and to advocate for their right to a nationality all over the world, which lead to criticism of the so far limited EU external action on statelessness.[66] The pledge to the UN indicates an ambition of the EU to become more involved with statelessness-related problems abroad. However, if the EU does not take measures on statelessness within its borders, its negotiating power when urging non-Member States to do that is reduced. The framework which they pledge to develop for addressing statelessness abroad cannot be equally effective without a corresponding domestic action. Developing and implementing internal minimum standards on the protection

[64] EU Pledge of 19 September 2012, Section B, para 3.1, text available here: <www.unrol.org/files/Pledges%20by%20the%20European%20Union.pdf>.

[65] See, for example, Communication from the Commission 'Latvia: Accession Partnership', 29 June 1998, Official Journal C 202, pp. 0041-0047.

[66] See, for example, D. Kochenov 'EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic', *Journal of Contemporary European Research*, Vol. 3, Issue 2, pp. 124-140, B. Wooding 'What should the European Union do about the mass and arbitrary deprivation of nationality in the Dominican Republic?', *European Network on Statelessness Blog*, 9 May 2014, available here: <www.statelessness.eu/blog/what-should-european-union-do-about-mass-and-arbitrary-deprivation-nationality-dominican>.

and identification of stateless persons is a prerequisite for exporting these standards abroad, and a necessary first step toward fulfilling the pledge made to the UN.

C. Stateless persons in existing EU legislation

The existence of the status of a stateless person is already acknowledged in the laws within the Common European Asylum System.[67] The Treaty on the Functioning of the European Union was the first EU treaty to mention stateless persons.[68] Even though statelessness is not a separate protection ground within the Common European Asylum System, it could be argued that the frequent references to this legal status require that stateless person are identified in a consistent manner across the Member States. The divergence in statelessness determination outcomes can lead to discrepancies in the implementation of some provisions. For example, Article 36 of the Directive 2013/32/EU of 26 June 2013 'On common procedures for granting and withdrawing international protection' reads:

1. A third country designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if:

   (a) he or she has the nationality of that country; or
   (b) he or she is a stateless person and was formerly habitually resident in that country,

This means that if a person is not stateless, his or her 'safe country of origin' can only be the country of his or her nationality, even if he or she enjoyed habitual residence in another country. The way in which a Member State decides on whether a person is stateless has an influence on the effects of this provision.

[67] See, for example, Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, Art. 36; Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.
[68] Art. 67(2) TFEU.

V. **Conclusion**

Statelessness is prevalent in the EU, as evidenced by the recent UNHCR studies and academic publications. [69] The development of EU-wide standards on the identification and protection of stateless persons would enhance the current national and international efforts in addressing the contemporary challenges of this problem in Europe. Relevant EU legislation would support the existing positive tendencies in the protection of stateless persons in many Member States, and prevent the 'race to the bottom' pressure that could hinder these developments. Moreover, stateless persons fall within the personal scope of some of the existing EU laws, and a common standard of determining who is stateless would increase the coherence of the implementation of these laws. Last but not least, the EU urges non-Member States to address statelessness in its foreign policy documents. At the same time, the prevalence of this problem within its own borders does not serve as a good example to the outside world, and undermines the EU's legitimacy to set standards externally while no such standards exist internally.

There are numerous reasons why the EU should get involved in the protection and identification of stateless persons in its territory. The relative lack of attention to this issue so far cannot be explained by the lack of legal tools to pass legislation on the identification and protection of stateless persons. Contrary to the common assumption, the EU does have competence to legislate on certain aspects of statelessness, in particular on the identification and protection of stateless persons. Such competence is based on the EU's mandate in migration affairs. The EU's experience with asylum status determination and the norms on the protection of asylum seekers can be a helpful source of inspiration for structuring equivalent legislation on statelessness.

The EU involvement would be timely at this stage, since most Member States do not have well-functioning statelessness determination procedures yet, and some have

[69] See various UNHCR research projects on statelessness in Europe, in particular 'Mapping Statelessness' projects on the UK, the Netherlands and Belgium, available here: <www.refworld.org/statelessness.html>. See also C. Sawyer and B. K. Blitz '*Statelessness in the European Union*' (Cambridge University Press, March 2011).

introduced them recently, or have committed to do so in the near future.[70] It is easier to adjust these procedures to a common EU standard when they are still in the making, and have not solidified within national legal systems yet. The end of the Stockholm Programme in 2014 gives an opportunity to include statelessness on the future EU migration policy agenda and to set the basis for the development of relevant legislation.[71]

[70] In the UK the new statelessness determination procedure took effect on the 6 of April 2013, see: <www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2013/hc1039.pdf?view=Binary>, Belgium pledged to introduce the procedure in the near future, and Hungary pledged to improve its existing procedure, see UN Ministerial Intergovernmental Event, Pledges 2011, available here: <www.unhcr.org/commemorations/Pledges2011-preview-compilation-analysis.pdf>.

[71] This opportunity has been missed by the Commission in its recent communication about its vision for the future of EU migration policy, EU Commission 'An open and secure Europe: making it happen', Brussels, 11th of March 2014, No. COM(2014) 154, available here: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/an_open_and_secure_europe_-_making_it_happen_en.pdf>. See also K. Swider 'Time to put statelessness on the EU agenda!' European Network on Statelessness Blog, 16 December 2014, available here: <www.statelessness.eu/blog/time-put-statelessness-eu-agenda>.