

Statelessness determination in Europe: Towards the implementation of regionally harmonised national SDPs

By Noémi Radnai

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Statelessness determination in Europe: towards the implementation of regionally harmonised national statelessness determination procedures

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Author biography

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Key words

Statelessness determination procedure, protection, harmonisation, European Union, Council of Europe

Abstract

Nationality is the closest legal tie between a natural person and a state. Stateless individuals lack this bond. To provide stateless persons with basic human rights, the international community created an autonomous protection status by adopting the 1954 Convention relating to the Status of Stateless Persons. However, for the proper implementation of this protection status, States need to establish statelessness determination procedures. In contemporary Europe, statelessness should be a major concern, and a growing number of European states are recognising the need to protect the stateless. The time has come for Europe to address the identification and protection of stateless persons in a harmonised manner. This paper argues that the harmonisation of standards on statelessness determination procedures at the European level would enhance the current national efforts in the identification and protection of stateless persons. To this end, European states need to facilitate the creation of a regional legal instrument, taking advantage of the powerful international organisations that exist in the region: the European Union and the Council of Europe. The legal instrument should serve as an incentive for States to establish statelessness determination procedures and to set out regionally harmonised minimum standards.

1. Introduction and background

Nationality is the closest legal tie between a natural person and a state. Stateless individuals lack this bond. Their legal condition renders them excluded from society; they are denied their most basic human rights. The 1954 Convention relating to the Status of Stateless Persons defines a stateless individual as a “person who is not considered as a national by any State under the operation of its law”.¹

In Europe, about 600,000 individuals are stateless.² Due to the hidden nature of the phenomenon, this number is only an estimate, and the context of it is quite complex. Europe has seen frequent border changes throughout its recent history. The dissolution of the socialist federations of Eastern Europe in the past few decades have rendered a high number of people stateless. Additionally, there is a large Roma minority scattered across the countries of Europe, and statelessness among the Roma population is a long-standing issue.³ The abovementioned persons are stateless in their ‘own country’, and are referred to as *in situ* stateless. The other context statelessness manifests itself is migration. A staggering 1.2 million people arrived in Europe in 2015 and in the beginning of 2016. During this time, according to the Institute of Statelessness and Inclusion, approximately 3% of asylum applicants faced nationality problems.⁴

The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) grants an essential set of rights to the individuals under its scope. However, it is not a self-executing treaty.⁵ In practice, States Parties are required to implement national legislation establishing their own statelessness-specific protection mechanisms, regulating the statelessness determination procedure and the specificities of the protection status. A statelessness determination procedure (SDP) serves to examine whether an individual is indeed stateless, *id est* not considered as a national by any State under the operation of its law. If the SDP results in the individual being identified as stateless, it is then clear that he shall be granted the rights envisaged in the 1954 Convention.⁶ The 1954 Convention does not contain provisions that regulate the statelessness determination procedure, however, the UNHCR Handbook on Protection of Stateless Persons contains the most important guidelines.⁷ Worldwide, there are 89 States

¹ Article 1, Convention relating to the Status of Stateless Persons, New York, 28 September 1954, in force 6 June 1960, 360 UNTS 117.

² Institute on Statelessness and Inclusion, ‘The World’s Stateless 2017’, available at: <http://www.worldsstateless.org/continents/europe/stateless-persons-in-europe> [accessed 18 February 2017]

³ Maylis de Verneuil, ‘Nationality: Romani; Citizenship: European’ (2016), *Statelessness Working Paper Series* No. 2016/03, Institute on Statelessness and Inclusion, p. 5.

⁴ Institute on Statelessness and Inclusion, ‘The World’s Stateless 2017’, available at: <http://www.worldsstateless.org/continents/europe/stateless-persons-in-europe> [accessed 18 February 2017]

⁵ Tamás Molnár, ‘Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order’ (2010), *Acta Juridica Hungarica* 51, No. 4, p. 296.

⁶ It is important to note that the positive outcome of the SDP does not *constitute* the individual’s right to benefit from the protection status; it is only of *declarative* nature, explicitly recognising the applicant as stateless. Source: Gábor Gyulai, ‘The determination of statelessness and the establishment of a statelessness-specific protection regime’ in: Alice Edwards and Laura van Waas (eds.), *Statelessness and Nationality in International Law* (2014), Cambridge: Cambridge University Press, p. 132.

⁷ UNHCR, *Handbook on Protection of Stateless Persons* (30 June 2014), available at: <http://www.refworld.org/docid/53b676aa4.html> [accessed 27 March 2017]

party to the 1954 Convention, and only 14 States⁸ have functioning statelessness-specific protection regimes in place in their national legislations.⁹ Out of these 14 countries, 10 are in Europe.¹⁰

This article argues that the harmonisation of standards on statelessness determination procedures at the European level would enhance the current national efforts in the identification and protection of stateless persons. To this end, European states need to facilitate the creation of a regional legal instrument, taking advantage of the capacities of the powerful international organisations that exist in the region: the European Union and the Council of Europe. The legal instrument should serve as an incentive for States to establish statelessness determination procedures and to set out regionally harmonised minimum standards. For the purposes of this work, Europe is defined as the geographical region comprising of 50 states: the 47 member States of the Council of Europe, plus Belarus, the Holy See and Kosovo (UNSCR 1244/99).¹¹

This study is intended as an advocacy-oriented research, whereby the aim is to identify problems and suggest possible solutions. To this end, the work advocates for the establishment of statelessness determination procedures at the national level; it argues for the regional harmonisation of standards instead of the ‘unification’ of the procedures. Why should statelessness determination procedures be harmonised at the European level? In what way could this be done? This study seeks to answer these questions by shedding light on different aspects of the phenomenon of statelessness and its legal and policy environment in contemporary Europe.

2. Overview: statelessness determination at the domestic and European levels

2.1. Existing statelessness determination procedures

States have the primary responsibility to identify and protect stateless persons in their territories. The States parties to the 1954 Convention have committed themselves to implement it, but they have been granted the freedom to do so in accordance with their own legal systems. The phenomenon of statelessness shows diverse profiles in each European country; consequently, every state has a different approach to addressing it. There are states that have proper statelessness determination procedures in place, while others—such as the Czech Republic and Germany—argue that their legal systems allow for the direct application of the 1954 Convention, and other provisions in their legislation protect stateless persons adequately.¹² For this reason, it is not simply ‘black or white’ whether a state has an SDP established in its domestic law. In this regard, the author relies on the views of the European Network on Statelessness, which only calls such procedures ‘SDPs’ if they are effective, and formalised in law (*i.e.* their operation is not solely on an *ad hoc* basis).¹³ Along these lines, at the time of writing, 10 European countries have functioning SDPs in place. These are: France, Georgia, Hungary, Italy, Latvia, Kosovo (UNSCR 1244/99), the Republic of Moldova, Spain, Turkey, and the United Kingdom. ‘Partially built’

⁸ France, Georgia, Hungary, Italy, Latvia, Kosovo, Moldova, Spain, Turkey, United Kingdom, Costa Rica, Ecuador, Mexico and the Philippines.

⁹ Outside of Europe, only Costa Rica, Ecuador, Mexico and the Philippines have established SDPs at the time of writing. ‘Partially built’ systems include Brazil and Peru. Source: Gábor Gyulai, Presentation on Statelessness for the Serbian Government delegation: General Framework and State Practice, held at UNHCR Regional Representation for Central Europe (4 November 2014). Updated according to correspondence with Gábor Gyulai on 30 October 2017.

¹⁰ See part 2.1.

¹¹ For the member States of the Council of Europe, please refer to: <http://www.coe.int/en/web/about-us/our-member-states;jsessionid=ABC7BCB90C679DE9AC5F711702C799AD> [accessed 12 November 2016]

¹² Katia Bianchini, ‘A Comparative Analysis of Statelessness Determination Procedures in 10 EU States’ (2017), *International Journal of Refugee Law*, Vol 29, No 1, pp. 42–83.

¹³ European Network on Statelessness, ‘Statelessness determination and the protection status of stateless persons’ (2013), available at: <http://www.refworld.org/pdfid/53162a2f4.pdf> [accessed 27 March 2017]

statelessness-specific protection systems—where the law foresees a protection status, but the SDP has not been elaborated yet—include Belgium, Slovakia, and Switzerland. Bulgaria’s recently introduced SDP, due to the significant flaws in the legislative framework, cannot be considered effective.¹⁴

By reviewing the existing procedures, it is possible to draw a conclusion on good practices as well as to identify potential pitfalls when establishing an SDP. The European Network on Statelessness, having scrutinised and compared the various SDPs in the world, emphasises that there is no single ‘best practice’.¹⁵ On one hand, every effort to address statelessness is welcome; on the other hand, the existing procedures still suffer from certain shortcomings. An important common characteristic of the procedures is that they define statelessness as a separate ground for protection.¹⁶ The set of rights provided all contain the right to lawful residence, identity documents and a set of social and economic rights.¹⁷ Differences ensue in the type of authority in charge of the decision and the sophistication of the procedural framework.¹⁸

The regulation of rights and duties of stateless persons takes place predominantly within the sphere of migration law, because stateless persons are non-citizens in every country.¹⁹ Consequently, the identification and protection of stateless persons can be regulated internationally and regionally.²⁰ The efforts for the harmonisation of responses to statelessness are already ongoing both within the Council of Europe and the European Union.

2.2. Legal framework under the Council of Europe’s aegis

The 47 countries comprising the Council of Europe (CoE) cover the majority of Europe, with only three exceptions: Belarus, the Holy See and Kosovo (UNSCR 1244/99).²¹ Being part of the CoE requires States to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR).²² The power of the ECHR lies in its enforceability; States Parties pledge to be under the jurisdiction of the European Court of Human Rights (ECtHR), the supervisory mechanism of the ECHR and its Protocols. Article 46(1) ECHR pronounces that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

Primarily, the CoE protects the basic human rights of stateless persons by virtue of the ECHR, as they belong to its *ratione personae*.²³ This makes the ECHR a valuable tool for strategic litigation in front of the ECtHR. According to the case law of the ECtHR, there are five relevant articles of the ECHR that

¹⁴ Gábor Gyulai, Presentation on Statelessness for the Serbian Government delegation: General Framework and State Practice, held at UNHCR Regional Representation for Central Europe (4 November 2014). Updated according to correspondence with Gábor Gyulai on 30 October 2017.

¹⁵ European Network on Statelessness, ‘Statelessness determination and the protection status of stateless persons’ (2013), p. 7. Available at: <http://www.refworld.org/pdfid/53162a2f4.pdf> [accessed 27 March 2017]

¹⁶ Gábor Gyulai, ‘Statelessness in the EU Framework for International Protection’, *European Journal of Migration and Law* 14 (2012), p. 287.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Katja Swider, ‘Protection and Identification of Stateless Persons through EU Law’ (2014), *Amsterdam Centre for European Law and Governance Working Paper Series*, 2014/5, p. 10.

²⁰ *Ibid.*

²¹ All references to Kosovo should be understood in full compliance with Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

²² European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950.

²³ Article 1 of the ECHR states that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

contain implicit obligations for States to identify stateless persons.²⁴ These are as follows: the prohibition of torture and inhuman or degrading treatment (Article 3), the right to liberty and security of person (Article 5), the right to respect for private and family life (Article 8), the right to an effective remedy (Article 13), and the prohibition of discrimination (Article 14).²⁵ In practice, access to litigation for these rights at the ECtHR is extremely limited for stateless persons.

The Council of Europe is also a platform for drafting and adopting regional conventions which may reinforce and complement existing universal human rights obligations. The European Convention on Nationality (hereinafter: ECN) pronounces the right to a nationality.²⁶ Adopted in 1997 and entered into force in 2000, this regional legal instrument contains important safeguards for the avoidance of statelessness, along similar lines to the 1961 Convention on the Reduction of Statelessness.²⁷ By the end of 2017, only 21 states have ratified the ECN.²⁸ The Convention on the Avoidance of Statelessness in relation to State Succession also contains provisions that encourage States to facilitate naturalisation and to adopt favourable nationality laws, tailored to the phenomenon of statelessness as the aftermath of state succession.²⁹ Nonetheless, in the 11 years since it has been open for signatures, only seven countries have ratified it.³⁰ Although the obligation of establishing statelessness determination procedures is not pronounced in any CoE convention in an explicit manner, implicit obligations for statelessness determination should be addressed through codification.

2.3. Statelessness in the law of the European Union

The law of the European Union is a *sui generis* legal order that has significant added value and primacy to national legal systems, currently binding on 28 Member States.³¹ When a provision of EU law is directly applicable, or has direct effect, the primacy of EU law means that national authorities are required to apply the provision of EU law instead of any conflicting provision of domestic law.³² If the provision of EU law is not directly applicable, or does not have direct effect, ensuring the primacy of EU law is left to the legal system of each Member State, *id est* the norm subject to the requirement of interpreting national legislation consistently with EU law.³³ Provisions regarding the status of stateless persons are found both in primary and secondary EU law, however, there is no explicit obligation for statelessness determination under the *aegis* of the European Union.

²⁴ Caia Vlieks, 'A European Human Rights Obligation for Statelessness Determination?', p. 19, available at: <http://arno.uvt.nl/show.cgi?fid=132988> [accessed 12 November 2016]

²⁵ European Network on Statelessness, 'Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?' (2014), *European Network on Statelessness Discussion Paper* 09/14, available at:

http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS%20Discussion%20Paper_September%202014.pdf [accessed 27 March 2017]

²⁶ Article 4(a), European Convention on Nationality, Strasbourg, 06/11/1997, in force 01/03/2000, ETS No. 166.

²⁷ Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 14458 UNTS 989, 175.

²⁸ Luxembourg ratified it on 19 September 2017.

²⁹ Council of Europe Convention on the avoidance of statelessness in relation to State succession, Strasbourg, 19/05/2006, in force 01/05/2009, CETS No. 200.

³⁰ Luxembourg ratified it on 16 October 2017.

³¹ On 29 March 2017, the United Kingdom invoked Article 50 of the TFEU, entering an irreversible procedure of leaving the European Union. This paper nonetheless addresses the United Kingdom as part of the European Union, as EU law still applies to it at the time of writing.

³² Giorgio Gaja, 'European Community and Union Law and Domestic (Municipal) Law', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2014.

³³ *Ibid.*

Article 67(2) of the Treaty on the Functioning of the European Union (TFEU) stipulates that stateless persons have the same legal status as third-country nationals.³⁴ This provision reflects the minimum requirement of the 1954 Convention that necessitates States to provide stateless people the same treatment as is accorded to aliens generally.³⁵ Statelessness is not defined in EU law; respectively, the legislator refers to Article 1(1) of the 1954 UN Convention.

The EU Charter of Fundamental Rights (CFR)³⁶ brings together the fundamental rights protected in the EU in a single document, but it does not contain any explicit mentions of statelessness.³⁷ It is relevant because stateless persons are also entitled to some of the rights that apply to everyone under the jurisdiction of the Member States. The CFR has the same legal effects as other EU treaties, therefore, secondary legislation has to be in conformity with it.³⁸ The CFR is also under the jurisdiction of the Court of Justice of the European Union, and it has a vertical direct effect between Member States and individuals.³⁹

In secondary EU legislation, mentions of statelessness are rather sporadic.⁴⁰ Under the Common European Asylum System, statelessness is not a ground for obtaining protection. The existing rules of EU law protect the stateless in an indirect manner. The basis of this indirect protection is the aforementioned Article 67(2) of the TFEU, which is a gateway to rights in the sense that community legislation often operates with the term ‘third-country nationals’ when stipulating the rights and obligations of foreigners in the EU.⁴¹ The existing protection of stateless persons is therefore a by-product of the legislation in place, which nonetheless might mark the first step towards the construction of a community framework on protecting the stateless.⁴²

Due to this very own sophisticated legal order, the European Union may serve as a bridge between the international obligations of the Member States and the action needed to implement them. As estimated by UNHCR, there are 400,000 stateless persons living in the European Union today.⁴³ There is no doubt that the European Area of Freedom, Security and Justice could be improved by adopting statelessness-specific legislation at the EU level.

³⁴ Treaty on the Functioning of the European Union, signed on 13 December 2007, Official Journal of the European Union C 326, 26/10/2012, p. 0001-0390.

³⁵ Katja Swider, ‘Protection and Identification of Stateless Persons through EU Law’ (2014), *Amsterdam Centre for European Law and Governance Working Paper Series*, 2014/5, p. 10.

³⁶ Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

³⁷ Tamás Molnár, ‘The EU Charter of Fundamental Rights and the protection of stateless persons in the EU’, presentation held at the conference Addressing Statelessness in the European Union, 18 January 2017, Brussels, available at: https://www.emnluxembourg.lu/wp-content/uploads/2017/01/FRA_EU-Charter-and-stateless-people_EMN-ENS-UNHCR-conference_18.01.2017.pdf [accessed 25 April 2017]

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Gábor Gyulai, ‘Statelessness in the EU Framework for International Protection’, *European Journal of Migration and Law* 14 (2012), p. 284.

⁴² Tamás Molnár, ‘Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order’ (2010), *Acta Juridica Hungarica* 51, No. 4, p. 304.

⁴³ UNHCR, ‘Global Trends: Forced Displacement in 2015’ (June 2016), available at: <http://www.refworld.org/docid/57678f3d4.html> [accessed: 12 September 2017]

3. Creating a regional legal instrument for harmonised European statelessness determination procedures

3.1. Reasons for the regional harmonisation of standards on statelessness determination

In contemporary Europe, statelessness should be a particular concern. Harmonised statelessness determination procedures could provide an emergency response to the protection needs of stateless persons in Europe. Today, over 80% of the continent's stateless population lives in only four countries: Latvia, the Russian Federation, Estonia, and Ukraine, where *in situ* statelessness is prevalent. Consensually, academia and UNHCR suggest that the best solution for *in situ* statelessness is the recognition of nationality. Undoubtedly, naturalisation is the most feasible solution for *in situ* stateless populations. Yet, some states (*e.g.* Estonia) are reluctant to naturalise certain groups of stateless persons. Therefore, for the time being, the author argues that statelessness-specific (international) protection mechanisms should be accessible to *in situ* stateless persons as well, as the protection status may serve as an interim measure and tackle protection gaps.

Where *in situ* statelessness is not a major issue, the phenomenon of statelessness mainly manifests itself in a migratory context. It shows that the risk of statelessness represents yet another by-product of the ongoing conflicts that cause forced migration, and a further consequence facing the millions of displaced persons, many of whom are undocumented, having no proof of their citizenship.⁴⁴

Moreover, children born in uncertain legal situations of irregular migration are at even larger risk of not being able to acquire any nationality, as the most frequent countries of origin have discriminatory nationality laws, and most of the European countries' rules on passing on nationality are governed by *ius sanguinis* regimes.⁴⁵ This problem should be tackled by allowing children who would otherwise be stateless to acquire the nationality of the state of birth. However, if states do not make efforts to address such legal gaps, a statelessness determination procedure and a stateless protection status could help children access vital services such as healthcare and education. In the case of children, it is of urgent importance that a rapid solution is found that serves the child's best interests.

Focusing efforts on the protection of stateless persons could benefit the human rights progress of both the European Union and the Council of Europe. Most importantly, it is urgent for states to address the indefinite and arbitrary detention of stateless persons.⁴⁶ Also, illegal (and exploitative) labour and human trafficking are real risks for the stateless. Granting them status as stateless persons should reduce their exposure to human trafficking and their exploitation by the shadow economy. As the CoE Commissioner for Human Rights recently highlighted, "the price to pay for the perpetuation of statelessness is high not only for the persons affected, but also for the countries in which stateless persons live".⁴⁷ He warned CoE members that allowing groups to be prevented from participation in socioeconomic and public affairs may result in the alienation of entire groups from society.⁴⁸

⁴⁴ UNHCR, 'Born in exile, Syrian children face threat of statelessness' (2014), available at: <http://www.unhcr.org/news/latest/2014/11/54589fb16/born-exile-syrian-children-face-threat-statelessness.html> [accessed 12 November 2016]

⁴⁵ Caia Vlieks and Katja Swider, 'The jus sanguinis bias of Europe and what it means for childhood statelessness' (15 June 2017), available at: <http://www.statelessness.eu/blog/jus-sanguinis-bias-europe-and-what-it-means-childhood-statelessness> [accessed 27 March 2017]

⁴⁶ European Network on Statelessness, 'Protecting Stateless Persons from Arbitrary Detention: an agenda for change' (2017), available at: http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_LockeinLimbo_Detention_Agenda_online.pdf [accessed 6 September 2017]

⁴⁷ Nils Muižnieks, 'Stateless but not rightless: Improving the protection of stateless persons in Europe', keynote speech by the Council of Europe Commissioner for Human Rights at the conference organised by UNHCR and the European Network on Statelessness in Strasbourg, 8 April 2014.

⁴⁸ *Ibid.*

There is a well-established link between statelessness and further displacement.⁴⁹ If states do not approach the definition of ‘stateless person’ with a common interpretation or application, it will cause the applicant to move from one state to another in hope of a more favourable outcome.⁵⁰ In refugee law, this phenomenon is called ‘asylum shopping’; in the situation of non-refugee stateless persons, it may be rephrased as ‘protection shopping’.⁵¹ Harmonising the standards on national SDPs may prevent secondary migration, which is one key aim of the EU *acquis communautaire* on migration and asylum.

Given the legal and institutional background of both organisations, there is a large scale of tools that can be utilised to promote the adoption of harmonised SDPs, from adopting EU legislation to the utilisation of Council of Europe soft law tools.

3.2. Adopting European Union legislation on the identification and protection of stateless persons

In December 2015, the European Council and the Representatives of the Governments of the Member States adopted the European Council Conclusions on Statelessness.⁵² The document begins by recalling the pledges of the Council made in recent years, and welcomes UNHCR’s 10-year campaign to end statelessness by 2024. It recalls that the Asylum, Migration and Integration Fund 2014-2020 can be used for implementing measures addressed to stateless persons. Most importantly, it acknowledges the importance of identifying stateless persons and takes note of the current SDPs some Member States have in place.⁵³

In their research, Swider and den Heijer argue that SDPs should be addressed at the EU level because, although most Member States are party to the 1954 Convention, only a few have adopted SDPs yet. Thus, the majority of the Member States are violating international standards.⁵⁴ While, legally speaking, this is a solid argument, the author views it from a different angle: with 24 Member States party to the 1954 Convention and six Member States⁵⁵ with functioning SDPs, the EU area is the leading region in the identification and protection of stateless persons. Advocates of EU-harmonised SDPs have already worked out possibilities of adopting an EU legislative act on the subject matter by picking the right treaty basis for regulation. Molnár argues that the ground for the identification and protection of stateless persons is Article 67(2) TFEU, read in conjunction with Article 352 TFEU, the ‘flexibility clause’.⁵⁶ The latter allows the Union’s competences to be adjusted to the objectives laid down by the TFEU where it has not provided the powers of action necessary to attain them. Since Article 67(2) TFEU mentions stateless persons as of the same status as third-country nationals, it brings them in its scope.⁵⁷

⁴⁹ Norwegian Refugee Council, ‘Statelessness and Displacement: Scoping Paper’ (2014), available at: http://www.institutetsi.org/stateless_displacement.pdf [accessed 27 March 2017]

⁵⁰ Carol Batchelor, ‘The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization’ (2004), *Refugee*, Vol. 22, No. 2 (2005), p. 32.

⁵¹ Katalin Berényi, ‘Statelessness and the refugee crisis in Europe’ (2016), *Forced Migration Review* 53, October 2016, p. 70.

⁵² European Council, ‘Conclusions of the Council and the Representatives of the Governments of the Member States on Statelessness’ (4 December 2016), available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/12/04-council-adopts-conclusions-on-statelessness/> [accessed 26 March 2017]

⁵³ *Ibid.*

⁵⁴ Maarten den Heijer and Katja Swider, ‘Why Union Law Can and Should Protect Stateless Persons’, Amsterdam Centre for European Law and Governance Research Paper No. 2016-03, available at: <http://ssrn.com/abstract=2823627> [accessed 18 April 2017]

⁵⁵ France, Hungary, Italy, Latvia, Spain and the United Kingdom.

⁵⁶ Tamás Molnár, ‘Moving Statelessness Forward on the International Agenda’ (2014), *Tilburg Law Review* 19 (2014), footnote 21 on p. 198.

⁵⁷ *Ibid.*

According to Swider and den Heijer, referring to Article 352 TFEU is unnecessary, as Article 79 TFEU on common immigration policy contains all the sufficient grounds in a more explicit (but still implicit) way.⁵⁸ Interpreting Article 67(2) TFEU in conjunction with Article 79 TFEU leads us to the conclusion that stateless persons cannot be left out of the EU's immigration policy.⁵⁹ The recently registered Minority SafePack initiative endorses this statement. This initiative will likely play a further role in choosing the appropriate treaty basis for an EU legislative act. According to the preamble of Commission Decision 2017/652, "the annex to the proposed citizens' initiative mentions (among others) the amendment of the EU legislation in order to guarantee approximately equal treatment for stateless persons and citizens of the Union, on the basis of Article 79(2) TFEU".⁶⁰ TFEU 79(2) grants capacity to the European Parliament and the Council to adopt legislative measures for the common immigration policy.

Per existing literature, the best solution for EU law to address the identification and protection of stateless persons would be the adoption of a directive on stateless persons. The Meijers Committee, which is a standing committee of experts on international immigration, refugee, and criminal law in the Netherlands, called for an EU directive on the identification of statelessness and the protection of stateless persons in October 2014.⁶¹ The proposal suggests that common criteria should be developed in three areas: statelessness determination, the standard of treatment, and residence. It calls for a fair procedure for determining whether a person is stateless. There should be a common interpretation of the definition of statelessness according to the 1954 Convention, as well as a minimum set of procedural safeguards and evidentiary standards for determining statelessness.⁶² In recent literature, those who recognise the impending risk of Syrian children being left stateless in Europe also encourage the adoption of an EU directive on stateless persons.⁶³

However, not all advocates of statelessness determination share this view. Gyulai has argued that "due to the lack of an explicit legal fundament in community law and the reluctance of Member States, it is very unlikely that the protection of (non-refugee) stateless persons would at any point be brought under the scope of common EU policies and legislation".⁶⁴ Indeed, Member States have been protective of their nationality matters, which was demonstrated in the reluctance to accept the concept of EU citizenship.⁶⁵ However, in contrast to the prevention and reduction of statelessness, regulating the identification and protection of stateless persons would not affect sovereignty in the field of nationality.⁶⁶ It would only mean the *influence* of EU law.⁶⁷ According to Gyulai, in some cases, harmonisation efforts have led to the weakening of protection standards, which he refers to as the 'race

⁵⁸ Maarten den Heijer and Katja Swider, 'Why Union Law Can and Should Protect Stateless Persons', Amsterdam Centre for European Law and Governance Research Paper No. 2016-03, p. 21. Available at: <http://ssrn.com/abstract=2823627> [accessed 18 April 2017]

⁵⁹ Ibid.

⁶⁰ Commission Decision (EU) 2017/652 of 29 March 2017 on the proposed citizens' initiative entitled 'Minority SafePack — one million signatures for diversity in Europe', preamble para. (4) point (h).

⁶¹ Meijers Committee, 'A proposal for an EU directive on the identification of statelessness and the protection of stateless persons' (13 October 2014), available at: <http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29336/20111014ATT29336EN.pdf> [accessed 30 March 2017]

⁶² Ibid.

⁶³ Katalin Berényi, 'Statelessness and the refugee crisis in Europe' (2016), *Forced Migration Review* 53, October 2016.

⁶⁴ Gábor Gyulai, 'Statelessness in the EU Framework for International Protection', *European Journal of Migration and Law* 14 (2012), p. 294.

⁶⁵ Maarten den Heijer and Katja Swider, 'Why Union Law Can and Should Protect Stateless Persons', Amsterdam Centre for European Law and Governance Research Paper No. 2016-03, p. 18. Available at: <http://ssrn.com/abstract=2823627> [accessed 18 April 2017]

⁶⁶ Ibid.

⁶⁷ See, *mutatis mutandis*, CJEU case C-135/08 (*Rottmann*)

to the bottom’ phenomenon.⁶⁸ The recurring failure of the Common European Asylum System is a good example: Member States deliberately lower their standards of protection to decrease relative attractiveness in comparison to other Member States to avoid having to handle asylum-seekers. The same thing could happen in the case of stateless persons.⁶⁹ This is pointed out by Swider and den Heijer as well, who are nevertheless in favour of an EU directive on statelessness.⁷⁰ The author notes that the fear of the pull-effect should not hinder Member States to comply with their obligations, but a transparent and effective implementation of such directive, if adopted, should be a priority.

Whether including statelessness as a separate ground for EU-harmonised protection is going to happen or not, the EU should keep advocating for the rights of stateless persons both within and outside its borders. As long as a statelessness-specific EU directive is not considered a political possibility, the EU should promote the idea of creating national statelessness-specific mechanisms in the Member States.⁷¹ To this end, the EU should further encourage the remaining Member States—Cyprus, Estonia, Malta, and Poland—to accede to the 1954 Convention. Statelessness should also continue to be on the agenda of the EU’s foreign policy: raising awareness of situations of statelessness and discriminatory nationality laws, and promoting solutions in other parts of the world could possibly decrease the number of stateless migrants arriving in the EU.⁷² The external promotion of addressing statelessness, at the same time, encourages the EU to adhere to the ‘practice what you preach’ principle.⁷³

3.3. The Council of Europe: routes to the codification of implicit obligations for statelessness determination

Notably, the Parliamentary Assembly and the Committee of Ministers of the Council of Europe have adopted several soft law tools on the prevention and reduction of statelessness. However, the identification and protection of stateless persons seem to have been of secondary importance on their agendas. In CoE soft law, only sporadic mentions are found on the need to establish statelessness determination procedures. In 1955, Parliamentary Assembly Recommendation 87 (1955) was issued, calling for member States to sign and ratify the 1954 Convention without delay.⁷⁴ In 1983, Committee of Ministers Recommendation No. R (83) 1 on stateless nomads and nomads of undetermined nationality called for States to accede to the 1954 Convention, and to apply it. Expressly asking for its application signals that the Committee of Ministers acknowledges that the 1954 Convention is not working properly without a statelessness determination procedure.

In April 2014, the Parliamentary Assembly released Resolution 1989 (2014) on the access to nationality and the effective implementation of the ECN.⁷⁵ The Resolution begins by recalling that the ECN

⁶⁸ Gábor Gyulai, ‘Statelessness in the EU Framework for International Protection’, *European Journal of Migration and Law* 14 (2012), p. 294.

⁶⁹ Maarten den Heijer and Katja Swider, ‘Why Union Law Can and Should Protect Stateless Persons’, Amsterdam Centre for European Law and Governance Research Paper No. 2016-03, p. 16. Available at: <http://ssrn.com/abstract=2823627> [accessed 18 April 2017]

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Inge Sturkenboom and Laura van Waas, ‘How real is the risk of a “stateless generation” in Europe? Reflections on how to fulfil the right to a nationality for children born to refugee and migrant parents in the European Union’ (2016), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2877368 [accessed 12 September 2017]

⁷³ European Network on Statelessness, ‘Submission to the European Commission Consultation on the future of Home Affairs policies: An open and safe Europe – what next?’ (January 2014), available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/public-consultation/2013/pdf/0027/organisations/ens-european-network-on-statelessness_en.pdf [accessed 4 April 2017]

⁷⁴ Council of Europe Parliamentary Assembly Recommendation 87 (1955) on statelessness (25 October 1955)

⁷⁵ Council of Europe Parliamentary Assembly Recommendation 1989 (2014) on access to nationality and the effective implementation of the European Convention on Nationality (9 April 2014)

guarantees the right to a nationality. It then calls on member States to establish statelessness determination procedures in line with the guidelines of UNHCR, and avoid refusing to recognise a person as stateless when his or her situation meets the definition of a stateless person as set out in Article 1(1) of the 1954 Convention, “in particular through the introduction of ‘alternative’ definitions of statelessness at the national level.”⁷⁶ Then, in March 2016, the Parliamentary Assembly adopted Resolution 2099 (2016) on the need to eradicate statelessness of children, which calls for States to introduce (or upgrade) statelessness determination procedures. It encourages States to do so in accordance with the guidelines of UNHCR to ensure that all stateless persons in their territories can be identified, protected and may ultimately acquire nationality through facilitated naturalisation.⁷⁷

There are two ways in which the Council of Europe could adopt legally binding instruments for harmonised statelessness determination procedures. The ECHR and its Optional Protocols are directly enforceable before the ECtHR. There are 13 Optional Protocols attached to the ECHR, extending its scope. The right to a nationality could be a plausible candidate for an Optional Protocol. However, the low number of signatures and ratifications of nationality-related conventions signal that probably there would be even less enthusiasm among States to accede to an Optional Protocol pronouncing the right to a nationality that is enforceable before the ECtHR. Another avenue could be the adoption of a revised ECN that would, this time, include the obligation to establish statelessness determination procedures on the national level. The design of the procedure could be left to States Parties. However, the revised Convention would have to be opened for signatures again, starting from the beginning.

Along the lines of legal considerations, a CoE convention on the protection of stateless persons would be the most favourable. For most decisions, the CoE Statute requires a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee of Ministers.⁷⁸ Adopting a CoE convention does not automatically generate an obligation for the member States to accede to it. The convention could contain the obligation to adopt a statelessness determination procedure (for those States that have not yet done so). Adequately, it could contain the most important minimum standards for the procedure, i.e. that the procedure should be formalised in law, it is accessible for everyone, the judicial review of the decision is available, etc.⁷⁹ An added benefit would be that CoE conventions are open for signature by non-members, too. It would be a great opportunity for non-members of the CoE to improve their foreign policy message. However, the overall low accession rate to previous conventions on nationality and the current political climate indicate that this might not (yet) be the moment for the members of the CoE to create such legally binding obligations for themselves. Of course, adopting such a convention can be a long-term goal, but in order to raise awareness of the issue and to attract as many future accessions as possible, it is useful to turn to soft law.

As mentioned before, the need to establish statelessness determination procedures has already appeared in some soft law instruments of the Council of Europe. Soft law instruments are not legally binding, but legally relevant. They can contribute to the consolidation of customary law and may serve as initiatives for national legislators to establish harmonised statelessness determination procedures that comply with the international standards. There are two organs of the CoE that have in their scope the adoption of soft law documents, and three soft law tools that may be suitable for serving as an incentive for establishing harmonised SDPs.

⁷⁶ Ibid.

⁷⁷ Council of Europe Parliamentary Assembly Resolution 2099 (2016) on the need to eradicate statelessness of children (4 March 2016)

⁷⁸ Jörg Polakewicz, ‘Council of Europe (CoE)’, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2014.

⁷⁹ UNHCR, *Handbook on Protection of Stateless Persons* (30 June 2014), available at: <http://www.refworld.org/docid/53b676aa4.html> [accessed 27 March 2017]

The Parliamentary Assembly of the CoE currently consists of 648 members (324 representatives and 324 substitutes) elected by the national parliaments. Often, new incentives appear in a recommendation adopted by the Parliamentary Assembly.⁸⁰ Recommendations of the Parliamentary Assembly contain proposals addressed to the Committee of Ministers. The Committee may accept, reject or modify the Assembly's proposals. On the other hand, resolutions embody decisions of the Parliamentary Assembly on questions which it is empowered to put into effect, or expressions of view for which it alone is responsible.⁸¹ For harmonised SDPs, both a Parliamentary Assembly recommendation and a resolution might be suitable.

The Committee of Ministers is the decision-making organ which acts on behalf of the CoE.⁸² Each member State delegates its minister responsible for foreign policy (or, as in practice, a substitute) to it. The Committee of Ministers adopts *recommendations* which constitute an important point of reference for national legislators and administrative authorities.⁸³ For the adoption of a recommendation, the CoE Statute requires a two-thirds majority of the representatives casting a vote and a majority of all representatives in the Committee of Ministers.⁸⁴ A Committee of Ministers recommendation is the highest level soft law tool.

4. Evaluation: which legal instrument is the most feasible and why?

While remaining idealistic in our objectives, realism is also important while selecting the most feasible tool to encourage (or oblige) states to adopt statelessness determination procedures. As mentioned before, one of the most prominent candidates for this task is a European Union directive on the protection of stateless persons to be adopted under the common immigration policy of the EU, on the basis of TFEU 79(2). This solution is backed by academics and experts EU-wide, and the recently registered Minority SafePack initiative might hold promising developments for the future. Today, however, there is great pressure on the EU to regulate asylum and other protection statuses. This situation has resulted in legislative fatigue concerning migration law, and has contributed to a less favourable political environment for the adoption of an EU directive on statelessness.⁸⁵ The author argues that, at this point, the adoption of a legally binding instrument on the EU level is unlikely, as Member States might be reluctant to adopt further enforceable norms concerning migration. The idea of enforceability might render efforts towards harmonisation counter-productive.

At the same time, more and more members of the Council of Europe acknowledge the need to establish statelessness determination procedures. The CoE consists of 47 member States, of which nine⁸⁶ have established statelessness determination procedures, while others address statelessness in a different manner that is not widely accepted as an SDP *per se* (for example, Switzerland).⁸⁷ This constitutes a

⁸⁰ Jörg Polakewicz, 'Council of Europe (CoE)', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2014, para. 17.

⁸¹ Council of Europe, 'Parliamentary Assembly', available at: <http://www.coe.int/en/web/tbilisi/parliamentaryassembly> [accessed 12 September 2017]

⁸² Jörg Polakewicz, 'Council of Europe (CoE)', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2014, para. 17.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para. 19.

⁸⁵ Maarten den Heijer and Katja Swider, 'Why Union Law Can and Should Protect Stateless Persons', Amsterdam Centre for European Law and Governance Research Paper No. 2016-03, p. 26. Available at: <http://ssrn.com/abstract=2823627> [accessed 18 April 2017]

⁸⁶ 10 European states excluding Kosovo.

⁸⁷ Karen Hamann, 'Statelessness determination: the Swiss experience', *Forced Migration Review* 54, February 2017, pp. 96-98.

‘critical mass’ for the harmonisation of statelessness determination procedures under the *aegis* of the CoE.

About 200,000 stateless persons live in states that are members of the CoE, but are not (yet) part of the EU. By addressing statelessness on the level of the CoE, the situation in the Western Balkans region and the former socialist federations’ successor states could be improved. Also, the current EU candidate countries (Albania, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey) are all members of the CoE. This is important because these states would want to improve their foreign policy message, and complying with their international obligations to effectively apply the 1954 Convention could be a major step forward.

It is not an overstatement to say that states have been reluctant to address nationality and migration matters as a response to international pressure. The low ratification rate of the ECN supports this argument. Soft law tools can serve as a compromise between constitutional sovereignty and the need to create rules to govern international relations.⁸⁸ According to Lord McNair, they are “instruments with extra-legal binding effect.”⁸⁹ Taking both legal and political arguments into account, the author concludes that the adoption of a soft-law instrument under the guidance of the Council of Europe is the most feasible way forward for encouraging a wider Europe to identify and protect stateless persons. The author underlines that statelessness is an issue that should be recognised at the highest levels. The adoption of a recommendation either by the Parliamentary Assembly or by the Committee of Ministers would help test the ground and shape the consensus that may eventually lead to directly enforceable European standards.⁹⁰ Progressively, a convention on the identification and protection of stateless persons may follow.

The leeway for the European Union to adopt a directive on the identification and protection of stateless persons is still there, and perhaps the Council of Europe’s efforts would increase the possibility of this outcome. Ideally, all relevant European regional organisations will push statelessness higher up on their agendas. The sharing of knowledge, experience, and good practices is crucial to this process. The work of the European Migration Network and the European Network on Statelessness continues to highlight good practices. In all circumstances, the harmonised procedures shall be in conformity with the international standards enshrined by UNHCR, and could be built up of the elements of existing SDPs.

The development of regionally harmonised statelessness determination procedures would help implement the 1954 Convention according to the international standards. In the view of the author, it is important to underline elements that are commonly recommended, but States should have the opportunity to design and customise their nascent statelessness determination procedures in the light of their own legal systems, and to adjust them to the protection needs of the stateless populations under their jurisdictions.

5. Conclusion

The time has come for Europe to address the protection of stateless persons in a harmonised manner. This work argued that the regional harmonisation of standards on statelessness determination procedures would enhance the current national efforts in the identification and protection of stateless persons. To this end, European states should facilitate the creation of a regional instrument by virtue of the powerful international organisations that exist in the region: the European Union and the Council

⁸⁸ Daniel Thürer, ‘Soft Law’, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2014.

⁸⁹ *Ibid.*

⁹⁰ Jörg Polakewicz, ‘Council of Europe (CoE)’, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2014.

of Europe. The legal instrument would serve as an incentive for States to establish statelessness determination procedures and set out regionally harmonised minimum standards.

This article began by looking at the current legal environment of statelessness determination, starting from the national level. A statelessness determination procedure is a logical prerequisite for accessing the rights set out in the 1954 Convention. As of the time of writing, 10 European states have SDPs in place in their national legislations. With only 14 SDPs worldwide, this number is considered as exceptionally high. The work then provided a brief overview on statelessness in legal instruments on the regional level, namely, in legally binding instruments of the CoE and the EU. Since obligations under the *aegis* of both the CoE and the EU contain implicit obligations for statelessness determination, harmonisation could be done by one of these organisations adopting a legal instrument which could serve as guidance for States to implement their own statelessness-specific protection mechanisms.

After discussing some relevant soft law tools and policy initiatives of both organisations, this article also looked at the possible avenues for the EU and the CoE to codify the obligation for statelessness determination. After taking the available possibilities into account, this article advocated for the adoption of a Council of Europe soft law document. This decision was made after weighing different sets of arguments: first, the specificities of stateless populations across Europe and current efforts to protect them; second, legal and political feasibility. Existing literature argues for an EU directive on the protection of stateless persons; the author agrees with the concept, but suggests the CoE soft law instrument for several reasons.

The CoE covers the majority of Europe; it brings together the EU Member States with non-EU countries which have large numbers of stateless persons under their jurisdictions. As a legally binding tool, the adoption of a CoE convention is a possibility. However, after discussing arguments for and against, this article has found that it is useful to move towards soft law instruments, which are not legally binding, but legally relevant. Possible ways for the CoE to adopt soft law documents were discussed by looking at the organisational structure of the CoE and the types of relevant soft law tools. Soft law documents are not enforceable, but they can serve as an important incentive for national policymakers and legislators. A Committee of Ministers recommendation is the strongest soft law instrument of the organisation, given that the Committee of Ministers is the most important organ of the CoE. The author argues that statelessness is an issue that should be recognised at the highest levels. Nonetheless, a Parliamentary Assembly recommendation could also serve the cause well, as its objectives may be pushed further by the Committee of Ministers. The idea of adopting a legally binding regional instrument can still be a long-term goal.

Luckily, there has been a paradigm shift in addressing statelessness: its perception has evolved from a technical matter to a multifaceted human rights problem that must be solved. Thus, the conviction that no number of stateless persons is negligible permeated international awareness. Academia, NGOs and international organisations should continue to jointly raise awareness of the issue. The most important message should be to promote the protection and integration of stateless persons into society. While being realistic about possible solutions, it is necessary to remain optimistic about the objectives. This article hopes that Europe will reach out to stateless persons and protect them according to their needs.