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STATELESSNESS IN INTERNATIONAL AND EUROPEAN LAW

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LIST OF ACRONYMS AND ABBREVIATIONS

1945 Convention	Convention relating to the Status of Stateless Persons
1961 Convention	Convention on the Reduction of Statelessness
1951 Convention/ Refugee Convention	Convention relating to the Status of Refugees
2006 Convention	Convention on the Avoidance of Statelessness in Relation to State Succession
	Convention relating to the Status of Refugees
ASFJ	Area of Security, Freedom and Justice
CCPR	UN Human Rights Committee
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee On The Elimination Of Racial Discrimination
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRDP	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
EC	European Community
ECN	European Convention on Nationality
ECSS	Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession
ECtHR	European Court of Human Rights
ENS	European Network on Statelessness
EP	European Parliament
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
Eurozenship/ Eurozens	European Citizenship/European Citizen
FRA	European Union Agency for Fundamental Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ISI	Institute on Statelessness and Inclusion
MS	Member States
OMC	Open Method of Coordination
SDP	Status Determination Procedure
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TCN	Third-country national (EU)
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UPR	Universal Periodic Review
USSR	Union of Soviet Socialist Republics

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CHAPTER I

INTRODUCTION

1.1 Research questions

Statelessness is a human-made problem that will not disappear without a human-made solution. The Nation-State system, the fundamental structure around which our lives are built and upon which we depend, is flawed and has allowed individuals to slip through the cracks. However, over the course of the last 80 years, statelessness' position within the international community has significantly shifted, leading to the production of international instruments of protection and even witnessing law-making responses from states.

Despite efforts at the international level, statelessness has yet to be eradicated, largely due to the complications connected with the implementation of a global framework of identification and protection. This research seeks to demonstrate, through the employment and analysis of legal instruments, how a regional approach could hold the potential to succeed where the international instruments have failed. In particular, it calls on the EU to take significant steps to create a framework that identifies and protects stateless persons in a harmonized fashion. Starting from these premises, the following questions are investigated:

Is there an obligation to establish Status Determination Procedures (SDPs) in the EU?

How can the EU improve the protection of stateless persons in Europe?

In an effort to answer these queries and provide a comprehensive picture of statelessness within the international and European system, the research is

divided as follows: first, the introductory chapter will explore the relevance of the theme, the state of the art, the definition of statelessness and the juxtaposition of a protection status for statelessness versus the enforcement of a right to nationality. This chapter will identify the justification behind the choice to address statelessness through a right-based approach and attempt to contextualize it within the existing literature.

The following chapter will frame the question of statelessness employing the ample lens of international law and clarify the position of the international instruments that have been established to address statelessness, namely the two international conventions of the United Nations (UN) and, in broader terms, the human rights regime. The analysis of the two conventions will highlight their achievements and advancement on statelessness issues within the international agenda. However, it will also reveal inadequacies that portray the current system to be unsuited to tackle statelessness at such a macroscopic level.

These considerations will lead into the next chapters, that will instead focus on statelessness in Europe, and, more specifically, in the European Union (EU). Chapter three will introduce statelessness in Europe, its history and the intricate socio-political dynamics between nation-states that led to its flourishing and lingering. The contribution of the Council of Europe (CoE) in this context -through conventions, case law and recommendations- will be explored.

Chapter four will then veer towards an analysis of statelessness within the EU, in an attempt to demonstrate that the Union possesses the necessary competences in the field of statelessness. It is often argued that the EU and its institutions do not have the scope to approach the subject, due to a lack of authority in the field of statelessness and, most importantly, citizenship. The chapter however, through an examination of the EU primary and secondary sources, identifies in art. 67 combined with art. 79 of the Treaty of the Functioning of the European Union (TFEU) the implicit powers that confer the EU the necessary competences to establish the foundations for a statelessness' legislation. The chapter will also touch upon the possibility of invoking art. 352 of the TFEU to produce such a legislation, recognizing the existence of the legal basis to do so, but also highlighting the difficulties that this approach implies, and ultimately its avoidable nature. The chapter identifies a solid solution in the establishment of a directive on statelessness and determines the main elements necessary for an effective implementation,

mirroring the ones that preceded it in relation to comparable categories of vulnerable groups.

Finally, chapter five explores further paths suggested within the arsenal of the EU system that could help improve or resolve the situation of stateless persons. This research, among the variety of EU's instruments, has narrowed down its scope to focus on the concept of EU citizenship, the role of the Charter of Fundamental Rights of the EU (the Charter) combined with the European Convention on Human Rights (ECHR) and the employment of soft law. Although different in nature and with different degrees of significance within the sphere of EU law, this chapter will analyze how each these aspects could—on paper—contain relevant means to provide solutions for stateless persons.

The research will then draw its conclusions in the final chapter, where the elements examined through the text will come together to compose a proposal to improve the position of stateless persons within international and European law.

1.2 Research Relevance

Because of the very nature of statelessness, it is challenging to establish the exact number of people that it affects today. The inconclusiveness is due to multiple causes: 1) there is still ambiguity over the notion of *stateless,* which is not yet universally clear and/or agreed upon[1]; 2) there is widespread

[1] Cf. Carol Batchelor, "Stateless Persons: Some Gaps in International Protection," *International Journal of Refugee Law* 7, no. 2 (1995): 232–59; Carol Batchelor, "Statelessness and the Problem of Resolving Nationality Status," *International Journal of Refugee Law* 10, no. 1–2 (1998): 156–82; Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*, vol. 11 (International refugees law series, 2018); Maureen Lynch, "Lives on Hold: The Human Cost of Statelessness," *Refugees International,* (2005); Lindsey N. Kingston, "Statelessness as a Lack of Functioning Citizenship," *Tilburg Law Review* 19, no. 1–2 (2014): 127–35; Hugh Massey, "UNHCR and De Facto Statelessness" (UNHCR Legal and protection policy research series, 2010); Jason Tucker, "Questioning De Facto Statelessness by Looking at De Facto Citizenship," *Tilburg Law Review* 19, no. 1–2 (2012); UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians" (UNHCR, 2005); Paul Weis, "The United Nations Convention on the Reduction of Statelessness, 1961," *International and Comparative Law Quarterly* 11, no. 4 (1962): 1073–96; David S

reluctance among states to conduct investigations to collect and disseminate statistical data; 3) stateless persons might be reluctant to reveal their status due to the possible consequences; 4) there is lack of exhaustive data from detention centers; 5) due to the lack of adequate spotlight shone on the subject at the global level. Nonetheless, the estimates suggest that statelessness may affect as many as ten million people[2] worldwide and at least 600'000 in Europe[3]. Currently, examples of stateless groups can be found in Latvia and Estonia, following the dissolution of the USSR[4], in Myanmar, where members of the Rohingya minority are denied citizenship, in Syria, where Kurd groups have been deprived of their citizenship following a discriminatory census[5], and in the Dominican Republic, where people of Haitian descendent are denied citizenship.

Article 15 of the Universal Declaration of Human Rights (UDHR) notoriously states that "[e]veryone has the right to a nationality" and "[n]o one shall be arbitrarily deprived of his nationality or denied the right to change his nationality." Enshrining *nationality* among the most fundamental human rights solidified its role as the foundational legal link between individual and state. However, despite the subsequent establishment of many international

Weissbrodt and Clay Collins, "The Human Rights of Stateless Persons," *Human Rights Quarterly* 28, no. 1 (2006): 245–76.

[2] Cf. Lynch, "Lives on Hold: The Human Cost of Statelessness," 1; ISI, "The World's Stateless, Deprivation of Nationality" (Institute on Statelessness and Inclusion, 2018). At least 4 million are formally recognized.

[3] See chapter III.

[4] In Estonia they are referred to as having *undetermined citizenship,* while in Lituania *non-citizen*. Both groups were created following the policy adopted at the beginning of the 90s. As the names suggests, these groups still enjoy more rights that third-country nationals (see chapter III). Cf. Aadne Aasland, "Citizenship Status and Social Exclusion in Estonia and Latvia," *Journal of Baltic Studies* 33, no. 1 (2002): 57–77; Raivo Vetik, "The Statelessness Issue in Estonia," in *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (Cambridge, 2011), 230–52; Raivo Vetik, "Ethnic Conflict and Accommodation in Post-Communist Estonia," *Journal of Peace Research* 30, no. 3 (1991): 271–80.

[5] Following the census, around 120'000 people became stateless within hours. The status of *ajanib* (which translates to 'foreigners') indicates a group of people who have irregular documentation which only allows the enjoyment of a limited range of rights, while the status of *maktumin* refers to people who have no documentation at all, and who, therefore, enjoy even fewer rights. Such status has been transmitted to the following generations, affecting an estimated of 300'000 people in 2011. These groups of stateless persons are collectively referred to as *bê nifûs,* people 'without IDs'. Gerard Chaliand, *A People Without a Country, the Kurds and Kurdistan* (Olive Branch Press, 1993); Thomas McGee, "The Stateless Kurds of Syria," *Tilburg Law Review* 19, no. 1–2 (2014): 171–81; Human Rights Watch, "Syria: The Silenced Kurds" (Human Rights Watch/Middle East Vol. 8, No 4, 1996).

instruments aimed at protecting said right by narrowing states' sovereignty in nationality matters[6], millions remain today stateless[7].

The vulnerabilities associated with statelessness generate not only human rights concerns but also critical human security risks, placing the matter at the forefront of the debate on citizenship, state sovereignty, and international cooperation. From a human rights perspective, it is easy to identify the rights precluded to individuals who lack a nationality: virtually every right stems from the bond between individuals and state, therefore one might say that the lack of such necessary condition renders the individual rightless. Political and social rights are unattainable, such as the right to vote or to participate in political life, as well as the right to free movement and the right to personal security and liberty: while it is true that such condition is analogous to any third-country national finding themselves in a foreign country, this detail is concerning for stateless persons as they do not enjoy these rights anywhere, contrary to third-country national, who do enjoy such rights in their country of citizenship; additionally, it is hard to imagine easy access to social, economic, and cultural rights without a citizenship, including crucial rights, such as the right to education, healthcare, and legal employment. The levels of uncertainty can reach alarming levels, leading to the most grueling instances of human rights violations, such as human trafficking, exploitation, and indefinite detention[8]. The legal existence of the individual is put into

[6] International instruments for the protection of statelessness will be addressed in Chapter II. Throughout this research, following the example of several scholars (Peter J. Spiro, "A New International Law of Citizenship," *American Journal of International Law* 105, no. 4 (2011): 694; Alice Edwards, "The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects," in *Nationality and Statelessness under International Law* (Cambridge University Press, 2012)) the words "*citizenship*" and "*nationality*" will be used interchangeably and will convey the same meaning (the link between individual and state), due to the close connection between the two concepts. They have been defined as two sides of the same coin (Caia Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness* (Intersentia, 2022), 16), where nationality is the bond between individual and state, while citizenship is their reciprocal relation as members of the polity.

[7] Causes of statelessness and the related gaps within the international framework will be addressed in chapter II.

[8] Lindsey N. Kingston, "Worthy of Rights: Statelessness as a Cause and Symptom of Marginalisation," in Understanding Statelessness, ed. Tendayi Block, Katherine Tonkiss, and Phillip Cole (New York: Routledge, 2017), 17–34; Laura Van Waas, "Addressing the Human Rights Impact of Statelessness in the EU's External Action," European Parliament Policy Department DG External Policies, 2014, 19; Inter-American Commission On Human Rights, "Uman Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System" (Human Mobility, Norms and Standards, OEA/Ser.L/V/II Doc. 46/15, 2015), 17-31.

question as the stateless person often faces a sort of "civil obliteration", having to face hurdles in the registration of major life events, such as birth, death, and marriage[9].

Becoming "legal ghosts"[10], not only represents a generational hindrance that gets inevitably passed down to one's offspring, but it generates severe psychological effects as well. On one hand, having a citizenship is central to the establishment of an identity[11], thus that exclusion from this sort of membership originates a sense of marginalization and isolation. On the other hand, further consequences of this condition are manifested through direct effects on the mental health of stateless persons, who endure daily stressors associated with their condition of uncertainty, potential displacement, and concerns regarding personal safety[12].

Recently there has been growing acknowledgment that the matter of statelessness transcends the perspective of human rights concerns and represents an alarming phenomenon with profound implications for human

[9] UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians" (UNHCR, 2005), 3, 6.

[10] The theme of invisibility is often used in reference to stateless persons to emphasize the lack of global awareness about their condition, as well as their legal dimension being obscured in the eyes of the international community without proper registration. Gábor Gyulai, "The Determination of Statelessness and the Establishment of a Stateless-Specific Protection," in *Nationality and Statelessness under International Law* (Cambridge University Press, 2012), 101; Ad Hoc Committee of Experts on Roma Issues, "Summary Conclusions of the Thematic Report on Solving the Legal Status of Roma From Ex-Yugoslavia and Their Lack of Personal Identity Documents" (CAHROM, 2012), 4. Cf. also: UNHCR, "What Is Statelessness?" (UNHCR, 2018); W. Hanley, "Statelessness: An Invisible Theme in the History of International Law," *European Journal of International Law* 25, no. 1 (2014): 321–27; Semegnish Asfaw, *The Invisible Among Us: Hidden, Forgotten, Stateless* (World Council of Churches Publications, 2016); Kristy A. Belton, *Statelessness in the Caribbean: The Paradox of Belonging in a Postnational World* (University of Pennsylvania Press, 2017). Similarly, terms such as "voiceless" and "erased" are often associated with stateless persons.

[11] Cf. Sahana Reddy and Arkalgud Ramaprasad, "Reframing the Problem of Statelessness: Quest for a Supra-Legal Perspective," *Oregon Review of International Law* 20, no. 361 (2019): 386–88; Andrew Riley et al., "Daily Stressors, Trauma Exposure, and Mental Health Among Stateless Rohingya Refugees in Bangladesh," *Transcultural Psychiatry* 54, no. 3 (2017): 304–31; S Stacie Kosinski, "State of Uncertainty, Statelessness and Discrimination in the Dominican Republic," *Boston College International & Comparative Law Review* 32, no. 377 (2007): 379; Constantin Sokoloff and Richard Lewis, "Denial of Citizenship: A Challenge to Human Security," *European Policy Centre* (Advisory Board on Human Security, 2005).

[12] ISI, "The World's Stateless, Deprivation of Nationality." 147 ff.

security[13]. Statelessness' connection to deprivation or refusal of citizenship, often leads to forced displacement and endangerment of international peace and security. In today's interconnected world, excluding entire groups and communities from the enjoyment of rights and benefits contributes to internal and international violence and tensions[14]. And even those stateless persons that are not directly affected by the most dramatic consequences of their deprivations, are constrained to a condition of human security risks due to the precariousness of their status. Human security, as addressed by the UN Development Programme (UNDP), does not only concern the violent outcomes or those involving weapons, but it is a concern for "life and dignity"[15], elements that are disregarded when statelessness is left unchecked.

Statelessness, therefore, is considered an undesirable condition in today's international framework, not only for the negative impact it has on individuals, but also due to the collateral effects it generates for the international community[16].

1.3 The state of the art

[13] The 2003 Commission on Human Security's report describes *human security* as the "[protection of] the vital core of all human lives in ways that enhance human freedoms and human fulfilment", Commission on Human Security, "Human Security Now" (Commission on Human Security, 2003), 4.

[14] *Ibid,* 5.

[15] United Nations Development Programme, "Human Development Report 1994: New Dimensions of Human Security" (Oxford University Press, 1995), 22.

[16] Cf. C. Carol Batchelor, "Transforming International Legal Principles Into National Law: The Right to a Nationality and the Avoidance of Statelessness," *Refugee Survey Quarterly* 25, no. 3 (2006): 11, outlines the impact of statelessness at the international level as follows: "[...]if one state fails to grant nationality to a person or group, this becomes a potential problem for all states. [...] this group will likely either seek full national legal identity elsewhere [...]. The instability created for them can easily be translated to the international level and can become a root cause of displacement or of conflict, particularly where no redress is possible." The UNHCR in its report (UNHCR, "What Would Life Be Like if You Had No Nationalit" (Division of Internal Protection, UNHCR, 1999), 1), advocates for international cooperation to eradicate statelessness, hoping to "[…] improve international relations and stability by resolving disputes related to nationality; […] develop international law and promote cooperation between States in matters pertaining to nationality in order to avoid future conflicts; […] prevent displacement and refugee flows which may result from statelessness and which may threaten international peace and security.*"*

The state of the art regarding statelessness has heavily evolved from the 1800s, with authors of the time failing to recognize the relevance of statelessness within the field of international law[17], strongly condemning the condition as totally irrational and outside the realm of possibilities understood within the subject. Though the lack of citizenship was always recognized as an anomaly within international public law[18], it did not start factoring into the international discourse until after World War II, coinciding with the creation of the United Nations system and the drafting of the first convention entirely dedicated to the protection of stateless persons[19].

Most of the work done on statelessness since these first steps has been descriptive and attempted to draw attention towards an issue that, until not long ago, was considered 'forgotten' by the international community[20]. Many academic works recount the impact of UN texts, and the role national laws play in creating statelessness[21]; other relevant texts analyze the impact that discrimination within citizenship laws has on citizenship and human rights[22]. Over the past years, the discourse shifted towards the right-based themes,

[17] Ernst Zitelmann, *Internationales Privatrecht*, vol. 1 (Leipzig: Duncker & Humblot, 1897), 176-77; Carl Ludwig Von Bar, *Lehrbuch Des Internationalen Privat- Und Strafrechts* (Stuttgard: Enke, 1892). According to Van Bar, it was impossible for an individual to have no nationality, because, given the existence of states, it followed that every individual must belong to one.

[18] Authors such as Antoine Pillet, *Traité Pratique De Droit International Privé* (Paris, France: Imprimerie J. Allier, 1919), 253; François Laurent, *Droit Civil International* (Bruxelles: Bruylant-Christophe & Co. Editeurs, 1880), 379; Albert G. De La Pradelle and Jean P. Niboyet, *Répertoire De Droit International* (Paris: Librairie du Recueil Sirey, 1929), 286, 558, remarked the anomaly of statelessness as something highly undesirable and impossible to understand.

[19] 1954 Convention Relating to the Status of Stateless Persons, see chapter II.

[20] Gábor Gyulai, "Forgotten Without a Reason: Protection of Non-refugee Stateless Persons in Central Europe," *Hungarian Helsinki Committee*, 2007.

[21] T. Alexander Aleinikoff, "Theories of Loss of Citizenship," *Michigan Law Review* 84, no. 7 (1986): 1471–1503Ian Brownlie, "The Relations of Nationality in Public International Law," *The British Year Book of International Law* 39, no. 1963 (1963): 284–364; George Ginsburgs, "Soviet Citizenship Legislation and Statelessness as a Consequence of the Conflict of Nationality Laws," *The International and Comparative Law Quarterly* 15, no. 1 (1966): 1–54 Erwin Loewenfeld, "Status of Stateless Persons," *Transactions of the Grotius Society* 27 (1941): 59–112; William Samore, "Statelessness as a Consequence of the Conflict of Nationality Law," *The American Journal of International Law* 45, no. 3 (1949): 476–94.

[22] Bogdan Aurescu, "The 2006 Venice Commission Report on Non-citizens and Minority Rights — Presentation and Assessment," *Helsinki Monitor* 18, no. 2 (2007): 150–63. M. Adjami and J. Harrington, "The Scope and Content of Article 15 of the Universal Declaration of Human Rights," *Refugee Survey Quarterly* 27, no. 3 (2008): 93–109; J. E. Doek, "The CRC and the Right to Acquire and to Preserve a Nationality," *Refugee Survey Quarterly* 25, no. 3 (2006): 26–32; Ruth Donner, *The Regulation of Nationality in International Law*, 2nd ed. (New York: Transnational Publishers, INC., 1994).

with the United Nations High Commissioner for Refugees (UNHCR) and other UN bodies producing several reports and guidelines raising awareness on statelessness by emphasizing the protection of human rights[23].

Statelessness is mentioned in many studies on refugees matters[24], given the proximity of the two conditions, which, together with the introduction of the second convention on statelessness[25], earned it a spot within the international agenda. Particularly after the drafting of the conventions on statelessness, significant research has been developed towards preventing statelessness, the definition of statelessness, as well as the protection of rights that should be recognized to stateless persons. Many commentators tend to emphasize the lack of clarity and direction on the related regulations and often provide propositions for improvements[26].

Authors such as Paul Weis[27] emphasize the consequences and the undesirability of statelessness on one hand and the significant privileges connected to citizenship on the other, putting forward arguments based on the

[23] James A. Goldston, "Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens," *Ethics & International Affairs* 20, no. 3 (12006): 321–47; Open Society Justice, "Human Rights and Legal Identity: Approaches to Combating Statelessness and Arbitrary Deprivation of Nationality," *Open Society Justice Initiative: Thematic Conference Paper*, 2006; Human Rights Council, "Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General" (United Nations General Assembly, 2005); UNHCR, "The Excluded: The Strange Hidden World of the Stateless," *Refugees* 147, no. 3 (2007); UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians" (UNHCR, 2005).

[24] Cf. John Hope Simpson, *The Refugee Problem: Report of a Survey* (Oxford: Oxford University Press, 1939), 253–54; James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed. (Cambridge University Press, 2014); Kate Darling, "Protection of Stateless Persons in International Asylum and Refugee Law," *International Journal of Refugee Law* 21, no. 4 (2009): 742–67; Maryellen Fullerton, "The Intersection of Statelessness and Refugee Protection in US Asylum Policy," *Journal on Migration and Human Security* 2, no. 3 (2014): 144–64.

[25] 1961 Convention on the Reduction of Statelessness, see chapter II.

[26] Cf. Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, *Understanding Statelessness*, 1st ed. (London: Routledge, 2017); Tamás Molnár, "Moving Statelessness Forward on the International Agenda," *Tilburg Law Review* 19, no. 1–2 (2014): 194–202; Caia Vlieks, "Strategic Litigation: An Obligation for Statelessness Determination Under the European Convention on Human Rights?," *European Network on Statelessness Discussion Paper*, 2014; Laura Van Waas, *Nationality Matters: Statelessness Under International Law* (Groningen: Intersentia, 2008); Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*; Gábor Gyulai, "Statelessness in the EU Framework for International Protection," *European Journal of Migration and Law* 14, no. 3 (2012): 271–92.

[27] Paul Weis, *Nationality and Statelessness in International Law,* (Alfhen aan den Rijn: Sijthoff & Noordoff International Publishers B. V., 1979).

role of citizenship as the bedrock of rights and international protection. Following this line of research, among the most cited works that touch upon statelessness, themes of human security and human rights for non-citizens are explored. From Amartya Sen's analyses, for example, it appears clear that, without citizenship, indisputable complications connected to personal and social development emerge, restricting personal freedom and limiting the individual's range of capabilities[28].

The growing interest in statelessness matters has generated a vast production of literature on its underlying causes and consequences, and recently the affirmation of the human rights regime has urged a newfound awareness that the identification of statelessness is one of the most cardinal topics on the matter. This aspect is closely connected with the ability of stateless persons to enjoy the rights that emerged through the conventions, with a growing body of literature interested in the human rights aspect of statelessness and the obligations that states hold towards stateless persons under international law[29].

The topic of statelessness has also found a place within other areas of research, such as philosophical and sociological studies[30], interpretation of

[28] Amartya Kumar Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), 15-17. Though it is accurate to point that that other elements at the domestic level restrict the freedoms and narrow the capabilities of action of an individual, the relevance of Sen's analysis cannot be underestimated in the context of statelessness and the lack of rights associated with it, see Section 5 of this chapter.

[29] Cf. Batchelor, "Stateless Persons: Some Gaps in International Protection", 232-59; 1995; Gyulai, "Forgotten Without a Reason: Protection of Non-Refugee Stateless Persons in Central Europe."; Douglas Hodgson, "The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness," *International Journal of Law Policy and the Family* 7, no. 2 (1993): 255–70; P. R. Chari, Mallika Joseph, and D. Suba Chandran, *Missing Boundaries : Refugees, Migrants, Stateless and Internally Displaced Persons in South Asia*, *Manohar eBooks* (New Delhi: Manohar Publishers & Distributors, 2003); Jo Boyden and Jason Hart, "The Statelessness of the World's Children," *Children & Society* 27, no. 4 (2007): 237–48; Stefanie Grant, "International Migration and Human Rights" (Global Commission on International Migration, 2005); David S Weissbrodt and Clay Collins, "The Human Rights of Stateless Persons," *Human Rights Quarterly* 28, no. 1 (2006): 245–76; David Weissbrodt, *The Human Rights of Non-citizens* (Oxfortd University Press, 2008).

[30] M Martine Leibovici, "Appartitre Et Visibilite. Le Monde Selon Hannah Arendt Et Emmanuel Levinas," *Journal of Jewish Thought and Philosophy* 14, no. 1–2 (2006): 55–71; Serena Parekh, "A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights," *Journal of Human Rights* 3, no. 1 (2004): 41–52; Daniel Tubb, "Statelessness and Colombia: Hannah Arendt and the Failure of Human Rights," *Undercurrent* 3, no. 2 (2006): 39–51; Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004)..

international law[31], analysis of regional and international treaties[32], protection of children's rights[33], gender equality[34], indeterminate detention[35] and forced displacement[36]. There has also been room for studies focused on the regional perspective of statelessness: some of these have emphasized the tools of the EU and the Council of Europe and their potential to prevent statelessness[37], with growing interest in the role of citizenship and the position of non-nationals within the regional borders. Additionally, comparative work has been produced on issues of nationality in European countries such as Germany[38] and Hungary[39], as well as pan-European investigations of

[31] Aleinikoff, "Theories of Loss of Citizenship."; Brownlie, "The Relations of Nationality in Public International Law", 284-364; Ginsburgs, "Soviet Citizenship Legislation and Statelessness as a Consequence of the Conflict of Nationality Laws."; Weis, *Nationality and Statelessness in International Law*.

[32]Batchelor, "Stateless Persons: Some Gaps in International Protection," 232-59; Gyulai, "Forgotten Without a Reason: Protection of Non-Refugee Stateless Persons in Central Europe."; Hodgson, "The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness," 255-70.

[33] Trevor Buck, *International Child Law*, *Routledge eBooks*, 1st ed. (London: Routledge/Cavendish, 2005).; Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1999).

[34]Allison J. Petrozziello, "(Re)Producing Statelessness via Indirect Gender Discrimination: Descendants of Haitian Migrants in the Dominican Republic," *International Migration* 57, no. 1 (2019): 213–28; Deirdre Brennan, Nina Murray, and Allison J. Petrozziello, "Asking the Other Questions: Applying Intersectionality to Understand Statelessness in Europe," in *Statelessness, Governance and the Problem of Citizenship*, eds. Tendayi Bloom and Lindsey N. Kingston (Manchester: Manchester University Press, 2021).

[35] Amal De Chickera and Et Al., "Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons," *THE EQUAL RIGHTS TRUST*, 2010; Jerome Phelps and Et Al., "Detained Lives: The Real Cost of Indefinite Immigration Detention" (London: LDSG, 2009); Matthew Seet, "Strengthening the Protection of Stateless Persons From Arbitrary Detention in Immigration Control Proceedings Kim V. Russia," *European Journal of Migration and Law* 17, no. 2–3 (2015): 273–86.

[36] Gyulai, "Forgotten Without a Reason: Protection of Non-Refugee Stateless Persons in Central Europem" 6.

[37] Batchelor, "Transforming International Legal Principles Into National Law: The Right to a Nationality and the Avoidance of Statelessness," 8-25.; Fiorella Dell'Olio, *The Europeanization of Citizenship: Between the Ideology of Nationality, Immigration and European Identity*, 1st ed. (London: Routledge, 2017); Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge: Cambridge University Press, 2007).

[38] Simon Green, "Beyond Ethnoculturalism? German Citizenship in the New Millennium," *German Politics* 9, no. 3 (2000): 105–24; C.A. Groenendijk and B. De Hart, "Multiple Nationality: The Practice of Germany and the Netherlands," in *International Migration Law. Developing Paradigms and Key Challenges* (Den Haag: T.M.C. Asser Press, 2007), 87–106.

[39] Paul Robert Magocsi, "Mapping Stateless Peoples: The East Slavs of the Carpathians," *Canadian Slavonic Papers* 39, no. 3–4 (1997): 301–31.

membership rights in Europe[40]. Research on the field of asylum seekers remains pertinent to statelessness[41], as well as all the relevant work related to the dissolution of states and the aftermath of state succession for ethnic Russians[42]. European regional research on statelessness has also often addressed the condition of the discrimination faced by the Roma in naturalization procedures[43].

Relevant to this work, research involving the EU has considerably increased, with an expanding number of academics calling for EU action on statelessness. Most notably, the comparative work of Bianchini[44] acquires great relevance in the field, as well as the work of Gyulai on implementation and status determination procedures[45], together with studies related to the prevention and elimination of statelessness[46] and analysis of national norms pertinent to statelessness[47].

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[40] Rainer Bauböck, "The Rights of Others and the Boundaries of Democracy," *European Journal of Political Theory* 6, no. 4 (2007): 398–405.

[41] Caroline Sawyer and Philip Turpin, "Neither Here nor There: Temporary Admission to the UK," *International Journal of Refugee Law* 17, no. 4 (2005): 688–728.

[42] Lowell Barrington, "The Domestic and International Consequences of Citizenship in the Soviet Successor States," *Europe Asia Studies* 47, no. 5 (1995): 731–63; Bill Bowring, "European Minority Protection: The Past and Future of a 'Major Historical Achievement,'" *International Journal on Minority and Group Rights* 15, no. 2–3 (2008): 413–25; Nida Gelazis, "The European Union and the Statelessness Problem in the Baltic States," *European Journal of Migration and Law* 6, no. 3 (2004): 225–42.

[43] Giulia Perin, "L'applicazione Ai Rom E Ai Sinti Non Cittadini Delle Norme Sull'apolidia, Sulla Protezione Internazionale E Sulla Condizione Degli Stranieri Comunitari Ed Extracomunitari," in *La Condizione Giuridica Di Rom e Sinti in Italia*, ed. Paolo Bonetti, Alessandro Simoni, and Tommaso Vitale, vol. Tomo I (Milano: Giuffrè Editore, 2011), 363–414.

[44] Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*.

[45] Gyulai, "Statelessness in the EU Framework for International Protection," 279-95.

[46] Laura Van Waas et al., "Practices and Approaches in EU Member States to Prevent and End Statelessness" (European Parliament: Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Civil Liberties, Justice And Home Affairs, 2015);

[47] Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*; Jelka Zorn, "A Case for Slovene Nationalism: Initial Citizenship Rules and the Erasure*," *Nations and Nationalism* 15, no. 2 (2009): 280–98; Bronwen Manby, *Citizenship Law in Africa. A Comparative Study* (New York: Open Society Foundation, 2014); Caroline Sawyer, Brad K. Blitz, and Miguel Otero-Iglesias, "De Facto Statelessness in the United Kingdom," in *Statelessness in the European Union: Displaced, Undocumented, Unwanted*, ed. Caroline Sawyer and Brad K. Blitz, vol. Part II (Cambridge: Cambridge University Press, 2011), 160–94; Rutvica Andrijasevic, "How to Balance Rights and Responsibilities on Asylum at the EU's Southern Border of Italy and Libya," *Working Paper: Centre on Migration, Policy and Society*, no. 27 (2004).

In the last two decades we have witnessed the research on statelessness somehow reproducing the same split that has been marked through the two conventions on statelessness: some focus on protection and identification as a solution, and others target prevention and identify the elimination of statelessness as the ideal outcome[48]. Although the two components are not mutually exclusive, researchers have tended to focus on either one of the two. In the same way, this research, although recognizing that the optimal achievement would be the unmitigated eradication of the stateless condition, sets its aspirations on the more attainable and pragmatic goal of identification and protection of stateless persons.

1.4 The definition of statelessness and its unnecessary problematization

Starting from the Second World War, the international community attempted to tackle the impact of statelessness in pursuit of a framework that would protect stateless persons. However, the first step needing clarification is the definition of statelessness itself: the notion of statelessness continues to generate controversies, and before further exploring this research's issue at hand, it must be defined for the purpose of this text.

Firstly, there seems to be a distinction between *de jure* and *de facto* stateless. The notion of *de jure* stateless relates to the formal lack of citizenship, understood as the legal link between State and person, without conferring any relevance to the quality of such link. On the other hand, the notion of *de facto* statelessness aims at giving prominence to the condition in which people, although formally retaining a citizenship, essentially find themselves in the same position as people formally stateless. The concept of *de facto* statelessness is, therefore, focused on the quality of the link between the State and person. On the latter point, the following three circumstances have

[48] Examples of focus on prevention are Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness* and Katalin Berényi, "Addressing the Anomaly of Statelessness in Europe: An EU Law and Human Rights Perspective" (PhD Dissertation, Nemzeti Közszolgálati Egyetem, 2018). Examples of focus on protection and identification are Seet, "Strengthening the Protection of Stateless Persons From Arbitrary Detention in Immigration Control Proceedings Kim V. Russia UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons," *UNHCR* (Geneva: UNHCR, 2014); Elyse Wakelin, "The Implications of Statelessness on the Politics of Protection," *E-International Relations*, 2012.

juridical relevance: people who have been denied the enjoyment of rights commonly linked to citizenship; people whose citizenship is subject to contention between two or more states; people who are unable to prove their citizenship[49].

During the diplomatic Conference that led to the drafting of the Convention Relating to the Status of Stateless Persons[50] (1954 Convention), the question of extending the definition to include *de facto* stateless persons as well had already emerged. According to a minority of representatives, in particular the United Kingdom, the Socialist Federal Republic of Yugoslavia, Belgium, Germany, and Norway, two main reasons compelled them to narrow the definition of statelessness to *de jure* stateless. Firstly, they wanted to avoid people benefitting from the 1954 Convention by forgoing their citizenship for purely personal reasons[51]. Furthermore, it was understood that people who were *de facto* stateless, inevitably conflated within the notion of refugee as provided by the 1951 Convention relating to the Status of Refugees (1951 Convention), resting on the assumption that only a person having "a well-founded fear of persecution" could have ineffective citizenship[52].

To most state representatives this connection was not as certain[53], identifying instead conflicts among internal state laws at the root of ineffective citizenship, from which often sprung unclear and divergent viewpoints on granting it[54]. Based on these observations, the representatives of some states

[49] Batchelor, "Statelessness and the Problem of Resolving Nationality Status," 172; UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons," 172 ff.

[50] The Conference was held in New York from the 13th to the 23rd of September 1954. Representative of 32 States were present, 5 of which were observers. During the Conference *ad hoc* committees were established relating to the questions of travel documents ("*ad hoc* committee on the question of travel documents*"*) and of the definition of statelessness ("Drafting committee on the definition of "stateless persons"). The Convention Relating to the Status of Stateless Persons was adopted the 28th of September 1954. Currently, there are 96 state parties to the convention.

[51] United Nations, UN Conference of Plenipotentiaries on the Status of Stateless Persons: Summary Record of the third Meeting, E/CONF.17/SR.3, 1954, 3.

[52] United Nations, UN Conference of Plenipotentiaries on the Status of Stateless Persons: Summary Record of the third Meeting, E/CONF.17/SR.3, 1954, 2-3.

[53] Nehemiah Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation," *The Division of International Protection of the United Nations High Commissioner for Refugees*, 1955, 8.

[54] Batchelor, "Statelessness and the Problem of Resolving Nationality Status," 172 "The law of some countries allows an individual to renounce nationality without first acquiring or being assured one, thereby leading to Statelessness. [...] Systems formally correct might also

suggested the idea of considering stateless who claimed valid reasons to renounce the protection of the state of which they possessed citizenship and remitting to the state the decision on whether such reasons were acceptable in the context of statelessness[55]. Alas, this proposal was rejected. The Conference eventually reached a compromise, and it accepted the definition of stateless referring solely to *de jure* stateless persons. Art. 1 of the 1954 Convention reads: "[…] the term stateless person means a person who is not considered as a national by any State under the operation of its law […]." However, the Convention includes a recommendation, according to which "the Conference Recommends that each Contracting State when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons." Similarly, the final act of the Convention on the Reduction of Statelessness (1961 Convention), recommends that persons *de facto* stateless are treated as persons *de jure* stateless, in order to allow them to acquire effective citizenship[56].

Frequently these dispositions are understood as evidence that both conventions on statelessness include *de facto* stateless persons as well within the reach of their protection[57]. According to others, however, the recommendation found alongside the 1954 Convention explicitly states that

clash by reason of underlying philosophy for granting nationality. [...] There are many variations in law and practice whichi create gaps leading to statelessness, and one perennial problem is the inability under the law of many countries for a mother to pass nationality to her child even if the father is stateless.*"*

[55] According to the Belgian representative proposal, "for the purpose of this Protocol (Convention), the term "stateless person" shall also include a person who invokes reasons recognized as valid by the State in which he is a resident, for renouncing the protection of the country of which he is a national*",* United Nations, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the fourth Meeting, E/CONF.17/SR.4, 1954, 2. The German representative held a similar position (UN Conference of Plenipotentiaries on the Status of Stateless Persons: Summary Record of the fourth Meeting, E/CONF.17/SR.4, 1954, 4).

[56] The 1961 New York Convention on the Reduction of Statelessness, entered into force in 1975, counting 75 party states. The Final Act Resolution, adopted the same day, states that "the Conference recommends that persons who are stateless de facto should as far as possible be treated as stateless de jure to enable them to acquire an effective nationality", (1961 Covention on the Reduction of Statelessness, 989 UN Treaty Series, Resolution I, 279).

[57] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons," 5; UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians," 12.

the persons to whom it is directed to are *not* stateless[58]. Ultimately, the conventions fail to provide explicit protection to *de facto* stateless persons, as well as a definition that furthers that of refugees, generating skepticism on the practical use of these recommendations.

The lack of a juridical binding definition for *de facto* statelessness does not prevent the occasional acknowledgment from the case law or international custom. For example, the Inter-American Court of Human Rights (IACtHR) stated that statelessness arises from the ineffectiveness of a person's citizenship[59]. Specifically, according to the Court, "[s]tates have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective*."* This stance seems to confirm the idea that *de facto* statelessness is the result, not only of circumstances similar to those of a refugee, but also of possessing a citizenship that does not allow the enjoyment of the rights customarily attached to it ("nationality that is *not effective")*. Similarly, the UNHCR Handbook on Protection of Stateless Persons defines *de facto* statelessness as "persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality*"*[60]. Furthermore, the Special Rapporteur Córdova, acknowledging the position of *de facto* stateless persons, suggested their assimilation within the protection of *de jure* stateless persons. The

[58] Manley O. Hudson, "Report on Nationality, Including Statelessness," *International Law Commission* (Yearbook of the International Law Commission, 1952), 17; Van Waas, *Nationality Matters: Statelessness Under International Law*, 19 ff.; Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*, 72 ff.; Massey, "UNHCR and De Facto Statelessness," 27 ff.

[59] *The Yean and Bosico Children v. The Dominican Republic,* [2005], Inter-Am. Ct. H.R., para 14.

[60] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons," 5. Cf. UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians," 25; UNHCR, "Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness" (UNHCR, 1999), 13.

proposal was immediately rejected by the Commission[61]. Regardless, contrary to the viewpoints expressed during the Conference, today it is a widely accepted idea that not all *de facto* stateless persons are refugees and that the key factor of their statelessness resides in the ineffectiveness of their citizenship[62]. Generally, there is the impression that the term "*de facto* stateless*"* has somewhat entered the common language in the international framework, surely thanks to the effort of organizations who support daily stateless persons[63], leading to overwhelming disappointment regarding the lack of a juridical definition of the term[64].

However, according to some, an expansion of the definition of stateless aimed at including *de facto* statelessness is not necessary, just as much as the distinction between stateless *de jure* and *de facto* can be considered redundant if not dangerous. Undoubtedly, considering all the elements that would render a person *de facto* stateless, they all seem to be encompassed within the definition of *de jure* stateless[65]. Firstly, people who are denied the rights attached to their citizenship can nonetheless demand them from the state, employing tools provided by the international framework on the protection of human rights as well. This aspect is all but irrelevant since it frames such individual in stark contrast with stateless persons who, lacking such a juridical link, are effectively excluded from the benefits that the international system link with the possession of citizenship[66]. It would instead be quite different if a State were to deny its citizen the right to return and to reside, as well as the

[61] International Law Commission, Report Of The International Law Commission Covering The Work Of Its Sixth Session, A/2693, 1954, para 35.

[62] Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation", 10 ff.

[63] Paul Weis declaration at the UN Conference on the Elimination or Reduction of Future Statelessness, 25th August 1961, cited in Batchelor, "Stateless Persons: Some Gaps in International Protection", 252.

[64] Cf. Weis, "The United Nations Convention on the Reduction of Statelessness, 1961," 1073 ff.; Batchelor, "Stateless Persons: Some Gaps in International Protection," 247 ff.; Batchelor, "Statelessness and the Problem of Resolving Nationality Status," 173 ff.; Weissbrodt and Collins, "The Human Rights of Stateless Persons," 2006, 251 ff.

[65] Van Waas, *Nationality Matters: Statelessness Under International Law*, 25 ff.

[66] Though human rights are meant to guarantee a minimum standard of treatment for every person, given the relevance of state sovereignty, citizenship remains a fundamental element. According to Yaffa Zilbershats, *The Human Right to Citizenship* (Ardsley: Transnational Publisher, 2002), 34, the international human rights framework has managed to *reduce* the rights exclusive to citizens, without eliminating completely the disparity of their application between citizens and non-citizens. The need for a specific system dedicated to the protection of stateless persons is a direct consequence of the privileges granted to citizens. See section 5 of this chapter.

international protection against third parties[67], as the denial of these rights, which constitute the bedrock of the right to nationality, could imply the loss of the right itself. Nevertheless, such circumstance would already be covered by the definition provided by the 1954 Convention of statelessness of *de jure* statelessness[68], according to which the person "is not considered as a national by any State under the operation of its law." In the case in which the citizenship of a person were to be the object of contention between states or were the person to be unable to provide evidence of their citizenship, once again the definition would include such event, as the person "is not considered as a national by any State under the operation of its law*",* and, effectively, would be a *de jure* stateless person. The circumstances linked to the conditions of these categories, seems to lead to the conclusion that the concept of de facto statelessness does not require a separate definition. *De facto* stateless persons are either covered by the definition of *de jure* statelessness or protected by the 1951 Convention, combined with the international framework on human rights.

However, one ambiguity connected to this reasoning remains: while it is true that those who are denied the rights attached to their citizenship or are denied a rightful claim to it—resulting in an ineffective nationality—should be able to claim the denied rights from the state or the international human rights framework, it is also true that the exact point of transition that defines the individuals entitled to this protection is difficult to identify . In the case of ineffective citizenship deriving from, for instance, systematic discrimination, the affected individual would be unable to claim their rights from the state due to the deliberate nature of their rights' violation. This situation could suggest that, if there is any purpose in debating the existence of a *de facto* category, it is to acknowledge their need to benefit from both protection framework: the one they should be able to claim from the state of nationality and the human rights regime, as well as the one for *de jure* statelessness, as, given the factual proximity of the conditions, there is no reason to exclude them from benefitting from both the protection regime[69].

Ultimately, the definition provided by the 1954 Convention is sufficient and one could argue that the distinction between concept of *de facto* and *de jure* statelessness sparks pointless negative debates when it is established that the

[67] A Weis, *Nationality and Statelessness in International Law,* 45 ff.
[68] Art. 1 of the Convention relating to the Status of Stateless Persons.
[69] Marco Balboni and Barbara Korcari, "Il Problema Dei c.d. Apolidi De Facto E Della Loro Tutela," *Cuadernos De Derecho Transnacional* 16, no. 2 (2024): 113–26.

term *de facto* stateless possesses no juridical relevance. This is true, especially when the creation of a superfluous hierarchy within the concept of statelessness does not benefit the implementation of a protection framework. However, what needs to be reconsidered are the establishment of shared criteria for the proof of citizenship, their systematic implementation and a supervising system, which are at the root of all these complications.

1.4.1 Statelessness and the intensity of the link

An additional element that has relevance to the description of the stateless condition is the degree of attachment a stateless person has with the State in which they reside. Not all stateless persons present the same attachment to the country, that varies from the complete absence of any link, as in the case of a person that has just recently arrived in the country as the result of a migration flow, to a very strong and meaningful link, as is the case of *in situ* stateless persons[70]. The degree of attachment to a country is a spectrum and not an exact science to assess, however, a general definition for *in situ* statelessness could be "[a] person who [is] stateless in their 'own country', who have meaningful and long-established ties to the country they live in"[71]. Contrary, migratory statelessness would refer to individuals who lack such bond with their country of residence and is tied with the concept of migratory flows and arrival, resulting in "relatively weak"[72] or totally absent connection with the country.

It is clear that the exact point of cut-off for this distinction is a hard-to-define grey area and is dependent on the individual circumstances. Nonetheless, the

[70] Cf. Gyulai, "Statelessness in the EU Framework for International Protection," 279-295; Gyulai, "The Determination of Statelessness and the Establishment of a Stateless-Specific Protection."; Mark Manly, "UNHCR's Mandate and Activities to Address Statelessness in Europe," *European Journal of Migration and Law* 14, no. 3 (2012): 261–77; Laura Van Waas and Monica Neal, "Statelessness and the Role of National Human Rights Institutions," *Tilburg Law School Legal Studies Research Paper Serie*, 2013, 15; Gábor Gyulai, "Statelessness Determination and the Protection Status of Stateless Persons" (ENS, 2013); Ivan Kochovski, "Statelessness and Discriminatory Nationality Laws: The Case of the Roma in Bosnia and Serbia" (LLM Thesis, Tilburg University, 2013);

[71] Vlieks, "Contexts of Statelessness: The Concepts 'Statelessness in Situ' and 'Statelessness in the Migratory Context," 36.

[72] Gyulai, "Statelessness Determination and the Protection Status of Stateless Persons."; Gyulai, "Statelessness in the EU Framework for International Protection."

distinction between these two categories is supported by an academic consensus, that recognizes its relevance when assessing the legal response required in the determination of measures for their resolution[73]. If it is assumed that naturalization and acquisition of nationality are the ultimate goals to resolve statelessness, it has been often argued that it acceptable for the means to reach it to diverge based on the level of attachment to the state that the individual present. From a legal perspective, there are two routes to address statelessness: the immediate recognition of nationality—associated by literature with *in situ* stateless persons—and the employment of stateless determination procedures that guarantee a status of protection—often recommended for migratory statelessness. This distinction is supported by the Handbook on Protection of Stateless Persons[74], which suggests that the procedure for the status determination of statelessness is not appropriate in the case of *in situ* stateless persons, and instead, in virtue of their *significant link* with the state, it should become custom to facilitate their access to immediate naturalization procedures[75].

The idea of granting facilitated naturalization for *in situ* stateless persons can be drawn from the concept of *genuine link* that was introduced by the International Court of Justice in the Nottebohm case[76]. Through this case, the Court has detailed the necessary criteria to prove such a genuine link. According to the court *"*the habitual residence of the individual concerned is an important factor, but there are other factors such as the center of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."[77] Such elements are characteristic of *in situ* stateless persons and match the description of their condition, strengthening the argument that the existence of a distinction

[73] Manly, "UNHCR's Mandate and Activities to Address Statelessness in Europe."
[74] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons."
[75] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons," para 58. However, not all countries have provided for or recognize facilitated procedures for *in situ* stateless persons.
[76] *Nottebohm case (Liechtenstein v. Guatemala),* [1953], ICJ. Eva Mrekajova, "Naturalization of Stateless Persons: Solution of Statelessness" (MA Thesis, University of Tilburg, 2012), 2012.
[77] *Nottebohm case (Liechtenstein v. Guatemala), [1955],* ICJ, 23.

between *in situ* and migratory statelessness warrants a different, perhaps prompt, solution for them[78].

1.5 Denationalization of rights: still the right to have rights?

One might wonder if the lack of nationality, in an era where human rights are experiencing a progressive expansion, is still a theme that requires an investigation and the engineering of solutions. The theme of the denationalization of rights is, however, a complex matter than has long held the attention of the human rights discourse. Hannah Arendt, in the context of rising totalitarianism in Europe and antisemitic sentiments, excellently describes the relation between nationality and rights, finding a direct causal link between the lack of a bond with a nation and the preclusion of rights[79]. Arendt describes nationality as a gateway to every other right, a *super-right* that represents membership to a *nation*, without which individuals are left *stateless* and *rightless*. This idea has been echoed by many academics through the years[80], finding that nationality plays a crucial role in the protection of rights and that it inevitably leads to the exclusion of the *other.* In 1958 the US Supreme Court mirrored this viewpoint by labelling the loss of citizenship and equivalent to the "total destruction of an individual's status in organised society", specifying that, not only the individual would lose their status within the international community, but the existence of such contradiction would negatively impact the state as well[81]. A contextualization of this theory that adapts it to our current times is, however, required, especially when we refer to the treatment of stateless persons and non-citizens in general.

[78]Caia Vlieks, "Contexts of Statelessness: The Concepts 'Statelessness in Situ' and 'Statelessness in the Migratory Context,'" in *Understanding Statelessness* (London: Routledge, 2017), 35–52.

[79] Hannah Arendt, *Origins of Totalitarianism* (New York: Harcourt, Brace and Company, 1951).

[80] Richard J. Bernstein, *Hannah Arendt and the Jewish Question*, *Policy Press* (Cambridge: Polity Press, 1996); Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*; Peter Baehr, *Hannah Arendt, Totalitarianism, and the Social Sciences* (Stanford: Stanford University Press, 2010).

[81] US Supreme Court, 31 March 1958, 356 U.S. 86, *Trop v. Dulles, Secretary of State et. Al.*

It is no secret that nationals benefit from more rights than non-nationals[82]. Although we understand human rights as something that must be granted to every person, simply by virtue of being *human*, there is no denying that some rights are conditional upon the possession of a citizenship[83]. Historically, states have granted rights to their citizens, expecting duties in return. It is today accepted that states provide to their citizens better benefits, treatment, and services compared to non-citizens.

However, a core principle of the human rights framework established after WWII to prevent states from abusing their power to persecute people, is that all people must enjoy the same human rights, regardless of their status. According to the Universal Declaration of Human Rights, which marked the birth of such ambitious framework, "all human beings are born free and equal in dignity and rights"[84]. By listing the rights that compose the benchmark of people's rights that all states must accord to all people, the declaration not only defined the rights all people are entitled to by virtue of being *human*, but it also started a process of *denationalization* of rights. Such a denationalization is remarked also in many other international instruments, such as the International Covenant on Civil and Political Rights (ICCPR), which, according to the UN Human Rights Committee, shall apply to everyone, irrespective of their nationality or status of statelessness[85]. This same line of thought has been later mirrored by other international instruments, such as the UN Committee on the Rights of the Child[86], and in Europe there is considerable case law supporting this idea: multiple cases have been brought before the European Court of Human Rights (ECtHR) by

[82] Cf. UNHCR, "Global Action to End Statelessness" (UNHCR, 2014): 1: "Stateless persons are often denied enjoyment of a range of rights such as identity documents, employment, education and health services"; Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*; Matthew J. Gibney, "Statelessness and Citizenship in Ethical and Political Perspective," in *Nationality and Statelessness under International Law* (Cambridge: Cambridge University Press, 2014), 51.

[83] Though international human rights frameworks assert that "all human beings are born free and equal in dignity and rights" and have therefore rights simply because they are human, in reality there are clear linkages between citizenship status and one's ability to access fundamental rights. Kingston, Lindsey N. "Statelessness as a Lack of Functioning Citizenship." *Tilburg Law Review* 19, no. 1–2 (2014): 128.

[84] Art. 1 of the Universal Declaration of Human Rights (1948).

[85] UN Human Rights Committee, "CCPR General Comment No. 15: The Position of Aliens Under the Covenant" (Twenty-seventh session of the Human Rights Committee, 1986), para 1.

[86] See section 3 of chapter II.

stateless persons, and the nationality of the applicant (or lack thereof) has never been deemed relevant[87].

It is undeniable that citizenship still plays an important role in accessing rights[88] and it is instrumental to draw a separation from the *other*, but the rights of non-citizens have greatly improved compared to the time of Arendt's writing. Therefore, when Arendt speaks of the "*right to have rights*"[89], it can be surely considered an exaggeration today, as we must recognize the great effort made by the international human rights framework in decoupling nationality from rights.

Nonetheless, recognizing the value that Arendt's theory on nationality still holds today, many academics[90] tried to suggest effective solutions to achieve full denationalization of rights: Benhabib for example, suggests a post-national theory according to which the lives of non-nationals can be improved[91] by explore how rights can be enjoyed through alternative forms of participation. Theories suggesting the denationalization of rights have expanded the movement of stateless persons' protection and reshaped the mindset from a perspective looking solely at citizenship as the solution, to one rooted in the identification and protection of stateless persons.

According to some research[92] citizenship may not even be the best option for stateless persons, and some academics[93] have argued in favor of the possible existence of a right to statelessness. Such an idea is born from a right-based approach that wants to include the agency of the stateless person among the right they are entitled to and focuses on how stateless persons can be guaranteed the protection of their rights. Some examples are provided to

[87] See *ECtHR, Slavov v. Sweden*, App. No 44828/98, [1999]; ECtHR, *Okonkwo v. Austria*, App. No 35117/97, [2001]; ECtHR, *Nashif v. Bulgaria*, App. No 50963/99, [2002]. See section 7 of chapter III.

[88] See chapter II.

[89] Arendt, *Origins of Totalitarianism*.

[90] Cf. Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, *International Migration Review* (Chicago: The University of Chicago Press, 1994); David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship*, *Choice Reviews Online* (Baltimore: Johns Hopkins University Press, 1996); Saskia Sassen, "Towards Post-National and Denationalized Citizenship," in *Handbook of Citizenship Studies* (SAGE Publications, 2002), 277–92.

[91] Cf. J. James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity*, *Princeton University Press* (Princeton: Princeton University Press, 1990); Seyla Benhabib, "Disaggregation of Citizenship Rights," *Parallax* 11, no. 1 (2005): 10–18.

[92] *Ibid*.

[93] K.J. Swider, "A Rights-based Approach to Statelessness" (PhD Dissertation, University of Amsterdam, 2018).

prove that citizenship is not always the best option, but it could result in dangerous and undesirable circumstances, such as mandatory army duty[94] or cases in which remaining stateless is more convenient for tax purposes[95]. Notwithstanding the possible benefits, a few examples of bad outcomes connected to citizenship cannot be used as the benchmark that lacerates the relationship between rights and nationality so thoroughly explored by Arendt and many others after her. However, the implication that a stateless person does not necessarily require a citizenship but could rely upon a status of protection around the condition of statelessness, reveals compelling scenarios from a perspective of a post-national solution to statelessness.

In fact, the immediate naturalization of all stateless persons, despite being the optimal solution, is a process that would require a radical change in national policy and strong cooperation at the international level. This degree of change is hardly imaginable[96] and it would be even more impractical to abandon people waiting for such change to happen. The unlikely target of ending statelessness by 2024 at the base of the 10-year UN worldwide campaign "IBelong" has been an emblematic example of this conundrum: though the campaign brought awareness[97] and achieved important milestones for each of its ten goals[98], its core ambition was never really within reach. In the wake of this decade of action, the UNHCR has officially launched the Global Alliance

[94] *Ibid*.

[95] Scott James C., *The Art of Not Being Governed: An Anarchist History of Unpland Southeast Asia* (New Haven: Yale University Press, 2009).

[96] See Section 1 of chapter II. The reluctancy of states to implement the immediate elimination of statelessness is reiterated in Roberto Córdova, "Nationality, Including Statelessness: Third Report on the Elimination or Reduction of Statelessness" (Report of the International Law Commission to the General Assembly, A/CN.4/81, 1954), para 29 , where the Commission considered that "it was not feasible to suggest measures for the total and immediate elimination of present statelessness."

[97] The Global Action Plan to End Statelessness attempted to establish a framework of 10 actions for states to address:1) resolve existing major situations of statelessness; 2) ensure that no child is born stateless; 3) remove gender discrimination from nationality laws; 4) prevent denial, loss or deprivation of nationality on discriminatory grounds; 5) prevent statelessness in cases of State succession; 6) grant protection status to stateless migrants and facilitate their naturalisation; 7) ensure birth registration for the prevention of statelessness; 8) issue nationality documentation to those with entitlement to it; 9) accede to the UN Statelessness Conventions and 10) improve quantitative and qualitative data on stateless populations. The objective of the campaign were to "*Resolve existing situations of statelessness; prevent new cases of statelessness from emerging; and better identify and protect stateless persons*" (UNHCR, "Global Action to End Statelessness" (UNHCR, 2014)).As reported by the yearly report of progress made.

[98] UNHCR, "The #IBelong Campaign: A Decade of Action to End Statelessness, 2014-2024" (UNHCR, IBelong, 2024).

to End Statelessness, that aims at bringing together governments, civil society and international organizations with a similar goal to accelerating solutions to end statelessness[99]. Nonetheless, according to the Institute on Statelessness and Inclusion (ISI), in 2019 the number of stateless persons was estimated at around 15 million, which, considering the similar estimate in 2005[100], suggests that the end goal is not closer nor within reach.

Therefore, despite the shrinking of the citizenship's exclusivity on rights and their progressive denationalization, as well as taking note of the post-national suggestions of membership that can improve the condition and protection of stateless persons, until the concept of nationality will hold relevance within the international legal system, the existence of statelessness will need to be addressed in order to generate solutions that can further reduce the gap between stateless persons and citizens.

1.6 The unlikely goal to end statelessness and the prioritization of identification

When investigating solutions for statelessness, this research focuses on identification rather than on the eradication of statelessness, in an effort to bring concrete answers to the people that are currently trapped in this condition. The goal of eliminating statelessness was acknowledge at the time of the drafting of the 1961 Convention on the Reduction of Statelessness[101], having however been shelved due to the strong implications that it would have on the States' right to confer nationality. At the time, the eradication of statelessness already appeared as an elusive ambition, and the 2014 campaign to end statelessness by 2024 has further substantiated the hurdles that the achievement of such goal stores. Likely due to the lack of an international supervisory body that can provide a robust enough mechanism that would ensure the implementation of the international norms, today's international provisions fail to overcome political obstacles: M. Hudson, special rapporteur appointed in 1951 by the International Law Commission, has already

[99] European Network on Statelessness, "Briefing Note: Addressing Statelessness in Europ: Ahead of the High-Level Segment on Statelessness" (ESN, 2024).
[100] See section 1 of chapter I.
[101] See section 2 of chapter II.

expressed this idea in 1952, when, in his report on nationality[102], he stated that "[i]t is difficult to envisage any measure that would wholly eliminate the statelessness of presently stateless persons […]" and suggested to redirect the focus on the *reduction* of statelessness, due to the role that politics play on nationality matters. For this reason, this research chooses to focus on a right-based approach instead, targeting the protection of existing stateless persons and the establishment of a standard of treatment able to exist void of nationality. Crucial for this investigation is the concept of identification of stateless persons, without which any effort spent towards the creation of a benchmark for rights would be futile.

The importance of identification is rooted in the idea that there cannot be a solution to statelessness without effective status recognition measures. This research argues that a strengthened effort to identify stateless persons in a more systematic way would dramatically improve their position. The idea draws inspiration from the success of the Nansen Passports, which were issued to refugees after WWI. Before the creation of these internationally recognized documents, even when states issued papers to refugees, they would often fail to be recognized by other states[103]. This led to the introduction of internationally recognized certificates that, to an extent, represented passports' surrogates[104] and restore a certain legal identity to refugees. However, this research attempts to further this premises by targeting the *normalization* of statelessness as a membership status. The normalization of statelessness would not refer to a change within the connotation that this condition carries, but rather it would indicate a structured and regularized status within a framework that is able to recognize and systematically address this condition[105].

Some elements to bring this vision on statelessness to life for already exist in the international framework but have not been properly implemented. The UNHCR, for example, has promoted the need to establish status determination procedures and greatly values their role in the protection of

[102] Hudson, "Report on Nationality, Including Statelessness."
[103] Claudena M. Skran and Evan Easton-Calabria, "Historical Development of International Refugee Law," in *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 2e*, 2nd ed. (Oxford: Oxford University Press, 2024).
[104] John G Stoessinger, "The Refugee and the World Community," *University of Minnesota Press* 52, no. 3 (1961): 17.
[105] Swider, "A Rights-Based Approach to Statelessness." 111 ff.

stateless persons[106], placing it in *Action 6* of its Global Action Plan on statelessness. The UNHCR also prepared a Handbook completely dedicated to the protection of stateless persons[107] recognizing how status determination procedures must be at the core of the effort to protect stateless persons.

It is clear that, for state parties to the 1954 Convention to be able to implement it, they must be able to identify who is stateless. The UNHCR defines this as an implicit obligation that derives from the 1954 Convention[108]. However, the Convention has been criticized for the lack of regulation and guidance in identifying statelessness, failing to provide any binding provision on the matter[109]. The international instruments[110] that have been drafted on statelessness have been careful to avoid any attempt to regulate this subject and have not provided binding guidance on the determination of statelessness. Identification has been forsaken to the discretion of states, who autonomously establish their status determination procedures[111] and the implementation of the 1954 Convention. However, neglecting the establishment of accessible and functioning SDPs would inevitably forgo the associated actions dictated by the convention: SDPs represent, therefore, an indispensable aspect within the mechanics of the protection of stateless persons. The national and international landscape is less than encouraging on this matter, as the countries that have produced them[112], more often than not, have inadequate SDPs[113], undermining any effort of collective action.

This research argues that to maximize the outcome and the practicality of such procedures, they must be harmonized and reciprocally recognized. The suggestion is that the recognition of the status of *stateless* should provide the

[106]UNHCR, "Establishing Status Determination Procedures for the Protection of Stateless Persons: Action 6" (UNHCR Good Practice papers, 2020).
[107] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons." UNHCR, "Establishing Status Determination Procedures for the Protection of Stateless Persons: Action 6."
[108] UNHCR, "Establishing Status Determination Procedures for the Protection of Stateless Persons: Action 6," 4.
[109] Cf. K. Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*; Van Waas, *Nationality Matters: Statelessness Under International Law*.
[110] See chapter II.
[111] See chapter IV.
[112] E.g. Argentina, Costa Rica, Ecuador, Hungary, Moldova, Panama, Paraguay, Italy, Spain, Uruguay.
[113]UNHCR, "Establishing Status Determination Procedures for the Protection of Stateless Persons: Action 6."; Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States.*

individual with the legal identity they are missing, normalizing their position within the international community, and facilitating the enjoyment of their rights. It should also be noted that this design could include a path to naturalization, without rendering it the central priority, replacing it instead with a system that guarantees the protection of the individual and further thins citizenship's monopoly on rights. The framework built around statelessness should, therefore, comprise two fundamental elements: prioritization of a harmonized system for status determination procedures and a defined standard of protection.

1.7 Conclusion

This chapter has laid down the building blocks of this research, highlighting the direction it strives to pursuit when approaching the issue of statelessness. By exploring the connection between human rights and nationality, the investigation has underscored a progressive denationalization of rights that the development of an encompassing human rights regime has accomplished. However, despite the established consensus that nationality today does not have a monopoly on rights anymore, this chapter has reaffirmed that nationality is not obsolete yet, and, consequently, statelessness must be addressed and related solutions must be devised.

The retracing and analysis of the stateless' state of the art has highlighted the emergence of several approaches proposed for addressing statelessness, which, combined with the assessment of the statelessness' definition and its problematization, has raised the themes of identification that have informed this research's premises. When choosing identification to constitute the bedrock of this research's proposed solution, it is also important to acknowledge the secondary role that the elimination of statelessness might acquire within this investigation, as it can be considered hindered by the admitted reluctancy of states to execute this vision due to its political ramification. This might mean that the international recognition of the right to nationality and its enforcement are not the central focus of this research on, albeit with some mentions apt to the support of specific arguments. Instead, the core element that has been remarked is that a structured approach to identification of statelessness is the main ambition of this research, and the

argument that, as suggested by new theories on post-national model of membership, statelessness can become an autonomous protection status recognized by states, that demotes the acquisition of citizenship from an absolute necessity, to, perhaps, a secondary ambition. Therefore, the first step, paramount to the realization of this goal, is the creation of an efficient identification system in order to establish who this protection extends to.

This chapter has revealed the EU as the supernational political entity designated by this research to fulfil this goal and construct such system and proposed the related investigation questions that this research will attempt to answer. In order to justify the choice of the Union as the principal figure able to achieve the desired outcome, the next chapter will describe the existing international framework around statelessness, whose limitations and insuperable hurdles are a testament to why the EU—at the regional level—possesses instead the tools to overcome these impediments and construct a solution for the identification of statelessness.

CHAPTER II

THE INTERNATIONAL FRAMEWORK ON STATELESSNESS

2.1 Introduction

The first convention ever adopted on the matter of statelessness is the Convention in Questions relating to the Conflict of Nationality Laws (1930) which, through measures that regulated acquisition and loss of citizenship, had the aim of ensuring that every person enjoyed one and only one citizenship, preventing both cases of statelessness as well as instances of multiple citizenships[114]. The first article of the Convention abdicates to the states' discretion the establishment of the criteria for granting citizenship, emphasizing the duty of states to recognize each other's nationality laws. However, by mentioning the respect of international law within the criteria of citizenship conferral, the convention implicitly admits the existence of limits to the state power[115]. Since 1930, the international community has produced two additional conventions exclusively dedicated to statelessness: the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. This chapter seeks to briefly analyze their most relevant aspects to the protection and avoidance of statelessness today, in order to identify the gaps and the added value that these instruments represent for the international framework on statelessness. Furthermore, the chapter will attempt to supplement the two conventions with the contribution that the human right regime has provided for the cause, with special attention towards the mechanisms for implementation of the relevant international

[114] Convention on Certain Questions Relating to the Conflict of Nationality Law, League of Nations, Entry into force: 1 July 1937, Treaty Series, vol. 179, p. 89, No. 4137.

[115] Art. 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law (1930) *"*It is for each State to determine under its own law who are its nationals. 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."

instruments and the annexed issues. The chapter reflect upon the impact that human rights law can have on the protection of stateless individuals and on the limitations that such approach has encountered, highlighting the gaps that appear to be incompatible with an effective fulfilment of the ambition to create an internationally recognized status of protection for stateless persons.

2.2 The Convention Relating to the Status of Stateless Persons

After WWII, the United Nations commissioned a study on people who, for some reason or another, were not linked to a state through citizenship, resulting in the annexation of stateless persons to refugees by integrating a protocol on stateless persons within the 1951 Convention on the Status of Refugees[116]. Eventually, the sentiment that statelessness deserved specific regulations prevailed, transforming what should have been a protocol into an autonomous convention: the 1954 Convention Relating to the Status of Stateless Persons[117]. Given the historical and conceptual link shared by the two conventions, the Convention on the Status of Refugees became the

[116] United Nations Department of Social Affairs, "A Study on Statelessness" (E/1112;E/1112/Add.1, 1946): "Taking note of the resolution of the Commission on Human Rights adopted at its second session regarding stateless persons, recognizing that this problem demands in the first instance the adoption of interim measures to afford protection to stateless persons, and secondly the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality, requests the Secretary-General, in consultation with interested commissions and specialized agencies: (a) To undertake a study of the existing situation in regard to the protection of stateless persons by the issuance of necessary documents and other measures, and to make recommendations to an early session of the Council on the interim measures which might be taken by the United Nations to further this object; (b) To undertake a study of national legislation and international agreements and conventions relevant to statelessness, and to submit recommendations to the Council as to the desirability of concluding a further convention on this subject." At the time *refugee* and *stateless* were used as synonyms. Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation." 101 ff.

[117] The initial idea was to extend the application of certain provisions that were going to be part of the 1951 Convention to stateless persons *mutatis mutandis* (UNESC, UN Ad Hoc Committee on Refugees and Stateless Person, "Report of the Ad Hoc Committee on Refugees and Stateless Persons" (Second Session, 1950)), however it became evident that the differences between stateless persons and refugees required adjustments in the provisions that could not be reflected through the transposition in a Protocol (UNGA Conference of Plenipotentiaries on the Status of Refugees and Stateless Person, "Summary Record of the Thirty-first Meeting" (No. 11, 1951), para 2.)

reference point for the drafting of the one on statelessness[118]. Hence, the text of the latter strongly recalls the former, though diverging through some omissions and changes that tried to adapt the regulations to the case of statelessness.

The 1954 Convention not only defines "stateless person", but it also describes the categories of persons to whom, albeit possessing the correct features, the Convention shall not apply. Firstly, persons who receive assistance and relief from other UN organs, as long as such assistance continues[119], such as Palestinian refugees who receive protection from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). People who reside in a state where they enjoy the same rights and duties as citizens are also to be excluded from benefiting from the Convention[120]. Lastly, the Convention does not apply to those who are responsible for crimes against peace, humanity, or serious non-political crimes before entering the state of residence, as well as people who commit crimes against the principles of the UN[121].

The Convention then defines the treatment that stateless persons must enjoy. Generally, the 1954 Convention attempts to guarantee a minimum standard of treatment to stateless persons by associating it with those of non-nationals. In this regard, art. 7 of the Convention states that "[e]xcept where this Convention contains more favorable provisions, a Contracting State shall

[118] Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation", 25.

[119] In the 1954 Convention, art. 1.2 (i): "[t]his Convention shall not apply: To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance."

[120] In the 1954 Convention, art. 1.2 (ii): "[t]his Convention shall not apply: To persons who are recognized by the competent authorities of the country in. Which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of the country."
(c) They have been guilty of acts contrary to the purposes and principles of the United Nations."

[121] In the 1954 Convention, art. 1.2 (iii): "[t]his Convention shall not apply: To persons with respect to whom there are serious reasons for considering that:
(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
(c) They have been guilty of acts contrary to the purposes and principles of the United Nations."

accord to stateless persons the same treatment as is accorded to aliens generally […].” This article represents a benchmark of treatment and, though—it will be argued—insufficient, remains one of the most relevant articles included within the convention in as much as it sets the general standard of equating stateless persons to non-nationals and approximating their guarantees.

The rights included within the Convention are guaranteed according to two fundamental criteria: the level of attachment to the State and the minimum standard of treatment guaranteed compared to citizens and non-nationals[122]. Relating to the first criteria, generally, five levels of attachment have been identified: subject to state jurisdiction, physical presence on the territory of the state, lawful presence on the territory of the state, lawful stay on the territory of the state, and habitual residence on the territory of the state[123]. However, it remains unclear how the term *habitual residence* must be interpreted, since the concept has not been defined by the Convention. The main point of discussion is whether the term is to be understood only in the case of lawful stay or can allow for a concrete habitual stay, despite the possible irregularity of permanence within the state[124]. The *ad hoc* committee on refugees and stateless persons has expressed a favorable opinion on the latter option, although emphasizing that the residence must be *“*on ongoing and stable basis”[125]. Nonetheless, given the possibility granted by the lack of a clear definition within the Convention, customarily, states tend to interpret the term in the most restrictive way possible,[126].

Regarding the standard of treatment, the rights listed by the convention related to three different situations: a standard as favorable as those of non-citizens in the same circumstances; a standard as favorable as those of

[122] Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*, 99.
[123] The 1954 follows the same system provided by the Convention on the Status of Refugees, Cf. James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), 228-238; Van Waas, *Nationality Matters: Statelessness Under International Law*, 230 ff.
[124] Supporting the former opinion, Cf. Hathaway, *The Rights of Refugees Under International Law*, 186-190.
[125] UNHCR, “Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons,” paras 138-139.
[126] Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*, 98.

citizens; and absolute rights, so defined because they are unrelated from standards offered to anyone else.

2.2.1 Civil, political, economic, social, and cultural rights

The Convention on the Status of Stateless Persons protects an array of civil and political rights, as well as a series of economic, social, and cultural rights. Among the civil and political rights, it protects the right to not be discriminated against (art. 3), the freedom of religion (art. 4), the right to personal status (art. 12), the rights to movable and immovable property (art. 13), the right to access to courts (art. 16), the freedom of movement (art. 26), the right to identity papers (art. 27), the right to transfer of assets (art. 30), and the protection from expulsion (art. 31). Among the economic, social, and cultural rights those explicitly protected are the artistic rights and the right to industrial property (art. 14), the right of association (art. 15), the right to wage-earning employment and self-employment (artt. 17 and 18), the right to liberal professions (art. 19), the right to rationing (art. 20) and housing (art. 21), the right to public education (art. 22), the right to public relief (art. 23), the right to labor legislation and social security (art. 24), the right to administrative assistance (art. 25) and the right to travel documents (art. 28).

The rights that must be guaranteed with a standard as favorable as those guaranteed to non-citizens are the rights to immovable property, the freedom of movement, the right of association, the right to wage-earning employment and self-employment and the right to housing. A treatment as favorable as those guaranteed to citizens is required for the freedom of religion, the right to access to courts within the State of residence, artistic rights and the right to industrial property, the right to rationing, the right to public education, the right to public relief and the right to labor legislation and social security. Lastly, absolute rights include the prohibition of discrimination, the right to personal status, the right to access courts *within the territory,* and the freedom from expulsion.

Being subject to the jurisdiction of the state is enough to guarantee the protection of the right to personal status, the right to immovable property, the right to access the courts, the right to rationing, and the right to housing. Physical presence is necessary to enjoy access to courts, the right to identity

papers, the right to transfer assets, the freedom of movement, the freedom from expulsion and, when the presence of the individual is lawful, the right to labor and the other labor-related rights must be guaranteed as well. If the stay of the stateless person is lawful, the right to access courts (at points 2 and 3) and most of the economic and social rights, such as the right to artistic and industrial property, the right to association, the right to labor, the right to public relief, the right to public administrative assistance and the right to travel documents must be guaranteed as well.

It is relevant to note that there is no immediate correlation between the two criteria of attachment to the state and standard of protection. The so-called absolute rights can be associated with several degrees of attachment while having the highest degree of attachment does not necessarily entail a degree of protection as favorable as that of citizens[127]. However, the range of protection offered by the 1954 Convention urges an analysis of whether its role as an added value to the protection of stateless persons is still relevant today, given the emergence and affirmation of the international law on human rights.

Compared to the International Covenant of Civil and Political Rights (ICCPR), the civil and political rights protected by the convention on the status are far less hefty. Particularly notable is the absence of the right to life (art. 6 ICCPR), the freedom from torture (art. 7 ICCPR), the prohibition of slavery and forced labor (art. 8 ICCPR), the freedom from arbitrary detention (art. 9 ICCPR), the right to private life (art. 17 ICCPR) and the minority rights (art. 27 ICCPR). These omissions have been justified by the peremptory character of the rights, which can be considered vastly established within international law[128]. However, given their reiteration in later conventions, their absence in the 1954 Convention becomes puzzling[129]. Notwithstanding the inclusion of art. 7—which can be interpreted as an encompassing safety net for the protection of stateless persons' rights—the omission of these rights is inexplicable, given the underlying goal of creating a minimum standard of treatment for stateless persons through this instrument and considering how

[127] Van Waas, *Nationality Matters: Statelessness Under International Law*, 231.
[128] Hathaway, *The Rights of Refugees Under International Law*, 94; Zilbershats, *The Human Right to Citizenship*, 41.
[129] Convention on the Right of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) and Convention on the Rights of Persons with Disabilities (2006).

vulnerable stateless persons are to circumstances such as indefinite detention and family separation[130].

Keeping in mind the disregard for such rights, coupled with the scant number of states party to the Convention[131], the inevitable conclusion is that the contribution on the protection of civil and political rights of the 1954 Convention might appear somehow inconsequential today. The list of rights presented by the Convention is incomplete and vague, and a more convincing form of protection can be found among the rights listed within other international instruments, such as the International Covenants on Civil and Political Rights[132].

On the other hand, pertaining to economic, social, and cultural rights, the most important document produced internationally is the International Covenant on Economic, Social and Cultural Rights (ICESC), which again offers a wider range of protection compared to the Convention on the status. A notable exclusion in this sense is the absence of the right to health (art. 12 ICESC), which can appear peculiar given the evident vulnerability of stateless persons on this matter[133]. However, the number of economic, social, and cultural rights protected by the 1954 Convention gives encouraging signs, providing an extended list compared to that of political and civil rights. Despite such promising start, it must be noted that the conditions to enjoy such rights are harder to meet than those of civil and political rights. Firstly, one must prove lawful presence in the territory to enjoy economic, social, and cultural rights, with the only exception of the right to housing and the right to rationing. And

[130] Cf. De Chickera and Et Al., "Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons."

[131] At the time of writing, the Convention Relating to the Status of Stateless Persons has been ratified by 96 states and signed by 23.

[132] Cf. C. Carmen Tiburcio, *The Human Rights of Aliens Under International and Comparative Law* (The Hague: Kluwer Law International, 2001), 76; Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2006), 537.

[133] Limited access to healthcare or the complete exclusion from them has been reported by multiple stateless groups, such as the Rohingya in Myanmar, the Kurds in Siria and people pf Haitian descent in the Dominican Republic. Cf. Open Society Justice, "Racial Discrimination and the Rights of Non-Citizens: Submission to the UN Committee on the Elimination of Racial Discrimination on the Occasion of Its 64th Session," 2004; Lynch, "Lives on Hold: The Human Cost of Statelessness," 4; Sokoloff and Lewis, "Denial of Citizenship: A Challenge to Human Security," 20. There have also been reports linked to access to child healthcare, including vaccination programs. (Sarah Aird, Helen Harnett, and Punam Shah, Stateless Children: Youth Who Are Without Citizenship (Youth Advocate Program International, Booklet No. 7 in a series on International Youth Issues, 2002), 6.

secondly, they are not absolute rights, but they can be waved and/or compressed. Therefore, the Convention's protection of these rights is weak and largely conditional.

Compared to what is provided by the Convention on the Status of Stateless Persons, the international system of protection of human rights offers a more complete and efficient guarantee of protection. The 1954 Convention, despite owing a huge debt to the 1951 Convention, suffered its reliance on it due to the significant limitation it experienced when many rights were directly transposed without adaptation to the circumstances of statelessness. For example, the 1954 Convention fails to mention Minority Rights[134], operating on the flawed assumption that the statelessness experience mirrors the one of refugees for whom the drafter might have deemed this right superfluous, but is blind to the prevalence of pre-existing stateless minority groups in various states that might have benefitted from the inclusion of this provision[135]. One might wonder if it would have been more beneficial to individually assess the needs to stateless persons when drafting this convention, rather than basing the provisions on a preexisting mold that did not necessarily fit the stateless experience.

2.2.2 Special rights for stateless persons

The 1954 Convention, in addition to the more common human rights, includes a unique section that protects the rights that are specific to the condition of statelessness in chapter V "Administrative measures." Among them are included measures relating to naturalization (art. 32), identification documents (art. 27), travel documents (art. 28), and expulsion (art. 31).

Generally, naturalization is considered the most efficient and definitive way to resolve the condition of statelessness. In this regard, the International Law Commission, upon the UN General assembly's request, designated the special rapporteur Còrdova to draft a report on *current* statelessness (in this way distinguished from *future* statelessness, tackled in the Convention on the

[134] In Art. 27 of the ICCPR.
[135] Van Waas, Nationality Matters: Statelessness Under International Law, 296-7.

Reduction of Statelessness) [136]. Said report, titled "Third report on the elimination or reduction of statelessness" was comprised of 4 possible international instruments' drafts: 1) a protocol on the *elimination* of *current* statelessness, paired with a draft of the *elimination* of *future* statelessness; 2) a protocol on the *reduction* of *current* statelessness paired with a draft on the *reduction* of *future* statelessness; 3) an alternative convention on the *elimination* of *current* statelessness; and 4) an alternative convention on the *reduction* of *current* statelessness.

Within the instruments presented, two separate lines of action can be identified: a radical one, aimed at the *elimination* of statelessness, and a milder one, aimed at the *reduction* of statelessness. The proposals geared towards the elimination of statelessness were promptly rejected, largely because grounded upon the immediate naturalization of all stateless persons[137]. The Commission considered this option hardly feasible, and the proposal was withdrawn, together with the idea of naturalization as a solution[138].

Lacking a convention specifically designed to resolve cases of current statelessness, the most important instrument on the matter can be found within the 1954 Convention, which, through art. 32, attempted to regulate naturalization procedures. According to this provision, "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings*."* However, some find the formulation of this article disappointing[139]. Using the term *facilitate* excludes the existence of an actual right to naturalization, but rather it invites states to comply at their own convenience[140]. A further criticism on this point relates to the ambiguity and

[136] Roberto Córdova, "Nationality, Including Statelessness: Third Report on the Elimination or Reduction of Statelessness" (Report of the International Law Commission to the General Assembly, A/CN.4/81, 1954).

[137] Ideally on the base of their residency.

[138] *Ibid*, para 29.

[139] Bianchini, Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States; Van Waas, Nationality Matters: Statelessness Under International Law.

[140] Thought the Executive Committee of the UNHCR suggests that all states spread awareness and information relating to citizenship access and naturalization procedures, it never supports openly the idea that a right to such procedures exists, only framing them as ideally available to stateless persons in UNHCR, "Conclusion on Identification, Prevention

vagueness of the provision, which does not specifically regulate the procedure of naturalization, its requirement, or the potential hurdles. Nonetheless, despite its weak formulation, art. 32 remains a fully binding provision towards state parties[141] and some states have taken appropriate measures in this regard[142]: Italy, for example, facilitates naturalization for stateless persons by reducing the required period of residence[143].

A further right grouped within this section is represented by Art. 27, which establishes the need to guarantee at least one form of identification to those who do not have it: "The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document*."* The UNHCR often reiterates that identification documents are a fundamental need of our society to access basic services, particularly when it comes to vulnerable categories of people such as stateless persons[144]. Identification documents, as specified in Art. 27, must be granted to whoever is present within the territory, regardless of their migration status.

In the same way, art. 28 prompts that "[t]he Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require […]"[145]. Unlike Art. 27, the 1954 Convention refers to the state on whether to grant such documents to those who cannot prove lawful presence within the territory, but encourages states to do so, especially if such individuals cannot obtain travel documents elsewhere. A travel document represents a fundamental element for a stateless person, since, as stated by paragraph 1 of the Convention's annex, it provides evidence of their stateless status: "[t]he travel document referred to in article

and Reduction of Statelessness and Protection of Stateless Persons" (Executive Committee 56th session. UN Doc, A/AC.96/1035, 2006), 7.

[141] Hathaway, *The Rights of Refugees Under International Law*, 98.

[142] As reported by UNHCR, "Establishing Status Determination Procedures for the Protection of Stateless Persons: Action 6," 21, some examples are Ecuador, where the period of residence required for naturalization is reduced to two years rather than 3 for stateless persons, Bulgaria and Hungary, where the period is reduced from five to three years, and Argentine, where the national law, not only establishes facilitated naturalization, but it also dictate prioritizing stateless persons who request it.

[143] Art. 9, comma 1, lett. e), l. 5 febbraio 1992, n. 9. See Simone Marinai, "La Protezione Internazionale Degli Apolidi," *Osservatorio Sul Diritto Europeo Dell'immigrazione* Working Papers (2015): 26.

[144] UNHCR, "Identity Documents for Refugees" (UN Doc, EC/SCP/33, 1984), para 1.

[145] For which a template is provided in the appendix of the Convention.

28 of this Convention shall indicate that the holder is a stateless person under the terms of the Convention of 28 September 1954.*"*

This section of the Convention, however, misses a great opportunity, as it fails to regulate diplomatic protection. By definition, this aspect is based on citizenship and inaccessible to stateless persons, which would have thus made it a perfect candidate to find room in this section of the Convention. It would have been ideal to tackle this issue to provide an avenue where this topic is discussed and define the requirements according to which stateless persons could enjoy it[146]. On this, the International Law Commission suggested habitual and regular residence as a sufficient condition to grant diplomatic protection[147]. The Commission reiterated the concept in the 2006 Draft Articles on Diplomatic Protection, in Art. 8[148]. Though it is known that the requirement of lawful residence often proves to be an insurmountable hurdle, the suggestion of considering residence as a sufficient criterion to grant diplomatic protection has been overall welcomed positively by states[149].

Furthermore, unlike the Convention on the Status of Refugees, the 1954 Convention, does not weigh in on the criminalization of entry[150], nor does it recognize the *non-refoulment* principle in favor of stateless persons[151], exposing an additional gap within its protection. Additionally, the 1954 Convention, fails to regulate the temporary admission awaiting status determination—including the search of a country of habitual residence—leaving stateless persons at risk of indefinite detention and precarious conditions: this is yet another crucial aspect of status determination that the conventions is silent upon. The UNHCR handbook, recognizing the

[146] Cf. Brownlie, *Principles of Public International Law*, 459 ff.; Jonkheer H. F. Panhuys, *The Role of Nationality in International Law: An Outline* (Leyden: Sythoff, 1959), 182-183; Tiburcio, *The Human Rights of Aliens Under International and Comparative Law*, 37 ff.

[147] International Law Commission, "Report of the International Law Commission on the Work of Its Fifty-second Session," (Yearbook of the International Law Commission, UN Doc A/55/10, 2000): "A state may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that state."

[148] International Law Commission, "Draft Articles on Diplomatic Protection" (Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, A/61/10, 2006).

[149] Van Waas, *Nationality Matters: Statelessness Under International Law*, 384.

[150] Art. 33 in the Convention Relating to the Status of Refugees.

[151] Goodwin-Gill considers these two principles when referring to refugees' right to temporary admission, in order to allow them to access effectively the correct status determination procedures. See. Guy S. Goodwin-Gill, "International Law and Human Rights: Trends Concerning International Migrants and Refugees," *International Migration Review* 23, no. 3 (1989): 526–46.

heightened danger of indefinite detention for stateless persons, has admitted that in the impossibility to locate a country of habitual residence, detention cannot be a solution, but rather the only option is the admission of the individual and the grant of lawful presence within the territory[152]. On the other hand, expulsion is discussed within the Convention in art. 31, which prohibits the expulsion of stateless persons, if not for reasons of public order and national security. However, this mention exclusively relates to those who are *lawful residents* and includes, for them, all the procedural safeguards, such as due process and granting the stateless person the appropriate time to locate a state that will lawfully accept them. Expulsion in the case of a stateless person who does not lawfully reside within the country is, instead, unregulated and left to the discretion of the states.

The Convention on the Status of Stateless Persons does, therefore, show some overall gaps in the protection is meant to provide, and often subsequent or existing international instrument have proved to guarantee more extensive protection from which stateless individuals can benefit. However, the existence of the Convention is not completely redundant, as it possesses the unique strength of identifying the stateless person status as a base for protection, it delineates their need for additional rights that are not shared by other categories—and therefore not identified in other international instruments—and it ascertain their right to a solution. In these terms, perhaps its most significant gap is the lack of guidelines on status determination procedures[153]. Without significant and uniform guidance, states often fail to identify stateless persons, rendering the very existence of the 1954 Convention and its content, inconsequential for the guarantees it tries to establish.

2.3 The Convention on the Reduction of statelessness and the causes of statelessness

[152] UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians," 22.
[153] See section 1 of chapter II.

It is well known that in international law a genuine link between individual and state is required to recognize a bond of citizenship[154], though leaving to states' discretion the choice of what criteria to use for this purpose. Factors such as the place of birth, the nationality of parents, residence and ethnicity can be keys for granting citizenship, as states often adopt one or a combination of them to establish citizenship. The most employed criteria are *ius soli* and *ius sanguinis*. Typically, states that share similar historic trajectories employ the same criteria: immigration countries tend to use *ius soli*, while emigration countries privilege *ius sanguinis*. Employing a combination of the two would virtually eliminate cases of statelessness, as the instance of the United States shows[155]. On the other hand, adopting the mentioned criteria in an imbalanced manner will lead to frequent cases of statelessness. Unlike *ius soli* and *ius sanguinis*, which are usually employed to automatically assign citizenship at birth, naturalization based *on ius domicile* requires typically a procedure focused on verifying the existence of a genuine link acquired through time or based on other factors, such as marriage or adoption[156].

The Convention on the Reduction of Statelessness aims to remedy the clashes that occur when such criteria are in conflict and lead to statelessness. Art. 1 of the Convention on Reduction states that "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless"[157]. The following articles address the avoidance of statelessness resulting from the lack of citizenship acquisition, particularly when it is due to administrative conflicts. Art. 2 mandates that "[a] foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State"; according to art. 3 children born on a ship or an aircraft flying the flag of a contracting state will be considered as born on the territory of the state; Art. 4 specifies that "[a] Contracting State shall grant its

[154] *Nottebohm case (Liechtenstein v. Guatemala),* [1953], ICJ, 22.

[155] Polly J. Price, "Jus Soli and Statelessness: A Comparative Perspective From the Americas," *in Citizenship in Question: Evidentiary Birthright and Statelessness*, ed. Lawrance and Jacqueline Stevens, 2017, 27-28; ISI, "The World's Stateless," 58. With the exception of cases of discriminatory laws in nationality matters, such as in the Dominican Republic (*TC/0168/13*, [2013], Dominican Republic: Constitutional Court; RFK Human Rights, "Briefing Paper: Denationalized Dominicans and Haitian Migrants at Risk," *Robert F. Kennedy Human Rights*, 2015.).

[156] *Nottebohm case (Liechtenstein v. Guatemala),* [1953], ICJ, 22.

[157] A person born in the territory of a state that adopts *ius sanguinis* from parents who hold the citizenship of a country which grants citizenship according to *ius soli* becomes stateless.

nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless if the nationality of one of his parents at the time of the person's birth was that of that State.*"*

This first section of the Convention draws some criticism due to its lack of guidelines on birth registration[158]. However, this gap is addressed by the International Covent on Civil and political rights[159] and by the Convention on the right of the Child[160] (CRC). The articles of the 1961 Convention, which mention foundlings, are well crafted, but there are some uncertainties on the off chance that one of the parents were to be later identified. Croatia, for example, withdraws the child's citizenship if a non-citizen parent is later discovered[161]. The convention displays therefore an inadequacy, as it fails to specify the need to have appropriate measures to avoid statelessness in this instance, ensuring that the loss of citizenship is always conditional to the acquisition of another one[162]. The European Convention on Nationality (ECN) does a better job regulating this aspect when it states that, in case of later discovery of a parent, the acquired citizenship can be lost only if this

[158] Birth registration is one of the most significant causes of statelessness. Hurdles springs from the lengthy procedures or its elevated costs, as well as physical complications linked to travelling to the offices or accessing them- being them far or hard to reach- and linguistic barriers. Such adversities can often obstruct the completion of the birth registration procedure. According to the report UNHCR, "Ensuring Birth Registration for the Prevention of Statelessness" (UNHCR, Good Practices Paper - Action 7, 2017), 3, disinformation regarding the importance of registration also plays an important role, together with the impossibility to present all the necessarity documents to complete it.

[159] Art. 24.2 of the International Covenant on Civil and Political Rights states that "Every child shall be registered immediately after birth and shall have a name.*"*

[160] According to art. 7.1 of the International Covention on the Right of the Child, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possibile, the right to know and be cared for by his or her parents."

[161] Art. 7 of the Croatia law on nationality, amended the 28th of October 2011 ("*Hrvatsko državljanstvo stječe dijete koje je rođeno ili nađeno na području Republike Hrvatske, ako su mu oba roditelja nepoznata ili su nepoznatog državljanstva ili su bez državljanstva. Djetetu će prestati hrvatsko državljanstvo ako se do navršene 14. godine njegova života utvrdi da su mu oba roditelja strani državljani*") dictates that a child born or found within the Republic of Croatia, from unknown parents or holding unknown citizenship, will acquire Croatian citizenship. The citizenship will be withdrawn if, before the child turns 14, the parents' citizenship is confirmed.

[162] UNHCR, "Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality Through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness" (UNHCR, HCR/GS/12/04, 2012), 12.

does not lead to statelessness[163]. Relating to the technical conflicts, despite the good elements provided by the Convention, some gaps remain, such as vulnerabilities connected to the freedom allowed to states in deciding their own criteria for granting citizenship, as reported by Art. 1: "[a] Contracting State which provides for the grant of its nationality […] may also provide for the grant of its nationality by operation of law at such age and subject *to such conditions as may be prescribed by the national law"*[164]. The Convention, therefore, in admitting the possibility of risks resulting from the discretion of states, further illustrates how the aim of the 1961 Convention was never to reach definitive elimination of statelessness, but to merely attempt its reduction.

Articles 6 and 7 deal with preventive measures in cases of renouncing or involuntary loss of citizenship. The principles are based on the general rule that the loss of citizenship must always be conditional to the acquisition of another one. Citizenship can be lost also following a spouse's loss of their own (art. 6) or following a prolonged period of residence in another state (art. 7). The 1961 Convention establishes that "[i]f the law of a Contracting State provides for loss of its nationality by a person's spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality" (art. 6) and that "[a] naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality" (art. 7 para 4).

Similarly, art. 5 addresses cases of voluntary renunciation of citizenship that fail to later secure another one. The article states that "[…] if the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality." The 1961 Convention deals

[163] Art. 7.1 (f): "A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases: […] where it is established during the minority of a child that the preconditions laid down by internal law which led to the ex lege acquisition of the nationality of the State Party are no longer fulfilled; […] A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless […]"

[164] Emphasis added.

with this issue accurately. However, compared to other instruments that address the prohibition of the loss or deprivation of citizenship[165], once again the European Convention on Nationality is the only one that mentions exact guidelines. Specifically, the European Convention establishes the cases that are acceptable in the sphere of citizenship renunciation or loss, condemning any kind of citizenship loss that would result in statelessness[166].

The subsequent articles focus on citizenships deprivation. The deprivation of citizenship can be the result of punitive action undertaken by the state towards those who are guilty of certain crimes, lack loyalty to the state, or also as discriminatory and/or persecutory measures[167]. According to Art. 8 of the 1961 Convention, "[a] Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless", while art. 9 establishes that "[a] Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds." It is clear that the list of factors that cannot be used as discrimination bases is quite limited. Secondly, the way the article is formulated forbids deprivation of citizenship but does not comment on the refusal to grant citizenship[168], as

[165] Art. 15(2) Universal Declaration of Human Rights del 1948: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality"; Art. 20(3) American Convention of Human Rights, of 1969: "No one shall be arbitrarily deprived of his nationality or of the right to change it"; Art. 9 of the Convention on the Elimination of All forms of Discrimination Against Women of 1979: "States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband"; Art. 8 of the Convention on the Rights of the Child, 1989: "State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

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

[167] Some examples are the Nuremberg Laws, which deprived Jewish people of German citizenship, the laws in Myanmar, which deprived of citizenship Rohingya people and those in Syria, which withdrew citizenship from Kurd people.

[168] The denial of citizenship is described in a report for the Advisory Board of Human Security as "[a]n individual's inability to obtain participative membership in a given State

well as the right to due process in the event of withdrawal or deprivation of citizenship[169]. In this circumstance as well, there are mechanisms at the international level that manage to fill the gaps: many international instruments highlight the prohibition of discrimination and provide a wider list of forbidden factors[170]. Furthermore, the European Convention on Nationality employs an entire chapter (the fourth) to regulate the rights to due process in the matters of citizenship[171].

The last instance examined by the 1961 Convention relates to state succession, which, historically, represent one of the main causes of

despite that individual's meeting the citizenship requirements generally identified under international standards." (Sokoloff and Lewis, "Denial of Citizenship: A Challenge to Human Security." 6.) The UNHCR, "UNHCR's Activities in the Field of Statelessness: Progress Report" (UN Doc. EC/51/SC/CRP.14, 2001), 6, provides further definition, stating that "in some cases persons are unable to acquire nationality in any State despite very strong ties which are sufficient for the grant of nationality to other equally-situated persons" and that "[h]istorically, some governments have limited political participation and representation to certain categories of individuals by making it more difficult for members of certain minority groups to become citizens" (Fernand De Varennes, "Towards Effective Participation of Minorities: A Brief Examination of Advisory and Consultative Bodies and Dialogue Mechanisms," in *Towards Good Governance and Social Integration: Proceedings and Developments from the Conference "Governance and Participation: Integrating Diversity,"* ed. John Packer (Netherlands: OSCE High Commissioner on National Minorities, 2007), 53–70). The denial of citizenship, as exemplified by the Rohingya case in Myanmar, is therefore the refusal to grant equal access to citizenship, for which there is no legal justification.

[169] A mechanism ensuring neutrality and uniformity in the case of citizenship withdrawal is fundamental in order to avoid cases of irregular or discriminatory decisions. The possibility to refer to the Court and appeal must be at the base of an impartial juridical system, to guarantee the compliance with international and national law. See Open Society Justice, "Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to Be Free From Arbitrary Deprivation of Nationality, and Combating Statelessness," *Submission to the United Nations Office of the High Commissioner for Human Rights for Consideration by the UN Commission on Human Rights at Its Sixty-Second Session*, 2005, 8.

[170] According to the 1948 Universal Declaration of Human Rights, which lists reasons of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[171] Art. 10 Processing of applications: "Each State Party shall ensure that applications relating to the acquisition, retention, loss, recovery or certification of its nationality be processed within a reasonable time"; Article 11 Decisions: "Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality contain reasons in writing"; Article 12 Right to a review: "Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality be open to an administrative or judicial review in conformity with its internal law"; Article 13 Fees: "Each State Party shall ensure that the fees for the acquisition, retention, loss, recovery or certification of its nationality be reasonable. Each State Party shall ensure that the fees for an administrative or judicial review be not an obstacle for applicants."

statelessness: some examples are the dissolution of the USSR and of the Socialist Federal Republic of Yugoslavia[172]. On this, art. 10 of the Convention states that *"*1. [e]very treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavors to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions"; and that "2. [i]n the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition*."* However, analyzing the provision, it is immediately obvious that the first paragraph does not provide any clear indication on avoiding statelessness, but simply encourages states to establish bilateral or multilateral agreements in order to avoid it, without providing suggestions on the execution or supervision of said agreements. The second paragraph contains a much more concrete norm, but still leaves room for complications: if a new state were to be formed without taking part in the convention, it could result in disagreements and contrasting interpretations. Once again, at the international level, a solution that integrates on this aspect of the Convention has emerged. In 2001, the International Law Commission encouraged preventive measures in the cases of statelessness deriving from state succession and invited states to recognize the right of people present in their territory to accept or decline the citizenship of the successor state[173]. At the regional level, another further step has been taken within the Council of Europe's Convention on the Avoidance of Statelessness in relation to State Succession of 2006*,* which, not only includes the principles found in the 1961 Convention and drafted by the International Law Commission, but it also stresses the importance of the link between individual and state (articles 5 and 6), the residence of the person (art. 5) and their will (art. 7).

The 1961 Convention, despite regulating the prevention of statelessness arising from several circumstances, fails to be an encompassing instrument when it ignores at least two relevant instances of statelessness causes: gender discrimination and climate change. Gender discrimination prevents women

[172] UNHCR, "Statelessness and Citizenship in the State of the World's Refugees: A Humanitarian Agenda" (UNHCR, 1997), 6 ff.

[173] With the 55/153 resolution of 2001 the UNGA takes note of the draft articles related to state succession prepared by the International Law Commission and it invites states to take appropriate measures, recommending their best effort in disseminate them.

and girls from fully enjoying socio-economic rights and often, when discrimination prevents them from transmitting, changing, or maintaining their citizenship, statelessness is the result. Specific protection is absent from the 1961 Convention, despite their vulnerable position due to the often-discriminatory laws on naturalization and citizenship transmission have characterized gender inequality as a factor that increases statelessness for women and their children[174]. Although statistics on statelessness have not yet been divided on the basis of gender and officially the UNHCR estimates that 50% of stateless persons are women, a more informal statistic calculates that women make up 51-78% of the stateless population[175]. The 2006 conclusion of the ExCom[176] recognizes that women are at greater risk of statelessness due to lack of nationality rights within a marriage and that statelessness may arise as a result from women's inability to transfer their nationality to children. In 2018[177] and later in 2023[178] the UNHCR stated that at least 25 countries deny equality between men and women in the conferral of citizenship, increasing the risk of creating statelessness, but also perpetuating statelessness in future generations. The gap that the 1961 Convention has left when failing to regulate gender inequalities is, therefore, not inconsequential. At the international level, however, the instrument that attempts to compensate for this deficiency is the CEDAW, which, in art. 9, delineates the right to nationality, and the connected rights to retain it, change it or transmit it to children.

Climate change, on the other hand, represents a new cause of statelessness that stems from the complete disappearance of territory due to the rising of sea levels[179]. In 2008 the representative of the Republic of Palau[180] stated, during the UN General Assembly, that "never before has the disappearance of

[174] Alice Edwards, "Displacement, Statelessness and Questions of Gender Equality Under the Convention on the Elimination of All Forms of Discrimination Against Women" (UNHCR, Division Of International Protection Services, PPLAS/2009/02, 2009), 53.
[175] *Ibid*.
[176] Executive Committee of the High Commissioner's Programme, *Conclusion on Women and Girls at Risk No. 105 (LVII) - 2006*, 6 October 2006, No. 105 (LVII).
[177] UNHCR, "Background Note on Gender Equality, Nationality Laws and Statelessness 2018" (UNHCR, 2018).
[178] UNHCR, "Background Note on Gender Equality, Nationality Laws and Statelessness 2023" (UNCHR, 2023).
[179] Etienne Piguet, "Climatic Statelessness: Risk Assessment and Policy Options," *Population and Development Review* 45, no. 4 (2019): 865–83.
[180] Palau is an archipelago of over 500 islands, part of the Micronesia region in the western Pacific Ocean.

whole nations been such a real possibility"[181]. Despite the substantial land that is threatened by this phenomenon, researchers still consider this far from being a threat of complete submersion[182]. The UNHCR has produced, in 2011, a report on the statelessness risks connected to climate change, delineating the main actors involved and proposing some initial actions to undertake[183]. If these scenarios were to occur, smaller islands would suffer the complete loss of territory and raise implication of the concept of statehood itself and the preservation of sovereignty. Though this scenario has not yet presented itself overwhelmingly, it is concerning that there are no remedies or international agreements in place that would prepare the international community for such eventuality.

By piecing together all these elements, it appears that the Convention on the Reduction of Statelessness focuses mainly on technical causes, which do not address all the relevant situations of statelessness. In its oversights, it is particularly disappointing when it fails to mention protection against gender discrimination, as well as the gaps in the protection against refusal to grant citizenship[184]. Furthermore, there are gaps in terms of rights to due process when there is a case of citizenship deprivation and in state succession procedures[185]. Overall, the Convention presents many shortcomings in relation to the goals it aims to achieve. Additionally, similarly to the Convention on the Status of Stateless Persons, this Convention presents a low rate of contracting states[186]. However, it can be said that the 1961 Convention retains today some added value that renders it still relevant: being the only international instrument that attempts to generate an encompassing solution to statelessness prevention, the Convention provides guidance that have not been matched in such an encompassing level, and it asserts the question of avoiding statelessness as a staple of human rights protection. In doing so, the

[181] UNGA, "Climate Change and Its Possible Security Implications : Report of the Secretary-General" (Sixty-fourth session, Report of the Secretary-General, UN doc A/63/PV.9, 2009). Among the states at risk there are coastal states such as the Netherlands, Bahrain, Azerbaijan and Denmark, which have a significant part of their land area with an elevation of less than 5 meters.

[182] Piguet, "Climatic Statelessness: Risk Assessment and Policy Options", 870.

[183] Susin Park, "Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States" (UNHCR, PPLA/2011/04, 2011).

[184] For example, the denial of citizenship in the Dominican Republic to people of Haitian descent, despite their birth in the Dominican territory (the Dominican Republic applies *ius soli*).

[185] Cf. L. Van Waas, *Nationality Matters: Statelessness Under International Law*, 194 ff.

[186] *Supra*, notes 50 and 56.

1961 Convention sets a standard on the avoidance of statelessness that will be later replicated by other international instruments, effectively rendering it a point of reference within the international framework.

It is evident that the international system of protection of human rights applies to stateless persons as well, as confirmed by the comments of the Human Rights Committee[187]. This means that the support of the international instruments can be considered an integration to the two conventions on statelessness and, sometimes, even outright substitutes. These considerations surely attenuate the need for specific protection of stateless persons but do not eliminate it, considering their exceptionally vulnerable position: the two conventions are a reminder that stateless persons occupy a particular position within the larger group of non-citizens due to their need for special measures[188], which are only tackled in dedicated section of the Conventions.

2.4 International mechanisms for the implementation of the conventions on statelessness

An often-criticized element within the field of statelessness and its Conventions is the lack of implementation and supervision of the designated framework[189]. Art. 34 of the 1954 Convention calls for the resolution of disputes relating to the interpretation or application of the Convention through the International Court of Justice, upon request of one of the parts[190]. Though a compulsory provision, it has never been engaged: considering how stateless persons, by definition, lack state representation, it would be fairly unlikely

[187] UN Human Rights Committee, "CCPR General Comment No. 15: The Position of Aliens Under the Covenant" (Twenty-seventh session of the Human Rights Committee, 1986), para 1.
[188] Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, 2nd ed. (Boston: Nijhoff, 2001), 19.
[189] Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*.
[190] "Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute."

that a state would challenge another through this mechanism[191]. The 1954 Convention includes in art. 33 an element that could seem, even though indirectly, to be part of a supervision or implementation mechanism: "[t]he Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention"[192]. However, this procedure relates to the right of each state to be informed of the implementation of the Convention by other states, without any particular reference to an actual supervision system[193]. A similar provision is present in Art. 14 of the Convention on the Reduction of Statelessness, which suggests that "[a]ny dispute between Contracting States concerning the interpretation or application of this Convention which cannot be settled by other means shall be submitted to the International Court of Justice at the request of any one of the parties to the dispute"[194]. This provision has never been employed either.

The 1961 Convention provides a contribution on this matter when Art. 11 states that "[t]heContracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority." Such a dedicated framework was never truly established and the UNHCR has been long designated as point of reference on statelessness matters within the UN. With resolution 3274 (IIXI), the UN General Assembly appointed the UNHCR as the point of reference for the implementation of art. 11, initially as a temporary measure, and then confirmed in 1976[195].

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[191] Weis, *Nationality and Statelessness in International Law,* 255; Batchelor, "Stateless Persons: Some Gaps in International Protection," 253; UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians," 13.

[192] "The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention."

[193] Nehemiah Robinson, "Convention Relating to the Status of Stateless Persons: Its History and Interpretation," *The Division of International Protection of the United Nations High Commissioner for Refugees*, 1955, 64.

[194] "Any dispute between Contracting States concerning the interpretation or application of this Convention which cannot be settled by other means shall be submitted to the International Court of Justice at the request of any one of the parties to the dispute."

[195] In compliance with art. 11 of the aforementioned Convention on the Reduction of Statelessness, the UNGA individua indentifies the UNHCR the body dedicated to this aim, in UNGA, "Question of the Establishment, in Accordance With the Convention on the

The Conventions, therefore, do not manage to provide a convincing mechanism of supervision and implementation, so it could be useful, for the purpose of this research, to analyze if and how the international human rights regime contributes in this sense to the protection of stateless persons and the implementation of the international norms in their favor.

2.5 The protection of stateless persons in human rights law: benefits and limitations

Through the years the UNHCR acquired a general mandate in relation to the prevention and reduction of statelessness, as well as protection of stateless persons. In 1950 the protocol adopted by the UNGA[196] was the first mention of the UNHCR being entrusted to oversee stateless persons, although referring only to stateless persons that were included in the definition of "refugee." Following the events in Europe that lead to mass statelessness, such as the dissolution of the USSR, Czechoslovakia and the Socialist Republic of Yugoslavia, the mandate expanded to include also stateless persons who were not refugees. In 1995 the UNHCR ExComm adopted a conclusion related to the reduction of statelessness and the protection of stateless persons [197], resulting in the UNGA adopting a resolution the same

Reduction of Statelessness, of a Body to Which Persons Claiming the Benefit of the Convention May Apply" (UN. General Assembly (29th session, A/RES/3274(XXIX), 1975), 92-93, "[…] The General Assembly, considering the Convention on the Reduction of Statelessness […] and […] its articles 11 and 20 requiring the establishment of a body to which a person claiming the benefit of the Convention may apply for the examination of [their] claim and for assistance in presenting it to the appropriate authority […], requests the Office of the United Nations High Commissioner for Refugees provisionally to undertake the functions foreseen under the Convention on the Reduction of Statelessness […]"; And again in the resolution UNGA, "Question of the Establishment, in Accordance With the Convention on the Reduction of Statelessness, of a Body to Which Persons Claiming the Benefit of the Convention May Apply" (31st session, A/RES/31/36, 1976) "[…] Having considered the report of the United Nations High Commissioner on Refugees on the question of establishing […] a body to which persons claiming the benefits of the Convention [on reduction of statelessness] apply, noting that the [UNHCR] us carrying out these functions, […] requests the United Nations High Commissioner for Refugees to continue perform these functions […]."

[196] UNGA, "Statute of the Office of the United Nations High Commissioner for Refugees."

[197] UNHCR ExCom, "Prevention and Reduction of Statelessness and the Protection of Stateless Persons."

year, officially delegating to the UNHCR the mandate on statelessness[198]. Additionally, in 2006, the ExComm adopted a conclusion about the identification and prevention of statelessness, providing details and specific directions on the nature and application of the mandate[199].

The choice of the UNGA in favor of the UNHCR was probably dictated by the correlation existing between stateless persons and refugees. The mandate is apolitical and impartial, and it has a social and humanitarian character[200], demanding that the UNHCR abstains from undertaking such activities that would be interpreted as political, in order to avoid conflicts of interest and inspire public trust. The mandate specifies the objectives and the recipients of its activities, among which are included birth registration, status determination procedures, special humanitarian activities, support of activities, and coordination of efforts. The UNHCR pursues its objectives through the publication of manuals that are aimed at the support of countries and their legislations on statelessness[201] and through worldwide campaigns, such as "IBelong*"* (the worldwide campaign started in 2014 to end statelessness by 2024). Additionally, it provides support in activities of national censuses, implementation of procedures of citizenship acquisition, and promotion of the Conventions on statelessness and it supports national legislations that work towards statelessness elimination.

Unfortunately, the mandate that the UNHCR was entrusted with does not include a supervision mechanism nor does it provide for the institution of a body capable of implementing the provisions of the Convention[202]. In the same manner, there is no authority in the UNHCR or elsewhere that could accommodate potential individual complaints. Nonetheless, the UN General Secretary has emphasized that the UNHCR must intensify its effort in the identification and reduction of statelessness, focusing on strengthening the

[198] UNGA, "Office of the United Nations High Commissioner for Refugees: Resolution / Adopted by the General Assembly." (97th meeting, A/RES/50/152, 1996).
[199] UNHCR, "Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons," 5.
[200] UNGA, "Statute of the Office of the United Nations High Commissioner for Refugees," in Chapter I, under "General Provisions", para 2: "Statute of the Office of the United Nations High Commissioner for refugees": The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.*"*
[201] UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians," 44.
[202] Which was instead established in later UN conventions.

rule of law[203], a task that appears, however, complicated by the lack of any binding authority.

Aside from the role of the UNHCR, in the first half of this chapter it has been established that Stateless persons' rights are also protected by instruments that do not have them as exclusive beneficiaries. The international community has developed a range of instruments that include within their goals assurance of non-citizens' rights protection, as well as the rejection of the insurgence of statelessness at birth.

Starting from the first Convention that is related to the concept of statelessness, the 1930 Hague Convention on Certain questions relating to the Conflict of Nationality laws established the first regulations around nationalities and the dangers connected to it. Despite the low numbers of ratifications on the Convention, it remains a relevant text, as it shone a spotlight on nationality laws' conflicts and attempted to contain their consequences[204]. Three protocols concerning matters of statelessness were attached to the convention: one protocol Relating to certain cases of statelessness[205], a second one, relating to military obligations in certain cases of double nationality[206] and a third one, the Special Protocol concerning Statelessness[207]. The first protocol sought to grant the citizenship of the territory a child was born in, if they would have been otherwise stateless, but only on the condition that the mother also held the citizenship of the same country; the second protocol tried to regulate cases connected to military obligations in the occurrence of a double nationality; the third one specifically dealt with the cases in which a person would lose their citizenship upon entering a new country. If the person does not manage to gain a new citizenship and has been sentenced to imprisonment, the country of last citizenship must admit the person within its territory. Despite the irrefutable relevance that this first convention has in trying to protect stateless persons

[203] UN Secretary-General, "Guidance Note of the Secretary-General: the United Nations and Statelessness" (UNSG, 2018), 3.
[204] The preamble of the Convention states its intention by claiming that "[…] it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only; Recognizing accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality *[...]"*
[205] Adopted the 12th of April 1930. Entered into force 1st of July 1937.
[206] Adopted the 12th of April 1930. Entered into force the 25th of May 1937.
[207] Adopted the 12th of April 1930. Entered into force the 15th of March 2004.

and minimize the occurrence of this phenomenon, it is also evident that the room for the application of its notions is quite narrow. Luckily, in the next several decades, the human rights system managed to produce more effective norms in this sense.

An additional international instrument that was designed for the protection of stateless persons just before the drafting of the conventions on statelessness is the 1951 Convention Relating to the Status of Refugees. Given the historical correlation of the two categories, it is not surprising that this convention's provisions mention statelessness as well, although only within the refugee context[208]. This means that stateless persons who are also refugees, could access facilitated naturalization process (art. 34 of the 1951 Convention) and they would be entitled to the protection of the whole range of rights mentioned within the Convention.

Moreover, the UNHCR works closely together with other UN organisms' international bodies that are involved in areas of interests for the subject of citizenship, such as committees that work to implement conventions on human rights that contemplate the right to nationality as well[209]. The relevance of the human rights treaties for the protection of stateless persons is enhanced by the existence of dedicated treaty bodies established to ensure the implementation of the related conventions[210].

In 1965, the International Convention on the Elimination of All Forms of Discrimination (ICERD) was drafted with ideals of equality in dignity and rights, including the mention of discrimination based on nationality[211]. Art. 5

[208] See section 1 of chapter II.

[209] Because of their influence, the following committees are particularly relevant: the Human Rights Committee, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, and the Committee on the Elimination of Discrimination against Women. Such committees are significant for their supervision functions, usually through the creation of reports, the review of individual claims, the adoption of comments, and the organization of relevant discussions regarding the interpretation of the treaties advancing the strengthening of the treaties. The related conventions all contain at least one article on nationality and therefore call for the supervision of some element of statelessness: the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1966 Covenant on Civil and Political Rights, at art. 24, the 1989 Convention on the Rights of the Child, at art. 2 and 7 and the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

[210] Cf. Helen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies. Law and Legitimacy* (Cambridge: Cambridge University Press, 2010).

[211] Art. 1.1 "[…] the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin

specifically protects the right of every individual to have a nationality. The Committee on the Elimination of Racial Discrimination (CERD) has taken some relevant actions that can benefit stateless persons: the General Recommendation 30 relates to the acquisition of nationality, concerning the reduction of child statelessness[212], and several observations relating to the right to nationality[213].

Though the 1966 ICCPR includes, at art. 24, the right to a nationality for every child, the Covenant focuses on child statelessness and tries to avoid the subject of general resolution of statelessness, given the complexity of the phenomenon had already been addressed by the 1961 Convention[214]. The UN Human Rights Committee monitors the implementation of the Covenant, and it can assess possible cases of violation. Notably, the aforementioned Committee has dealt with cases of refusal of naturalization[215] as well as a case involving a stateless person[216], in which the committee concluded that the state (the Netherlands) ought to review its decision to not register the individual as stateless, as the state was preventing him from accessing his rights under the 1954 Convention. This case also provides an example of how the human rights instrument can concretely affect the lives of individuals and be implemented at national level.

In 1979, the CEDAW proposes new elements on equality, specifically about gender. Art. 9 is directed at eliminating discrimination between men and

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which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." and art. 2.1 "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races […]."

[212] Committee on the Elimination of Racial Discrimination, "General Recommendation 30 on the Discrimination of Non-citizens" (CERD/C/64/Misc.11/rev.3, 2004).

[213] Michael Hoornick, "Addressing Statelessness Through the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD')," *Statelessness and Citizenship Review* 2, no. 2 (2020): 222–47.

[214] UNGA, "Draft International Covenants on Human Rights : Report of the 3rd Committee" (17th session, A/5655, 1963)., see also J. Johannes Chan, "The Right to a Nationality as a Human Right: The Current Trend Towards Recognition," *Human Rights Law Journal* 12, no. 1 (1991). 4–5; María José Recalde Vela, "How Far Has the Protection of the Right to Nationality Under International Human Rights Law Progressed From 1923 Until the Present Day?" (LLM Thesis, University of Tilburg, 2014), 80–83.

[215] Q v Denmark, Comm No. 2001/2010, (CCPR, 2015) UN Doc. CCPR/C/113/D/2001/2010 (2015).

[216] DZ v the Netherlands, Comm No. 2918/2016, (CCPRm, 2016), UN Doc. CCPR/C/130/D/2918/2016 (2016).

women in relation to nationality, as well as being relevant in preventing child statelessness as well. The CEDAW committee, besides its many direct recommendations to states to ensure gender equality in nationality matters[217], has also issue two general recommendations as well: recommendation nº 21[218] and nº 32[219].

Furthermore, one of the most powerful instruments in favor of the protection of stateless persons is the 1989 CRC itself, since it is one of the UN conventions that counts the most state parties[220]. In art. 7 it provides for the acquisition of a nationality for every child, specifically designed to prevent statelessness, together with provisions aimed at ensuring birth registration (art. 7) and non-discrimination (art. 2). Particularly, art. 7.1 establishes every child's right to a nationality, requiring registration at birth[221]. The formulation of the right to a nationality in a similar manner is later re-stated in many other conventions, such as the ICCPR at art. 24.2 and 24.3: "2. [e]very child shall be registered immediately after birth and shall have a name; 3. [e]very child has the right to acquire a nationality." The monitoring body of the CRC has yet to make general Comments relevant to statelessness.

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) contains similar provisions relating to non-discrimination and protection of children (art. 1 and 7), and the 2006 Convention on the Rights of Persons with Disabilities (CRPD) protects from discrimination, protects the rights of children, and guarantees the freedom of movement (art. 18) as well.

Several instruments exist also at the regional level: the American Convention on Human Rights (1969) includes the right to a nationality in many details at

[217] ISI, "Statelessness & Human Rights: The Convention on the Elimination of All Forms of Discrimination Against Women, Statelessness Essentials" (ISI, Statelessness Essentials, 2018).
[218] UN Committee on the Elimination of Discrimination Against Women (CEDAW), "CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations" (13th Session, 1994).
[219] UN Committee on the Elimination of Discrimination Against Women (CEDAW), "General Recommendation No. 32 on the Gender-related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women" (CEDAW/C/GC/32, 2014).
[220] Every member of the UN is party to this convention, except for the United States of America.
[221] "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."

art. 20[222] and its Court has produced some judgments on relevant issues[223]; the African Court of Human and Peoples' Rights has expressed its opinion on issues linked to statelessness[224]; the League of Arab States[225] and the Association of Southeast Asian Nations[226], include, within their human rights declarations, provisions in favor of the right to a nationality.

Within the framework of international protection of human rights, other non-contentious mechanisms are relevant on the matter of implementation, such as the Universal Periodic Review[227](UPR). This mechanism has allowed a high number of recommendations to be made relating to statelessness, highlighting many hurdles presents in different countries[228]. Recently, statelessness has become a point of focus for the UPR reports. In total, the first and the second cycle of UPR included 773 recommendations on citizenship and/or statelessness, reaching 162 countries that received at least one recommendation. These recommendations are both on the causes and consequences of statelessness.

A second non-contentious mechanism to be noted is the Statelessness Index, which deals with examining legislations, practices, and policies on statelessness in European countries, comparing them with the international law standard. This instrument was created and developed by the European Network on Statelessness and includes summaries of the data of 30 states, including tools to compare such data[229].

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[222] Every person has the right to a nationality. (2) Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. (3) No one shall be arbitrarily deprived of his nationality or the right to change it.

[223] See *Ivcher-Bronstein v Peru*, Case No 74, [2001], Inter-Am. Ct. H.R; *The Yean and Bosico Children v. The Dominican Republic,* [2005], Inter-Am. Ct. H.R; *Case of Expelled Dominicans and Haitians v Dominican Republic*, Series Case No. 282, [2014], Inter-Am. Ct. H.R.

[224]For example, *Amnesty International v Zambia,* Comm No 212/98, (ACHPR, 1998); *John K Modise v Botswana,* Comm No 97/93, (ACHPR, 1993); *Open Society Justice Initiative v Côte d'Ivoire* Comm No 318/06 (ACHPR, 2006).

[225] Art. 29 of the Arab Charter on Human Rights (2004).

[226] Art. 18 of the ASEAN Human Rights Declaration (2012).

[227] Universal Periodic Review.

[228] Cf. Laura Van Waas and Ileen Verbeek, "Statelessness and Human Rights: The Universal Periodic Review" (Institute on Statelessness and Inclusion, 2017), 5 ff.

[229] Albania, Austria, Belgium, Bulgaria, Croatia, Ciprus, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, North Macedonia, Malta, Moldova, Montenegro, Norway, Netherlands, Poland, Portugal, Romania, Serbia, Slovenia, Spain, Sweden, Swizerland, United Kingdom and Ucraina.

It is evident that, at the international level, despite the existing gaps within the conventions on statelessness, there is a link between human rights and protection of non-citizens' rights that favors stateless persons as well. The international instruments strongly contemplate the right to a nationality and the right to non-discrimination in its absence. However, despite the dispositions on the right to a nationality and the existence of committees promoting the implementation of such conventions, the right to a nationality and the protection of non-citizens are still imperfectly implemented. Mirroring art. 15 of the UDHR[230], the mentions of this right in every following convention have lacked specificity, as they fail to regulate the criteria that describe such right. It follows that the development and the implementation of the right have become disappointing, especially in the face of a total absence of obligations or responsibilities that impose to states clear criteria according to which citizenship must be assigned.

2.6 Human rights approach: benefits and limitations of the international standards

These premises lead to question whether the totality of the international human right regime adds value to the protection of stateless persons or if the lack of nationality is effectively significant in excluding them from this framework as well. As it has been established, states must take action for the international framework to add some value to the issue of statelessness. An individual and sporadic approach, rooted in state sovereignty and national law, has failed to yield concrete result and eliminate statelessness. Therefore, the international human rights law could represent a powerful tool in this sense, within the perspective of realizing an organized system that can restrict state action in term of nationality and enhance the safeguard of rights. However, some hurdles might limit the ability of the international system in achieving this target.

The 1954 Convention relating to the Status of Stateless persons has attempted to create a minimum standard of treatment for stateless persons. To bolster the ambitions of the Convention and reinforce its gaps, the development of an

[230] "Everyone has the rights to a nationality" and that "No one shall be arbitrarily denied of his nationality nor denied the right to change his nationality."

international system based on human rights has progressively laid the foundation for the decoupling of nationality and rights. This has rendered the position of stateless persons less dramatic that what chapter I described, strongly reducing the gap of rights enjoyed by citizens and non-citizens. However, the position of stateless persons does not remain without complexities: although not entirely right-less, the lack of citizenship carries straits that are not properly addressed by international law.

The main contribution that the rest of the international regime of human rights' protection can offer to reinforce the framework of protection that the 1954 Convention attempts to establish is that, in stark contrast with the two conventions on statelessness, many other international conventions have been equipped with proper tools for their enforcement, through the establishment of committees and tribunals. This detail is not irrelevant as, they not only ensure monitoring, but they also represent several avenues through which the stateless person can present a claim and seek remedy. These complaints can be brought in front of international courts or be heard by several international committees, with the possibility of bringing them to the more general attention.

Moreover, a further reason that makes the international human rights law relevant in statelessness matters, is its ability to shape international and national laws through its norms[231]. The external pressure applied on countries to reach implementation of human rights standards is considered a strong incentive to comply. Additionally, within the international system, often the principles present within international human rights law mirror a vast consensus, hampering the possibility to contradict it, lest upsetting the international order. Even when a state might not be fully convinced, due to the regularity with which these principles present themselves in international fora, they will likely generate some persuasive effect[232]. Finally, the rights of children, as examined within the previous section, seem to produce a general consensus: the concern over the protection of children has created some of the most ratified texts internationally.

However, the main limitation of the international human rights regime is that, although the progressive emergence of the human rights standards has

[231] Douglass Cassel, "Does International Human Rights Law Make a Difference," *Chicago Journal of International Law* 2, no. 1 (2001): 121–35.
[232] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," *The Yale Law Journal* 111, no. 8 (2002): 1937–2025.

managed to confine the privileges of citizenship[233], it would be incorrect to state that citizenship is irrelevant today. Despite the apparent universality of human rights championed through these instruments, some rights seem to remain exclusively available to citizens, denoting how, concretely, rights have not been fully decoupled from citizenship. Van Waas describes such rights as "citizens' rights dressed up as human rights"[234]. An example of this statement is that human rights law evidently does not guarantee freedom of movement[235].

To confirm this viewpoint, there are several human rights that seem to be out of reach for stateless individuals. A first instance is represented by the fact that, despite the ample presence of non-discrimination notions throughout most of the human rights law, a distinction in treatment between citizens and non-citizen is often accepted: the ICERD reinforced this stance when, in its opening article, specifies that the convention does not apply to "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens"[236]. This kind of distinction is not necessarily always accepted, as established by the ICERD Committee[237], but they are not specifically regulated either, allowing for unequal enjoyment of rights between nationals and non-nationals. Additionally, economic rights are limited to stateless persons and often precluded, warranting a distinct treatment from citizens, as ICESCR establishes that that countries may choose the extent to which they would like to guarantee such human rights to non-nationals, as well as the protection from expulsion, *non-refoulment,* and political rights.

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[233] "Throughout the twentieth century and to date, international human rights law has sought to remedy this deficiency or vacuum, by denationalizing protection (and thus including every individual, even stateless persons)", Separate opinion of Judge A.A. Cancado Trindade, *The Yean and Bosico Children v. The Dominican Republic,* [2005], Inter-Am. Ct. H.R., para 7.

[234] Laura Van Waas, "Nationality and Rights," in *Statelessness and the Benefits of Citizenship: A Comparative Study* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights and International Observatory on Statelessness, 2009), 21.

[235] The European and American Conventions for example limit such movements to state to which they are citizens.

[236] Art. 1(2) of the ICERD.

[237] Under the Convention, differential treatment based on citizenship...will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim (Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004), para 1(4)).

If human rights were to apply to everyone, as forecasted by the Human Rights Committee of the ICCPR[238], there would be no need to a statelessness framework of protection, because any violation of human right would be detached from the possession of nationality and simply be regarded as a violation of human rights. However, the aim of the human rights regime was never that of evading the preeminence of nationality[239] and the sovereign right of states was never questioned: while the UDHR preaches the guarantee of human rights for every person, it is evident that, among them, there are some who can only be exercised by a citizen towards their state. Therefore, though the technical attribution of human rights might not have discriminants in terms of possession of nationality, the lack of such bond will compromise the ability to *exercise* them[240].

It is safe to conclude that the international human rights regime has aided but not fully remedied the statelessness difficulties that the 1954 Conventions had left exposed and states' discretion in the distinction between rights afforded to nationals and stateless persons put stateless persons in a precarious position. Taking into account these considerations, within the concept of "human rights" the term "human" is put into doubt when we consider the protection of stateless persons. The constant presence of the right to a nationality throughout the framework is evidence enough of the importance that such a concept continues to hold and is a testament to the system realizing its own flaws and trying to produce a remedy for them. This is why stateless persons, as vulnerable individuals, cannot simply benefit from the human rights framework but need alternative solutions to secure their position.

2.7 Conclusion

This chapter had the aim of highlighting the general trends within the international effort to combat statelessness. From a thorough analysis of the two conventions dedicated to stateless, emerged the ambition to create a

[238] UN Human Rights Committee, "CCPR General Comment No. 15: The Position of Aliens Under the Covenant."; UN Human Rights Committee, "Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (CCPR/C/21/Rev.1/Add.13, Eightieth session, 2004), para 10.
[239] Donner, The Regulation of Nationality in International Law, 183-186.
[240] Van Waas, Nationality Matters: Statelessness Under International Law, 407.

benchmark for rights guaranteed to stateless persons and guidelines to avoid statelessness in the future. The investigation of the 1954 Convention allowed an overall assessment of its value towards the protection of stateless persons and to draw some conclusions regarding its contribution but especially its limitations. The Convention fails to bear comparison with the Convention on the Status of Refugees, from with it draws its inspiration, due to the lack of appropriate measures veered towards the context of statelessness, and it rather echoes the context of its predecessor. Furthermore, the 1954 Convention reduces the scope of the protection in some provisions and completely eliminates others—such as non-punishment upon unlawful entry and the notion of *non-refoulment*—significantly lowering the guaranteed reserved to stateless persons. The biggest drawback of the 1954 Convention, however, is not one of its provisions—or lack thereof—but the overall approach to rights. Mirroring the Convention on Refugees, the Convention does not guarantee absolute rights to stateless persons, but it creates a division among stateless persons based on their level of attachment to the country[241]. Most of the rights described within the Conventions are conditional upon lawful residency, meaning that only a reduced selection of rights is *absolute,* such as the ones listed "Administrative Measures" section[242].

Furthermore, the Convention is arranged for states to provide a treatment to stateless persons "as favourable as those of citizens" or "at least as favourable as aliens." Through this approach, the Convention abdicates the responsibility of codifying the content of the international standard, and it relinquishes the question to the individual states or to other international norms. Specifically, when the 1954 Convention refers to a treatment "as favourable as that provided to aliens" it ignores the main plague of statelessness: stateless persons are never citizens and therefore cannot ever enjoy these rights unless a provision stipulates it. Third-country nationals and stateless persons, although often associated in the enjoyment of rights, are not equals, due to this critical disparity. Therefore, to overcome the challenges associated to statelessness and if this approach to rights is chosen, the provisions ought to at least always provide treatment as favorable as those of citizens[243]. The

[241] For example, for the right of housing it is necessary to be lawfully staying in the country.
[242] Section 2 of chapter III.
[243] However, it should be noted that this approach, although the best option available, would still present a fundamental flow: equating the provision of rights based on those of another group of people fails to create a standard and a benchmark or protection, but simply compels states to treat stateless persons as their citizens, which could be good or bad. The intrinsic

combination of these two attributes of the Convention (the conditionality of the level of attachment to guarantee most rights and the association of rights with those provided to "aliens generally") severely weaken its effectiveness in providing a standard of rights for stateless persons.

Moreover, the content and terminology of the Convention is ambiguous and undistinguished: a blatant example is the failure to regulate naturalization for stateless persons, delivering an imprecise provision surrounded by an optional language. Additionally, there are at least four areas in which statelessness is overlooked and demonstrate stateless persons' position of disadvantage compared to citizens and third-country citizens. As established by the history behind the drafting of the 1954 Convention, it was already apparent that the instrument was not geared towards completely eliminating the privileges associated with the bond of citizenship, and therefore the Convention reveals its limits.

Together with the shortcomings of the 1954 conventions, it is also crucial to mention the positives contributions that the 1954 has made within the international scene: firstly, the Convention provides a thorough definition of the term *stateless*, which, as already analyzed in chapter I, has been recognized by the international community as the guiding principle in identification of statelessness. A definition not only allows the term to enter the international discourse, but, finding space within a convention, implies the need for provisions toward stateless persons and highlights the importance of providing them with specific protection. Furthermore, the Convention not only introduces the definition of stateless person, but it also requires the guarantee of identity papers designed for the status of statelessness[244], providing the foundation for a potential system of protection[245]. Overall, the convention possesses the unique quality of advocating for a status of protection based on statelessness, especially when it delineates their need for additional rights that are not shared by other categories and not identified in other international instruments. Finally, albeit with the described problematics, it ascertains the right to a solution.

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weakness of the protection system hinges on the inability to provide a protection status that is independent from other categories.

[244] Art. 27 and Art. 28 "The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document." "The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory […]."

[245] Cf. Van Waas, *Nationality Matters: Statelessness Under International Law*, 398.

Looking at the 1961 Convention, an analysis of its articles reveals its limitations in primarily focusing on the 'legal' causes of statelessness, as most of its article are centered around causes that originate from technicalities of laws. It is particularly disappointing when it fails to provide clear protection against gender discrimination, as article 9, when listing instances it prohibits discrimination against, does not mention it. Furthermore, the 1961 Convention has also shortcomings when it addresses arbitrary deprivation—when it does fails to protect against arbitrary deprivation in the form of refusal of nationality—and in state succession—when it does not provide enough details on the regulation of the process and leaves multiple gaps on this aspect. A last point of note on the Convention derives from what could be defined as "new" causes of statelessness. Although it could be argued that causes such as climate change could not have been foreseen at the time of the drafting, their existence reinforces concerns on the Convention's capability to be an encompassing instrument for statelessness reduction.

However, the support of the human right regime and the drafting of several conventions directed at all people gave the impression that the potential gaps left by the conventions had been covered. The added value they provide—which the statelessness conventions have been unable to—can be identified especially in their capability to be enforced and provide avenues in which stateless persons can present claims. This additional layer seems to guarantee the last piece of the puzzle to equating stateless persons to third-country nationals. However, further investigation has exposed how the vulnerability of stateless persons supersedes the disadvantages faced by third-country nationals, as it has become evident that several rights are not truly universal but the ability to exercise them is conditional upon the possession of a nationality. Among the shortcomings identified in this chapter there is the freedom of movement, freedom from arbitrary detention, the right to a solution, diplomatic protection, political rights, and economic rights. This leads to the conclusion that the international instruments employed have failed to produce a standard of protection for stateless persons that encompasses all areas and dismisses the common dichotomy nationality-rights. The following chapters will take a closer look at the regional level, specifically at statelessness in Europe and the tool that have been employed to create that benchmark of rights and protection that failed to emerge at the international level.

CHAPTER III

STATELESSNESS IN EUROPE

3.1 Introduction

The unique history of citizenship in Europe has shaped the emergence of statelessness in the continent accordingly. Europe has been marked through the centuries by wars, redrawing of borders, dissolutions and unifications, and has cradled the development of state sovereignty's concept as we understand it today. States' power consolidated behind the idea of membership and their definitive prerogatives to decide the parameters of exclusion. This constant evolution was characterized by changes that carried nationalistic tones[246] and led to the exclusion of minority groups and migrants, in an effort to pursue homogenous populations drawn through ethnic and cultural lines[247]. The birth of modern nationality coincided with the implementation of various forms exclusionism in order to define its boundaries which, incidentally, constructed various forms of statelessness[248]. Statelessness became the ultimate form of exclusion, and its incidence grew to the point that it required a legal response from the international framework[249]. This chapter sets Europe at the forefront of this investigation by first diving into its historical background of statelessness to trace back the origin of the phenomenon and the political and

[246] Cf. John M. Roberts, *A General History of Europe: Europe, 1880-1945*, 3rd ed. (Harlow: Longman - Pearson Education, 2001); Jan-Werner Muller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press, 2011); E. J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge: Cambridge University Press, 1990).
[247] Cf. Ernst Hirsch Ballin, *Citizens' Rights and the Right to Be a Citizen* (Leiden: Martinus Nijhoff Publishers, 2014).
[248] William Conklin, *Statelessness: The Enigma of the International Community* (Oxford: Hart Publishing, 2014), 6.
[249] Mira L. Siegelberg, *Statelessness: A Modern History* (Cambridge: Harvard University Press, 2020), 2-11.

social implications it carried for the continent. The 19th and the 20th century will then be briefly analyzed, as they will be classified as the catalysts for the emergence and spread of statelessness in Europe. Following, European stateless groups will be introduced as representation of the mass statelessness in Europe that directly results from the history of the continent, forged from the employment of citizenship as instrument of exclusion and as evidence of the perduring crisis of human rights in Europe. This will lead into a discussion of the continent's main challenges regarding statelessness today, which will be exposed through current examples of stateless populations in Europe and the themes emerged from the CoE and the ECtHR.

3.2 Emergence and evolution of statelessness in Europe

Though Europe has been the root of some of the most progressive developments in the protection of human rights, statelessness remains a challenge in the region, as its historical legacy is marked by colonialism, ethnic conflicts and bureaucratic hurdles[250]. The evolution of statelessness, be it through its correlation to refugees or otherwise producing its own trajectory, traces a multilayered path through the years that created implications for themes of migration, nationalism and international law. The emergence of the phenomenon in Europe stretches back to the 19th century, a juncture in time which is notorious for its geopolitical upheavals and territorial disputes, where mass movements across borders were frequent and populations blended across the continent. The century that followed was defined by the emergence of nation-states and it bore witness as they assembled and amalgamated around the two global conflicts and the Cold War era. Although Europe has emerged as a champion for human rights in the latter part of the same period and has generated a robust infrastructure to address human rights challenges, maybe due to the delicate nature of the issue and surely spurring

[250] Cf. Rudolf Von Albertini, "The Impact of Two World Wars on the Decline of Colonialism," *Journal of Contemporary History* 4, no. 1 (1969): 17–35; Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality*; John Torpey, "The Great War and the Birth of the Modern Passport System," in *Documenting Individual Identity. The Development of State Practices in the Modern World*, ed. Jane Caplan and John Torpey (Princeton: Princeton University Press, 2001), 256–70.

from the geopolitical events that characterized it, the region has failed to prevent or resolve a deep-seated, intergeneration statelessness.

3.2.1 The 19th and 20th century

Historical documentation regarding statelessness is limited before the 20th century, however evidence suggest that such a condition existence, albeit at the peripheries of empires or amidst territorial conflicts[251]. At the time, statelessness did not appear to be perceived as a prominent issue, though it is this exact period that laid the groundwork for the proliferation that soon followed and set the stage for the contemporary challenges in the international community. During this transformative time, nation-states were consolidating their power and drawing their territorial aspirations, ushered by burgeoning nationalist movements[252]. Enclosed in this socio-political climate, monarchical rule gave way to nascent democratic principles, which began to represent the collective identity of the nation—notwithstanding the limited citizen representation that was derivative of its time[253]. Citizenship started to be formally recognized and recorded, as the relative laws were, and, while the concept of nationality was taking shape, national borders became a prominent affair. This nation-building process, however, engendered avenue for statelessness, particularly among minorities that found themselves within the borders of the newly established states. At this point, nationalistic fervor was prominent and preached division of nations along ethnic lines and ultimately led to a concept of citizenship defined by its exclusionary practices[254]. Furthermore, the bureaucratic complexities that distinguished state membership—such as the introduction of passports—emerged as a fundamental precursor to the proliferation of statelessness in Europe[255].

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[251] Cf. Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness*, 55-60.
[252] Cf. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality*, 101–130.
[253] J. Muller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*, 11.
[254] Cf. Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge: Harvard University Press, 1992), 2-17.
[255] Torpey, "The Great War and the Birth of the Modern Passport System." 257: "t]he (re)imposition of passport controls by numerous West European countries […] vastly

The 20th century witnessed two World Wars and the collapse of several empires, completely redrawing the face of Europe and resulting in large-scale displacement of entire populations. The collapse of the Austro-Hungarian and Ottoman empires, for example, left millions in a legal limbo, with many ethnic groups scattered across newly created nation-states and subject to discriminatory laws[256]. The unprecedented devastation caused by the war resulted in the mass exodus of people attempting to cross borders throughout Europe in search of safety[257], which indirectly lead to statelessness through a variety of mechanisms. Topical was the loss of identification papers, which, leading to the inability to prove one's status, identity or country of former residency[258], effectively rendered individuals stateless.

This period is crucial for understanding modern statelessness in Europe, as it witnessed the emergence of a particular kind of statelessness, *mass* statelessness: Vishniak, in 1945, is one of the first to delineate the critical difference between individual statelessness (that can, for example, spawn from birth or bureaucratic issues)[259] and mass statelessness, that concerns entire groups of peoples. Mass statelessness was a novel concept, which quickly took Europe by storm and troubled European states. Their newly found concern to be able to identify who was part of their nation and who was not, started to give rise to restriction of movements across borders, with

enhanced the ability of governments to identify their citizens, to distinguish them from non-citizens, and thus to construct themselves as 'nation-states." Cf. Miriam Rürup, "Lives in Limbo: Statelessness After Two World Wars," *German Historical Institute* 49 (2011): 113.

[256] Conklin, *Statelessness: The Enigma of the International Community*, 107.

[257] M Siegelberg, *Statelessness: A Modern History*, 12–25.

[258] M. Vishniak, *The Legal Status of Stateless Persons*, in A. G. Duker (ed), *Pamphlet Series: Jews and the Post-War World,* in *American Jewish Committee*, 1945, p. 15; cf. J. Torpey, *The Invention of the Passport. Surveillance, Citizenship and the State,* in *Cambridge University Press*, 2000, 123.

[259] Marc Vishniak, "The Legal Status of Stateless Persons," ed. Abraham G . Duker, *Pamphlet Series Jews and the Post-War World, American Jewish Committee* 6 (1945), 15. "It was the first World War that made statelessness a large-scale problem. People had been evacuated on a grand scale and had lost their documents and identification papers. Later many of them, unable to prove their identity or their former residences by documentary evidence, became stateless." Note that Vishniak already defined statelessness as "an individual's lack of nationality" (7) and stateless people as "individuals who are not connected with any country by ties of citizenship or nationality*"* (11). This definition is consistent with the international definition of statelessness provided by the 1954 Convention.

nationality becoming politicized through denaturalization of people as a form of exclusion or punishment[260].

In the aftermath of the Great War maps were redrawn through treaties among European powers and the phenomenon of statelessness was further aggravated[261]. Having taken notice of this anomaly within the international community, states attempted to put a remedy to it through some bilateral and multilateral agreements: the Treaty of St. Germain of 1919 between the Allies and Austria and the Treaty of Trianon of 1920, between the Allies and Hungary, for example, both included a couple of provisions aimed at the prevention of statelessness. More specifically, Art. 64 and art. 65 of the Treaty of St. Germain[262], which are also mirrored in art. 56 and art. 57 of the Trianon Treaty[263], displayed an effort to eliminate statelessness that results from state succession and child statelessness at birth. Furthermore, in 1922, this trajectory continued through a series of bilateral agreements among the successor states of the Austro-Hungarian Empire, in an attempt to remove the conflict of laws that generated statelessness. From these efforts, the Rome Convention sprung in 1922, which focused conflicts of nationality laws in the successor states. However, the convention resulted in very limited scope, as it was only ratified by Italy and Austria, and therefore became a bilateral agreement rather than a general measure. Overall, these attempts proved to be unsuccessful, because, despite the mounting pressure of statelessness, states often leaned towards a restrictive interpretation that favored their own political interests and employed insufficient effort to translate them into law[264]. During this period most national legislations were reluctant to grant

[260] Conklin, *Statelessness: The Enigma of the International Community*; Rürup, "Lives in Limbo: Statelessness After Two World Wars," 118–119; Vishniak, "The Legal Status of Stateless Persons," 13–14.

[261] Rürup, "Lives in Limbo: Statelessness After Two World Wars," 113, 119.

[262] Art. 64: "Austria admits and declares to be Austrian nationals ipso-facto and without the requirement of any formality all persons possessing at the date of the coming into force of the present Treaty rights of citizenship (pertinenza) within Austrian territory who are not nationals of any other State;
Art. 65: All persons born in Austrian territory who are not who are not born nationals of any other State shall ipso-facto become Austrian nationals;"

[263] Art. 56. "Hungary admits and declares to be Hungarian nationals ipso facto and without the requirement of any formality all persons possessing at the date of the coming into force of the present Treaty rights of citizenship (pertinenza) within Hungarian territory who are not nationals of any other State;
Art. 57 All persons born in Hungarian territory who are not born nationals of another State shall ipso facto become Hungarian nationals."

[264] Von Albertini, "The Impact of Two World Wars on the Decline of Colonialism," 17-18.

citizenship[265] and, not only tried to restrict the occurrence of naturalization, but began processes of withdrawal of citizenship as well[266].

In the aftermath of WWI, the League of Nations responded to the statelessness issue by appointing Fridtjof Nansen as a High Commissioner for Russian Refugees, who introduced the Nansen Passport as a form of travel document for stateless refugees (particularly Russian and Armenian) and by drafting, in 1930, the Hague Convention[267]. However, the international cooperation did not last long, because when WWII erupted, Europe was thrown into chaos again and, as Vishniak points out, stateless persons become even more vulnerable in times of war[268]. During WWII, extensive operations of displacement and denationalization of people took place[269], which only added to the already existing statelessness struggle that was affecting Europe, still far from being properly addressed. Denationalization became a weapon in the hands of States, able to instantly strip entire groups of people of every right by depriving them of nationality. A blatant example of this practice were the laws adopted between 1933 and 1941 by Nazi Germany[270].

Following the War, the international community, with European countries occupying a central role in the development of the new international standards, set to pave the way for the adoption of human rights treaties that would bind every country not to repeat the atrocities of the past three decades[271]. Among other relevant international documents, the UDHR retains a prominent spot in relation to the protection of stateless persons, as it notoriously confirms the right to nationality as a fundamental right that needs

[265] As shown by the collection of nationality laws by Flournoy and Hudson (Richard W. Flournoy and Manley O. Hudson, *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties* (Cambridge: Cambridge University Press, 1929).), most nationality laws did not mention statelessness and actually had the indirect effect of increasing its occurrence.

[266] Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness*, 62.

[267] See chapter II.

[268] Vishniak, "The Legal Status of Stateless Persons," 56: *"*Stateless people are restricted in their rights in time of peace, and infinitely more so in time of war."

[269] Laura Van Waas, "A 100-year (Hi)Story of Statelessness," *Peace Palace Library Blog* (blog), 2016, https://peacepalacelibrary.nl/blog/2016/100-year-history-statelessness.

[270] Lawrence Preuss, "International Law and Deprivation of Nationality," *Georgetown Law. Journal,* 23 (1937): 250–76.

[271] Daniel G. Cohen, "The 'Human Rights Revolution' at Work. Displaced Persons in Postwar Europe," in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2012), 45–61; Peter N. Stearns, *Human Rights in World History* (New York: Routledge, 2012).

to be recognized and respected. Despite its lack of binding power, which dampens the concrete aid that it can provide for stateless persons, the UDHR represents an important junction in history as it shines a spotlight on the way nationality could be instrumental in human rights' deprivation, therefore warranting a central role in the human rights framework.

However, before the century reached a close, two further elements that had an historical impact on developing structural statelessness within the region in the 20th century are the era of decolonization and the Cold war. The decline of colonialism led to tensions between states and further stressed the need to address nationality laws in European countries: decolonization represented an unprecedented phenomenon within Europe and, among other socio-political challenges that states had to address, some of them related to citizenship as well. Since there existed no specific standard on how to execute decolonization procedures, states often referred to state succession standards for guidance[272]. It is in the backdrop of this new emergency that the 1961 Convention was drafted and heeded to include provisions specifying the need to ensure the avoidance of statelessness resulting from land's transfer. However, this system was not without faults, and it still left room for statelessness. European colonial empires often relinquished control of their overseas colonies and added a layer of complexity to an already convoluted matter. Former colonial subjects, who now had no guidance on obtaining citizenship rights in the newly independent nations, were beset with legal ambiguities and administrative hurdles. Entire migrant communities fell through the crack of the newly established national systems due to the lack of a clear legal framework to address the question of citizenship acquisition, which resulted in statelessness, discrimination and even exploitation[273]. Exclusionary practices were sometimes based on which side groups supported during the independence struggle, or they were due to the intricacies connected to the gradual disappearance of imperial status and its various form of membership[274].

Furthermore, during the Cold War, in Eastern Europe, citizenship became highly politicized[275] and after the dissolution of the Soviet Union, the Socialist Federal Republic of Yugoslavia and Czechoslovakia, statelessness

[272] Siegelberg, *Statelessness: A Modern History*.
[273] Cf. Conklin, Statelessness: The Enigma of the International Community.
[274] Siegelberg, *Statelessness: A Modern History,* 226.
[275] Gay J. McDougall, *The First United Nations Mandate on Minority Issues* (Leiden: Martinus Nijhoff Publishers, 2015), 328.

was pushed once again at the center of the attention within the region, as millions of people "needed to confirm their new citizenship status"[276]. The newly established states—the successor states—each had their own criteria for recognizing nationality and often adopted citizenship laws based on ethnicity, leaving who failed to meet such criteria—often ethnic minorities—to inevitably become stateless. Despite the efforts of the international and European community to alleviate the situation, the new states were less than enthusiastic about ratifying treaties that guaranteed membership to their state to large number of minorities[277].

The concatenation of these historical events influenced each other in a cascade of circumstances that affected citizenship policies and left Europe ridden with stateless cases that seeped through the cracks, as states were unable to see past their own interests to permanently eradicate it.

3.4 Statelessness challenges in Europe today

Despite increasing awareness and legal frameworks, statelessness remains a significant issue in the region today. The UNHCR estimates that over 600,000 people in Europe lack a nationality[278]. The main current causes of statelessness in the region are connected to state succession, discriminatory nationality laws and arbitrary deprivation of nationality[279]. It is reported than 75% of the stateless population in Europe live in 4 successor states of the Soviet Union (Latvia, Estonia, Ukraine and the Russian Federation). However, statelessness is present in most EU Member States (MS), although, due to inaccurate and unreliable statistics, it is challenging to estimate exact

[276] UNHCR, "The State of the World's Refugees 2000. Fifty Years of Humanitarian Action" (Oxford: Oxford University Press, 2000), 189.
[277] Weissbrodt, *The Human Rights of Non-Citizens*, 93; Igor Štiks, *Nations and Citizens in Yugoslavia and the Post-Yugoslav States: One Hundred Years of Citizenship* (London: Bloomsbury Publishing, 2015), 160.
[278] Cf. Lily Chen, Petra Nahmias, and Sebastian Steinmueller, "UNHCR Statistical Reporting on Statelessnes" (UNHCR Statistics Technical Series, 2019); Institute on Statelessness and Inclusion, "Chapter III Stateless Persons: Counting the World's Stateless: Reflections on Statistical Reporting on Statelessness" (UNHCR Statistical Yearbook, 2013), 41–47. Though challenges to mapping statelessness persist in Europe as well, this region has the most comprehensively mapped picture of statelessness.
[279] Cf. UNHCR and IPU, "Nationality and Statelessness. A Handbook for Parliamentarians," 27-43

figures[280]. Furthermore, though some European states have enacted dedicated provisions to identify stateless persons, such as Italy, Moldova and France, some others fail to recognize the vulnerability of stateless persons and have no procedures at all[281]. Therefore, the biggest challenge associated with statelessness today is the identification of stateless persons and the implementation of overarching solutions.

3.4.1 Romani

One of the most notable groups of people who remained stateless as a result of the events of the 20th century are the Roma people[282]: though their origin remains shrouded in some mystery, and it is unclear how they established themselves in Europe, historical evidence suggests they migrated in the continent from India between the 10th and 14th centuries[283]. The term "Roma" was chosen for them at the 1st World Romani Congress in 1971, and it encompasses a variety of groups that are associated by their historical tendency to travel[284]. The mobile characteristic of this ethnic minority is often

[280] ISI, "The World's Stateless," 103.

[281] ENS, "Statelessness Determination and Protection in Europe: Good Practice, Challenges, and Risks" (Thematic Briefing, Statelessness Index, 2021), 6

[282] Cf. Conklin, *Statelessness: The Enigma of the International Community*.

[283] Cf. Claude Cahn and Elspeth Guild, "Recent Migration of Roma in Europe" (OSCE, Commissioner For Human Rights, 2008),13 : "It is now generally accepted by scholars that the Romani people of Europe are descended from groups which left India around 1,000 years ago and began arriving on the territory of today's European Union in or around the 14th century […]"; Council of Europe, "Roma History: Arrival in Europe" (Project Education of Roma Children in Europe, 2023); Adam M Warnke, "Vagabonds, Tinkers, and Travelers: Statelessness Among the East European Roma," *Indiana Journal of Global Legal Studies* 7, no. 1 (1999): 335–35.

[284] Roma is a term that was coined by non-Roma external authorities and does not necessarily reflect the identity and diversity of these groups. The CoE has long employed this generic term to encompass several categories of Travelers: (a) Roma, Sinti/Manush, Calé, Kaale, Romanichals, Boyash/Rudari; b) Balkan Egyptians (Egyptians and Ashkali); c) Eastern groups (Dom, Lom and Abdal); but also groups such as Travellers, Yenish, and the populations designated under the administrative term "Gens du voyage", as well as persons who identify themselves as Gypsies), but it has also produced a glossary to display the point of view of Roma (Council of Europe, "Roma and Travellers," https://www.coe.int/en/web/roma-and-travellers) and, in 2020 it has launched a an action plan to foster their inclusion (Council of Europe, "Council of Europe Strategic Action Plan for Roma and Traveller Inclusion (2020-2025)" (CoE, 2020).

derivative of the constant discrimination and persecution[285] they have endured and has forced them to carry a disproportionate burden of statelessness across the EU Member states, among which a recurrent example is Italy[286].

Notable junctures in time have punctuated their progressive descent into the abyss of statelessness, such as being targeted during the Holocaust[287], being refused nationality after the fall of the Soviet Union by successor states on the base of ethnicity[288] and having suffered through events of mass expulsion operated by national governments[289]. Currently, one of the most severe challenges they are encountering is derived from the employment of *jus sanguinis*-based nationality laws by most European countries, which often prevent some Roma from acquiring citizenship[290]: due to the blood-based nationality laws that are prevalent in Europe[291], Roma are often an example of *in situ* statelessness in the region[292]. Furthermore, themes connected to statelessness that have been often associated to the Roma Communities are

[285] Jessica Parra, "Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws With International Agreements to Reduce and Avoid Statelessness," *Fordham International Law Journal* 34, no. 6 (2011): 1667-1669

[286] Cf. European Network on Statelessness, "Ending Childhood Statelessness: A Study on Italy" (ENS Working Paper 07/15, 2015).

[287] Cf. Warnke*, "Vagabonds, Tinkers, and Travelers: Statelessness Among the East European Roma,"* 342-43.

[288] Cf. Claude Cahn and Sebihana Skenderovska, "Roma, Citizenship, Statelessness and Related Status Issues in Europe" (Briefing Paper for Expert Consultation on Issues Related to Minorities and the Denial or Deprivation of Citizenship, Convened by the UN Independent Expert on Minority Issues, 2007); Warnke, "Vagabonds, Tinkers, and Travelers: Statelessness Among the East European Roma," 356**.**

[289] Cf. Cahn and Guild, "Recent Migration of Roma in Europe," 49-50: "Forced expulsions to Serbia have been ongoing for a number of years, particularly from Denmark, Germany, Switzerland and Sweden […]; Anaïs Faure Atger and Sergio Carrera, "L'affaire Des Roms.A Challenge to the EU's Area of Freedom, Security and Justice," *Center for European Policy Studies*, 2010: 1–18.

[290] Parra, "Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws With International Agreements to Reduce and Avoid Statelessness." 1669.

[291] For example, in Germany, Roma that have been in the country for generation do not acquire German citizenship but a temporary status (*duldung*) that imposes several restrictions and must be often renewed (Cf. Cahn and Skenderovska, "Roma, Citizenship, Statelessness and Related Status Issues in Europe.")

[292] See section 4 of chapter I.

the lack of ID[293], the lack of social inclusion that prevents them from benefit from social services[294] and their hurdles in accessing the justice system[295].

Through the years, the Council of Europe has supported initiatives and produced recommendations to bring the matter to the forefront of the European human rights priorities, by advocating for the removal of administrative and financial obstacles in accessing social and economic rights, while at the same time promoting the resolution of issues connected to identity documents that propagate statelessness among them[296].

Nonetheless, Roma people remain one of the most marginalized communities in Europe, and although estimates show figures as high as 10 million Roma today in Europe[297], similarly to most stateless communities, it is impossible to determine an exact number. It is evident that, despite the effort in producing pan-European solutions to address the *in situ* statelessness that disproportionally affects Roma Communities, the inadequacies of the provisions mixed with the failure of States to appropriately implement the international agreements their have undertaken[298], allow today the persistence of the issue within the region.

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[293] Ad Hoc Committee Of Experts On Roma Issues, "Thematic Report on Solving the Legal Status of Roma From Ex-Yugoslavia and Their Lack of Personal Identity Documents" (Council of Europe, 2014) and Ad Hoc Committee Of Experts On Roma Issues, "Thematic Report on Solving the Lack of Identity Documents and Statelessness of Roma" (Council of Europe, 2018).

[294] Council of Europe, "Protecting the Rights of Roma and Travellers" (CoE, 2010).

[295] Ad Hoc Committee Of Experts On Roma Issues, "CAHROM Thematic Report on Roma and Traveller's Access to Justice (With a Gender Focus)" (Council of Europe, 2018).

[296] PACE, Recommendation 2003 on Rome Migrants in Europe of 12 June 2012; Committee of Ministers of the Council of Europe, Recommendation No. R (83) 1 On Stateless Nomads And Nomads Of Undetermined Nationality of 22 February 1983; PACE, Recommendation 1633 on Forced returns of Roma from the former Federal Republic of Yugoslavia, including Kosovo, to Serbia and Montenegro from Council of Europe member states of 25 November 2003; Committee of Ministers of the Council of Europe, Recommendation No. R (2001) 17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe of 27 November 2001; Committee of Ministers of the Council of Europe, Resolution No. (75) 13 Containing Recommendations On The Social Situation Of Nomads In Europe of 22 May 1975.

[297] Cf. European Commission, "The Situation of Roma in an Enlarged European Union" (Directorate-General for Employment, Social Affairs and Inclusion, 2005), 6: "[T] here are possibly over ten million Roma in Europe as a whole […]. Around one and a half million Roma joined the European Union when the ten new Member States acceded to the Union in May 2004. Roma are the European Union's largest minority ethnic community."

[298] Parra, "Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws With International Agreements to Reduce and Avoid Statelessness," 1682.

3.4.2 Non-citizens in Latvia and Estonia

State succession is another prevalent cause of statelessness in Europe. After the fall of the USSR, the nationality laws enacted by the Soviet successor states of Estonia and Latvia encapsulate a perfect example of why statelessness continues to flourish in Europe today. Statelessness is a complex issue in these two Baltic states, as it encompasses historical implications and political dynamics that are essential to grasp in order to understand the root causes of statelessness in these two countries. The history of statelessness in Latvia and Estonia is closely tied to their experiences of occupation and annexation during the 20th century: both countries were incorporated into the Soviet Union following World War II, which, encouraged by the soviet government, led to mass migration of ethnic Russians and other Soviet nationals to the Baltic states. This inevitably resulted in the alteration of the demographic makeup of the region. However, after the fall of the USSR, the soviet citizenship lost legal effect, allowing Latvia and Estonia to establish their own nationality laws, which were strict[299], and based on *jus sanguinis*. In an effort to restore the demographic situation that existed before the annexation to the Soviet Union, people who only possessed Soviet citizenship[300], even if regularly residing in the country, were not granted citizenship and acquired a new status within the country, known as "non-

[299] In Latvia, the Citizenship Law of 1994 established a two-tier citizenship system, distinguishing between citizens by birth and naturalized citizens. Individuals who were permanent residents of Latvia at the time of independence in 1991 and their descendants are eligible for automatic citizenship, while others must go through a naturalization process, which includes language and history exams. Therefore, former USSR citizens, even if long-term residents at the time of independence, were not granted automatic citizenship. Similarly, Estonia's Citizenship Law of 1992 provides for automatic citizenship for individuals who were citizens of Estonia prior to Soviet occupation in 1940 and their descendants. Others, including Soviet-era migrants and their descendants, must apply for citizenship through a naturalization process, which also includes language and citizenship exams.

[300] Which were ethnically Russian people, but not exclusively: "besides people who identify as ethnic Russians, there are many who identify as ethnically Ukrainian, Belarusian, Polish, Lithuanian, or with ethnic roots in the Caucasus. Even some ethnic Latvians are non-citizens" *(*A Latvian Non-citizen, "'Non-Citizens' of the Baltics: Common Misconceptions Explained," *European Network on Statelessness* (blog), 2021, https://www.statelessness.eu/updates/blog/non-citizens-baltics-common-misconceptions-explained.)

citizen"[301]. Although the choice to establish such restrictive nationality laws was at first deemed as a temporary solution to resolve the issue of the Soviet settlers[302], the status of *non-citizens* has perdured in time and is today a much-debated issue within the European and international community.

In Latvia and Estonia there are today approximately 300'000 non-citizens. According to the Latvian and Estonian government, these people are not to be considered stateless, but as retaining a particular status that is not citizen of their country nor of any other country, but also not stateless[303]. They are granted a series of rights deriving from this status: they have the rights of movement and return, and they enjoy protection under the law. However, despite also enjoying equal social rights as citizens, the same cannot be said for economic and political rights: their constrains in these areas are exemplified by their inability to vote, work in civil services and hold official positions or offices[304]. Among other limitations, they cannot own land, travel within the EU without a visa and they face discrimination relating to the compensation of their pensions, as well as in other laws[305], failing to be protected by the national minority legislations[306].

Despite the existence of a naturalization process that the two states have attempted to establish, the policies have not been effective nor efficient in reducing the number of non-citizens[307]. Therefore, notwithstanding the attempts at convincing the international community otherwise, non-citizens

[301] *Nepilsonis*, or citizens of a non-existent state. Furthermore, the law decreed that were to be excluded by Latvian citizenship also those who "1. have, by unconstitutional methods, acted against the independence of the Republic of Latvia; 2. have propagated fascist, chauvinist, national-socialist, communist or other totalitarian; 3. are officials of foreign state; 4. serve in the foreign armed forces, internal military forces, security service or police; 5. have been employees, informers, agents of KGB; 6. have been members of the communist party (Art. 11 of the Latvian Citizenship Law*, Pilsonības likums,* 11th August 1994).

[302] Berényi, "Addressing the Anomaly of Statelessness in Europe: An EU Law and Human Rights Perspective," 73.

[303] According to the judgment conferred by the Latvian Constitutional Court (Case No 2004-15-0106, [2005], Constitutional Court of the Republic of Latvia, para 15) "[…] non-citizens cannot be seen neither as citizens, nor as stateless persons but rather as *individuals with a specific legal status."*

[304] Berényi, "Addressing the Anomaly of Statelessness in Europe: An EU Law and Human Rights Perspective."

[305] Miroslavs Mitrofanovs and Et Al., "The Last Prisoners Of The Cold War: The Stateless People Of Latvia In Their Own Words" (Averti-R ltd., 2006), 4.

[306] Aleksandra Kuczyńska-Zonik, "Non-citizens in Latvia: Is It a Real Problem?," *Sprawy Narodowościowe Seria Nowa*, no. 49 (2017), 8-9.

[307] *Ibid*, 5-8.

do not have *essentially* the same rights as citizens[308]. Moreover, similar efforts by the two governments to claim that non-citizens are not stateless are also not convincing when the condition of non-nationals seem to fit the international definition of statelessness: they are not nationals of any state under the operation of its law, and they are unable to claim all the rights attached to nationality[309]. Effort to launch a campaign of naturalization have started in 1996 due to pressure received from the EU and other members of the international community. However, the intrinsic barriers posed within the naturalization process slow the progress on the matter and the percentage of non-citizens in Latvia and Estonia remains overwhelming[310].

3.5 The Council of Europe

It is clear that the historical chain of events that has generated statelessness in Europe continues to carry consequences that European states have failed to address. Stateless populations are a perpetual presence in Europe, not only enclosed within specific groups[311] but also as standalone cases spread throughout the region. Among the many statelessness issues that permeate Europe today, the Council of Europe stands as a beacon to promote their fight. This institution was established in the aftermath of the World Wars, in 1949, as the recognition for the need to keep human rights in high regards spiked within the region[312]. In view of the Council's ambition to establish legal

[308] A Latvian Non-citizen, "'Non-Citizens' of the Baltics: Common Misconceptions Explained."
[309] As reported in the 1954 Convention, if a non-national were to enjoy the same rights as a citizen, they would be excluded by the definition of the convention: art. 1(2) "This Convention shall not apply: ii. To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." As shown, this is not the case for non-citizens.
[310] Cf. Mitrofanovs and Et Al., "The Last Prisoners Of The Cold War: The Stateless People Of Latvia In Their Own Words."; Kuczyńska-Zonik, "Non-Citizens in Latvia: Is It a Real Problem?"
[311] To which, for instance, could be also added the example of the Slovenian "erased", where thousands had not obtained Slovenian citizenship by the registration deadline in 1992 and, consequently, were removed from the official registry of permanent residents, leading to the loss of legal status (Cf. Jasminka Dedic, Vlasta Jalusic, and Jelka Zorn, The Erased – Organized Innocence and the Politics of Exclusion (Ljubljana: Peace Institute, 2003)).
[312] Cf. *Ibid*.

benchmarks for individual freedoms and fostered cooperation among states, it should come as no surprise that this institution has long acknowledged the precarious position of stateless people and shown a commitment to battling statelessness by developing a number of instruments meant to prevent it and protect those who are affected by it. The investigation of the tools and the results achieved by the CoE is particularly relevant for this work, as the relationship between the European Union and the Council of Europe is characterized by collaboration, interdependence, and mutual reinforcement of common values, notably in the realms of human rights, democracy, and the rule of law. These two distinct entities were vested with separate mandates and do not include the same overall pool of members, but they share overlapping objectives and conduct, at times, complementary roles in advancing and guaranteeing fundamental freedoms across the continent[313].
In recent years, the relationship between the two institutions has grown more interconnected and, in the spirit of solidifying an already evident complementarity, the Union has been exploring the possibility of accessing the ECHR for several years. The Lisbon Treaty[314] finally provided the necessary breakthrough[315], by plainly stating the EUs intention to accede to the ECHR and establish a uniform legal framework for the protection of human rights throughout Europe. The political commitment that was instilled in such a pledge revealed the path forward that was previously missing. However, it quickly became apparent that transforming the commitment into political arrangements presented challenges, due to issues connected with the EU's legal standing within the ECHR system and the role of EU institutions within the ECHR proceedings. The complexity of the discussions primarily stemmed from the need to balance EU's autonomy with the rights protected

[313] Cf. Frank Emmert and Chandler Carney, "The European Union Charter of Fundamental Rights Vs. The Council of Europe Convention on Human Rights and Fundamental Freedoms - a Comparison," Fordham International Law Journal 40, no. 4 (2017): 1051-1172; Tobias Lock, "The ECJ and the ECtHR: The Future Relationship Between the Two European Courts," The Law and Practice of International Courts and Tribunals 8, no. 3 (2009): 375–98; Tobias Lock, The European Court of Justice and International Courts (Oxford: Oxford University Press, 2015), 167-76; Jan Wouters and Michal Ovádek, The European Union and Human Rights: Analysis, Cases, and Materials (Oxford: Oxford University Press, 2021), 212-312.
[314] Art. 6(2) of the TEU: 2. "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."
[315] The first opinion of the Court regarding the accession of the European Community to the ECHR was negative due to lack of competences within the Treaties that were deemed to require a Treaty amendment (Opinion 2/94 Accession by the Community to the ECHR ECLI:EU:C:1996:140, para 35).

by the ECHR, but, after years of negotiations, a draft agreement on the EU's accession to the ECHR was reached in 2013[316].

However, finalizing the agreement and obtaining the necessary ratifications from EU member states and the Council of Europe member states proved to be another lengthy process: as per the procedure outlined in article 218 of the TFEU[317] in section 11[318], the Commission inquired to the European Court of Justice (ECJ) relating to the compatibility of the draft agreement with EU law. The Court delivered the Opinion 2/13 on December 18, 2014, rendering a significant ruling that precluded the EU from acceding to the ECHR. The Court's reasoning was multifaceted but centered on concerns related to the autonomy of EU law and the institutional framework of the EU[319]. The main points upon which the ECJ touched were the primacy of EU law within the EU legal order, emphasizing that the EU's accession to the ECHR should not compromise the autonomy and effectiveness of EU law[320]; the distinct institutional framework of the EU was highlighted, which, comprising its own courts, legal principles, and mechanisms for safeguarding fundamental rights, could not be subjecting it to external judicial review, and risk undermining the unique character and coherence its legal system[321]; the acknowledgement

[316] European Parliament, "Completion of Eu Accession to the European Convention on Human Rights" (Legislative Train, A New Push For European Democracy, 2024).

[317] "Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organizations shall be negotiated and concluded in accordance with the following procedure [...]"

[318] "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

[319] Opinion 2/13, *Accession of the European Union to the ECHR,* ECLI:EU:C:2014:2454.

[320] Concerns were raised regarding potential conflicts between ECtHR judgments and EU law, particularly in areas where divergent legal standards and principles might apply. *Ibid*, para 200 "it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy" and para 258 " it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU." See generally section VIII 2(a) of the opinion "The specific characteristics and the autonomy of EU law."

[321] *Ibid*, para 258 "it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body" and para 257 "[…] the agreement envisaged fails to have regard to the

that the complexity of the accession process needed comprehensive safeguards to address legal, institutional, and practical challenges[322]. The Court concluded, once more, that the accession to the ECHR was not compatible with EU law, as the imperative to preserve the autonomy of the EU law was confirmed as a beacon for the decision.

In light of these reflections, the ECJ's opinion effectively closed the door to EU accession to the ECHR and, by extension, membership within the Council of Europe. However, over the following years, the Commission and the Council continued the work to address the objections of the court[323] and in October 2019 the EU opened to resuming negotiations (which formally restarted in the fall of 2020). Following the strong commitment by the EU to join the ECHR[324], in March 2023 the *ad hoc* negotiation group on EU accession to the ECHR reached a technical agreement.

3.6 The CoE Conventions relevant for statelessness

Due to these recent developments, the CoE holds increasing value for the protection and identification of stateless persons and for this research, especially due to the contribution it has provided on the matter over the years. The CoE consists of 47 European states—including all the EU MS—and is considered to be a standard-setting organization within the region[325] thanks

specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters." See generally section VIII 2(e) of the opinion "The specific characteristics of EU law as regards judicial review in CFSP matters."

[322] *Ibid*.

[323] In February 2019 the resolution of the European Parliament (Resolution (EU) P8_TA(2019)0079 of the European Parliament, of 12 February 2019 on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework, para 29) echoes the value of acceding to the ECHR: "Recalls the obligation laid down in article 6 TEU to accede to the ECHR; asks the Commission to take the necessary steps to eliminate the legal barriers that prevent the conclusion of the accession process, and to present a new draft agreement for the accession of the Union to the ECHR […]."

324 The 31st of October 2019 the president and the first vice-president of the European Commission co-signed a letter to resume the negotiation to accede to the ECHR. See Council of Europe, "EU Accession to the ECHR ('46+1' Group)," 2024, https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.

[325] Irena Guidikova, "General Introduction," in *Council of Europe (CoE)*, 3rd ed. (Alphen aan den Rijn: Kluwer Law International, 2018), para 10.

to its production of Treaties, recommendations and guidelines aimed at the realization of human rights and fundamental freedoms[326]. The promotion of nationality has long been included within this agenda of the CoE, which has linked the promotion of democratic principles with the guarantee of nationality and the cooperation of the states[327]. It is maybe disappointing that the ECHR, the chief CoE instrument that is meant to create an encompassing benchmark of human rights protection, fails to include the right to nationality. However, the question of statelessness is addressed in numerous other CoE instruments, starting from 1954, when the idea of a European Treaty on statelessness was raised[328]—that was ultimately considered superfluous and abandoned due to the drafting, soon after, of the 1954 Convention on the Status of Stateless Persons.

Later efforts proved more successful in addressing nationality, chief among others the European Convention on Nationality. This cornerstone convention was born in an effort to generate a "comprehensive convention which would contain modern solutions to issues relating to nationality suitable for all European States"[329], and by focusing entirely on regulating matters pertaining to nationality, it became a keystone in the CoE fight against statelessness. In fact, the Convention main value resides on the acknowledgment of the right to nationality's imperative nature, legitimizing it as a fundamental human right and underscoring the value of facilitating the acquisition, retention and restoration of nationality[330]. The progressive character of this instrument consisted in the consolidation in a single text of the developments that had emerged from the international and national laws on nationality, from which this text draws inspiration[331]: Article 4, for example, recalls what was stated

[326] Art 1(b) Statute of the CoE.
[327] Hans C. Krüger, "1st European Conference on Nationality: Trends and Developments in National and International Law on Nationality" (Council of Europe, 2000), 9-12.
[328] PACE, Recommendation 87, Statelessness, adopted on 25 October 1955. "In view of the work already done in the United Nations, and being anxious to avoid duplication, your Committee has decided to refrain for the time being at any rate, from dealing with the problem of statelessness, but it is following closely all activities in this field."
[329] Council of Europe, "Explanatory Report to the European Convention on Nationality" (European Treaty Series - No. 166, 1997), para 4.
[330] See chapter III.
[331] Gerard-René De Groot, "The European Convention on Nationality: A Step Towards a Ius Commune in the Field of Nationality Law," *Maastricht Journal of European and Comparative Law* 7, no. 2 (2000): 120.

in art. 15 of the UDHR[332], advocating for the right of nationality and adding the imperative to avoid statelessness, especially when springing from arbitrary deprivation, marriage dissolution or nationality change[333]. Moreover, the Convention required facilitation of naturalization for stateless persons[334], as well as access to nationality for children who would otherwise be stateless[335]. For its attempt to catalogue all the elements of nationality as a guideline for states to implement, this instrument remains relevant in the landscape of statelessness protection and powerful human right keystone. However, its ratification numbers among the members of the Council[336] are less than optimal, leading to the logical consequence that the legal standards it sets might not have been fully realized.

Furthermore, the European Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (1963) addresses challenges arising from multiple nationalities and endeavors to prevent statelessness and delineate obligations concerning military service in such instances[337]. The convention sets the goal to minimize statelessness and harmonize national legislations among member states by regulating acquisition and loss of nationality in the event of multiple citizenships. Some protocols attempted to complete the overarching objectives of this instruments by taking into consideration the regulation of factors that might have emerged since the adoption of the treaty[338]. At the base of this treaty's

[332] "[…] a. everyone has the right to a nationality; b. statelessness shall be avoided; c; no one shall be arbitrarily deprived of his or her nationality; d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse."

[333] "The rules on nationality of each State Party shall be based on the following principles: a. everyone has the right to a nationality b. statelessness shall be avoided; c. no one shall be arbitrarily deprived of his or her nationality; d. Neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse."

[334] art. 6(4): "Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons: […] stateless persons and recognized refugees lawfully and habitually resident on its territory"

[335] Art. 6(1): Each State Party shall provide in its internal law for its nationality to be acquired ex lege by […] foundlings found in its territory who would otherwise be stateless" and art. 6(2) "[…] nationality shall be granted: […], to children who remained stateless […]."

[336] Less than half of its members.

[337] See chapter I.

[338] Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 1977, CETS No. 095) and

establishment was the understanding that multiple nationality, in the same way as no nationality, was undesirable and needed to be regulated through a communal effort[339], hence the 1963 Convention. This tool, however, was not without flaws, as demonstrated by the need to add several protocols to address its gaps and today it might be even argued that the Treaty is obsolete, as multiple nationalities are no longer viewed as a compelling issue[340].

While the 1963 Convention might have gone out of style, the European Social Charter (1961) has, from a perspective of stateless persons' protection, maintained the allure that it had when it was drafted. The Charter focuses on guaranteeing fundamental social and economic rights and protects a broad range of human rights such as the right to health, welfare and education. Although it contains no specific statelessness mention, it has an appendix which includes a provision in favor of stateless persons[341], that invites each party of the convention to provide treatment as favorable as possible to stateless persons—but not less favorable than the one guaranteed in the ECHR or any other international instrument. But perhaps the most relevant implication that derives from the Charter is the role it has assumed as one of the inspirations for the EU Charter of Fundamental rights[342], a testament to the position that the CoE and its documents occupy within EU law.

Furthermore, the CoE, aware of the main challenges connected to statelessness that have been plagued Europe, conceived the European Convention on the Avoidance of Statelessness in Relation to State Succession in 2006. The drafting of this convention originated from the understanding that the phenomenon of state succession has led to the majority of cases of statelessness in Europe and it is most appropriate that a body devoted to the

Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 1993, CETS No. 149).

[339] Council of Europe Convention Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 1963, CETS No. 43), Preamble: "Considering that cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe."

[340] Dimitry Kochenov, "Double Nationality in the EU: An Argument for Tolerance," European Law Journal 17, no. 3 (2011): 9-10.

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

[342] Berényi, "Addressing the Anomaly of Statelessness in Europe: An EU Law and Human Rights Perspective," 142-142.

protection of human rights in Europe would produce such instrument. This convention, adopted in 2006, provides rules and details on the behavior that states should assume in order to prevent and reduce numbers of statelessness. As it focused exclusively on statelessness arising from state succession, other causes of statelessness were not touched upon, but restricting the aim allowed the convention to produce clear and detailed provisions to address this issue. Given the prevalence of state succession-related statelessness within the region, this convention set the task to fill the gaps that other international instruments failed to cover due to their ample scope—that did not allow them to detail the aspects of this theme—or due to their lack of binding force[343]. The convention is connected in many ways to the ECN, and it recalls it often[344], rendering them somewhat complementary. Although it might be contended that the 2006 Convention has a limited relevance due to the specificity of its scope, it could conversely be argued that, considering the high rate of statelessness within the region that derives from state succession, and framed in conjunction with the ECN, the Convention remains a significant instrument in Europe.

To accompany the wide array of conventions drafted by the CoE and its efforts towards the cause of stateless persons, it is important to note the several recommendations in favor of stateless persons[345]. Through these recommendations the CoE has committed to emphasize elements of the statelessness condition that needed to be addressed, such as the condition of undetermined nationality, the undesirability of statelessness among children and the possibility of acquiring the nationality of the country of residence.

[343] See also Ineta Ziemele, "State Succession and Issues of Nationality and Statelessness," in Nationality and Statelessness under International Law, ed. Alice Edwards and Laura Van Waas (Cambridge: Cambridge University Press, 2013), 226.

[344] Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (Strasbourg, 2006, CETS No. 200), Preamble.

[345] Committee of Ministers of the Council of Europe, Recommendation No. R (83) 1 on the Stateless nomads and nomads of undetermined nationality of 22 February 1983; Committee of Ministers of the Council of Europe, Recommendation No. R (84) 9 on second-generation migrants of 20 March 1984; Committee of Ministers of the Council of Europe, Recommendation No. R (84) 21 on the acquisition by refugees of the nationality of the host state of 14 November 1984; Committee of Ministers of the Council of Europe, Resolution (70) 2 on the Acquisition by refugees of the nationality of their country of residence of 26 January 1970, and PACE, Recommendation 564 on the Acquisition by refugees of the nationality of their country of residence of 30 September 1969; Committee of Ministers of the Council of Europe, Recommendation No. R (99) 18, on the avoidance and reduction of statelessness of 15 September 1999; Committee of Ministers of the Council of Europe, Recommendation No. (09) 13 on the nationality of children of 9 December 2009.

The the CoE and its instruments represents a point of reference in Europe for statelessness in a manner that compares—if not exceeds—the contribution of the two conventions on statelessness. Firstly, by providing a normative framework that codifies principles of nationality, non-discrimination, and protection of stateless persons, it furnishes a normative framework guiding member states in enacting domestic legislation conducive to preventing and reducing statelessness. Furthermore, their attempts to shape legal certainty on nationality matters through the depiction of clear criteria for its acquisition, loss and restoration, aims at minimizing ambiguity and ensuring consistent implementation across member states. Additionally, with the overarching human rights ethos of the Council of Europe, these instruments underscore the intrinsic link between nationality and fundamental rights, affirming the right to a nationality as an indispensable aspect of human dignity and identity. Lastly, and evermore important in matters such as statelessness, through the exchange of best practices, capacity-building initiatives, and mutual assistance mechanisms, these conventions foster enhanced cooperation among member states.

3.7 The ECtHR case law on statelessness

In relation to statelessness, maybe the most relevant tool produced by the CoE is the case law derived by the supervisory body of the ECHR: the European Court of Human Rights. The ECtHR is a judicial body established by the European Convention on Human Rights to enforce and interpret the Convention's provisions[346]. The Court addresses cases alleging violations of human rights committed by member states of the Council of Europe, and in its role as a guardian of fundamental freedoms and rights across Europe, it ensures that states adhere to the principles outlined in the Convention. The ECtHR's jurisprudence has become an essential factor in statelessness matters when the Court has begun to set standards for the protection of stateless

[346] Art. 19 of the ECHR "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court." It shall function on a permanent basis. Cf. Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime," *European Journal of International Law* 19, no. 1 (2008): 125–59.

individuals through landmark decisions that emphasized the imperative character of the right to nationality and rejected the related discriminations. This jurisprudence has, therefore, demonstrated to be a useful tool through its ability to shape policies and practices of its members.

Additionally, the ECtHR case law relating to statelessness is relevant when discussing the issue within the EU context for several reasons. Firstly, ECtHR judgments, have the ability to influence EU law[347] and, considering the commitment undertaken by the MS towards the ECHR, they factually represent legal obligations that the MS must adhere to; secondly, the ECtHR rulings can be employed as relevant precedents for domestic courts, which renders the outcomes of statelessness related cases directly pertinent for similar situations in MS; and lastly, ECtHR cases relating to statelessness can provide concrete examples of how human rights principles are applied in real-life situations, and raise awareness about the challenges faced by stateless persons.

Through the years the ECtHR has shaped the boundaries and the imperatives of statelessness protection, stretching its decisions in a wide range of topics, starting with cases concerning children and their risk to statelessness, as well as discrimination on the basis of nationality, nationality withdrawal and statelessness resulting from state succession. The Court acquired relevance by assessing cases involving statelessness and through some of its decisions that did not directly mention it, but that have been, nonetheless, influential for statelessness and related arguments or supported claims from which the obligation for stateless identification could be inferred.

In *Mennesson v. France*[348], for example, the Court's emphasis on the right to identity of the child raises important points on the broader context of including nationality within the concept of identity and in framing cases towards the child's best interest. The Court's ruling that the state's refusal to acknowledge a child's identity (a child born via surrogacy abroad, for which the intended parents are not recognized) could amount to a violation of art. 8 of the EHCR (right to respect for private and family life) has relevant implications for the protection of children at risk of statelessness and to their

[347] See section 4 of chapter V.
[348] ECtHR, *Mennesson v. France*, App No 65192/11 [2014].

right to birth registration, all elements that the Court will later recall in statelessness related cases[349].

In fact, the approach of the Court remained consistent when it was presented with cases concerning children at risk of becoming stateless or lacking a nationality, with the underlying concern of children's rights to have their identity acknowledged by the state and to not be punished for the actions of their parents perdures. Subsequent rulings, such as *C v. Italy*[350], *D.B. and Others v. Switzerland*[351], and *Hashemi and Others v. Azerbaijan*[352] remained anchored to art. 8 when the applicants were denied access to nationality or legal recognition due to their parents' immigration status or other bureaucratic barriers, maintaining that the state cannot ignore the child's need for legal protection, even in the case of parent's precarious status.

Furthermore, the Court had the chance to take an explicit stance on discrimination on the context of nationality in *Genovese v. Malta*[353], where the applicant, a child of a Maltese father and a non-Maltese mother, was denied automatic citizenship, despite the father's clear connection to the claimant. The case has been relevant for childhood stateless as well as discrimination, when the Court found this situation to be in violation of art. 8, in conjunction with art. 14 (prohibition of discrimination) and declared that discriminatory practices in laws that regulate the acquisition of nationality are not acceptable unless there are "reasonable or objective grounds [to] justify such difference of treatment"[354]. This case is considered a landmark event, as it reinforced the right to an identity previously established through other cases involving children's rights, but it also uncovers the intersection that these circumstances present with discrimination and expanded the scope of children's protection when the risk of statelessness is looming[355].

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[349] Further cases that reinforced these principles are ECtHR, ECtHR, *Labassee v. France,* App No 65941/11 [2014] and ECtHR, *Affaire Foulon Et Bouvet C. France,* App No 9063/14 and 10410/14 [2016], where, again, statelessness was not involved, but where the Court emphasized the state's obligation that derive from art. 8 to ensure that the child's identity is recognized, highlighting nationality as a relevant element of one's identity.

[350] ECtHR, *Affaire C. c. Italie,* App No 47196/21 [2023].

[351] ECtHR, *D.B. and Others v. Switzerland,* App No 58252/15 and 58817/15 [2022].

[352] ECtHR, *Affaire Hashemi Et Autres C. Azerbaïdjan,* App No 1480/16 [2022].

[353] ECtHR, *Genovese v Malta*, App No 53124/09, [2011].

[354] *Ibid,* para 48-49.

[355] Rene De Groot and Olivier Vonk, "Nationality, Statelessness and ECHR's Article 8: Comments on Genovese V. Malta," European Journal of Migrtion 14, no. 2012 (2012): 323–25.

Together, these cases illustrate the evolving jurisprudence of the ECtHR in protecting children from the risks of statelessness, with a strong emphasis on the right to identity and non-discrimination. The Court has increasingly viewed nationality and legal recognition as integral to a child's development and well-being, underscoring that state obligations in these areas extend beyond simple legal formalities, but are also crucial to protecting children from the detrimental effects of statelessness.

The withdrawal of nationality has been another theme that the Court has often weighed in on and its decisions have provided elements to support the cause of stateless persons. In particular, in several occasions, such as *Ramadan v. Malta* and *K2 v. United Kingdom*[356] the Court, though ultimately not finding the state to be in violation under the Convention, has reflected the principle that states have large discretion on matters of nationality but that they must always considered the impact on the individual life and the proportionality of the action when withdrawing nationality, especially if the deprivation of nationality leads to statelessness[357]. In the first case the applicant was statelessness and contested the state for having revoked his Maltese nationality (obtained fraudulently). Despite the Court not finding merit in the claim of the State's alleged violation of art. 8, the case remains relevant as it established precise criteria to assess arbitrariness by considering whether this action had been perpetrated in accordance with the law and the necessary safeguards had been guaranteed[358]. Nonetheless, in view of the Court's missed opportunity to make a statement regarding the inadmissibility of rendering individuals stateless, the opinion of the Judge Pinto de Albuquerque acquires heightened importance, as he criticizes the punitive path undertaken by the State by underlining how statelessness should be avoided at all costs, calling for the Court to declare explicitly that the right to nationality belongs within art. 8 of the ECHR[359].

Confirming these concerns, in cases such as *K2* and *Ghoumid and Others v. France*[360], the applicants faced the withdrawal of their nationality after

[356] ECtHR, *K2 v the United Kingdom,* App No 42387/13 [2017].
[357] *Ibid*, para 66.
[358] The same criteria are emphasized in K2.v. United Kingdom, where the Court assessed whether the deprivation of nationality has been carried out with appropriate safeguards for the individual.
[359] "It is high time for the Court to recognise explicitly that State citizenship belongs to the core of someone's identity, which is protected by Article 8 of the Convention", *Genovese v Malta*, Dissenting Opinion Of Judge Pinto De Albuquerque, para 24.
[360] ECtHR, *Case Of Ghoumid And Others V. France,* App No 52273/16 and 4 other [2020].

terrorist-related crimes and highlighted concerning trend of punitive deprivation of nationality that allows for the creation of statelessness. The Court rejected the claims of violation of art. 8 and 14 as it was deemed that the withdrawal of citizenship did not affect their private life, but it did however admit that it weakened their ability to stay in the country.

The Court did not always concede to the states in matters of nationality withdrawal however: in *Emin Huseynov v. Azerbaijan*[361], the state terminated the citizenship of an individual and rendered him stateless and in this instance the Court found the action to be arbitrary and in violation of the ECHR in light of the failure by Azerbaijan to guarantee the procedural safeguards and highlighted the disregard for the 1961 Convention and related international norms. This circumstance reinforced the notion that, although states have discretion in the application of their nationality laws, the Court, where the violation is clear and the withdrawal does not respect the criteria that have been set through the jurisprudence, will remind the states that there needs to be regard for the consequences and international norms[362].

These cases collectively reflect the Court's growing concern with the withdrawal of nationality, particularly in contexts where it risks leaving individuals stateless or exposed to arbitrary treatment. Notwithstanding the outcome of the individual cases, the Court has maintained its line on the importance of protecting individuals from unduly consequences deriving from a withdrawal of nationality that is not rooted in law and not accompanied by procedural fairness. The Court has often signaled towards a cautionary approach to deprivation of nationality and has maintained the importance of upkeeping human rights obligations and avoid undermining individuals' legal identity.

Among the many contributions of the Court, it is not surprising that one of the main causes of statelessness in Europe has also often been addressed. In this context the ECtHR has generally acquired a position of protection of the

[361] ECtHR, *Emin Huseynov v. Azerbaijan (No. 2)*, App No 1/16 [2023].
[362] *Ibid*, "In determining whether the termination of the applicant's citizenship had constituted an interference with his right to private life, the Court noted the various methodological approaches previously used in cases relating to citizenship and followed the consequence-based approach. It examined what the consequences of the impugned measure had been for the applicant and then whether the measure in question had been arbitrary." The Court later noted that the State had failed to comply with its international obligations, namely "had disregarded the requirements of the 1961 United Nations Convention on the Reduction of Statelessness which was an integral part of the legal order of Azerbaijan and under which renunciation should not lead to statelessness."

individuals' right to a legal identity in relation to art. 8 and a critical approach with the aim of sponsoring avoidance of statelessness. Some interesting cases in this sense have been *Hoti v. Croatia*[363], *Kuric v. Slovenia*[364], *Mainov v. Russia*[365], and *Slivenko v. Latvia*[366], where the Court has paid attention to the consequences of state succession when this resulted, through no fault of their own, to statelessness. Particularly relevant is Hoti, where the Court criticized the state for not having provided adequate measures to assess the statelessness of the applicant, implying that the determination of statelessness is a relevant element for accessing human rights, that is an excessive standard of proof cannot be acceptable in this context and that the burden of proof must be shared[367]. The Court has emphasized in all of these cases that the uncertainty stateless persons are left in is not tolerable and that individuals cannot be arbitrarily excluded from the protection of the law. While the ECHR does not always mention statelessness or the right to a nationality—or a residence—these decisions from the court underscore the inadmissibility of leaving individuals without the possibility to regularize their status[368]. These cases are examples of how the Court recognizes the existence of an obligation from states to safeguard individual rights in the context of state succession and considered the risk of statelessness to be intertwined to the right to a legal identity.

The ECtHR has also developed a critical body of case law around the detention of stateless individuals through which it has highlighted the intersection between arbitrary detention and the right to identity and legal recognition. Such were the cases of, for example, *Kim v. Russia*[369], *Shoygo v. Ukraine*[370], and *Mainov v. Russia,* which demonstrated how the Court supported a view of vulnerability for stateless persons in detention, especially when their status remains uncertain. These decisions all display episodes in which states have failed to properly ensure the lack of arbitrariness in the detention and have prolonged it in a manner that was deemed excessive and not necessary, welcoming the motions related to the right to private and

[363] ECtHR, *Hoti v Croatia*, App No 63311/14 [2018].
[364] ECtHR, *Kuric and Others v. Slovenia*, App. no. 26828/06 [2012].
[365] ECtHR, *Mainov v. Russia*, App No 11556/17 [2018].
[366] ECtHR, *Slivenko v. Latvia*, App. no. 48321/99, [2003].
[367] Katja Swider, "Hoti V Croatia: European Court of Human Rights Landmark Decision on Statelessness," Statelessness & Citizenship Review 1, no. 1 (2019): 189.
[368] *Hoti v Croatia*, paras 138-140.
[369] ECtHR, *Kim v. Russia*, App No 44260/13 [2014].
[370] ECtHR, *Shoygo v. Ukraine,* App No 29662/13 [2021].

family life, the prohibition of discrimination and the right to liberty (art. 5)[371]. In *Slivenko* and *Kim* the Court emphasized that without a clear legal ground for it, detention cannot be justified, and that clarity on the individual's nationality is required in cases of prolonged holding, lest violating art. 5. In fact, it was clarified that statelessness cannot be a sufficient justification for the detaining individuals when due process had not been guaranteed, and the individual is left in a legal limbo. Moreover, in *Shoygo v. Ukraine* and *Mainov v. Russia*, it was further stressed that the failure to resolve the individual's status—legal identity—is a fundamental component of the arbitrariness of the detention[372]. The Court also expressed concerns over the violation of procedural rights of stateless individuals, that can be undermined by their precarious condition. This body of jurisprudence reinforces the Court's commitment to prevent arbitrary detention and set a clear standard for stateless individuals' treatment.

The lack of a specific mention of a right to nationality within the ECHR is remedied by the several instances in which the Court has nonetheless found its implied association with other articles of the Convention and has painted a clear position towards the positive obligations of states to recognize the status of individuals and to provide for them the necessary guarantees in case of determination of statelessness. It is therefore evident that the Court has produced relevant decisions on statelessness and has influenced states' behavior within the region.

3.8 Conclusion

European statelessness, rooted in nationalism and exclusion, was initially shaped by the continent's nation-building processes in the 19th and 20th century, where forming distinct national identities became a priority and states decided to establish legal mechanisms to reinforce this concept through ethnic and cultural unity. Those who did not fit the criteria were relegated to the fringes of society, fallen victim to the rigid citizenship laws that states were employing in search of autonomy and control. Furthermore, when states realized the exclusion's potentiality of application to target specific groups,

[371] Seet, "Strengthening the Protection of Stateless Persons From Arbitrary Detention in Immigration Control Proceedings Kim V. Russia", 273–86.
[372] *Mainov v. Russia,* para 26.

statelessness reached its most disastrous peak and became an enduring aspect in the political landscape, with recurring impacts on minority groups.

The complex history of stateless in Europe underlines the European states' inability to create a pathway for inclusion as a response to the political events that reshaped the regional borders, often because political interests overshadowed the imperative to resolve the emerging statelessness or caused it themselves. Following the fall of empires and the consequent border scramble post-World Wars, European states were aware of the issue of statelessness and its catastrophic potential, but their attempts to address it were limited by fragmented solutions and restrictive interpretations that served state interests rather than being rooted in interstate cooperation. The League of Nations' measures, for instance, fell short because most states failed to fully commit to relinquishing their discretionary powers over citizenship and, when clear opportunities arose to correct what had become instances of systematic exclusions, national interests frequently eclipsed the collective resolve to integrate stateless individuals. By consistently placing sovereignty above cooperation, any potential stored by proposed solutions was curtailed and statelessness was allowed to persist across generations. The further political shifts that took the stage in the 20th century—such as the dissolution of the Soviet Union and the decolonization process—exposed the limitations of European nationality laws, as successor states favored *jus sanguinis* principles as a way to establish their autonomy and attempting to reconstruct the illusion of ethnic homogeneity historically associated with their country. These laws, designated to fortify national identities, left large portions of ethnic minorities stateless and limited their rights, as is the example of Latvia and Estonia, where Russian-speaking minorities were relegated to a *non-citizen* status. Confronted by many actors about the legitimacy of their actions and the consequences that resulted from them, these states attempted to introduce mechanisms for naturalization, whose inefficiency, however, appeared to be another reminder of states' reluctance to confront the exclusionary nature of their citizenship law.

Today, while statelessness awareness has grown, the constant presence of this issue represents a profound reflection on the continent's unresolved tension between human rights and sovereignty. The Council of Europe has made strides in the direction of statelessness reduction by attempting to establish standards that challenge the exclusionary nature of citizenship practices, however, due to—sometimes—low ratification numbers, its enforceability is precarious. Nonetheless, the case law produced by the Court of Human

Rights, through cases such as Genovese v. Malta and Kim v. Russia, has highlighted its position towards statelessness and established that denying nationality infringes on the right to personal identity and the prohibition of discrimination. These decisions from the Court suggest interesting clarification on the position of stateless individuals and the obligation that befall states to guarantee their fundamental rights. However, the consequences of these cases cannot impose the systematic change that this issue requires, and ultimately stateless individuals are left at the mercy of inconsistent national interpretations and practices.

The lack of binding conditions for states to adopt inclusive nationality laws, renders any attempt to eradicate statelessness aspiration, due to the restrictive manner that states have demonstrated to choose to interpret citizenship and any related topic. The current reality in Europe exposes fundamental gaps in the European protection of human rights, because its piecemeal approach to nationality relies on states' discretion and ultimately sustains the issue itself by allowing entire groups to fall into a legal void. Currently, statelessness is accepted as an unfortunate reality that states try to avoid but constantly sideline at the benefit of their political interests, while the perspective should shift to recognize that it is an historical failure for which they bear responsibility and must correct by prioritizing inclusion and cooperation. The lack of binding overall regional path towards a solution that is able to ensure inclusive nationality policies suggests that statelessness, though solvable, will remain unaddressed because not prioritized by the actors that have no interest in doing so.

While it has been established that the resolution of statelessness is something unreachable, the international system should limit the impact that the status of stateless implies by providing rights and guarantees associated with statelessness. This research, after establishing that inability of the current system to comply with this mission, identifies the EU as an institution capable of producing such legislations.

CHAPTER IV

THE EU'S POTENTIAL TO SOLVE STATELESSNESS

4.1 Introduction to The Rationale behind EU Action on Statelessness

EU law does not provide a definition of "stateless persons" and refers directly to the 1954 Convention's definition and the related international obligations undertaken, as stated in Art. 1 (e) of the Council Regulation No. 1408/71 of the European Community, later replaced by the art. 1 (h) of the Council Regulation No. 883/2004 in 2010: "'[…] stateless person' shall have the meaning assigned to it in Article 1 of the Convention relating to the Status of Stateless Persons, signed in New York on 28 September 1954"[373]. Furthermore, the EU does not have specific legislations addressing the situation of non-refugee stateless persons, who, before the Lisbon Treaty, were never contemplated within EU law: though the EU as an entity regularly focuses on issues related to refugees, as well as migration and border patrol policies, the legal status and protection of stateless persons who are not classified as refugees falls primarily under the jurisdiction of individual member states.

The absence of EU legislation on statelessness means that the legal status and rights of stateless persons varies widely across Member States depending on national laws and policies: some Member States have specific procedures for determining statelessness and granting protection to stateless individuals, while others lack adequate mechanisms for identifying and assisting stateless

[373] Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

persons[374]. It might seem that there is no scope to address statelessness at the EU level, as the initial impression indicates that the EU has delegated this responsibility to the discretion of individual Member States. Van Waas suggests, however, that despite the lack of concrete action by the EU, there is a growing interest by the institutions and the MS towards addressing statelessness and discovering what role they could play in tackling the issue[375], with encouraging signs emerging in recent years. In 2009, the European Parliament (EP), in its resolution "Situation of fundamental rights in the European Union 2004-2008"[376], briefly mentioned the challenges of stateless persons residing in the EU MS under the paragraph of *minority*, calling for the ratification of the two UN conventions relating to statelessness and the identification of "[…] just solutions, based on the recommendations of international organizations, to the problems encountered by all victims of discriminatory practices […]." On the same note, in 2012, the MS which had not yet done so, pledged to the UN that they would ratify the 1954 Convention and *consider* ratifying the 1961 Convention as well[377]. Today, all but three MS have ratified the 1954 Convention[378], and a majority[379] has ratified the 1961 Convention. This type of engagement on a specific issue could be interpreted as an ambition within the EU to increase its involvement in the overall implementation of statelessness-related solution and envisaging a commitment to strengthening the associated protection.

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[374] Due to the fluctuating legislations and provisions aimed at identifying stateless persons set in place in each country, rights and guarantees are granted to varying degrees across the EU. Some states (such as Spain and Hungary) have legislations and procedures aimed at the identification of stateless persons; others (such as Italy and France) formally accept statelessness as a ground for protection but do not have a clear procedure for status determination; some have no procedures at all (such as Greece and Sweden); some other states argue that their legal systems allow for the direct application of international treaties (including therefore the 1954 Convention on Protection of Stateless Persons) and have "other provisions that adequately protect stateless persons in compliance with their international obligations" (such as Germany and the Czech Republic), lacking clear guidance on the stateless status determination (Cf. Swider, "Protection and Identification of Stateless Persons Through EU Law," 47).

[375] Van Waas, "Addressing the Human Rights Impact of Statelessness in the EU's External Action."

[376] Resolution (EU) P6_TA(2009)0019 of the European Parliament of 14 January 2009 on the situation of fundamental rights in the European Union 2004 –2008. See chapter V.

[377] De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness."

[378] As of the drafting of this document, the commitment of Cyprus, Estonia, and Poland is still pending.

[379] As of the drafting of this document, six EU MS have yet to ratify the 1961 Convention on the Reduction of Statelessness: Cyprus, Estonia, Greece, Malta, Poland, and Slovenia.

Furthermore, the European Parliament has been negotiating its position on the EU pact on Migration and Asylum, which was presented by the European Commission in 2020, introducing five legislative proposals aiming at setting a comprehensive approach that would bring together areas of migration, asylum, integration, and border management. Despite the relevance of statelessness in the context of migration and asylum, the issue was not addressed at all in the first draft of 2021, while some steps forward towards protecting the rights of stateless persons have been made in the new positions of the EU parliament[380]. However, these improvements do not seem sufficient either, as, among other things, it has been suggested that the lack of specifications and clarity regarding statelessness is a missing opportunity to regulate "follow-up action, including referral to an adequate procedure to determine statelessness (or nationality) and grant the rights and protections enshrined in the 1954 Convention where an individual is determined to be a stateless person"[381].

Over the years, the Union has produced additional demonstrations of a trend in support and acknowledgment of the sensitivity of statelessness as a global plight[382] and a paramount step in this direction is the inclusion of stateless persons within the Lisbon Treaty[383]. This first mention of statelessness was interpreted by Van Waas as the recognition that stateless persons "must be given a place within the EU legal order" and, therefore, an implicit acknowledgement of the need to address the statelessness position within the Union[384]. Despite these encouraging premises, the EU does not provide guidance on addressing and tackling statelessness within its internal border. In 2020, a European Citizens' Initiative[385] was submitted to the European Commission, calling for the improvement of the protection of persons belonging to minorities, including stateless persons. Some suggested this initiative was set to play an important role in defining the EU treaty basis for

[380] The new pact (2023) includes provisions to identify whether a person is stateless within the Screen Regulation (Art. 2(5), Recital 24 reminds MS to respect their international obligations towards stateless person and to identify and protect them; Art. 27(2) states that if an individual claims statelessness, the fact must be registered clearly.

[381] European Network on Statelessness, "Statelessness and the EU Pact on Migration and Asylum: Analysis and Recommendations for Implementation" (ENS Briefing, 2024).

[382] See section 2 of chapter V.

[383] This aspect will be further analyzed in section 4 of this chapter.

[384] Van Waas, "Addressing the Human Rights Impact of Statelessness in the EU's External Action," 20.

[385] Commission Decision (EU) 2017/652 of 29 March 2017 on the proposed citizens' initiative entitled 'Minority SafePack — one million signatures for diversity in Europe'.

a legislation on statelessness[386]. Though the Commission managed to dodge the matter as the initiative was rejected, in its Communication, it recognized that "further action can be taken to address the situation of stateless persons, through better implementation of the existing legislation […] and the EU policy on the integration of migrants"[387]. Arguably, the biggest challenge relating to statelessness' protection and identification remains indeed the **"**actual implementation of an appropriate and effective response to [it]"[388].
This leads directly into the central topic of this research, as it is often argued[389] that statelessness cannot be tackled at the EU level due to two essential gaps within EU law that would effectively disqualify any involvement of the Union on the topic: the first one is that citizenship matters are an exclusive prerogative of the MS and it is therefore unlikely that the EU would intervene on the subject of statelessness[390]; the second one is that no competence within the EU law empowers it to take initiative on statelessness[391]. However, this research chooses to start from these two points of skepticism to demonstrate that the two hurdles are not insurmountable and seeks to propose answers by examining EU law sources.
This chapter sets the task of circumventing the exclusive MS competence on citizenship by suggesting solutions that would not burden state sovereignty and establishing a concrete connection between statelessness and EU legal tools through the analysis of relevant components that provide the basis for competence on the matter. Through the chapter the rationale for designating the EU to address the issue of statelessness will emerge, anchored in protection gaps and implementation failures, but mainly in unfulfilled EU competence and commitments to set procedural guarantees and common

[386] Noémi Radnai, "Statelessness Determination in Europe: Towards the Implementation of Regionally Harmonised National SDPs," *ISI Statelessness Working Papers* 2017, no. 8 (2017): 12.
[387] Communication COM(2021)171 Final from the European Commission of 14 Janury 2021 on on the European Citizens' Initiative "Minority SafePack – one million signatures for diversity in Europe," 13.
[388]L Laura Van Waas, "Statelessness," *A 21st Century Challenge for Europe, in Security and Human Rights* 20, no. 2 (2009): 141.
[389] Gyulai, "Statelessness in the EU Framework for International Protection," 284; 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," *Acta Juridica Hungarica* 51, no. 4 (2010): 304; Molnár, "Moving Statelessness Forward on the International Agenda." 198.
[390] Due to the inherent association between citizenship and statelessness.
[391] Katja Swider and Maarten Heijer, "Why EU Law Can and Should Protect Stateless Person," *European Journal of Migration and Law* 19 (2017): 124.

interpretations for third-country nationals. It will be established that the EU provides elements in the protection of migrant's rights and uniform procedures that will pave the way for arguments in favor of a legislation on statelessness that is not only possible, but overdue. The chapter will first analyze the EU's avenues for competence on statelessness, introducing art. 67 of the TFEU as its cornerstone and art. 79 as the link that warrants a residency path for stateless persons. Following, it will then linger on the consequences that a legislation on statelessness would have on MS: it is undeniable that any solution related to the regularization of the status of stateless persons would have an impact on the Members and on their citizenship laws, as it would indirectly allow them to acquire a level of rights, and, eventually, citizenship. Some may argue that such influence would be considered outside the scope of action of the EU. However, this section supports the argument that the level of impact would be no different from what the EU has been already employing, through the years, on its migration policy and the application of the freedom of movements principle.

The chapter will then suggest the possible activation of the "Flexibility Clause" for the creation of a relevant legislation, by suggesting that the implicit powers to act upon the identification of statelessness have already been established through art. 67 of the TFEU, in combination with art. 79 of the TFEU.

The research then pauses to addressed the question of subsidiarity, arguing that, not only statelessness has failed to be addressed at the local level—with current national legislations revealed to be often inefficient or inexistent—but also that the EU has, through the years, chose the route of harmonization of policy at the EU level when addressing the entry and stay of several categories of third country nationals that it has integrated within its migration policy, and that it is only logical that a policy related to stateless persons would be handled similarly.

Finally, the chapter will assemble its findings to propose a directive as an attenable solution for the issue on stateless within the EU. This tool represents a clear choice, and one that considers precedents as well. Its main quality of flexibility has long rendered it apt for the employment in a sensitive area such as the migration one, which is scattered with the need to adapt to different national scenarios. This final section will attempt to justify this choice and encapsulate the main factors that it should comprise in order to ensure a fair and efficient implementation of this solution.

4.2 The question of EU competences on statelessness

To build an argument in favor of an EU-led legislation on statelessness, it is essential first to identify factors that would allow for challenging the current distribution of competences between Member States and the EU on the matter. This concept within the EU is central to understanding the division of powers between the EU institutions and the Member States: it delineates the scope of authority granted to the EU by its Member States, specifying the areas in which the Union can legislate and act[392]. Competences hinge upon the principle of Conferral, the mechanism designated for their allocation within the EU. It stipulates that the EU possesses only those competences conferred upon it by its Member States through the EU Treaties[393]: in other words, the EU has no inherent powers of its own but derives its authority from the sovereign decisions of its Member States. Any powers not explicitly conferred upon the EU are retained by the MS, in order to ensure that the EU acts within the limits of its mandate and respects the principle of subsidiarity. In particular, art. 5(1) of the TEU codifies the limits of EU actions[394] and it specifies in art. 5(2) that the Union "[…] shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein […]." Art. 2 through Art. 6 of the TFEU regulate the details of the Union competences, listing the relevant categories and areas. The aforementioned art. 5 definitively establishes that:

[392] The TFEU defines in art. 2 the categories of competence, while in artt. 2 through 5 it outlines the area related to the competences.

[393] The TEU defines in art. 5 the principle of conferral, stating that competences not conferred upon the Union in the Treaties remain with the Member States:
"1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. […]."

[394] "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."

"Competences not conferred upon the Union in the Treaties remain with the Member States."[395].

Until the Lisbon Treaty, the EU chose not to acknowledge statelessness within its primary sources, relinquishing to MS and their potential international commitment to handle the matter. The turning point of this approach is the first mention of stateless persons in Art. 67(2) of the TFEU, declaring that "[…] For the purpose of this Title, stateless persons shall be treated as third-country nationals." The Title in question—the Area of Security, Freedom, and Justice (ASFJ)—ensures the absence of internal borders within the EU and aims to create a shared policy to control external borders, asylum, and migration. This article has broad implications that spark from approximating the treatment of stateless persons to TCNs, starting from the EU authority to set their conditions of entry and stay, which would, reasonably, apply to stateless individuals as well.

This proposition's premises spring from an overview of the ASFJ which, comprised of article 67 through 89, delineates its scope, objectives, and operational frameworks, with the aim of addressing issues such as border controls, immigration, asylum, judicial cooperation in civil and criminal matters, and police cooperation. To include stateless persons within the scope of this policy domain is a detail that cannot be overestimated, as Title V is outlined within the TFEU to foster a cohesive and cooperative European space, to ensure the free movement of persons supported by several harmonized policies. By granting stateless persons the same rights granted to third-country nationals, art. 67 implies that stateless persons across the Union must be able to enjoy such rights equally, as dictated by the overarching objective described within this title. However, the ASFJ fails to properly identify stateless persons, as it does instead through its policies for other categories that benefit from it[396]. Although the Union has stated that it is in accordance with the 1954 Convention definition of statelessness[397], this does not guarantee that all MS have adequate mechanisms at their disposal to identify stateless individuals. The efficacy of MS in identifying stateless persons varies significantly, with some having clear status determination

[395] Cf. K. Koen Lenaerts, *Le Juge Et La Constitution Aux États-Unis D'Amérique Et Dans L'ordre Juridique Européen* (Bruxelles: Bruylant, 1988), 346; René Barents, "The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation," *Common Market Law Review* 30, no. Issue 1 (1993): 85–91.

[396] Such as refugees, students and workers.

[397] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Art. 1 (h).

procedures and others having none at all[398], leading to the logical conclusion that European law cannot be and is not uniformly applied across the Union.
On a surface analysis, one might be inclined to deduce that the EU has already regulated the position of stateless persons on the basis of Art. 78 and Art. 79: "The Union shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties […]" and "[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings […]." However, upon further investigation, it is apparent that not all stateless persons fall within the scope of the existing directives, and that none contain a specific regime of protection for *non-refugee* stateless persons[399]. Art. 78 and Art. 79 divide international protection into three categories: temporary protection, subsidiary protection, and asylum. The EU uses *temporary protection* as a short-term solution to deal with large-scale influxes of displaced people like refugees escaping natural disasters or conflict. It gives Member States the authority to issue temporary residency permits to people who require international protection for a predetermined amount of time, usually until their home countries circumstances improve and it is safe for them to return. Temporary protection is based on humanitarian considerations and is intended to provide immediate assistance and relief to displaced persons in crises, as described in the Temporary Protection Directive of 2001[400]. *Subsidiary protection* is, instead,

[398] *Supra*, note 374.
[399] As noted above (see chapter I and chapter II), despite their frequent association, *many* refugees could identify themselves with the condition of statelessness, but not *all* stateless persons are refugees. Hence, the need to identify a distinction between refugee stateless individuals and non-refugee stateless individuals.
[400] Directive 2001/55/EC of the Council of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Art. 2(a) states that "For the purposes of this Directive: (a) "temporary protection" means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such

a form of international protection granted to individuals who do not meet the criteria for refugee status under the 1951 Refugee Convention but would face a real risk of serious harm if returned to their home country. This harm may include threats to life, physical integrity, or freedom as a result of indiscriminate violence, armed conflict, or human rights violations. Subsidiary protection is based on the EU Qualification Directive (2011)[401], which establishes common standards for recognizing and granting subsidiary protection to eligible individuals. Furthermore, the same Directive defines refugees[402] as well, adapting the 1951 Convention on refugees to delineate who would benefit from *asylum*. All three concepts have specific meanings in international law and are connected to non-refoulement, the 1951 Convention, and a fear of persecution or harm in their former country (or, in the case of stateless persons, their habitual residence). A stateless person *could* identify with one of these categories, but not *all* stateless individuals could. Therefore, these categories are too narrow to encompass non-refugee stateless persons and cannot be adapted to include them.

However, Art. 67(2) prospects the creation of a "common policy on asylum, immigration, and external border control, based on solidarity between Member States, which is fair towards third-country nationals," and it seems rather odd not to regulate the status of non-refugee stateless persons in the creation of a harmonized European immigration policy. Art. 79 of the TFEU

persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection."

[401] Art. 2(f) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted defines subsidiary protection granted as follow: […] 'person eligible for subsidiary protection' means 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 or her country of origin, or in the case of a stateless person, to his or her 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) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

[402] *Ibid*, Art. 2(d) "'refugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply."

grants the EU the authority to develop a common immigration policy and specifies the basis for defining various aspects related to third-country nationals. Firstly, paragraph (a) contains the necessary basis for the EU to regulate conditions of entry and stay of third-country nationals[403]; jointly, paragraph (b) entrusts the EU to establish the rights of third-country nationals who are legally residing in a Member State[404]. Considering Article 67(2), it can be concluded that Art. 79 (a) and (b) can also be employed as the legal basis for defining entry, residence conditions, and the adjunct rights of stateless persons. As it has been argued[405], Art. 79(2)(a) does not restrict the reasons for its application and can be inferred to include stateless persons as well, notwithstanding the absence of explicit reference to them. Parallels could be drawn from several other categories that have not been explicitly mentioned in the legislation but whose tailored framework has been developed basing their legal grounds on Art. 79. A first example would be the student directive (2004/114/EC)[406], which establishes rules for entry and stay of third-country national students and opens its preamble acknowledging its legal basis as "the Treaty establishing the European Community, and in particular points (3)(a) and (4) of the first subparagraph of Article 63 thereof"[407], which is the immediate precursor of Art. 79[408]. In the same way, the Family Reunification Directive (2003/86/EC)[409], which sets conditions

[403] "2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (a) the conditions of entry and residence and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification."

[404] For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: b) (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States.

[405] Swider and Heijer, "Why EU Law Can and Should Protect Stateless Person," 129.

[406] Directive 2004/114/EC of the Council of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training, or voluntary service.

[407] 3. Measures on immigration policy within the following areas:
(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;
4. measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

[408] Art. 63 of the Treaty establishing the European Community (Consolidated version 2002)

[409] Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification.

for the entry and stay of family members of third-country nationals, as well as the Long-Term Residence Directive (2003/109/EC)[410], that provides a framework for the residence of long-term residents, also recognize Art. 63 in their preamble as their legal basis. Furthermore, the Directive for Researchers and Students (2016/801/EC)[411] has been developed on the basis of Art. 79, as stated in the preamble: "Having regard to the Treaty on the Functioning of the European Union, and in particular points (a) and (b) of Article 79(2) thereof […]."
Arguably, the status of stateless persons, the same way as that of a third-country student, researcher, or worker, can be defined within the application of EU law, as Art. 79 does not limit its scope but attempts to harmonize the tiers instead. It is hard to justify why, therefore, EU would not have an obligation to identify stateless persons under these premises in order to correctly apply EU law homogenously across the region.

4.3 Residence as the key to solve statelessness in the EU

Suppose that art. 67 and art. 79 TFEU were to be considered grounds to regulate entry and stay of stateless persons within the EU, the logical consequence would be the establishment of a residence permit based on statelessness status, as suggested by some[412]. It has been discussed in previous chapters that residence is paramount in the enjoyment of rights, as most of the rights contained within the 1954 Convention are incidental to it as well[413]. Furthermore, residence would not only guarantee stateless persons the rights prescribed by international law, but, within EU law, it would also grant them a comparable treatment to that of citizens. In fact, the Union, in keeping with the commitment to defend fundamental rights, has gradually expanded its jurisdiction over residence rights in a way that has impacted and set the

[410] Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents.
[411] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.
[412] Katja Swider, Giulia Bittoni, and Laura Van Waas, "The Evolving Role of the European Union in Addressing Statelessness," in *Solving Statelessness*, ed. Laura Van Waas and Melanie J. Khanna (Oisterwijk: Wolf Legal Publishers, 2015), 393.
[413] See section 2 of chapter II.

foundation for an extended protection of TCNs. Considering the reframing within the Treaties of stateless persons akin to that of TCNs, it could be legitimate to hypothesize the extension of similar residence rights to stateless persons as well, in alignment with the EU commitment to produce a common immigration policy that is fair to TCNs. Since a solution to statelessness could be imagined through the lens of residence within the EU, it is necessary to pause into this aspect of Union law to analyze it further and make an assessment.

The concept of residence in the EU is integral to the principles of freedom of movement and non-discrimination enshrined in EU law[414]: residence rights allow individuals to live and work in other EU member states contributing to Europe's economic, social and cultural integration. The EU's competence in residence matters derives primarily from its treaty provisions and secondary legislation, establishing the legal framework for the free movement of persons within the EU in Article 21 of the TFEU[415]. Secondary legislation, such as the Free Movement Directive[416] and the Long-Term Residence Directive[417], further elaborate on the rights of EU citizens and their family members to reside in other member states and to secure a stable residence status. The Free Movement directive legitimized residence as the essential catalyst for the enjoyment of free movement established in art. 21 of the TFEU, while the Long-Term Residence directive provides legal certainty to TCNs legally residing in the EU, grounding their integration and approximation of rights to those of citizens in their resident status.

Similar ambitions and means are pursued with the asylum policies, through which the EU has strengthened MS coordination and cooperation on residence and migration matters by implementing mechanisms such as the Common European Asylum System, which standardizes asylum laws and

[414] Art. 3 of the TEU.

[415] "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States […]."

[416] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. The directive sets out rules on entry, residence, and expulsion for EU citizens and their family members exercising their right to free movement within the EU.

[417] Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Within this framework, acquires particular relevance Art. 11, Equal treatment, which lists the areas in which TCNs enjoy equal rights as nationals.

procedures, and the Schengen Area, which permits passport-free travel between member states[418]. The Tampere Programme[419], later recalled by the Stockhold Programme[420], laid the groundwork for this evolution of the migration and asylum policy and was consequential in instilling EU competence on residence: by emphasizing the need to treat TCNs fairly and to provide them with comparable rights to those of citizens[421], it factually rooted their protection and integration within the Union primarily within their residence and their status as residents.

The EU has expanded its role in the field of migration also through its response to challenges related migration. The 2015 European Agenda on Migration, for instance, aimed to strengthen unity and collaboration between EU member states in relation to migration flows and advancing routes to legal migration[422]. On the same vein, the EU intensified its commitment through the establishment of initiatives such as the European Migration Network and the European Asylum Support Office, which facilitate the exchange of information, best practices and expertise among member states on migration and asylum issues. The growing significance of cross-border mobility within the EU and the steady integration of MS are reflected in the evolution of EU competence in residence matters. In fact, the EU has created uniform guidelines and norms over time to guarantee the protection of TCNs and the integration of refugees within the EU, as well as the efficient exercise of their residency rights, evolving in a manner that allowed it to progressively address emerging challenges and gaps in this area.

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[418] For example, the EU legal framework on asylum and migration, including the Qualification Directive (Directive 2011/95/EU) and the Reception Conditions Directive (Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection), establishes common standards for the treatment of refugees and they ensure that individuals granted refugee status or subsidiary protection have the right to reside, work, and access social rights and services in the member state hosting them.

[419] The Tampere European Council Conclusions of 15-16 October 1999.

[420] The Stockholm European Council Conclusions of 23 And 24 March 2001.

[421] The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them, rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia. See paragraphs 18 of the Tampere Council Conclusions.

[422] Opinion C 71/46 of the European Economic and Social Committee of 24 February 2016 on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration'

The CJEU jurisprudence has made a significant contribution to this developing EU legal framework, most notably by providing clarifications and interpretations on the extent and significance of residence rights under EU law. Through a gradual expansion of the interpretation of EU citizenship, the Court secured the reinforcement of free movement's principles and residence guarantees within the Union, often focusing its scrutiny on the preservation and enhancement of rights for citizens and their family, irrespective of their nationality.

A notable example is the Zhu and Chen case[423], in which the CJEU addressed the rights of a child with EU nationality and her non-EU national mother regarding residence in the UK. The Court emphasized the relevance of residence rights spurring from EU citizenship and the priority of harmonizing national legislations to align with the EU requirement of residence. In fact, when Kunqian Catherine Zhu, an Irish national by birth, and her mother, Man Lavette Chen, a Chinese national, challenged the UK authorities' refusal to grant them long-term residence permits on the basis that Mrs. Che, as Catherine's primary caregiver and a non-EU national, could also benefit from residence rights in the UK under EU law, the ECJ recognized their claim. Reiterating earlier case law[424], the Court clarified that MS cannot impose restrictions that would impede the exercise of fundamental freedom protected by the EU and that they must respect the internal laws of other Members[425]. Through her Irish citizenship, Catherine enjoyed all the rights attached to EU citizenship, including free movement within the Union, and article 18 EC[426] (now Article 21 TFEU) and Directive 90/364[427] entitled her mother to reside with her in the UK[428]. By virtue of this decision, the Court underscored its

[423] Case 200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* ECLI:EU:C:2004:639.

[424] Such as Case 369/90 *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria* ECLI:EU:C:1992:295.

[425] Specifically, Mrs Chen had entered the UK while pregnant and gave birth to Catherine in Northern Ireland, who automatically acquired Irish nationality, as specified under section 6(1) of the Irish Nationality and Citizenship Act of 1956, which was amended in 2001 and applies retroactively as of 2 December 1999: "Every person born in Ireland is an Irish citizen from birth."

[426] "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States […]."

[427] The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence: 2. dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.

[428] In para 47 it was established that "Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and

role in ensuring consistent enjoyment of residence rights within the EU and safeguarded citizens' rights to effectively exercise the rights deriving from this status, including those extended to their caregivers, irrespective of their nationality, and demonstrating propensity to strike down any national measure that unduly restrict residence rights. Picking up the same thread, the Court asserted her role in interpreting and reinforcing EU competence on residence by reaffirming the application of due proportionality when such restrictions on residence imposed by a MS are inevitable. It is what the Court addressed in the case of Tsakouris[429], where it reiterated that it is admissible to restrict free movement on grounds such as public security, but that such restrictions must adhere to the principle of proportionality.

Furthermore, the Court acquired a particularly relevant role in the field of residence within the EU by consistently ruling on issues concerning free movement and the right of a citizen to reside in MS: these decisions have supported the expansion of residences rights' understanding within the EU and aided in the interpretation of citizens' rights and those of their family. This is what cases such as Zambrano[430] and Singh[431] centered around. In the former the Court clarified that depriving Mr. Zambrano of residence and working rights violated EU law as parent of dependent EU citizens children, and, by doing so, delineating the scope of art. 20 beyond customary cross-border movements[432]. The latter certified the extension of free movement and

is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State."

[429] Case 145/09 *Land Baden-Württemberg v Panagiotis Tsakourisdis* ECLI:EU:C:2010:708, para 53.

[430] During their residence in Belgium, they had two children who acquired Belgian nationality and, despite their children's citizenship status, the Belgian authorities refused to regularize Mr. Zambrano's stay, citing procedural issues related to the children's registration with Colombian authorities. Case 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* ECLI:EU:C:2011:124, para 23: "Mr. Ruiz Zambrano's application to take up residence was rejected on 8 November 2005, on the ground that he '[could] not rely on Article 40 of the Law of 15 December 1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities, but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalize his own residence."

[431] Case 370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* ECLI:EU:C:1992:296.

[432] Cf. Robin Morris, "European Citizenship: Cross-Border Relevance, Deliberate Fraud and Proportionate Responses to Potential Statelessness," *European Public Law* 17, no. 3 (2011):

right of residence to family members as well, even upon return to one's home country, as it was the case of Mrs. Singh—a TCN—who, after living and working for a period in a MS with her husband—an EU citizen—was denied a residence permit upon return to the husband's country of citizenship, but for whom the Court confirmed that the right of free movement and the consequent right to residence apply in similar conditions as those applied in the another host country of the EU[433]. Reaffirming this concept, the Court supported the expansion of family reunification rights to family members of EU citizens, including those who are TCNs, establishing that national measures cannot unjustly limit family reunification, as touched upon in the Metock case[434]: here the Court affirmed that MS cannot restrict the right to reside of an EU citizen's family member, regardless of their prior legal status. The decision reached by the Court was met with strong criticisms and concerns over immigration control and possible loopholes in the system, among the most vocals were Denmark, Ireland and the UK. The Commission however, repelled them and reiterated the Court's decision in the Report on the application of the Directive, calling on all MS to review any law that is not compatible with the ruling[435].

Additionally, the Court has often been instrumental in clarified elements of the residence's conditions, as, for example, in the Baumbast case[436], where the Court addressed the events surrounding the refusal of a residence permit of a TCN married to an EU national who was no longer economically active in the MS. The ECJ has resolved, in that circumstance, that EU citizens retain their residence rights even if they no longer fulfill the requirements (e.g.

417–35; Sara Iglesias Sánchez, "Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to Be Abandoned?," *European Constitutional Law Review* 14, no. 1 (2018): 7–36; Adrian Favell and Randall Hansen, "Markets Against Politics: Migration, EU Enlargement and the Idea of Europe," *Journal of Ethnic and Migration Studies* 28, no. 4 (2002): 581–601.

[433] "[…] when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State," *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department,* para 23.

[434] Case 127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform,* ECLI:EU:C:2008:449.

[435] Communication COM (2009) 313 final of from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[436] Case 413/99 *Baumbast, R v Secretary of State for the Home Department* ECLI:EU:C:2002:493.

employment), notwithstanding that they are not a burden on the host state's welfare. The Court has therefore played a significant role in shaping the EU's competence on residence, as it has identified and clarified the criteria and conditions associated with residence within the Union, simultaneously limiting the discretion of MS applied on this matter.

It has been repeatedly established, therefore, that the EU has competence on residence deriving from its Treaties and secondary sources and expanded them through the decision of the Court. This gradual evolution has resulted in a development of the rights attached to the status of resident as well, which today have transformed to guarantee a quasi-citizen status for TCNs who possess it. It has been argued that directives such as the Long-Term Residence Directive, coupled with the Family Reunification Directive and other directives that complete the plethora of the EU migration policy, allow TCNs to enjoy a position that is comparable to a subsidiarity form of EU citizenship[437]. Residence within the Union has acquired a unique function that could be considered as a post-national form of membership, as long-term residents enjoy equal treatment in most areas, enhanced residence security and mobility rights. Leaving aside the implication to sovereignty that this transformation could represent for the Union, it is clear that, despite the fact that MS continue to retain the prerogative to certain rights[438] and that a distinction between insiders and outsiders perdures, it is undeniable that the separation between residents and citizens is shrinking[439].

Hence, considering the quasi-citizenship status that the evolution of residence within the EU has produced, failing to regulate and grant residence on the basis of statelessness appears to be a double missed opportunity: firstly, because it leaves an unaddressed gap within the migration policy of the Union; secondly, because it could represent an effective solution to the question of statelessness that does not burden the sovereignty of MS. In fact, in the same way in which residence has represented the foundation of the

[437] Diego Acosta Arcarazo, "Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership," *European Law Journal* 21, no. 2 (2014): 200–219.

[438] Political rights, for example. Michael A. Becker, "Managing Diversity in the European Union: Inclusive European Citizenship and Third- Country Nationals," *Yale Human Rights and Development Journal* 7, no. 1 (2004): 132–83; Randall Hansen, "A European Citizenship or a Europe of Citizens? Third Country Nationals in the EU," *Journal of Ethnic and Migration Studies* 24, no. 4 (1998): 751–68.

[439] Neil Walker, "Denizenship and Deterritorialisation in the European Union," in *A Right to Inclusion and Exclusion? : Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, ed. Hans Lindahl, 13th ed. (Oxford: Bloomsbury, 2009), 262.

migration policy for some TCNs categories, it could also be the answer for stateless individuals, who instead continue to endure a fragmented landscape within the Union and lack a comprehensive protection regime, clashing with the objectives set out in art. 79.

4.4 The influence of EU law on MS nationality laws: a balancing act

In light of the conclusions this chapter is reaching, the question of citizenship needs to be addressed. At first glance, it might appear odd to tackle statelessness at the EU level, given that citizenship has been traditionally regarded as an exclusive competence of the Member States[440] and, to date, the Treaties have not touched on the matter of citizenship. However, there is room to suggest that the objections relating to the inability of the EU to act upon statelessness owed to the lack of formal competences on citizenship does not seem convincing, as the Union has often produced legislation which influence it in different ways.

It is known that sovereign states retaining the authority to determine their membership is a long-established principle of international law[441], which has rendered the EU prudent when approaching this subject. The Treaties themselves acknowledge this by affirming the autonomy of Member States, further reinforcing the normative position of their independence in matters of nationality law: art. 20 of the TFEU clarifies that "[…] Citizenship of the Union shall be additional to and not replace national citizenship […]", as a testament to the limits of EU power in this area. This clarification follows multiple declarations from MS attesting to the absolute and solid nature of their sovereignty. Three prominent cases that demonstrated how the states alone have the right to weigh on nationality are the UK, Denmark and Germany which, while operating in different circumstances, all had the same intention.

Firstly, Germany, upon signing the Treaty of Maastricht, included a Declaration stating that "[a]ll Germans as defined in the Basic Law for the Federal Republic of Germany shall be considered nationals", which was later supported by the Declaration nº. 2 included in the Maastricht Treaty: "The

[440] Hans D'Oliveira, "Union Citizenship and Beyond," in *European Citizenship under Stress. Social Justice, Brexit and Other Challenges* (Boston: Brill | Nijhoff, 2020), 38; Artt. 2–6 TFEU and Art 5(2) TEU.

[441] ICJ, Nottebohm case (Liechtenstein v. Guatemala), [1953].

Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. […]." Interestingly, this declaration was removed from the Lisbon Treaty of 2009, though it continued to be referenced on later occasions[442].

In addition, the Edinburgh Summit was held in the context of the Maastricht Treaty negotiations and was intended to discuss a number of controversial topics such as the fine line that must be drawn between supranational integration and member states sovereignty, especially in relation to citizenship issues. The summit was a forum for member states to address these concerns, among all, the ones of Denmark, who unilaterally declared that: "Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. […]. Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules […]"[443]. To which the Edinburgh Decision[444] attempted to provide guarantees to assure the ratification of the TEU by including the following declaration: "The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union […] do not in any way take the place of national citizenship. The 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"[445]. The Edinburgh Decision

[442] Rottman (Case 135/08 *Janko Rottman v Freistaat Bayern* EU:C:2010:104) explicitly recalls Declaration n. 2 when defining the legal framework applicable for the case in paras 3 and 40.

[443] The Edinburgh European Council Conclusions Of December 11-12, 1992, Annex 3 "Unilateral Declarations Of Denmark, To Be Associated To The Danish ACT Of Ratification Union And Of Which The Eleven Other Member States."

[444] The Edinburgh European Council Conclusions of December 11-12, 1992. They centered around, among other themes, a series of conclusions reached by the European Council on issues related to citizenship and sovereignty.

[445] The declaration is later recalled also in protocol n. 22 *On the position of Denmark* annexed to the Treaty of Lisbon *"*RECALLING the Decision of the Heads of State or Government, meeting within the European Council at Edinburgh on 12 December 1992, concerning certain problems raised by Denmark on the Treaty on European Union, HAVING NOTED the position of Denmark with regard to Citizenship […] as laid down in the Edinburgh Decision […]."

emphasized the principle of subsidiarity, asserting that decisions on citizenship should be made at the national level unless there is a compelling reason for EU-level intervention. By limiting EU action in citizenship matters to areas where it could truly add value or effectively address cross-border challenges, this principle aimed to protect member state sovereignty.

The Edinburgh Decision and the Unilateral Declarations described above are example of how the principle of state sovereignty within the EU framework and MS' exclusive competence on nationality matters was reinforced. They helped allay MS concerns that their authority to determine the rights and obligations of their citizens would be compromised by the establishment of EU citizenship and they allowed for the establishment of a more nuanced understanding of EU citizenship that balanced national autonomy with the need for shared rights and responsibilities.

Consequently, the lack of concrete EU competence on citizenship has often led literature to raise motions against the direct involvement of the EU in statelessness matters[446], as the Union's interference with state sovereignty is something that, as shown, the MS have always been wary of, especially during the introduction of the European Citizenship[447]. Even a solution that would not involve direct acquisition of citizenship, but mainly focus on residence rights, would undeniably have some effects on citizenship acquisition and impact MS' citizenship laws in some way. However, we are witnessing an evolution and ever-expansion of EU competences through the years: the legal orders of Member States and EU institutions have become closely interwoven, resulting in competences that are hardly ever completely exclusive and an expansion to embed areas not referenced within the Treaties[448]. In fact, actions taken by a Member State in areas of their exclusive competences, can often impact EU competences and vice versa, which means that MS competence on nationality cannot be considered absolute. Relevant to this point, the ECJ has more than once reiterated the importance of the

[446] *Supra*, note 389.

[447] While art. 8 (see note 14) does not explicitly state that EU citizenship is supplementary to national citizenship, it implies a complementary relationship by stating that EU citizenship is based on holding the nationality of a Member State. A more explicit language about the supplementary nature of EU citizenship comes from the Treaty of Lisbon (2007) which includes, in the amended Article 20 of the Treaty on the Functioning of the European Union (TFEU) "[…] *Citizenship of the Union shall be additional to and not replace national citizenship* […]" to clarify and affirm the supplementary nature of EU citizenship.

[448] Robert Schütze, "EU Competences: Existence and Exercise," in *The Oxford Handbook of European Union Law*, ed. Anthony Arnull and Damian Chalmers (Oxford: Oxford University Press, 2015), 77.

principle of sincere cooperation[449], and therefore, emphasized that the exercise of the exclusive competences by Member States must not jeopardize EU goals. Specifically, art. 4 of TEU states that "[…] The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."
Therefore, albeit not dictated by competences, the influence of EU on national citizenship laws cannot be avoided, and it becomes particularly evident in three instances. Firstly, EU citizenship, notwithstanding reiterated assurances of its complementary rather than alternative nature, establishes an interconnectedness with the national citizenship and compels each MS to carry the burden of every other MS and their inclusionary/exclusionary practices[450]: since nationals of every MS are citizens of the Union, they can benefit from social, economic and political rights deriving from this status in any country of the EU. Therefore, acquisition and loss of nationality and the connected policies influence every member of the Union. This idea has been long supported by the ECJ case law. In the Rottmann case, Mr. Rottman, originally an Austrian national and resident, moved to Germany pending legal scrutiny in Austria. He fraudulently acquired German nationality through naturalization in 1999 and in the meantime lost his Austrian one. However, after learning of his legal issues in Austria, German authorities stripped him of the recently acquired German citizenship, and this action, combined with the renunciation of the Austrian one, rendered him stateless. The implication that revoking German citizenship would strip Rottman of the rights attached to EU citizenship is what compelled the intercession of the CJEU. The Court found that the withdrawal of citizenship would not have been necessarily against EU law, but that such decision must be taken in proportionality to the consequences that it would entail for the individual and their family, keeping in consideration EU law[451]. This case clarified the fundamental status of EU citizenship within the EU legal order in a way that some have considered as a milestone in the sphere of EU influence over nationality laws, as it is viewed

[449] Art. 4 of the TEU. Cf. Barbara Guastaferro, "Sincere Cooperation and Respect for National Identities: The Unitary and the Pluralist Twists of the European Integration Process," *Neo-FEDERALISM Working Paper Series* 2/2015 (2015): 3–35.
[450] For examples the rights of freedom of movement of EU workers and their family under the directive 2004/38/EC.
[451] *Janko Rottman v Freistaat Bayern*, paras 48, 56. The Court expressed a similar conclusion in Case C-118/*20 JY v Wiener Landesregierung* ECLI:EU:C:2022:34.

as the corroboration that decisions regarding acquisition and loss of nationality must be conducted to not conflict with EU law[452].

A second instance of EU's influence on nationality laws is comprised of the objectives of the Union. Provisions aimed at the realization of EU objectives will cascade and impact MS' exclusive competences, regarding citizenship as well, through primary and secondary sources. For example, the EU has influenced the conditions under which individuals can acquire citizenship in Member States and sometimes even led to amendments to national laws in order to align with EU directives: the Directive 2003/109/EC "on the status of third-country nationals who are long-term resident" set out common rules for the acquisition of long term-resident status, which will likely lead to a pathway to citizenship in most member states[453]. The Directive establishes five years of lawful continuous residence within EU territory as a prerequisite for obtaining long-term resident status[454]. As a result of harmonizing the requirements for obtaining long-term resident status—a category that was previously under national jurisdiction—the Directive has a substantial impact on national sovereignty and naturalization policies within Member States by indirectly influencing national citizenship laws.

In countries like Germany[455] and the Netherlands[456] where obtaining a long-term residency permit is mandatory for naturalization, this Directive essentially creates a uniform route to citizenship. And, even in states not requiring a long-term residence permit for citizenship, the Directive

[452] G.R. De Groot and A. Seling, "The Consequences of the Rottmann Judgment on Member State Autonomy - the European Court of Justice's Avant-gardism in Nationality Matters," *European Constitutional Law Review* 7 (2011): 150–60.

[453] Italy, for example, amended its national law to align with this directive (DECRETO LEGISLATIVO 8 gennaio 2007, n. 3 Attuazione della direttiva 2003/109/CE relativa allo status di cittadini di Paesi terzi soggiornanti di lungo periodo).

[454] Directive 2003/109/EC, para 6: ") The main criterion for acquiring the status of long-term resident should be the duration of residence in the territory of a Member State. Residence should be both legal and continuous in order to show that the person has put down roots in the country […] and article 4.1 "Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application."

[455] Germany nationality legislation (*Staatsangehörigkeitsgesetz*, StAG), in section 10, para 1, states that "Foreigners who have been legally ordinarily resident in Germany for five years must be naturalised upon application […]."

[456] Dutch nationality legislation (*Rijkswet op het Nederlanderschap*), at art. 8c states that "Only the following applicants shall be eligible for the grant of Netherlands nationality […] c. who has been admitted to and has had his or her principal place of residence in the European part of the Netherlands, Aruba, Curaçao, Sint Maarten or the public bodies of Bonaire, Sint Eustasius and Saba for a minimum period of five years immediately preceding his or her application; [….]."

strengthens the position of candidates' naturalization by facilitating proof of the necessary period of residence. Thus, this Directives harmonization of regulations for permanent residents has a significant impact on national citizenship laws and is indicative of an EU-led effort to facilitate citizenship for non-EU nationals.[457]. The Qualification Directive produces analogous effects to those of the Long-term Resident Directive, as it indirectly allows refugees to obtain nationality when it requires MS to grant the beneficiaries of the refugees' status a residence permit[458]. Another example would be the Citizens' Rights Directive[459], which sets out rules on the right of free movement and residence within the territory of the MS by EU citizens and their families, as well as their right to permanent residency. Similar to the aforementioned directives a number of MS modified their national laws to conform to the EU directives[460]: although the directives primary goal is to enhance the legal standing of citizens of third countries, they also have a minor but relevant impact on national sovereignty by encouraging a more inclusive view of citizenship that is consistent with EU ideals.

In an analogous and complementary way, the EU openly influences MS nationality laws through the principle enshrined in art. 21 of the TFEU[461], granting anyone who has the nationality of a MS (and therefore EU citizenship) the right to move and reside freely in any MS of the Union. This principle inherently affects national citizenship law, in as much as it permits EU citizens to establish residency in member states and earn citizenship after fulfilling specific requirements—such as a period of lawful residence. The significance of art. 21 is highlighted in, for instance, the *Micheletti* case[462] of

[457] Directive 2011/95/EU.

[458] Art. 24 "As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit […]."

[459] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[460] For example, Germany amended its German Immigration Act460 through the "Law on General freedom of movement of EU Citizens"460 in 2005 to implement the Directive 2004/38/EC. Despite some gaps in the transposition highlighted in Ferdinand Wollenschläger and Jennifer Hölzlwimmer, "Obstacles to the Right of Free Movement and Residence of EU Citizens and Their Families - Country Report for Belgium" (European Parliament, Directorate-General for Internal Policies, Policy Department, Citizens' Rights and Constitutional Affairs, 2016), 15, the directive was entirely transposed into national law.

[461] "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

[462] *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria,* paras 10-11.

1992, as it marked a significant juncture in the evolution of EU law regarding the interplay between nationality, Union citizenship, and the freedom of establishment. Mario Micheletti, an Argentinean-born individual of Italian descent, obtained Italian nationality through *jus sanguinis* principle and, thereby, became a Union citizen. Micheletti sought to establish himself in Spain on account of his dual Italian-Argentinean nationality. However, his application for a permanent residence permit in Spain was denied in accordance with Article 9 of the Spanish Civil Code, which gave preference to the Argentinean nationality linked with his former residence over his Italian nationality[463]. Nevertheless, as established by Article 43 of the EC Treaty, this decision went against Mr. Micheletti's freedom of establishment within the EC for Union citizens[464]. In response to his appeal, the CJEU ruled that once a Member State, in accordance with EU law, grants nationality to an individual, other Member States cannot impose additional conditions or restrictions that hinder the exercise of fundamental freedoms guaranteed by EU treaties, such as the freedom of establishment[465]. The ruling was significant as it implied an obligation for states to had *due regard* for EU law in matters of nationality[466], beginning a trend of expansion of EU competence in nationality matters as it effectively affirmed the existence of boundaries to states' discretion on nationality that derive from EU law.

Though a solution to statelessness will always have some degree of impact on citizenship, these elements show how this implication has always existed, especially given the influence of the EU on migration matters and since the establishment of EU citizenship and principle of free movement. It is therefore clear that EU law is having a larger role on national citizenship policies, despite citizenship remaining primarily a matter under the

[463] *Ibid*, para 5. "[…] in cases of dual nationality where neither nationality is Spanish, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain is to take precedence, that being Argentine nationality in the case of the plaintiff in the main proceedings."

[464] "[…] restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. […] Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings […]."

[465] *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria*, para 10 "Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty."

[466] Cf. D'Oliveira, "Union Citizenship and Beyond," 37.

sovereignty of the Member States. The EU has gradually shaped the parameters within which Member States exercise their nationality laws through its legal framework and the mediation of the Court's jurisprudence[467]. This influence is evident when the EU law imposes limitations on how states can exercise their sovereign rights in this area, as it has happened when such actions might affect the rights and freedoms guaranteed under EU law. Though lacking explicit competence, through the years the EU has proved how a degree of influence on citizenship matters is acceptable and at times, inevitable. The logical conclusion is that a possible legislation on statelessness ought not to be repudiated on this premise.

4.5 The implicit obligation to identify statelessness

While it is evident that there is an obligation to identify stateless persons derived from the combination of art. 67(2) and art. 79, such requirement does not appear to find explicit corroboration anywhere else within the Treaties. However, a teleological interpretation of EU sources highlights the inherent responsibility of identifying statelessness within the Union's broader objectives and seem to require a degree of elasticity when applying the legislative powers of the EU. Incidentally, the EU foresaw the unreasonable ambition to define the exact boundaries of its own competence and realized the formation of the doctrine of implied powers. This well-established concept in EU law states that the Union may use powers not expressly conferred by the Treaties when doing so is necessary to accomplish its goals. The doctrine of implied powers has been developed by the judiciary with the support of the Court[468], although it is inspired by the rationale behind art. 235

[467] Further cases in which the ECJ confirmed that situations concerning nationality loss and acquisition falls within her purview are Case C-118/20 JY v Wiener Landesregierung ECLI:EU:C:2022:34; Case C-72/22 PPU M.A. v Valstybės sienos apsaugos tarnyba ECLI:EU:C:2022:505; Case C-689/21 X v Udlændinge- og Integrationsministeriet. ECLI:EU:C:2023:626.

[468] Cf. Joseph Weiler, *The Constitution of Europe: "Do The New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), 189; Robert Kovar, "Les Compétences Implicites: Jurisprudence De La Cour Et Pratique Communautaire," in *Relations Extérieures De La Communauté Européenne Et Marché Intérieur: Aspects Juridiques et Fonctionnels*, ed. Paul Demaret (Bruxelles: Story Scientia, 1988),15; Ian MacLeod, I. D. Hendry, and Stephen Hyett, *The External Relations of the European Communities* (Oxford: Clarendon Press, 1996), 47–55; Paolo Mengozzi,

EEC[469]. The idea is that EU competences can go beyond what is expressly conferred by the Treaties and can be *implied* from the necessary extensions of the provisions in order to attain their aims. In areas where further authority is required to achieve the Unions objectives, this doctrine has played a crucial role in broadening the scope of EU competences and, indirectly, it has continuously defined their outer limits. It could be argued that this doctrine takes a foundational place within the EU legal order, in view of its potential to fulfil the entire scope of application of Union law.

Over time the ECJ defined the prerequisites for admitting implicit powers, interpreting the extent of EU competences and providing clarity in murky situations. The case that arguably set the standard for implicit powers within the EU legal order is the ERTA case[470], where the Court recognized that the EU could exercise powers beyond those explicitly conferred by the Treaties when such powers were necessary to fulfill its tasks. The case confronted Council and Commission over a question of competence[471], where the former contested an excess outside the limits prescribed, while the latter claimed that the Treaties did provide the necessary legal basis on the matter[472]. The Court, in agreement with the existence of implicit powers to be extracted from the written text, fostered the expansion of EU competences by shining a spotlight on what is necessary to achieve an EU aim. From here, the Court has reiterated this position by applying teleological interpretation as a tool that expanded the EU competences in case of reasonable necessity, paving the way

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Luis Miguel Poiares Pessoa Maduro, and Loïc Azoulai, eds., "The EC External Competences: From the ERTA Case to the Opinion in the Lugano Convention," in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Portland: Hart Publishing, 2010), 213; Piet Eeckhout, "Bold Constitutionalism and Beyond," in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Portland: Hart Publishing, 2010), 218; Robert Post, "Constructing the European Policy: ERTA and the Open Skies Judgments," in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Portland: Hart Publishing, 2012), 234; Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009), Chapter 6.

[469] Although the correlation between the doctrine of implied powers and art. 235 EC is clear, their procedural application differs and is not uncommon for the Court to acknowledge implicit powers without necessarily recalling art. 235.

[470] Case 22-70, *Commission of the European Communities v Council of the European Communities, European Agreement on Road Transpo*rt ECLI:EU:C:1971:32.

[471] Graham Butler and Ramses A. Wessel, "Happy Birthday ERTA! 50 Years of the Implied External Powers Doctrine in EU Law," *European Law Blog* (blog), 2021.

[472] The arguments were based and referred to Title IV, i.e. Transport, combined with Article 228 of EEC which regulates the procedures for concluding agreements with third countries, in accordance with Article 74, which includes common transport policy within the objectives.

for the affirmation of this doctrine within the EU legal framework, as witnessed in the Casagrande[473] decision, where the Court reached a comparable decision. Similarly, Opinion 1/76[474] emphasized that the EU can exercise implicit powers when such powers are indispensable to achieving a treaty objective, even if not explicitly stated. Interestingly, in cases such as the Kadi case[475] the Court has also highlighted that a further prerequisite for the use of implicit powers is the alignment with the core tenets of EU law, which, in this instance, were identified with the EUs commitment to human rights.

On the other hand, as a benchmark for the limit of the doctrine of implied powers, the Court was tasked with weighing in on the EUs accession to the ECHR. With its Opinion 2/94[476], the ECJ reaffirmed the admissibility of powers granted to the Union that are inferred from the Treaties but not expressly delineated[477], and it clarified also that the EU is empowered to call on implied powers, for "the purpose of attaining a specific objective"[478] that has been set by the Union[479]. However, the Court marked here the boundaries of this principle by resolving that implied powers cannot be used to expand the competence of the Union. In this case, the Court concluded that the accession to the ECHR would have constituted a Treaty amendment. Therefore, the court has provided and solidified a few specifications for implicit powers: the non-expansion of the competences conferred by the Treaties, an action necessary to achieve a Treaty objective and the respect for fundamental EU principles.

In the context of stateless persons, who are equated with third-country nationals by the TFEU, the EU must be enabled to identify who is stateless to ensure that they are accorded the specific rights and protections to which they are entitled under both EU and international law. The absence of explicit provisions for identifying stateless persons in the Treaties does not preclude the EU from acting in this area. Rather the doctrine of implicit powers enables

[473] Case 9-74, *Donato Casagrande v Landeshauptstadt München* ECLI:EU:C:1974:74.
[474] Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels* ECLI:EU:C:1977:63.
[475] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECLI:EU:C:2008:461.
[476] Opinion 2/94 *Accession by the Community to the ECHR*.
[477] *Ibid*, para 25.
[478] *Ibid*.
[479] Further supported by cases such as Joined cases 3, 4 and 6-76, *Cornelis Kramer and others* ECLI:EU:C:1976:114 and Opinion 1/76.

the Union to take the required actions to close this gap and guarantee that stateless people are not left in a legal limbo. Identification of stateless persons is critical to upholding fundamental rights and enacting a cogent and equitable immigration and asylum policy—two goals that the Union is expressly charged with achieving. Specifically, art. 78 clearly states the EU objective of establishing a common immigration policy; Art. 2 of the TEU establishes the foundational values of the EU, which include respect for human dignity, freedom, democracy, equality, the rule of law, and human rights; Art. 6, which reaffirms the EU's commitment to fundamental rights by recognizing the Charter of Fundamental Rights of the European Union as having the same legal value as the Treaties; and art. 21 which guides the EU's external actions by promoting its foundational principles—such as democracy, the rule of law, and human rights—on the international stage.
It seems, therefore, that in the context of identifying stateless persons, a teleological interpretation of several provisions contained within the Treaties implies the urgency to identify stateless persons and that the production of a legislation on statelessness would not signify an expansion of EU competences but, rather, a fulfillment of their true intentions. Despite the absence of any written provision of the identification or regulation of the situation of statelessness within the EU, it could be argued that the Treaties empower the EU to take action on this matter, and that the description of this doctrinal flexibility of the Union perfectly fits this circumstance.

4.5.1 The role of art. 352 in identifying stateless persons

Due to the considerations arisen from the implicit powers, the element within the EU *acquis* that could play a significant role in integrating stateless persons into the Union's policies is Art. 352 of the TFEU[480]. The flexibility clause was first introduced in Art. 235 EEC and later as Art. 308 EC. The provision, which could be argued to have codified the doctrine emerged from the ERTA

[480] "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures."

case[481] and was envisioned to give the EU the authority to take action in areas in which the Treaties do not expressly confer jurisdiction, evolved through the phases of the Union from initially referring to the "operations of the Common Market"[482], to further pushing the boundaries of its reach to "the framework of the policies defined in the Treaties"[483]. The redefinition of this wording dramatically expanded the horizon of the Clause[484], which evolved in conjunction with the redrawing of EU integration. This mandate experienced its peak during the initial phases of the integration, in the 70s and 80s[485], as it allowed the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, to adopt appropriate measures to attain the objectives set out in the Treaties[486]. This provision allows for some legislative flexibility and enables the Union to respond to new challenges and unforeseen events that call for a coordinated response, by representing the tool employed to close gaps in its competences. This current form of the flexibility clause covers all areas of EU activity except for the Common Foreign and Security Policy[487]. There exist multiple historical and contemporary instances of the application of the flexibility clause, as it has been utilized in diverse policy domains where specific treaty provisions may be absent but where EU-wide collective action is considered imperative to accomplish shared objectives[488].

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[481] *Commission of the European Communities v Council of the European Communities, European Agreement on Road Transpo*rt, paras 16-18, 28-30.

[482] Treaty establishing the European Community, Article 308.

[483] Treaty on the Functioning of the European Union, Article 352.

[484] Carl Lebeck, "Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised Eu Treaties," *Journal of Transnational Law & Policy* 17, no. 2 (2007): 329.

[485] For example, Before the Single European Act, Article 235 EEC was employed for international environmental agreements. Examples include the Convention on Air Pollution (Council Decision 81/462), Chemical Pollution (Council Decision 77/586), Sea Pollution (Council Decision 77/585), and Marine Pollution (Council Decision 75/438).

[486] Art. 352(1) of the TFEU: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures."

[487] Art. 351(4) TFEU.

[488] The flexibility clause has supported various legislative proposals since the Lisbon Treaty, notable examples include the exercise of the right to take collective action (Communication COM (2012) 130 from the European Commission of 21 March 2012 on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services), the Statute for a European Foundation (Communication COM (2012) 35 of the European Commission of 8 February 2021 on the Statute for a European Foundation), the Programme 'Europe for Citizens' for 2014–2020 (Communication COM

Specific legal foundations established by the Lisbon Treaty, which mandate Council unanimity and national and European parliament oversight, have been introduced to restrict the application of the flexibility clause. A first limit of art. 352 consists in the prohibition of its activation in pursuit of Treaties' amendments, modifications of the EU's institutional makeup or increase of the Union's authority beyond what is required to accomplish the goals set forth in the Treaties. Furthermore, it cannot be used as a foundation for harmonizing the laws and regulations of Member States in areas where doing so is expressly forbidden by the Treaties[489]. Additionally, a number of political and legal restrictions have surfaced which further limits the application of Article 352 TFEU. National safeguards, such as the German Federal Constitutional Court's Lisbon Urteil and the British European Union Act 2011, require prior parliamentary approval before invoking the flexibility clause[490]. These development shows a current tendency of increasing scrutiny and control of the national institutions over the application of the clause. A recent tendency can be noted within the European Commission, that has shifted its legal approach in favor of specific treaty provisions requiring a qualified majority rather than relying on the flexibility clause. This approach is apparent, for example, in the preference of Article 114 TFEU for internal market regulation, as it requires a qualified majority and thus avoids the unanimity constraint of Article 352[491].

Through this chapter, it has been argued that the mention of stateless persons within the TFEU ought to trigger the theory of implied powers, which should lead to proper identification of stateless persons: suppose this was the case, the idea of resorting to art. 352 would be appropriate, as hinted by several

(2011) 884 from the European Commission of 14 December 2011 on establishing for the period 2014-2020 the programme "Europe for Citizens"), the Multiannual Framework for the EU Agency for Fundamental Rights for 2013–2017 (Communication COM (2011) 880) from the European Commission of 13 December 2011 on establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2013-2017) and the Electronic publication of the Official Journal of the EU (Communication COM (2011) 162 from the European Commission of 4 April 2011 on electronic publication of the Official Journal of the European Union).

[489] Art. 352 of the TFEU.

[490] T Theodore Konstadinides, "Drawing the Line Between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause," *Yearbook of European Law* 31, no. 1 (2012): 261.

[491] *Ibid*, 240.

authors[492], to answer for the lack of explicit EU competences and assemble the relevant framework. The explicit bestowal of rights to stateless persons in art. 67 of the TFEU raises themes of how to uniformly determine the status of stateless persons and ascertain their condition, which could find an answer through the implementation of the flexibility clause. Art. 352 would open the door to the adoption of arrangements fit for that task, in alignment with the EU commitment to uphold human rights and produce a uniformed migration policy, as detailed in Art. 6 TEU and 78 TFUE[493].

However, some authors[494] have highlighted several drawbacks linked to employing the flexibility clause, both intrinsic to the legal source and to the purpose: firstly, the requirement for unanimous consent from the Council is often identified as a possible hurdle, as it might be a challenging prerequisite to reach unanimity in issues such as migration and statelessness due to the diverse interests of MS. In addition, there is a possibility that applying art. 352 to harmonize statelessness laws will be challenged on the grounds that it may violate national jurisdiction, especially with regard to nationality laws, which are customarily managed by Member States.

Article 352 TFEU offers a potential solution to creating legal basis that encompasses a harmonized framework to address statelessness in the EU, though its use in this context faces significant legal and political challenges. The application of the flexibility clause has become increasingly limited, although it has been, historically, crucial in extending the EUs jurisdiction. As a result, Article 352 TFEU seems to only be employed to address political sensitive issues on a case-by-case basis. This evolution represents a more general change in the way the EU handles unforeseen legislative needs, moving away from the flexibility clause and toward the use of more targeted treaty provisions.

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[492] Cf. T., Molnár, "Moving Statelessness Forward on the International Agenda," 198; Anne Brekoo, "A Role For The European Union Addressing Statelessness" (BA Thesis, 2019), 72; Swider and Heijer, "Why EU Law Can and Should Protect Stateless Person," 129; Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness*, 187; *De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness,"* 54; Uliana Ermolaeva, Elisabeth Faltinat, and Dārta Tentere, "The Concept of 'Stateless Persons' in European Union Law" (Amsterdam International Law Clinic, 2017), 15; Berényi, "Addressing the Anomaly of Statelessness in Europe: An EU Law and Human Rights Perspective," 159.

[493] See section 5 of this chapter.

[494] Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness*, 193-194; Brekoo, "A Role For The European Union Addressing Statelessness."

These limitations push towards weighing alternate legal foundations and strategies in order to resolve the problem of statelessness within the EU. However, some contend that invoking Article 352 may even be redundant, as implicit powers already exist under Articles 67 and 78 TFEU, which confer sufficient competence to the EU to take action on this matter[495]. In fact, it has been established by the jurisprudence, such as the ERTA case[496], that implicit competences deriving from competences explicitly granted by the Treaties can be implemented without invoking the flexibility clause.

4.6 Complying with the principle of subsidiarity

If doubts regarding the existence of EU competence in matters of statelessness were to be resolved, it would be just as relevant to determine whether addressing statelessness would be more effectively managed at the local or at the regional level. While the EU may possess the jurisdiction to act, this does not inherently compel it to do so: instead, it must adhere to a stringent subsidiarity test.

The principle of subsidiarity is foundational within the governance structure of the EU as it guides the allocation of powers and responsibilities between the EU institutions and the member states[497]. This principle essentially states that decisions should be taken at the lowest possible level of governance, unless a particular issue can be more effectively addressed at the EU level. At its core, subsidiarity seeks to ensure that decisions are made as closely as possible to the citizens they affect, taking into account the specific needs and circumstances of different regions and communities. The principle of subsidiarity is enshrined in the TEU, which lays down the legal framework for EU decision-making. Article 5(3) of the TEU states that "[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the

[495] Swider and Heijer, "Why EU Law Can and Should Protect Stateless Person," 129; Radnai, "Statelessness Determination in Europe: Towards the Implementation of Regionally Harmonised National SDPs," 12.

[496] *Commission of the European Communities v Council of the European Communities, European Agreement on Road Transport,* paras 16-18.

[497] Art. 5 of the TEU.

scale or effects of the proposed action, be better achieved at Union level." Fundamentally, the EU legislation and its policy-making process are guided by this principle. It requires the EU institutions, particularly the European Commission, to justify the necessity and added value of proposed EU actions that could not be achieved more effectively by member states acting individually or through cooperation [498].

The principle of subsidiarity has evolved over the years through the interpretation of the ECJ, and changes in EU treaties: the ECJ has, in more than one occasion, clarified the scope and application of subsidiarity, ensuring that EU actions respect the autonomy and prerogatives of member states [499]. In addition to court cases, the principle of subsidiarity is also invoked in debates within the European Parliament and the Council of the European Union when assessing proposed EU legislation. In order to ensure that EU proposals uphold the principle of subsidiarity and strike the correct balance between EU action and national autonomy, members of the EP and national governments frequently examine them. Subsidiarity contributes to the democratic legitimacy and efficacy of EU governance, while respecting the diversity and autonomy of its member states by encouraging decentralization and local decision-making. To ascertain whether a proposal complies with the principle of subsidiarity specific guidelines are provided in Article 5 of the TEU. The assessment hinges on two key criteria: the necessity and the EU added value test. Once a legal basis for EU action is established, it must be determined whether the objectives can be sufficiently achieved by the

[498] As established by art.5(3) of the TEU, the application of subsidiarity involves three elements to consider:
(a) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence); (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); (c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value). If the answers to these conditions are affirmative, then the EU may proceed with action. However, if the answer is negative, then the principle of subsidiarity suggests that the EU should refrain from acting, leaving the issue to be addressed by member states.

[499] Examples of the principle of subsidiarity being invoked or applied in EU court cases include: Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* ECLI:EU:C:2000:544 in which The CJEU ruled in favor of Germany, stating that the directive exceeded the powers conferred on the EU by the Treaty of the European Community and emphasized that the measures were not necessary at the EU level and could be addressed more effectively by individual member states; Case C- 84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* ECLI:EU:C:1996:431, in which the CJEU upheld the directive, ruling that the EU had the competence to enact the directive under the social policy provisions of the Treaty and found that the objectives of the directive (protecting workers' health and safety) could be better achieved at the EU level due to the cross-border nature of employment.

Member States acting independently, and whether pursuing these objectives at the EU level would be more effective due to the scale or impact of the action.

4.6.1 Status Determination Procedures

As scholars and international organizations have argued over the years, regulations pertaining to statelessness would be consistent with the principle[500]. The current state of national legislation demonstrates how MS have been unable to address statelessness independently, as stateless individuals are often left without an avenue to determine their status and deprived of their rights. SDPs in the EU are rarely perfect and have only been established by a small number of Member States. Moreover, in the ones that have been established, is not unusual to identify gaps in their practical application, due to impractical requirements and insufficient rights associated with status recognition. For instance, in Bulgaria's SDP, the right to residence and other contingent rights are subject to additional conditions, with a higher standard of proof than for asylum seekers and no guarantees of timely decisions or protection from detention during the process[501]. In Italy, the SDP is practically inaccessible, as requirements such as holding a residence permit or possessing a birth certificate are incompatible with the status of stateless persons[502]. In France, similarly to Spain[503], there is no timeframe attached to the decision and there is no accelerated route to citizenship[504] (as suggested by the 1954 Convention). In Hungary the rights attached to the status are not

[500] Gyulai, "Statelessness in the EU Framework for International Protection," 284; 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," 303; Laura Van Waas, "EU Citizenship for Stateless People?," *European Network on Statelessness* (blog), 2013, https://www.statelessness.eu/updates/blog/eu-citizenship-stateless-people; De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness," 54–59, Carol Batchelor, "The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization," *Refugee* 22, no. 2 (2005): 31–58.

[501] Valeria Ilareva, "ENS Statelessness Index Survey 2022: Bulgaria" (ENS, 2022).

[502] Alberto Pasquero, "ENS Statelessness Index Survey 2022: Italy" (ENS, 2022).

[503] Adam Ariche and Rubén Romero Masegosa, "ENS Statelessness Index Survey 2022: Spain" (ENS, 2022).

[504] Cécile Queval and Elise Martin Gomez, "ENS Statelessness Index Survey 2023: France" (ENS, 2023).

guaranteed and applicants are vulnerable to detention[505]. In MS without a SDP the situation is even more concerning. In Austria, for example, being identified as stateless does not confer any rights based on statelessness, nor does it guarantee a residence permit, and the standard of proof is unregulated[506]. In Belgium[507], acknowledgement of stateless status does not guarantee rights or a residence permit, a situation mirrored in Croatia[508]. It is evident that identification and protection of stateless persons is something that has been endorsed by the Union on several occasions[509], however Members have so far failed to achieve such a goal autonomously.

A further, related point that makes the proposed goals more challenging to achieve at the MS level is that an uncoordinated approach to statelessness protection risks triggering a "race to the bottom"[510]. This occurs when Member States, concerned about an influx of stateless persons seeking easier recognition and better protection, adopt less favorable regimes than their neighbors. An outcome of this competitive standard-lowering could the inadequate protection and potential breaches of international obligations[511]. State policies may be further influenced by a disjointed effort, leading them to put deterring migration ahead of upholding their international obligations[512]. Similarly, States might be reluctant to put SDPs into place because they fear that these measures would make them more desirable as destinations and increase migratory flows. Defining and recognizing statelessness is often associated with negative consequences for the Member State, especially an increase pressure from immigration.

SDPs are believed to be what is generally referred to as a "pull factor" in the context of migration and immigration policy, which is defined as conditions or incentives in a destination country that attract migrants or refugees to move

[505] Juhász and Gábor Gyulai, "ENS Statelessness Index Survey 2023: Hungary" (ENS, 2023).
[506] Leonhard Call-Blaßnig, "ENS Statelessness Index Survey 2022: Austria" (ENS, 2022).
[507] Valérie Klein, "ENS Statelessness Index Survey 2022: Belgium" (ENS, 2022).
[508] Natasa Kovacevic, "ENS Statelessness Index Survey 2023: Croatia" (ENS, 2023).
[509] See section 3 of chapter 5.
[510] Swider and Heijer, "Why EU Law Can and Should Protect Stateless Person," 122; De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness," 58; N Radnai, "Statelessness Determination in Europe: Towards the Implementation of Regionally Harmonised National SDPs," 13.
[511] Melissa Fleming, "Europe: UNHCR Concerned Over Increasing Restrictive Measures, Urges Effective Comprehensive European Response" (UNHCR Briefing Notes, 2016).
[512] Swider and Heijer, "Why EU Law Can and Should Protect Stateless Person," 122.

there[513]. These factors can include economic opportunities, social benefits, political stability, safety, and access to education or healthcare. Pull factors contrast with "push factors," which are conditions or circumstances in migrants' countries of origin that compel or drive them to leave, such as poverty, conflict, persecution, or lack of opportunities. Pull factors might be viewed negatively among some MS because they can contribute to increased immigration pressures, strain on public services, social tensions, and challenges in managing migration flows. Generous welfare benefits employment prospects or asylum policies may make some countries more appealing to migrants than others. As a result, those nations may bear a disproportionate share of the burdens and responsibilities of migration[514].
This perception seems, however, to be unfounded. In 2015, a list of questions was sent to experts within MS[515], and based on the responses provided by countries that have established SDPs, there no clear indicators suggested an increase of stateless persons recognized through the process[516]. The UK denied any claim that the introduction of SDPs would and had increased the number of applicants, a response mirrored by the Hungarian Office of Immigration and Nationality. Moreover, the data does not support the notion that procedures for identifying stateless individuals act as a "pull factor." The experiences of countries with established SDPs indicate a stable number of applications, providing no evidence to substantiate claims that such procedures attract an increased influx of stateless persons. France, for example, one of the states with the longest-standing statelessness SDPs, received an average of 224 applications for statelessness determination between 2010 and 2016[517]. In 2022, though the number of applications has risen to 503, 108 were recognized for stateless status and 103 as stateless refugee status, demonstrating a stable admission rate. Hungary established its SDPs in 2007, and in the timeframe between their institution and 2019, it has

[513] Klaus F. Zimmermann, "European Migration: Push and Pull," *International Regional Science Review* 19, no. 1–2 (1996): 95–128; European Commission, "Push and Pull Factors of International Migration: A Comparative Report" (European Commission, 2000).
[514] Cf. De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness."
[515] *Ibid*, 52.
[516] There was, however, mention of the expectance of increase in the future due to the overall increase of influx of people seeking refuge in Europe.
[517] Office français de protection des réfugiés et apatrides, "RAPPORT D'ACTIVITÉ 2022," *À L'écoute Du Monde* (OFPRA, 2022), 26.

received a total of 284 applications[518]. This leads to conclude how coordinating SDPs and identifying stateless persons is unlikely to constitute pull factors.

4.6.2 The Common European Asylum System

Concerns about the pull factor concept however point to a wider discussion in the EU regarding how to strike a balance between solidarity and responsibility in immigration and asylum policies. The following critical step is to determine whether the EU can successfully contribute to the achievement of these objectives. This point is ably illustrated by the precedent of the CEAS[519], which shows how coordinated efforts are the optimal solution for protecting vulnerable populations within the EU[520]. In fact, to properly engage the principle of subsidiarity is not only essential to demonstrate that the MS fail to adopt efficient and apt legislations on statelessness, but it must also be argued that, even if the MS had appropriate measures to identify statelessness, an EU harmonized approach would remain the ideal solution.

[518] UNHCR, "Establishing Status Determination Procedures for the Protection of Stateless Persons: Action 6," 9.

[519] The primary objectives of the CEAS are to enhance solidarity and responsibility-sharing among EU member states, ensure fairness and consistency in the treatment of asylum seekers, and improve the efficiency and quality of asylum processes519. To achieve these objectives, the CEAS has established a comprehensive set of legislative instruments and institutions. These elements are intended to work together harmoniously to create a strong system that can successfully handle the intricacies of managing asylum claims while respecting international law and human rights: the Dublin Regulation establishes which member state is responsible for examining an asylum application, aiming to prevent multiple claims and ensure swift access to procedures; the Eurodac Regulation supports this by maintaining a biometric database of asylum seekers' fingerprints; the Asylum Procedures Directive sets common standards for processing applications; while the Qualification Directive outlines criteria for granting protection and the rights associated with it. The Temporary Protection Directive offers also procedures for managing large-scale influxes of displaced people and the Reception Conditions Directive guarantees minimal standards for the assistance and care of asylum seekers. In addition, there is the European Asylum Support Office (EASO), which enhances practical cooperation and offers support to member states in implementing CEAS.

[520] Cf. Radnai, "Statelessness Determination in Europe: Towards the Implementation of Regionally Harmonised National SDPs."; Katalin Berényi, "Statelessness and the Refugee Crisis in Europe," *Forced Migration Review* 53 (2016); Swider and Heijer, "Why EU Law Can and Should Protect Stateless Person," 101-135; Batchelor, "The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization," 31-58; Berényi, "Addressing the Anomaly of Statelessness in Europe: An EU Law and Human Rights Perspective."

In this perspective, the EU migration and asylum policy represent a clear example that demonstrates how EU legislators have chosen repeatedly to adopt policies at the regional level to address challenges concerning vulnerable groups. The EU has deemed it necessary to implement legislations relating to TCNs to manage their entry and stay rather than relinquish this task to the individual MS, which proved how a common methodology to manage TCNs was pivotal for applying and enforcing EU law for all the categories involved. Similarly, considering the close proximity of stateless individuals and TCNs dictated by EU law, it would be logical to apply the same criteria to stateless persons as well.

A primary example is the CEAS, which, despite its failure to prescribe the identification of statelessness among its categories, offers some interesting justification for its creation that apply to stateless persons as well. The Tampere Program[521] summarized, in 1999, the rationale for its creation, setting out a comprehensive framework for the development of the EU's AFSJ, and, indirectly, it becomes relevant for the potential EU action on statelessness. Key points of the conclusions included the commitment to a common EU asylum and immigration policy, focusing on fair treatment of third-country nationals, and efficient management of migration flows: it emphasized the importance of mutual recognition of judicial decisions and improved access to justice, advocating for closer judicial cooperation in both civil and criminal matters, as well as the respect for human rights—as enshrined in the ECHR—and the aim to offer a high level of protection to citizens in terms of security and legal rights within the EU. Therefore, the aim of the CEAS initiative was to create a uniform and equitable policy regarding asylum throughout all of its member states and to guarantee fair treatment, as well as preserve their basic rights and protection standards[522]. Moreover, the CEAS sets the standard to provide recognition and an entry point to residence— exemplified by Qualification Directive[523]—and by creating a predictable and efficient system to balance responsibility among member states, it provides clear rules to address those seeking refuge within the EU.

In addition to this, it has been contended that, not only the same justification should apply to statelessness today as well, but incorporating a category for

[521]Cf. The rationales for establishing a Common European Asylum System as formulated in the Tampere Programme, Conclusion of the European Council of 15/16 October 1999.
[522] *Ibid*, para 11.
[523] See section 2 of this chapter.

stateless persons within the CEAS could have been appropriate[524] for several reasons: one of the main goals of the system's creation was the reduction and prevention of human being's trafficking[525] through a more efficient and harmonized management of migration flows and stateless persons are a category particularly vulnerable to this phenomenon[526]. Additionally, the CEAS was heavily influenced by the 1951 Convention and its 1967 Protocol and was established to give effect to the principles enshrined in these international agreements within the framework of the EU. Given the closely intertwined history of stateless persons and refugees, it is disappointing that a comparable solution has not been reached for the 1954 Convention, despite the similarities with the refugee category, and almost complete ratification of the Convention among MS.

However, though necessary to address challenges of free internal movement and mounting migratory pressures, it is true that the current EU migration policy has come under significant criticism[527]: conceived initially to foster burden-sharing and common solutions among MS, these efforts have increasingly prioritized external border control, rather than immigrants[528]. Such approach is often driven by political motives and fear of immigration, aiming to contain the issue outside of Europe's border rather than addressing it, which, as a result, shifted the focus away from comprehensive asylum management to a more securitized approach that seeks to prevent migration. Critics have highlighted several flaws within this framework, such as procedural inefficiencies and substandard reception conditions, which fail to

[524] Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness*, 184.

[525] As established in Section IV of the Conclusion, "Management of Migration Flows", paras 22-27.

[526] Cf. Laura Van Waas et al., "Researching the Nexus Between Statelessness and Human Trafficking: The Example of Thailand" (Wolf Legal Publishers, 2015).

[527] Cf. Alessia Vatta, "The EU Migration Policy: Between Europeanization and Re-Nationalization," in *Europe of Migrations: Policies, Legal Issues and Experiences*, ed. Serena Baldin and Moreno Zago (Trieste: Università di Trieste, 2018); Terri Givens and Adam Luedtke, "EU Immigration Policy: From Intergovernmentalism to Reluctant Harmonization," in *The State of the European Union: Law, Politics, and Society*, ed. Tania Börzel and Rachel Cichowski, vol. 6 (Oxford: Oxford University Press, 2003), 291–312; Kaija Schilde and Sara Wallace Goodman, "The EU's Response to the Migration Crisis: Institutional Turbulence and Policy Disjuncture," in *The Palgrave Handbook of EU Crises*, ed. Akasemi Newsome, Jarle Trondal, and Marianne Riddervold (Cham: Springer International Publishing, 2021), 449-468; Elina Pirjatanniemi and Mustaniemi-Laakso, "EU Migration Policy and Human Rights," in *The European Union and Human Rights: Law and Policy* (Oxford: Oxford University Press, 2020).

[528] Schilde and Goodman, "The EU's Response to the Migration Crisis: Institutional Turbulence and Policy Disjuncture," 454-456.

uphold the fundamental rights of asylum seekers[529]. There have also been claims that the policies appear to have resulted in an unequal allocation of accountability, putting an excessive amount of strain on some member states and escalating already-existing tensions within the Union[530].

Despite these criticisms however, the CEAS exemplifies how the harmonization of migration procedures has undeniably elevated and unified the legal standards of protection across the EU and this unification, while imperfect and variably implemented across member states, represents a significant advancement toward ensuring consistent treatment of asylum seekers and migrants[531] and could represent a significant step forward for the protection of stateless persons[532]. Despite the missed opportunity to include stateless persons within the CEAS, the same rationale that applied for the establishment of the CEAS and the need to centralize the identification and the related practices, can now be argued to be engaged for statelessness. Through the establishment of procedural safeguards to guarantee the protection of their rights, the EU has used its authority over time to set conditions for the entry and stay of nationals of third countries. EU legislative measures provide common interpretations and guarantee a unified application of the law, ensuring better compliance and enforcing mechanisms. Incorporating stateless persons into its migration policy would facilitate a more equitable distribution of responsibility among EU Member States, achieving a level of burden-sharing that individual countries might not be able to accomplish on their own.

[529] Pirjatanniemi and Mustaniemi-Laakso, "EU Migration Policy and Human Rights," 445; European Union Agency for Fundamental Rights, "Migration to the EU: Five Persistent Challenges" (FRA, 2018), 12–13; European Council for Refugees and Exiles, "The Length of Asylum Procedures in Europe, Asylum Information Database" (ECRE, 2016); UNHCR, "UNHCR Europe Monthly Report - December 2019" (UNHCR, 2019 European Union Agency for Fundamental Rights, "Fundamental Rights Report 2017" (FRA, 2017), 130; European Union Agency for Fundamental Rights, "European Legal and Policy Framework on Immigration Detention of Children" (FRA, 2017), 12– 17.

[530] Pirjatanniemi and Mustaniemi-Laakso, "EU Migration Policy and Human Rights," 455.

[531] A Vatta, "The EU Migration Policy: Between Europeanization and Re-Nationalization," 27.

[532] It could be argued that, to fully realize the potential of these harmonized policies, the EU should address the underlying disparities and refocus on a more balanced approach that prioritizes human rights alongside security concerns.

4.6.3 Compliance with international and European norms

In addition to the prior reasonings, there is also something to be said about the EU legislation standardizing identification and protection for stateless persons to enhance compliance with international norms. International treaties do not always provide optimal remedies for non-compliance, while EU laws result more enforceable in national courts and consequently increases the practical efficacy of international standards. Should the EU fail to put strong internal measures in place, it will be less efficient in fulfilling its UN pledge to address statelessness abroad[533]. Developing and enforcing internal standards is crucial for effective external advocacy. In this sense, the EU has already shown interest in its relationship with candidate states regarding the issue of statelessness: the lack of explicit competence in regulating nationality did not hinder the EU from tackling these issues during its pre-accession negotiations[534]. Albeit not consistent in its application[535], the conditions set by the EU led to a number of changes within citizenship laws during the pre-accession preparation[536].

Finally, divergent determinations can affect the correct application of EU provisions: whether a person is determined to be stateless or not can directly impact the interpretation and application of Union law. In fact, stateless persons are, at times, mentioned throughout the CEAS, often afforded the same treatment as third-country nationals. In the Directive 2013/33/EU (on reception conditions), the Regulation (EU) No 604/2013 (Dublin Regulation)[537] and Regulation (EU) No 603/2013 (EURODAC

[533] De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness," 44.

[534] Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Alfen Aan den Rijn: Kluwer Law International B.V., 2008), 80-82.

[535] Citizenship matters only played a role in the negotiations with a few states, such as Latvia, Estonia and Czech Republic. See Dimitry Kochenov, "Pre-Accession, Naturalisation, and 'Due Regard to Community Law'. The European Union's 'Steering' of National Citizenship Policies," *Romanian Journal of Political Science*, no. 2 (2004): 72–88.

[536] Katja Swider, "Pre-Accession Changes to Residence-Based Naturalization Requirements in Ten New EU Member States," *EUI Working Papers* RSCAS 2011, no. 18 (2011), 4-5.

[537] Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Regulation)[538], stateless persons are consistently mentioned alongside third-country nationals and the two categories are granted the analogous treatment throughout the legislations[539].

However, while in the Directive 2013/32/EU (on asylum procedures) [540] stateless persons are, for the most part, granted the same treatment as third-country nationals, art. 36 poses an exception where the "safe country of origin" is swapped for the "former country of habitual residence" in relation to stateless persons. In a similar way, also the Directive 2011/95/EU is consistent in acknowledging stateless persons and third-country nationals as one category, with the exception of Art. 2 and Art. 11, where once again, "country of nationality" is replaced with "country of former residence." Correct identification of the individual and their status is crucial as the appropriate application of these articles differs based on their status as either stateless or nationals of a third country. The implication would be that every member state must be able to effectively implement this distinction and therefore distinguish whether an individual is stateless or a third-country national. Whether a person is determined to be stateless or not, directly impacts the assessment of their safe country of origin under this provision[541] and there must be a consistent interpretation of this query to apply Union law homogenously.

Failing to identify stateless persons would be consequential in its implementation and endangers their ability to enjoy their rights. An illustrative example of this concept took place in a Dutch court in 2009, where the case 322726 / HA ZA 08-3512[542] was addressed. A man born in Czechoslovakia (what would today be considered Slovakia) entered the

[538] Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation.

[539] For example in the Directive 2013/33/EU, art. 14 establishes the "Member States should have the power to introduce or maintain more favourable provisions for third-country nationals or stateless persons who ask for international protection from a Member State […]"; art. 15 of the Dublin regulation states that "Where the application for international protection is made in the international transit area of an airport of a Member State by a third-country national or a stateless person, that Member State shall be responsible for examining the application"; art. 18 (3) of the EURODA Regulation establishes that "The Member State of origin shall unmark or unblock data concerning a third-country national or stateless person whose data were previously marked or blocked […]"

[540] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

[541] De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness," 58-59.

[542] District Court The Hague, 5 of August 2009, 322726 - HA ZA 08-3512.

Netherlands in the '90s and requested a residence permit in 2003 on humanitarian grounds, having unclear nationality and being unable to leave the country. The court admitted that whether he was recognized as a stateless person or as a Slovakian was consequential in the application of his rights to residence and the application of the EU law hinged on the clarification of this detail to be appropriately applied[543]. It therefore evident that the correct application of EU law cannot be achieved without clear identification rules for statelessness.

It has been illustrated that an EU legislation on statelessness would be compatible with the principle of subsidiarity under several points of view. It is self-evident that tackling the issue at the local level has led to great unevenness among MS legislations and incurs the risk of adverse effects, such as a "race to the bottom" and similar violations of international commitments. Furthermore, precedents that the EU has often chosen to address comparable situations through the employment of EU dictated legislations, as it deemed it necessary to achieve uniformity and effectiveness among MS. This choice of consistent application of EU law has proven successful in providing protection and rights[544]. Furthermore, and most importantly, as things stand today, EU law cannot be correctly applied across the Union without the identification of stateless, as blind spots have already arisen throughout its application, rendering an EU harmonized legislation not only an option, but a necessity.

4.7 A statelessness directive in the EU

Considering the premises established by this chapter, which displayed the existence of competence for the EU to employ a legislation, and, ascertained also that such action would be conform to the principle of subsidiary, this section identifies the employment of a directive on statelessness as the most appropriate tool at the EU disposal to address statelessness and explains the rationale behind this choice. The use of directives has shaped the EU's area of migration due to their characteristic flexibility, a feature which enabled the EU to accommodate the diverse national interests while maintaining EU

[543] *Ibid*, para 4(11).

[544] Tineke Strik, "Two Decades Eu Migration Law for Third Country Nationals," in Migration on the Move. Essays on the Dynamics of Migration (Leiden: Brill Nijhoff, 2017), 76–94.

common values and the pursuit of EU goals. This section will build an argument as to why directives, despite the potential challenges, represent today the instrument with the most promise to effectively address statelessness issues within the EU legal and political framework.

The EU migration policy has been subject to a significant evolution in the EU and today it combines a series of efforts, including initiatives, regulations and common standards, which generate a complex governance operating the management of external borders, freedom of movement within the internal borders, asylum practices, neighboring cooperation and security regulations[545]. It is not surprising that this policy has been subject to increasing fragmentation over the years[546], displaying diverse degrees and modes of differentiated integration[547]. The Union's migration policy has therefore combined various forms of differentiation into its turbulent process of integration due to the two phenomenon that emerged alongside it: politicization and securitization on migration processes[548].

The policy was revitalized in the 90s[549], a period of increasing migration pressure, through initiatives such as the Schengen area regime and the Dublin regime, yet its effective harmonization suffered from being undercut by the political framing of migration as a threat. The Maastricht Treaty included asylum and migration, formally establishing cooperation as a component of Justice and Home Affairs as a result of the pressing need for deeper

[545] Nicoletta Pirozzi, Pier Domenico Tortola, and Lorenzo Vai, "Differentiated Integration: A Way Forward for Europe," *Istituto Affari Internazionali*, 2017.
[546] Ariane Chebel D'Appollonia, "EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation," *Comparative European Politics* 17, no. 2 (2019): 193.
[547] For the classification of differentiated integration cf. L Leon N. Lindberg and Stuart A. Scheingold, *Europe's Would-be Polity: Patterns of Change in the European Community* (Englewood Cliffs: Prentice Hall, 1970), for a first categorization focused on functional scope and level of centralization; Alexander Stubb, "A Categorization of Differentiated Integration," *JCMS Journal of Common Market Studies* 34, no. 2 (1996): 283–95, for a categorization that considers time and territory as variables of commitments; and Frank Schimmelfennig, Dirk Leuffen, and Berthold Rittberger, "The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation," *Journal of European Public Policy* 22, no. 6 (2015): 764–82 for a more recent classification that integrates the elements of vertical, horizontal, internal and external differentiation.
[548] D'Appollonia, "EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation," 193.
[549] Cf. Kay Hailbronner, "European Immigration and Asylum Law Under the Amsterdam Treaty," *Common Market Law Review* 35, no. 5 (1998): 1047–67; Bernd Martenczuk, "Variable Geometry and the External Relations of the European Union: The Experience of Justice and Home Affairs," in *Justice, Liberty, Security: New Challenges for EU External Relations* (Brussels: VUBPRESS, 2008), 493; Janine Silga, "Differentiation in the EU Migration Policy: The 'Fractured' Values of the EU," *European Papers* 7, no. 2 (2022): 910.

coordination. At this point, migration remained largely under the control of individual states, until the Treaty of Amsterdam introduced the AFSJ. The establishment of this area within the EU's purview marked a significant step towards integration that will be consolidated by the Lisbon Treaty, where the EU's role is strengthened through the extension of its jurisdiction over immigration and asylum matters. However, the EU migration policy has always presented challenges and complexities, due to the need to combine the growing evolution of cooperation among MS to confront shared transnational challenges, with States' concerns over their sovereignty and focus on the protection their own interests[550]. The underlying motif of this process has always been a reluctance of states to concede power in a sensitive area such as migration, often been regarded as a sovereign right, and which has therefore often urged States to secure a central role and a predominant position in the area[551].

It is unsurprising that flexibility has been a necessary requirement for the pursuit of integration in the area of migration, as the capacity to adapt constituted a path forward in the reinforcement of cooperation. The capacity to adapt through the decision-making process and the implementation phase rendered *differentiation* the essential feature of the EU and an inevitable outcome for the EU migration policies[552]. Initially, differentiation on the larger EU integration's scale was criticized, in particular when it applied to the AFSJ and to migration as an essential part[553], remarking how the flexibility which allowed to accommodate diverging interests would inevitably lead to legal fragmentation and potential political tensions—path the AFSJ appeared to be headed towards[554]. However, this characteristic seems now to be accepted as a structural and stable feature of the EU institutional architecture[555].

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[550] Nicole Koenig, "A Differentiated View Of Differentiated Integration," *Jacques Delors Institute Policy Paper*, no. 140 (2015).
[551] Georgia Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Leiden: Martinus Nijhoff Publisher, 2006), 199.
[552] D'Appollonia, "EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation," 205.
[553] Jörg Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation," *European Law Review* 23, no. 4 (1998): 320.
[554] S. Peers, "Justice and Home Affairs: Decision-making After Amsterdam," *European Law Review*, no. 2 (2000): 183–91.
[555] Cf. D'Appollonia, "EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation."; Deirdre Curtin, "From a Europe of Bits and Pieces to a Union of Variegated Differentiation," *EUI Working Papers* RSCAS 37 (2020); Bruno De Witte,

Against this backdrop, it could be argued that directives emerged as a key legislative tool in this context, owing to the inherent toleration to national circumstances and, as the complexity and fragmentation of the EU migration policy grew, so did the relevance of directives within it. Furthermore, due to the limitations intrinsic to other EU instruments that are binding in their entirety and directly applicable—such as regulations—, alternative avenues often do not offer room for flexibility, and in areas as sensitive and delicate as migration and statelessness they run the risk of being counterproductive and result in resistance and poor implementation. In fact, MS have a long history of resistance to migration policy's integration and are reluctant to concede any powers beyond those necessary for security purposes: the 1987 case related to migration[556] is a testimony to this trend, indicating a clear preference of flexible solutions and mistrust towards other national and EU actors[557].

Despite proposals from the Commission to transform asylum directives into regulations[558], in the case of statelessness a directive appears to be the most suitable option[559]: a flexible approach to migration has always been a key dimension of the EU migration policy, rendering directives particularly beneficial in such policy areas. By setting the minimum standards that MS must meet, the directives ensure that MS work towards a common goal, such as the identification and protection of stateless persons, through a mechanism that ensure compliance, but allowing the States the discretion in the implementation of the standards and the consideration of their specific contexts.

As underscored throughout this research, statelessness is a particularly polarizing topic, and stateless individuals are often caught in the gaps of

"Variable Geometry and Differentiation as Structural Features of the EU Legal Order," in *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (Cheltenham: Edward Elgar Publishing, 2017), 9.

[556] Joined cases C-281/85, C-283/85 to C-285/85 and C-287/85 *Federal Republic of Germany and others v Commission* ECLI:EU:C:1987:351.

[557] Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, 202.

[558] Communication COM (2016) 466 final from the European Commission of 13 July 2016 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Communication COM(2016) 467 final from the European Commission of 13 July 2016 on establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

[559] Swider and Heijer, "Why EU Law Can and Should Protect Stateless Person," 108.

national migration policies. The directives' fundamental feature of adapting to varying national and legal framework seems therefore most appropriate to establish common standards of identification and protection for them, allowing MS to retain control over specific aspects of their migration and nationality laws, and ensuring the implementation of a mechanism that addresses statelessness in a pragmatic and structured manner.

4.7.1 The fundamental elements of a directive on statelessness

It has been argued that the main elements that are necessary to achieve an effective policy on statelessness within the EU are a common standard of treatment, clear SDPs and a right to residence[560]. It would be unnecessary to go into the specific legal details, however, this section will attempt to delineate the main features of these elements and their role.

SDPs represent the building block of a legislation relating to statelessness, as the recognition of the status has the potential to greatly improve the condition of the stateless individual regardless of the attached framework. Neither of the two conventions on stateless provides any binding guidance on how to determine statelessness[561] and the matter is intrinsically complex due to the difficulty of establishing statelessness[562].

The UNHCR and other international organizations have, over the years, attempted to produce guidelines to help states navigate this challenging

[560] *Ibid*; Katja Swider, "Protection and Identification of Stateless Persons Through EU Law," , *International Journal of Refugee Law* 29, no. 1 (2014); Meijers Committee, "A Proposal for an EU Directive on the Identification of Statelessness and the Protection of Stateless Persons" (Meijers Committee, CM1410, 2014).; Radnai, "Statelessness Determination in Europe: Towards the Implementation of Regionally Harmonised National SDPs, 204-210; Berényi, "Statelessness and the Refugee Crisis in Europe."

[561] Van Waas, *Nationality Matters: Statelessness Under International Law*, 402; UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons, para 62; UNHCR, "Establishing Status Determination Procedures for the Protection of Stateless Persons: Action 6," 4.

[562] Not only individuals might be unable to prove their identity due to lack of identification papers, but statelessness can also be a complex political topic that could require the assessment of the statehood under international law of the country of nationality or whether the person is admissible somewhere else.

task[563]. The UNHCR guidelines, despite suggesting that the Conventions *imply* an obligation to determine stateless[564] highlighting that States have "broad discretion in the design and operation of SDPs as the 1954 Convention is silent on such matters"[565]. As it is in the nature of a directive, the MS would retain discretion in its implementation, however, an imperative would be a common interpretation of the definition of statelessness, as established by art. 1 of the 1954 Convention on Statelessness and embraced by the EU[566]. The UNHCR has produced a guideline to help States navigate this definition, in line with its global mandate on statelessness, in order to provide support and "interpretative legal guidance" in addressing statelessness[567]. Statelessness definition could result tricky to interpret in all of its parts, therefore these guidelines are a welcome beacon to follow for states that are trying to navigate the creation of SDPs.

Firstly, when referring to "State", since the definition is formulated as a negative, the inquire of whether a person is stateless is limited to States with which the individual has links with[568]. "Not considered as a national […] under the operation of its law" refers to the legal practice and framework of the specific State: this means that the person does not enjoy the rights and benefits typically associated with nationality, even in the event that, formally, the conditions for nationality are met. Specifically, it is also highlighted that the application of the law in practice is what needs to be kept in consideration, not just the written form, because if someone is systematically denied their rights or refused the grant of nationality, they would be included under this definition. Overall, the term "law" in this definition comprises the written

[563] As it has done in the past for the determination of the status for refugee, which could acquire relevance in this context as well: UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees" (UNHCR, HCR/1P/4/Eng/REV.2, 1979); UNHCR, "Refugee Status Determination: Identifying Who Is a Refugee" (UNHCR, Self-Study Module 2, 2005).
[564] De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness," 46.
[565] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons, para 62; UNHCR, "Establishing Status Determination Procedures for the Protection of Stateless Persons: Action 6," 10
[566] See section 1 of chapter IV.
[567] 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" (UNHCR, HCR/GS/12/01, 2012), 1.
[568] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons, paras 18-22.

aspects of it, but also on the judicial decision and the practical application of the law[569].

Furthermore, an additional feature that cannot be omitted from the creation of a SDPs, is its formalization into law, to ensure its fairness and transparency[570]. Additionally, the procedures must be overseen by a specialized body whose authority is recognized by other institutions of the states, as the complexity of nationality laws requires an understanding of how laws are applied in order to assess evidence from foreign jurisdictions[571] and its decisions must have the power to bind the state to them. Bianchini highlights how centralized procedures are ideal[572], as they are more likely to develop the expertise on the matter[573] and ensure uniform application of the determination across the country. However, the structure of the SDP is left to the discretion of each state, and some might prefer to choose a decentralized system, where it is important for local authorities to be trained accordingly and avoid inconsistent decisions[574].

Furthermore, one of the most significant challenges in statelessness determination is represented by the evidentiary standards and the burden of proof, rendered particularly difficult by the need to prove a negative: the *absence* of a nationality. Typically, the burden is borne by the claimant who has the initial responsibility of substantiating their claim. However, due to the nature of statelessness, the burden of proof must be split, as both the applicant and the examiner must cooperate to ascertain the fact. The burden of proof should not rest solely on the applicant, as they might face unsurmountable hurdles during this process, especially when dealing with foreign states. In alignment with this principle, the UNHCR[575] offers a model of "shared burden" based on cooperation of the two parts, in which the applicant

[569] *Ibid*, paras 22-24.
[570] UNHCR, "Statelessness Determination Procedures: Identifying and Protecting Stateless Persons" (UNHCR, 2014), 5.
[571] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons."
[572] *Ibid,* 110; UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons, para 66 ss; De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness." 46.
[573] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons," 27.
[574] K Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*, 173.
[575] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons, para 62 ff.

provides all the available evidence and the state assists in gathering further proof, limiting the scope of the research to the states with which the applicant has a relevant link[576]. It would be best to take a flexible approach and rejects an overly strict standard that would undermine the goal of protecting stateless persons and, instead, aligns it with the refugee status determination model which requires a claim to be proven to a reasonable degree[577]. Conjunctly, the standard of proof, represented by the threshold of evidence necessary to establish statelessness, must also take into consideration the nature of statelessness, and, in particular, the consequences of an incorrect decision of rejection. The UNHCR advises to employ a similar standard of proof as the one applied to refugees' assessments, namely having proven to a "reasonable degree" the lack of nationality of any state[578].

To further guarantee the fairness of the process procedural safeguards and due process are important components that must be emphasized. In this context, acquires relevance the guarantee of the right to an effective remedy as well[579]. Legal and interpretation assistance during the process cannot be undermined, as many states fail to provide it adequately[580]. Such discrepancy risk putting into question the access to justice for stateless individuals. Timely decisions are also a factor, as the Handbook notes that protracted processes worsen stateless persons precarious situation and hinder their ability to exercise their rights[581]. Ultimately, it is imperative to emphasize and empower the appeals process, granting the applicant the ability to reverse initial rulings and prevent being caught in a recurring evaluation cycle. Accordingly, the SDPs should, as much as possible, reduce any administrative fee —if they have any at all— for it not to act as a deterrent towards the applicants, as prescribed by the 1954

[576] De Groot, Swider, and Vonk, "Practices and Approaches in EU Member States to Prevent and End Statelessness," 47.

[577] UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees" (UNHCR, HCR/1P/4/Eng/REV.2, 2019), para 42.

[578] UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees," 1979, para 42. In the refugee status determination context, an individual can claim a well-founded fear of persecution by establishing "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the [refugee] definition."

[579] UNHCR, "Statelessness Determination Procedures and the Status of Stateless Persons ('Geneva Conclusions')" (UNHCR, 2010), 4.

[580] Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*, 277.

[581] UNHCR, "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons, paras 28-30.

Convention[582]. The applicant, were their application to be rejected, should also be entitled to the *ratio decidendi,* ideally in written form.

Avoiding removal while awaiting a decision is the final component, since stateless people are especially susceptible to arbitrary detention. It has been observed that immigration detention frequently serves as a fallback option, endangering the human rights of those who are stateless[583]. It would be therefore fundamental to produce a legal mechanism that protects stateless persons from detention during the determination process and grants them interim residence rights while waiting for their status to be adjudicated.

The other two elements of the directive are the content of the protection and the right to residence. Firstly, a common minimum standard of protection should be established, to guarantee stateless persons the possibility to enjoy the right associated with their status and guaranteed by the 1954 Convention and the rest of the human rights framework. Specifically, it should take into consideration the unique requirements of stateless persons[584]. Moreover, the 1954 Convention does not entail a right to residence. However, it has been argued throughout this research that residence would be the optimal solution to grant stateless persons an avenue to regularize their status without excessively burdening the States and it would grant stateless persons all the socio-economical rights that are conditional on residence in the EU. Taking a page off of the asylum regime, a residence solution could be temporary and renewable, leading to permanent legal residence[585].

4. 8 Conclusion

An analysis of statelessness as it is encapsulated today within the EU framework, reveals disappointing protection gaps and implementation failures. The two most supported arguments for the ineligibility of the EU to address stateless with its tools have proven to be underwhelming, if not

[582] See also art 32 of the 1954 Convention on the Status of Stateless Persons.
[583] De Chickera and Et Al., "Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons," 99 ff.
[584] Cf. Van Waas, *Nationality Matters: Statelessness Under International Law*, 359-388.
[585] Directive 2011/95/EU, Art. 24; Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection.

completely misguided. The claim that the EU does not have competence to regulate statelessness in a post-Lisbon Treaty era is unconvincing, as well as any claim that perseveres in excluding any EU action due to the lack of competence on citizenship matters. Through this chapter it has been established that the legitimization of statelessness within the EU derives directly from the Lisbon Treaty, which introduces this category and incorporates it within that of TCNs. Although such inclusion only concerns the ASFJ, the mention is enough to raise questions regarding the Union's ability to guarantee what is prescribed within the Treaty if identification procedures are not in place. In fact, currently the landscape of SDPs is scattered across MS and the uniformity that is so often craved by the Union within its migration policy and in the treatment of TCNs, is far from sight. As this chapter has analyzed, the EU has displayed a tendency to produce guidelines and legislations in order to harmonize the identification of several categories of TCNs, and it is hard to justify why a similar direction was not employed for stateless individuals.

Due to the establishment that stateless persons must be guaranteed the same rights are TCNs within the Union, this chapter argues that the theory of implied powers ought to be triggered in relation to the identification of statelessness, which would then lead to the need to regulate their entry and stay as prescribed by the art. 79. There could also be an argument to be made for the employment of the Flexibility Clause on statelessness, since this subject matter would seem to fit its requirement as a competence gap within the written text of the Treaty, that can however be deduced from the teleological reading of its legislation. However, it is also true that the application of art. 352 has long been facing stricter contains and often less demanding options have been preferred to it. Nonetheless, as the jurisprudence has established, the implied powers do not necessarily need to rely on the clause to be applied. In fact, given the EU's competence in setting conditions of entry and stay for TCNs established within Title V, it appears that the regulation of statelessness within the EU can be entirely within the hand of the Union.

Although statelessness is included within the migration policy when there is reference to asylum seekers, it is important to note that not *all* stateless persons are refugees, and that none of the regimes established within the Treaties accounts for the regulation of non-refugee stateless persons, who nonetheless, are a category that demands specific attention. Art. 79 has been often used to harmonize the conditions of entry and stay of several categories,

and there is nothing halting the Union to apply a similar approach to statelessness. The Union has the power to set procedural guarantees for stateless individuals and produce a protection regime that could integrate the provisions of the 1954 Conventions and the rest of the human rights regime in a similar way as it has already employed in the case of refugees. Furthermore, has demonstrated by the prior examples of TCNs that have been addressed at the EU level, harmonization is the preferred path chosen by the Union, as it realizes that harmonization guarantees an equal and efficient implementation of its legislation on migratory matters. Committing to the same rationale, statelessness-related legislation should also be harmonized.

The guarantee of residence rights within the Union would represent a clear path towards a solution for statelessness within the Union: the status of residents within the Union has become a subsidiary of EU citizenship, thanks to the guarantees that the EU has provided through the expansion of its competence, often driven by the decisions handed by the Court. Residence is what the EU has strongly rooted the protection of all TCNs, and a similar solution would be optimal for stateless persons as well, as it would guarantee them legal certainty and the protection of most rights, without unduly impacting state sovereignty. While still lacking a citizenship, stateless persons could however rely on clear and structured legislative procedures, that could realistically reduce statelessness within the Union by realizing a status that grants them visibility and an accepted identity.

Regardless, it is true that any regulation on statelessness, even one that is grounded on residency, would produce some indirect effect on the citizenship law of MS. It has been established that this reasoning should not qualify as a deterrent from employing legislations on statelessness, as the EU routinely influence these matters through its principles of freedom of movement, the rights attached to the EU citizenship, and every regulation that exists within the sphere of the migration policy, that impacts today the sovereignty of MS as much as the addition of a legislation on statelessness would.

Therefore, the Union should produce a directive on statelessness on the footsteps of the one on asylum seekers, and institute through it the creation of harmonized SDPs to ensure the homogenous identification of statelessness across MS, as well as the common interpretation of the definition of statelessness through its compliance mechanisms. Furthermore, this directive would ensure the standard of treatment of stateless persons to be approximated to that of TCNs, but also guarantee the specific needs required by statelessness, as ascribed by the 1954 Convention.

CHAPTER V

OTHER APPROACHES TO STATELESSNESS IN THE EU

5.1 Introduction

This chapter builds on the discussion of the EU's potential to solve statelessness within its border introduced by this research, to veer away from a solution rooted in the conventional methods and explore other avenues that have been suggested to be at the EU's disposal. While the earlier analysis delved into an examination of formal mechanisms centered on competences and the judicial role of the Court, here the focus shifts towards additional strategies that are meant to complement, reinforce or possibly supplant the established solutions. In particular, the dormant potential of the EU citizenship, the possible contribution of soft law and the role that the ECHR plays in influencing the EU legal order. Each of these pathways, although diverse in their legal nature and approach, could reveal the promise to undertake the issue of statelessness.

Firstly, the chapter will address the potential of the EU citizenship to provide concrete solution for statelessness. It has been often theorized that the Union citizenship could reveal potential and solutions to numerous problems were it to be decoupled from national citizenship. In the same way, it has often been speculated that such a development could improve the condition of stateless persons and represent a solution that would undercut any hesitation relating to state sovereignty, while at the same time provide certain rights and membership to stateless individuals. Although this aspect will be examined and various points of view will be presented, this section will ultimately recognize the challenging nature of such proposition, as it clashes with the foundational relation between EU institutions and MS.

As a second element will center around the role of the UE Charter of Fundamental Rights and the potential that it can harbor in conjunction with the ECHR, by assessing the impact that the Convention and its Court can have

on the EU legal order. The section will specifically consider how strategic litigation before the ECtHR could foster the potential to prompt legal obligations for MS to establish SDPs, maintaining that the ECHR remains—today—outside the formal EU legal system.

The third section will analyze skepticism surrounding the existence of EU competences on statelessness and nominates soft law as a more attainable remedy by investigating its potential to facilitate dialogue among MS and conciliate diverging views. However, the inherent contradictions of this instrument appear to outweigh the support it can provide, above all its non-binding nature, and the growing concern for the implications on the EU governance and rule of law. Voluntary adherence and informal agreements essentially dilute the structure of accountability and when the lines between policy suggestion and legal obligation become blurred, it is evident that soft law can only be a temporary fix and cannot represent a durable solution.

The chapter will reach the conclusion that, although statelessness within the Union is a complex issue and the EU, as an entity, requires its actions to be rooted into clear and explicit competences, these elements can, albeit not individually, provide interesting support for any legislation on stateless that were to be created.

5.2 The added value of EU citizenship

The innovative concept of Eurozenship (European Citizenship), by transcending national borders, unites individuals from different states under a shared civic identity. Its nature challenges the traditional notion of citizenship in many ways by granting rights and freedoms beyond one's own country and by redefining what it means to be part of a collective political community. It could be said that European citizenship, working towards its effort of integration, has also reshaped the relationship between individuals and states in an increasingly interconnected context. The unique attributes of this approach to membership have sparked interest among many who

suggest[586] that EU citizenship may represent the key to improve the protection afforded to stateless individuals and could even be a permanent solution.

After the Paris Summit of 1972, which proposed that a European identity would be necessary to foster further integration, the idea of European citizenship was developed in the 1970s[587]. The concept took some time to be fully realized, and it finally translated into the Maastricht Treaty, which delineated specific rights for citizens of EU member states in Articles 18 through 21. These include the right to free movement and residence within the Union (Article 18 TEC, now Article 21 TFEU), and the right to vote and stand in both local and European elections under the same conditions as nationals of the host Member State (Article 19 TEC, now Article 22 TFEU). Furthermore, the Treaty (Article 20 TEC now Article 23 TFEU) gives EU citizens the right to consular protection from any EU Member State when they are in a non-EU nation where their home state is not represented. Crucially Article 22 TEC (now Article 25 TFEU) indicates that the list is not all-inclusive and permits the adoption of provisions to augment or add to these rights, meaning that the rights listed in the Maastricht Treaty represent only a portion of the legal entitlements of EU citizens.

The Amsterdam Treaty, Charter of Fundamental Rights, and the Lisbon Treaty have expanded and detailed the scope of this protection, thus broadening the benefits connected to this status. Notably, the rights attached to EU citizenship and the more general notion of the European Citizen status, have been, though the years, subject to significant jurisprudence as well and, as it often does, the ECJ, in its role of arbiter and interpreter of EU law, has provided definitions, clarifications and expansions of these rights through its

[586] Brekoo, "Statelessness in the European Union: Exploring the Potential Value of Union Citizenship."; —,A Role For The European Union Addressing Statelessness" (BA Thesis, 2019); Dimitry Kochenov and Aleksejs Dimitrovs, "EU Citizenship for Latvian 'Non-Citizens': A Concrete Proposal," *Houston Journal of International Law* 38, no. 1 (2016): 55–97; Dimitry Kochenov and Aleksejs Dimitrovs, "EU Citizenship for Latvian 'Non-Citizens': A Concrete Proposal," *Houston Journal of International Law* 38, no. 1 (2016): 60; Theodora Kostakopoulou, "Who Should Be a Citizen of the Union?: Toward an Autonomous European Union Citizenship," Verfassungsblog: On Matters Constitutional, 2019, 2–4; Julia Bradshaw, "Emerging From the Chrysalis: Union Citizenship Must Escape Its Nationality-Based Shortcomings," *Liverpool Law Review* 34, no. 3 (2013): 195–215; Julia Bradshaw, "Stateless in Europe: The Unbearable Lightness of Being an Unperson in the EU," in The Human Face of the European Union (Cambridge: Cambridge University Press, 2016), 260–92; Oliver Garner, "The Existential Crisis of Citizenship of the European Union: *the Argument for an Autonomous Status*," Cambridge Yearbook of European Legal Studies 20 (2018): 116–46.

[587] Cf. Willem Maas, *Creating European Citizens* (Lanham: Rowman & Littlefield Publishers, 2007).

rulings, and has contributed to molding EU citizens' rights and responsibilities. One of the most relevant contributions reached by the Court on the matter is the recognition that the European Citizenship's quality to enable who possess it to enjoy the same treatment within the Union irrespective of the (MS') nationality they hold, renders it the *fundamental status* of MS' citizens[588]. Through further cases, the Court contributed to paint a picture of the scope and outer limits of the EU citizenship, as well as its reach and impact. It progressively clarified its substance when, in *Baubast*[589], it ruled that the right to reside within a MS is directly conferred by art. 21(1) TFEU and when it established in *Zhu and Chen*[590] and *Zambrano*[591] that the status of EU citizens entails concrete rights, such as residence rights for TCNs who are parents of an EU citizen. A key element was added by the Court when it specified that the application of EU law is not restricted to cross-border movements[592]. Furthermore, the Court contemplated its limit in *Micheletti*[593], *Rottman*[594] and *Tjebbes*[595], conceding that the determination of nationality falls within the purview of MS. However, through these cases it also established that the application of discretion on nationality matters must respect EU law and the principle of proportionality, especially when it affects EU citizenship or results in its ultimate loss.

The status of European citizen is therefore a dynamic entity that, affected by legislative and judicial developments, remains in motion and it is always changing. Acknowledging these developments, some scholars[596] propose that European citizenship could reach the next step on its expansion and become decoupled from any national attachment, and in so doing providing a solution for statelessness in the EU.

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[588] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neu* ECLI:EU:C:2001:458, para 31. The criteria is further explained in case C-300/04 *M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag* ECLI:EU:C:2006:545, para 61.
[589] *Baumbast, R v Secretary of State for the Home Department.*
[590] *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department.*
[591] *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm).*
[592] *Ibid,* para 45.
[593] *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria.*
[594] *Janko Rottman v Freistaat Bayern.*
[595] Case C-221/17 M.G. *Tjebbes and Others v Minister van Buitenlandse Zaken* ECLI:EU:C:2019:189.
[596] *Supra,* note n. 586.

In favor of this evolution, Bradshaw advocates for extending European citizenship to all residents of the EU, both natives and non-natives. Supporting the argument, Kochenov criticizes the current state of European citizenship for its exclusionary criteria of relying solely on the possession on a MS' nationality. It is further argued that long-term TCNs are the ones most negatively impacted by this approach because, despite their contribution to society and their integration into the community, they lack necessary passport to be enjoy European benefits. Finding it hard to justify such exclusion in a democratic society, it is reiterated that a more equitable criterion for EU citizenship would be residence[597].

According to this reasoning, the current approach to citizenship alienates non-citizens and "overlooks stateless individuals"[598], whereas detaching citizenship from nationality and basing it on societal participation could foster a more engaged and inclusive European Union. Bradshaws supports the idea that EU citizenship "has failed to live up to [the ideal that citizenship is bestowed upon all those who are members of the community] and the exclusion faced by the stateless third country nationals and other people of concern highlight its real shortcomings." A call for a radical transformation of EU citizenship rooted in the idea of democratic inclusion is made here: such a change would allow the EU to formally recognize and grant rights to a large number of people who currently lack national citizenship. It is further argued that it is incompatible for a nation to be a member of the EU—considering the Charter and the existence of an obligation to accede to the ECHR[599]—without the entirety of their population being able to enjoy the rights to membership[600].

Arguments in favor of a disentailment of the two dimensions of citizenship are made from a perspective of social cohesion and equality as well. This idea disputes situations in which MS often create categories of nationality and classify individuals on the base of them, as well as take liberties with revoking of citizenship[601]. If the EU were able to grant EU citizenship according to its

[597] Dimitry Kochenov, 'The Ius Tractum of Many Faces: European Citizenship and the Diffi cult Relationship Between Status and Rights' (2009) 15 Colombia Journal of European Law 169, 235–236.
[598] Bradshaw, "Emerging From the Chrysalis: Union Citizenship Must Escape Its Nationality-Based Shortcomings," 197.
[599] See section 3 of chapter V.
[600] Bradshaw, "Emerging From the Chrysalis: Union Citizenship Must Escape Its Nationality-Based Shortcomings," 211.
[601] Kostakopoulou, "Who Should Be a Citizen of the Union?: Toward an Autonomous European Union Citizenship," 2.

discretion, especially to specific groups—such as stateless persons—this type of conduct would be limited. Additionally, following this logic, EU citizenship could add a layer of guarantees and fair treatment to TCNs. Focusing on this aspect, it has been argued that granting European citizenship to stateless individuals offers more benefits than merely providing residence status[602], such as political rights, from which stateless persons have been traditionally excluded[603], as well as diplomatic and consular protection. It could also mitigate other rights-related challenges stateless people face—including discrimination—and might indirectly facilitate the acquisition of nationality through naturalization, as, ideally, it would allow stateless persons to legally reside in a MS.

Brekoo[604] focuses on the exclusion of statelessness from the additional benefits of EU citizenship due to nationality functioning as an "enabling right." Granting EU citizenship would address this gap and, facilitating stateless persons' acquisition of nationality within an EU Member State, improve their overall rights and living conditions[605]. She goes on to illustrate the potential benefits of EU citizenship for stateless persons, imagining a hypothetical scenario where the definition of EU citizenship is revised to include, not only nationals of Member States, but also individuals *declared* as EU citizens[606]. This change would grant the EU the necessary authority to regulate the acquisition of EU citizenship independently. Under the terms of this new arrangement, individuals who are stateless may be eligible to apply for EU citizenship after proving their legal residency in the EU for an extended period of time and having been formally determined to be stateless through appropriate SDPs.

A concrete example of this idea is illustrated by Kochenov and Dimitrovs, who proposed its application for Latvian non-citizens[607], whose status, they

[602] Brekoo, "A Role For The European Union Addressing Statelessness." 37.
[603] Indira Goris, Julia Harrington, and Sebastian Köhn, "Statelessness: What It Is and Why It Matters," *Forced Migration Review* 4 (2009), 32.
[604] Brekoo, "A Role For The European Union Addressing Statelessness," 27.
[605] Brekoo, "Statelessness in the European Union: Exploring the Potential Value of Union Citizenship," 25.
[606] Brekoo, *ibid* 34, evokes the same treaty revision originally proposed by D. Kostakopulou in "Who Should Be a Citizen of the Union?: Toward an Autonomous European Union Citizenship," 3.
[607] Kochenov and Dimitrovs, "EU Citizenship for Latvian 'Non-Citizens': A Concrete Proposal," 60.

explain, is distinct from both national and alien[608]. They introduce an argument that contents how "[a] a Member State nationality for the purposes of EU law can have a different meaning and scope compared with "citizenship" in national law." Thanks to this distinction, it could be argued that a declaration issued by Latvia with the intent to clarify that non-citizens *are not* citizens under national law, but they *are* citizens under EU law, would suffice to extend EU citizenship to this category as well[609]. This proposal, albeit short of addressing stateless persons directly, attempts to challenge the current conception of EU citizenship as entirely dependent on MS nationality and infers that there could be a route to EU citizenship for other categories—such as long-term TCNs—without impacting MS' sovereignty on nationality matters.

However, the intricate nature of EU treaties and the supplementary characteristics of EU citizenship, render these propositions difficult to implement. Some authors acknowledge the probable inadequacies and suggest that strategic litigation might be necessary to make this possible for groups like the stateless Roma[610].

Despite the impression that EU citizenship might be evolving into an autonomous status, such transformation is far from being within reach, and the innovative proposal of employing it as a solution to statelessness in Europe represents a highly complex and, perhaps, over ambitious objective. Skepticism built around the feasibility of this proposal are conditioned by several logical gaps within the proposal that affect fundamental aspects of EU law.

The first objection that will be raised on the idea of an autonomous status for EU citizenship is summarized by the content of art. 20 TFEU, when it specifies the derivative nature of EU citizenship relative to MS nationality. Art. 9 TEU also explicitly states the *additional* nature of European Citizenship, leaving no room or grounds for competences, and rendering, therefore, its dependent relation to national citizenship inescapable. As

[608] Interestingly, they are skeptical of positioning them within the category of stateless persons as well. They lean towards a categorization of citizens that did not exist in international law before and consist in "nationality without citizenship or political participation." *ibid*, 64-65.
[609] *Ibid,* 61-62.
[610] Cf. Parra, "Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws With International Agreements to Reduce and Avoid Statelessness," 1666; Institute on Statelessness and Inclusion, "Nationality: Romani; Citizenship: European," *Statelessness Working Papers Series*, no. 2016/03 (2014).

highlighted in chapter four[611], several MS required for this aspect to be clarified in order to accept the creation of EU citizenship itself and it is easy to pinpoint some of those that would immediately object to the proposed switch[612]. Breaking the link between Eurozenship and national citizenship would effectively challenge national authority over citizenship matter and strain the foundations upon which the idea of EU citizenship is built. The EU is a voluntary association of states and that the exercise of the rights attached to EU citizenship is a consequence of the reciprocal obligations undertaken by MS[613]. Staples such as the principle of non-discrimination on the basis of nationality and recognition of nationality, stand at the core of EU citizenship: with these basic principles in mind, it is hard to imagine how EU citizenship would continue to flourish and constitute a guarantee for individuals when it becomes detached from the foundational element that binds it to MS.

Furthermore, continuing on this reasoning, the severance of such link would create not only a void within the reciprocal relation between states, but it would likely impact the one between state and individuals as well. Džankić[614], for example, warns that the emancipation from the state would imply the retention of benefits associated with citizenship without being accompanied by the duties that are usually their counterpart. EU citizenship could risk declining into a status that is free from accountability to any state and inaugurate various troublesome scenarios. On the other side of the coin, there are concerns that such an approach to rights and citizenship would create two tiers of citizenship, one composed of those who possess a MS nationality and those who only possess EU citizenship. This distinction would prove different political rights—as likely only those possessing national citizenship would be able to vote on national elections—as well as lower incentives for granting or simplifying naturalization, justified in account of already possessing the autonomous EU citizenship's benefits. The democratic gap would be further

[611] See section 4 of chapter IV.

[612] For example, this radical change would be unlikely to convince another Danish referendum on the heels of that of 1992; Hungary is one of those states that would not gladly accept such novelty to allow TCNs to become naturalized or acquire EU citizenship; it would also have to meet the opposition of the German Constitutional Court has concluded in *BVerfGE 123, 267 – Lissabon* that matters of populations are subject to the constitution's eternity clause (Daniel Thym, 'The Case Against an Autonomous 'EU Rump Citizenship' (2019), EUI Working Papers, 12).

[613] Case C-621/18, *Wightman v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999.

[614] Jelena Dzankic, "Eurozenship: Always a Bridesmaid?," Verfassungsblog: On Matters Constitutional, 2019.

aggravated by states' arguments that the implementation of exclusionary practices impacting EU citizenship would not concern other MS nor the EU any longer, as EU citizenship can be achieved through other routes. This would imply a lowered standard of protections for individuals and their nationality rights, allowing extensive liberties compared to those currently restrained by the Court[615]. Arguably, democratic principles would suffer from these implications, as civic engagement and solidarity would be weakened by corroded civic responsibilities and duties—that EU citizenship alone would be unable to enforce—would go neglected, as new classes of citizenships would be created, severing the safeguards that are guaranteed today by the reciprocity that exists between MS.

The second motion that would be extrapolated from the wording of art. 20 is that disentangling EU citizenship from national citizenship would require a Treaty change or the institution of a Citizenship Directive[616]. The search for competence necessary to the formulation of a Directive on citizenship would be challenging, particularly in light of states who have never hidden their sentiments towards the limitations that must be imposed upon EU citizenship[617]. An amendment of the Treaty, on the other hand, would represent an equally tall order, if not taller, due to the many steps it requires and the many possibilities of veto it involves[618].

Among others, the last points that is worth mentioning on this matter—pertinent to the focus of this research—is that the concrete relevance of EU citizenship as a solution to statelessness might have been exaggerated in some instances by those who propose it. If the premises are to grant it on the basis of residence, it has been noted that the acquisition of nationality for a third-country national residing in the EU is the last step in a process in which secure residence would have already guaranteed equal treatment rights. As

615 Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (London: University College London, 2019). On this point, D. Kostakopoulou claims that EU citizenship rights would not be weakened the disentanglement of the two planes, as MS are held accountable by EU institutions that will enforce the compliance with the obligations if breached. However, this justification does not seem to fully convince in the context of nationality matters if drastic changes were to be applied to the concept.

616 Hans Ulrich Jessurun D'Oliveira, "Brexit, Nationality and Union Citizenship: Bottom Up," *EUI Working Papers* 2018, no. 49 (2018): 1–13.

617 This is the same reasoning that leads the Court to caution when encountering cases relating to nationality and has never challenged sovereignty of MS in this area.

618 Art. 48 TEU.

explored[619], the substantial rights guaranteed to TCNs by the directive 2003/109/EC would be minimally increased by the addition of EU nationality. This explains why, reportedly, TCNs often do not feel the need to acquire the nationality of the country of residence, as doing so would not bring significant increment to their rights and benefits[620]. Instead, it could be argued that advanced migration agreements between states, such has been he case of Brexit, can substitute the need to transform EU citizenship into an autonomous state and guarantee the equivalent rights. It has been observed that the EU and the UK have solved more than 90% of their issues relating to citizens' rights through the exit agreement that they put in place[621], hinting therefore to the fact that the concept of autonomous EU citizenship might be redundant in light of the agreements that states might be able to reach.

These elements lead to the conclusion that EU citizenship does not fundamentally change the rights and security granted to long-term residents, whereas those who are not residents would hardly enjoy complete protection through EU citizenship's rights alone. This point is particularly relevant for stateless persons for whom is not clear how the granting of a disentangled EU citizenship would solve their core adversities. This idea seems fundamentally flawed by the fact that the EU is not a state and granting them Eurozenship would not affect their legal status. If EU citizenship could ever possess the potential to alleviate the limitations faced by stateless persons, when detached from national citizenship, it would lose its most attractive qualities—the guarantees and protections provided by a state.

The implication that the key to rights in the EU and to EU citizenship continue to have a common fundamental element in residence could spark a radical idea: making national citizenship dependent on Eurozenship, rather than the other way around, and in so doing uniforming rules for acquisition and loss of citizenship for *all* TCNs. However, the creation of an EU citizenship framework based on residence would face numerous hurdles, first among many, the 27 different nationality policies existing within the EU[622] and the

[619] See chapter IV.

[620] Falk Lämmermann, "Einbürgerung – Aktuelle Entwicklungen Und Perspektiven," *Zeitschrift Für Ausländerrecht Und Ausländerpolitik* 29, no. 9 (2009): 289–96.

[621] Daniel Thym, "The Case Against an Autonomous 'EU Rump Citizenship,'" *Verfassungsblog: On Matters Constitutional*, January 18, 2019.

[622] Though EU has not signaled intentions in this direction, academic calls for minimum harmonization are mounting . Olivier Vonk, *Dual Nationality in the European Union: A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (Leiden: Martinus Nijhoff Publishers, 2012), 160–161.

wide sovereign discretion in nationality laws exercised by member states. To implement this proposal would require the unlikely cooperation of states and the effort necessary would result in a disproportionate solution to the much more specific issue of statelessness[623].

It is true that, through a post-nationality lens, EU citizenship could be morphed into an innovative solution that guarantees and identity and membership to stateless persons. And it is also true that major historical changes often unexpectantly prevail from what —initially—might have appeared to be *radical* ideas for reform[624]. However, given the delicate interplay that exists today between the EU and MS regarding the scope of the EU citizenship, disentangling it from national citizenship seems an objective just out of reach. In fact, currently, despite the continuous evolution of the concept that we are witnessing through the input of the Court, its development as an autonomous status is realistically limited and faces significant challenges.

The absence of a clear path for EU citizenship to directly aid the condition of stateless persons, does not however diminish the support that this element of EU law can provide for them through the decisions of the Court. As chapter IV has underscored, the expansion of TCNs rights and the clarifications regarding their rights, have often sprung from the interpretations of this element and its related rights, and has allowed to Court to express her rejection towards the withdrawal of citizenship that would result in statelessness.

5.3 The Role the Charter of Fundamental Rights

A further instrument in the hand of the EU that cannot be omitted is the Charter of Fundamental Rights of the EU and the conjunct function that human rights perform within the Union. The EU has formulated a series of principles and values that are considered to be of utmost importance and that the Union committed to promote internally and externally. These values, which include respect for human rights and the rule of law, are generally

[623] Arrighi, Jean-Thomas. "On the Risk of Trying to Kill 'Seven at a Blow.'" Verfassungsblog: On Matters Constitutional, 2019.
[624] Kostakopoulou, "Who Should Be a Citizen of the Union?: Toward an Autonomous European Union Citizenship," 3.

accepted by the European community and have been incorporated into its legislation over time. Art. 2 of the TEU, for one, clarifies which are the core values of the EU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*"*

They have inspired the development of key principles of EU law, such as proportionality, legal certainty, gender equality, equality before the law, non-discrimination, subsidiarity, equity, good faith, solidarity, and effective remedies. All these principles are relevant to addressing issues of statelessness: as a human rights issue, it intersects with the EU's human rights priorities and many of the mentioned legal principles. For example, instance the legal certainty principle matters in cases involving the determination of statelessness and the proportionality principle matters when evaluating state actions that lead to statelessness[625]. The EU's commitment to these values and principles underscores its approach to human rights and legal issues, both domestically and internationally. In fact, art. 3 of the TEU states that "The Union's aim is to promote peace, its values and the well-being of its peoples"[626] and art. 6(3) integrates specifying that "fundamental rights […] result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Moreover, art. 6(1) of the TEU recognizes the Charter of Fundamental Rights as having the same legal value as the Treaties, which then becomes a pertinent legal instrument for the protection of non-refugee stateless persons. As a more sophisticated and contemporary instrument than the ECHR, the Charter functions as an exhaustive list of fundamental rights within the European Union and includes contemporary rights like the right to personal data

[625] As demonstrated by *Janko Rottman v Freistaat Bayern*. See section 4 of chapter IV.
[626] An effort that has been strengthened through the introduction of the EU citizenship.

protection[627], the right to asylum[628], and the right to good administration[629]. These additions demonstrate how fundamental rights within the EU framework have evolved.

The EU Charter fulfills three principal purposes within the Union's legal system. Firstly, it acts as a source of inspiration for discovering general principles of EU law; secondly, it aids in interpreting EU law, mandating that secondary EU legislation and national laws implementing EU directives be construed in light of the Charter's provisions; lastly, it provides grounds for judicial review, allowing for the annulment or invalidation of EU legislation and national laws that contravene the Charter's principles[630]. Application and interpretation of the EU Charter are primarily directed at the Union and MS when they are implementing EU law[631] and the Charter does not expand the competences of the EU, as laid down in the Treaties[632]. However, the concept of "implementation of EU law" has been broadly interpreted, as demonstrated by *Åklagaren v Hans Åkerberg Fransson*[633], where even a distant connection to EU law sufficed to invoke the Charter[634]. This broad interpretation has been

[627] Art. 8 of the EU Charter "1. Everyone has the right to the protection of personal data concerning him or her."

[628] Art. 18 of the EU Charter "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

[629] Art. 41 of the EU Charter "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union."

[630] Koen Lenaerts, "The Role of the EU Charter in the Member States," in *The EU Charter of Fundamental Rights in the Member States*, ed. Michal Bobek and Jeremias Adams-Prassl (Oxford: Hart Publishing, 2022), 19–20.

[631] As prescribed under the *Scope* of the EU charter in art. 51(1): 1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

[632] Art. 51(2) of the Charter: "2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." Which is also recalled within the TEU", recalled also in art. 6(1) of the TEU: […] The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."

[633] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105.

[634] On this concept, it was later expanded through Case C-198/13 *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others* ECLI:EU:C:2014:2055 that to determine whether a national measure falls under the implementation of EU law for the purposes of Article 51(1) of the EU Charter it is necessary to evaluate the connection between the national law and EU law in terms of purpose, content, and relevant EU regulations.

further refined to include national measures that aim to implement EU law, pursue objectives related to EU law, or have rules that affect or are influenced by EU law[635].

As seen, while nationally falls under the purview of MS competence, it intersects with EU law in specific contexts such as migration, asylum policy, and European citizenship. In these intersections, the Charter's applicability is considered, particularly in light of the Zambrano doctrine[636], which indicates the Charter's relevance when Article 20 TFEU (pertaining to EU citizenship) is applicable. Thus, nationality matters can sometimes fall within the Charter's scope when connected to EU law.

The relationship between the EU Charter and the ECHR is relevant to this, as it is characterized by overlapping rights, such as the prohibition of torture—found in both instruments[637]: as established by the Charter, where its rights correspond with those in the ECHR, their meaning and scope are aligned[638]. However, the ECHR is seen as providing minimum protection, with the Charter potentially offering more extensive safeguards, as specified in art. 52(3), which, when referring to the correspondence of rights with the ECHR, reads that "[…] this provision shall not prevent the Union law providing more extensive protection."

The Charter delineates various rights, some of which apply universally, such as the right to life (Article 2), while others are specific to certain groups, including children (Article 24), the elderly (Article 25), and persons with disabilities (Article 26). Additionally, workers' rights, like protection against unjustified dismissal (Article 30), and family protections (Article 33) are specified. Interestingly, though part of Title V, the right to good administration (Article 41) is addressed to 'every person' and pertains to EU institutions. Rights under Title V of the Charter pertain solely to EU citizens, including the right to vote in European Parliament elections (Article 39) and freedom of movement and residence (Article 45). Due to their non-citizen status

[635] As later clarified in *Julian Hernández and Others*, para 37.

[636] Delia Ferri and Giuseppe Martinico, "Revisiting the Ruiz Zambrano Doctrine and Exploring the Potential for Its Extensive Application," *European Public Law* 27, no. 4 (2021): 685-698.

[637] Art. 3 in the ECHR and art. 4 of the Charter of Fundamental Rights of the EU.

[638] Art. 52(3) of the Charter: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"

stateless people face difficulties under the Charter that restrict their access to certain rights. The right to nationality is notably absent.

However, the Charters Titles on Dignity and Freedoms[639] include provisions that are applicable to every person irrespective of nationality. Article 7, which protects the right to private life (mirroring Article 8 of the ECHR) could be invoked to safeguard nationality as an aspect of personal identity. As argued by Vlieks[640], art. 7 is relevant to the protection and identification of statelessness as the European Court of Human Rights has recognized that nationality is a crucial aspect of a person's identity, protected under the right to private life: the landmark case *Genovese v. Malta*[641] codified nationality as part of an individual's private life[642]. Similarly, in *Hoti v. Croatia*[643], the Court found statelessness to be a relevant element to private life and found that the state did not comply with its positive obligation to provide a procedure to determine his status[644]. Nationality has been, therefore, established as central in the right to private life, as well as the obligation to clarify the status of the individual. Consequently, it can be argued that EU rules that address individuals lacking nationality, such as third-country nationals, and fail to consider the impact on personal identity or leave individuals uncertain about their nationality, can be challenged using Article 7. This emphasizes how important it is to identify stateless people in order to guide future decisions about the best course of action for protection.

Additionally, Article 6 forbids arbitrary detention, which is pertinent to stateless people in migratory contexts and highlights the significance of identifying stateless people to guarantee the protection of their rights. Stateless individuals in irregular migratory contexts in Europe often face immigration detention. The Court has stated that detention in a migratory context seriously interferes with the right to liberty and must comply with strict safeguards, such as legal basis, clarity, predictability, accessibility, and protection against arbitrariness[645]. The European Union Agency for

[639] Titles I and II of the EU Charter.
[640] Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness*, 202.
[641] *Genovese v Malta*. See chapter III.
[642] *Ibid*, para 33.
[643] *Hoti v Croatia.* See chapter III.
[644] *Ibid*, para 141.
[645] Case C-528/15 Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor ECLI:EU:C:2017:213, para

Fundamental Rights (FRA) has noted that in situations of statelessness, practical obstacles to removal may exist that are beyond the migrant's control, with no real prospect of removal[646]. As a reasonable prospect of removal is required by the Return Directive[647] to prevent arbitrary detention, statelessness must be considered when assessing detention in relation to removal. Stateless persons' rights are thus protected by the right to liberty underscoring the significance of identifying their unique vulnerabilities and making sure they are appropriately recognized[648]. Thus, the right to liberty can be relied upon by stateless individuals to protect their rights, underscoring the significance of identifying and addressing their unique vulnerabilities[649]. Furthermore, procedural guarantees—particularly with regard to immigration naturalization and other administrative procedures—are exceptionally important for stateless people. According to CJEU case law on EU citizenship and EU legislation on asylum and migration, many of these procedures seem fall within the scope of the Charter.

The EU Charter is a vital instrument for fundamental rights within the EU, and it could provide critical support in the protection for stateless individuals, particularly in terms of identification and procedural guarantees. Although certain rights are restricted based on nationality, the Charter offers significant safeguards that have the potential prevent and identify statelessness. The distinction between EU citizens and non-citizens, including stateless individuals, underscores the importance of non-discrimination in addressing statelessness within the EU legal framework and in properly identifying statelessness.

40. On guidelines and safeguards relating to (arbitrary) detention of stateless people see also The Equal Rights Trust, "Guidelines to Protect Stateless Persons From Arbitrary Detention" (ERT, 2012).

[646]European Union Agency for Fundamental Rights, "Detention of Third-Country Nationals in Return Procedures" (FRA, 2010).

[647] See Art 15(4) Return Directive.

[648] Cf. Tamas Molnár, "The Charter of Fundamental Rights and the Protection of Stateless People in the EU: A Dormant Giant," *European Network on Statelessness* (blog), 2017, https://www.statelessness.eu/updates/blog/charter-fundamental-rights-and-protection-stateless-people-eu-dormant-giant.

[649] Drawing on Articles 6(1) and 13 of the ECHR.

5.3.1 The influence of the ECHR on the EU and the obligation for status determination

Through the direct link that exists with the Charter, the ECHR is another element that could play an interesting role in the establishment of stateless status determination procedure in EU MS. While it has been clarified that the EU is not (yet) part of the ECHR[650] despite the intentions manifested within the TEU[651], the Convention holds an exceptional role within the Union's legal order[652]. The ECJ has incorporated the ECHR and the ECtHR jurisprudence as general principles of EU law[653] and, while it is true that the ECJ has asserted its autonomy throughout the years and has reserved the right to deviate from the ECHR when necessary, the Court has also routinely directly referred to the Convention in its case law[654], as well as to the ECtHR case law[655]. On this same note, the Court has also acknowledged that changes to

[650] Opinion 2/13, para 258.
[651] Art. 6(2).
[652] Cf. Rick Lawson, "Confusion and Conflict? Divergent Interpretations of the ECHR in Strasbourg and Luxembourg," in *Dynamics of the Protection of Human Rights in Europe*, ed. Lawson and Matthijs De Blois (Dordrecht: Brill | Nijhoff, 1993), 219; Dean Spielmann, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities," in *The EU and Human Rights*, ed. Philip Alston, Mara R. Bustelo, and James Heenan (Oxford: Oxford University Press, 1999), 757; Denys Simon, "Des Influences Réciproques Entre CJCE Et CEDH : " Je T'aime, Moi Non Plus " ?," *Pouvoirs* 96, no. 1 (2001): 31 Laurent Scheeck, "Solving Europe's Binary Human Rights Puzzle: The Interaction Between Supranational Courts as a Parameter of European Governance," *Centre D'études Et De Recherches Internationales Sciences Po*, no. 15 (2005), 1; Sionaidh Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis," *Common Market Law Review* 43, no. 3 (June 24, 2004), 629; Guy Harpaz, "The European Court of Justice and Its Relations With the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy," *Common Market Law Review* 46, no. 1 (2009): 105.
[653] Wouters and Ovádek, The European Union and Human Rights: Analysis, Cases, and Materials, 244. See also Joined Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk* ECLI:EU:C:2003:294, paras 71 ff.
[654] See Case 36-75 *Roland Rutili v Ministre de l'intérieur* ECLI:EU:C:1975:137; and Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* ECLI:EU:C:1974:51.
[655] Joined cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* ECLI:EU:C:1989:337; and C-13/ 94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170.

its case law might be needed, in order to adapt to the new standard developed by the ECtHR[656].

A further relevant element is art. 52(3) of the EU Charter[657], which creates a direct link with the ECHR, and inaugurates a framework of harmony in the interpretation of right within Europe[658]. Art. 52 mandates an alignment between what is guaranteed by the Charter and the ECHR, attempting to establish a minimum standard no lower than the one offered by the ECHR and allowing for the possibility to provide for a more extensive one. The EU is, therefore, indirectly bound by the minimum standard provided by the ECHR, in order to avoid discrepancies in human rights protection and conflicts in the interpretation of these rights[659]. However, when referencing the ECHR, it could be argued that the provision does not merely refer to the Convention but includes the dynamic interpretation that the ECtHR provides of it[660]: mutual and regular reference and reliance on both assures greater legal certainty related the content of the rights, as exemplified by the *Baustahlgewerbe* case[661], in which the ECJ defined the standard of the rights concerned—art 85 of the ECC Treaty[662]—by referencing the ECHR case law[663] and verifying whether the standard set by the ECHR has been met. Similarly, in the *Kadi* case, the CJE found it necessary to rely on a previous ECtHR decision[664] in order to distinguish the antithetical positions of the two

[656] See C-94/00 *Roquette Frères SA v Directeur général de la concurence, de la consommation et de la répression des fraudes, and Commission of the European Communities* ECLI:EU:C:2002:603, para 29.

[657] Síofra O'leary, "The EU Charter Ten Years on: A View From Strasbourg," in *The EU Charter of Fundamental Rights in the Member States*, ed. Michal Bobek and Jeremias Adams-Prass (Oxford: Hard Publishing, 2020), 42.

[658] "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[659] Francesco Cherubini, "The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View of the Accession," *German Law Journal* 16, no. 6 (2015): 1377-8.

[660] Lock, "The ECJ and the ECtHR: The Future Relationship Between the Two European Courts." 382.

[661] Case C-185/95 *P Baustahlgewebe v Commission* ECLI:EU:C:1998:608

[662] Today art. 101 of the TFEU

[663] The CJEU quoted the judgments in Erkner and Hofauer v Austria (1987) Series A No 117; Kemmache v France (1993) Series A No 218; Phocas v France ECHR 1996-II; Grayfallou AEBE v Greece ECHR 1997-V, see Baustahlgewebe v Commission (n 14) para 29.

[664] ECtHR, *Behrami and Behrami v France,* App No 71412/01 [2007]; ECtHR, *Saramati v France, Germany and Norway,* App. N. 78166/01 [2007].

cases, which contributed to the ECJ final decision. Furthermore, in the *Spain v United Kingdom* case[665], the Court heavily anchored its judgment on the ECtHR precedent of *Matthews v United Kingdom*[666], reaffirming its alignment to it and prioritizing Convention rights[667].

Although not bound, the ECtHR and the ECJ share therefore an interconnected dialogue that allows for the preservation of their autonomy and flexibility. However, the ECJ does not miss a chance to reiterate that the ECHR is an inspiration, and not formally binding, that the EU retains full autonomy, and that the Charter remains the main point of reference. Nonetheless, the close correlation between the two is often underscored by the ECJ case law, as it has been in the *McB* case[668], where the Court explicitly confirmed the direct correspondence between art. 7 of the Charter and the art. 8 of the ECHR, grounding its judgment on the scope and interpretation of the latter. It is true that subsequential jurisprudence[669] have shown more restrain and negated the binding power of the Convention, but, seeing how the minimum standard provided by the Charter is a mirror of the ECHR and its related case law, the implication seems to be an ongoing influence on the EU law and the ECJ[670], perhaps concealing the potential to influence its actions in relation to statelessness determination as well.

Starting from these premises, there have been arguments that propose the existence of an obligation to determine statelessness based on the interpretation of some articles of the ECHR[671]. Although lacking explicit reference to statelessness and to the right of nationality, the case law of the ECtHR has been interpreting the Convention in a direction that seems to

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[665] Case C-145/04 *Spain v United Kingdom* ECLI:EU:C:2006:543.

[666] ECtHR, *Matthews v United Kingdom* App. No 24833/94 [1999].

[667] The ECtHR had found EU law to be incompatible with the ECHR due to the EU's 1976 Act on Direct Elections to the European Parliament excluding British citizens living in Gibraltar from elections to the European Parliament.

[668] Case C-400/10 *PPU McB v E* ECLI:EU:C:2010:582, para 53.

[669] Case C-279/09 *DEB Deutsche Energiehandels—und Beratungsgesellschaft* ECLI:EU:C:2010:811, para 32; *Åklagaren v Hans Åkerberg Fransson*, para 44; Case C-501/11 *Schindler v Commission* ECLI:EU:C:2013:522, para 32; Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* ECLI:EU:C:2012:233, para 62.

[670] E.g. Joined Cases C-924/19 PPU and C-925/19 PPU ECLI:EUC:2020:367, para 192 (Directive 2011/95/EU) and Directive 2013/32/EU); Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* ECLI:EUC:2018:257, para 47 (Equality Framework Directive (2000/78/EC)).

[671] Cf. C. Vlieks, "Strategic Litigation: An Obligation for Statelessness Determination Under the European Convention on Human Rights?"

suggest that the failure to identify statelessness might be in violation of the Convention.

Firstly, a relevant right could be enshrined in art. 3 of the ECHR, that provides for the prohibition of torture and inhumane or degrading treatment and is an absolute and interrogable right. Three key issues should be taken into consideration in relation to this right: the mental suffering and uncertainty that derive from an unclear status; detention conditions; and the possibility of expulsion.

Stateless persons are privy to mental suffering caused by the uncertainty of their legal status, especially if the state fails to respond to their situation and abandons them in a limbo[672]. The Court and the Commission have long included psychological suffering within the grounds of art. 3[673] and, specifically, there have been precedents in which the ECtHR has ruled that severe mental distress caused by the state's inaction qualifies as *inhuman and degrading treatment*. Such was the case of *Kurt v. Turkey*[674], in which the son of the applicant had been the victim of disappearance and requested that the State be held responsible for the suffering she endured due to the inaction and complacency of the authorities in the face of her prolonged stress. In this case, the Court accepted that the mental suffering amounted to a treatment within the scope of art. 3[675]. The uncertainty and stress that derive from being unable to determine one own's status, combine with the lack of response from the authorities, might cause a similar mental suffering and impose a positive obligation for states to determine statelessness[676].

Furthermore, stateless persons are frequently detained in migratory contexts, which could entail harsh conditions, mainly in detention centers, and prolonged, which might result cruel and degrading[677]. When there is not realistic prospect of deportation or removal, the detention becomes arbitrary and indefinite: in absence of a clear legal mechanism for stateless determination, the detention of stateless persons will inevitably become

[672] See section 2 of chapter I.
[673] P Pieter Van Dijk et al., eds., *Theory and Practice of the European Convention on Human Rights*, 5Theory and Practice of the European Convention on Human Rights ed. (Cambridge: Intersentia, 2018), 416-417.
[674] ECtHR, *Kurt v Turkey*, App No 24276/94 [1998].
[675] *Ibid*, para 134.
[676] C. Vlieks, "Strategic Litigation: An Obligation for Statelessness Determination Under the European Convention on Human Rights?" 4.
[677] De Chickera and Et Al., "Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons," 93-94.

perpetual, which could be considered degrading and inhumane treatment under art. 3. The Court has established that mental suffering associate with arbitrary detention violates the Convention in *Mikolenko v Estonia*[678], recognizing the admissibility of the initial detention, which fell within the scope of art. 5, but deemed unjustified when it became evident that the authorities had not done their due diligence relating to the deportation proceedings of the detainee[679]. Additionally, the Court has also recognized that the treatment that stateless persons experience while in detention might also constitute degrading and inhumane treatment, both because of the legal vacuum they are left in, but also because of the possible harsh conditions they are subject to[680]. In the case of *A and others v the United Kingdom*[681], the Court acknowledged that the uncertainty linked to indefinite detention is a relevant element to art. 3[682].

The last question relevant for this article is expulsion, as stateless persons might face deportation to country where they might be subject to inhumane and degrading treatment due lack of tie or legal protection. The exposure to such ill treatment might warrant protection under art. 3, as the Court's case law has suggested in the case *Auad v. Bulgaria*[683], where expulsion was halted due to a genuine risk of inhumane and degrading treatment. In this case, the Court recognized the relevance of the applicant's stateless status in deciding that expulsion would constitute a risk of violation of art. 3, demonstrating that determining statelessness can be relevant in assessing the risk of ill treatment.

Art. 5 of the ECHR protects against arbitrary detention and outlines the ground under which detention is permitted, a circumstance that stateless persons are at heightened risk of suffering from when the expulsion is not feasible and the readmission in the country is negated. Again, *Auad v Bulgaria* is a reference point on this, as the detention of a stateless persons was considered to violate art. 5 once it became clear that deportation was not an option. This exemplifies how status determination mechanisms are necessary to avoid arbitrary detention, as the inability of the state to identify the statelessness of the detainee is the essential factor that contributes to the arbitrary nature of the detention status. While it is true that art. 5 does not

[678] ECtHR, *Mikolenko v Estonia*, Appl, No. 10664/05 [2009].
[679] *Ibid*, para 63.
[680] *Kim v. Russia* "The Court also held, unanimously, that there had been violations of Article 3 of the Convention on account of the applicant's conditions of detention […]." 75.
[681] ECtHR, *A. and others v the United Kingdom,* App No 3455/05 [2009].
[682] *Ibid,* para 116.
[683] ECtHR, *Auad v Bulgaria*, App No 46390/10 [2011].

explicitly require states to determine statelessness, the Court's case law has implied several times that statelessness should be considered when assessing the legality of detention[684], which is to be considered unlawful if the person cannot be deported due to statelessness. It could be argued that this creates an implicit obligation for states to identify stateless persons and therefore implement a SDPs, or else be in violation of art. 5.

Additionally, as recalled previously in this chapter, art. 8 of the ECHR positions itself as crucial element of stateless persons' protection. The right to respect for private and family life acquires relevance especially when it has been employed for the protection of migrants and their family. It has been argued[685] that, when the actions of the state (or lack therefore) impact personal circumstances, it can be considered infringement of this right, as it was concluded by the Court in *Slivenko v. Latvia*[686], when the removal of a family possessing ties to the country was deemed interference with private life. In considering the condition of statelessness of the applicants to be a relevant personal circumstance to keep into account, the Court might have suggested a duty to establish statelessness in order to assess and acknowledge statelessness in these contexts.

Furthermore, in the case of *Kuric and Others v. Slovenia*[687], the erasure perpetrated by the country left the applicant with an uncertain legal status that the Court considered to be an interference with the right to personal life. These cases indicate that the Court has confirmed a position according to which prolonged uncertain status and the failure to determine statelessness might be found to be in conflict with essential aspects of the right to private life, obliging states to fulfill SDPs in order to comply with their obligations.

Furthermore, the prohibition of discrimination as prescribed by art. 14 prohibits the discrimination of the enjoyment of the rights guaranteed by the Convention, rendering this article not independent but applicable in conjunction with other ECHR rights. In the context of statelessness, discrimination based on nationality acquires great relevance, as stateless persons might face discrimination in various area due to their lack of nationality. This was the case of *Andrejeva v. Latvia*[688], where the Court found

[684] E.g. *Kim v. Russia* and *Mikolenko v Estonia.*
[685] C. Vlieks, "Strategic Litigation: An Obligation for Statelessness Determination Under the European Convention on Human Rights?" 14.
[686] ECtHR, *Slivenko v. Latvia*, App. no. 48321/99, [2003].
[687] ECtHR, *Kuric and Others v. Slovenia*, App. no. 26828/06 [2012], paras. 336-8.
[688] ECtHR, *Andrejeva v Latvia*, App No 55707/00 [2009].

that differential treatment based solely on nationality violated Article 14 in conjunction with Article 1 of Protocol No. 1—right to property. The failure to identify stateless persons can therefore lead to similar systematic discrimination, and art. 14 might therefore imply an obligation for states to address the unique vulnerabilities faced by stateless persons by providing for an identification mechanism.

It could be deduced that the ECHR might implies an obligation for states to determine statelessness, and Vlieks suggests that strategic litigations on the basis of these rights might be able to highlight this crucial point[689]. Although not explicitly requiring states to determine statelessness, the direction chosen by the court in several instances suggests that compliance with the Convention cannot be achieved without mechanisms for status determination and future case law might lead to a more explicit obligation in this sense.

Given the close connection between the two European courts and the fact that all MS are parties to the Convention, such conclusions might be relevant for the EU legal system as well. If the ECtHR interpretation of the ECHR articles mandates status determination for statelessness, this could indirectly influence future ruling of the ECJ in an effort to align its policies accordingly.

5.4 EU Soft law on statelessness

Despite an apparent lack of concrete foundations, the seeds of EU action on statelessness have been long present within the instruments employed by the institutions to steer the Union's agenda. Soft law has increasingly been concerned with addressing the question of statelessness within the EU, by providing guidelines and directions. From this viewpoint, the references that the EU has made to statelessness, in multiple occasion, within its Conclusions and Recommendations, have been symptomatic of the EU's concern towards the topic: though non-binding sources, they are essential tools influencing policy and legislative developments across MS. Conclusions serve as distinct barometers of the political will of the MS influencing both national policy and the course of future EU legislation. The purpose of recommendations on the other hand is to encourage the MS to adopt particular policies or actions

[689] Vlieks, "Strategic Litigation: An Obligation for Statelessness Determination Under the European Convention on Human Rights?" 27.

in order to achieve a shared goal. Recommendations carry significant weight as they providing guidance on best practices and policy measures, often promoting harmonization across the EU and, as will further explored later, they provide further clarification on the interpretation of the EU norms. The EU advocacy for adoption similar policies across Member States through these instruments encourages a more uniform and cohesive approaches to shared challenges and is instrumental in agenda-setting. Conclusions and recommendations are instrumental in agenda-setting: by identifying emerging issues and priorities, they help shape the EU's policy agenda and influence the focus of future legislative efforts.

In 2014, the European Council produced a Conclusion reporting the strategic agenda of critical priorities for the next five years[690]. Within this agenda, one of the areas mentioned was the area of Freedom, Security, and Justice, which stressed how the EU must "develop strategies to maximize opportunities of legal migration through coherent and efficient rules" and that the EU must address smuggling and trafficking of human beings through a more robust and harmonized migration policy, as well as making the implementation of the CEAS an absolute priority, by identifying and protecting vulnerable people across the region[691]. Although statelessness is not specifically mentioned, efforts to protect stateless people and address statelessness as a whole are indirectly supported by the larger policy frameworks and priorities established within the Conclusion. The European Council emphasized the importance of developing a comprehensive approach to migration and asylum policies: this approach includes protecting vulnerable groups within the EU's migration and asylum framework[692]. The Conclusion indirectly contributes to addressing the legal limbo that stateless persons often find themselves in through the prioritization of the need for fair and effective asylum systems, as determined by one of the EU's key objectives, the creation of an area built on the respect for fundamental rights.[693]. Moreover, the Conclusion's call for enhanced cooperation among Member States to address migration challenges comprehensively[694], is significant as statelessness is arguably included within the challenges that the EU is facing, and enhances cooperation can lead to sharing of best practices and development of harmonized approaches to

[690] European Council Conclusions of 27 June 2014, EUCO 79/14.
[691] *Ibid*, Section 1, para 8.
[692] *Ibid*, Section 1 paras 1, 5 and 7.
[693] *Ibid*, Section 1, para 1.
[694] *Ibid*, Section 1, paras 2, 3, 7 and 9.

statelessness. One of the most relevant mentions of statelessness is the 2015 Conclusion on Statelessness[695], which marked a significant milestone in the EU's commitment to addressing and protecting stateless persons. This document highlights the importance of acknowledging statelessness as a critical human rights issue[696] and advocates for comprehensive and coordinated measures within the EU.

The Council has brought attention to this subject and renovated its discussions at the highest levels of EU governance by clearly recognizing the urgency of statelessness and its impact on human rights. The recognition of the immediate need for concrete action serves as a basis for creating targeted policies and initiatives aimed at protecting the rights of stateless individuals in the EU. Among the most notable aspect of the conclusion, the admission of the vulnerability of stateless persons[697], condition underscored previously by the Global Approach to Migration and Mobility of 2005, stands out, as is positions them within a framework for which appropriate ad hoc measures are necessary. On this, the Conclusion recognized that the accurate identification of statelessness is a necessary condition for the enjoyment of core fundamental human rights and avoid discrimination and continues therefore by signaling the paramount priority of providing and improving identification and registration procedures

Moreover, the 2015 Conclusions stressed the importance of harmonizing practices concerning statelessness across EU Member States[698] and emphasized the necessity of collaborating with international organizations and civil society to address statelessness effectively, welcoming the 10-year campaign to end statelessness, as well as recalling that the Asylum, Migration and Integration Fund 2014-2020 can be used to finance measures addressed to stateless persons. This collaborative approach leverages the expertise and resources of international actors to develop comprehensive strategies for preventing and reducing statelessness, such as the UNHCR has attempted to

[695] Council of the European Union, of 4 December 2015, Council adopts Conclusions on Statelessness.

[696] The Conclusion references, among others, Art. 15 of the UDHR and the ECN on the right of nationality, as well as the EU's Strategic Framework on Human Rights and Democracy and its Action Plan, which focuses on tackling statelessness within non-EU countries.

[697] "*Recalling* that the Global Approach to Migration and Mobility of 2005 refers to stateless persons as a particularly vulnerable group […]." Council of the European Union Conclusions on Statelessness of 4 December 2015, para 6.

[698] *Recognise* the importance of exchanging good practices among Member States concerning the collection of reliable data on stateless persons as well as the procedures for determining statelessness, *ibid,* para 16.

produce for the past decades, in an effort to ensure that the EU and its policies are aligned with the international standards and the best standards introduced by it, to enhance its own efforts on the matter. The recognition of statelessness as a significant issue the EU has set a clear and actionable agenda through its advocacy for identification procedures and interstates collaboration, which in turn has the potential to contribute to a broader trend within the EU to take action on statelessness and undertake a commitment of protection.

Furthermore, there have been mentions of stateless persons throughout several Resolutions over the years. In 2015, the Resolution of 8 September 2015 on the Situation of Fundamental Rights in the European Union (2013-2014) made some relevant comments on the situation of stateless persons: firstly, it condemns unlawful detention of stateless persons, highlighting their right to dignity, and effective remedy[699]; additionally, it recognizes the "fundamental right to citizenship", inviting MS to respect it and ratifying the 1961 Convention and the 1997 ECN. An additional Resolution that provides some fascinating insight into the EU's position concerning the condition of stateless persons is the 2019 Resolution on Children's Rights[700], in which the EP expresses its concern about children born stateless in the EU, resulting in lack of "basic rights, including healthcare, education and social protection"[701] and directly calls upon MS to find a solution. Lastly a clear agenda on statelessness is further necessitated by the 2016 Resolution on the Situation in the Mediterranean and the Need for a Holistic Approach to Migration, which emphasizes the importance of reducing the number of stateless persons and encourages Member States to introduce statelessness determination procedures and share good practices among themselves concerning the collection of reliable data on stateless persons as well as on the procedures for determining statelessness[702].

These elements of soft law highlight a clear position of the EU towards the protection of stateless persons within the Union and suggest awareness towards their vulnerable position. Through the various mentions emerges a general direction recognized by EU institutions, which emphasizes the

[699] Resolution (EU) P8_TA(2015)0286 of the European Parliament of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), para 124.
[700] Resolution (EU) P9_TA(2019)0066 of the European Parliament of 26 November 2019 on children's rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child.
[701] *Ibid*, para 38.
[702] Resolution (EU) P8_TA(2016)0102 of the European Parliament of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, para 32.

importance of identification and protection, along with the recognition of the benefits of collective and harmonized action to achieve effective results.

5.4.1 The potential of soft law to resolve statelessness in the EU

Some have argued that the EU may lack the competence to address statelessness directly and there have been suggestions that resorting to soft law might be a more effective approach[703]. In her presentation relating practices and approaches of EU MS to prevent and end statelessness, Swider suggests that the EU can employ soft law to coordinate policies among its members, grant visibility and foster information and data exchange. Similarly, Gyulai suggest the EU could improve the protection provided to stateless persons within its border by encouraging MS to ratify statelessness relevant international conventions, and "ameliorate the visibility of stateless persons in statistics"[704]. Further soft law suggestions include developing guidelines to assist Member States in collecting data and assessing statelessness status, advancing the goal of creating national mechanisms dedicated to stateless persons, promoting awareness of statelessness within its institutions by integrating statelessness-specific training programs, regularly reporting on statelessness issues, and closely cooperating with international bodies that address statelessness. Alongside these perspectives, Molnár underscores how the European Parliament has been instrumental in elevating the status of statelessness within the EU political agenda and in highlighting the importance of fulfilling international obligations towards stateless persons[705]. Building off of these suggestions, it is necessary to take a closer look at soft law in the EU today to make an assessment of the added value that it can bring to statelessness.

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[703] Cf. Katja Swider, René De Groot, and Olivier Vonk, "Presentation on Practices and Approaches in EU Member States to Prevent and End Statelessness," Slide show, 2015, https://www.europarl.europa.eu/cmsdata/123282/k-swider.pdf.; G Gyulai, "Statelessness in the EU Framework for International Protection."; 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."; Vlieks, *Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness*, 26.

[704] Gyulai, "Statelessness in the EU Framework for International Protection." 294.

[705] 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." 303.

Soft law instruments represent today "murky" instruments of the EU[706], as their use and effect are increasingly coming under scrutiny and criticized. Logic would dictate that soft law be the antipode of hard law, however they do not mirror the same legal dyad of "binding" and "non-binding." The relationship between soft and hard law seems instead to generate a spectrum, covering a range of degrees of legally binding force. Today, the definition of soft law has mutated and transformed from legally non-binding instruments to instruments that are in *theory* not legally-binding, but that, in *practice*, may potentially carry legal effects[707].

Soft law as a concept is experiencing in the last decades an exponential climb, especially in the context of international law[708] thanks to the growth of international instruments and globalization. In the EU, soft law is represented by recommendations and opinions, which are enshrined in art. 288 of the TFEU as EU instruments void of any binding force. Though soft law is never mentioned in the Treaties and jurisprudence does not define the concept either, other instruments such as communications, notices and guidelines are generally included within the notion. It is relevant to note that the Court has, in several circumstances, considered it worthy of reiteration that art. 288 intends to grant these instruments power to "exhort and to persuade", which does not equate binding force[709].

The relevance of soft law mechanisms increased significantly within the EU through the Open Method of Coordination[710], which generated a new form of

[706] Corina Andone and Florin Coman-Kund, "Persuasive Rather Than 'Binding' EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis," *The Theory and Practice of Legislation* 10, no. 1 (2022): 24, 30.

[707] Cf. Patrick Cottrell, David M. Trubek, and Mark Nance, "Law and New Governance in the EU and the US," in *"Soft Law", "Hard Law", and the EU Integration*, ed. Gráinne De Búrca and Joanne Scott (Oxford: Hart Publishing, 2006), 65-94; Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques," *Modern Law Review* 56, no. 1 (1993): 19–54; Linda a. J. Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004).

[708] Oana Ştefan, András Jakab, and Dimitry Kochenov, eds., "Soft Law and the Enforcement of EU Law," in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: Oxford University Press, 2017), 1.

[709] Case C-16/16P *Kingdom of Belgium v European Commission* ECLI:EU:C:2018:79, para 26; this formula has been reiterated by the Court regarding the guidelines and recommendations of the European Banking Authority in Case C-501/18 *BT v Balgarska Narodna Banka* ECLI:EU:C:2021:249, para 79 and Case 911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* ECLI:EU:C:2021:599, para 48.

[710] The Lisbon European Council Conclusions of 23–24 March 2000, Part I, para 5.

governance[711] that would focus on coordination mechanisms rather than coercive tools in order to overcome the resistance of MS to policy making. This shift has led to more than 10% of EU law today being comprised of soft law instruments[712]. These instruments can be organized into three categories[713]: informative instruments, which include proposal for future action; interpretative instruments, which interpret hard law and specify how the institutions should exercise their discretion; steering instruments, which guide the action of MS and institutions in a non-binding way. The role of the Commission is fundamentally that of promoting coordination of the MS through some of these instruments, namely recommendations: art. 168 of the TFEU leads the way by establishing the role of the Commission and its instruments to pertain the establishment of guidelines, indicators and to organize exchange of best practices and evaluations, providing the basis for a coordinative and supporting role, voluntary-based, and which excludes any possibility of binding instruments.

It might seem that the role of soft law in the EU is clear-cut, and it might even be argued that, in this capacity, soft law has been already employed in several circumstances to address statelessness[714], with some successful results, such as the almost total ratification of the Conventions on statelessness. However, the desired outcome of a solution for stateless persons appears far out of sight, as soft law's lack of binding force seems to be an insurmountable hurdle. Nonetheless, there is something to be said for soft law shifting in recent time, as we are witnessing a more frequent choice of soft law over hard law within the EU to handle issues, especially if they are divisive matters or times of crisis[715]. The wording of soft law has even morphed into something resembling hard law, with structures that appear to provide legal basis and assurance of compliance with subsidiarity and proportionality[716].

Soft law has become the preferred option for several reasons, chief among them its flexibility and ability to promote compromise. The flexibility of these

[711] Armin Schäfer, "Resolving Deadlock: Why International Organisations Introduce Soft Law," *European Law Journal* 12, no. 2 (2006): 194-195.
[712] Ştefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union*, 12.
[713] Senden, *Soft Law in European Community Law*, 140 Ştefan, Jakab, and Kochenov, "Soft Law and the Enforcement of EU Law," 1.
[714] See section 1 of chapter IV.
[715] Andone and Coman-Kund, "Persuasive Rather Than 'Binding' EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis," 26.
[716] *Ibid.*

instruments renders the drafting process easier, and they often allow for adaptation to multiple circumstances, an attribute that allows for rapid reaction in the face of unforeseen and critical times[717]. In response to the pandemic, for example, the Commission justified its soft law approach due to the fragmentation and inefficiency that would spur from an uncoordinated MS approach[718]. Furthermore, the adoption procedure is much simpler[719], requires low legislative costs[720], and avoids the demanding scrutiny that hard law regulations are instead privy to. In fact, art. 292 of the TFEU confers the Commission the power to adopt recommendations, though its content is vague and does not explicitly indicate the appropriate adoption procedure for them. Additionally, it is interesting to note that, unlike directives, recommendations are excluded from both art. 263 and art. 265, which enable natural or legal persons to file a complaint in front of the ECJ on the ground that "an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion." Soft law instruments appear therefore to be outside the scope of the ECJ jurisdiction, and they remain judicially reviewable mainly under the preliminary ruling procedure, as established in art. 267[721]. A further element that renders soft low often a preferred option is the possibility it allows in the face of domestically controversial issues, which would risk endangering the total ratification of the legislation if the MS greet them with substantial disagreement. Hard law is subject to constant pressure and scrutiny, and disagreements on a delicate topic can jeopardize the conclusion of the entire agreement; on the opposite

[717] *Ibid,* 23; Peter Slominski and Florian Trauner, "Reforming Me Softly – How Soft Law Has Changed EU Return Policy Since the Migration Crisis," *West European Politics* 44, no. 1 (2020): 95; Danai P. Ionescu and Mariolina Eliantonio, "Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective," *Journal of Contemporary European Research* 17, no. 1 (2021): 45.

[718] Andone and Coman-Kund, "Persuasive Rather Than 'Binding' EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis," 26.

[719] Cf. Silvère Lefevre, *Les Actes Communautaires Atypiques* (Bruxelles: Emile Bruylant, 2006); Oana Ştefan et al., "EU Soft Law in the EU Legal Order: A Literature Review," *SoLaR Working Papers*, 2018, 5.

[720] Slominski and Trauner, "Reforming Me Softly – How Soft Law Has Changed EU Return Policy Since the Migration Crisis," 96.

[721] See Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* EU:C:1989:646 paras. 8–9 and, later, Case C-911/ 19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* ECLI:EU: C:2021:599 paras. 56–57 and *BT v Balgarska Narodna Banka*, para 82.

side of the spectrum, soft law, due to its non-binding nature, fosters compromise and communication among the actors[722].

Elaborating on these premises, one of the most compelling aspects of soft law, particularly in the context of developing a framework on statelessness, is its *hardening*, a term that has been used to refer to phenomenon through which these instruments progressively gain a *quasi-legal* status. It has become evident and often warned about by many, that soft law can, despite its intended nature, produce legal effects in the EU[723]. Firstly, it is not uncommon for soft law instruments to require a course of action to be taken within a specific timeframe, and to require justification from MS who undertake a different path or choose to ignore the suggestions[724]. In fact, soft law tends to produce legal obligation through the employment, the drafting and wording, of common EU fundamental principles, such as sincere cooperation, legitimate expectations and legal certainty, which in turn produce harder commitments[725]. A further example is represented by the intricate relation between soft and hard law, where the former is often issued to interpret or apply the latter, resulting in blurring the lines between the two. The use of "conditionality" where Member States must comply with soft law instruments to receive certain benefits—like in the Cooperation and Verification Mechanism for Romania and Bulgaria post-accession[726]—also proves how legally binding acts incorporate soft law standards, hardening the soft law measures. Therefore, something that starts as purely non-binding soft law at the level of EU institution, can become much more robust within MS' legal systems, shifting from a flexible guideline to something that resembles, or

[722] Schäfer, "Resolving Deadlock: Why International Organisations Introduce Soft Law," 208.

[723] Cf. Ştefan, "European Competition Soft Law in European Courts: A Matter of Hard Principles?"

[724] Sabine Saurugger and Fabien Terpan, "Studying Resistance to EU Norms in Foreign and Security Policy," *European Foreign Affairs Review* 20 (2015): 1–20.

[725] Oana Andreea Ştefan, "European Competition Soft Law in European Courts: A Matter of Hard Principles?," *European Law Journal* 14, no. 6 (2008): 766; see, among others, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 *P Dansk Rerindustn N S v Commission* EU:C:2005:408.

[726] Andone and Coman-Kund, "Persuasive Rather Than 'Binding' EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis," 27; F. Coman-Kund and C. Andone, "European Commission's Soft Law Instruments: In-between Legally Binding and Non-binding Norms," in *..), Lawmaking in Multi-Level Settings: Legislative Challenges in Federal Systems and the European Union*, ed. Patricia Popelier et al., vol. 18 (London: Bloomsbury Publishing, 2019), 190.

even becomes, hard law[727]. This idea is supported also by the Grimaldi jurisprudence, which urged national judges to *take into consideration*[728] soft law when interpreting legally binding provisions, especially when they are supporting legally binding acts.[729]

Nevertheless, it could be claimed that this would hardly justify a preferential path for employment of soft law to produce a statelessness framework, as it is unclear why would MS comply with soft law. However, there are, in reality, several reasons why MS comply with soft law. It has been argued that soft law, although void of any legal power, carries substantial political power. Cremona[730] argues that the basis of this compliance in the EU is art. 4(3) of the TEU, namely the principle of loyal cooperation, aimed at achieving the Treaties' goals. Spurring from this, the mechanisms for soft low compliance rely on feelings such as the fear of being challenged in court, the fear of missing out on benefits, fear of being excluded as well as shame, peer pressure and peer reviewing[731]. Therefore, legally non-binding act, can become politically and socially binding, through the employment of coercive mechanisms other than legal force[732].

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[727] Opinion of Advocate General Bobek on Case C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR*), ECLI:EU:C:2021:294, para 95.

[728] Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* ECLI:EU:C:1989:646, para 18.

[729] *Salvatore Grimaldi v Fonds des maladies professionnelles* para 18; Joined Cases C-317/08 to C-320/08 *Alassini v Telecom Italia* EU:C:2010:146 para 40.

[730] Marise Cremona, *Compliance and the Enforcement of EU Law*, *Oxford University Press eBooks* (Oxford: Oxford University Press, 2012).

[731] Cf. Flückiger Alexandre, "Pourquoi Respectons-nous La Soft Law? Le RôLe Des ÉMotions Et Des Techniques De Manipulation," *Librairie Droz* 47, no. 144 (2011): 81–95; Myrto Tsakatika, "A Parliamentary Dimension for EU Soft Governance," *Journal of European Integration* 29, no. 5 (2007): 549-564; Elissaveta Radulova, "The OMC: An Opaque Method of Consideration or Deliberative Governance in Action?," *Journal of European Integration* 29, no. 3 (2007): 365; Sandra Kröger, "The End of Democracy as We Know It? The Legitimacy Deficits of Bureaucratic Social Policy Governance," *Journal of European Integration* 29, no. 5 (2007): 566; Ionescu and Eliantonio, "Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective, 48; Filippo M. Zerilli, "The rule of soft law," *Focaal* 2010, no. 56 (2010): 6; Nicholas Wolterstorff, *Understanding Liberal Democracy: Essays in Political Philosophy*, ed. Terence Cuneo (Oxford: Oxford University Press, 2012), 15-16.

[732] In the Case C-27/04 *Commission of the European Communities v Council of the European Union.* ECLI:EU:C:2004:436 the discretion of the Council to take decisions was limited by the Commission's recommendations, demonstrating how peer pressure is enough to grant soft law concrete practical and legal effects (Imelda Maher, "Economic Governance: Hybridity, Accountability and Control," Columbia Journal of European Law 13, no. 3 (2007), 838–40).

However, soft law presents challenges and raises concerns as well, which severely impend their application as sole statelessness solution. The first major issue, of course, is its lack of binding force: although the previous paragraphs have attempted to prove that soft law can be effective and have lasting and secure outcomes, these instruments remain non-binding and, therefore, hardly enforcement. The EU has a long history of MS resisting and attempting to circumvent EU norms, especially in the field of human rights, with MS increasingly emphasizing their sovereignty. The new modes of governance[733] were introduced to combat such attitudes through persuasive methods rather than coercive ones, based on the idea that soft law "push[es] actors to comply with the goal through a learning process leading to the transformation of actors' preferences"[734]. However, resistance to soft low is just as widespread as resistance to hard law, and MS attempt just as hard to avoid and ignore compliance to it, though arguably more successfully, as the passive and active opposition is more difficult to observe empirically. Persuasion, which would be at the base of soft law compliance mechanisms, is not effective if, like in the case of statelessness, the topic is controversial and threatens state sovereignty[735].

Furthermore, while authors[736] underline the effectiveness of soft law, especially in national courts, stressing the impact it has in shaping decisions and actions, others recognize it only as "window dressing", meaning it looks good on paper but does not achieve much in practice. Studies have shown how soft law can have some indirect effect, and it has been proven[737] how the ECJ takes into consideration these instruments in its ruling. However, the common denominator is the presence of an already established item of hard

[733] Cf. Joanne Scott and David M. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union," *European Law Journal* 8, no. 1 (2002): 2, 6.
[734] Sabine Saurugger and Fabien Terpan, "Resisting EU Norms. A Framework for Analysis," *Sciences Po Grenoble Working Paper* 2 (2013): 4.
[735] *Ibid.*
[736] Isabelle Bruno, Sophie Jacquot, and Lou Mandin, "Europeanization Through Its Instrumentation: Benchmarking, Mainstreaming and the Open Method of Co-ordination … Toolbox or Pandora's Box?," *Journal of European Public Policy* 13, no. 4 (2006): 519–36; Sophie Jacquot, "The Paradox of Gender Mainstreaming: Unanticipated Effects of New Modes of Governance in the Gender Equality Domain," *West European Politics* 33, no. 1 (2010): 118–35; Charles F. Sabel and Jonathan Zeitlin, "Learning From Difference: The New Architecture of Experimentalist Governance in the EU," *European Law Journal* 14, no. 3 (2008): 271–327; Erika Szyszczak, "Experimental Governance: The Open Method of Coordination," *European Law Journal* 12, no. 4 (2006): 486–502.
[737] Ştefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union*.

law that accompanies the reasoning and is only *reinforced* by soft law: without it, soft law is ineffective[738]. In the case of statelessness legislation, it is therefore evident that some ground for action needs to first be rooted in hard law, before thinking of soft law as an avenue, and it cannot certainly be considered the first solution.

Finally, an important criticism that has been moved against soft law is its questionable democratic legitimacy. In fact, the *hardening* of soft law and its blurred legal nature raise questions of legal certainty and institutional balance, as relying on soft law rather than following the formal procedures established by the Treaties muddles the distribution of powers between the EU institutions[739] . It can be argued that, when EU institutions use *hardened* soft law instruments in areas where there is little to no competence conferred to the EU, it could be interpreted as *de facto* extension by stealth of EU competences[740]. Strongly supporting this position, Molinari suggests for example, that the choice of employing soft law in the field of returns has been made exclusively in an attempt to circumnavigate the institutional guarantees, which appear today to be the main justification for such choice[741]. Soft law mechanisms often conflict with traditional standards of democratic legitimacy, largely because they lack a significant parliamentary role or oversight, especially when they attempt to produce legal effect independently from the supportive role of binding act.

Soft law lacks transparency, procedural safeguards, participation requirements, and reviewability which become problematic when its effects become compulsory or binding, as they undermine the Commission's legitimacy and contribute to a democratic deficit within the Union[742]. The European Parliament has voiced concerns relating to the lack of involvement in the drafting of soft law, underscoring the issue in several resolutions, when, as early as 1968, it warned against evasion of procedural decision-making by

[738] Saurugger and Terpan, "Resisting EU Norms. A Framework for Analysis," 18.
[739] Cf. Slominski and Trauner, "Reforming Me Softly – How Soft Law Has Changed EU Return Policy Since the Migration Crisis," 96.
[740] See Opinion of Advocate General Bobek in Case C-16/16P *Kingdom of Belgium v European Commission*, ECLI:EU:C:2017:959, para 156.
[741] Caterina Molinari, "Accordi Di Soft Law in Materia Di Rimpatri: Carta Bianca per Le Istituzioni UE?," *Diritto, Immigrazione E Cittadinanza* 1, no. 22 (2022): 56, 60-66,
[742] Coman-Kund and Andone, "European Commission's Soft Law Instruments: In-between Legally Binding and Non-Binding Norms," 194; Ionescu and Eliantonio, "Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective," 60.

the Council[743]. This concern has persisted, with additional resolutions addressing the issue in June 2003, referencing the Open Method of Coordination (OMC)[744], and in 2007[745], when the EP expressed strong criticism of soft law mechanisms, arguing that they bypass the appropriate legislative processes and undermine the rule of law. A further point on this sense, is that soft law' use in court is considered undesirable[746], as it would come at the expenses of legal certainty and, therefore, be unfit for judicial enforcement.

Taking all the above in consideration, it is evident that soft law cannot represent a credible long-term solution for statelessness within the EU. While it is true that soft law can have effective results in helping MS interpret and apply the policies that already exist, without the support of hard law the intervention of such non-binding mechanisms would be inadequate at best, and legally questionable at worst. Currently there is no hard law established to support statelessness identification, and any attempt to circumvent the current state of affair, say, through legislations by stealth, would not provide any legal certainty, would lack reviewability and accountability, and would put into question the legitimacy and legality of the EU, ultimately doing a disservice to the stateless cause.

Soft law can, however, play a complementary and dynamic role when coupled with hard law: specifically, it can be of support when the latter is imprecise or contains ambiguities, and in harmonization contexts when provisions are unclear or gaps are left, influencing their interpretation[747].

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[743] Resolution (EU) C 63/19 of the European Parliament of 8 May 1969 sur les actes de la collectivité des États members de la Communauté ainsi que les actes du Conseil non prévus par les traités.

[744] Resolution (EU) P5_TA(2003)0268 of the European Parliament of 5 June 2003 on the application of the open method of coordination, paras 4-8.

[745] Resolution (EU) P6_TA(2007)0366 of the European Parliament of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments.

[746] Cf. Jan Klabbers, "Informal Instruments Before the European Court of Justice," *Common Market Law Review* 31, no. 5 (1994): 997; Jan Klabbers, "The Redundancy of Soft Law," *Nordic Journal of International Law* 65, no. 2 (1996): 167; Jan Klabbers, "The Undesirability of Soft Law," *Nordic Journal of International Law* 67, no. 4 (1998): 381; Christine M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law," *The International and Comparative Law Quarterly* 38, no. 4 (1989): 862–65.

[747] Cf. Slominski and Trauner, "Reforming Me Softly – How Soft Law Has Changed EU Return Policy Since the Migration Crisis," 98.

5.5 Conclusion

Statelessness in a complex legal issue which can hardly be resolved through a simple solution. Luckily, the Union's structure proposes several avenues that have the potential to engage with the issue through creative approaches. This chapter has started form this standpoint in an attempt to discover additional routes that could bolster or support any action taken by the Union on the matter. Among them, stands out the concept of EU citizenship, especially in light of a post-national solution for statelessness. The concept of a European citizenship has, since its inception, inspired and generated interesting suggestions among those who envisioned a post-national model of membership and has long been championed as possessing the potential to be more than an accessory to national membership. Driven by the continuous expansion of its scope by the decision of the Court, some have advocated for all the missed opportunities that the decoupling of EU citizenship from national citizenship could achieve. Chief among these, the idea that granting European citizenship to stateless individuals would ensure them rights and guarantees without impacting MS sovereignty and, factually, serve as a supranational identity for stateless persons.

However, this solution is far from being attainable, given the often-remarked non-autonomous status of EU citizenship. In fact, despite the transformative potential that can be envisioned through this instrument, its application remains firmly tethered to national citizenship and any attempt to decouple the two would overhaul the current EU legal structure. A proposal to guarantee EU citizenship to stateless individuals after a period of legal residency would offer political rights and facilitate naturalization, however this proposal remains more aspirational than practically attainable, due to the complex EU mechanisms grounded in States' sovereignty. Nonetheless, EU citizenship is not without relevance for statelessness matters', as its principles have inspired the expansion and protection of TCNs through the decision of the ECJ.

Additionally, considering the role of human rights in this research's approach to statelessness, some considerations on the EU Charter of Fundamental rights and the general position of human rights within the Union could not be avoided. In fact, the Charter enshrines values such as human dignity, equality and respect for human rights, and, despite most of its application is reserve for EU citizens, certain rights are universally applied within the EU and,

therefore, include stateless persons as well. Among these, acquire particular relevance the right to personal liberty and the protection from arbitrary detention, to which stateless persons are especially susceptible. Furthermore, coupled with the right to private life, which has been interpreted to include the right to nationality, these provisions indicate a strong responsibility from the EU to identify statelessness, as failure to do so would be in conflict with the norms prescribed by the Charter.

On the theme of human rights, the relationship of the Charter and the Union with the ECHR should also be considered, as its jurisprudence has, driven by some key provisions of the Convention, produced a number of decisions that suggest the imperative to identify statelessness. The ECtHR has, on numerous occasions, reiterated that uncertainty relating to one's legal status can be considered inhuman treatment and that failure to identify statelessness, especially in the absence of deportation options, would constitute breach of the ECHR. Although the ECHR does not explicitly require the establishment of SDPs, the direction that its Court has repeatedly chosen suggests that they are necessary to comply with the Conventions guarantees: considering the close relationship between the two Courts and the Union's continuous attempts to accede to the ECHR, there is potential for the ECJ ruling to reflect these principles and encourage MS to adopt SDPs.

Furthermore, soft law has also demonstrated a propensity for producing statelessness-related elements. This EU instruments has long attempted to shine a spotlight on statelessness and steer the EU agenda towards statelessness solutions. However, the suggestions that the EU should rely on it to tackle this issue does not seem convincing, mainly due to its lack of binding force, which associate them to the other international instruments that have attempted, but ultimately failed, to tackle statelessness at a wider level. Its flexibility and adaptability often render soft law the tool of choice to address sudden challenges, and it is entrusted to interpret and provide guidance on hard law instruments, however, it remains an inadequate instrument as a sole mechanism to comprehensively address statelessness. Importantly, any attempt from soft law to *harden* would lack democratic legitimacy, transparency and accountability and could only provide inconsistent and temporary solution, which are not suitable as a long-term approach to statelessness. Nonetheless, is hard law on statelessness were to be produced, the support of soft law on statelessness would be essential to ensure the harmonized interpretation and application of the law by MS.

This chapter has highlighted that, while the EU has several alternative tools to address statelessness, none can credibly solve the issue single-handedly. The EU today prioritizes State sovereignty and the employment of its mechanisms, which is why this research suggests an approach through a legally binding framework that can, however, incorporate elements of other supporting tools.

CHAPTER VI

DISCUSSION AND FINAL OBSERVATIONS

6.1 The limitations of the international response to statelessness

When looking at statelessness today, much has changed since the first UN report on statelessness[748] and the drafting of the 1954 Convention. At the time, though a human right framework was being constructed in Europe, the absence of a nationality was still associated with a condition of rightlessness, and the lack of an organized solution prompted the international community to produce an instrument to clarify their vulnerability and to take measures to protect them. Today, this association is not as pronounced, as states are limited in their ability to deprive individuals of citizenship and when statelessness is not avoided, international conventions on human rights intervene to ensure that their human rights are protected. The international community has shifted to generally understand statelessness as intolerable and states seems to have been converging towards this idea. The human rights framework has been removing from citizenship the monopoly on rights and denationalizing their protection[749]. While it is true that the benefits exclusively connected to citizenship have been progressively shrinking, the connection to the state cannot be considered completely obsolete yet, as proven by the inclusion of the right to a nationality in many international human rights instruments. This means that a framework for statelessness is not obsolete yet either, because, as long as the bond of nationality will hold an exclusive significance within the international community, the lack of such bond will signify a violation of the right to nationality, and therefore, a breach of a fundamental right.

This logical conclusion has been reached by the international community as well, where there is growing agreement surrounding the avoidance of future statelessness, with strong focus surrounding statelessness at birth. However,

[748] Hudson, "Report on Nationality, Including Statelessness."
[749] US Supreme Court, 31 March 1958, 356 U.S. 86, *Trop v. Dulles, Secretary of State et. Al.*

states are more hesitant to address present statelessness due to the consequences that resolving it would inevitably have on state sovereignty. This is underlined by what can be considered to be a failure to produce a stateless specific international framework that systematically protects the condition of statelessness: though two conventions on statelessness have been drafted at international level and the right to nationality permeate most of the international human rights framework, the condition of statelessness has not been resolved, nor has it been consistently regulated.

When human rights are often identified as the core values of many states, the persistence of statelessness represents a confusing contradiction. What is delineated by this investigation of the international framework on statelessness is, however, that nationality is not interpreted as a universal right, but rather as a right addressed to those who already possess it, as an assurance not to lose it in the absence of due guarantees or to exercise the related rights. Nationality is framed as a prerogative of states and not as an individual's right that can be claimed from anyone by virtue of being *human*[750]*:* it is rather a right that citizens can exercise when their status is jeopardized. This perspective on the right to nationality is as a testament to the tension between sovereignty and statelessness resolutions.

Given what appears to be an unresolvable conundrum, one might wonder if the right to nationality and the insistence on nationality acquisition might represent the appropriate instrument to approach statelessness, or if a right-based approach would be a preferable option[751]. If it is true that the status of citizen is conditional for accessing the entirety of the human rights catalogue, it is also true that a shift in the approach to statelessness could guarantee the protection of most of them. A rights-based approach focuses on empowering stateless individuals through legal rights, in order to allow them to invoke their rights and claim accountability from the policy makers[752]. This approach would position stateless persons as entitled rights-holders—rather than vulnerable individuals—and would place obligations towards them on the institutions. The underlying idea of this approach is to distance itself from the search of fulfilling immediate needs on a case-to-case basis or to force the acquisition of nationality, but to create a protection status that guarantee them

[750] Vlieks, Nationality and Statelessness in Europe: European Law on Preventing and Solving Statelessness, 236.
[751] Cf. Swider, "A Rights-Based Approach to Statelessness."
[752] Andrea Cornwall and Celestine Nyamu-Musembi, "Putting the 'Rights-based Approach' to Development Into Perspective," Third World Quarterly 25, no. 8 (2004): 1432.

the agency to invoke (or not[753]) their rights. Rights should not be granted to stateless individuals on the guise of humanitarian donations, but within a systematic structure, as to have rights does not mean to have enough of something, but to have social guarantees[754].

Considering that not all human rights have the same exclusive characteristic of the right to nationality, and that most states pledge to adhere to their universal character, it appears contradictory the lack of a satisfactory protection status for stateless persons. This discrepancy is explained by the fact that it is not the international obligations that are directly being breached, but, at the root, the main imbalance is represented by a failure to efficiently identify statelessness. It has been often argued that statelessness identification is at the core and the precursor of any solution that relates to statelessness, however, there is no homogenous approach to this theme among states, and it has been demonstrated to be the least regulated aspect on the existing instruments about statelessness. The motivation for the lack of such crucial guidance can likely be linked to the reluctance to encroach on the states' rights to define something that has the potential to influence nationality. The states' autonomous management of this area, in the absence of binding guidelines, has, however, failed to produce satisfying outcomes.

Taking into consideration the difficulties that this task has exposed over the years, Milbrandt[755] suggests a non-governmental approach to the identification of statelessness, that would allow stateless individuals to register and, among other things, support states in collecting the information necessary to assess the status of individuals that potentially qualify for the statelessness protection within their legislation. This approach is inspired by the Nansen Passports which, introduced after WWI as a mean to identify refugees and provide them with identification documents, were progressively recognized by many states and, therefore, relatively successful in their ambition. Unfortunately, among other objections that could be raised to this

[753] On the right to statelessness see Swider, "A Rights-Based Approach to Statelessness," 158 ff; Omar Alansari, "Identity Without Citizenship: Towards a Global Uniform Registration System for the Stateless" (PhD Dissertation, Queen's University Belfast, 2020), 98.
[754] Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy (Princeton: Princeton University Press, 1996).
[755] Jay Milbrandt, "Stateless," *Pepperdine University School of Law Legal Studies Research Paper Series* 2012, no. 6 (2012).

proposal[756], it is hard to imagine Milbrandt's vision to come into fruition, if only the establishment of an institution tasked with the supervision of the statelessness conventions[757] is any indication of the international community's eagerness to institute an international body on statelessness. Furthermore, the foundational requirement for instituting a convincing international statelessness' system—that the global community has struggled to meet—is the need for enforceability and accountability. This aspect has often been curtained by state sovereignty in statelessness matters, due to the political implication the regulation of nationality laws can carry. However, Milbrandt's suggestion springs from an interesting assumption that has increasingly demonstrated to hold true: leaving identification to states' autonomous discretion is not fruitful to reach encompassing results and a supranational authority is necessary to regulate the matter.

6.2 A right-based solution in Europe

The objective complications to develop any binding and sophisticated approach at the international level, does not prevent the possibility of uncovering the potential that regional dynamics have for statelessness solutions. Though neither the EU nor the CoE's most relevant instruments for human rights protection include the right to nationality, both these institutions have been involved in the development of a strong human right system and in contributing to shrink the exclusive rights associated to nationality. This research has therefore developed the idea that statelessness could be transformed, in Europe, into a status devoid of citizenship that would be *not* represent an automatic synonym of *rightless*.

[756] Firstly, the base of this idea is rooted in the intention of bypassing the governments, essentially privatizing the identification of statelessness. Among the complexity that would spring from this approach, is the risk of recognition associated with the identification provided by this system: if the idea is to mirror the Nansen Passports, which allowed refugees to travel through state borders, without state recognition such ambition of mobility would encounter countless hurdles; it is also hard to imagine that any international system not supported or in coordination with states would be able to receive, verify and assess statelessness identification application autonomously; finally this identification system would solve the issue of legal status of stateless persons, that would still hinge upon the recognition of states.

[757] See section 4 of chapter II.

In particular the European Union, with its *sui generis* structure and institutions, has been designated by this investigation as the ideal candidate for this approach. The European Union positions itself at the forefront of the human right promotion, and the values that it upholds are meant to represent the constitutional values upon which the MS are built. It is therefore surprising that a condition such as the one of statelessness has been allowed to proliferate within its border, even worse that the Union has released conclusions on statelessness inviting States to take measures regarding it—implying its awareness of the existence of the issue and what are its exact criticalities. It is therefore disappointing to realize that statelessness has not been addressed or regulated at the EU level.

Even more surprising is the realization that the identification of statelessness appears to be a matter well within the EU competences, explicitly since the introduction of the Treaty of Lisbon, when stateless individuals have been equated to third-country nationals for the purpose of the area of freedom, security and justice. It seems evident that the teleological implications of this mention raise themes of implicit powers within the Union that require it to establish measures to ensure that stateless individuals are able to enjoy the rights prescribed to them within the treaty. It is hard to justify the absence of regulations on statelessness within the EU today, as it is impossible to ensure the equal treatment of stateless individuals and TCNs within the Union if statelessness is not correctly identified. An unregulated response to this matter risks creating unbalances within the EU migration policy. Supporting this argument, there are several EU instruments within the EU *acquis* that reinforced the need to identification, such as the rights guaranteed by the Charter and the jurisprudence of the two European Courts, which have never missed the occasion to assert their rejection towards statelessness and the obligation for states to avoid it in the absence of justifying grounds.

Moreover, the need for a harmonized approach, that has emerged as a lesson from the failures of the international framework on statelessness, is also something that can be addressed at the EU level in the same fashion as it has been considered the appropriate response to, for example, asylum seekers or other categories of TCNs. This solution addresses, therefore, the first research question that chapter I posed:

> Is there an obligation to establish Status Determination Procedures (SDPs) in the EU?

By looking at the EU legal sources and its competences, it can be determined that Art. 67(2) of the TFEU, combined with art. 79 TFEU, raises obligations for the EU to impose the establishment of SDPs to its MS to comply with EU law. Furthermore, the EU competence in setting conditions of entry and stay of third-country nationals and define their standard of treatment within the Union, allows it to set procedural guarantees to ensure the effectiveness of these rights for stateless individuals as well. It is also relevant that the EU can uniform the interpretation of the definition and clarify any doubt through soft law and the intervention of its Court. The Union can also integrate the protection regime initiated by the 1954 Convention and extend it with its own standards and the general human rights regime. Incidentally, the EU has already created a framework that has been supporting the approximation of TCNs to citizens, which opens an interesting path for stateless individuals. It is not hard to imagine the creation of such a framework of protection, if the CEAS is any indication of how the EU can provide such guarantees to vulnerable categories of TCNs.

However, this research attempts to go further to suggest that the combination of harmonized identification procedures and the competence in setting condition of entry and stay and a standard of treatment could allow the EU the possibility of revolutionize the status of stateless persons: by creating a framework on statelessness that has clear and efficient means of identification and encompasses guarantees based on residence, the EU could create a structure in which statelessness would be another form of membership, and not a synonym of rightless. This calls on the second research question initially posed:

How can the EU improve the protection of stateless persons in Europe?

Considering the existing precedents within the EU policy of migration, this investigation has identified the answer to this second query within the creation of a Directive on statelessness that would delineate and provides guidelines for the establishment of SDPs. This solution appears optimal since, as the international framework on stateless has demonstrated, the chief concern regarding any binding legislation on statelessness is the possible corrosion of states' sovereignty. However, the flexibility that a directive guarantees to states, would allow them to adapt the legislation to their need while ensuring compliance.

A similar supranational solution for statelessness has been often associated with the employment of EU citizenship. It appears, however, that the resistance this proposal would encounter is far more complex that the one towards a directive. Firstly, the restriction tied to its very nature firmly negate the possibility of a disentanglement of the EU citizenship from national citizenship, a point that MS have taken great care, through the years, to communicate. Secondly, it would require a stretch of imagination to envisage that any MS would agree to such a drastic expansion of EU citizenship's scope, consequently taking the risk to unlock further exploitation of this instrument that could escape their control. Hence, it appears that this route would encounter stricter opposition, while being grounded on the same principles as the proposed statelessness directive: a structured system of identification and residency as the foundational criterion for acquisition of EU nationality.

This research suggests therefore, that hinging on the rights that residents within the EU enjoy and on the constant approximation of their status to that of citizens, the Union could normalize statelessness and empower stateless persons through legal rights. Normalizing statelessness would not mean that this condition would be desirable or positive, but it would simply include it within the possible models of membership available, which defines it and renders it operational. While it is true that gaps between the status of resident and that of citizen exist, by bringing statelessness into the domain of what is legally and bureaucratically regulated, the Union would succeed in providing stateless persons the agency to claim their rights and choose their legal path ahead, be it naturalization or a residence status that guarantees the necessary rights. Therefore, where the international framework has failed to provide guarantees and protection, the EU has the potential to transform a historically rightless category into a secured protection status.

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