

UNIVERSITY COLLEGE DUBLIN

European Master's Degree in Human Rights and Democratisation  
A.Y. 2017/2018

# Reconceiving Statelessness

An Analysis of potential Solutions to realise the  
Right to a legal Identity in Europe

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## ABSTRACT

Stateless people face daily challenges in their life: Due to the national vs. non-national dichotomy the access to many human rights, e.g. education, health care, freedom of movement or the right to vote, is denied without holding a nationality. They are not recognised as a member by any state and subsequently live excluded at the edge of societies. As nationality conferral touches upon the highly sensitive matter of state discretion, the current international efforts to end statelessness by means of a merely legal ‘one size fits all’ approach might be off target. In addition, the conventional thin notion of *de jure* statelessness disregards the complexity of statelessness and the need to adequately address all its varying dimensions, including *de facto* statelessness. Hence, this present thesis analyses potential solutions to protect the rights of stateless people in Europe beyond the dilemma of reduction. Given the recent refugee crisis the thesis particularly considers statelessness in migratory context. Examining approaches from five different perspectives - Human Rights, Humanitarian Action, Sustainable Development, Technology and Praxis at domestic levels – this thesis argues for a new understanding of statelessness and a paradigm shift that supersedes the necessity of nationality by realising in lieu the right to a legal identity.

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## LIST OF ABBREVIATIONS

#Ibelong campaign	UNHCR's #Ibelong Campaign to end Statelessness within 10 years
1954 Convention	Convention relating to the Status of Stateless Persons
1961 Convention	Convention on the Reduction of Statelessness
CERD	Convention/Committee on the Elimination of Racial Discrimination
CEDAW	Convention/Committee on the Elimination of All Forms of Discrimination Against Women
CoE	Council of Europe
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CMR	Council of Europe Committee on Migration, Refugees and Displaced Persons
CRC	Convention/Committee on the Rights of the Child
CRPD	Convention/Committee on the Rights of Persons with Disabilities
DCI	Defence for Children International
ECHR	European Convention on Human Rights
ECN	European Convention on Nationality
EMN	European Migration Network
ENS	European Network on Statelessness
EU	European Union
FRA	European Union Agency for Fundamental Rights
GAP	Global Action Plan to End Statelessness: 2014-2024
HR	Human Rights
HRC	Human Rights Council

HRCttee (CCPR)	Human Rights Committee (also known as the Committee on Civil and Political Rights)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ID	Identity
ID2020	The ID2020 Alliance
ID4D	Identification for Development Initiative
IHRL	International Human Rights Law
IL	International Law
IRO	International Refugee Organisation
ISI	Institute on Statelessness and Inclusion
LIBE	European Union Committee on Civil Liberties, Justice and Home Affairs
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
SDG(s)	Sustainable Development Goal(s)
SDP(s)	Statelessness Determination Procedure(s)
TEU	Treaty on the European Union
TFEU	Treaty of the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme

UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICC	United Nations International Computing Centre
UNICEF	United Nations Children's Emergency Fund
UNSG	United Nations Secretary General
UNTC	United Nations Treaty Collection
UPR	Universal Periodic Review
WB	World Bank (Group)
WFP	United Nations World Food Programme

## PREFACE

*Without papers, you are like a dead person!*

- Stateless Roma family father in Macedonia<sup>a</sup>

*The doors of the world are closed to me!*

- Jirair, stateless boy from Georgia<sup>b</sup>

*I fly through this life with nowhere to land.*

- Unknown stateless person<sup>d</sup>

*If statelessness has remained in the cupboard for several decades, the protection of stateless persons has been kept right at the back, on its dustiest shelf!*

- Academic Scholar<sup>c</sup>

*Stateless [persons] are not asking for special treatment. They are only asking for equal treatment [and] the chance to have the same opportunities as other[s]. It is our responsibility to give them this chance!*

- UNHCR<sup>e</sup>

*Nationality [or] no nationality, honestly I realized that it is pointless. It is only something that divides and separates people.*

- Yannick in France<sup>f</sup>

*I am asking for help [...] and as a result I am being kept in detention with criminals. I have not done anything wrong, I am not a criminal.*

- Rashid, stateless Rohingya in Myanmar<sup>g</sup>

<sup>a</sup>Tagesschau (2017): Staatenlose – verfolgt und diskriminiert, Video (German), 00:00:13min, available at: <https://www.tagesschau.de/ausland/un-staatenlosigkeit-101.html> [09/07/18].

<sup>b</sup>UNHCR (2015): I am here, I belong – The Urgent Need to End Childhood Statelessness, report, p.2, available at: <http://www.refworld.org/docid/563368b34.html> [06/07/18].

<sup>c</sup>Gyulai (2014), p. 120.

<sup>d</sup>Greg Constantine (2016): Nowhere People: exposing a portrait of the world's stateless, Video by Ted Talks, available at: <https://www.youtube.com/watch?v=u9DD6MZj5Z4> [07/07/18].

<sup>e</sup>UNHCR (2015), p. 23

<sup>f</sup>UNHCR (n.d.)(e): Statelessness in France, available at: <http://www.unhcr.org/ibelong/statelessness-in-france/> [07/07/18].

<sup>g</sup>European Network on Statelessness (ENS) (n.d.): Rashid – Faces of Statelessness, available at: <https://www.statelessness.eu/faces-of-statelessness/rashid> [09/07/18].



Due to recent events...

July 2018 – what a miracle! The entire world has been gripped by the spectacular cave rescue in Thailand, where 12 football players and their coach have been locked deep in the Tham Luang cave for more than two weeks, as a sudden rain fall has blocked the exit. The ordeal of the 11-to 16-year old survivors dominated the world’s front-page headlines for which they have become unintentionally famous. Now they have been invited by the world-famous football club Manchester United for a visit next season.<sup>1</sup> Though: Three of the kids, as well as the coach, are stateless and do not have a passport, wherefore they cannot travel and accept the invite. They belong to the Tai Lue minority, an ethnic group who has moved for generations across regions in the remote hills of Myanmar, Laos, China and Thailand for which reason they are not recognised as a national by any of these countries.<sup>2</sup> However, due to their sudden fame, the Thai Interior Ministry has recently confirmed that the three little stars and their coach will get Thai nationality within the next six months, so that they can take the chance to travel to the United Kingdom. Though, this matter is not self-evident: Approximately 500 000 stateless people are estimated living in the Kingdom of Thailand who endure daily restrictions in many aspects of their life. Indeed, the Thai legislation may allow these people to apply for a Thai nationality if they fulfil the requirements (such as proof of birth on the territory or Thai lineage), but due to slowness and arbitrariness of local administrations, the verification process might take up to 10 years or even longer.<sup>3</sup>

Albeit, statelessness does not only exist in countries far away –also Europe is concerned by an emerging ‘stateless generation’ coming along with the refugee crisis.<sup>4</sup> However, statelessness is still a neglected topic: While a robot gains Saudi-Arabian citizenship entailing to have more rights than the country’s women<sup>5</sup>, most countries in the world do not have any effective safeguards to protect the rights of the 10 million stateless people.

Therefore, as terrifying as the cave drama has been, human rights activists “are hopeful that this tale will shine a light on the dreadful challenges faced by stateless peoples both in Thailand and across the [world].<sup>6</sup>

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<sup>1</sup> AFP (2018): Coach Ek the unlikely stateless hero of Thai cave drama, news article, available at: <https://www.afp.com/en/news/23/coach-ek-unlikely-stateless-hero-thai-cave-drama-doc-17e98c3> [14/07/18].

<sup>2</sup>Adam Withnall (2018): Thailand cave rescue: 'Stateless' boys and coach to be granted Thai citizenship after ordeal, news article in: The Independent, available at: <https://www.independent.co.uk/news/world/asia/thai-cave-latest-rescued-boys-citizenship-coach-stateless-trapped-chiang-rai-a8445516.html> [14/07/18].

<sup>3</sup> Pratch Rujivanarom (2018): Citizenship of three young cave survivors shines light on plight of stateless persons, news article in: The Nation, available at: <http://www.nationmultimedia.com/detail/national/30349971> [14/07/18].

<sup>4</sup> Louise Osborne / Ruby Russell (2015): Refugee crisis creates 'stateless generation' of children in limbo. In: The Guardian, Newspaper, London, UK., available at: <https://www.theguardian.com/world/2015/dec/27/refugee-crisis-creating-stateless-generation-children-experts-warn> [07/06/18].

<sup>5</sup> Natasha Salmon (2017): Saudi Arabia becomes first country to grant a robot citizenship – and people are saying it already has more rights than women, news article in: The Independent, available at: <https://www.independent.co.uk/news/world/middle-east/saudi-arabia-robot-citizenship-more-rights-than-women-people-angry-a8024851.html> [14/07/18].

<sup>6</sup> Sanna Johnson, International Rescue Committee’s (IRC) regional vice-president for Asia, as cited in: Whitnall (2018).

# I. INTRODUCTION

Formerly, man had only a body and soul. Now he needs a passport as well,  
for without it he will not be treated as a human being.

(Stefan Zweig in *The World of Yesterday*<sup>7</sup>)

In our modern world, human rights are deemed to be universal – though in practice, there are still too many people that do not have access to basic human rights. One of these oldest vulnerable groups that suffer from most severe human rights violations is the one of stateless people. They are humans as you and me – only with the slight difference that they do not have a nationality. This difference might seem very little, though, it affects their whole life: Not belonging to any state means belonging nowhere. The mere fact of not being registered as a national in any state system and thus officially being non-existent to the authorities condemns stateless people to live a life in shadow.

Without a nationality many fundamental rights such as the right to vote, education, marriage, health care or the freedom of movement are denied to stateless people, who are therefore no longer treated as equal human beings but rather as non-nationals to whom those rights apparently do not apply. Even simple daily activities, such as opening a bank account or buying a SIM-card, are often affiliated with utmost difficulties when someone cannot prove his existence. Using the words of political theorist Hannah Arendt “The abstract nakedness of being nothing but human [is] their greatest danger”<sup>8</sup>, this evidence shows that holding a valid nationality is a prerequisite for the realisation and enjoyment of all those adherent rights that are claimed to be universal. Hence, the right to a nationality, as enshrined in International Human Rights Law (IHRL), is often described as the superior *right to have rights* or even the *right to exist*.

Notwithstanding, every 10 minutes one child is born stateless around the world<sup>9</sup> although many international human rights instruments, foremost Article 7 of the almost universally

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<sup>7</sup> Stefan Zweig (n.d.), as cited in: Tendayi Bloom/ Katherine Tonkiss/ Phillip Cole (Ed.) (2017): Understanding statelessness. Routledge Studies in Human Rights, Routledge, New York, USA, p. 1.

<sup>8</sup> Hannah Arendt (1967): *Origins of Totalitarianism*. Harvest Book, New York, USA, p. 300.

<sup>9</sup> UNHCR (2015), p. I; European Network on Statelessness (ENS) (2015): No Child should be stateless, Report, London, UK, p. 4, available at: [https://www.statelessness.eu/sites/www.statelessness.eu/files/ENS\\_NoChildStateless\\_final.pdf](https://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf) [06/07/18].

ratified Convention on the Rights of the Child (CRC), explicitly set out the importance of the right to a nationality and oblige states to implement nationality acquisition measures for all children who would otherwise be stateless.<sup>10</sup>

Nevertheless, given the estimated high scale of stateless children in Europe<sup>11</sup>, the Institute on Statelessness and Inclusion (ISI) reports that “[t]he nationality laws of many European states have been found to fail to adequately protect children born on their territory from statelessness”<sup>12</sup>. Furthermore, the European Network on Statelessness (ENS) concerns “[...] that more than half of European parties to relevant international conventions have not properly implemented their obligations to ensure that all stateless children born in the country acquire a nationality”<sup>13</sup>.

Hence, this present master thesis examines the research question

How can stateless persons in Europe be better protected and their rights ensured?

In doing so, this thesis focuses in particular on the phenomenon of statelessness in Europe in the context of (irregular) migration because this aspect is still rarely considered in the current statelessness discourse, despite its high relevance and actuality due to the refugee crisis in recent years.

In order to understand and identify the problems with the phenomenon of stateless migrants in Europe, the first chapter provides a thematic overview and elaborates current controversies concerning the one-sided legal definition of statelessness. It highlights the shortcomings in international and European law and the differences between *de jure* and *de facto* statelessness. Furthermore, the distinction between nationality and citizenship will be elaborated and why the narrow focus on solving stateless solely by granting nationality is insufficient. The second part analyses existing and innovative solution approaches from each a human rights-, humanitarian- and development-based perspective, calling upon a combined approach that effectively addresses statelessness beyond merely legal solutions. In addition, the benefits of the technological Digital Identity approach will be discussed and how the shortcomings of

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<sup>10</sup>UNHCR (n.d.): The Urgent Need to End Childhood Statelessness, available at: <http://www.unhcr.org/ibelong/the-urgent-need-to-end-childhood-statelessness/> [06/07/18]; ENS (2015), p. 4.

<sup>11</sup> According to the ENS report (2015), p. 4, there were e.g. alone in Sweden already 8974 children recorded as stateless in 2014. However, there are no reliable disaggregated data of stateless children in Europe yet as many European states do not adequately register statelessness. In consequence, the numbers of stateless children are only rough estimations.

<sup>12</sup> Institute on Statelessness and Inclusion (ISI) (2017): The World’s Stateless: Children. Wolf Legal Publishers, Oisterwijk, NL, p. 74, available at: <http://www.institutesi.org/worldsstateless17.pdf> [06/07/18].

<sup>13</sup>ISI (2017), p. 74; cf. ENS (2015), p. 4.

present Statelessness Determination Procedures (SDPs) could be bypassed in order to make effective use of their potential at national level.

Using the methodology of literature review and desk-study, this present thesis strives to rethink the conventional notions of statelessness and nationality. Aiming to reveal innovative solutions that leverage humanity over legal statuses and human rights over the predominance of state sovereignty, its value lies within the novel contribution to enable a dignified life for stateless people beyond administrative barriers.

## II. IDENTIFYING THE PROBLEM

In a world where the principle of non-discrimination was fully realised, nationality would not matter. Nationality would not affect access to basic services such as health care and education or to place related activities such as crossing an international border [...]. Despite three quarters of a century of global human rights norms and two decades of near universal child rights principles, nationality matters.<sup>14</sup>

### 2.1. Setting the scene: Statelessness in Europe

Despite the rise of the claimed universal human rights-regime after World War II and sedulous international efforts to reduce statelessness which culminated in two particular Conventions (1954/1961), statelessness still remains

[...] the newest mass phenomenon in contemporary history, and the existence of an ever-growing new people comprised of stateless persons, the most symptomatic group in contemporary politics.<sup>15</sup>

Worldwide, the number of stateless people is counted to be approximately 10 million with at least 70 000 children being born stateless each year.<sup>16</sup> Unlike the common perception that statelessness depicts a problem only in other continents of the world, it affects approximately 600 000<sup>17</sup> people in Europe as well. Notwithstanding, due to a lack of reliable data and the invisible character of statelessness these statistics are only rough estimations; the actual number of non-reported stateless populations is probably much higher.<sup>18</sup> Especially in Europe, the actual scale of statelessness is more or less unknown because most stateless people and children, particularly within a migratory context, are not recorded as such.<sup>19</sup>

Whether if people of Haitian descent in the Dominican Republic, stateless Palestinians, the

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<sup>14</sup> Jaqueline Bhaba (2017): The importance of nationality for children. In: Institute on Statelessness and Inclusion (ISI) (2017): The World's stateless: Children. Wolf Legal Publishers, Oisterwijk, NL, chapter 7, p. 112.

<sup>15</sup> Arendt (1967), p. 277.

<sup>16</sup> UNHCR (n.d.) (b): Statelessness around the World, Website, available at: <http://www.unhcr.org/en-ie/statelessness-around-the-world.html> [09/06/18].

<sup>17</sup> ISI (2017), p. 73.

<sup>18</sup> The scale of stateless persons would also significantly increase when taking into account *de facto* statelessness. For further elaborations, see chapter 2.3.

<sup>19</sup> ENS (2015), p. 4.

Rohynga people in Burma or the Crimean Tatars in Ukraine: The causes for people becoming stateless vary as much as the countries they live in and as political theorist Hannah Arendt already stated more than 50 years ago,

[t]heir existence can hardly be blamed on one factor alone, but if we consider the different groups among the stateless it appears that every political event [...] inevitably added a new category to those who lived outside the pale of the law [...].<sup>20</sup>

Although having been a very disregarded and non-prominent issue for a long time, statelessness does not depict a new phenomenon: Regarding the many ‘*Heimatlosen*’ resulting of the reformation of state borders after World War I with the 1919 Peace Treaties, the dissolution of Austrian-Hungarian empire and the creation of the Baltic states or the million Jewish people who have been stripped of their German citizenship during World War II<sup>21</sup>, statelessness is present all along European history. Thus, with reference to Arendt’s quotation above, apparently there is a clear nexus of statelessness as a consequence of political upheavals.

In recent years, too, the first main reason for statelessness in Europe has been due to political events, particularly in the 1990’s with the dissolutions of Yugoslavia and the Union of Soviet Socialist Republics (USSR) and again, the subsequent creation of new states and borders. Thus, over 80% of today’s reported stateless populations in Europe live indeed in only four countries, which are all successor states of the former USSR: Latvia, Estonia, Ukraine and the Russian Federation.<sup>22</sup> Although the succession took place more than 25 years ago and since then numbers have continued to decline in recent years, still almost half a million people are trapped in statelessness in these four European countries, as well as another 10 000 reported people living in the six emerged successor states of former Yugoslavia.<sup>23</sup> Due to political overthrows and border changes, these people have become stateless although they usually lived already since generations on the same territory. Thus, their form of stateless is called *in situ*.<sup>24</sup>

Furthermore, in many countries the acquisition of identity documents is affiliated with the

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<sup>20</sup> Arendt (1967), p. 277.

<sup>21</sup> *ibid.*

<sup>22</sup> ISI (2017), p. 73.; ENS (2015), p. 5.

<sup>23</sup> *ibid.*

<sup>24</sup> cf. Caia Vlieks (2014): Contexts of statelessness: the concepts ‘statelessness *in situ*’ and ‘statelessness in the migratory context’. In: Bloom/Tonkiss/Cole (2017). *Understanding Statelessness*, Routledge Studies in Human Rights Vol. 4, Routledge, New York, USA, Chapter 3, pp. 35-52.

precondition of a permanent residence. As some minority groups, such as the Roma community, live in informal mobile settlements, they cannot fulfil this requirement.<sup>25</sup> Although they are entitled to obtain and exercise their citizenship in theory, the 10-12 million Roma people across Europe are predominantly disenfranchised in practice and discriminated due to their ethnicity and itinerant lifestyle.<sup>26</sup>

However, the other main cause for arising statelessness in Europe is migration.<sup>27</sup> Within mixed migration flows many people arrived in Europe in past decades, e.g. as refugees, trafficking victims or migrant workers. In some cases they have been already stateless in their country of origin, in other cases, with special regard to irregular migration, people have become stateless upon their arrival in Europe. Especially since the war in Syria and the following European ‘refugee crisis’ in 2015, the number of stateless people has significantly increased in some European Countries - for example in Sweden where plus 11 000 new stateless persons have been reported merely in 2015.<sup>28</sup>

Within this migratory context, notably foreign children born in Europe are exposed and vulnerable to statelessness<sup>29</sup>; mainly because of discriminatory nationality laws in their parent’s country of origin or because of a conflict with the different nationality acquisition laws of the country they immigrated to.<sup>30</sup> Moreover, failures in birth registration, irregular migration or the simple fact of crossing borders without papers depict other factors that make undocumented people falling through the ‘cracks’.<sup>31</sup> Peculiarly in the case of unaccompanied migrant children, the responsible state has the obligation to step in and take care of those children. Unfortunately, if they are stateless the question of responsibility is often not clear and particularly children or families with an irregular migrant status often hide from the

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<sup>25</sup> Milijana Trivkovic (2013): No residence, no rights, ENS blog, available at: <https://www.statelessness.eu/blog/no-residence-no-rights> [07/07/18].

<sup>26</sup> cf. Council of Europe (2013): Protecting the Rights of Roma, pp. 11ff, available at: <https://edoc.coe.int/en/roma-and-travellers/5976-pdf-the-council-of-europe-protecting-the-rights-of-roma.html> [09/07/18]; cf. Elena Rozzi (2011): Undocumented Migrant and Roma Children in Italy: Between Rights Protection and Control. In: Bhabha (Ed.) (2011): Children Without a state – A Global Human Rights Challenge, MIT Press, Cambridge, Massachusetts, Chapter 8, pp.177-216.

<sup>27</sup> cf. Vlieks (2014), p. 35ff; cf. Sophie Nonnenmacher/Ryszard Cholewinski (2014): The Nexus between statelessness and migration. In: Edwards/van Waas (2014): Nationality and Statelessness under International Law, Cambridge University Press, UK, Chapter 10, pp. 247-263.

<sup>28</sup> ISI (2017), p.74.

<sup>29</sup> cf. Luca Bicchocchi (2011): Undocumented Children in Europe – Ignored Victims of Immigration Restrictions. In: Bhabha (2011): Children without a State – A Global Human Rights Challenge, MIT Press, Massachusetts, Chapter 5, pp. 109-130.

<sup>30</sup> *ibid.*

<sup>31</sup> Other reasons such as child abandonment, cross-border adoption or transnational surrogacy also produce statelessness in Europe; though due to space limits these factors have to be disregarded at this point.

authorities because of their fear of being deported.<sup>32</sup>

As codified in the Preamble of the CRC, childhood is a particular phase and status of (under)development that demands and entitles to special care, protection and assistance. Besides the general vulnerability that comes along with statelessness, children are even more defenceless and exposed to the coercive powers of a state due to the fact of immaturity. Hence, stateless children experience the full vehemence of denied human and children's rights – firstly because of their status as a stateless person and secondly because of their status as a child.<sup>33</sup> With regard to this two-folded intersectionality, stateless children face serious deprivations of 'key elements of childhood'<sup>34</sup> such as education, health care and assistance. As they officially do not exist before the law, these children are trapped in a dangerous limbo, because "unlike citizen or otherwise legal children, their claim to protection as minors is in tension with their excludability as outsiders"<sup>35</sup>.

In order to examine the situation of stateless people Europe and search for adequate solutions, the following sections take a closer look at the conventional definition as well as expanded definition of statelessness and the legal framework in international and European law, as they all depict further factors to the problem beyond the ostensible missing legal status of nationality. Furthermore, the crucial distinction between nationality and citizenship will be analysed.

In sum, there are

two different contexts [of statelessness], the first consisting of countries – many industrialized – that host stateless persons who are predominantly, if not exclusively, migrants or of migrant background; and the second consisting of countries that have *in situ* stateless populations (i.e. those that consider themselves to already be 'in their own' country). The response to statelessness will need to vary, depending on these circumstances.<sup>36</sup>

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<sup>32</sup> Jaqueline Bhaba (2011): From Citizen to Migrant: The Scope of Child Statelessness in the 21<sup>st</sup> Century. In: Jaqueline Bhaba (Ed.) (2011): Children without a State - A Global Human Rights Challenge. Massachusetts Institute of Technology (MIT) Press, USA, Chapter 1, pp. 1- 42, cf. Biccocchi (2011), pp. 109ff.

<sup>33</sup> Gerard-René de Groot (2014): Children, their right to a nationality and child statelessness. In: Edwards/van Waas (2014): Nationality and Statelessness under International Law, Cambridge University Press, UK, Chapter 6, pp. 144-168.

<sup>34</sup> Bhabha (2011), p. 16.

<sup>35</sup> *ibid.*

<sup>36</sup> UNHCR Geneva Conventions (2011), as cited in Gábor Gyulai (2014): The determination of statelessness and the establishment of a statelessness-specific protection regime. In: Edwards/van Waas (Ed.) (2014): Nationality and Statelessness under International Law, Cambridge University Press, UK, Chapter 5, p. 118.



## 2.2. Status quo: The Legal Framework behind Nationality and Statelessness

“To be denied the legal status of nationality is to be denied human rights”<sup>37</sup>.

This simple sentence summarizes the essence of all provisions and objectives in International Human Rights Law (IHRL) as well as in regional European Standards, which will be further presented in the following:

### 2.2.1. Core International Human Rights Instruments

The fundamental right to a nationality is codified in a series of international legal instruments, most prominently in Article 15(1) of the Universal Declaration of Human Rights (UDHR)<sup>38</sup> (“Everyone has the right to a nationality.”), Article 7(1) CRC (“The child shall be registered immediately after birth shall have [...] the right to acquire a nationality [...]”) and Article 24(2,3) of the International Covenant on Civil and Political Rights (ICCPR) (similar diction to Art. 15 CRC).

Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>39</sup>, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>40</sup>, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>41</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)<sup>42</sup> explicitly mention the right to nationality as well – though each with a slightly different diction, depending on the focus of the convention. Generally, all conventions intend to ensure the right of each individual to acquire, change and retain a nationality regardless of sex, ethnic, race, colour, language, religion etc. Besides the right to a nationality, the above-mentioned international human rights instruments also impose numerous positive and negative obligations to their State Parties in

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<sup>37</sup> Alison Kesby (2012): *The Right to have Rights – Citizenship, Humanity and International Law*, Oxford University Press, UK, p. 144.

<sup>38</sup> UNGA (1948): Universal Declaration of Human Rights, Resolution 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [06/07/18].

<sup>39</sup> UNGA (1965): International Convention on the Elimination of All Forms of Racial Discrimination, Resolution A/RES/2106(XX), Art. 5(d)(iii), available at: [www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_2106\(XX\).pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2106(XX).pdf) [06/07/18].

<sup>40</sup> UNGA (1979): Convention on the Elimination of All Forms of Discrimination against Women, A/RES/34/18, Art. 9, <http://www.refworld.org/docid/3ae6b3970.html> [06/07/18].

<sup>41</sup> UNGA (2006): Convention on the Rights of Persons with Disabilities, A/RES/61/106, Art. 18, available at: <http://www.refworld.org/docid/45f973632.html> [06/07/18].

<sup>42</sup> UNGA (1990): Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, A/RES/45/158, Art. 29, available at: <http://www.refworld.org/docid/3ae6b3980.html> [06/07/18].

order to adequately ensure this right. These obligations contain, *inter alia*, immediate birth registration, non-discrimination (especially in terms of gender-discriminatory nationality acquisition, nationality inheriting or marriage laws), the warranty to implement and respect these rights, the prohibition of arbitrary nationality deprivation or unlawful interferences.

In addition, Article 6 UDHR and Article 16 ICCPR codify the universal right to a legal identity (“Everyone has the right to recognition everywhere as a person before the law”).

Overall, the most significant directive of IHRL is probably that states shall “[...] promote and protect the human rights of all persons subject to their jurisdiction, be they stateless or otherwise.”<sup>43</sup> In other words, all state parties are obliged to protect human rights regardless of a person’s status and irrespective of their nationality.<sup>44</sup>

Furthermore, Article 7 and 8 of the CRC clearly stipulate that State Parties have to safeguard the right to nationality “[...] in particular where the child would otherwise be stateless” and that “[w]here a child is illegally deprived of some or all of the elements of his or her identity [including nationality], States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity”. As the CRC is almost universally ratified, state parties are legally bound by these obligations.

Article 9(2) CEDAW indicates that “States Parties shall grant women equal rights with men with respect to the nationality of their children” and all domestic laws of the State Parties have to be in accordance with the corresponding ratified international treaties; thus they are not allowed to undermine any of their provisions. However, despite all those provisions are distinct and to be utterly complied with, “[...] few EU countries have adopted th[ese] principle[s] into domestic law and those that have, consistently fail to implement [them]”<sup>45</sup>. In addition, although 189 states have ratified CEDAW, to this date there are still 25 countries<sup>46</sup> worldwide which maintain discriminatory nationality laws that entail a tremendous risk of statelessness for children born to single mothers.

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<sup>43</sup> Amal de Chickera/Laura van Waas (2017): Unpacking Statelessness. In: Bloom/Tonkiss/Cole (Ed.) (2017): Understanding Statelessness, Routledge Studies in Human Rights, Routledge, New York, USA, Chapter 4, p. 59.

<sup>44</sup> Alice Edwards (2014): The meaning of nationality in international law in an era of human rights: procedural and substantive aspects. In: Edwards/van Waas (Ed.) (2014): Nationality and Statelessness under International Law. Cambridge University Press, Cambridge, UK, Chapter 1, p. 11.

<sup>45</sup> Louise Osborne / Ruby Russell (2015): Refugee crisis creates 'stateless generation' of children in limbo. In: The Guardian, Newspaper, London, UK., available at: <https://www.theguardian.com/world/2015/dec/27/refugee-crisis-creating-stateless-generation-children-experts-warn> [07/06/18].

<sup>46</sup> UNHCR (2018)(g): Background Note on Gender Equality, Nationality Laws and Statelessness (March 2018), p. 6, available at: <http://www.refworld.org/pdfid/5aa10fd94.pdf> [09/07/18]; Global Campaign for Equal Nationality Rights (n.d.): The Problem, website, available at: <https://equalnationalityrights.org/the-issue/the-problem> [09/07/18].

### 2.2.2. The 1954 and 1961 Statelessness Conventions and the 1951 Refugee Conventions

The other two international key instruments on statelessness are the 1954 Convention relating to the Status of Stateless Persons (1954 Convention)<sup>47</sup> and the 1961 Convention on the Reduction of Statelessness (1961 Convention)<sup>48</sup>. Though, at present only 90 out of 193 UN Member States have ratified the 1954 Convention and only 71 States are party to the 1961 Convention.<sup>49</sup> Thus, less than half of the UN Member States are bound by the obligations directed in the two conventions, wherefore their relevance and outcome might be limited.

Nonetheless, for those states that have ratified the treaty, the 1954 Convention stipulates important provisions on the treatment and protection of stateless people. Above all, state parties must accord a treatment as favourable as possible and in the same way, respectively not less favourable, as accorded to aliens.<sup>50</sup> Furthermore, the contracting states shall grant “[...] the same protection as is accorded to nationals of that country”<sup>51</sup> and are prohibited to forcibly expel stateless persons from their territory. With aiming to provide a distinct framework that “[...] helps resolve the practical problems they face in their everyday lives”<sup>52</sup> and including a whole bunch of essential rights - such as *inter alia* the right to public education, the right to wage-earning employment, the right to have access to courts, social security, freedom of movement, administrative assistance and in particular the issuing of valid identity and travel documents - the 1954 Convention sets out valuable minimum standards for a dignified handling of stateless persons.

But: These standards only apply to stateless persons who, firstly, qualify under the convention’s narrow definition of not being considered as a national by any State<sup>53</sup> and, secondly, sojourn lawfully on the territory of the state.<sup>54</sup> Subsequently, they do not apply to the thousands of *de facto* stateless persons<sup>55</sup> and irregular stateless migrants. In addition,

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<sup>47</sup> UNGA (1954): Convention relating to the Status of Stateless Persons, A/RES/526/A(XVII), available at: [http://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons\\_ENG.pdf](http://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf) [06/07/18].

<sup>48</sup> UNGA (1961): Convention on the Reduction of Statelessness, A/RES/896(IX), available at: <http://www.refworld.org/docid/3ae6b39620.html> [07/07/18].

<sup>49</sup> United Nations Treaty Collection (UNTC) (2018): Depository – Status of Treaties, database, available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-4&chapter=5&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=en) [06/07/18].

<sup>50</sup> UNGA (1954), Article 7(1).

<sup>51</sup> *ibid*, Article 14.

<sup>52</sup> UNHCR (2014): Introductory Note. In: UNGA (1954), p. 3.

<sup>53</sup> UNGA (1954), Article 1(1). This circumstance prescribed in this definition is also called *de jure* statelessness. For further elaborations, see section 2.3.

<sup>54</sup> cf. Laura van Waas (2014): The UN statelessness conventions. In: Edwards/van Waas (2014): Nationality and Statelessness under International Law, Cambridge University Press, UK, Chapter 3, p. 79f.

<sup>55</sup> The subject of *de facto* statelessness will be further elaborated in section 2.3.

Article 12(1) explicitly stipulates the discretion of states to govern the personal status of a stateless person by domestic law. Again, the provisions of this convention are inhibited by the limited scope of international law to not affect state sovereignty and internal affairs. Thus, the implementation of the convention at the national level is constrained by divergent municipal legislation and varying efforts to fulfil those provisions<sup>56</sup>. For instance, the contracting states shall facilitate and expedite the assimilation and naturalisation of stateless persons at their best.<sup>57</sup> However, in the European Union (EU) the rights accorded to stateless people differ on a large scale<sup>58</sup>; especially with rising xenophobia since the refugee crisis in 2015, many states set their priorities on how to legally expel aliens from their territory, rather than how to integrate them.<sup>59</sup>

While the 1954 Convention strives to regulate the status and attendant rights of stateless persons, the complementing 1961 Convention seeks to reduce and prevent statelessness by directing clear provisions concerning the acquisition of nationality. The 1961 Convention utterly obliges the contracting state to “[...] grant its nationality to a person born in its territory who would otherwise be stateless”<sup>60</sup> (*jus soli* principle<sup>61</sup>) or to a person born outside its territory when the parents possess the state’s nationality (*jus sanguini* principle<sup>62</sup>) either automatically at birth or proximately upon application. Furthermore, it strictly prohibits the deprivation of nationality by virtue of racial, ethnic, religious or political reasons<sup>63</sup> and in case of loss of nationality due to a change in a person’s personal status (for instance because of marriage or adoption), the possession of another nationality shall be ensured.<sup>64</sup>

Nevertheless, only a few states have ratified the 1961 convention<sup>65</sup> and the recognition of nationality acquisition based on both *jus soli* and *jus sanguini* principles often leads to conflicts between domestic nationality laws of states or unclear purviews between states,

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<sup>56</sup> Four EU member states have not even ratified the 1954 Convention, cf. EMN (2016): EMN Inform - Statelessness in the EU, Synthesis Report, p. 4, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-informs/emn-informs-00\\_inform\\_statelessness\\_final.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-informs/emn-informs-00_inform_statelessness_final.pdf) [12/07/18].

<sup>57</sup> UNGA (1954), Article 32.

<sup>58</sup> European Parliament (2015): Practices and approaches in EU member states to prevent and end statelessness, study, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL\\_STU\(2015\)536476\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU(2015)536476_EN.pdf) [12/07/18].

<sup>59</sup> cf. ISI (2017), p.17.

<sup>60</sup> UNGA (1961): Convention on the Reduction of Statelessness, A/RES/896(IX), Art. 1(1). available at: <http://www.refworld.org/docid/3ae6b39620.html> [07/07/18].

<sup>61</sup> UNGA (1961): Article 1(1); *Jus Soli* means: Law of the soil/territory.

<sup>62</sup> *ibid*, Article 4(1); *Jus sanguini* means: Law of the blood.

<sup>63</sup> *ibid*, Article 9.

<sup>64</sup> *ibid*, Article 5.

<sup>65</sup> Eight EU member states have not ratified the 1961 Convention, cf. EMN (2016), p.

especially in the context of migration.<sup>66</sup> In addition, the deprivation of nationality in the course of counterterrorism measures is increasingly performed and subject of legislation debate in some countries.<sup>67</sup>

In order to evaluate the relationship between refugees and stateless persons, the 1951 Convention Relating to the Status of Refugees<sup>68</sup> (1951 or Refugee Convention) plays an important role: According to the definition in Article 1(A)(2), a refugee “[...] is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion”<sup>69</sup>. Above all, the Refugee Convention obliges state parties to protect individuals from political or other persecution.

Especially after the First World War (WWI), before drafting the 1954 Statelessness Convention, there was no distinction between a refugee and a stateless person, as both groups found themselves in the adjacent conditions of not receiving protection and assistance from their state of former habitation.<sup>70</sup> Notwithstanding, refugees have been identified by the causes of their flight, whereas statelessness has been regarded as incidental and as a less relevant implication to the refugee status. Thus, refugees may simultaneously be stateless, with the status as refugee being the focal point, but in reverse stateless persons, who may not be refugees, did not fall under the scope of the refugee definition; in consequence, statelessness alone being not decisive to receive protection and the rights attributed to the refugee status.<sup>71</sup> In other words, refugees were the priority while the problems faced by stateless persons were disregarded with less urgency and importance.

Today, the general perception prevails that stateless persons and refugees are situated in similar conditions, as they both suffer from lacking national protection and cannot rely on or go back to their state of origin.<sup>72</sup> Therefore, the wording and articles of both the 1951 Refugee and the 1954 Statelessness Convention are quite similar. Nevertheless, the Refugee Convention contains two fundamental principles which are not included in the Statelessness

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<sup>66</sup> These issues will be highlighted in section 2.2.4.

<sup>67</sup> cf. ISI (2017), p.17.

<sup>68</sup> UNGA (1951): Convention and Protocol Relating to the Status of Refugees, A/RES/2198(XXI), available at: <http://www.refworld.org/docid/3be01b964.html> [06/07/18].

<sup>69</sup> UNHCR (2010): Introductory Note. In: UNGA (1951), p.3.

<sup>70</sup> Carola Batchelor (1995): Stateless persons: Some gaps in International Protection. In: International Journal of Refugee Law, 7(2), p. 239.

<sup>71</sup> Batchelor (1995), p. 243; cf. Eric Fripp (2016): Nationality and Statelessness in International Law of Refugee Status, Bloomsbury Publishing, London, UK., Chapter 1, pp. 95-101.

<sup>72</sup> *ibid.*

Conventions, namely the essential principles of non-penalisation and non-refoulement, codified in the Articles 31 and 33. With these two additional articles, the Refugee Convention explicitly prohibits the penalisation of refugees for illegal entry or presence in a country and their forcible return to the country where the refugee's freedom or life may be threatened.

However, despite statelessness had not yet been seen as a separated issue by the time the Convention had been adopted, as much as important these two principles are, as less do they apply to many border-transgressing stateless persons – because not every migrant is a refugee as determined under the correspondent refugee definition. Especially *de facto* stateless persons are hence at risk of being refouled as they neither are identified as stateless persons, nor as refugees and also do hold, at least on the paper, a formal nationality where they could be sent back to. Given the widespread practice of immigration detention, crossing borders without legal documents – as it may be the case for hundreds of stateless persons – indeed entails a penalisation. And as a last gap, for many *de facto* stateless persons it may be exactly this ineffective or discriminatory nationality that forced them to migrate or flee, but as this reason is generally not considered in the Refugee Convention, those stateless persons are not accorded the rights and protection that are solely reserved to refugees (or *de jure* stateless people under the 1954 Convention).<sup>73</sup> Therefore, *de facto* stateless people are also denominated as the 'unprotected', because to this date no explicit convention regulates their status and protection.<sup>74</sup>

In sum, all three Conventions may have honourable and benevolent aspirations, but as remarked above, there are a number of crucial shortcomings that make stateless people fall through the cracks of international protection. In addition, all three conventions are not regarded as 'Core International Human Rights Instruments', wherefore the compliance of state parties with their provisions are not monitored by a corresponding treaty body. Besides, all three conventions highly respect state sovereignty and thus leave explicitly some leeway in determining the personal status and handling of stateless persons and refugees at domestic level. Lastly, as they all have been drafted in the post-WWII-era and thus focused on the needs of refugees and stateless persons of that time, the contents of the three conventions -

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<sup>73</sup> David Weissbrodt/Clay Collins (2006): The Human Rights of Stateless Persons, Human Rights Quarterly, vol. 28(1), pp.252f.

<sup>74</sup> Sawyer, Caroline (2011): Stateless in Europe: legal aspects of *de jure* and *de facto* statelessness in the European Union. In: Sawyer/ Blitz (Ed.) (2011): Statelessness in the European Union – Displaced, Undocumented, Unwanted. Cambridge University Press, Cambridge, UK, Chapter 4, p. 81f; cf. Paul Weis (1979): Nationality and Statelessness in International Law (2<sup>nd</sup> ed.), Sijthoff & Noordhoff International Publishers B.V, Alphen aan den Rijn, NL; cf. Eric Fripp (2016).

particularly with regard to globalisation, mass migration and the European refugee crisis – may no longer be up to date to the extent that amendments may be required. However, “the international refugee protection system [...] is at least an existing and functioning protection framework in many countries, while currently the same cannot be said of the statelessness protection regime.”<sup>75</sup>

### 2.2.3. Regional Standards

The Council of Europe (CoE) provides two documents explicitly addressed to nationality and statelessness: The first one is the 1997 European Convention on Nationality (ECN)<sup>76</sup> and the second one is the 2009 Convention on the Avoidance of Statelessness in Relation to State Succession<sup>77</sup>. Due to its low number of ratifications, more precisely only 7 out of 47<sup>78</sup> CoE member states, and its specification on the case of state succession, the latter will not be further examined at this point. Nevertheless, the positive aspirations of the CoE to adequately address all facets of statelessness in Europe, whereof state succession is one extensive main cause, may be remarked.

However, the higher relevance lies with the ECN although, with only 21 ratifications<sup>79</sup>, again less than half of the CoE member states are legally bound to this treaty. The ECN manifests generally similar principles as its two ‘counterpart’ Statelessness Conventions in international law, i.e. the right of everyone to a nationality, the avoidance of statelessness, non-discrimination and the prohibition of arbitrary deprivation of a person’s nationality. Likewise as the Statelessness Conventions, ECN does not oblige states to adopt one particular nationality granting system: it also recognises both birth acquiring systems, *jus soli* and *jus sanguinis*; leaving the determination to whom nationality will be granted exclusively to the state’s discretion – as long as the municipal laws are in line with the four above-mentioned principles.<sup>80</sup> Albeit, ECN is the only convention that defines what exactly is meant by the term ‘nationality’ – namely a legal bond between the individual and the state - and thereby clears confusion which is often emerging by delusively designating nationality as a person’s

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<sup>75</sup> Gyulai (2014), p. 120.

<sup>76</sup> Council of Europe (CoE) (1997): European Convention on Nationality (ECN), ETS No.166, available at: <https://rm.coe.int/168007f2c8> [06/07/18].

<sup>77</sup> Council of Europe (CoE) (2009): Convention on the Avoidance of Statelessness in Relation to State Succession, CETS No.200, available at: <https://rm.coe.int/1680083747> [06/07/18].

<sup>78</sup> Council of Europe (2018): Chart of signatures and ratifications of Treaty 200, Status as of 17/06/2018, available at: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/200/signatures?p\\_auth=VygO6E2r](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/200/signatures?p_auth=VygO6E2r) [17/06/18].

<sup>79</sup> *ibid.*

<sup>80</sup> CoE (1997), Article 3.



ethnic origin.<sup>81</sup> Notwithstanding the ECN focuses lies solely on ‘universal’ nationality conferral as the one-and-only solution to address statelessness. Similarly to the Statelessness Conventions, it disregards *de facto* statelessness and by appreciating both birth nationality granting systems also the potential conflicts between different nationality laws that come inevitably along with the increasing immigration flows to Europe within the past few years.

For the sake of completeness, the European Convention on Human Rights (ECHR)<sup>82</sup> shall be mentioned, too, but this document does not contain any explicit provisions pertaining to nationality or statelessness.<sup>83</sup>

Concerning the European Union (EU), one of the key documents is ‘The Charter of Fundamental Rights of the European Union’ (EU Charter). Although the Charter does not encompass any explicit provision concerning statelessness or the right to a nationality as well, it stipulates in Article 1 the respect and protection of inviolable human dignity and in Article 24(2) that “[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.”. But “When is it in the best interest of the child to be stateless”<sup>84</sup> and in the sense of human dignity to detain migrants without legal documents? Probably never! Thus, in lieu of binding safeguards that regulate nationality matters, the EU Charter rather codifies in Chapter V a number of ‘Citizen’s Rights’, such as the right to vote or the right to free movement, work and residence within the territory of the EU member states. These citizen’s rights are also set out in another EU key document, namely the Treaty of the Functioning of the European Union (TFEU), under Article 20(2). According to TFEU Article 20(1), “[e]very person holding the nationality of a Member State shall be a citizen of the Union”. Hence, EU citizenship is directly connected and dependent upon the formal affiliation to an EU member state; EU citizenship is an additional asset attributed to EU member state’s nationals, though it cannot replace national citizenship. *Id est*, nationality is a prerequisite to gain EU citizenship and thus access to

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<sup>81</sup> *ibid*, Article 2(a): “Nationality means the legal bond between a person and a State and does not indicate the person's ethnic origin“.

<sup>82</sup> Council of Europe (CoE) (1950): Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, available at: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) [06/07/18].

<sup>83</sup> The only article that might appear as relevant in the context of irregular migration is Article 8: The right to respect private and family life, including the prohibition of public authorities to unlawfully interfere with the exercise of that right and separate families. For further information, see: Bhabha (2011); Bicocchi (2011); Patti Tamara Lenard (2017): The right to family – protecting stateless children. In: Bloom, Tendayi/Tonkiss, Katherine/Cole, Phillip (Ed.) (2017): Understanding statelessness, Routledge Studies in Human Rights Vol. 4, Routledge, New York, USA, Chapter 14, pp. 227-240.

<sup>84</sup> Renate Winter (2015), as cited in ENS (2015), p. 6.



certain associated rights that are withheld from non-EU citizens.<sup>85</sup> This nexus between nationality and (EU) citizenship demonstrates the emphasis and importance of nationality within the EU context.<sup>86</sup>

In sum, the laudable aspirations to establish International and European standards on nationality and statelessness were certainly a driving factor to raise awareness and bring this important matter on the political agenda. As disregarded as the subject is today, it would have probably been less considered without all these numerous conventions and provisions. Though, there are some serious shortcomings that need to be improved in order to better address statelessness henceforth. Especially the refugee crisis in 2015 and the entailed evolution of a new ‘statelessness generation’ in Europe, due to conflicting nationality laws between states, demonstrate the need for equal standards concerning the handling of stateless people. Furthermore, the matter of *de facto* statelessness remains completely disesteemed in all treaties and as much as all the contained provision might be helpful in theory, in practice they collapse because of the humble quantity of ratifications.

#### **2.2.4. Modes of Nationality Acquisition and the conflict with gender-discriminatory nationality laws**

Despite all these distinct obligations in international and European law, states actually enjoy great leeway when it comes to their domestic nationality acquisition laws – let alone those states that did not ratify the conventions in the first place. Articles 1 and 2 of the 1930 The Hague Conventions articulate:

It is for each State to determine under its own law who are its nationals[;]  
[...] any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.<sup>87</sup>

In theory, the active denial of nationality may be prohibited – in practice it is widely executed under the plea of states being sovereign and thus in charge to decide who shall belong to the

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<sup>85</sup> cf. Tonkiss, Katherine (2017): Statelessness and the performance of citizenship-as-nationality. In: Bloom/Tonkiss/Cole (Ed.) (2017): Understanding Statelessness, Routledge Studies in Human Rights Vol. 4, Routledge, New York, USA, Chapter 14, pp. 210-226.

<sup>86</sup> cf. ENS (2015), p. 11ff.

<sup>87</sup> League of Nations (1930): Convention on Certain Questions Relating to the Conflict of Nationality Law, Treaty Series, vol. 179, p. 89, No. 4137, available at: <http://www.refworld.org/docid/3ae6b3b00.html> [15/07/18].

country.<sup>88</sup>

As noted above international and European law both prescribe two modes of nationality acquisition at birth: The birthplace-based *Jus soli* (law of the soil), where a child gains the nationality of the country on whose territory it has been born, and the descent- or parentage-based *jus sanguinis* (law of the blood)<sup>89</sup>, where a child gains the nationality of the parents; some countries also set out a combination of the two.<sup>90</sup> In particular, the principle of *jus soli* shall be applied when a child would otherwise be stateless. In reverse, *jus sanguinis* shall be applied to parents living abroad in a country that does not recognise *jus soli*. These principles are most prominently codified within the ECN and 1961 Statelessness Convention and deemed as the solution to reduce and prevent statelessness.

But: Especially in the context of migration many children born in exile fall through the cracks because of conflicts between these two nationality conferral types, for instance when the country on whose territory the child is born, does only apply *jus sanguinis* but the country of origin only applies *jus soli*. In Europe the descent-based *jus sanguinis* approach strongly holds regional sway<sup>91</sup> which on the one hand may prevent statelessness abroad, but on the other hand creates statelessness interiorly:

Children born to European parents anywhere in the world are at minimal risk of statelessness, [but it simultaneously] fosters the assumption that children born to non-European nationals in Europe should be citizens of elsewhere, leaving some of those children at risk of statelessness<sup>92</sup>.

This narrow presumption that children of foreigners are always able to inherit the foreign nationality of their parents, absolves the European states from accountability.<sup>93</sup> The clearest case illustrating this problem is when the parents of a child born on European territory are stateless themselves. According to international and European law obligations, the state on whose territory the child is born should then apply as an exception the *jus soli* principle in order to protect the child from statelessness. But as the parents need their own personal identity documents in order to register their child and for the nationality acquisition process,

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<sup>88</sup> In Europe, this issue receives currently a new emphasis in the light of counter-terrorism. Cf. Sangita Jaghai (2017): Citizenship deprivation, (non) discrimination and statelessness - A case study of the Netherlands, ISI Statelessness Working Paper Series No. 2017/07 (5<sup>th</sup> ed.), available at: [http://www.institutesi.org/WP2017\\_07.pdf](http://www.institutesi.org/WP2017_07.pdf) [15/07/18].

<sup>89</sup> Edwards (2014), p. 16.

<sup>90</sup> ENS (2015), p. 8; Edwards (2014), p. 17.

<sup>91</sup> ENS (2015), p. 11; Sawyer (2011).

<sup>92</sup> Caia Vlieks (2015), as cited in ENS (2015), p. 11.

<sup>93</sup> ENS (2015), p. 11.

usually in those cases the statelessness of the parents is not actually recognised due to lacking Statelessness Determination Procedures (SDPs) in many European States. In general, European states are very reluctant to award their nationality to foreigners, especially if there is no social attachment cognisable – as is foremost in the cases of refugees.<sup>94</sup>

Another main problem are gender-based discriminatory nationality laws: Despite utterly contradicting all international law provisions and the foremost principle of non-discrimination, the domestic legislation of 25 countries worldwide prevent mothers from conferring their nationality to their children<sup>95</sup>. Only fathers are allowed to bequeath their nationality.<sup>96</sup> Especially within the context of migration and the recent refugee crisis, these discriminatory nationality laws have tremendous consequences for emerging statelessness in Europe, as most refugees come from exactly those countries that prohibit women to pass on their nationality, i.e. from the Middle East and African countries.<sup>97</sup> Besides, “over 50 countries deny female citizens equal rights with male citizens<sup>98</sup>”, including the ability to acquire, change and retain their nationality.

With regard to the migratory context, subsequently children of many single women are at risk of statelessness when the mother’s country of origin, such as Syria, maintains gender-discriminatory nationality laws that do not allow women to pass their nationality on to their child, but in contrast European States refuse to accord their nationality along with *jus soli* because the mother officially holds a nationality and the European State sees the country of origin in charge to grant nationality – which it effectively does not, though. As a result, the child will be rendered stateless. Given the myriad of Syrian refugees migrating to Europe in the last few years, the pressing risk of creating a new ‘stateless generation’ in Europe cannot longer be ignored.<sup>99</sup> NGOs and Coalitions, such as the Global Campaign for Equal Nationality Rights, fight against the maintenance of discriminatory nationality laws and advocate for law reforms in those countries in questions.

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<sup>94</sup> cf. ENS (2015); Sawyer (2011).

<sup>95</sup> Global Campaign for Equal Nationality Rights (n.d.): The Problem, website, available at: <https://equalnationalityrights.org/the-issue/the-problem> [09/07/18].

<sup>96</sup> Edwards (2014), p. 18.

<sup>97</sup> These 25 states have gender-discriminatory nationality laws: The Bahamas, Bahrain, Barbados, Brunei, Burundi, Iran, Iraq, Jordan, Kiribati, Kuwait, Lebanon, Liberia, Libya, Malaysia, Mauritania, Nepal, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Swaziland, Syria, Togo, United Arab Emirates, cf. Global Campaign for Equal Nationality Rights (n.d.).

<sup>98</sup> *ibid.*

<sup>99</sup> Louise Osborne / Ruby Russell (2015): Refugee crisis creates 'stateless generation' of children in limbo. In: The Guardian, Newspaper, London, UK., available at: <https://www.theguardian.com/world/2015/dec/27/refugee-crisis-creating-stateless-generation-children-experts-warn> [07/06/18].

Apart from nationality acquisition at birth, there are other ways to acquire or change a nationality, for example through marriage, adoption or naturalisation. Some countries provide the option to grant nationality to persons who have stayed and worked in the country for a certain amount of time and whose life is centred there as well. The mode of conferring nationality based on naturalisation is called *jus domicili* (the law of long residence).<sup>100</sup> Though, the prerequisite is to be registered and to regularly sojourn in the country – therefore, irregular migrants cannot avail themselves to the method of *jus domicili* and thus are condemned to live hiding from the authorities. Furthermore, in recent years increasingly “[...] new, more onerous naturalization practices have emerged against a backdrop of political concern and tensions over the integration of migrants and new citizens, as well as fraud.”<sup>101</sup> These practices are often conducted with naturalisation tests, where applicants need to e.g. demonstrate a prescribed level of language skills or their cultural integration efforts.

Another important factor is birth registration<sup>102</sup>, as it is the first step to establish a legal identity and contains key information that are necessary to determine a child’s nationality. In consequence, when a child is not registered at birth, it may have access to a nationality in theory, but because it is not recorded in the system, in effect the child is invisible or non-existent to the authorities and without papers that may prove this theoretical nationality; henceforth the child is rendered *de facto* stateless.<sup>103</sup> This shows the inevitability of birth registration as an urgent act to prevent and avoid statelessness at first sight. However, for many parents or guardians registering their child’s birth is not as self-evident as it may sound: Sometimes an administration fee is required which may invoke reluctance of poor families or language barriers need to be overcome. In some cultures, the necessity or sense of birth registration is not realised as they have never availed the features of nationality yet and have lived for generations without effective nationality. Some state authorities might work inefficiently as well, undertake mistakes or issue wrong or no documents. Sometimes there is a long waiting time and a delay in the processes, disorganisation or the loss of birth certificates that lead to non-registration.<sup>104</sup>

Due to fear of being discovered and deported, most irregular migrants do not register the birth

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<sup>100</sup> Edwards (2014), p. 19f.

<sup>101</sup> *ibid.*, p. 14.

<sup>102</sup> UNHCR (2017)(b): Ensuring birth registration for the prevention of statelessness, Good Practices Paper, Action 7, available at: <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2017/11/Good-Practices-Paper-on-Ensuring-Birth-Registration-for-the-Prevention-of-Statelessness.pdf> [15/07/18].

<sup>103</sup> cf. Bhabha (2011).

<sup>104</sup> UNHCR (2017)(b), p. 5f.

of their children, even if the child may have the right to acquire the country's nationality by virtue of *jus soli*. So again, irregular migrants are trapped in a limbo: The child may have the right to lawfully stay in the country as a recognized citizen, but the parents have an irregular status and thus officially no right to stay in the country. Hence, the danger of separation is threatening the family for which reason the child cannot take advantage of its lawful nationality; rendered being *de facto* stateless.<sup>105</sup>

On the other hand, some migrants also intentionally destroy their documents in order to be categorised as stateless persons or refugees, aiming to thus enjoy the special protection status and adherent benefits in the asylum seeking process. This is why the establishment of Statelessness Determination Procedures (SDPs) is required.<sup>106</sup>

### **2.3. The Concepts of Nationality and Citizenship**

Overall, while different national laws may recognise different categories of citizenship or provide different levels of rights to its various citizens compared to another country, for international law purposes, there are only two relevant categories: being a national or being (de jure) stateless.<sup>107</sup> [...] In an ideal world, such differences in citizenship categories would be removed entirely.<sup>108</sup>

Speaking about the 'right to a nationality' as enshrined in IHRL and the association of being *the right to have rights*, it is necessary to first of all understand the concepts of nationality and its differentiation from citizenship. Although these concepts are closely related and both terms are widely used as synonyms to denominate the relationship between an individual and a state, they are not the same. Generally, nationality regulates inter-state relations under international law and citizenship individual-state relations under municipal law.<sup>109</sup>

#### **2.3.1. The Concept of Nationality**

The term 'nationality' denotes a formal international legal status of membership to one (or more) particular state(s). In other words, nationality constitutes "[...] the allocation of individuals, termed nationals, to a specific state – the state of nationality – as members of that

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<sup>105</sup> Bhabha (2011); UNHCR (2017)(b), p. 3.

<sup>106</sup> For further elaborations about SDPs, see section 3.5.

<sup>107</sup> Edwards (2014), p. 41.

<sup>108</sup> *ibid*, p. 39.

<sup>109</sup> Kesby (2012), p. 43.

state [...]”<sup>110</sup>. As territory and population form crucial state attributes, nationality has the primary function to order and maintain the international system and to regulate inter-state affairs by creating the distinction between ‘nationals’ (persons ascribed as member to a state) and ‘aliens’ (persons ascribed as members of another or no state).<sup>111</sup> Holding a nationality means having a legal bond to a particular state that recognizes the individual as its member. Subsequently, nationals have access to certain rights, such as the right to enter and reside in their state of nationality, benefit from (diplomatic) protection as well as from nationality proving documents (e.g. passport) that are necessary to enjoy inter alia the freedom of movement, travel, health care and education.<sup>112</sup> By the majority, nationality also expresses to a certain extent ethnic and social attachment to the state of nationality.<sup>113</sup> On this basis, “the national is in place and the stateless person out of place”<sup>114</sup> - excluded, belonging nowhere, falling through the international public order of state affiliation. The judgement of the *Nottebohm Case (Liechtenstein vs. Guatemala)* indicated that

Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments [...]. Nationality is thus determined by one’s social ties to the country of one’s nationality and when established gives rise to rights and duties on the part of the state.<sup>115</sup>

Thus, when drafting the UDHR, the inclusion of Art. 15 (“Everyone has the right to a nationality.”) was not without controversy as this obligation would directly affect and restrict a state’s discretion to confer nationality.<sup>116</sup> But as the UN itself was founded on the principle of nationality, the existence of millions of stateless people after WWII deemed a profound contradiction to exactly this principle and thus could no longer be accepted.<sup>117</sup> With the postulation of the right to nationality as an inherent and universal right of all human beings and in particular with the adoption of the two statelessness conventions, international law constrains the exclusive domain of state jurisdiction and discretion by obliging states “[...] to provide individuals with the equal and effective protection of the law and their duty to prevent

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<sup>110</sup> Paul Weis (1979): *Nationality and Statelessness in International Law* (2<sup>nd</sup> ed.), Sijthoff & Noordhoff International Publishers B.V, NL, p. 59; Kesby (2012), p. 41.

<sup>111</sup> Kesby (2012), p. 41ff.

<sup>112</sup> Edwards (2014); Tonkiss (2017), pp. 241ff.

<sup>113</sup> Kesby (2012), p. 40.

<sup>114</sup> *ibid*, p. 42.

<sup>115</sup> International Court of Justice (1955): *Nottebohm Case (Liechtenstein v. Guatemala)*, Judgement of April 6<sup>th</sup> 1955, p. 23, available at: <http://www.icj-cij.org/files/case-related/18/018-19550406-JUD-01-00-EN.pdf> [15/07/18]; Edwards (2014).

<sup>116</sup> Kesby (2012), p. 48.

<sup>117</sup> *ibid*, p. 42.

and reduce statelessness”<sup>118</sup>. As the state is ‘subject’ of international law, nationality thus connotes the nexus between individuals and international law.<sup>119</sup>

### **2.3.2. The Concept of Citizenship**

In contrast to the international relevance of nationality, citizenship is figured as a political and legal status at purely domestic level, and is therefore not included in international law.<sup>120</sup> The concept of citizenship also denotes the formal membership of an individual to a state, though based on the principle of reciprocity with regarding the individual as ‘subject’ of politics. Citizens have to conform with and obey to the domestic law of the state; in return they obtain particular political and civil rights (or in other words ‘citizen’s rights’), such as the right to vote or to work that are solely reserved for citizens. Thus, citizenship is often deemed as ‘full membership’ or a ‘privilege’, because citizens are granted more rights and latitude than nationals. To clarify, one can be a national to a state but not a citizen, although there may be sometimes overlaps.<sup>121</sup> As citizenship is a matter of municipal law, every state has different provisions on citizen’s rights.

Especially in Britain the distinction between nationality and citizenship is very complex as there are six different types of British membership<sup>122</sup>, each with different entitlements. For instance, British overseas nationals hold on one hand British passports and fall under the British jurisdiction of diplomatic protection; on the other hand they are not automatically entitled to live or work in the United Kingdom.<sup>123</sup>

As citizenship rights are based on reciprocity with duties to the individual, they may be partly restricted, e.g. in the case of imprisonment when a citizen infringed upon domestic law. The right to nationality under international law obligations is strictly barred from such arbitrary deprivations, though, and subsequently remains – at least in theory - constant.<sup>124</sup>

### **2.3.3. The limitations of ‘the right to nationality’ in international law**

In sum, nationality governs the external aspects and citizenship the internal aspects of state

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<sup>118</sup> *ibid.*, p. 50.

<sup>119</sup> cf. Kesby (2012), p. 42f; Edwards (2014); Tonkiss (2017).

<sup>120</sup> Kesby (2012), p. 43; Tonkiss (2017), p. 242f.

<sup>121</sup> Tonkiss (2017), p. 242f.

<sup>122</sup> These types are: British citizens, British subjects, British overseas citizens, British overseas territories citizens, British overseas nationals and British protected persons. Cf. The Economist (2017): The Economist explains: What is the difference between nationality and citizenship?, website, available at: <https://www.economist.com/the-economist-explains/2017/07/09/what-is-the-difference-between-nationality-and-citizenship> [06/07/18].

<sup>123</sup> The Economist (2017); Edwards (2014), p. 39.

<sup>124</sup> Kesby (2012), p. 45.

membership.<sup>125</sup> “More precisely, international law is concerned with the status of nationality (rights and duties of the state of nationality in relation to other states) as opposed to the municipal [citizen]ship between a national and the state of nationality (which confers mutual rights and duties on both)”<sup>126</sup>. The notion of nationality in international law regards the national as a passive object without political voice, in contrast to the domestic concept of citizenship which recognises the citizen as an active subject with rights and duties. Within these conceptions, nationality is to be separated from citizenship and therefore also stands apart from those civil and political rights that are attributed solely to citizenship.<sup>127</sup> Subsequently, nationality alone – although being a prerequisite for the protection and enjoyment of certain rights - does not guarantee the full access to membership and hence social inclusion. This citizen vs. non-citizen dichotomy offers non-citizens who are permanently residing in the country subsequently only those basic rights that are available to tourists as well.<sup>128</sup> In focusing merely on nationality, international law thereby “fail[s] to capture statelessness as a potential condition of rightlessness”<sup>129</sup>. Hence, considering the right to nationality as *the right to have rights* crystallised to be delusive.

Notwithstanding the right to nationality is defined at international level, its actual consequences for individuals at national level are beyond the scope of international law as it only governs on international sphere with the limited purview of not interfering in state’s sovereignty. Moreover, the thin formulation of the right to nationality “[...] which is oriented to ensuring that each person has the right to some nationality – irrespective of the quality or substance of that nationality – may conceal the inequalities between nationalities [...]”<sup>130</sup>. Given the tremendous differences, for instance, in terms of international Visa entitlements between a powerful German and a less recognized Kosovan passport<sup>131</sup> or the exemplifying ineffectiveness of the Syrian state to protect its nationals, the inequalities between states are evident. However, focusing solely on the acquisition of a formal legal status but not even a bit

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<sup>125</sup> Kesby (2012), p. 43, cf. Paul Weis (1979)

<sup>126</sup> *ibid.*

<sup>127</sup> Kesby (2012), p. 143.

<sup>128</sup> Matthew J. Gibney (2011): The rights of non-citizens to membership. In: Sawyer/Blitz (Ed.) (2011): Statelessness in the European Union – Displaced, Undocumented, Unwanted. Cambridge University Press, Chapter 3, p. 57.

<sup>129</sup> Kesby (2012), p. 143.

<sup>130</sup> *ibid.*, p. 46.

<sup>131</sup> At present, the German passport is among the most powerful passports in the world, which grants visa-free entry to 126 countries. In contrast, a Kosovan national may have severe travelling and entry difficulties, as some countries do not recognize Kosovo as an independent state. In addition, the passport only grants visa-free access to 15 states, foremost in the Balkans and marginal overseas islands. Cf: Passport Index (2018): Global Passport Power Rank, database, available at: <https://www.passportindex.org/byRank.php> [14/06/2018].



on its quality, the right to nationality as formulated in international law sidelines these obvious disparities in regards to equal nationality. All in all, “nationality remains a purely formal status denoting membership of a state for the purposes of international law with the content and substance of that membership at the national level remaining a matter for municipal law”<sup>132</sup>.

The criticism of these insufficient rights provisions also come along with the emergence of *de facto* statelessness, which will be discussed in the following.

## 2.4. Two different Notions of Statelessness – *de jure* and *de facto*

### 2.4.1. Defining *de jure* and *de facto* statelessness

Article 1(1) of the 1954 Statelessness Convention defines “the term ‘stateless person’ [...] [as] a person who is not considered as a national by any state under the operation of its law.”

In other words, these so-called *de jure* (legal) stateless persons do not have any nationality and thus do not belong to any state. Most *de jure* stateless persons are stateless since birth, as they have never been given any nationality the day they were born or subsequently. In other cases, *de jure* stateless persons have lost their nationality and never acquired a new one.<sup>133</sup>

In contrast, *de facto* (actual) stateless persons indeed do have a nationality in theory which is ineffective in practice, though. They

“[...] are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals”<sup>134</sup>.

In other words, *de facto* statelessness is the inability or unwillingness to avail oneself of the protection or assistance of one’s country of (former) nationality.<sup>135</sup> Taking into account the scope of *de facto* statelessness<sup>136</sup>, the statistics of statelessness would be significantly higher

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<sup>132</sup> Kesby (2012), p. 43.

<sup>133</sup> Bhabha (2011), p.2; Sawyer (2011), p. 69f.

<sup>134</sup> Fripp (2016), p. 96.

<sup>135</sup> International Refugee Organisation (IRO) (1946): Constitution of the International Refugee Organisation, Annex I, Part I, Section A.2; available at: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0284.pdf> [15/07/18].

<sup>136</sup> Though, there is no aggregated data on *de facto* statelessness; especially the scope of children affected by

than with just recording *de jure* stateless persons.

However, there is no official definition for *de facto* statelessness, although both terms emerged equally in the pre-Human Rights era. Yet *de facto* statelessness has consequently been disregarded by the international community and is thus not included in any legal framework, notwithstanding a UNHCR statelessness study already stated in 1949 – i.e. before drafting the relevant statelessness conventions - that “although in law the status of stateless persons *de facto* differs appreciably from that of stateless persons *de jure*, in practice it is similar”<sup>137</sup>. Therefore, increasing criticism on the conventional legal definition of statelessness that solely focuses on *de jure* statelessness is spurred with the emerged notion of *de facto* statelessness.<sup>138</sup>

#### **2.4.2. The Statelessness Definition Discourse**

There are three dimensions of critique<sup>139</sup> that reveal the insufficiency of the current legal definition and how it does not properly address the full scope of statelessness:

(1) The challenge of proof: Even if a person may be holding a nationality, there can be a lack of proof, for instance when the necessary documents got lost or destroyed or due to failures in the responsible administration. On the other hand, these people can also not prove their statelessness for which reason they are situated in a limbo where they are neither considered as a national nor as a stateless person. In consequence, they fall through the system of both state and international frameworks and any protection mechanism does not apply to them.

(2) The challenge of connection and belonging: Even if a person holds a valid nationality, it does not necessarily mean that this person has a real connection to the state of nationality. Thus, in essence such nationality is meaningless and does not adequately represent the person’s true and effective belonging or adjunctive rights.

(3) The challenge of access to rights: The current definition does not encompass or specify, even implicitly, the attributes or quality of holding a nationality.<sup>140</sup> Even if a nationality is ineffective, the definition would subsequently still categorise the holder as non-stateless.

Although the core concern of the United Nations (UN) was foremost to articulate protection

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statelessness in Europe is actually not recorded wherefore only rough estimations exist. See: ENS (2015), p. 4.

<sup>137</sup>UN Ad Hoc Committee on Refugees and Stateless Persons (1949): A Study of Statelessness, , E/1112; E/1112/Add.1, Chapter 3, p. 7, available at: <http://www.refworld.org/docid/3ae68c2d0.html> [15/07/18].

<sup>138</sup>de Chickera/ van Waas (2017), p. 57.

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

<sup>140</sup> Batchelor (1995), p. 232.

for stateless people, the *de jure* definition of the statelessness convention solely “[...] focused on status (i.e. the possession or absence of nationality) without considering the quality of that status or the nexus between status and protection”<sup>141</sup>. Thus, the definition’s understanding of statelessness is very narrow, for which reason an “[...] effective nationality of the state with which a person has true connections with”<sup>142</sup> or, in reverse conclusion, the complete absence of a nationality is the only valid ticket to obtain access to associated rights and to categorise people into stateless’ and nationals.

The example of irregular migration perfectly illustrates the shortcomings within the legal *de jure* definition: Most irregular migrants may have an official nationality of their country of origin which is ineffective, though (for instance due to war, administrative failures, corruption, insurgence, persecution, discrimination, etc.). Thus, they are trapped in a dilemma of *de facto* statelessness as they neither can turn for protection to their state of origin, nor to the current state they live in due to their irregular status.<sup>143</sup>

As none of the above-mentioned aspects is considered in the *de jure* definition, the concept of *de facto* statelessness deemed for a long time as the progressive ‘catch-all solution’ to overcome the gaps and limitations of the current statelessness definition<sup>144</sup>. Though, the concept is contested by the question whether statelessness itself and other violations to the right of nationality are indeed two sides of the same coin or not rather two different coins that need to be addressed separately. With regard to the spectrum of different violations (for instance the denial of issuing a birth certificate), *de jure* statelessness is probably the most severe form of infringement to the right to nationality. In consequence, not every person whose right to nationality has been violated is necessarily stateless.<sup>145</sup> In this regard, the statelessness convention may indeed not cover all forms of violations to the right to nationality, because it solely focuses on one very extreme and specific infringement, namely *de jure* statelessness, thus striving to provide protection for exactly this specific target group. Subsequently, the critique of this definition that it does not embrace *de facto* statelessness may not be fully justified bearing in mind that an ineffective nationality is another form of violation with different ‘symptoms’. However, it is urgently necessary not to continue disregarding the problems that an ineffective nationality entails and therefore to shift the

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<sup>141</sup> de Chickera/van Waas (2017), p. 57.

<sup>142</sup> *ibid.*

<sup>143</sup> Bhabha (Ed.) (2011), preface.

<sup>144</sup> de Chickera/van Waas (2017), p. 57.

<sup>145</sup> *ibid.*, p. 59.

current discourse from the quest of an expanded statelessness definition rather to the definition of the quality of nationality and the importance of a legal identity.

As “[...] *de facto* statelessness is most commonly viewed as the lack of an effective nationality, the argument being that a right only in name and not in substance, is no right at all”<sup>146</sup>, it is important to not only evaluate the access and denial to the right of nationality, but also the associated attributes and quality of it.

In order to demonstrate this matter, let us compare the right to nationality with an analogous right, such as the right to education: The right to education as codified in International Law (IL) does not only consist of admission to a school, but also of a certain standard of education, e.g. ensuring regular attendance, (free) availability and accessibility, non-discrimination, improving teaching staff, aiming to foster the full development of the human personality, etc.<sup>147</sup>. Moreover, the Sustainable Development Goal (SDG) 4 of the so-called UN ‘Agenda 2030’<sup>148</sup> sheds a particular light on the attributes of education by aiming to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”<sup>149</sup>. Subsequently, the right to education is not only infringed if access to education is denied but also if a student faces challenges in enjoying the associated features of this right (e.g. school fees, no barrier-free accessibility, no appropriate learning material, etc.).

With reference to the above-mentioned quote that a right without contents is not a right, one can argue that it is not only the access but also the quality that makes a right a right.

In conclusion, “it seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man”<sup>150</sup> Hence, the sole focus of international and regional law provisions on solving statelessness by awarding a nationality is for many cases off target: First, because it does not capture *de facto* statelessness and second, because there are no provisions concerning the quality and features of nationality. In consequences, inequalities of nationalities and hence ineffective nationalities sustain. Besides,

it is important to bear in mind that the right to nationality, although clearly set

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<sup>146</sup> Roberto Cordova (1954), as cited in de Chickera/van Waas (2017), p. 59.

<sup>147</sup> UNGA (1966): International Covenant on Economic, Social and Cultural Rights (ICESCR), A/RES/2200/A(XXI), Art. 13, available at: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> [06/07/18]; UNGA (1989): Convention on the Rights of the Child (CRC); A/RES/44/25, Art. 28, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [06/07/18].

<sup>148</sup> UNGA (2015): Transforming our World: The 2030 Agenda for Sustainable Development, resolution A/Res/70/1, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E) [06/07/18].

<sup>149</sup> *ibid.*, pp. 14,17.

<sup>150</sup> Arendt (1967), p. 300.

out in numerous human rights instruments, touches on highly sensitive matters of state sovereignty. [...] Questions pertaining to who exactly belongs to the ‘imagined community’ that is the state, go to the very core of a state’s being and are critical to the never-ending process by which states define themselves as distinct from others.<sup>151</sup>

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<sup>151</sup> Benedict Anderson, as cited in Melanie J. Khanna/Peggy Brett (2017): Making effective use of UN human rights mechanisms to solve statelessness. In: van Waas/Khanna (Ed.) (2017): Solving Statelessness, Wolf Legal Publishers, Oisterwijk, NL, chapter 1, p. 15

### III. SOLVING THE PROBLEM

It is not easy to reconcile twenty-first-century challenges and problems with twentieth-century resources and nineteenth-century models.<sup>152</sup>

As revealed in the first part, the current international human rights regime pertaining to statelessness has predominantly stalled after the adoption of the latest statelessness convention in the 1960s. Thus, it evidently fails to adequately address contemporary statelessness due to its obsolescence and fundamental shortcomings, such as sidelining *de facto* statelessness and promoting only the access but not any substance to the right to a nationality. The following chapter will examine the potential of existing and innovative solutions from various perspectives to provide an answer as to how these gaps may be bypassed and, subsequently, the rights of stateless people better protected.

#### 3.1. The Human Rights Approach

##### 3.1.1. The Potential of Human Rights Treaty Bodies

As noted above, both Statelessness Conventions as well as the Refugee Convention are not encompassed in the ‘core human rights instruments’. Therefore, these treaties do not have a monitoring treaty body that observes the implementation of the conventions and, where necessary, composes recommendations to state parties which do not fulfil their obligations. In consequence, this thesis stresses that the mandate of other existing treaty bodies should be expanded to pay greater attention to the relevant statelessness provisions of their respective convention. As already mentioned, the majority of the nine core human rights instruments contain at least one explicit relevant provision pertaining to statelessness. Furthermore, these instruments imply fundamental principles throughout, such as the prohibition of discrimination, which may be applied to statelessness.

As their corresponding treaties involve the most prominent provisions on statelessness and nationality, especially the Human Rights Committee (HRCtee) and the Committee on the Rights of the Child (CRC), they should generally further scrutinise the matter of statelessness and particularly assess periled country situations within the Committee’s reporting cycles. The Committee on the Elimination of Discrimination against Women (CEDAW) is already in

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<sup>152</sup> Bhabha (2011), p. 2.

progress to effectively monitor its adherent Article 9. Through its Concluding Observations<sup>153</sup> and recommendations<sup>154</sup> on the abolishment of gender-discriminatory nationality laws, the Committee contributed to political debates about reforming laws in certain countries.<sup>155</sup> These efforts demonstrate the impact of treaty body monitoring and the importance of strong recommendations to states that do not (or do not sufficiently) implement their international obligations. However,

[a]s with other treaty bodies, there have been some significant omissions. The failure to make any relevant recommendations to certain states with stateless populations and the fact that 30 States did not receive recommendations to ratify the UN Statelessness Conventions are cases in points.<sup>156</sup>

Besides the necessity for greater involvement of statelessness in concluding observations, another feature of UN treaty bodies lies within their ability to adopt General Comments (GC)<sup>157</sup> that give further guidance and interpretation to specific articles of their treaty. Indeed, the HRCtee adopted a General Comment on the rights of the child as specified in Article 24 ICCPR<sup>158</sup> but dedicated only one vague paragraph<sup>159</sup> to the question of nationality conferral and thus leaves large space for state discretion. In addition, the Committee on the Elimination of Racial Discrimination (CERD)<sup>160</sup> and CEDAW<sup>161</sup> published General Comments with

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<sup>153</sup> cf. for example: CEDAW (2010): Concluding observations of the Committee on the Elimination of Discrimination against Women: Egypt, CEDAW/C/EGY/CO/7, p. 9, available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-EGY-CO-7.pdf> [04/07/18]; CEDAW (2011): Concluding observations of the Committee on the Elimination of Discrimination against Women: Nepal, CEDAW/C/NPL/CO/4-5, p. 6, available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-NPL-CO-4-5.pdf> [04/07/18].

<sup>154</sup> cf. Melanie J. Khanna / Peggy Brett (2017): Making effective use of UN human rights mechanisms to solve statelessness. In: van Waas / Khanna (2017): Solving Statelessness, Wolf Legal Publishers, Oisterwijk, NL, chapter 1, p. 39f.

<sup>155</sup> Frances Raday (2012): Gender and Democratic Citizenship: The impact of CEDAW. In: International Journal of Constitutional Law (2012), Volume 10(2), pp. 512–530, available at: <https://doi.org/10.1093/icon/mor068> [05/07/18].

<sup>156</sup> Khanna / Brett (2017), p. 42.

<sup>157</sup> cf. UNHCR (2009): Extracts of selected General Comments and Recommendations of the United Nations Human Rights Treaty Bodies relating to nationality and statelessness, available at: <http://www.refworld.org/type.GENERAL,UNHCR,,4c28bcfa2,0.html> [04/07/18]. This concise compilation of General Comments relating to Statelessness and Nationality reveals that the topic has not yet been sufficiently addressed in GCs of all UN treaty bodies.

<sup>158</sup> UN Human Rights Committee (HRCtee) (1989): CCPR General Comment No. 17: Article 24 (Rights of the child), available at: <http://www.refworld.org/docid/45139b464.html> [04/07/18].

<sup>159</sup> *ibid.*, §8.

<sup>160</sup> CERD (2002): CERD General Recommendation XXX on Discrimination Against Non-Citizens; available at: <http://www.refworld.org/docid/45139e084.html> [04/07/18].

<sup>161</sup> CEDAW (2014): General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, available at: <https://documents-dds->

further elaborations on the right to a nationality, but statelessness is either entirely omitted or only mentioned as a side-issue.

Despite the awareness of the CRC of the right to a nationality's fundamental significance, no General Comment on Article 7 CRC exists to this date. Indeed there are a few references in other General Comments of the CRC<sup>162</sup>, to statelessness and the right to a nationality; however statelessness remains again sidelined and is merely considered within the context of flight and asylum-seeking. Hence, this missing General Comment on Article 7 CRC might be the necessary bridge to close the 'flaws of the laws': A first General Comment exclusively on statelessness could also include *de facto* statelessness and give answers to the question of childhood statelessness within an irregular migratory context. The impact of such an unprecedented General Comment would not only extricate the topic out of the 'treaty body shadow' but also unfold the full potential of treaty body monitoring and guidance.

Albeit, the idea of mainstreaming the right to a nationality across all treaty bodies already exists and culminated in composing two Joint General Comments (JGC)<sup>163</sup> by the Committee on the Protection of Migrant Workers and Members of their Families (CMW) and the CRC in November 2017. In particular the JGC No. 4/23 CMW/CRC<sup>164</sup> sets out for the first time interpretation of the statelessness-relevant Articles 7/8 CRC and 29 ICRMW by also emphasising on the principle of family unification and non-separation. However, this document emphasises on the prevention and reduction of statelessness through the legal tools of birth registration and nationality conferral. It omits *de facto* statelessness and the protection of stateless children while they are still stateless. Nevertheless, through these Joint General Comments the CRC and CMW declare a common understanding of statelessness and assert joint efforts to safeguard the right to a nationality. From now on, two Committees with two differing perspectives of expertise are starting to observe and reflect the issue of statelessness in their dialogue with states, which will most likely then be represented in the Committees'

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[ny.un.org/doc/UNDOC/GEN/N14/627/90/PDF/N1462790.pdf?OpenElement](http://ny.un.org/doc/UNDOC/GEN/N14/627/90/PDF/N1462790.pdf?OpenElement) [04/07/18].

<sup>162</sup>cf. CRC (2005): General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, IV(a)§12;§20, available at: <http://www.refworld.org/docid/42dd174b4.html> [04/07/18].

<sup>163</sup> CMW/CRC (2017)(a): Joint general comment No. 3 (2017) of CMW and No. 22 (2017) of CRC on the general principles regarding the human rights of children in the context of international migration, , CMW/C/GC/3-CRC/C/GC/22, available at: <http://www.refworld.org/docid/5a1293a24.html> [05/07/18]; CMW/CRC (2017)(b): Joint general comment No. 4 (2017) of CMW and No. 23 (2017) of CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, available at: <http://www.refworld.org/docid/5a12942a2b.html> [05/07/18].

<sup>164</sup> *ibid*, CMW/CRC (2017b).



recommendations to the state and reinforce advocacy.<sup>165</sup> Therefore, formulating common JGCs with two or more treaty bodies could be the first step towards increased collaboration, cross-referencing and mainstreaming of statelessness across all treaty bodies and beyond. In sum,

As [Joint] General Comments provide for a more solid understanding of issues, they can serve as valuable tools for the further engagement with other mechanisms. If guidance provided to states takes into account most of the aspects related to the issue and if recommendations are formulated on the basis of the expertise of members from different Treaty Bodies, the impact on the development of legal and policy frameworks at national level will be stronger.<sup>166</sup>

Although General Comments and recommendations are foremost addressed to state parties, their interpretation and guidance represent a powerful tool for the work of Non-Governmental Organisations (NGOs) as well. Based on the Committee's understanding expressed in General Comments and Concluding Observations, NGOs may submit further information about the effective implementation of states to the Committee, for instance within regular reporting cycles, which enhances coherence and impact.<sup>167</sup>

### **3.1.2. The Value of the Universal Periodic Review (UPR)**

The Universal Periodic Review [UPR] provides a distinct opportunity to address the violations suffered by stateless persons and communities and to promote the realisation of the right to a nationality for all. It is a mechanism through which all UN Member States are subjected to a review of their performance across all human rights.<sup>168</sup>

The UPR<sup>169</sup> is an inter-state mechanism of the Human Rights Council (HRC) which examines the human rights situation in every UN member state. Once every four to five years, states

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<sup>165</sup> Francesco Cecon (2017): Advancing children's right to a nationality through the UN Committee on the Rights of the Child, ISI World's Stateless Children, website, available at: <http://children.worldsstateless.org/3/the-right-of-every-child-to-a-nationality/advancing-childrens-right-to-a-nationality-through-the-un-committee-on-the-rights-of-the-child.html> [05/07/18].

<sup>166</sup> *ibid.*

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

<sup>168</sup> Institute on Statelessness and Inclusion (ISI) (2017) (b): Statelessness and Human Rights – The Universal Periodic Review, statelessness essentials booklet, Wolf Legal Publishers, NL, p.2, available at: <http://www.institutesi.org/Statelessness-and-UPR.pdf> [05/07/18].

<sup>169</sup> For more information about the functioning of the Universal Periodic Review, see <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

assess another State under Review (SuR) and issue recommendations that the SuR may choose to accept or reject. Due to limited time availability and challenging structural outlays, the UPR cannot go into sufficient detail; nevertheless, the outcome of recommendations may leverage the human rights problems in a country on its political agenda and raise awareness for certain issues that need to be addressed.<sup>170</sup>

Although statelessness has gained increasing attention in the past decade, the matter has not been sufficiently scrutinised in the past two UPR cycles. To this date, in total 57 686 state recommendations were issued; of which only 479 recommendations explicitly address the realisation of human rights for stateless people or the right to a nationality, a relative proportion of only 0.8%.<sup>171</sup> Adding the other 294 recommendations that implicate the issue, the ratio of all 773 statelessness-relevant recommendations still amounts to only 1.3%.<sup>172</sup> These statistics reveal that the international community still does not dedicate the attention to statelessness that is needed.

Most recommendations directed to the implementation of universal birth registration, the abolishment of gender-discriminatory nationality laws and the ratification of two statelessness conventions.<sup>173</sup> In total, 162 countries received one or more relevant recommendations. However, the recommendations foremost considered *in situ* statelessness and thus, only those 38 UN states that are known for having a significant high number of *in situ* population on their territory received several follow-up recommendations within the two UPR cycles.<sup>174</sup>

Nevertheless, as the third UPR cycle (2017-2021) is currently ongoing, it is remarkable that the ‘Lessons Learnt’ from the two previous cycles and increasing advocacy from Civil Society have lead to a greater awareness for the statelessness issue, which is reflected by the increasing number of recommendations on nationality and statelessness. Especially since the foundation of the European Network on Statelessness (ENS)<sup>175</sup> in 2012 and of the Institute on

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<sup>170</sup> Khanna / Brett (2017), p. 25.

<sup>171</sup> ISI (2017) (b), p. 9; Khanna/Brett (2017), p. 26ff.

<sup>172</sup> *ibid.*

<sup>173</sup> ISI (2017) (b), p. 12.

<sup>174</sup> Institute on Statelessness and Inclusion (ISI) (2017) (c): Nationality & Statelessness in the UPR, online article, available at: <http://www.statelessnessandhumanrights.org/upr-universal-periodic-review/nationality-statelessness-in-the-upr> [05/07/18].

<sup>175</sup> ENS is a Civil Society Alliance based in London with 103 members in 39 European countries. The Network strives to mainstreaming a better understanding of statelessness through capacity building activities, advocacy and awareness-raising. By virtue of the involvement of leading academics and many evidence-based reports, ENS is the primer source of information about statelessness in Europe. In addition, the network significantly contributes to the development of laws and policies aiming to better safeguard stateless people. For more information, see: <https://www.statelessness.eu/> [12/07/18].

Statelessness and Inclusion (ISI)<sup>176</sup> in 2014, the role of Civil Society, including scholarship and research on statelessness, has significantly increased. The two unprecedented NGOs specialised on statelessness have contributed to leverage statelessness on national, regional and international level by producing country studies, annual reports and working papers. They are particularly engaged in the UPR process by handing in joint submissions to the Human Rights Council with valuable information about the statelessness situation in the SuR<sup>177</sup>, but also to other UN human rights bodies such as the CRC. The ISI also compiled a strategy for enhanced civil society engagement on statelessness in the UPR.<sup>178</sup>

Due to the enhanced engagement of ENS, European countries are increasingly held accountable in the UPR and statelessness in migratory contexts is now considered in the recommendation as well. For instance, Switzerland received five explicit recommendations pertaining to statelessness during the 28<sup>th</sup> HRC Session in November 2017, including the recommendation to ratify the 1961 Statelessness Convention, formalise adequate Statelessness Determination Procedures (SDPs) and to ensure that the definition of statelessness in national law is in line with international standards.<sup>179</sup> Also the Netherlands<sup>180</sup> and Germany both recently received for the first time the recommendation to establish formal SDPs. Furthermore, Germany obtained two pioneering recommendations to ensure birth registration, in particular for children from irregular migrants.<sup>181</sup> Compared to the outcome of

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<sup>176</sup> ISI has been founded in 2014, the year when the recent global statelessness movement culminated in the adoption of UNHCR's GAP, by leading statelessness scholars with the mission to promote inclusive societies around the world by realising the right to a nationality. The Institute is based in Eindhoven, NL, and has an affiliation with Tilburg University, which is one of the leading research facilities on statelessness at present. Besides its meaningful academic engagement, another main pillar of ISI's work is advocacy and capacity building on national, regional and international level. One of the main foci is to strengthen the work of UN human rights bodies by engaging, inter alia, with CRC and CEDAW. For more information, see: <http://www.institutesi.org/> [11/07/18].

<sup>177</sup> Cf. ENS (n.d.): UPR, CRC and other ENS submissions, website, available at: [https://www.statelessness.eu/resources/ens-submissions?field\\_term\\_country\\_tid=All&field\\_term\\_theme\\_tid=All&field\\_term\\_resource\\_type\\_tid=All](https://www.statelessness.eu/resources/ens-submissions?field_term_country_tid=All&field_term_theme_tid=All&field_term_resource_type_tid=All) [11/07/18].

<sup>178</sup> Cf. ISI (n.d.): Tips for civil society engagement, available at: <http://www.statelessnessandhumanrights.org/upr-universal-periodic-review/tips-for-civil-society-engagement> [12/07/18].

<sup>179</sup> European Network on Statelessness (ENS) (2017): Switzerland received recommendations on statelessness at its third Universal Periodic Review. In: ENS Website > News&Events, available at: <https://www.statelessness.eu/news-events/news/switzerland-received-recommendations-statelessness-its-third-universal-periodic> [05/07/18]; Institute on Statelessness and Inclusion (ISI) (2018): Human Rights Engagement. In: ISI Website > Our Work, available at: <http://www.institutesi.org/ourwork/humanrights.php> [05/07/18].

<sup>180</sup> ISI (2017) (d): Universal Periodic Review – 27<sup>th</sup> session: Overview and analysis of recommendations on nationality & statelessness, p. 3, available at: [http://www.institutesi.org/UPR27\\_stateless.pdf](http://www.institutesi.org/UPR27_stateless.pdf) [05/07/18]; cf. ISI (2018).

<sup>181</sup> ISI (2018) (b): Universal Periodic Review – 30<sup>th</sup> session: Overview and analysis of recommendations on nationality and statelessness, p. 6, available at: [http://www.institutesi.org/UPR30\\_stateless.pdf](http://www.institutesi.org/UPR30_stateless.pdf) [05/07/18]; UNHRC (2018): Draft report of the Working Group on the Universal Periodic Review – Germany,

the two previous UPR cycles, these recommendations depict meritorious progress. Notably given the aftermath of the refugee crisis and subsequently the large scale of *de facto* statelessness in Europe, it seems that the understanding of statelessness as an issue of European countries has increased, which also might be owed to the work of ENS and ISI. Whereas statelessness in the previous UPR cycles was considered as a side-issue under the ‘Migration, Asylum-Seeking and Refugees’-domain, it has finally been determined as a discrete issue for the third cycle. This acknowledgment is also reflected in the realignment of the UPR Info-Website, where the database can now be searched by the heading ‘Statelessness and the right to a nationality’.<sup>182</sup>

Although these implications are favourable and depict success of common efforts to leverage the topic, the general attention on nationality and statelessness in UPR remains still very little when compared with other human rights issues such as human trafficking.<sup>183</sup> Moreover, the recommendations are usually formulated very broadly and there are only a few recommendations that specify on the protection of stateless persons while they are still stateless.<sup>184</sup>

Furthermore, the UPR is limited by its own inter-state relations and a state’s discretion to refuse the recommendations made:

Which State makes a recommendation can also affect the acceptance or rejection of that recommendation. For instance, the fact that recommendations on gender discrimination in nationality law have predominately been made by Western [...] States to Arab States may be a factor in the high level of rejection of these recommendations.<sup>185</sup>

Thus, it may be worth to cogitate about the replacement of state-to-state recommendations through collective HRC statements that may have a stronger impact. Furthermore, a coherent and systematic follow-up is indispensable. In theory, the subsequent UPR cycle should re seize the implementation of previous recommendations, but in practice such follow-up has been inconsistent.<sup>186</sup> That is why OHCHR recently started to draft matrices for the third cycle

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A/HRC/WG.6/30/L.4, Geneva, CH, p. 24, available at: [https://www.upr-info.org/sites/default/files/document/germany/session\\_30\\_-\\_may\\_2018/a\\_hrc\\_wg.6\\_30\\_l.4.pdf](https://www.upr-info.org/sites/default/files/document/germany/session_30_-_may_2018/a_hrc_wg.6_30_l.4.pdf) [05/07/18].

<sup>182</sup> UPR Info (2018): Database of Recommendations, database, available at: <https://www.upr-info.org/database/> [05/07/18]; Khanna / Brett (2017), p. 34.

<sup>183</sup> Khanna / Brett (2017), p. 43; ISI (2017) (d), p. 9.

<sup>184</sup> UPR Info (2018); Khanna / Brett (2017), p. 25ff; ISI (2017) (d), p. 9ff.

<sup>185</sup> Khanna / Brett (2017), p. 33f.

<sup>186</sup> *ibid*, 25f.

where information on the implementation of previous recommendations will be collected.<sup>187</sup> Whether this helps to ensure better implementation and follow-up will be seen in the next years.

### **3.1.3. The Impact of the Human Rights Council (HRC), the Office of the High Commissioner on Human Rights (OHCHR) and the Idea of a Special Procedure on Statelessness**

The Human Rights Council (HRC) is the United Nations' main intergovernmental body for addressing and promoting human rights. Its key impact lies within

[...] its discussions, resolutions and reports [through which] states develop their understanding of human rights, establish new standards and mechanisms, draw attention to the implementation of human rights and address particular situations of concern.<sup>188</sup>

Since 2008, the HRC adopted two resolutions concerning the right to a nationality, namely 'human rights and the arbitrary deprivation of nationality' and 'the right to a nationality: Women and Children'<sup>189</sup> and released six reports about this subject.<sup>190</sup> Though, despite this general trend towards greater attention on statelessness, there is still no HRC resolution solely on statelessness. The existing resolutions focus foremost on discrimination issues in nationality conferral, but again do not discuss the matter of *de facto* statelessness and the protection of stateless people while they are still stateless. Furthermore,

[s]ubstantively, the two resolutions on the right to nationality are somewhat cautious about asserting state obligations; they urge states to refrain from enacting or maintaining discriminatory nationality laws [...], but stop short of any stronger language on the subject.<sup>191</sup>

Moreover, other thematic resolutions about specific groups, such as Roma, migrants or indigenous people entirely omit the issue of statelessness and access to nationality, although it

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<sup>187</sup> cf. for example: UPR Info (2018) (b): Review: Germany > Miscellaneous Documents > NGO Submission Matrix Germany – to complet, available at: <https://www.upr-info.org/en/review/Germany/Session-30---May-2018/Miscellaneous-documents#top> [05/07/18].

<sup>188</sup> Khanna / Brett (2017), p. 16.

<sup>189</sup> UN Human Rights Council (HRC) (2016): Human rights and arbitrary deprivation of nationality, A/HRC/RES/32/5, available at: <http://www.refworld.org/docid/57e3dc204.html> [05/07/18]; HRC (2012): The Right to a Nationality: Women and Children, A/HRC/RES/20/4, available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/04/PDF/G1215304.pdf?OpenElement> [05/07/18].

<sup>190</sup> OHCHR (2018): Right to a Nationality and Statelessness: The Right to a Nationality and the Human Rights Council > Past reports, available at: <https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx> [05/07/18].

<sup>191</sup> Khanna/Brett (2017), p. 20.

might be of great concern for these vulnerable groups as well.

So far, only one country received specific resolutions on statelessness and nationality issues, namely Myanmar due to the massive Rohingya crisis.<sup>192</sup> Given that country-specific resolutions have dealt with Sudan, Somalia, Syria and Ivory Coast in recent years, this dearth of mentioning statelessness is very striking as the situations pertaining to equal nationality rights in these countries are also far from ideal. The main causes for these omissions are a lack of knowledge of the statelessness problems in these countries, a “[...] strategic decisions to not address these topics through country-specific resolutions, which are generally seen as confrontational by the state concerned”<sup>193</sup> or simply the focus on other – apparently more – pressing topics.<sup>194</sup>

Thus, thematic and country-specific HRC resolutions offer large scope for improvement to unleash their great potential of further strengthening and mainstreaming the issue of statelessness at national level.

As part of the UN Secretariat, the Office of the High Commissioner on Human Rights (OHCHR) contributes in combating statelessness by providing technical consultancy on nationality laws and policies through its various field presences. It mainly advocates for reforming discriminatory nationality laws and submits regular reports to the HRC.<sup>195</sup> Evidently, the work of OHCHR does not really encompass on other aspects relating to statelessness beyond the promotion of law reforms and thus requires significant improvements, as the nature of statelessness is far more complex.

Special Procedures (Special Rapporteur, Independent Experts or working groups) are independent experts appointed by the HRC to investigate the progressive realisation of human rights – either within a thematic or country-specific mandate. They undertake country visits, send communications, raise awareness and compile annual reports with their findings. Currently, there are 44 thematic and 12 country mandates,<sup>196</sup> none of which adequately address statelessness. “A large number of the Special Procedures have touched on statelessness or the right to nationality in their work, but few have done so in depth or with

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<sup>192</sup> cf. OHCHR (2018) (b): Overview of HRC resolutions on Myanmar, available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?b=10&c=125&t=11](http://ap.ohchr.org/documents/dpage_e.aspx?b=10&c=125&t=11) [05/07/18]; HRC (2017): Situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/HRC/RES/S-27/1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/358/08/PDF/G1735808.pdf?OpenElement> [05/07/18].

<sup>193</sup> Khanna /Brett (2017), p. 21.

<sup>194</sup> *ibid.*

<sup>195</sup> OHCHR (2018).

<sup>196</sup> OHCHR (2018) (c): Special Procedures of the Human Rights Council, website, available at: <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx> [05/07/18].

any regularity.”<sup>197</sup>

In addition, the main result of the Special Procedures in country communications and reports lies foremost within the elimination of discriminatory nationality laws.<sup>198</sup> Similarly to the treaty body mechanisms, it should therefore be the task of existing Special Procedures to better take into account the inter-relation of nationality issues with other human rights and address the matter within their work.

Finally, the creation of a Special Procedure on Statelessness and Nationality definitely deserves serious consideration, as such a specialised mechanism would not only surge the international awareness for statelessness but could also stress on other neglected aspects of the issue beyond purely legal solutions.

#### **3.1.4. Summary**

In conclusion, each UN human rights mechanism has a valuable potential to significantly contribute in tackling statelessness. The power of strong recommendations, persistent monitoring and follow-up, annual reports that involve statelessness and the provision of further guidance reveal important tools to steer more attention on the topic and strengthen awareness for the nature and scope of statelessness. Despite the global trend towards increasing recognition on statelessness, there are still a lot of shortcomings that may be improved.

First of all, this thesis calls for adjusting the current obsolescence of international law to the new contemporary understanding of statelessness. The nature of statelessness has changed since WWII and thus, the conventional IL provisions from 60 years ago are not adequate anymore given the emerging notion of *de facto* statelessness and statelessness in migratory contexts. Furthermore, the gap in international law of focusing solely on the access but not on the substance to the right to a nationality needs to be rectified in order to grant better protection to stateless people.

Secondly, the adoption of the required General Comment on the Right to a Nationality (for instance by the CRC) as well as a particular thematic and more country-specific HRC resolutions on statelessness provide impactful and necessary guidance for states and civil society

Thirdly, the idea of JGCs, such as the exemplifying JGC by CRC/CMW, reveals essential

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<sup>197</sup> Khanna /Brett (2017), p. 23.

<sup>198</sup> *ibid*, p. 22f.



resources for mainstreaming statelessness across all treaty bodies. Subsequently, involving other treaty bodies and forming inter-related collaborations that work closely together and jointly address statelessness from their individual perspective of expertise constitute the most powerful tool.

And fourthly, the creation of a Special Procedure on Nationality and Statelessness would not only galvanise the topic from an underpart to a protagonist on the international stage but also have a high impact on the implementation of existing provisions at national level.

The international HR mechanisms for combating statelessness do already exist – now it is the task to effectively avail of them.

### **3.1.5. A spotlight on Europe**

The same as remarked for the Human Rights mechanisms at international level may also be applied at regional level: Existing human rights bodies, such as the CoE Commissioner for Human Rights, the CoE Steering Committee on Human Rights, and other related Committees of the Parliamentary Assembly of the Council of Europe (PACE)<sup>199</sup>, should enlarge their work on statelessness and monitoring of the European Convention on Nationality (ECN). Foremost the Committee on Migration, Refugees and Displaced Person (CMR) and the CoE Special Representative on Migration and Refugees should explicitly expand their mandates with the incorporation of statelessness.

Nevertheless, the PACE adopted two explicit statelessness resolutions, namely on ‘The Need to eradicate statelessness of children’<sup>200</sup> and on ‘Access to nationality and the effective implementation of the European Convention on Nationality’<sup>201</sup>. Even though these two resolutions are deemed as a first step towards the right direction, they, again, do not include *de facto* statelessness. Statelessness in migratory contexts is considered in the resolution on the eradication of childhood statelessness, but not to a sufficient extent and also not in the context of irregular migration. There is a small number of other relevant resolutions which imply statelessness, but here again statelessness is only considered as a side aspect within the

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<sup>199</sup> Namely the Committee on Legal Affairs and Human Rights, the Committee on Social Affairs, Health and Sustainable Development, the Committee on Equality and Non-Discrimination and the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee).

<sup>200</sup> PACE (2016): Resolution 2099 – The Need to eradicate Statelessness of Children, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=22556&lang=EN> [11/07/18].

<sup>201</sup> PACE (2014): Resolution 1989 - Access to nationality and the effective implementation of the European Convention on Nationality, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=20871&lang=en> [11/07/18].



overall contexts of migration and flight.<sup>202</sup> Furthermore, some country-specific resolutions have explicitly addressed statelessness, but foremost only in those few countries with large known *in situ* stateless populations (e.g. Latvia, Estonia, Russia, Kosovo, Ukraine). There are 25 recommendations which are related to statelessness, but only one of it is solely on statelessness<sup>203</sup>, respectively on the ratification of the 1954 UN Statelessness Conventions. The rest of these recommendations is, likewise the resolutions, mostly directed to the statelessness situations in Eastern European countries or within the context of asylum-seeking, migration and flight. Besides, the CoE works in particular on the improvement of the living conditions for the Roma minorities and released many resolutions and recommendations on this topic. In addition, there is a special ‘Roma and Travellers Team’ which counteracts the discrimination of Roma people in Europe and their difficulties being recognised as citizens of any country. Albeit, most significantly the ‘Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019)’<sup>204</sup> seeks to ensure that every child has a nationality and therefore suggests to establish an ad hoc Committee of Experts within the time frame of 2018-2019. This Committee shall examine the practical implementation of the principle of avoiding statelessness in relation to child migration, identify solutions and give practical guidance.<sup>205</sup> To this date of writing, the Committee has not yet been established, though.

However, the actual acknowledgment of statelessness as a discrete issue is still relatively limited compared to general migration questions. Nevertheless, there is a large openness towards statelessness and the CoE aspirations to improve its work in this area seem evident. For a few years, the CMR and the Special Representative on Migration and Refugees collaborate closely with the European Network on Statelessness (ENS), e.g. in 2017 for the #Lockedinlimbo campaign<sup>206</sup> which called for a European-wide establishment of SDPs in

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<sup>202</sup> PACE (2018): Document 14524 (Draft Resolution) - Integration, empowerment and protection of migrant children through compulsory education, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24555&lang=en> [11/07/18].

<sup>203</sup> PACE (1955): Recommendation 87 – Statelessness, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=14122&lang=EN&search=c3RhdGVsZXNzbnVzc3x0eXBIX3N0cl9lbjpsZWNVbW1lbnRhdGlvbG==> [11/07/18].

<sup>204</sup> CoE (2017): Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019), available at: <https://edoc.coe.int/en/children-s-rights/7362-council-of-europe-action-plan-on-protecting-refugee-and-migrant-children-in-europe-2017-2019.html> [11/07/18].

<sup>205</sup> CoE (2017), p. 10.

<sup>206</sup> For further information, see: ENS (2017)(b): #LockedinLimbo campaign, website, available at: <http://lockedinlimbo.eu/about/> [11/07/18]; cf. ENS (2017)(c): How the Council of Europe is working to help protect stateless refugees and migrants from ending up #LockedinLimbo, blog, available at:

order to prevent stateless people being arbitrarily held in detention. In addition, the idea of an Expert Committee on Statelessness has been invoked and catalysed by ENS, who advocated for its inclusion in the Action Plan.<sup>207</sup> This relation points out the significant contributions of civil society also at regional level.

The EU conceived increasing concerns about statelessness and realised the adherent implications coming along with the migration crisis, too. Therefore, the EU mandated the European Migration Network (EMN)<sup>208</sup> in 2016 with the establishment of a particular platform on statelessness<sup>209</sup>. The objective of the platform is to bring all relevant stakeholders in the field together in order to determine the status quo and scope of statelessness within the EU, so that policy-makers can better address the issue. The EMN synthesis report on ‘Statelessness in the EU’<sup>210</sup> gives an overview concerning the current state of play and conducted a study of national practices how members states (MS) of the EU tackle statelessness. The report revealed that the majority of MS do not have any SDPs to this date and stressed those MS, which are not part to the statelessness conventions yet, to ratify them. In addition, the report gives further guidance on the establishment of SDPs based on the UNHCR handbook.

Also the European Parliament’s Policy Department for Citizen's Rights and Constitutional Affairs conducted such a study on statelessness<sup>211</sup> at the request of the Committee on Civil

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<https://www.statelessness.eu/blog/how-council-europe-working-help-protect-stateless-refugees-and-migrants-ending-lockedinlimbo> [11/07/18].

<sup>207</sup> ENS (2017)(d): A Catalyst for Action – Working to address statelessness in Europe, Annual Report 2017, p. 5, available at: [https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS\\_Annual\\_Report\\_2017.pdf](https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_Annual_Report_2017.pdf) [11/07/18].

<sup>208</sup> EMN is an EU network of experts in the field of migration in asylum who work together on the provision of objective policy-relevant information and knowledge sharing. The EMN has been legally established in 2008 by the European Council and is coordinated by the European Commission. The network has National Contact Points in all EU member states and Norway which regularly collect national statistics and country-specific information, e.g. integration practices, about the topics discussed. For further information, see: [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network_en) [11/07/18].

<sup>209</sup> For further information, see: European Commission Migration and Home Affairs (n.d.): What we do, Website, available at: [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/expert-groups\\_en/platform-statelessness\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/expert-groups_en/platform-statelessness_en) [12/07/18].

<sup>210</sup> EMN (2016): EMN Inform - Statelessness in the EU, Synthesis Report, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-informs/emn-informs-00\\_inform\\_statelessness\\_final.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-informs/emn-informs-00_inform_statelessness_final.pdf) [12/07/18].

<sup>211</sup> European Parliament (2015): Practices and approaches in EU member states to prevent and end statelessness, study, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL\\_STU\(2015\)536476\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU(2015)536476_EN.pdf) [12/07/18].

Liberties, Justice and Home Affairs (LIBE) in 2015. Given the low number of MS who established SDPs, it is recommended that the EU takes legislative action in formulating an explicit directive.

Indeed, the necessity of [such] a directive [...] derives from the EU's objective to establish a common migration policy that is not only fair towards stateless persons but is also based on solidarity among Member States (Articles 67(2) TFEU and 80 TEU). Member States that offer a (better) protection regime would likely have to bear a larger burden than Member States that offer less beneficial protection, or none at all.<sup>212</sup>

In addition, the EU should urge those MS that have not yet ratified the UN Statelessness Convention to accede to it in order to fulfil its pledge from 2012 to promote their universal ratification across the EU. In particular, the ratification of the 1954 Convention would then create accountability for the MS to meet the protection standards as stipulated in the convention.

Another option would be to amend the EU regulation on 'Community Statistics on Migration and International Protection'<sup>213</sup> by an obligation of data collection on statelessness, so that MS have subsequently a duty to communicate data on statelessness to the statistical office of the EU (Eurostat)<sup>214</sup>, as specific data on statelessness in the EU are currently absent.

Moreover, it is advisable that the European Union Agency for Fundamental Rights Agency (FRA) takes into account the issue in its - to this date relatively limited - work on statelessness as well. Claiming of "helping to make fundamental rights a reality for everyone living in the EU"<sup>215</sup>, FRA should better observe the application of those fundamental rights as set out in the EU Charter – except for the citizen's rights under chapter V – for stateless persons in the EU as well.

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<sup>212</sup> European Parliament (2015), p. 56, section 5.3.1.

<sup>213</sup> European Union (2007): Regulation (EC) No 862/2007 on Community statistics on migration and international protections, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0862&from=EN> [12/07/18].

<sup>214</sup> European Commission (n.d.): Eurostat – Your key to European Statistics, Database, available at: <http://ec.europa.eu/eurostat/data/database> [12/07/18].

<sup>215</sup> European Union Agency for Fundamental Rights (FRA) (n.d.): About fundamental rights, website, available at: <http://fra.europa.eu/en/about-fundamental-rights> [15/07/18].

## 3.2. The Humanitarian Approach

### 3.2.1. The UNHCR statelessness mandate in a nutshell

Originally, UNHCR was solely mandated to address refugee situations. As remarked above, flight and statelessness were formerly one inseparable notion and statelessness was viewed as an additional symptom to the refugee status, not as a discrete matter. That is why statelessness has merely been addressed as a side-issue through the UNHCR refugee mandate and only stateless refugees were qualified to receive protection pursuant the 1951 Refugee Convention<sup>216</sup> and the UNHCR Statute<sup>217</sup>. However, following the collapse of the former USSR and Yugoslavia and the subsequent emergence of mass statelessness because of border rearrangements and forced displacements, the international community perceived that statelessness also takes place outside of refugee contexts.<sup>218</sup>

Thus, the UNGA expanded UNHCR's mandate in 1995:<sup>219</sup>

Concerned that statelessness, including *the inability to establish one's nationality* [emphasis added], may result in displacement, and stressing, in this regard, that the prevention and reduction of statelessness and the protection of stateless persons are important also in the prevention of potential refugee situations.<sup>220</sup>

With the expansion of UNHCR's mandate, the understanding of a stateless person has shifted from the narrow definition in the 1954 Convention to a more broad conception by taking into account that also a person who may have a nationality in theory, but cannot establish it in practice. This added appreciation of statelessness may be a first approach towards the inclusion *de facto* statelessness, which is yet to come.

The UNHCR mandate can be summarized into four key components of operation: identification, protection, prevention and reduction of statelessness.<sup>221</sup> Nevertheless, the

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<sup>216</sup> UNHCR (1951), Article 1(A)(2).

<sup>217</sup> UNHCR (1950): Statute of the Office of the United Nations High Commissioner for Refugees, A/RES/428(V), §6(A)(II), available at: <http://www.refworld.org/docid/3ae6b3628.html> [05/07/18].

<sup>218</sup> Mark Manly (2014): UNHCR's mandate and activities to address statelessness. In: Edwards/van Waas (Ed.) (2014): *Nationality and Statelessness under International Law*, Cambridge University Press, UK, chapter 4, p. 89; Radha Govil (2017): *The Sustainable Development Goals and solutions to statelessness*. In: van Waas/Khanna (Ed.) (2017): *Solving Statelessness*, Wolf Legal Publishers, Oisterwijk, NL, chapter 2, p. 49.

<sup>219</sup> UNGA (1996): Resolution on the Office of the High Commissioner for Refugees, A/RES/50/152, available at: <http://www.un.org/documents/ga/res/50/ares50-152.htm> [05/7/18].

<sup>220</sup> *ibid.*, Preamble.

<sup>221</sup> Manly (2014), 88f; UNHCR (2018): *How UNHCR helps stateless people*, website, available at: <http://www.unhcr.org/en-ie/how-unhcr-helps-stateless-people.html> [05/07/08]

implementation of the expanded mandate has been haltering for a long time: “In a litter of two offspring, statelessness was the metaphorical runt. It was overlooked [...] while the refugee mandate received all the attention.”<sup>222</sup>

Though, with the emergence of increasing civil society engagement and academic research in the past decade, UNHCR also conceived the desideratum to immediate action for ending statelessness. Thus, in 2014 the first Global Forum on Statelessness was held in The Hague where the various dimensions of statelessness and possible solutions were discussed. This first-time-ever event solely on statelessness marked a significant milestone in the perception of statelessness as a discrete matter and a driving factor towards increasing endeavours in substantially conducting the UNHCR mandate. From then on, the efforts in combating statelessness have surged remarkably: UNHCR has involved statelessness as an own pillar within its activities and has significantly increased the budget on this statelessness programme.<sup>223</sup> In addition, other resources have been dedicated, such as the establishment of several specialised regional offices and the growing deployment of competent staff with expertise in statelessness.<sup>224</sup> Never before, UNHCR has devoted so much money, time and efforts into this long-time neglected part of its mandate. All these pushes have culminated in the launch of the unprecedented ‘#IBelong Campaign to End Statelessness by 2024’<sup>225</sup> (hereafter: #IBelong campaign) in the same year, arguably to this date the most striving statelessness project worldwide ever.

### **3.2.2. The #IBelong Campaign and Global Action Plan to End Statelessness by 2024**

In a partnership with textile manufacturer United Colours of Benetton<sup>226</sup>, UNHCR created the extensive, creative and modern #IBelong campaign to mobilize governments and civil society, disseminating awareness for statelessness via Social Media, videos, a strong internet presence, signature collection for an open letter, logo-printed T-shirts, but on the other hand also through the provision of Good Practices Papers, frequent reports, handbooks, brochures

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<sup>222</sup> Manly (2014), p. 92.

<sup>223</sup> UNHCR (2018): Global Focus, UNHCR Operations Worldwide: Financials, Web-Database, available at: [http://reporting.unhcr.org/financial#\\_ga=1.249077891.562491722.1481282576](http://reporting.unhcr.org/financial#_ga=1.249077891.562491722.1481282576) [04/07/18].

<sup>224</sup> Kristy A. Belton (2016): Ending Statelessness Through Belonging: A Transformative Agenda? In: Ethics & International Affairs, 30(4), p. 420f, available at: <https://doi.org/10.1017/S0892679416000393> [05/07/18].

<sup>225</sup> UNHCR (2018)(b): Website of the #IBelong campaign, available at: <http://www.unhcr.org/ibelong/> [05/07/18]; UNHCR (2018)(c): #IBelong campaign to End Statelessness, website, available at: <http://www.unhcr.org/ibelong-campaign-to-end-statelessness.html> [05/07/18].

<sup>226</sup> Benetton Group (2014): United Colors of Benetton’s Fabrica develops #IBelong Campaign in support of UNHCR’s aim to end statelessness by 2024, Press Release, available at: <http://www.benettongroup.com/media-press/press-releases-and-statements/united-colors-of-benettons-fabrica-develops-ibelong-campaign-in-support-of-unhcrs-aim-to-end-statelessness-by-2024/> [05/07/18].

and guides for both practitioner's and parliamentarians, fundraising and a public calendar including advocacy-events on statelessness.<sup>227</sup>

The campaign's creative concept is centered on the right to belong. [...] [It] includes the hashtag #IBelong and uses a globe as the main icon/logo. Since statelessness is an abstract idea for most people, the icon shows a person in fetal position inside a globe, symbolizing how everyone belongs in the world, how the world can care for and protect every person. The key message that ties the hashtag and the globe together is: #IBelong to a world where everyone has the right to a nationality.<sup>228</sup>

Through pictures and the collection of testimonies from stateless persons, the campaign aims to give statelessness a face.<sup>229</sup> Interestingly, the whole campaign is pervaded by the notion of belonging, as expressed by the campaign's slogan #IBelong. Unlike more general slogans, for instance #Nationalitymatters or #Nationalityforall, the slogan #IBelong emphasises through the 'I' on the ownership of the stateless individuals. Thus, the campaign's subject is innovatively the stateless individual – instead of the state as the primer actor to confer nationality.

If we take into account the notion of nationality as being assigned as a national to/by a state, the term 'belonging' defines the fact of being a member of the state, or in other words, being rightly placed.<sup>230</sup> Under the conventional notion of nationality, it is solely within a state's discretion to award nationality and thus 'formal belonging'. It is therefore striking that the #IBelong campaign shifts the perspective from state sovereignty to the individual's actual sense of belonging, and thus beyond the entire debate of nationality conferral.

From the vantage point of those affected by statelessness, this is a powerful declaration of presence and agency. It demands that we understand formal belonging not only from the state's perspective but also from that of the excluded themselves. We are thus led to question the current state system in which the state is the actor—granting or denying formal belonging—and the people are the acted upon. Framing statelessness in this way is bold,

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<sup>227</sup> cf. UNHCR (2018)(e) Campaign Resources, available at: <http://www.unhcr.org/ibelong/campaign-resources/> [05/07/18].

<sup>228</sup> UNHCR (2016): User Guide: #IBelong Campaign to End Statelessness, Campaign Identity and Creative Concept, p. 1.

<sup>229</sup> UNHCR (2014): Campaign to End Statelessness, External Concept Note, available at: <http://www.unhcr.org/statelesscampaign2014/External-Concept-Note.pdf> [05/07/18].

<sup>230</sup> Belton (2016), p. 419.

especially when we consider that UNHCR is an intergovernmental agency and that the realm of citizenship determination has traditionally been considered a state prerogative.<sup>231</sup>

In order to achieve the aspirations of the #IBelong campaign to durably eliminate statelessness within a decade, UNHCR published simultaneously the ‘Global Action Plan to End Statelessness: 2014-2024 (GAP)’<sup>232</sup>. This strategic framework consists of 10 concrete, inter-related actions and 15 sub-goals, based on the four UNHCR mandate principles: identification, protection, reduction and prevention of statelessness. These actions shall be implemented by states at their best with the assistance of UNHCR and other stakeholders until the year 2024. At first glance, the composition of the GAP depicts a well sophisticated plan: For each action, the ‘Starting Points’ describe the present situation, the ‘Milestones’ set out interim assessment dates to ensure that action is progressively taken and the ‘Goals’ specify the desired results that shall be achieved by 2024. In addition, the GAP provides further advice on the realisation of each action and specifies UNHCR’s assisting role in the whole process. Another asset is that potential obstacles to the implementation are considered. Annual monitoring and benchmarking in 2017<sup>233</sup> and 2020 shall ensure a persistent implementation of the required actions.

Due to differing dimensions and varying scopes of statelessness depending on country contexts, the GAP asserts that not every action needs necessarily to be performed in every country.<sup>234</sup> In some states, the abolishment of discriminatory nationality laws might already be the ultimate success whereas in other countries, for instance, the establishment of SDPs is required to solve statelessness in migratory contexts. Furthermore, a successful implementation also depends on a country’s capacity and resources: Evidently, least developed countries do not have the same financial means as industrial countries, and other pressing priorities competing with eradication of statelessness. However, the GAP expresses unprecedented ambitions and thus accelerates the global boost of statelessness on the international agenda.

Despite this crucial impact of providing a sophisticated and transformative strategy, there are

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<sup>231</sup>ibid, p. 422.

<sup>232</sup>UNHCR (2014b): Global Action Plan to End Statelessness: 2014-2024, available at: <http://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html> [02/07/18].

<sup>233</sup> Despite copious research, there could curiously no documents or facts be found on the benchmarking in 2017.

<sup>234</sup> UNHCR (2014b), p. 4.



several ‘gaps in the GAP’.<sup>235</sup>

(i) First, there is a large question mark behind the challenge of feasibility. For more than a century, statelessness has always played an inferior role – which it still does in the mindset of millions of people, including politicians. However, with the release of the GAP, governments are all of a sudden stressed to take immediate action on statelessness and end it within the short period of only 10 years, which seems an enormous, even impossible, task. In other words, the GAP might be too ambitious and too rushed. With the increase of civil society engagement and greater public awareness on statelessness in the last decade, UNHCR probably felt the need to redress the long negligence of its statelessness mandate by hastening to publish an Action Plan with the mere aim of ending statelessness. Although taking into account prospective obstacles that may hamper the implementation of the action plan, it does not consider the overall obstacle that a ‘phenomenon’ which has evolved over centuries and whose historical root causes may be deeper than one thinks (for example in the case of the Rohingya or of religious-based gender inequalities), cannot simply be erased within a comparatively diminutive time period of 10 years. It may do so perhaps on the surface, radically said by e.g. giving every person a passport, but as the nature of statelessness is far more complex with regard to *de facto* statelessness and the predicament of state sovereignty, the successful and thorough implementation of the right to a(n effective) nationality firstly requires more time and secondly a multi-facet approach that goes beyond the mere objective of universal nationality acquisition.

(ii) The GAP’s ‘one-size-fits-it all’ solution of ending statelessness through the ultimate goal of universal nationality acquisition is thus insufficient: First, because it sidelines the important fact of social attachment to a state for effective nationality and secondly, because as diverse and unique as the causes and contexts for statelessness are, as diverse and unique need to be the solutions. What works for the one, might not work for the other.

(iii) There is a clear focus of the GAP on the reduction and prevention of statelessness. Although these are important factors for durable statelessness elimination, the protection of stateless persons while they are still stateless is nearly eluded. Indeed, the only explicit Action 6 prescribes to “grant protection status to stateless migrants [...]”<sup>236</sup>, which “[...] permits

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<sup>235</sup> Following analysis has been inspired by: Belton (2016), p. 419-427; Kelly Staples (2017): Recognition, nationality, and statelessness – State-based challenges for UNHCR’s plan to end statelessness. In: Bloom/Tonkiss/Cole (Ed.) (2017): Understanding Statelessness, Routledge Studies for Human Rights, Routledge, London/NY, chapter 11, p. 173ff.

<sup>236</sup> UNHCR (2014)(b), Action 6.



residence and guarantees the enjoyment of basic human rights [...]”<sup>237</sup>. However, firstly this protection provision solely focuses on stateless migrants, thus leaving entirely aside the protection of *in situ* stateless persons, but does not involve the challenge of irregular migration. Secondly, the action does neither exemplify what is meant by ‘basic human rights’ (e.g. Should stateless people be allowed to work or to marry? Or is allowing them to stay in the country already the maximum of benevolence?), nor how exactly such a ‘protection regime’<sup>238</sup> should look like. Besides this lack of guidance, there is nothing said about the entitlement of *de facto* stateless persons or irregular stateless migrants to such a protection status.

(iv) Although the GAP points out in its introductory words that not every state needs to complete every action, it keeps the overall pretensions at some points essentially low. For instance, Action 6 only prescribes 70 countries to establish SDPs until 2024. This deceptive number basically contradicts the plan’s overall utopia to end statelessness worldwide, because statelessness exists in more than just 70 countries. In addition, an effective identification of stateless people is essential to be aware of them and protect them as such. Thus, the aspired standard of establishing SDPs in only 70 countries is insufficient, as all stateless persons in all countries need to be identified in order to be recognised and protected.

(v) As a last criticism can be mentioned, that the pioneering paradigm shift of the #IBelong campaign is not reflected in the corresponding action plan. Where the campaign postulates an innovative focus on actual “belonging, inclusiveness and agency of the excluded”<sup>239</sup>, the GAP continues in contrast to view states as the primary actors to solve statelessness under the assumption of “adequate leadership and effective implementation”<sup>240</sup>. The GAP constitutes mainly legal solutions through the prism of state membership, such as the simplification and facilitation of naturalisation processes for stateless migrants<sup>241</sup>. This thin bureaucratic approach sidelines the fact that statelessness even exists due to the dilemma of border defence and state discretion.

When one considers that states still jealously guard their sovereign right to determine who belongs, it is difficult to imagine how statelessness—itsself a by-product of the state system's malfunctioning—can be resolved by the

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<sup>237</sup> *ibid*, p. 3, 16.

<sup>238</sup> *ibid*, p. 17.

<sup>239</sup> Belton (2016), p. 424.

<sup>240</sup> UNHCR (2014)(b), p. 4.

<sup>241</sup> *ibid*, Action 6.

very actors that generated stateless people in the first place.<sup>242</sup>

Furthermore, the GAP does not consider individual consequences and ownership; it lumps all stateless people together in one pot and leaves the decision of nationality acquisition – and thus of access to fundamental rights – solely upon the courtesy of states.

Therefore, the GAP does not appear as revolutionary and transformative as it seemed at first glance. However, the promotion of the #IBelong campaign’s sprouting paradigm shift may be a first step to adjust the GAP to that effect and thus unleash its full potential.

### **3.2.3. The Coalition on Every Child’s Right to a Nationality**

With the growing awareness of statelessness, the issue of childhood statelessness has also gained further attention. Thus, within the #IBelong campaign, in 2016 UNHCR launched in collaboration with UNICEF the common ‘Coalition on Every Child’s Right to a Nationality’, involving over 15 partners such as the NGO Plan International, the Norwegian Refugee Council or the ‘Global Campaign for Equal Nationality Rights’. The coalition manifests “to raise awareness about and combat the hidden problem of childhood statelessness and to promote the right of every child to acquire a nationality”<sup>243</sup>. The coalition’s main activities encompass advocacy at regional and international level, public information as well as technical and operational cooperation (such as CRC monitoring and mobile birth registration initiatives) together with UN Country Teams (UNCT) and other local partners. Resembling the GAP, the coalition’s four key objectives<sup>244</sup> are:

- Ensure that no child is born stateless
- Remove gender discrimination from nationality laws
- Ensure universal birth registration to end statelessness
- States’ accession to the UN Statelessness Conventions<sup>245</sup>

Although the coalition’s approach of working together across all levels and sectors by involving local actors and civil society appears coherent and impactful, its thin legal focus and the promotion of law reforms as the ‘antidote to statelessness’ may be criticised in the same light as the GAP. The coalition does not go beyond the ‘one and only’-solution of universal nationality conferral and views – similar to the GAP – states as the primary actor to solve statelessness.

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<sup>242</sup> Belton (2016), p. 425.

<sup>243</sup> UNHCR/UNICEF (n.d.): Coalition on Every Child’s Right to a Nationality – Coalition Presentation, p. 6, available at: <http://www.unhcr.org/ibelong/wp-content/uploads/Coalition-Presentation.pdf>, [05/07/18].

<sup>244</sup> *ibid.*

<sup>245</sup> UNHCR/UNICEF (n.d.), p. 6.

### 3.3. The Sustainable Development Approach

Promoting [...] right to a legal identity through [...] sustainable development goals will be important to ending statelessness and crucial to dismantling some of the major barriers to sustainable and peaceful development.<sup>246</sup>

Originally, statelessness has been seen as a purely humanitarian or human rights issue but hardly as a matter of Sustainable Development. This chapter argues why statelessness is relevant to Sustainable Development and how the Agenda 2030 and the emergence of Digital Identity initiatives may contribute to effectively protect the rights of stateless persons.

#### 3.3.1. The Nexus between Human Rights, Humanitarian Action and Sustainable Development

The link between humanitarian action and statelessness is evident with regard to its historical “[...] close association with refugee crises, notably the large-scale displacement and mass denationalisation of German Jews during the Second World War [...]”<sup>247</sup>. Furthermore, the refugee crisis that fled Europe in 2015 with hundreds of thousands of stateless migrants and the largest contemporary humanitarian crises of the stateless Rohingya population in Myanmar evidently reveal the connections between flight and statelessness, and subsequently between humanitarian aid and statelessness, given the “importance of addressing statelessness to prevent conflict and persecution from occurring in the first place”<sup>248</sup>. UNHCR as an emergency response actor has been mandated as the statelessness agency of first instance. For this reason, the other UN agencies have predominantly omitted efforts to take action against statelessness.

The relevance of statelessness to Human Rights is straightforward, too, as “[s]tateless persons are first and foremost human, and the right to nationality [...] is a universal human right”<sup>249</sup> which is throughout enshrined in many international and regional legal instruments. Moreover, “[i]n practice, possession of a nationality often acts as the gateway to the full panoply of civil, political, economic, social and cultural rights.”<sup>250</sup>

Hitherto statelessness has entirely been neglected as a matter of Sustainable Development and thus remained at the very ‘bottom shelf’ of the development priorities.

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<sup>246</sup> Govil (2017), p. 48.

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

<sup>248</sup> *ibid.*, p. 49.

<sup>249</sup> *ibid.*

<sup>250</sup> *ibid.*

The development lexicon does not include the word ‘statelessness’, [...] [thus] the development field can almost be excused for not noticing.<sup>251</sup> This lack of understanding statelessness has led to it being rendered invisible in development context, as is often sadly the case for stateless people themselves.<sup>252</sup>

Even the annual Human Development Report<sup>253</sup> by the UN Development Programme (UNDP) has never mentioned or implicated statelessness at all, although a state’s ranking on the Human Development Index (HDI)<sup>254</sup> is determined, inter alia, by the indicator of Human Security which interestingly also contains the numbers of internally displaced persons (IDPs) and refugees, among whom statelessness is doubtlessly a widespread phenomenon.

Nevertheless, statelessness has rarely been viewed as being within the purview of the UN development agency. First of all, because most development programmes are preoccupied with national outcomes as they intend to develop a specific country and its domestic population – wherefrom stateless persons are frequently excluded and thus not considered in the assessment of development needs.<sup>255</sup> Furthermore, development has conventionally been viewed as being primarily competent for ‘developing countries’ where apparently the safeguarding of very basic needs and poverty reduction constitute more pressing issues than the elimination of statelessness. And thirdly, unlike human rights, “development is more concerned with aggregate improvements and less so with equality of access and enjoyment of the improvements made”<sup>256</sup>. Therefore, the absence of nationality reveals a human rights issue, but is not of interest for development programmes.

Although these traditional conceptions manifest a barrier to the perception of statelessness from a development perspective, the nexus juts out when examining the relationship between statelessness and human development: Evidence<sup>257</sup> shows that statelessness negatively

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<sup>251</sup> Amal de Chickera (2013): Statelessness, Human Rights and Development: It’s time to Connect the Dots. In: European Network on Statelessness Blog, available at: <https://www.statelessness.eu/blog/statelessness-human-rights-and-development-its-time-connect-dots> [05/07/18].

<sup>252</sup> Govil (2017), p. 50.

<sup>253</sup> UNDP (n.d.): Publications > Human Development Reports 1995-2016, available at: <http://www.hdr.undp.org/en/global-reports> [05/07/18].

<sup>254</sup> For more information about the Human Development Index see: UNDP (n.d.) (b): Human Development Index (HDI), website, available at: <http://hdr.undp.org/en/content/human-development-index-hdi> [05/07/18].

<sup>255</sup> Govil (2017), p. 51; de Chickera (2013).

<sup>256</sup> de Chickera (2013).

<sup>257</sup> cf. for example: UNHCR (2011): Mapping Statelessness in The United Kingdom, available at: <http://www.refworld.org/docid/4ecb6a192.html> [05/07/18]; Govil (2017), p. 51f, cf. footnote 26.

impairs all key indicators of the HDI<sup>258</sup>, including education, health, decent living standard, economic income, gender equality or security. Furthermore, stateless persons often live in a condition of multidimensional poverty, vulnerability and marginalisation – indeed across all over the world and also in industrialised countries. This relation illustrates that the world of development can no longer refrain from the problems of statelessness. Besides, the narrow focus of development programmes on solely national outcomes<sup>259</sup> seems deficient in times of globalisation and cross-national migration movements, and the omission of whole sectors of populations – such as stateless people – in the target group drastically impedes the realisation of social and economic development.<sup>260</sup> Thus, in other words: Statelessness is indeed a matter of sustainable development as it is of humanitarian action and human rights.

Furthermore, likewise to refugee situations, the handling, protection and naturalisation of stateless persons need long-term sustainable solutions. Humanitarian action is the entity of crisis response and intermediation, and human rights the entity responsible for legal evolutions and protection mechanisms, but without the entity of sustainable development to establish durability and stability, the process of solving statelessness is incomplete. Evidently, all three disciplines are inter-related and thus should complement each other and work cohesively.

Development promotes aspiration, not obligation [...], [but] aspirations will not be realised if not coupled with obligations to treat people equally, to be fair and not to discriminate – in short, good governance and a rule-of-law approach are needed for development to be meaningful for stateless persons and to avoid entrenching their position of inequality.<sup>261</sup>

Therefore, international human rights law constitutes the fundament to build on with sustainable development; in reverse, development means deliberately directing efforts to the realisation of human rights. This significant link between human rights and development has been recognised at the latest with adoption of the Declaration of the Right to Development<sup>262</sup> in 1986. But it took nearly another 30 years, until the Agenda 2030 for Sustainable

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<sup>258</sup>For further information about the HDI and human development indicators cf. UNDP (n.d.)(b).

<sup>259</sup> de Chickera (2013), Govil (2017), p. 51.

<sup>260</sup> UN Secretary General (UNSG) (2011): Guidance Note of the Secretary General: The United Nations and Statelessness, p. 2, available at: <http://www.refworld.org/docid/4e11d5092.html> [07/07/18].

<sup>261</sup> Govil (2017), p. 51.

<sup>262</sup> UNGA (1986): Declaration on the Right to Development, A/RES/41/128, available at: <http://www.refworld.org/docid/3b00f22544.html> [05/07/18].

Development<sup>263</sup> (hereafter: Agenda 2030) placed a practical cornerstone for a consolidated human rights-based approach to development.<sup>264</sup> At the first World Humanitarian Summit in 2016, the Agenda 2030 has been acknowledged as an historic opportunity, “under which both humanitarian and development actors can work together to ensure the safety, dignity and ability to thrive of the most vulnerable”<sup>265</sup> and thus to transcend humanitarian-development divides. In sum, the combination of humanitarian action, human rights obligations and sustainable development aspirations seem as the most promising and coherent route to address such complex global challenges as statelessness.

### 3.3.2. Sustainable Development Goals (SDGs) as a tool for combating statelessness

Since its adoption in 2015, the Agenda 2030 has dominated the entire work of development cooperation. Unfortunately, this important agenda does not contain any explicit reference to statelessness<sup>266</sup>, however by virtue of its universality<sup>267</sup> and significant similarities with IHRL and GAP, it represents a useful tool in the process of solving statelessness and an initial point from where inter-disciplinary collaborations can be further strengthened.

In view of the fact that the vast majority of the world’s estimated 10 million stateless people live on the lowest rungs of society, including in terms of economic prosperity, political participation and social inclusion, the overarching aim of the 2030 Agenda ‘to reach the furthest behind first’ and ‘leave no one behind’ clearly applies to those who experience the many

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<sup>263</sup>UNGA (2015): Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, available at: [http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf) [05/07/18].

<sup>264</sup> There have already been predecessor Development Agendas, such as the Agenda 21 (1992) or the UN Millennium Development Goals (MDGs) (2000), but they were not as sophisticated and widespread as the SDGs and did not pursue a human rights-based development approach likewise the SDGs contemporarily do.

<sup>265</sup> World Humanitarian Summit (2016): Transcending humanitarian-development divides - Changing People’s Lives: From Delivering Aid to Ending Need, Commitment to Action, §2, available at: [http://www.fao.org/fileadmin/user\\_upload/newsroom/docs/COMMITMENT.pdf](http://www.fao.org/fileadmin/user_upload/newsroom/docs/COMMITMENT.pdf) [05/07/18].

<sup>266</sup> Indeed, §23 of the Agenda explicitly refers to meeting the special needs of refugees and IDPs, but not to statelessness itself.

<sup>267</sup> Despite its non-legally binding character as a form of declaration, the Agenda 2030 has been endorsed by all 193 UN member states and asserted universality as one of the agenda’s core principles. Cf. UN (2015): Historic new Sustainable Development Agenda unanimously adopted by 193 UN Members, in: Sustainable Development News Blog, available at: <https://www.un.org/sustainabledevelopment/blog/2015/09/historic-new-sustainable-development-agenda-unanimously-adopted-by-193-un-members/> [06/07/18]. For further information about universality: cf. UN Development Group (UNDG) (2015): Universality and the 2030 Agenda for Sustainable Development from a UNDG lense, Discussion Note (draft), available at: <https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/files/en/qcpr/undg-discussion-note-on-universality-and-2030-agenda.pdf> [06/07/18].

negative consequences of not being recognised as citizens of any country.<sup>268</sup>

As the agenda strives to improve impoverished living conditions and to create more equal, inclusive and justice societies, the situations of stateless people may be transformed as well, provided that the agenda may be effectively implemented.

Despite the overall principles of universality, ‘leaving no one behind’, inclusiveness, interconnectedness and multi-stakeholder partnerships<sup>269</sup>, the true key features lie within the agenda’s 17 Sustainable Development Goals (SDGs) and 169 associated sub-targets that shall be regularly monitored by means of 230 global indicators and achieved by the year 2030.

Although there are no SDGs explicitly formulated on statelessness, many of them are pertinent to the amelioration of stateless persons’ living conditions.<sup>270</sup> For instance, SDG 3 and 4 help to bridge the denial of education and health services due to the absence of a nationality and SDG 5.1, 10.3 and 16.b contribute significantly to the abolishment of gender-discriminatory nationality laws and discrimination. In particular SDG 16.9 is of utmost relevance to ensure the right to a nationality, aiming to: “By 2030, provide legal identity for all, including birth registration.”

With regard to the chart<sup>271</sup> below, there are clear correlations between the SDGs, GAP and international human rights instruments:

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<sup>268</sup> UNHCR (2017): The Sustainable Development Goals and Addressing Statelessness, Briefing Note, available at: <http://www.refworld.org/docid/58b6e3364.html> [06/07/18].

<sup>269</sup> UNSSC Knowledge Centre for Sustainable Development (n.d.): The 2030 Agenda for Sustainable Development, Summary Document, Bonn, Germany, available at: [https://www.unssc.org/sites/unssc.org/files/2030\\_agenda\\_for\\_sustainable\\_development\\_kcsd\\_primer\\_en.pdf](https://www.unssc.org/sites/unssc.org/files/2030_agenda_for_sustainable_development_kcsd_primer_en.pdf) [06/07/18].

<sup>270</sup> UNHCR (2017), p. 2ff.

<sup>271</sup> cf. UNHCR (2017), p. 6; Govil (2017), p. 63.

**- Overview of similarities between IHRL, UNHCR mandate, GAP and SDGs\* -**

HR instrument (article)	UNHCR mandate	GAP Action	Related SDGs and sub-targets	
1961 Convention, ICCPR 16, CRC 8	Reduction	<b>Action 1:</b> Resolve existing major situations of statelessness	SDG 10: Target 10.3 SDG 16: Targets 16.9 and 16.b	1.3: Implement nationally appropriate social protection systems and measures for all [...] and by 2030 achieve substantial coverage of the poor and the vulnerable  3.8 Achieve universal health coverage, [...] access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all  5.1: End all forms of discrimination against all women and girls everywhere  4: Ensure inclusive and equitable quality Education and Lifelong Learning for all  8.5: By 2030, achieve full and productive employment and decent work for all women and men [...] and equal pay for work of equal value  10.3: Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard  16.9: By 2030, provide legal identity for all, including birth registration  16.b: Promote and enforce non-discriminatory laws and policies for sustainable development  17: Strengthen the means of implementation [through capacity-building and availability of reliable data] and revitalize the global partnership for sustainable development.
CRC 7(2), 1961 Convention	Reduction / Prevention	<b>Action 2:</b> Ensure that no child is born stateless	SDG 16: Target 16.9.	
CEDAW 9, ICERD 5(d)(iii)	Reduction / Prevention	<b>Action 3:</b> Remove gender discrimination from nationality laws	SDG 5: Target 5.1. SDG 10: Target 10.3 SDG 16: Target 16.b	
1961 Convention, CEDAW 9, CRC 8, CRPD 18, ICERD 5(d)(iii)	Prevention	<b>Action 4:</b> Prevent denial, loss or deprivation of nationality on discriminatory grounds	SDG 10: Target 10.3 SDG 16: Target 16.b	
1961 Convention, CRC 7(2)	Prevention	<b>Action 5:</b> Prevent statelessness in cases of State succession	SDG 16: Target 16.9	
1954 Convention, CRC 2(2) ICCPR 24, ICRMW 43, ICESCR	Identification / Protection / Reduction	<b>Action 6:</b> Grant protection status to stateless migrants and facilitate their naturalization	SDG 1: Target 1.3, 1.4 and 1.5 SDG 3: Target 3.8 SDG 4: Target 4.1 and 4.5 SDG 8: Target 8.5 SDG 10: Target 10.3 SDG 16: Targets 16.9	
CRC 7, CRPD 18(2), ICRMW 29, ICCPR 24	Prevention	<b>Action 7:</b> Ensure birth registration for the prevention of statelessness	SDG 16: Target 16.9 and 16.b	
1954 Convention, ICCPR 16	Identification / Reduction / Prevention	<b>Action 8:</b> Issue nationality documentation to those with entitlement to it	SDG 16: Target 16.9 and 16.b	
	Protection / Reduction / Prevention	<b>Action 9:</b> Accede to the UN Statelessness Conventions	SDG 17: Target 17.14 and 17.17	
1954 Convention	Identification	<b>Action 10:</b> Improve quantitative and qualitative data on stateless populations	SDG 17: Target 17.18	
	Identification: Protection: Reduction: Preventions:	3/10 Actions 2/10 Actions 6/10 Actions 7/10 Actions	SDG 1: Poverty Reduction SDG 2: Nutrition SDG 3: Health & Well-being SDG 4: Universal Education	



		SDG 5: Gender Equality SDG 8: Economic Growth & Work SDG 10: Reduce Inequalities SDG 16: Justice & Strong Institutions SDG 17: Global Partnerships	
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\*This table reveals the connections and similarities between each Action of the GAP, the four elements of UNHCR’s statelessness mandate, relevant human rights instruments and the SDGs and their associated sub-targets.

This chart illustrates the evident connections and present contributions to statelessness from each of a human rights, humanitarian and sustainable development perspective. As one can see, there are several overlaps and similarities between IHRL, GAP and SDGs: For instance, all three disciplines direct to universal birth registration, the facilitation of nationality conferral for stateless persons and the abolishment of discriminatory nationality laws. Nonetheless, all three approaches currently focus on legal solutions and rather on the prevention and reduction of statelessness than the protection of stateless people while they are still stateless or when their nationality is ineffective. Although all approaches seek to protect stateless persons and grant them access to basic rights, no approach explicitly sets out a concrete protection mechanism for stateless persons. In particular, the GAP remains more or less silent on *how* stateless people shall be protected. In terms of IHRL, the 1954 Statelessness Convention is the only instrument that provides a specific framework for the protection of stateless people; albeit its comparatively low number of ratifications degrades the convention's relevance.

Therefore, the SDGs constitute probably the most practical route to protect stateless persons, as they endeavour to ensure basic rights to everyone (SDG 2: right to food, SDG 3: health care, SDG 4: education, SDG 8: labour rights), to improve the living conditions for the most vulnerable (SDG 1: Poverty Reduction, SDG 6: Clean water and sanitation, SDG 11: Housing and urbanisation) and to create equal, inclusive societies (SDG 5: Gender Equality, SDG 10: Reduction of Inequalities, SDG 16: Peace, Justice and strong Institutions).

Furthermore, SDG 16.9 (Provision of legal identity for all) helps especially in migratory contexts to identify, recognise and protect stateless people by granting them a legal status and the necessary documents that ensure their access to rights. Resembling to Action 10 GAP and the provisions of the 1954 Convention, the target thus implicitly contributes to the establishment of SDPs and Digital Identity solutions.

In addition, SDG 17 (Global Partnerships) motivates a promising approach for further cross-agency collaboration, public-private partnerships, civil society involvement and combined efforts for capacity-building on the matter of statelessness, once it will surge as a priority to the international community. In addition, sub-target 17.18 (likewise Action 10 GAP) calls for amended disaggregated data collection. As currently the only data available on statelessness are rough estimations, the necessity for reliable data and application of SDG 17.18 are evident.

In consequence, the successful implementation of all these features would not only enhance the protection of and access to rights, but also provide durable solutions for stateless people to help themselves:

[...] SDGs may also help with the integration of stateless (and formerly stateless) populations, particularly large *in situ* groups, which may in the longer term help to facilitate initiatives aimed at resolving their statelessness and preventing new cases from occurring.<sup>272</sup>

Despite all these positive impacts on statelessness and the agenda's potential to fill the gaps of GAP and IHRL, it might be difficult to apply their scope of implementation to stateless people, because the SDGs “[...] are based on the assumption that individuals who experience discriminatory treatment are in a position to report the mistreatment and, in fact, take the opportunity to do so<sup>273</sup>” – which is not the case for the vast majority of stateless persons. Another shortcoming is the formulation of the indicators to measure the implementation of the goals: For instance, the corresponding indicator 16.9.1<sup>274</sup> that measures SDG 16.9 merely considers one single aspect of legal identity<sup>275</sup>, namely the birth registration of children under five years of age. Given that the indicator does not measure other factors which affect the provision of legal identity - e.g. the issuing of identity or status documents, the proper functioning of the administrative authorities, reliable data and statistics to see progress, the establishment of SDPs to distinguish stateless persons and provide them with a particular status –, it is evident that statelessness is not sufficiently incorporated in the Agenda 2030. Without adequate indicators that set standards for statelessness, the potential of the SDGs to improve the situation for stateless persons cannot yet be fully realised.

The task of the international community now is to ensure that stateless persons are explicitly considered [when] global and country-level indicators are refined, measurement methodologies developed and national planning systems activated, so that they too may benefit from this initiative which

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<sup>272</sup> UNHCR (2017), p. 2.

<sup>273</sup> Govil (2017), p. 69.

<sup>274</sup> UNGA (2017): Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, A/RES/71/313, p. 22: Indicator 16.9.1 (“Proportion of children under 5 years of age whose births have been registered with a civil authority, by age”), available at: <https://undocs.org/A/RES/71/313> [05/07/18].

<sup>275</sup> Further elaborations upon the definition of legal identity will be found in section 3.4.

aims at a world that is just- rights-based, equitable and inclusive.<sup>276</sup>

Besides the contribution for solving statelessness, the supplementation of the SDGs with statelessness-specific sub-targets and indicators would also bypass the shortage of international law and give substance to the right to a nationality. To illustrate this argument, let us use again the analogy with education: The right to education is codified – likewise the right to nationality – in a whole bundle of human rights instruments (even though both in very shallow formulations). Similar to the right to a nationality, only the access to the right is crucial in international law – there are no prescriptions on the quality and attributes of neither the right to education, nor the right to a nationality. However, the Agenda 2030 provides with SDG 4 - including 10 sub-targets and 11 global indicators on all dimensions of education - a substantive framework for the right to education that bridges the qualitative gaps of international law. Hence, where human rights law only strives to ensure the access to education, the Agenda 2030 closes the gap by ensuring the quality of education with practical features such as the global expansion of scholarships until 2020<sup>277</sup> or the supply of qualified teachers<sup>278</sup>. Why can we not apply the same concept to the right to a nationality and use the SDGs as a tool to give substance to the right and its implementation? Moreover, through the formulation of specific sub-targets and indicators on statelessness, including *de facto* statelessness, perhaps the same success for reduced statelessness number may be recorded in a few years as with the statistics on education.

Such added sub-targets to the present SDG 16 could be formulated as following examples<sup>279</sup>:

- By 2030, ensure that every person has an effective nationality
- By 2030, ensure that every national legislation establishes effective statelessness identification procedures and particular statelessness protection mechanisms
- By 2030, substantially increase the supply of competent authorities with expertise in statelessness and provide qualitative training for all professionals dealing with statelessness in all its various forms

and corresponding indicators to monitor the implementation as followed:

- Statistical progress of statelessness reduction, including *de facto* statelessness<sup>280</sup>

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<sup>276</sup> Govil (2017), p. 69.

<sup>277</sup> UNGA (2015), p. 17: SDG 4.b “By 2020, substantially expand globally the number of scholarships [...]”.

<sup>278</sup> UNGA (2015), p. 17: SDG 4.c “By 2030, substantially increase the supply of qualified teachers [...]”.

<sup>279</sup> Examples suggested by the author.

<sup>280</sup> As the notion of *de facto* statelessness is more complex and thus the number of *de facto* stateless people may be more difficult to count, this suggestion for a new indicator is of course too simple and superficial.

- Proportion of countries with effective statelessness identification procedures and particular statelessness protection mechanisms
- Proportion of competent authorities and professionals who received at least the minimum organised training to adequately take care of stateless persons

All in all, the Agenda 2030 creates new opportunities for encountering statelessness through a sustainable development approach. With the successful implementation of the corresponding SDGs, the way for stateless people to access basic social services will be smoothed and discrimination in nationality laws and policies be tackled. Despite being a non-binding intergovernmental agreement, all UN-member states have endorsed the Agenda 2030 and thus voluntarily committed themselves to work on national and international level in order to achieving the goals. Moreover, the obvious similarities with UNHCR's GAP and IHRL provisions underline the reasoning that a sustainable development approach to statelessness may not only function as a remedy to the shortcomings of each of the two other approaches, but also as a vehicle for durable help-to-self-help solutions. However, the full potential of the agenda as a tool to combat statelessness is not yet unfolded

(i) first, because the right to a nationality is not sufficiently included despite the Agenda's aspiration "to realise the Human Rights for all"<sup>281</sup> and its claimed human-rights-based approach.

(ii) secondly, because the marginalised group of stateless people is not considered in the Agenda, despite its assertion to pay "particular attention to the voices of the poorest and most vulnerable"<sup>282</sup>

In this light, the Agenda entirely omits statelessness. Nevertheless, as the international community will most probably not draft a new agenda until the year 2030, we have to harness the present SDGs. Though,

[t]o maximise the effectiveness of the SDGs and Targets in achieving these statelessness-related results, modifications to the existing Global Indicators associated with the relevant SDGs and Targets are [...] needed, as these will influence the manner in which the SDGs are implemented.<sup>283</sup>

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Nevertheless, the objective of this section is not to prescribe how the SDGs should be reformulated, but to stimulate and inspire to think about how statelessness-specific amendments could be incorporated in the Agenda 2030.

<sup>281</sup> UNGA (2015), Preamble.

<sup>282</sup> *ibid.*

<sup>283</sup> Govil (2017), p. 68f.

### 3.4. The Technological Approach: Digital Identity

As examined above, to this date the Human Rights and Humanitarian approaches all strive for legal solutions to tackle statelessness – mainly through the abolishment of discriminatory nationality laws, the insurance of birth registration and ultimate nationality acquisition (e.g. through naturalisation). Although these are all important and necessary aspects for ending statelessness in the long-term, a sole legal approach disregards immediate requirements to safeguard stateless people’s rights and the fact that in most cases “[i]n practice, individual[s] [...] far more often face the practical impossibility of obtaining official documentation than an explicit legal denial of nationality”<sup>284</sup> - in other words: the main causes why people fall through the bureaucratic system are less active arbitrary deprivations by states, but rather practical obstacles for individuals to receive or verify their identity (such as disfunctioning authorities, loss of documentation, high administration fees or the absence of awareness for the importance to register oneself).

The right to a legal identity is stipulated in Article 6 of the Universal Declaration of Human Rights: Everyone shall have the right to recognition everywhere as a person before the law.

Though, approximately 230 million children have not been registered at birth<sup>285</sup> and 1.1 billion people live without proof of identity around the world<sup>286</sup>, lots of them who are stateless. As discussed above, the evidence of legal existence (such as a passport, identity card or birth certificate) is crucial to get access to basic social services, such as education or health care, but also for other daily activities that we take for granted – travelling, opening a bank account or even buying groceries become very difficult without a proof of identity.<sup>287</sup> The following section thus examines the revolutionary value of Digital Identity systems for the realisation of SDG 16.9 and Article 6 UDHR, and its potential to transform the life of stateless people through human ingenuity and technical progress beyond merely legal solutions.

[...] Identity in the 21st century is no longer just paperbased and centred on

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<sup>284</sup> Insitute on Statelessness and Inclusion (ISI) (2017) (e): Identification for Development (ID4D) and Regional Passports. In: The World’s Stateless Blog, available at: <http://www.worldsstateless.org/continents/africa/identification-for-development-id4d-and-regional-passports> [07/07/18].

<sup>285</sup> Govil (2017), p. 57.

<sup>286</sup> Worldbank Group (2017): ID4D Identification for Development – Annual Report 2017, p. 1, available at: <http://pubdocs.worldbank.org/en/561391513609113984/2017-ID4D-Annual-Report.pdf> [07/07/18].

<sup>287</sup> cf. Rajaa Elidrissi (2018): Blockchain may replace IDs in the future, CNBC Video, available at: <https://finance.yahoo.com/news/blockchain-may-replace-ids-future-130000055.html?guccounter=1> [07/07/18].

breeder documents, such as birth certificates and ID cards. With new technologies providing access to the internet, mobile phones and related services, to information, education, banking, and other economic opportunities, the concept and realities of identity broadens.<sup>288</sup>

But what exactly is meant by the term ‘identity’? “Identity is a set of attributes that uniquely describes an individual or entity.”<sup>289</sup> These attributes are, *inter alia*, name, age, nationality, gender, residence address, date and place of birth, profession, but also pictures and fingerprints – in other words, our identity summarizes all our individual characteristics that uniquely distinguish us from others. These identity characteristics are proved by a number of legal ‘identity instruments’<sup>290</sup>, such as passports, ID cards, birth certificates, but also driver’s license or health insurance cards which function as the ‘fundamental asset of interaction’<sup>291</sup>. Likewise its human counterpart, digital (or: virtual) identity is a set of unique personal data attributes on the internet, such as Social Media Profiles, Email-Address, online shopping account, online search activities, passwords or individual purchasing behaviour.<sup>292</sup>

However, the current identification systems – online and offline – are all centralised to governments, institutions and internet providers, meaning the individual does not have the ownership about his identity and control about the dissemination of his data; identity will always be dependent on those authorities. Without any official identity evidence, people cannot prove who they are. This paradox of not being able to prove your own existence is striking and entails far-reaching consequences in human interactions.<sup>293</sup> Therefore, “[a] new wave of technological development might be opening up an unexpected perspective through which improve this situation.”<sup>294</sup>

In order to close the global ‘identification gap’<sup>295</sup>, the international community has worked for

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<sup>288</sup> UNHCR (2018)(f): UNHCR Strategy on Digital Identity and Inclusion, Brochure, p.1, available at: [http://www.unhcr.org/blogs/wp-content/uploads/sites/48/2018/03/2018-02-Digital-Identity\\_02.pdf](http://www.unhcr.org/blogs/wp-content/uploads/sites/48/2018/03/2018-02-Digital-Identity_02.pdf) [08/07/18].

<sup>289</sup> Worldbank Group (2017) (b): Principles on Identification for Sustainable Development: Towards a Digital Age, p. 2 footnote 1, available at: <http://pubdocs.worldbank.org/en/200361509656712342/web-English-ID4D-IdentificationPrinciples.pdf> [07/07/18].

<sup>290</sup> IBM Blockchain (2018): Digital identity management: How much of your personal information do you control?, information video, available at: [https://www.youtube.com/watch?v=H69l\\_trRrU](https://www.youtube.com/watch?v=H69l_trRrU) [07/07/18].

<sup>291</sup> IBM Blockchain (2018).

<sup>292</sup> Techopedia (n.d.): Dictionary: Digital Identity – Definition: What does Digital Identity mean?, online lexicon, available at: <https://www.techopedia.com/definition/23915/digital-identity> [07/07/18].

<sup>293</sup> UNHCR (n.d.)(c): The Promise of Blockchain and Safe Identity Storage for Refugees, blog post, available at: <http://www.unhcr.org/blogs/wp-content/uploads/sites/48/2018/04/fs.pdf>

<sup>294</sup> UNHCR (n.d.)(c).

<sup>295</sup> cf. World Bank Group (n.d.): ID4D – Identification for Development, Programme Flyer, p. 28, available at: <http://pubdocs.worldbank.org/en/325451527084344478/ID4D-ProgramFlyer-V52018.pdf> [09/07/18].

some years on the establishment of a worldwide self-sovereign identity management system. Current passports and ID cards illustrate already a predecessor form of such digital identity systems by using Biometric authentication technologies<sup>296</sup>. In combining Biometrics with the revolutionary blockchain technology<sup>297</sup>, conventional identity instruments could be replaced by a new model of paperless identity networks.

This new decentralised identity database would store all our online and offline identity-related information, such as bank account activities, educational records, medical history, GPS location and unique physical features e.g. the shape of our eyes, in one large virtual ledger which is accessible from everywhere and for everyone via mobile devices.<sup>298</sup>

Blockchains are decentralized network systems that harness the internet's infrastructure in order to distribute and log transactions. Blockchains take the form of digital public ledgers that are free and accessible for all connected nodes; rather than belonging to a single institution, these ledgers belong to all the users connected to them. Users' identities within a ledger are encrypted and therefore known only to the users themselves.<sup>299</sup>

Thereby, individuals can still prove their identity "even when the institutions that originally provided that proof in the form of certificates no longer exist, all because of the indisputable verification mechanism that blockchains offer."<sup>300</sup> Furthermore, the system's interconnectedness allow new forms of identification verification, for instance through iris scans<sup>301</sup>, which subsequently create new opportunities for daily life activities that have originally been challenging without official documents. Henceforth, e.g. child vaccination<sup>302</sup>, crossing borders without passports, paying without cash or credit card<sup>303</sup> and better facilitation for doctors who can track their patient's full medical history with one click are

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<sup>296</sup> Gemalto (2018): Biometrics – Authentication and Identification, website, available at: <https://www.gemalto.com/govt/inspired/biometrics> [07/07/18].

<sup>297</sup> For further information about the blockchain technology see: Blockgeeks (n.d.): What is Blockchain Technology? A Step-by-Step Guide For Beginners, online guide, available at: <https://blockgeeks.com/guides/what-is-blockchain-technology/> [07/07/18].

<sup>298</sup> Accenture (2017): Establishing a trusted Identity with Blockchain, video, available at: <https://www.accenture.com/us-en/insight-blockchain-id2020> [07/07/18].

<sup>299</sup> UNHCR (n.d.)(c), p.1.

<sup>300</sup> *ibid*, p.2.

<sup>301</sup> Accenture (2017).

<sup>302</sup> ID2020 Alliance (2017): ID2020 Alliance – Committed to improving lives through Digital Identity, p. 5f, available at: <https://static1.squarespace.com/static/578015396a4963f7d4413498/t/5b315d558a922d49bba03f62/1529961813814/ID2020+Alliance+Doc+-+Jan+2018.pdf> [07/07/18].

<sup>303</sup> Rajaa Elidrissi (2018): Blockchain may replace IDs in the future, CNBC Video, available at: <https://www.cnb.com/2018/05/10/blockchain-refugees-identity-wfp.html> [07/07/18].



only some of the life-changing opportunities such systems might bring in the future. Thereby, “[...] digital identities will circumvent situations in which [...] documents are lost, destroyed or stolen, and [people] have no way to prove who they are”<sup>304</sup>, entailing that the dependence on state authorities and legal documents will more and more vanish. Especially in the contexts of migration and statelessness, these features will be of utmost value:

Developing a digital identity system for displaced populations can provide administrative benefits for distributing aid, and for population planning, public health, and economic development. In many places, refugee and disaster relief depends on pen and paper registration systems, making administration tedious.<sup>305</sup>

Through these new possibilities of digital identification, the problem of missing data on the millions of non-registered ‘invisible’ people could be solved as well which in turn enables the provision of targeted protection measures. For instance, if an organisation knows exactly how many people have been affected by a humanitarian crisis, it can better and faster react to the beneficiaries’ needs.

Furthermore, through strong encryption digital identities will better prevent duplicates, fraud and data theft.<sup>306</sup>

In 2014, the World Bank Group launched its ‘Identification for Development Initiative’ (ID4D)<sup>307</sup> “to enable all people to exercise their rights and access services”<sup>308</sup> by supporting – through financial allowance and technical advice - foremost developing countries on enquiry in establishing robust and secure digitalised identification management systems that accelerate and facilitate bureaucratic processes.

With this initiative, the Worldbank is also part of the large ID2020 - Alliance<sup>309</sup>, a multi-stakeholder public-private partnership (PPP) founded in 2017 that seeks to establish a trusted global Identity Network to empower, amongst other, refugees, IDPs and stateless people. Most prominently, computer giants Microsoft and Accenture are part of the alliance, but also

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<sup>304</sup> Tania DoCarmo (2018): The Migrant’s Rights to a Digital Identity, In: Platypus – The CASTAC Blog, available at: <http://blog.castac.org/2018/02/migrants-identity/>. [07/07/18].

<sup>305</sup> DoCarmo (2018).

<sup>306</sup> IBMBlockchain (2018).

<sup>307</sup> For further information see: Worldbank Group (n.d.)(b): ID4D – Identification for Development, Website, available at: <http://id4d.worldbank.org/about-us> [07/07/18].

<sup>308</sup> Worldbank Group (2017), p. 1.

<sup>309</sup> For futher information see: ID2020-Alliance (n.d.): ID2020 – An Alliance committed to improving lives through digital identity, website, available at: <https://id2020.org> [07/07/18].

UN agencies (UNICEF, UNHCR, UNDP, WFP, UNICC), NGOs, governments, businesses and foundations.

In order to meet the needs of all participating stakeholders - but foremost those of the beneficiaries - the ID2020-Alliance constituted four principles<sup>310</sup> (the 4P-approach): Subsequently, Digital Identity solutions have to be

- Personal: unique to only the user
- Persistent: lives with the user from birth to death
- Portable: accessible from anywhere
- Private: only the user grants the permission to use or view data

Thereby, the alliance seeks to contribute to the realisation of SDG 16.9 which aims to provide every person with a legal identity until 2030.

While the development of Digital Identity systems is still in progress, the UN World Food Programme (WFP) has tested a first prototype in a refugee camp in Jordan for two years. Some of the refugees in the camp were already stateless or without documents in their homeland, but the majority of them indeed held a formal citizenship before displacement. However, their official documents have been destroyed or lost during their flight, and – e.g. in the case of Syria – their states of nationality and the authorities are dysfunctioning as well, for which reason most of the refugees are rendered *de facto* stateless and without any proof of identity. Subsequently, one of the main problems is to get access to financial institutions. The innovative WFP project called ‘Building Blocks’<sup>311</sup> therefore uses the blockchain technology to facilitate payments without cash or credit card – the revolutionary instrument of payment is the eye.<sup>312</sup>

How does it work? Refugees are registered into the UN's online biometric database, which includes iris scans, fingerprints, health records and photos. When the device scans a customer's eye, it links to the UN's online bank of iris records. Then, it deducts the price of groceries from their WFP monetary aid.<sup>313</sup>

Annually, the WFP spends alone \$1.3 billion for paper vouchers to help beneficiaries buying food. This new technology does not only save a large amount of money by eliminating

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<sup>310</sup> ID2020 (2017), p. 5; cf. Worldbank Group (2017)(b).

<sup>311</sup> For further information about the project, see: WFP (2017): Building Blocks, Project Website, available at: <https://innovation.wfp.org/project/building-blocks> [08/07/18].

<sup>312</sup> Elidrissi (2018).

<sup>313</sup> Elidrissi (2018); cf. WFP (2017).

paperwork; it crucially gives people a self-sovereign identity and a proof of existence – even without having a nationality.

Currently around 100 000 Syrian refugees benefit from the Building Blocks project in Jordan, but WFP plans to expand by giving 500 000 refugees a Digital Identity – and thus the means to fight hunger with technology - by the end of 2018.<sup>314</sup>

In December 2017, a non-governmental grassroots initiative launched a similar project, called ‘The Rohingya Project’<sup>315</sup> to empower the stateless Rohingya diaspora in overcoming financial exclusion and social restrictions. The project aims to give Rohingya people all around the world a verified digital identity which then they can use for bank transactions via a virtual blockchain ledger and as an alternative form of documentation.

In the beginning of 2018, UNHCR also rolled out a Strategy for ‘Population Registration and Identity Management EcoSystem (PRIMES)’<sup>316</sup> with the objective of digital inclusion. Aiming to register all refugees worldwide in a digital repository by the end of 2019, these records can then be used for better case management and assistance.

Blockchain is [...] not controlled by any government or banks - which means no single party can compromise a person’s identity. Using their own unique blockchain-based digital identities and crowdfunded resources, [stateless] communities will have the foundation to empowering themselves economically and socially.<sup>317</sup>

With proliferation of and transition to such a universal virtual identity system, digital identity may also function prospectively in all other aspects and biometric scanners or implanted ID chips might prospectively soon replace conventional documentation, such as passports, work permits or student cards, but also passwords, usernames and PINs. Such a self-sovereign identity system would then eliminate the current need for a state authority to verify one’s identity and issue the required proving documents. In addition, nationality would then only be one out of a hundred other identity-determining credentials and thus lose its significance.

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<sup>314</sup>ibid.

<sup>315</sup> For further information see: The Rohingya Project (2018): Homepage of the Rohingya Project, website, available at: <http://www.rohingyaproject.com/> [07/07/18]; The Rohingya Project (2017): The Rohingya Project, Video, available at: <https://www.youtube.com/watch?v=K0m735MILYY> [08/07/18].

<sup>316</sup> UNHCR (n.d.)(d): PRIMES, Website, available at: <http://www.unhcr.org/primes.html> [08/07/18]; UNHCR (2018)(f): UNHCR Strategy on Digital Identity and Inclusion, brochure, available at: [http://www.unhcr.org/blogs/wp-content/uploads/sites/48/2018/03/2018-02-Digital-Identity\\_02.pdf](http://www.unhcr.org/blogs/wp-content/uploads/sites/48/2018/03/2018-02-Digital-Identity_02.pdf) [08/07/18].

<sup>317</sup> The Rohingya Project (2018): Frequently asked questions (FAQ), available at: <http://www.rohingyaproject.com/faqs/> [07/07/18].

Henceforth, centralised dependencies would vanish including the power of authorities to deny access to basic rights due to a lack of documentation.

Despite all these advantages of digital identity and its indisputable opportunity for a fairer and inclusive society, this technological approach entails also some serious risks:

First of all is the question of data abuse: What happens if all these interconnected highly sensitive personal information fall into malicious hands? Although IT developers promote such digital identities to be even more secure than old-fashioned passports would ever be, the consequences of one single error could be tremendous.

Another central question is the one of privacy: How much information is really needed to confirm a person's identity?<sup>318</sup> Is it really necessary to track all transactions and movements a person does? Is it really necessary to establish permanent identity records of a person's whole life circle from birth to death? Where do we draw the border between transparency, exposure and surveillance? Do digital identities enlarge our freedom or rather curtail it? What would be the consequences for human rights? In this light, the challenge will be to trade the empowerment of Article 6 UDHR (right to identity) against the right to privacy, enshrined in Article 12 UDHR.

Another challenge will be that

Developing digital identity standards is proving to be a highly complex process. Technical challenges aside, a universal online identity solution requires cooperation between private entities and governments. Add to that the need to navigate legal systems in different countries and the problem becomes exponentially difficult.<sup>319</sup>

Besides, while digital identities are on the rise and rapidly develop, the regulating law is lagging behind. Additionally it will be very difficult to convince states to diminish their powers and consent to the establishment of a decentralised identification system.

In conclusion, self-sovereign digital identities entail great benefits, but also great risks: Indeed the revolutionary system could function as an enabling tool to counteract many of the daily problems faced by stateless people and thus to disburden their living conditions on a practical

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<sup>318</sup> Brandie Nonnecke (2017): Risks of recognition: New digital ID program for refugees is vulnerable to abuses, Berkeley Blog, available at: <http://blogs.berkeley.edu/2017/11/27/risks-of-recognition-new-digital-id-program-for-refugees-is-vulnerable-to-abuses/> [08/07/18].

<sup>319</sup> Blockgeeks (n.d.).

basis. Furthermore, the project of digital identity could be a driving catalyst for achieving SDG 16.9. Like any new technology, the prospective ramifications and dangers of such interconnected data systems are yet unknown, though, and need to be carefully considered at every stage of development. However, the question of statelessness is a highly political one which might probably not be durably solved with a technological answer alone. Nevertheless, the true value of digital identity lies probably within its implicit suggestion to rethink the notion of identity<sup>320</sup>: Currently, legal identity is determined and verified by the credential of government-issued nationality documents. This dependence could be voided and superseded by new citizen-state relationships<sup>321</sup> through the paradigm shift of ‘attribute verification’, which deems nationality as only one out of hundreds other possible identity-discerning credentials.

### **3.5. The Practical Approach: Statelessness Determination Procedures**

As the developing of digital identity will evidently take years or even decades to be fully established, and the same may be anticipated about the adoption of new amended legal instruments, there is still immediate action needed on national levels. What can European<sup>322</sup> countries do to better protect stateless people?

The lack of adequate data on the scale of [...] statelessness in Europe is serving to further compound the problem by reducing its visibility and impairing stakeholders’ ability to take necessary action.<sup>323</sup>

Subsequently, it is first of all necessary to collect data. If we talk about statelessness, we have to know to which magnitude the problem arises in each country to effectively address it. Hence, standardised statelessness determination procedures (SDPs) are of greatest importance to identify the beneficiary target group. The identification of invisible stateless persons is not only a fundamental part of UNHCR’s mandate, but also explicitly directed in Action 6 GAP and implicitly in the 1954 Statelessness Convention. The idea of national protection

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<sup>320</sup> cf. Michael Salmony (2018). Rethinking digital identity. *Journal of Payments Strategy & Systems*, 12(1), pp. 40-57.

<sup>321</sup> cf. Miriam Lips (2010): Rethinking citizen–government relationships in the age of digital identity: insights from research., *Journal Information Polity*, Vol. 15(4), pp. 273-289, available at: <https://content.iospress.com/articles/information-polity/ip000216> [15/07/18].

<sup>322</sup> As this thesis focuses mainly on statelessness in Europe, the following section will analyse the potential of SDPs for European countries, although their impact might be of worldwide relevance. However, the assumption is that due to a lack of capacity and resources, the establishment of SDPs in less industrialised countries might be of lower priority. Furthermore, SDPs are only meaningful in migratory context, wherefore countries with large *in situ* populations are less concerned to establish SDPs than European countries which are currently affected by large migration influx.

<sup>323</sup> ENS (2015), p. 4.

mechanisms also includes the creation of a specific statelessness status, likewise the status of refugees or asylum seekers, which grants particular rights, documentation and protection to officially recognised stateless person through SDPs.

An effective statelessness determination mechanism is an indispensable precondition of any effort aimed at the protection of stateless persons, or to put it simply: in order to implement protection measures in favour of a certain population, one has to know who the people concerned are.<sup>324</sup>

Therefore, it seems very striking that less than 10% of all State Parties to the 1954 Statelessness Convention have established specific SDPs in order to properly identify the precise number of stateless persons.<sup>325</sup> In many cases frauds, refugees or a simple document loss cannot be distinguished from actual statelessness. Subsequently, in most countries stateless persons are not recognised as such and hence do not receive the protection they may need.

Although the 1954 Convention does explicitly outline state obligations to protect the vulnerable group of stateless people and to guarantee specific rights to them, the treaty does neither prescribe any identification mechanism to determine the beneficiaries, nor how exactly protection shall look like in practice.<sup>326</sup> As this ‘non-self-executing nature’<sup>327</sup> of the convention forms another aspect of the problem, the UNHCR created a handbook<sup>328</sup> and Good Practices Paper<sup>329</sup> on how to proceed with statelessness protection mechanisms and thus achieve Action 6 GAP until 2024. Nevertheless, “[...] six decades after the adoption of the 1954 Convention, stateless individuals still lack an opportunity to claim and enjoy protection in most countries, and existing protection regimes are far from ideal.”<sup>330</sup>

But what exactly does ‘protection’ mean when it comes to statelessness? In a broader sense, protection means to ensure the access and enjoyment of all those rights that are embedded in the 1954 Convention and all other HR instruments. In a narrower sense, protection also

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<sup>324</sup> Gabor Gyulai (2014): The determination of statelessness and the establishment of a statelessness-specific protection regime. In: Edwards/van Waas (2014): *Nationality and Statelessness under International Law*. Cambridge University Press, Cambridge, UK, Chapter 5, p. 116.

<sup>325</sup> UNHCR (2016): Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons, p. 2, available at: <http://www.refworld.org/docid/57836cff4.html> [09/07/18].

<sup>326</sup> UNHCR (2014) (b): *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons*, UNHCR, Geneva, CH, p. 6+27, available at: <http://www.refworld.org/docid/53b676aa4.html> [09/07/18].

<sup>327</sup> Molnár (2010), as cited in Gyulai (2014), p. 117.

<sup>328</sup> footnote 326.

<sup>329</sup> footnote 325.

<sup>330</sup> Gyulai (2014), p. 121.

encompasses the official recognition of a stateless person and the warranty of a formal legal status that is necessary to actually get access to rights. In contrast to the other objectives of eliminating and preventing statelessness by conferring a nationality, ‘protection’ seeks to ensure rights while a stateless person is still stateless – hence in the whole process before a stateless person receives a nationality.<sup>331</sup>

In the context of *in situ* statelessness, where stateless people lived on the territory for many years, even for generations, and have a strong tie to this country, naturalisation and the conferral of that state’s nationality may probably be the most appropriate response to this kind of statelessness.<sup>332</sup> In these cases SDPs are not relevant, because, according to the HRCtee, the scope of the concept of someone’s ‘own country’ does not only apply to nationals, but also to other long-term residents and non-nationals, including stateless people, who have ‘special ties’ and social attachment with the country concerned.<sup>333</sup>

However, in the more complex case of statelessness in migratory context, the person in question may not (yet) have such strong ties to the country they live in and the country they currently sojourn may thus refuse to naturalise these persons. That is when SDPs come into play, first, to identify hitherto unknown stateless people and second to grant them protection once they are officially recognised.<sup>334</sup>

When searching for solutions that safeguard people without nationality, the idea of effective SDPs and the subsequent award of a specific statelessness status at national levels is a first step towards a functioning international statelessness protection regime. Some few, foremost European countries<sup>335</sup>, have already incorporated the creation of a statelessness status in their nationality legislation. Within these national legal frameworks:

[...] Statelessness is explicitly defined as a protection ground *per se* and individuals are able to claim protection based merely on their statelessness. If this fact is objectively confirmed through a statelessness determination

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<sup>331</sup> *ibid*, pp. 117ff.

<sup>332</sup> Inter-Parliamentary Union (IPU)/UNHCR (2014): *Nationality and Statelessness – Handbook for Parliamentarians* No. 22 (2<sup>nd</sup> ed.), Geneva, CH. p. 20; UNHCR (2014), p. 25f.

<sup>333</sup> HRCtee (1999): CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, §20, available at: <http://www.refworld.org/docid/45139c394.html> [11/07/18]; cf. Gyulai (2014), p. 119.

<sup>334</sup> IPU/UNHCR (2014), p. 20; UNHCR (2016), p. 25f.

<sup>335</sup> At present, 12 countries worldwide have established SDPs, of which 10 are European (namely France, Georgia, Hungary, Italy, Latvia, Kosovo, Republic of Moldova, Spain, Turkey and United Kingdom). Cf. UNHCR (2016), Annex, pp. 16ff.



procedure, they will receive a legal status solely on this ground.<sup>336</sup>

The introduction of this new statelessness label then supersedes the “need to be stateless *and* a refugee [or] to be stateless *and* a legal resident”<sup>337</sup> in recognising statelessness itself as a sufficient reason for non-returnability and protection.

However, the design of such national statelessness legislations is allocated to broad state discretion and due to the absence of any common standards both in the 1954 Convention and GAP, the effectiveness of present SDPs vary largely. In consequence, some procedural considerations have to be taken into account when establishing SDPs:

First of all, the question of institutional location and access: Where should such SDPs take place? UNHCR suggests in its handbook to integrate SDPs into existing entities (immigration office, registry office, authority responsible for naturalisation questions, courts, police, etc.) and to combine them – by virtue of similarities – with refugee determination procedures.<sup>338</sup>

Furthermore, UNHCR favours centralised procedure systems because they provide better facilitation of expertise and communication among officials undertaking such procedures.<sup>339</sup>

This way, personnel as well as budgetary resources may be economised. As these suggestions seem logical from a government’s perspective, they omit the actual needs of stateless individuals: Statelessness in migratory contexts is often linked with irregular migration. Consequently, when SDPs are only situated within state authorities, irregular stateless migrants will most probably not resort to these authorities due to their fear of being discovered and deported. Therefore, a decentralised low-threshold model might be the better option to reach those individuals. This means to conduct SDPs rather in impartial and local institutions such as refugee camps, initial migrant reception facilities or in community-based drop-in centres. After a first positive assessment in those independent institutions, positive SDP results could subsequently be reported in a second step to the competent state authority which then officially confirms the statelessness status. In addition, decentralised institutions (or a centralised system with many branches) would have the advantage of better accessibility. In France, for instance, SDPs are organised within the ‘Office Français de

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<sup>336</sup> European Network on Statelessness (ENS) (2013): Statelessness Determination and the Protection Status of Stateless Persons, Summary Guide of Good Practices, p. 6, available at: <https://www.statelessness.eu/resources/ens-good-practice-guide-statelessness-determination-and-protection-status-stateless> [09/07/18].

<sup>337</sup> Gyulai (2014), p. 121.

<sup>338</sup> UNHCR (2014)(b), p. 27, Section B, §65-66.

<sup>339</sup> *ibid.*, §63.



Protection des Réfugiés et Apatrides’ (OFPRA)<sup>340</sup>, which is the same instance for asylum seekers. Due to its only location near Paris, the office might be too far away for many of the *sans papiers* living in other regions of France. That is why the whole process is conducted in written form (*‘sur dossier’*).<sup>341</sup> This system brings on the one hand the advantage that everyone can apply for the *apatride* status from everywhere via an online application form, but on the other hand this application needs to be written in French<sup>342</sup> which might pose eventual language barriers to non-French speakers. In addition, written procedures do not consider the ‘human’ aspect of statelessness: A lot of stateless persons experienced degrading treatment and discrimination throughout their entire life; every stateless individual has an own particular story and reason for being stateless. As these stories are often very complex, it might not be adequate to squeeze them into one standardised application form. Furthermore, likewise in asylum processes, the official undertaking the statelessness verification process might get a better picture of the individual’s situation through a personal interview and provide them with further information and counselling e.g. about the next steps. As stateless persons in most cases suffer of a lack of documentation, they cannot substantiate their claim of being stateless with solely written evidence which is probably the reason why only 16% of all SDP applicants in France have been recognised officially as stateless.<sup>343</sup> Therefore, oral statements and testimonies might have a greater impact and should in consequence be valued in the procedures as well. Hungary provides a good example for this case: The country established decentralised SDPs independently from the asylum authority which require mandatory detailed interviews with the applicant. In addition, the system provides legal and translation assistance for filling out the application form.<sup>344</sup> However, although the UNCHR handbook prohibits the precondition of lawful stay<sup>345</sup>, the SDPs in Hungary are exactly linked with this precondition that the applicant has to sojourn lawfully in the country.<sup>346</sup> “Such a requirement is particularly inequitable given that lack of nationality denies many stateless

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<sup>340</sup> Engl: French Office for the Protection of Refugees and Stateless. For further information, see: OFPRA (2014): Livret d’accueil apatrides, information booklet, available at: <https://www.ofpra.gouv.fr/fr/apatridie/procedure> [10/07/18].

<sup>341</sup> Half of all current national SDP systems are conducted in written form. For further information, see: UNHCR (2016), pp. 16ff.

<sup>342</sup> Arnaud Lucien et al. (2011): The Sans Papiers in France. In: Sawyer/ Blitz (Ed.) (2011): Statelessness in the European Union – Displaced, Undocumented, Unwanted. Cambridge University Press, Cambridge, UK, Chapter 10, p. 259; UNHCR (2016), p. 9.

<sup>343</sup> In 2015, OFPRA received 281 applications for SDPs of which 68% were submitted by refugees from Syria, Western Sahara and Myanmar. Only 45 applicants received the statelessness status. See: UNHCR (2016), p. 10.

<sup>344</sup> UNHCR (2016), p. 11.

<sup>345</sup> UNHCR (2014)(b), p. 28,§69.

<sup>346</sup> UNHCR (2016), p. 5.

persons the very documentation that is necessary to enter or reside in any State lawfully.”<sup>347</sup>

This paradox certainly explains the low number of total applications received in Hungary.<sup>348</sup>

But other countries have inappropriate admissibility criteria, too, that should be rectified. In Spain, for example, individuals need to apply for SDPs within one month after entering the territory, otherwise the application will automatically be dismissed.<sup>349</sup> This criterion omits the fact that due to a variety of reasons a lot of stateless persons are not aware of their own statelessness or of the existence of SDPs or might be reluctant to apply for it. This approach opposes the principles of the 1954 Convention, which defines “a stateless individual is still stateless even if she or he has already stayed in the ‘host country’ [...] for more than a year.”<sup>350</sup> Furthermore, all systems only consider *de jure* statelessness, which makes it impossible for *de facto* stateless people to receive a statelessness status and associated access to rights.

Another issue is the question of initiation: Most existing SDP systems function upon inquiry initiated by the individual with the submission of an application. Given that many stateless people are not aware of SDPs or hesitant to apply (e.g. when SDPs are conducted by state authorities), this mere *in officio* approach is insufficient.<sup>351</sup> Especially in the case of unaccompanied minors, illiterate persons or stateless people who might not even know that they are stateless, an *ex officio* approach, meaning that SDPs can also be initiated by the competent authority if statelessness is suspected, would be very useful.<sup>352</sup> Although this *ex officio* approach is already exercised in Moldova and Spain<sup>353</sup> and evidently leads to a greater number of SDP applications,<sup>354</sup> the UNHCR Handbook remains silent on this matter and merely recommends the dissemination of information e.g. by means of campaigns, to raise awareness for the existence of SDPs.<sup>355</sup> “Nevertheless, there appears to be some general

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<sup>347</sup> UNHCR (2014)(b), p. 28, §69.

<sup>348</sup> UNHCR (2016), p. 12: From their establishment in 2007 until 2016, the Hungarian authorities have only received a total of 241 applications within 9 years.

<sup>349</sup> UNHCR (2016), p. 18; Gyulai (2014), p. 130.

<sup>350</sup> Gyulai (2014), p. 131.

<sup>351</sup> European Network on Statelessness (ENS) (2013): Statelessness Determination and the Protection Status of Stateless Persons, Summary Guide of Good Practices, p. 16, available at: <https://www.statelessness.eu/resources/ens-good-practice-guide-statelessness-determination-and-protection-status-stateless> [09/07/18].

<sup>352</sup> ENS (2013), p. 13f; Gyulai (2014), p. 128f.

<sup>353</sup> UNHCR (2016), p. 5.

<sup>354</sup> cf. UNHCR (2016), p. 15: The Republic of Moldova recorded within 4 years already 617 SDP applications. 41% of these were granted statelessness status and another 42% even acquired Moldavian nationality as the SDPs resulted in the realisation that the stateless person is actually entitled to Moldovan nationality. Only 17% of all applications have been rejected.

<sup>355</sup> UNHCR (2014)(b), p. 28, §68.

reticence about an *ex officio*-initiated statelessness determination procedure, the main argument being that a state authority cannot ‘force someone to be stateless’.<sup>356</sup> Therefore, states may be advised to put in place proper safeguards to ensure that no measures are taken without the explicit consent of the concerned person. Another option would be to limit *ex officio* initiation only to unaccompanied minors, but simultaneously to oblige authorities to spread information about the existence of SDPs, so that people who are not aware of them might also have the opportunity to apply.<sup>357</sup>

However, the overall challenge of statelessness identification is to prove that someone is not a national by any of the world’s nearly 200 states. Given the nature of statelessness, individuals usually cannot substantiate their claim of being stateless with meaningful, if any, documentary evidence.<sup>358</sup> Therefore, “establishing statelessness is often a cumbersome exercise and if the evidentiary rules are too strict, this can easily undermine the protection objective of the 1954 Convention.”<sup>359</sup>

Hence, the principle of a ‘shared burden of proof’<sup>360</sup> should be established, where both, the individual and the authority working on the case, collaborate in order to obtain as much facts as possible. Subsequently, the stateless individual has the duty to provide truthful and full account of his position, including the submission of all available documents, information and testimonial explanations. In reverse, the determining authority has the duty to verify that the applicant is indeed not recognised as a national by any state with which the individual has a link with, e.g. through birth, descent, habitual residence or marriage.<sup>361</sup> Therefore, it is not necessary to send inquiries to all states in the world, only to those that are suspected. Though, as fundamental this information would be for the process, many of the approached foreign authorities might fail to respond, or if they do, fail to respond within an appropriate time frame.<sup>362</sup>

States are therefore advised to adopt the same standard of proof as that required in refugee status determination, namely, a finding of statelessness would be warranted where it is established to a ‘reasonable degree’ that an individual is not considered as a national by any state under the operation of

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<sup>356</sup> Gyulai (2014), p. 128.

<sup>357</sup> ENS (2013), p. 17; Gyulai (2014), p. 129.

<sup>358</sup> OSCE/UNHCR (2017), p. 22.

<sup>359</sup> Gyulai (2014), p. 137.

<sup>360</sup> UNHCR (2014)(b), §89-90; ENS (2013), p. 26f.

<sup>361</sup> *ibid.*

<sup>362</sup> Gyulai (2014), p. 139; ENS (2013), pp. 27-30.

its law.<sup>363</sup>

This ‘reasonable degree’ hence means flexibility and sympathetic interpretations in decision-makings that take into account the inherent difficulties of proving statelessness. Therefore, in some situations, especially when the concerned person has never held any nationality, indicative evidence should be deemed as sufficient. Good Practices from Italy and Hungary demonstrate how some positive SDP decisions have been made on a lower standard based on the credibility of the applicant.<sup>364</sup>

Another question is the one of which rights are finally granted to recognised stateless persons. Ideally, recognised stateless persons should be able to exercise all rights enshrined in the 1954 Convention. However, as the design of statelessness protection mechanisms falls under the jurisdiction of state discretion, the rights connected to a statelessness status vary widely. To this date, all 12 countries with SDPs issue temporary residence permits to identified stateless people.<sup>365</sup> Though, Spain is the only country which awards the right to work as set out in Article 17 of the 1954 Statelessness Convention.<sup>366</sup> Furthermore, Moldova is the only country that issues proper identity and travel documents in accordance with Articles 27/28 of the 1954 Convention. These documents also entitle its holder to full access to all rights and freedoms under Moldovan legislation. In addition, recognised stateless persons in Moldova have the possibility to participate in free social integration activities offered by the Ministry of Culture and language classes offered by the Ministry of Education.<sup>367</sup> These differences in the enjoyment of rights should be rectified by the establishment of common European standards for SDPs, so that every stateless person enjoys the same rights. Otherwise, “practical considerations may then have the final say on this issue: It is not difficult to accept that the lack of proper legal condition for the applicant renders the entire identification (and protection) framework meaningless.”<sup>368</sup>

Nevertheless, a stateless person does not become stateless by virtue of a positive SDP result; indeed they are already stateless before, but the determination process helps them to be officially recognised as such and subsequently receive, ideally, a better treatment and access to rights. Thus, any finding by a state that an individual qualifies for the statelessness

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<sup>363</sup> ENS (2013), p. 27.

<sup>364</sup> Gyulai (2014), p. 139, footnote 81.

<sup>365</sup> ENS (2013), p. 36.

<sup>366</sup> UNHCR (2016), p. 8.

<sup>367</sup> UNHCR (2016), p. 15.

<sup>368</sup> Gyulai (2014), p. 133.

definition under Article 1(1) 1954 Convention is of declaratory nature, rather than constitutive.<sup>369</sup>

This circumstance subsequently raises the question, to what extent applicants should be protected during the SDP process. Many applicants, especially in migratory contexts, may not have a residence permit yet and are therefore jeopardised of being expelled when the country in question does not have any safeguards for SDP applicants. Therefore, some countries direct suspensive effect of removal orders for the applicant, e.g. France, Moldova and Turkey. In Georgia, SDP applicants even receive a temporary ID card to facilitate their stay.<sup>370</sup> But negative examples, such as Italy, Latvia or UK, do not have any such measures to grant applicants the right to stay in the country during the process<sup>371</sup>, which leaves them trapped in limbo especially if they sojourn irregularly in the country. “Currently, no national legislation applies a clear and meaningful legal concept of ‘applicant for stateless status’ or ‘applicant for statelessness determination’.”<sup>372</sup>

Hence, states need to consider as well the protection frame for applicants while their status verification is still in process. With the provision of a restricted legal status before the actual statelessness status, individuals could then get at least access to basic services and a temporary lawful residence permit which prevents them from being treated as a criminal.

In some cases, SDPs might last months or years due to the complexity of finding evidence. Particularly for youth and children, a long processing time would have tremendous consequences, as they grow up very fast and may then miss parts of their whole childhood not going to school or being vaccinated. Therefore, it is important to set out reasonable deadlines for decision-making. At present, only four countries, namely Moldova, Latvia, Hungary and Georgia, stipulated explicit time limits for SDPs no longer than 6 months.<sup>373</sup> This Good Practice of clear and realistic deadlines is recommended to all other states as well.

After all, it is evident that the current statelessness protection mechanisms are all far from ideal and lack of a lot of shortcomings that need to be rectified. With the stipulation of common European standards, which are based on the above all IL principles of prohibition of discrimination, the right to an effective remedy and the respect for the child’s best interest, and observed by a prospective monitoring mechanism, the effectiveness and scope of SDPs

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<sup>369</sup> UNHCR (2014)(b), p. 10,§16.

<sup>370</sup> UNHCR (2016), Annex, pp. 16ff.

<sup>371</sup> *ibid.*

<sup>372</sup> Gyulai (2014), p. 131.

<sup>373</sup> ENS (2013), p. 20.

could be significantly increased.

Furthermore, the involvement of NGOs, social workers, volunteers and local communities in the process of SDPs is recommended, not only to ensure low thresholds but also in terms of counselling, assistance and integration. Given the enormous presence of independent local refugee aids in many European countries<sup>374</sup>, their support could be expanded to non-refugee statelessness as well. By means of mainstreaming statelessness and provide adequate training to all professionals who work with migrants, the awareness for statelessness and subsequently the help to hem could be surged among actors on all levels. As SDPs currently do only apply to *de jure* stateless persons, the partnership with civil society would also have an impact on determining *de facto* statelessness. For instance, if a social worker or refugee assistant is informed about the symptoms of statelessness and the adherent problems, maybe they can recognise a *de facto* stateless irregular migrant child in the future and help the family to gain protection through cooperating with the authorities. Such preliminary ‘informal SDPs’ would certainly have a great impact given the scale of *de facto* statelessness.

In conclusion, “the identification of stateless persons is, as demonstrated by several recent [...] country case studies on statelessness in the EU, the most pressing statelessness related objective in the EU nowadays.”<sup>375</sup> Once effectively implemented, SDPs are a relevant solution in safeguarding stateless people at national level. Though, in order to unleash the full potential of SDPs, the final inclusion of *de facto* statelessness would be desirable. Furthermore, the adoption of common binding EU standards based on Good Practices would be necessary, first, in order to push member states in establishing such protection mechanisms, and second, in order to prevent shortcomings and ineffectiveness as currently is predominant. However,

Given the size of the global identification gap, no single country, international organization, NGO, or private sector entity can surmount this challenge by working alone—coordination is needed at the global, regional

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<sup>374</sup> For instance, in Germany, many independent actors (Churches, specialised actors, communities but also volunteers and Social Workers) assist refugees during their asylum seeking processes and afterwards for a succesful integration. Furthermore, the government provides integration- and language courses for all refugees with residence permit. For further information, see: Die Bundesregierung (2018): Flüchtlings- und Asylpolitik – Was unternimmt Deutschland?, Website, available at: [https://www.bundesregierung.de/Webs/Breg/DE/Themen/Fluechtlings-Asylpolitik/1-Inland/\\_node.html](https://www.bundesregierung.de/Webs/Breg/DE/Themen/Fluechtlings-Asylpolitik/1-Inland/_node.html) [10/07/18].

<sup>375</sup> Euoprean Parliament (2015), p. 56, section 5.3.1.

and national levels.<sup>376</sup>

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<sup>376</sup> Worldbank Group (n.d.)(c): ID4D – Partnerships, Website, available at: <http://id4d.worldbank.org/who-is-involved> [15/07/18].

## IV. CONCLUSION AND RECOMMENDATIONS

The slow but steady improvement [...] of documented evidence of the impact of statelessness in human rights terms, the greater use of UN and regional human rights mechanisms to encourage States to address statelessness, and the strengthening of the civil society sector in this area, have all contributed to establishing statelessness as a human rights issue, albeit one that still needs to be mainstreamed.<sup>377</sup>

After having examined the national vs. non-national dichotomy, the thesis revealed that the conventional performance of state sovereignty and citizenship places “nationality at the centre of defining access to rights”<sup>378</sup>. Due to a lack of nationality, an estimated 10 million stateless people face daily challenges in accessing social services, such as health care or education, and endure limitations in many aspects of their life, e.g. denied work and residence permits, travelling or opening a bank account, which leaves them vulnerable to poverty, degrading living conditions and exploitations. However, most countries in the world do not yet have any particular national safeguards that regulate the status and protection of stateless people sojourning on their territory. Also in Europe, despite increasing concerns of the emergence of a ‘stateless generation’ coming along with the refugee crisis, the action on statelessness is still very low.

For nearly six decades after the adoption of the two statelessness conventions, the general attention on statelessness has been very low and statelessness has been foremost seen as a side-effect of flight. With the increasing emergence of civil society engagement and UNHCR’s launch of the Global Action Plan (GAP) to end statelessness in 2014, the issue has been leveraged on the political agenda for a few years. Notwithstanding, most of the current solutions focus on the prevention and reduction of statelessness by means of legal administrative approaches, such as birth registration and nationality acquisition, but less on the actual protection of stateless people and their reflexive sense of belonging.

In the context of *in situ* statelessness, the premise of naturalisation might be the most adequate, as these people have a social attachment to the country in question and lived in

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<sup>377</sup>Góvil (2017), p. 50f.

<sup>378</sup> Katherine Tonkiss (2017): Statelessness and the performance of citizenship-as-nationality. In: Bloom, /Tonkiss/Cole (Ed.) (2017): Understanding statelessness, Routledge Studies in Human Rights Vol. 4, Routledge, New York, USA, Chapter 15, p. 249.



most cases for generations on its territory (e.g. Latvia and Ukraine).

However, this approach is not suitable for all dimensions of statelessness: For instance in the context of migration and *de facto* statelessness, nationality conferral is not the prompt solution – first, because it is unlikely that the state where they sojourn will grant them immediately nationality, and secondly, because they may not (yet) have a strong tie to this country in question. Therefore, in these contexts the urgent focus should lie on their protection in a first step and then look for a durable solution (e.g. maybe they want to return back to their country of origin or indeed gain the state’s nationality after several years they lived in the ‘new’ country) in the longer term.

Taking into account the reduction vs. protection dilemma, this thesis analysed what can be done and done better in order to protect stateless people while they are still stateless. Considering various solutions from five different perspectives, the following recommendations can be made:

- Empowering [stateless people] requires strengthening the relevant legal framework, implementing it more effectively and addressing prevailing attitudes and lack of awareness.<sup>379</sup>

In consequence, no solution will function on its own and requires efforts across levels. Hence in order to build a strong network, respectively a functioning statelessness protection regime, all three disciplines of humanitarian action, human rights and sustainable development need to work together. In this light, collaborations, such as the Coalition on Every Child’s Right to a Nationality, with stakeholders from all sectors including civil society are strongly recommended.

- The overall shortcoming of current efforts to counteract statelessness is the exclusion of *de facto* statelessness. While *de jure* statelessness is finally recognised under the 1954 Convention as a discrete status apart from a refugee context, there is no such framework for *de facto* stateless persons who are subsequently left ‘unprotected’ (except from the general provisions in international law). As *de jure* and *de facto* statelessness are two sides to the same coin, namely violations of the right to a nationality, it is important to give substance to exactly this right in order to protect both groups. Given the evidence of ineffective nationalities, the access to a right alone

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<sup>379</sup> Jyothi Kanics (2011): Realizing the rights of undocumented children in Europe. In: Bhabha (Ed.) (2011): Children without a State - A Global Human Rights Challenge. Massachusetts Institute of Technology (MIT) Press, USA, Chapter 6, p. 131.

is meaningless without any substantive provisions. Hence, another recommendation is to adopt a coherent legislation that specifies the quality of the right to a nationality in order to safeguard those *de facto* stateless people who are affected from ineffective nationality.

- Although,

[t]he UN General Assembly has entrusted [...] UNHCR with a mandate relating to [...] statelessness [...], all UN entities system-wide must increase their efforts to address statelessness. The UN should tackle both the causes and consequences of statelessness as a key priority within the Organization's broader efforts to strengthen the rule of law.<sup>380</sup>

Therefore, another recommendation is to making effective use of Human Rights mechanisms by expanding the mandate of existing UN treaty bodies, particularly the CRC, for increased monitoring of the statelessness-relevant provisions of their corresponding convention. Mainstreaming statelessness across all treaty bodies by adopting Joint General Comments and issuing strong recommendations is of utmost importance to leverage statelessness on the political agenda. In addition, an enhanced focus on statelessness should be put in place when conducting the Universal Periodic Review (UPR). Besides, the establishment of a Special Procedure on Statelessness deserves actual considerations.

- The same is to be said about the existing mechanisms at regional level: It is recommended to expand the work of the CoE Committee on Migration, Refugees and Displaced Persons as well as the mandate of Special Rapporteur on Migration and Refugees by an enhanced focus on statelessness in order to surge the matter. On EU level, the establishment of an ad hoc EU Committee on statelessness would be favourable as well as legislations for EU member states to better collect and report data to the Eurostat database. In addition, a common policy and strategy on statelessness would be recommended.
- By virtue of its strategic character, universality and frequent monitoring, the Agenda 2030 has probably to this date the strongest impetus for the transformation to inclusive societies. Hence another recommendation is to harness the potential of the Agenda

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<sup>380</sup>UN Secretary General (2011), p. 1.

also in the light of statelessness, as many of the Sustainable Development Goals (SDGs) are utterly relevant in combating statelessness and similar to UNHCR's GAP. Once effectively implemented, foremost SDG 16.9 - stipulating the universal provision of a legal identity - may be a driving catalyst. It is crucial, that the SDG does not focus on the provision of a nationality as this is a sensitive matter. However, recognising every person before the law by giving him a legal status that proves his existence is also an important human right and could, in line with SDPs and national safeguards, also grant access to important rights.

- Taking the analogy with the right to education, the SDGs in addition fill the gaps of IL: As IL only obliges states to ensure universal access to education, the SDGs formulate further practical provisions that ensure the quality of education (e.g. sufficient supply of competent teachers, provision of scholarships). The same could be applied to the right to a nationality; hence another recommendation is to include targets that direct particular measures to be taken for ensuring a substantive nationality. In addition with amending statelessness-specific global indicators for a better monitoring, the aim of the Agenda 2030 to 'leave no one behind' could be also realised for the vulnerable group of stateless people and improve their living conditions as well.
- Another recommendation calls for better data collection on statelessness at national levels, first in order to get an overlook about the coverage of statelessness and second in order to identify prospective beneficiaries. Without knowing the scope and dimension of statelessness in a given country, it will be difficult to adequately address the problem. Therefore, the idea of Statelessness Determination Procedures (SDPs) as explicitly suggested in the GAP, is the solution with the highest potential. As currently only 10 European states established SDPs which have fundamental shortcomings that hampers their effectiveness, this thesis recommends the adoption of an EU and CoE resolution in line with the 1954 Convention that obliges the member states to incorporate SDPs in their national legislations. In order to ensure their effectivity, such a resolution should give further guidance based on Good Practices from existing SDPs. In addition, the status of recognised stateless people should ensure all rights enshrined in the 1954 Convention. In order to ensure this, the establishment of a regional monitoring body and frequent studies would be useful.
- Another recommendation is to involve civil society in the process of SDPs in order to

ensure a low-threshold approach that better captures stateless people. In addition, mainstreaming statelessness and organise mandatory training across all professionals dealing with potential stateless persons may contribute for a better understanding and identification of stateless persons. Furthermore, the provision of legal and translating assistance as well as *ex officio* initiation of SDPs are strongly recommended.

- The launch of an unprecedented Action Plan on statelessness depicts a strong impetus for action. However, the ‘one size fits it all’ solution which UNHCR promotes is not adequate by focusing solely on the state as the primary actor to solve statelessness. With regard to the sprouting paradigm shift of the #IBelong campaign, this thesis stresses to reconceive statelessness by taking into account individual ownership, personal identity and actual sense of belonging beyond a merely legal status.
- In this light, the revolutionary approach of Digital Identity decreases the power of state sovereignty by superseding the necessity to have a nationality with a self-sovereign identity which grants access to fundamental rights. Hence, this solution has the potential to immediately improve the lives of all people who lack of documentation and eliminate the dependency on authorities. Therefore, pushing the development of digital identity is highly recommended.

Indeed, the main finding of the analysis is that the key to protection lies not within having a nationality itself – which is also difficult to receive due to conflicts with state sovereignty - but rather to have a legal identity, of which nationality is only one attribute. Such a ‘post-nationalist’ concept places identity at the centre and views merely “nationality as one among many sources of self and group identity within societies on a par with other sources of identity (such as ethnic, linguistic, religious)”<sup>381</sup>. Even if the attribute of nationality may then be missing, stateless people can still prove their existence and would have an associated legal status that determines their access to basic rights. Perhaps this status does not grant full membership and citizen’s rights (e.g. right to vote), but at least the way would be paved for enabling social inclusion and fairer societies.

If the existence of statelessness is viewed as indefensible and the performance of nationality is a contributing factor to the continued occurrence of statelessness, post-nationalism offers a means of thinking about [membership] and belonging without recourse to nationally defined

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<sup>381</sup> cf. Tonkiss (2017), p. 249.

citizenship rights.<sup>382</sup>

With this paradigm shift, the perception of statelessness may also be reconceptualised: Rather than conceiving statelessness as a burden or threat, such a new understanding views stateless people in the first place as what they are: human beings. Then, “resident [stateless] non-citizens should be considered as members rather than strangers”.<sup>383</sup> Even beyond, with emerging concepts of Global Citizenship and World Passports, the universal realisation of the right to a legal identity could drive the reconception of stateless people, and especially children, as future ‘citizens to become’ who can potentially contribute to the greater society.<sup>384</sup>

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<sup>382</sup> Tonkiss (2017), p. 251.

<sup>383</sup> Gibney (2011), p. 68.

<sup>384</sup> Halleli Pinson / Madeleine Arnot /Mano Candappa(2010): The Migrant Child as a Learner Citizen. In: Pinson/Arnot/Candappa (2010): Education, Asylum and the ‘Non-Citizen’ Child: The politics of compassion and belonging. Palgrave Macmillan, Basingstoke, UK, Chapter 7, pp. 115-140.

## ACKNOWLEDGEMENTS

*“We must be the change we want to see in the world.”*

- Mahatma Ghandi -

I am so happy and grateful about this incredible year with E.MA – a year full of horizon-opening experiences, full of meeting amazing people and new friends, a year full of intense studying, struggling but also succeeding, a year that did not only change my perspectives, self-confidence and language-skills but also truly changed my life and gave me the necessary wings and courage to fly.

At this point, I want to say thank you:

First of all, to my lovely parents – without you this would have never been possible! Thank you for your support (not only financially ;), for accompanying me through this whole year, for all the phone calls, plane tickets to home, visits and for giving me the chance to discover the world. Feet may wander, but hearts stay at home!

To my two caring sisters, for all encouraging messages and phone calls, for always keeping your fingers crossed when I had exams, for helping me with applications and for your visit in Ireland which meant a lot to me.

To my smart brother-in-law, for the correction of all my essays and applications with such diligence even in times of stress. Thank you for your help!

To all other people who made this master’s programme an unforgettable journey: To the staff and professors in Venice for their dedication; to Graham and Orla in Dublin for their great support and amiability (and the unique chance to meet the Irish President on our first day); to my Via Foscarini-flatmates who were the best roomies ever; to the ‘Castle’ for taking me to Hogwarts; to all my new friends from all over the world for being such wonderful and funny comrade-in-arms and to my old friends from home who shared my excitements and never lost keeping in touch.

And finally a special thanks to my flatmate Alex who does not only, indeed, deserve the ‘Speedy Reader’-award but also an award for correcting all 94 pages of my thesis. Words can’t express my gratitude and appreciation for your time and efforts!

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Title of EMA Thesis: Reconceiving Statelessness -

An Analysis of potential Solutions to realise the Right to a legal Identity in Europe

Academic year: 2017/2018

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