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BLOOD OR SOIL, WHICH ONE IS THICKER?

THE OBLIGATIONS OF EU MEMBER-STATES FOR THE INTERNATIONAL PROTECTION OF STATELESS CHILDREN

Author: Caterina Parodi
Supervisor: Dr Daria Davitti

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ABSTRACT

Statelessness has grave implications for the lives of millions of children across the globe. Without a nationality, children cannot have their rights effectively protected, despite the international protections enshrined in the Stateless Conventions. Whilst the UN launched a Global Action campaign to eradicate statelessness, many children seeking refuge in the EU are classified has having 'undetermined' nationality. These children grow up in limbo, completely unprotected. The aim of this dissertation is to critically evaluate the existing safeguards aimed at preventing childhood statelessness, while assessing EU Member-States compliance with them, both in law and in practice. The main argument advanced in this dissertation is that the discretion afforded to Member-States in this field allows for double-standards for the type and extent of protection granted to children. Consequently, it is advanced that the only way to effectively address this issue is by adopting a holistic child based-rights approach at the EU level and an independent monitoring system that helps harmonise the practice of Member-State and ultimately ensure a child's right to nationality, especially when otherwise stateless.

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LIST OF ABBREVIATIONS

CEAS	Common European Asylum System
CEDAW	UN Convention on the Elimination of all forms of Discrimination Against Women
CERD	Convention on the Elimination of all all forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CMW	Committee on the Protection of the Rights of all Migrant Workers and Members of their Families
CoE	Council of Europe
CoEU	Council of the European Union
ComRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECN	European Convention on Nationality
ECtHR	European Court of Human Rights
EMN	European Migration Network
ENOC	European Network Ombudspersons for Children
ENS	European Network on Statelessness
EU	European Union
EUDO Citizenship	European Union Democracy Observatory on Citizenship
HRC	Human Rights Council
HRCommitte	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRL	International Human Rights Law

IL	International Law
ILC	International Law Commission
ISI	Institute on Statelessness and Inclusion
LIBE Committee	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
MS	Member States
PETI Committee	European Parliament's Committee on Petitions
SDP	Stateless Determination Procedures
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

INTRODUCTION

We live in a fully globalized world. A world where boundaries become less significant when facing transnational issues. A world where technology, information and progress make boundaries relative, where a gentle wave in one part of the globe can signify a tsunami in some other part of the world. The logical product of a world like ours, made of a patchwork of agreements and international diplomacy, would be unity – our human species aware of the challenges faced in the past, now united to overcome the future, in a spirit of pluralism, democracy and acceptance. Truth is, this could not be further from reality. After decades fostering inter-state relations and advancing human rights instruments, setting minimum standards and thresholds with the purpose of achieving equality and equity between all human beings, the ambition of all human beings being born equal in dignity and in rights[1] seems to be slipping through our fingers now more than ever.

If each and every 'member of the human family'[2] was to be born free and equal in dignity and in rights, every person would be directly and automatically bearer of a compound of inalienable human rights since birth. If this were to be true, nationality would not play a ponderous role on the enjoyment of civil, political, economic and social rights. But in fact, nationality matters,[3] and is hence enshrined in the Universal Declaration of Human Rights (UDHR),[4] the Convention on the Rights of the Child (CRC),[5] and many other international and regional human rights instruments. Nevertheless, it is estimated that more than ten million people[6] around the world live without a nationality,[7] and a baby is born stateless every ten

[1] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) Art 1 (UDHR).
[2] Preamble of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[3] Jacqueline Bhabha, "The importance of nationality for children", in Institute on Statelessness and Inclusion (ISI), *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 112.
[4] UDHR art 15.
[5] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[6] UNHCR, 'Global Trends: Forced Displacement in 2016' <www.unhcr.org/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html> accessed 10 June 2017.
[7] Please note that for the purpose of this dissertation the terms "nationality" and "citizenship" will be used interchangeably, as many international law and human rights scholars agree. See P Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff International Publishers BV 1979) 3-7; Alice Edwards, "The meaning of Nationality in international law in an era of human rights" in Alice Edwards and Laura vas Waas (eds) *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 11-14.

minutes.[8] If statelessness is 'a recipe for exclusion, precariousness and dispossession',[9] statelessness at birth is condemning a child to live in the limbo of legal invisibility. Access to education or basic healthcare are for the majority of stateless children a mirage, with this fact having a crippling effect for the child's development and adulthood.[10]

The Middle-Eastern armed conflicts, and in particular the outbreak of the Syrian Civil war on March 2011, have forced more than 11 million Syrians to flee their homes. While around 5 million Syrians sought refuge in neighbouring countries, namely Lebanon, Egypt, Jordan, Iraq and Turkey,[11] more than one million desperately strived to reach Europe. The result was the well-known "European refugee crisis"[12] and the consequent chaos, mainly due to lack of real action, solidarity and cooperation between European Union (EU) Member States (MS). The resulting deaths in the Mediterranean, borders being closed and fences being erected, are all facts that undoubtedly 'challenge a long-held narrative that Europe is a beacon for its treatment of refugees and respect for human rights'.[13]

Among those who manage to enter the EU, there are countless asylum-seekers whose documents were destroyed by the war or lost while trying to escape death and despair, which risk being treated as irregular migrants due to their lack of documentation. Among them are stateless children, undocumented children born 'en route' and children born in EU MS to either documented or undocumented 'migrants'. These precarious statuses are either inherited by their stateless parents, due to discriminatory laws of the countries of origin that prevent mothers to pass their nationality to their children,[14] due to lack of birth registration or

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[8] UNHCR, 'Statelessness Report' in *I am here, I Belong: The Urgent Need to End Childhood Statelessness* (3 November 2015) <www.refworld.org/docid/563368b34.html> accessed 10 May 2017 (UNHCR Statelessness Report).

[9] Matthew J. Gibney, "Statelessness and citizenship in ethical and political perspective" in Alice Edwards and Laura vas Waas (eds) *Nationality and Statelessness under International Law* (Cambridge University Press 2014)44.

[10] UNHCR Statelessness Report (n 8) 1-4.

[11] Syria Regional Refugee Response <http://data.unhcr.org/syrianrefugees/regional.php#> accessed 20 June 2017.

[12] For the purposes of this dissertation, I should clarify that I object to the term 'refugee crisis', since I see the current situation as a self-inflicted crisis, due to lack of solidarity and respect for European Union's values. Moreover, it is important to clarify that throughout this dissertation the term 'refugee' will be used in an inclusive manner, relating to people legitimated to international protection. The expression 'undocumented migrants' will be used to reflect the way authorities categorize them. The rationale for this approach is related with the notion of prima facie refugees, where the recognition is merely declaratory; See UNHCR, 'Guidelines On International Protection No. 11: Prima Facie Recognition of Refugee Status' (24 June 2015) UN Doc HCR/GIP/11/11.

[13] Nikolaj Nielsen, 'Refugee crisis, the vain search for solidarity' in EU Observer Magazine (29 December 2016) <https://euobserver.com/europe-in-review/135949> accessed 20 June 2017.

[14] UN Office of the High Commissioner for Human Rights (OHCHR): Women's Rights and Gender Unit, 'Project on a Mechanism to Address Laws that Discriminate Against Women (6 March 2008)

administrative barriers and discriminatory practices. In fact, a point will be made in this dissertation that many EU States are now categorizing children as being of 'unknown citizenship' or a decision is made over their nationality without any substantial proof. The aim of this approach, unfortunately, is to avoid recognizing these children as stateless, as this would afford them rights under the Stateless Conventions, and a facilitated access to acquire citizenship. Regardless of the cause, childhood statelessness (and equivalent status) are in direct contravention with the 'right of every child to acquire a nationality',[15] and are in fact 'the antithesis of the best interests of children'.[16]

The aim of this dissertation is not purely criticize the EU MS. Rather it has the objective of assessing to what extent are EU MS complying with their obligations under international and regional law aimed at preventing, and thus eradicating, statelessness at birth. In doing so, this dissertation assesses both existing legal frameworks and their implementation. At the same time, a critical assessment of EU MS' practices in the field of stateless determination will also be carried out, in order to grasp the underlying aims of such practices. The United Nations High Commissioner for Refugees (UNHCR) launched in 2014 the I Belong Campaign,[17] aimed at eradicating statelessness in ten years, to which the EU pledged to contribute. The main point of this dissertation is to expose the necessity of looking at the issue of childhood statelessness from a holistic child rights-based perspective, having as threshold the legitimacy of every child's right to acquire a nationality. Hence, legislating at the supranational level in the framework of the Common European Asylum System (CEAS), while monitoring compliance and ensuring accountability is the only effective way to mitigate the extensive discretion afforded to states in the field of nationality. This is the only effective way to ensure compliance with International Law (IL) and for the EU to uphold its 'reputation' as a beacon for human rights and democratisation.

I will start from contextualizing the statelessness phenomenon, particularly assessing the relation between nationality and sovereignty assumed in IL, and the discretion granted to domestic jurisdiction in the attribution of nationality. An in-depth analysis of the definition of statelessness and its different *nuances* will then be provided, in order to help understand the

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<http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf> accessed 10 June 2017.

[15] CRC Art 7.

[16] UNHCR Stateless Report (n 8) 5, citing the African Committee on the Rights and Welfare of the Child, *Nubian Minors v. Kenya* (22 March 2011).

[17] See UNHCR, 'I Belong Campaign' (2014-2024) <www.unhcr.org/ibelong-campaign-to-end-statelessness.html> accessed 26 June 2017 (I Belong Campaign).

need for looking at the issue from a holistic lens. Chapter 2 will focus on of the characteristics of childhood statelessness in the context of forced migration, while outlining the importance of nationality for children. In chapter 2, the two main doctrines which provide grounds for acquisition of nationality at birth, *jus soli* and *jus sanguinis*, will be confronted and a brief reflection on Europe's preference for transmission of nationality by blood will be offered. The last part of chapter 2 will put emphasis on the discriminatory laws of the countries of origin, particularly Syria, as contributing factors to childhood statelessness. Chapter 3 aims at providing a general understanding of the existing international applicable framework, with a particular focus on the the CRC and the UNCHR's authoritative guidelines on this matter. The applicable European legal framework, its limitations and possible expansion will be examined in Chapter 4. Hopefully, this will provide the necessary foundations to scrutinize, in chapter 5, the compliance of EU MS with international standards. This will be done by firstly analysing the legal safeguards found in MS' domestic laws directly aimed at preventing statelessness at birth, while considering the crucial importance of birth registration and Stateless Determination Procedures (SDP) to coherently and consistently address the issue in the EU. Chapter 6 examines current trends in MS' policies and practice on statelessness. In this context, the 'unknown nationality' approach mentioned above will be discussed, and the implications of affording too much discretion to MS will be examined by looking at the current practices in Italy.

Lastly, the main argument of this dissertation will be presented in chapter 7, through a proposal to adopt a holistic child rights-based approach at EU level, as the only way to ensure the effective right of every child to acquire a nationality. The dissertation also considers the creation of an independent monitoring body, responsible for scrutinizing compliance and ensuring accountability. This is because, as we now know too well, law without effective implementation is destined to remain dead-letter.

Methodology

The present dissertation will firstly focus on academic literature review, in order to provide a coherent theoretical framework that will be used as basis for the critical evaluation of the relevant primary sources on the statelessness institute. Moreover, the UNHCR Handbook on Protection of Stateless Persons as well as its Guidelines on Statelessness No. 4 will be relevant and taken into account throughout the analysis, as well as other secondary sources. A critical comparison of different up-to-date domestic and regional reports will be part of this dissertation as well. When needed, statistical data will be briefly analysed and the EUDO Citizenship Database will be consulted whenever clarifications are needed.

1. THE STATELESS PHENOMENON: THEORETICAL FRAMEWORK

Statelessness is certainly not a new phenomenon. Rather, it is a world-wide plight that has shadowed all modern history. In fact in her book "The Origins of Totalitarianism", Hanna Arendt portrayed stateless people as the 'most symptomatic group in contemporary politics' as they embodied the triumph of the nation and sovereignty to the detriment of inclusiveness and human rights.[18] This strong statement should be read within the historical context in which it was written,[19] but it nevertheless remains actual, as the issue of statelessness continues to characterise contemporary experiences. Statelessness may result from a vast range of causes, such as state succession, conflict of national laws, marriage laws, discriminatory laws on the transmission of nationality from the parents to the children, absence of birth registration, administrative practices, renunciation of nationality by the individual or denationalisation (i.e. when a State arbitrarily deprives a citizen of nationality).[20]

In order to understand this phenomenon, and more specifically its causes and consequences for children and their development, it is necessary to understand its conceptualisation and consequently the conceptualisation of nationality, and their importance under international law. Therefore, in this chapter a theoretical framework of the general notion of statelessness and nationality will be provided, as well as a brief historical contextualization of the issue in the European context. These are two crucial starting points to a subsequent focus on Statelessness at birth and comparable status in the context of forced migration, and the assessment of compliance by EU Member States with relevant international and regional standards.

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[18] Hanna Arendt, *The Origins of Totalitarianism* (Harcourt, Brace & Co 1951) cited by Gibney (n 9) 45.

[19] Hanna Arendt was stateless herself for more than one decade. See for example Siobhan Kattago, 'The Tragic, Enduring Relevance of Arendt's Work on Statelessness' (Public Seminar, 2 September 2016) <http://www.publicseminar.org/2016/09/the-tragic-enduring-relevance-of-arendts-work-on-statelessness/#.WUJ1vBPyvVp> accessed 10 June 2017.

[20] UN High Commissioner for Refugees (UNHCR), *Nationality and Statelessness: A Handbook for Parliamentarians* (20 October 2005) <http://www.refworld.org/docid/436608b24.html> accessed 10 June 2017 (Statelessness Handbook 2005).

1.1 Nationality, Sovereignty and International Law

Since times immemorial, the concept of sovereignty has been at the core of international disputes, remaining until today a highly delicate issue in the international arena.[21] Sovereignty is often conceived as an almost *sacred* feature of the state, which should not be tampered with by any means.

The concept of nationality was scrutinized by the International Court of Justice in the *Nottebohm Case*,[22] where it was defined as the 'legal bond' between the individual and the state. Nationality will consequently fall under the field of sovereignty of the states to the extent that it requires a specific link with that same state 'having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[23] This so-called 'genuine link' between citizen and state constitutes the basis for the attribution of nationality and can derive from distinct sources. Descent, place of birth, ethnicity, residence or language are some of the features that connect an individual to a state and, thus can give rise to the attribution of nationality.[24] This legal status, which is enacted by the state, is based on one or a combination of the three principles that comprehend one or more of the above features: *jus soli*, *jus sanguinis* and *jus domicilii*. The principles of attribution of nationality at birth, *jus soli* and *jus sanguinis* will be analysed in the next sections, as they are fundamental to a child's right to nationality.

Notwithstanding the fact that matters of nationality fall within the domestic jurisdiction of each state, this premise is not absolute.[25] In fact, 'nationality is a matter of domestic law, but is one with international consequences'.[26] It will affect and hence be limited by international relations as well as international law. As set by the Permanent Court of International Justice, '[t]he question whether a certain matter is or is not *solely* within the domestic jurisdiction of a

[21] For further information on state sovereignty see Father Robert Araujo, 'Sovereignty, Human Rights and Self-Determination: The Meaning of International Law' (2000) 24(5) Fordham International Law Journal <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1770&context=ilj> accessed 11 June 2017.
[22] *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4.
[23] ibid 23.
[24] Laura van Waas, *Nationality Matters: Statelessness Under International Law* (Intersentia 2008) 33.
[25] Matters such as 'nationality and migration' or 'custom and tariffs', despite being of domestic jurisdiction are 'matters of international concern' to the extent that affect and are of 'great interest to other States'. See Weis (n 7) 66.
[26] Edwards (n 7) 12.

State is an *essentially relative* question; it depends on the development of international relations'.[27]

The Permanent Court then suggested that as the international relations and obligations between states were progressing and insofar as international law gained ground, the leeway of the sovereign countries in this matter would narrow.[28]

In this respect, the emergence of new instruments of international law,[29] and in particular the development of international human rights law, played a significant role in what concerns the scope of state sovereignty. International human rights law in particular, at least in theory applies to each and every individual, regardless of their nationality.[30] Nonetheless, the exercise of most of these civil, political, economic, cultural and social rights, including access to healthcare and education, are dependent on being citizen of a state - to the extent that the State is the duty bearer. In other words, international human rights law enshrines the type of protection to which stateless persons are entitled, whilst at the same time outlining the obligations vested upon the state parties. In that sense and according to Weis:

> [N]ationality connotes the quality of being a member of a State which is vested with the character of a subject of international law (international person). It is through the medium of the subject of international law to which an individual belongs that he is connected with international law.[31]

In this context, it is thus important to reiterate that, despite the recognition of human rights as 'universal', 'inalienable', 'inherent to all human beings',[32] and also as 'interdependent' and 'indivisible',[33] the enjoyment of most human rights is dependent upon obtaining a *nationality*. Consequently, nationality can be considered almost as a different type of right, which is preliminary to the enjoyment of other categories of rights.[34] By its very nature, the right to a nationality is understood as the 'right to have rights'.[35]

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[27] *Tunis and Morocco Nationality Decrees case* (Advisory Opinion N° 4 1923) 24 (emphasis added).
[28] Statelessness Handbook 2005 (n 20) 8; Waas, *Nationality Matters* (n 24) 37.
[29] E.g. Convention on Certain Questions Relating to the Conflict of Nationality Law (Adopted 13 April 1930, entered into force 1 July 1937) 179 LNTS 89 (1930 Hague Convention).
[30] Edwards (n 7) 12; UDHR Arts 1-2.
[31] Weis (n 7) 13.
[32] UNHCR, 'What are human rights?' <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> accessed 12 June 2017.
[33] See e.g. UNGA Res 60/251 Human Rights Council (3 April 2006) UN Doc A/RES/60/251.
[34] On the interdependence and indivisibility of human rights: Helen Quane, 'A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of

Moreover, and citing Oppenheim, Weis proceeds with the argument that if nationality 'is the principal link between the individual and international law' and international law and international protection have as a *pre-requisite* nationality as the 'essential condition for securing to the individual the protection of his rights under international sphere', then having no nationality means being put in a very precarious position. Weis thus refers to the rights of the stateless persons as *res nullius*.[36]

In fact, stateless people have been compared to *legal ghosts, invisible* and *undesired*. They face discrimination and are more susceptible to a whole range of human rights violations such as human trafficking, sexual exploitation, forced labour, extreme poverty and arbitrary arrest and detention.[37] On the other hand, they have no means for enjoying rights. In many contexts they are deprived from basic rights such as access to healthcare, employment, marriage, inheriting or owing property or even opening a bank account.[38]

The consequences for statelessness at birth, in turn has a shattering psychological effect not only during childhood, but also into adulthood. A child born without a nationality, will lack protection in general and in particular. The UNHCR's report,[39] prepared in the context of the I Belong Campaign,[40] makes a clear point on this subject. Stateless children face discrimination and encounter many obstacles to education as many states make nationality a pre-requisite for school admission or have to pay high fees. It also impacts children's self-esteem and sense of worth, as they feel humiliated for not having the same opportunities of other children, with stateless children often describing themselves as 'invisible', 'alien', 'living in a shadow', 'like a street dog' and 'worthless'.[41] This and other effects of statelessness and unprotected status

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Indigenous Peoples' (2012) 25(59-83) Harvard Human Rights Journal <http://harvardhrj.com/wp-content/uploads/2009/09/Quane.pdf> accessed 12 June 2017.

[35] Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012).

[36] Weis (n 7) 162.

[37] See e.g. UNHCR 'Nationality and Statelessness: Handbook for Parliamentarians N° 22' (2014) 5 <www.refworld.org/docid/53d0a0974.html> accessed 15 June 2017 (Statelessness Handbook for Parliamentarians); European Network on Statelessness (ENS), 'Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners (2015) 8 <www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Toolkit.pdf> accessed 12 June 2017 (ENS Regional Toolkit).

[38] UNHCR 'What would life be like if you had no Nationality?' (1999) 3 <www.unhcr.org/protection/statelessness/3b8f92124/life-nationality.html> accessed 12 June 2017; ISI, 'Impact of Statelessness' (2017) <www.institutesi.org/world/impact.php> accessed 12 June 2017.

[39] UNHCR Stateless Report (n 8).

[40] See UNHCR 'I Belong Campaign: Coalition on Every Child's Right to a Nationality' <www.unhcr.org/ibelong/> and particularly <http://www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/> accessed 12 June 2017 (I Belong Campaign).

[41] UNHCR Statelessness Report (n 8) 15.

in the development of the child will be assessed further in this dissertation. For obvious reasons of lack of data and unwillingness of the states, the consequences of classifying a child as of 'unknown citizenship' are not extensively assessed. Nonetheless, insofar as the latter do not have any type of specific instrument of protection, one can argue that the consequences of having an uncertain status are at the very minimum tantamount to being stateless. An argument can however also be made that children of 'unknown citizenship' are subject to even more uncertainty, as they do may even be excluded to the protection granted to stateless children. A key issue to be addressed, therefore, is the prevention of situations in which children are considered stateless or without any assigned nationality. This can be done, for instance, by addressing the issue of conflicts between nationality laws.

The 1930 Hague Convention is seen as the first international attempt to address the issue of conflicts between nationality laws (considered to fall under the domestic jurisdiction of each state) and IL as well as customary law. Indeed it is identified by the UNHCR as the 'first international attempt to ensure that all persons have a nationality'[42]. Its Article 1 envisages that:

> It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.[43]

Thus, it is fair to assume that the limitation of sovereignty by international law was recognized early in the days of the League of Nations. Moreover, and as highlighted by Fripp:

> It is a long-established principle of international law that a State cannot avert responsibility for an international law wrong by reliance upon its own constitutional or other law, or some lacuna in this, as enabling or justifying its action.[44]

In addition, Fripp further explains that the development of International Human Rights Law (IHRL) and the consequent accreditation of the principle of non-discrimination as customary

[42] Statelessness Handbook for Parliamentarians (n 37) 5.
[43] 1930 Hague Convention (n 29) Art 1.
[44] Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 21 where he refers to the Alabama Claims Arbitration where this principle was established: Alabama Claims Arbitration (1872) 1 Moore Intl Arbitrations 495 125-34.

law, combined with the progress in the field of treaty-making, 'led to the identification of norms affecting state conduct in respect of nationality'.[45] Thereby, it follows that nationality is not a field of exclusive competence of domestic jurisdiction. Rather, as already said, as it has international consequences, it will be influenced by international law.

In fact, International Law (IL) clearly recognizes the right to everyone to a nationality in several human rights binding and non-binding instruments. Not only within the text of the two Conventions on Statelessness[46] that directly regulate statelessness and nationality, but also in the cornerstone instruments of IHRL, such as the UDHR,[47] the International Covenant on Civil and Political Rights,[48] the International Convention on the Elimination of All Forms of Discrimination against Women[49] and the CRC.[50]

The Human Rights Council (HRC) also recognized that despite having discretion in the field of nationality laws, states shall nevertheless 'comply with the principles of international law, in particular the best interests of the child and non-discrimination'[51]. Moreover it highlighted the importance of states ensuring safeguards that allow a child that would otherwise be stateless to acquire nationality 'as soon as possible after birth',[52] and urged states to 'honour their international human rights obligation to register every child's birth, regardless of the child's parents' nationality or statelessness or legal status',[53] hence including children of undocumented migrants of refugees.[54] In sum, it is clear that the strengthening of IL directly influences the leeway which can be given to states to legislate on the issue of nationality. These developments in international law occurred inter-alia to guarantee everyone's right to a nationality and the preservation of that same nationality.

After examining the importance of nationality for the enjoyment of rights and legal protection, the next section analyses the meaning of statelessness, distinguishing *de jure* from

[45] ibid 20.
[46] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Convention); Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention).
[47] UDHR Art 15.
[48] ICCPR (n 2).
[49] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).
[50] CRC (n 5).
[51] HRC, 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' (16 December 2015) para 44, UN Doc A/HRC/31/29.
[52] ibid para 42.
[53] ibid para 45.
[54] This issue will be further analysed in the Chapter 3.

de facto statelessness and *absolute* from *relative* statelessness, as well as take into consideration the *effectively stateless*, in order to contextualize and provide a framework for statelessness at birth and the special vulnerability of children born stateless in the context of forced migration.

1.2. Statelessness: The Quest for a Definition

Defining statelessness is the first step towards successfully addressing and preventing this major human right's concern, which is deeply entrenched globally. Only with a concrete definition, the identification and recognition of stateless persons will be possible, policy discussions will be well-informed and relevant norms coherently applied. In defining statelessness, however, it is crucial to remember that such a definition cannot be understood in a vacuum. Thus, obligations of international protection and broader IHRL obligations should be central to the quest for a definition.

The 1954 Convention Relating to the Status of Stateless Persons[55] establishes the definition of a stateless person in its Article 1(1): 'For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law'. According to the UNHCR, the international agency mandated to address statelessness,[56] the above definition is fully binding for all state parties to the 1954 Convention, since it does not allow for reservations and it 'applies in both migration and non-migration contexts'.[57] In the same Handbook,[58] UNHCR refers to the International Law Commission's (ILC) Draft Articles on Diplomatic Protection with commentaries,[59] which recognized the fact that the 1954 Convention's definition of Stateless Person has undoubtedly 'acquired a customary nature'.[60] This means that this definition is now considered applicable

[55] 1954 Convention (n 46).
[56] Statelessness Handbook for Parliamentarians (n 37) 44-48; UNHCR 'Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons' (Geneva 2014) 4 (UNHCR Handbook).
[57] UNHCR 'Guidelines on Statelessness No 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons' (2012) 2-3 UN Doc HCR/GS/12/01 (Superseded by the UNHCR Handbook); UNHCR Handbook (n 56) 9-10.
[58] UNHCR Handbook (n 56).
[59] ILC, 'Report of the International Law Commission on the Work of its 58th session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10 (ILC Report); See also the commentary on Article 8 of the Draft Articles on Diplomatic Protection in which ILC recognized the evolution and development of IL in what concerns stateless persons and refugees.
[60] Ibid, 48-49.

horizontally in all matters relating to the subject of statelessness and not only 'for the purpose' of the said Convention.[61]

Despite the importance of the above definition in international law and for the effective protection of stateless people, its conceptualisation remains controversial. As pointed out by Waas, disagreement has characterised from the outset the discussions on the wording of the definition and on the extent of the protection offered by it.[62] The debate mainly concerns the distinction between *de jure* statelessness and *de facto* statelessness and the fact that the present definition encompasses only *de jure* stateless persons. Essentially, *de jure* statelessness, which is the enshrined in Article 1(1) of the 1954 Convention, is a matter of legal framing. As explained in the Summary Conclusions of the Expert Meeting on The Concept of Stateless Persons under International Law, 'The issue under Article 1(1) is not whether or not the individual has a nationality that is effective, but whether or not the individual has a nationality at all'.[63] Nonetheless, as highlighted by Batchelor,

> the definition itself precludes full realization of an effective nationality because it is a technical, legal definition which can address only technical, legal problems. Quality and attributes of citizenship are not included, even implicitly, in the definition.[64]

In fact, the arguments opposing this definition of statelessness, touch on this exact point. There are cases in which an individual has, by law, a nationality, but in fact does not enjoy the rights theoretically attached to it. Thus, *de facto* statelessness is inter-alia concerned with the *quality* and *effectiveness* of such nationality in practice.[65]

At the time of the debate of the definition that was to be part of the 1954 Stateless Convention, the underlying idea of the international community engaged in the discussion

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[61] According to Article 38(1)(b) of the Statute of the International Court of Justice, 'international custom as evidence of a general practice accepted as law' is considered to be a source of international law, thus applying to all branches of it.
[62] Waas, *Nationality Matters* (n 24) 19-22
[63] UNHCR, 'Expert Meeting: The Concept of Stateless Persons under International Law' (Prato 27-28 May 2010) 2 <www.refworld.org/docid/4ca1ae002.html> accessed 10 June 2017 (Prato Conclusions).
[64] Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1998) 7(2) 232 International Journal of Refugee Law <www.unhcr.org/research/library/3c7521734/stateless-persons-gaps-international-protection.html> accessed 10 May 2017.
[65] Waas, *Nationality Matters* (n 24) 20.

was that Article 1 of the 1951 Refugee Convention[66] offered protection to the persons that *de facto* lacked national protection.[67] However, as emphasized by Waas, such definition does not cover all categories of *de facto* stateless persons.[68] Instead, it offers protection only to a person that:

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[69]

As mentioned above, there are several arguments suggesting that the above definition does not embrace the critical situation in which an individual is *de facto* stateless,[70] such as the cases where despite maintaining the legal bond of nationality, the individuals are 'unable to rely on their country of nationality for protection';[71] or situations where individuals are inside their country but 'unable or, for valid reasons, unwilling to avail themselves of the protection of their country of nationality'.[72] In some cases an individual may also be unable to prove their nationality or statelessness, being therefore classified as being of 'unknown or undetermined nationality';[73] or in cases of state succession, a person may receive a nationality different from the one with which they have a 'genuine link'.[74] These points were thoroughly analysed by Massey in the background paper[75] for the UNHCR Expert meeting on the Concept of Stateless Persons in International Law,[76] also known as the 2010 Prato Conclusions. In the same background paper, the author also referred to the Committee of

[66] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention); Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugees Protocol).
[67] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Geneva 2-25 July 1951) held to enact a Protocol to the 1951 Refugee Convention relating to the status of Stateless Persons. However, the parties concerned, understood that further study on the matter was needed, thus the Protocol was not adopted at the time. See UNGA, 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons' (25 July 1951) UN Doc A/CONF.2/108/Rev.1.
[68] Waas, *Nationality Matters* (n 24) 21.
[69] 1951 Refugee Convention (n 66) Art 1(2).
[70] See for example Batchelor (n 64).
[71] Waas, *Nationality Matters* (n 24) 20.
[72] Hugh Massey, 'Legal and Protection Policy Research Series: UNHCR and *De Facto* Statelessness' (April 2010) 61, LPPR/2010/01 <http://www.unhcr.org/4bc2ddeb9.pdf> accessed 15 May 2017.
[73] ibid 40-53; Waas, *Nationality Matters* (n 8) 24.
[74] Massey (n 72) 53-60.
[75] ibid.
[76] Prato Conclusions (n 63).

Ministers of the Council of Europe's Recommendation CM/Rec(2009)13[77] on the Nationality of Children, which advised the Council of Europe Member States to 'treat children who are factually (*de facto*) stateless, as far as possible, as legally stateless (*de jure*) with respect to the acquisition of nationality'.[78] Nonetheless, as the Explanatory Memorandum attached to the Recommendation emphasized, 'it is up to the states concerned to determine what de facto statelessness is and thus which persons are to be covered by this principle'.[79]

In the final text of the Expert Meeting report,[80] the divergence in opinions on this matter is conspicuous. On the one hand, there is the risk of wrongly classifying persons as being *de facto* stateless when they are in fact *de jure* stateless, thus not affording them the protection to which they are entitled through the 1954 and 1961 Stateless Conventions.[81] On the other hand, the adoption of an overbroad definition of statelessness worried some of the attendees of the Expert Meeting.[82]

At last a definition of *de facto stateless* persons was agreed, as being 'persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'.[83] In addition, it was recognized that in spite of previous considerations on the subject there are indeed 'many stateless persons who are not refugees'[84], whilst according to Massey refugees are stateless – either *de jure* or *de facto*.[85] As to the safeguard given to such persons, who are *de facto* but not *de jure* stateless, it was recognized that there wasn't at that time any specific international protection regime

[77] CoE Committee of Ministers, 'The nationality of children: Recommendation CM/Rec(2009)13 and explanatory memorandum' (9 December 2009) 9 <https://rm.coe.int/16807096bf> accessed 15 May 2017.
[78] Massey (n 72) 29.
[79] Referring to Principle 7 of the Explanatory memorandum to the Recommendation CM/Rec(2009)13 (n 74) relating to *de facto* statelessness. See also CoE CM/Rec(2009)13 (n 77) 20-21.
[80] Prato Conclusions (n 63)
[81] In fact it was recognized in the same meeting that there are 'gaps in the existing international protection regime that affect *de facto* stateless persons in particular', to the extent that they fall into the 'cracks' and are not entitled to protection under the 1954 and 1961 Conventions; Prato Conclusions (n 63) 5.
[82] ibid 5; A point should be made as to the persons that are inside their country of nationality but are unable to enjoy the rights that should follow the nationality, i.e. persons holding an *ineffective* nationality, that until this moment where thought to be *de facto* stateless. Despite the disagreement on the subject, the definition of *de facto* stateless person adopted in the Prato conclusions requires the person to be outside of the country of 'nationality': see Prato Conclusion (n 63) 6. The rationale behind this can be found in the Report by Massey (n 72) 36-39 and is connected to the understanding that the 'non-enjoyment of the rights attached to a nationality does not constitute *de facto* statelessness' (with the only exception being diplomatic protection and consular assistance); See Waas, *Nationality Matters* (n 24) 25.
[83] Prato Conclusions (n 63) 6; Waas, *Nationality Matters* (n 24) 23.
[84] ibid 5.
[85] Massey (n 72) 62. In the case of a refugee being stateless *de jure* he or she is to be protected by the 1951 Refugee Convention, given the higher level of protection afforded, namely the principles of non-penalisation (Art 31) and non-refoulement (Art 33) of said Convention. See Prato Conclusion (n 63) 2.

concerning the subject. Nevertheless, as previously stated, the CoE Recommendation CM/Rec(2009)13 on Nationality of children is mentioned in addition to the recommendations made in the Final Act of the 1961 Convention, which 'recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality'.[86]

Lastly, there is still another differentiation which is of essential importance for the scope of this dissertation. In his monograph entitled *Problem of Statelessness*,[87] Weis presents a distinction between 'original or absolute' statelessness and 'subsequent or relative' statelessness.[88] Although international law has evolved since the date of his monograph, this distinction is still valid and relevant.[89]According to Weis, absolute statelessness occurs when a child does not acquire any nationality at birth and remains without it, whilst relative statelessness arises from loss of nationality. In other words, the individual acquired a nationality at birth but has lost it or renounced to it. These two types of stateless status have different sources. The latter, subsequent statelessness, can occur by various reasons, such as: discriminatory laws on the grounds of race and/or religion (for example the stateless Rohingya people of Myanmar)[90] or sex (for example conflict of marriage laws when a spouse loses his/her nationality by marrying a national from another state, failing to acquire the nationality of the spouse).[91] Relative statelessness can also occur by loss or deprivation of nationality,[92] or by State Succession: when territorial changes occur, the nationals of the succeeded state can acquire the nationality of the new state or, in turn remain stateless.[93]

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[86] 'Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness' (Geneva 1959 and New York 1961) UN Doc A/CONF.9/14 and Add.1 (emphasis added)

[87] Paul Weis, 'Statelessness as a Legal Political Problem' in P. Weis and R. Graupner, *The Problem of Statelessness* (British Section of the World Jewish Congress London 1944).

[88] ibid 4.

[89] Cf Paul Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961' (1962) 11(4) International and Comparative Law Quarterly 1073-196.

[90] HRC, 'Situation of human rights of Rohingya Muslims and other minorities in Myanmar: Report of the United Nation High Commission for Human Rights' HRC 32nd session (29 June 2016) UN Doc A/HRC/32/18.

[91] Note that in the example presented by Weis the spouse losing nationality is the woman. This is mainly due to the fact that most nationality laws are gender-biased against women. Weis, 'Statelessness as a Legal Problem' (n 87) 5; See also OHCHR: Women's Rights and Gender Unite, 'Project on a Mechanism to Address Laws that Discriminate Against Women' (2008) 73-83

[92] ibid 6; Cf UNGA 'Human rights and arbitrary deprivation of Nationality: Report of the Secretary-General' UN HRC 25th session (19 December 2014) UN Doc A/HRC/25/28; See also Jorun Brandoll, 'Deprivation of nationality: limitations on rendering persons stateless under international law' in Alice Edwards and Laura vas Waas (eds) *Nationality and Statelessness under International Law* (Cambrige University Press 2014) 194-216.

[93] This occurred greatly in the aftermath of the fall of the Soviet Union (URSS) and as a repercussion of the Russian annexation of Crimea. In the latter context see Oxana Shevel 'The Aftermath of Annexation: Russia and Ukraine Adopt Conflicting Rules for Changing Citizenship of Crimean Residents' (European Union Democracy Observatory on Citizenship, last update 16 April 2014) <http://eudo-citizenship.eu/news/citizenship-news/1113-

Original statelessness, on the other hand, derives essentially from 'conflict of laws, i.e., from the fact that the nationality laws of States do not secure for every individual the acquisition of a nationality at birth'.[94]

Absolute *de jure* stateless children, in other words children who do not acquire any nationality at birth are thus the specific focus of this dissertation. Nonetheless, when examining the various definitions outline above, there is a risk of losing sight of the main objective of such debate: ensuring protection to those who are entitled to it under international law.[95] The difficulty in distinguishing the cases of *de jure* and *de facto* stateless is widely acknowledged and there is a real danger that those entitled to international protection will ultimately remain unprotected. For example, children born in EU territory or 'en route', i.e. children born in exile to undocumented migrants, will in the great majority of cases encounter obstacles in seeing their nationality ascertained or statelessness fully declared.

I argue that the Prato Conclusions briefly addressed the issue of undocumented migrants without giving it the necessary consideration. According to the document, for undocumented migrants to be categorized as *de facto* stateless, according to the definition established above, there has to be a request of protection and a consequent refusal of such protection.[96] Despite recognizing that 'prolonged non-cooperation including where the country of nationality does not respond to the host country's communications can also be considered as a refusal of protection',[97] the Prato Conclusions leave much to be desired. On the one hand, it disregards the fact that undocumented migrants can be *de facto* stateless persons whose documents were lost or destroyed when fleeing the country of origin and will thus be enable to prove their status.[98] On the other hand, it opens the possibility of putting the concerned person in an even more precarious situation – not only in cases where an individual is fleeing from direct

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the-aftermath-of-annexation-russia-and-ukraine-adopt-conflicting-rules-for-changing-citizenship-of-crimean-residents> accessed 13 June 2017.

[94] Weis, 'Statelessness as a Legal Political Problem' (n 87) 4.

[95] At the time of the drafting of the UDHR, the International Refugee Organisation Representative, Oliver Stone, declared that: 'The principle of international protection for stateless people was accepted by the United Nations when it created the International Refugee Organisation, and [that] therefore the Declaration on Human Rights should contain a statement recognizing the fundamental need of protection of thousands of people who were stateless *either in law or in fact*'. See Laura Van Waas, 'The UN Stateless Conventions' in Alice Edwards and Laura vas Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 65-66.

[96] Prato conclusion (n 63) 7.

[97] ibid.

[98] In fact, according to Weis, cited by Batchelor (n 64) 252, the requirement of a 'proof of a negative on the part of the individual concerned' is not satisfactory. Please note that Weis was referring to the requirement for a state to grant nationality, however, the underlying idea is similar in so far that a 'proof of a negative' is concerned.

persecution, but mainly in cases of civil war or armed conflicts that result in massive numbers of undocumented refugees, due to the fact that 'prolonged-non-cooperation' can be broadly interpreted by the governments of the host-state, leaving the concerned individual 'in limbo' indeterminately. Lastly, from the perspective of international protection it is unconceivable that refugee would have to wait in limbo for the country of origin to refuse protection or not to cooperate for a prolonged time, only to be then recognized as a *de facto* stateless person to whom no specific protection mechanism is available.

In reality, the lines between *de jure* and *de facto* statelessness are fundamentally blurred.[99] Thus, as maintained by Weis:

> [I]n order for the Convention to achieve its aim and for as many persons as possible to be enabled to acquire an effective nationality without passing from generation to generation the uncertainty of their status, the term should be interpreted in its widest and most liberal sense. The crucial question was one of protection.[100]

It appears obvious from the above that the adoption of both the definition of a *de jure* stateless person in the 1954 Convention and the definition of a *de facto* stateless person in the Prato Conclusions were above all political. Moreover, the already mentioned recommendations in what concerns the equal treatment and opportunity to acquire nationality of *de facto* stateless as *de jure* stateless whenever possible, indicate the intention of the supra-national institutions, UNHCR and Committee of Ministers of the CoE in extending protection to the ones *effectively* in need. In this respect it is important to point out that in the general considerations of the Prato Conclusions it was recognized the importance of interpreting and applying the definition of 'stateless person' in a 'holistic manner, paying due regard to its ordinary meaning'.[101]

In sum, it is evident that the different approaches to the concept of statelessness are far from having achieved harmonious recognition and this can consequently contribute to the

[99] Batchelor (n 64) 252 citing the statement by Weis to the United Nations Conference on the Elimination or Reduction of Future Statelessness (25 August 1961).
[100] Batchelor (n 64) 252 citing Weis and referring to the Final discussion and vote of the United Nations Conference on the Elimination or Reduction of Future Statelessness (11 October 1961) UN Doc A/CONF.9/SR.23.
[101] Despite the fact that analysing the elements of such definition would also be useful, Prato conclusions (n 63) 2.

undermining of an already fragile system of protection under international law.[102] Nonetheless, it is important to emphasise that if the ultimate aim of the 1961 Convention[103] and the UNHCR's Global Action Plan to End Statelessness[104] are to be achieved, there has to be shift in the approach to this issue. From a strict application of the definitions and provisions in the interest of the states, we must move towards a holistic right-based approach to statelessness. Civil Society Organisations (CSOs) involved on the issue of statelessness, in fact, 'have elected to adopt a *pragmatic*, *flexible* approach',[105] rather than focusing on further definitional debates.

In the same way in which International Refugee Law (IRL) and IHRL are viewed as complementary and mutually reinforcing in achieving international protection, international and regional instruments on statelessness should be seen as further complementing IRL and IHRL. It is with this in mind that existing instruments are further examined below.

1.3. The Concealed Phenomenon of Statelessness in Europe

Similarly to the rest of the world, statelessness in Europe is both historical and current. It arose mainly due to state succession,[106] during the significant changes to European's states borders in the 1990s. The collapse of the USSR and the disintegration of Yugoslavia left a trail of poverty, destruction, refugees, and a high number of stateless persons.

According to the UNHCR's latest statistics,[107] the total number of stateless persons in Europe is 570,534. However, these are estimated figures and the number can actually be significantly

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[102] In this respect is worth to note that the queries regarding the definition and scope of statelessness are far from over. Jacqueline Bhabha for example, takes a different approach to *de facto* statelessness and introduces a 'new' category of *effectively* stateless people; See Jacqueline Bhabha, 'From Citizen to Migrant: The Scope of Child Statelessness in the Twenty-First Century' in Jacqueline Bhabha (ed) *Children Without a State: a global human rights challenge* (MIT Press 2011).

[103] Weis, 'Statelessness as a Legal Political Problem' (n 87) 1073-1080 particularly in what regards the 'Draft Convention on the Elimination of Statelessness'; See also the Introductory Note to the 1961 Convention by the OHCHR <http://www.unhcr.org/uk/protection/statelessness/3bbb286d8/convention-reduction-statelessness.html> accessed 15 June 2017; Cf I Belong Campaign (n 17).

[104] UNHCR, 'Global Action Plan to End Statelessness 2014-24' (2014) <www.unhcr.org/54621bf49.html> accessed 2 July 2017 (UNHCR 2014-24).

[105] Waas, *Nationality Matters* (n 24) 23.

[106] For further information on state succession as a cause for statelessness see Ineta Ziemele, 'State succession and issues of Nationality and statelessness' in Alice Edwards and Laura vas Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 217-246

[107] UNHCR, 'Global Trends: Forced Displacement in 2016' (2017) 64 <www.unhcr.org/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html> accessed 20 June 2017

higher, as every day hundreds of people continue to arrive, many them stateless or at risk of being stateless. The number of stateless children, on the other hand is completely unknown.[108] This is mainly due to the fact that even if statelessness is more documented in Europe than in any other region of the world,[109] there is still 'no homogeneity among [EU] Member States as regards the procedures they use to determine statelessness'.[110] Moreover, great part of EU Member States do not have any type of specific administrative procedures towards the determination of stateless persons. According to the EMN, at the time of the report only seven Member States had specific procedures for statelessness determination.[111]

Furthermore, even where such determination mechanisms are available, the rigid administrative practices often hinder a successful identification of statelessness.[112] This, as further discussed in the next chapters, may imply that Member States are in fact circumventing their obligations in what regards children's right to a nationality, despite the efforts of CoE,[113] the Council of the European Union (CoEU)[114] and many other European institutions[115] to fulfil the EU pledge to reduce and eventually eradicate statelessness.[116]

[108] European Network on Statelessness (ENS), 'No Child Should be Stateless' (September 2015) 4 <www.refworld.org/docid/5729b6d54.html> accessed 10 May 2017 (ENS 2015).
[109] ibid 1-4.
[110] European Migration Network, 'EMN Inform: Statelessness in the EU' (Version 4, 11 November 2016) 1 <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> accessed 15 June 2017 (EMN 2016).
[111] EMN 2016 (n 110) ch 5.
[112] E.g. the burden of proof lies with the applicant – which can be difficult in the cases of forced migration as many of them are undocumented; EMN 2016 (n 110) ch 5.
[113] E.g. CoE Parliamentary Assembly, 'The Need to Eradicate Statelessness of Children' Resolution 2099(2016).
[114] E.g. CoEU 'Conclusions of the Council and the Representatives of the Governments of the Member States on Statelessness' (04 December 2015) <www.consilium.europa.eu/en/press/press-releases/2015/12/04-council-adopts-conclusions-on-statelessness/> accessed 20 June 2017 (CoEU Statelessness Conclusions).
[115] E.g. European Network of National Human Rights Institutions Position Paper with Recommendations on the Eradication of statelessness in Europe <http://www.mensenrechten.nl/sites/default/files/ENNHRI%20Statement%20on%20Statelessness.September.2014%20pdf.pdf> accessed 20 June 2017
[116] Gerard-René De Groot, Katja Swider, Olivier Vonk, 'Practices and Approaches in EU Member States to Prevent and End Statelessness (European Parliament 2015) 9 <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU(2015)536476_EN.pdf> accessed 20 June 2017 (IPOL 2015).

2. CHILDHOOD STATELESSNESS IN THE CONTEXT OF FORCED MIGRATION

Not acquiring a nationality at birth is not exclusively related to a lack of legal protection and accrued obstacles in the enjoyment of fundamental human rights. Firstly, from a legal point of view being stateless directly contravenes inter-alia Article 15 UDHR and Article 3(1) CRC to the extent that being stateless couldn't be further from having the best interests of the child as a primary concern.[117] From a psychological point of view it directly affects the sense of belonging and self-esteem of the child, contributing to feelings of frustration, discrimination and community detachment.[118] The main moral argument is that this is a situation which could be easily solved through state's policy, by preventing statelessness at birth.[119]

As argued by Carens, modern citizenship can be compared to a feudal status: it 'is assigned at birth, for the most part, not subject to change by an individual's will and efforts; and it has a major impact upon a person's life standards'.[120] However, as explained by Gibney, 'that may be at least one thing worse than holding a feudal status, and that is holding no status at all'.[121] This is particularly true for children on the move – either migrant, undocumented, asylum seeker, refugee or unborn,[122] as they are especially vulnerable to statelessness. Children born 'en route' or children born in EU countries to undocumented or refugee parents are at risk of absolute statelessness not only due to conflict between nationality laws, but also due to discriminatory laws on passing nationality from ascendant to descendent and lack of birth registration.

This chapter narrows the scope of this research to children that do not acquire any nationality at birth, being therefore classified as stateless or of 'unknown' nationality. It also clarifies the claim that children are legally entitled to a nationality. In this context, I will firstly evaluate the importance of nationality for children. Then I analyse the two modes of acquiring of

[117] ComRC, 'General comment Nº 14: On the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (29 May 2013) UN Doc CRC/C/GC/14.
[118] UNHCR Statelessness Report (n 8) 2-23.
[119] E.g. Louise Aubin, 'Update on Statelessness Standing Committee' (June 2015) <www.unhcr.org/55af8bc39.pdf> accessed 26 June 2017
[120] Gibney (n 9) 44 citing J. Carens, 'Migration and Morality: A Liberal Egalitarian Perspective' in B. Barry and R. Goodin (eds), *Free Movement* (London Harvester Wheatsheaf 1992) 26.
[121] ibid 44
[122] When referring to unborn children I refer to children of pregnant undocumented, stateless women, since in most cases the child will most likely considered stateless or of unknown nationality when born.

nationality at birth in the EU context, as well as the underlying factors that contribute to statelessness at birth in the current EU setting, i.e. children born to undocumented parents and children which do not have access to birth registration. Lastly, I consider the special vulnerability of children in the context of forced migration to demonstrate the special need for a child rights-based approach[123] in the EU migration and nationality attribution policies.

2.1 The Importance of Nationality for Children

Nationality may acquire a different meaning for a child than for an adult, but is equally important since it will shape their personality and condition their development and opportunities. As already discussed, nationality is the legal link between the individual and the state.[124] For adults, this link encompasses both rights and duties. In this respect, adults make use of their nationality in order to actively participate in their communities, and on the other hand comply with the duties flowing from their nationality, for example paying taxes or participating in military service. In the context of childhood, however, nationality assumes a somehow different role, as it places the state in a position of duty-bearer and the child in a position of rights-holder. States are bound to ensure a minimum set of rights to children placed under their jurisdiction and can even be entrusted the responsibility of acting as an indirect 'substitute' of the parents and legal guardians in some specific circumstances.[125]

In this respect, Benyam Dawit Mezmur, Chairperson of the ComRC, recognized that if stateless adults are seen as 'invisible', being stateless during childhood is being 'the invisible of the invisible'.[126] Mezmur also highlighted the significance of nationality for children for its 'crosscutting' characteristic as an 'enabling right',[127] and for being interlinked with most CRC provisions. This means that the distinctive trait of nationality as an enabling right further enhances its centrality to the enjoyment of all other children's human rights. Another enabling right, according to the Chairperson, is the right to education, to the extent that when fulfilled it has a 'positive effect on other rights'.[128] The right of every child to education is enshrined in

[123] ComRC, 'General Comment No.13: The right of the child to freedom from all forms of violence' (18 April 2011) para 59 UN Doc CRC/C/GC/13.
[124] See chapter 1.2 above.
[125] CRC Article 3.
[126] See 'An interview with Benyam Dawit Mezmur Chairperson of the United Nations Committee on the Rights of the Child' in ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 130.
[127] ibid 131.
[128] ibid 131.

the CRC,[129] but is largely influenced by nationality since access to education will be hindered by statelessness or lack of documentation. If access to primary education is affected, access to higher education is almost impossible.[130]

UNHCR's report 'Under the Radar and Under Protected' outlined clearly the difficulties encountered by stateless children in what regards their development and protection. The report pointed out, inter alia, the difficulties in accessing basic health-care and vaccinations,[131] the impossibility to be included in social welfare programs and protections systems, the increased vulnerability to sexual exploitation, abuse, child-trafficking, child-marriage, and abuse in general. Children without a nationality and undocumented children are substantially more exposed to forced child-labour, child-soldier recruitment, detention and arrest, and incarceration in adult prisons as they are unable to prove their age.[132] The HRC, although indirectly, also addressed some of the hurdles faced by children without a citizenship, underscoring the importance of this right to a life with dignity. It recognized the close connection between the right to an identity and a nationality, while highlighting the difficulty to access registration at birth for children of stateless and undocumented parents.[133] The non fulfilment of the 'right of the child to the enjoyment of the highest attainable standard of health' (Article 12 ICCPR) is mentioned by the HRC, while underlining the prohibition of discrimination for access to health, namely for 'prisoners or detainees, minorities, asylum seekers and irregular migrants'.[134] Freedom of movement,[135] right to an adequate standard of living[136] and right to family life[137] are also hampered by statelessness according to the Council.

Thus, in the words of Bhabha, 'though nationality does not, on its own, guarantee well-being or enjoyment of the constituent elements of a safe and rights endowed life, its absence is

[129] CRC Art 28; ICESCR Art 13.
[130] UNHCR Stateless Report (n 8) 9-10.
[131] Highlighting the fact that at the moment of the report, statelessness precluded children from being vaccinated in around 20 countries and in more than 30 countries documentation is a necessary requisite for a child to have access to health-care. See UNHCR and Plan, 'Under the Radar and Under Protected: The urgent need to address childhood statelessness' (2012) 8 <www.unhcr.org/509a6bb79.pdf> accessed 20 June 2017 (UNHCR and Plan 2012).
[132] ibid 9-10.
[133] HRC (n 51) para 31.
[134] ibid para 35.
[135] Ibid para 37; UDHR Art 12; ICCPR Art 12.
[136] Ibid para 38; ICCPR Art 11.
[137] ibid para 36; CCPR Arts 17, 23; CRC Arts 7, 9, 10, 16, 18.

strongly correlated with serious violations and profound human suffering'.[138] More importantly, children have the right to a nationality and a legal identity, and EU Member States are bound by international and regional law to guarantee such rights.

2.2. Acquisition of Nationality at Birth: *jus soli* vs. *jus sanguinis*

Acquiring nationality is not an issue for the great majority of the world's population, since it is almost always automatically acquired at birth. Difficulties in acquiring nationality, however, can result not only from a lack of will of states in attributing nationality, but from conflict of nationality laws,[139] due to the deep-rooted principle of sovereignty in this field of law.[140] Therefore, and as recognized by the UNHCR,

> In a world of global interaction, frequent movement across borders, mixed marriages, and increased numbers of persons living outside of their country of nationality, it is no longer possible for States to avoid the creation of statelessness solely through an independent application of national laws. [141]

The only way to prevent statelessness, therefore, is through a coherent system of national laws safeguarding children who are at risk of being stateless. Generally speaking, there are two principles that guide the acquisition of nationality at birth: *jus soli* and *jus sanguinis*. The first principle is directly connected to the soil – a child born in the territory of a state will automatically be granted the nationality of such state.[142] The *jus sanguinis* principle, is instead directly related to blood – a child will acquire the nationality of their ascendants, i.e. a child will acquire the citizenship of a given state if at birth 'one or both parents are nationals of that state'.[143] The latter is undoubtedly the *traditional* method of acquisition of nationality in

[138] Jacqueline Bhabha, 'The importance of nationality for children' in ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 118.
[139] Defined by Waas as a 'negative conflict of laws': a child is born in a country which laws attribute nationality by *jus sanguinis* to parents which are citizens of a country which ascribes nationality by *jus soli;* Waas, *Nationality Matters* (n 24) 50.
[140] Despite the recognized limitations by international law, see Chapter 1.1; ibid 50.
[141] ibid 50 citing UNHCR, 'Progress Report on UNHCR Activities in The Field Of Statelessness' (4 June 1999) EC/49/SC/CRP.15
[142] A principle followed predominantly in the American Continent. See Juliana Barrios, 'Do stateless regimes always protect children from statelessness? Some reflection from the Americas' in ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 393-400.
[143] Waas, *Nationality Matters* (n 24) 33.

Europe and in the EU in particular, hence it can be ascertained that in general, blood is understood as the 'effective link' required to be worthy of EU citizenship.[144]

Each of the above tenets has positive and negative aspects. On the one hand, the European *jus sanguinis* doctrine, in principle protects from statelessness all children born to European parents, irrespectively of the place in which the child is born. On the other, this principle of inheritance of citizenship by blood line, leaves the assumption that, 'children born to non-European nationals in Europe should be citizens of elsewhere'.[145] The *jus soli* principle, however, is also not a silver bullet for eradicating statelessness, as it opens a dangerous path to statelessness when children are born outside the country of their parents, as the nationality is not passed through the bloodline. It can also be subject to discriminatory practices that will preclude certain categories of citizens from being recognized.[146]

In conclusion, the most effective way to tackle statelessness (or comparable status) at birth is through an interlinked approach to nationality laws. A simple legislative safeguard that protects children who would be otherwise stateless, has the potential, if applied in a consistent and non-discriminatory manner, to successfully prevent stateless, as it will stop the vicious circle of inherited statelessness. Currently, thanks to the pressure by many CSOs and the UNHCR, and the mainstreaming of the two existing stateless conventions, most EU MS have some safeguard in their domestic legislation to protect children from statelessness. However, and as it will be demonstrated in the next chapters, in the majority of EU Member-States there is an inherent lack of willingness to grant nationality to children born to non-nationals. This shapes the laws adopted but also their implementation, as they are often applied in a discriminatory manner and with various administrative barriers.

2.3. Children's special vulnerability to statelessness in the Context of Forced Migration

In every civil war, national or international armed conflict children are the most affected, and with them the future generations of our humanity. Many parents, single mothers and pregnant women travel thousands of miles through mountains, land and sea to try to save their children

[144] ibid; In this context European citizenship is intended not only to be the citizenship of one of the EU Member-States. See Treaty on the European Union (TEU) Art 20.
[145] Caia Vlieks and Katja Swider, 'The jus sanguinis bias of Europe and what it means for childhood statelessness' (17 June 2015) <www.statelessness.eu/blog/jus-sanguinis-bias-europe-and-what-it-means-childhood-statelessness> accessed 29 June 2017
[146] See Juliana Barrios (n 142) 396-399

and reach a 'country of refuge'. And while no war is a children's friendly environment, the specific context of the current refugee situation in Europe is proving to leave profound scars in every child that will survive, and if no additional measures are taken it will certainly create a generation of stateless children.

While Europe struggles to cope with the mass influx of refugees arriving to its borders and shores, the protection of children is largely neglected and the child's rights approach that could help mitigate some of the dangers to which children are exposed is not taken seriously.[147] Ideally, children would at least receive a nationality automatically at birth and hence be protected by it, having a legal identity and a sense of belonging. Even children of Syrians in the current context of forced displacement have, at least in theory, access to Syrian nationality through paternal *jus sanguinis*. However, many children are at risk of statelessness or worse, to be considered of 'unknown' or 'undetermined nationality'. Although some of the causes for childhood statelessness have been mentioned earlier in this dissertation, it is now necessary to consider to what extent such causes are acknowledged and addressed by EU Member States.

Migration can, in itself, be considered a direct cause of statelessness, either because some domestic jurisdictions strip their citizens from nationality when they are outside the country for a long-period of time,[148] or as a result of forced displacement, e.g. in the case of loss or destruction of documentation. For the purpose of this dissertation, and bearing in mind the necessity to prevent statelessness in order to eradicate it, the causes examined are those relevant to the migratory context. The people within the scope of this study, children born to Syrians in exile, are particularly vulnerable to statelessness, mainly because of the following reasons:

1) Discriminatory Laws of the Country of origin;

2) Lack legal of safeguards to ensure every child's right to acquire nationality;

3) Discriminatory practices and/or administrative hurdles in the host countries;

4) Difficult access to birth registration;

[147] ENOC Taskforce Children on the Move, 'Safety and Fundamental Rights at Stake for Children on the Move: Call for the EU and European Countries to implement a child rights perspective in the reception of migrating children' <http://enoc.eu/wp-content/uploads/2016/01/ENOC-Task-Force-Children-on-the-Move-1st-report-25Jan2016.pdf> accessed 10 May 2017 (ENOC 2016).
[148] Waas, *Nationality Matters* (n 24) 167.

5) Lack of coherent Statelessness Determination Procedures;

6) Children born to stateless parents: when both parents are stateless, their children inherit the stateless status from their parents, if no additional safeguards against statelessness are put in practice. Children of *Maktoum* persons (a person not registered in the Syrian records) and children of *Maktoum Kurds* (Syrian Kurds which were stripped from their Syrian nationality), Palestinian Refugees and other exceptional cases of statelessness are of particular concern;[149]

7) Children born in exile to 'undocumented migrants';[150]

8) Children unable to effectively acquire the nationality by *jus sanguinis* due to lack of proof of parentage link.

These causes will be further examined and contextualized when scrutinizing the approach of EU Member States to these issues and assessing their efforts in preventing statelessness.

2.4. Discriminatory laws of the Countries of Origin as a Contributing Factor to Statelessness at Birth

Discriminatory laws are one of the main contributing factors to statelessness and also to the categorization of a children as being of 'unknown' nationality, which can lead to lack of effective protection. The principle of non-discrimination is primarily enshrined in the UDHR[151] and serves as basis for many other Conventions and Declarations.[152] Despite the universal recognition of this principle and the efforts of IOs and CSOs to combat discrimination, many laws often remain discriminatory on paper and/or in practice.[153]

One of the key factors contributing to childhood statelessness and particularly statelessness at birth is discrimination on grounds of sex in the transmission of nationality to the child. In

[149] Zahra Albarazi and Laura Van Waas, 'Understanding statelessness in the Syria refugee context: Research Report' (2016) <http://www.syrianationality.org/pdf/report.pdf> accessed 30 June 2017.
[150] Cf (n 12).
[151] UDHR Art 2.
[152] E.g. CEDAW (n 49); International Convention on the Elimination of All Forms of Racial Discrimination (Adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).
[153] HRCommittee, 'General Comment Nº 18: Non-Discrimination' (10 November 1989) UN Doc CCPR/C/GC/18.

forced migration contexts such as the Syrian one, many times the father is not present – because fighting in the war, deceased or unknown. The CEDAW Committee has in fact issued a general recommendation on this matter.[154] While the whole text of general recommendation No. 32 sheds light on a range of different aspects of the 'gender-related dimensions of refugee status, asylum, nationality and stateless of women', attention must be given to the way in which the recommendation highlights the consequences of such discrimination for childhood statelessness, particularly in migratory contexts.[155] The Committee criticised in particular the inequitable laws or practices that preclude women to 'access documentation that proves their identity and nationality',[156] and the reservations made to CEDAW's Article 9 relating, inter alia, to the right of women to transmit their nationality to their children, in the same way as men do. In this respect it stated that such reservations 'undermine the object and purpose of the convention' and expressed its doubts on the validity of such reservations, since the principle of non-discrimination and right to nationality are asserted in several international human rights instruments.[157]

The UNHCR, in line with its goal of ending statelessness by 2024,[158] issues an annual Background note on gender equality within nationality laws, particularly in what concerns the attribution of nationality to children. In its latest report of 8 March 2017,[159] the High Commissioner for Refugees recognized the substantial improvement of States' nationality laws in what concerns equality between men and women since the entering into force of CEDAW. Nevertheless, it emphasized the fact that 'equality between men and women relating to conferral of nationality upon children has not yet been attained in 26 countries in almost all parts of the world', and more specifically in the Middle East, North Africa and Sub- Saharan Africa.[160] UNCHR continued to stress the connection between gender-biased nationality laws and childhood statelessness. The situations in which this can occur are manifold, namely:

> (i) where the father is stateless; (ii) where the laws of the father's country do not permit conferral of nationality in certain circumstances, such as when the

[154] CEDAW Committee, 'General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women' (14 November 2014) UN Doc CEDAW/C/GC/32.
[155] ibid paras 51-63.
[156] ibid para 57.
[157] Ibid para 58.
[158] UNHCR 2014-24 (n 104).
[159] UNHCR, Background Note on Gender Equality, National Laws and Statelessness (8 March 2017) <http://www.refworld.org/pdfid/58aff4d94.pdf> accessed 25 June 2017.
[160] UNHCR on Gender Equality (n 158) 1.

> child is born abroad; (iii) where a father is unknown or not married to the mother at the time of birth; (iv) where a father has been unable to fulfil administrative steps to confer his nationality or acquire proof of nationality for his children because, for example, he has died, has been forcibly separated from his family, or cannot fulfil onerous documentation or other requirements; or (v) where a father has been unwilling to fulfil administrative steps to confer his nationality or acquire proof of nationality for his children, for example if he has abandoned the family.[161]

In the above situations, a woman that gives birth outside the country will not be able to pass her nationality to her child. In the same report, the UNHCR names several countries that advanced reforms in nationality law, simply by allowing women to confer nationality in the same manner as men. The second part of the report presents an outline of the 26 countries and the degree of (in)equality of the respective nationality laws. In the case of a Syrian mother, she 'can only confer nationality if the child was born in Syria and the father does not establish filiation in relation to the child'.[162] In other words, the great majority of children born in exile risks statelessness.

The Arab League[163] created the Arab Charter on Human Rights.[164] Despite being highly criticized in 2008 by the then UN High Commissioner for Human Rights Louise Arbor for non-compliance with international human rights standards,[165] it advanced some important steps for human rights in Arab states. The Charter, however, does not have any enforcement mechanism, and compliance is only monitored through recommendations enacted by the Arab Human Rights Committee upon receiving State's reports[166]. This Committee does not receive petitions by State Parties or individuals, and despite attempts to create an Arab Human Rights

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[161] ibid.
[162] ibid 4.
[163] Created in 1945, has 22 Member-States. However, Syrian's membership has been suspended since 2011. See: <www.nationsonline.org/oneworld/arab_league.htm> accessed 25 June 2017.
[164] Mohammed Amin Al-Midani and Mathilde Cabanettes (trs), 'Arab Charter on Human Rights, (Boston University International Law Journal 24(147) 2006) 147-164.
[165] UN News Centre, 'Arab rights charter deviates from international standards, says UN official' (30 January 2008) <http://www.un.org/apps/news/story.asp?NewsID=25447#.WVBLJhPyvVq> accessed 25 June 2017.
[166] The League of Arab States: Human Rights Standards and Mechanisms, 'Towards Further Civil Society Engagement: A Manual for Practitioners (Open Society Foundations Arab Regional Office) 40-47 <http://www.cihrs.org/wp-content/uploads/2015/12/league-arab-states-manual-en-20151125.pdf> accessed 25 June 2017.

Court, this step is still to be realized. A Statute for an Arab Court[167] operating within and in accordance with the Arab Charter of Human Rights was passed by the Ministerial Council of the League of Arab States, but it has zero ratifications at this time.[168]

In sum, in relation to the discriminatory nature of the nationality laws of the countries of origin of women seeking asylum in the EU, in particular of Syrian nationality, it can be said that there is no foreseeable change towards a non-discriminatory mode of conferring nationality to descendants.

2.5. Other Discriminatory Laws and/or practices

As discussed in the previous section, discrimination can occur through explicit domestic legislation, but it can also occur by applying or interpreting apparently neutral provisions in a discriminatory manner, with the aim to make access to citizenship difficult, or even impossible, to certain categories of persons.[169] Those situations are intimately related to administrative practices and national contexts,[170] as recognised in various circumstances by the UN Treaty Bodies.[171]

The HRCommittee acknowledged in its GC No. 18 that not all differentiations in law are deemed to be discriminatory.[172] In this context, as long as the measures have a legitimate aim and these distinctions are 'based on reasonable and objective criteria', states are allowed to make such distinctions,[173] within the scope of sovereignty of the state in nationality matters, i.e. given that such measures are in compliance with international law and obligations.[174] Therefore, according to Brett, when an exception to granting nationality to a child born in the territory of a state is based on objective criteria, such as 'children born in the territory to those "in transit" are not, *per se*, discriminatory. The fact of being in transit rather than a citizen in

[167] International Commission of Jurists, 'The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court' (2015) 5-43 <www.icj.org/wp-content/uploads/2015/04/MENA-Arab-Court-of-Human-Rights-Publications-Report-2015-ENG.pdf> accessed 25 June 2017.
[168] Source Human Rights Law Research Guide: Arab States <http://unimelb.libguides.com/human_rights_law/regional/arab> accessed 25 June 2017.
[169] Peggy Brett, 'Discrimination and childhood statelessness in the work of the UN human rights treaty bodies' in ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 171-172.
[170] E.g. discriminatory application of nationality laws in Italy precluding the access of children born to Roma parents, situation addressed by the CERD Committee, ibid 173.
[171] Ibid 169-170.
[172] HRCommittee (n 152).
[173] Peggy Brett (n 168) 173-74 referring to HRCommittee (n 152) para 13.
[174] See chapter 1.1.

the state is an objective criterion and the exclusion of such persons from nationality is not unreasonable'.[175] The ComRC, in its Concluding observation directed to Chile,[176] endorsed the view of the CEDAW Committee on this subject. According to both Committees, the exception on the principle of acquiring nationality at birth by *jus soli* to children born to non-nationals in transit was, 'systematically applied to migrant women in an irregular situation, irrespective of the length of their stay in the State party',[177] thus constituting a discriminatory practice. Consequently, the Committee urged the State Party to amend its legislation 'to ensure that all children born in the State party who would otherwise be stateless can acquire Chilean nationality at birth, *irrespective of their parents' migrant status*'.[178] Another important recommendation in the same document concerned access to birth registration for children born in the territory of the State party, which shall be ensured, 'irrespective of their parents migrant status'.[179]

In conclusion, as evidenced in this chapter, the Treaty Bodies clearly indicated their position in relation to discrimination based exclusively on the child's parents' status. Even if some exclusionary laws may be accepted when grounded in reasonable and objective criteria, the 'parents' status' is not a reasonable ground for exclusion. As already ascertained, the child's right to acquire a nationality under the CRC and the ICCPR is an independent and inalienable right.

[175] Peggy Brett (n 168) 174.
[176] ComRC, 'Concluding Observations on the combined fourth and fifth periodic reports of Chile' (30 October 2015) UN Doc CRC/C/CHL/CO/4-5 referred by Peggy Brett (n 168) 174.
[177] ibid para 32.
[178] ibid para 33 (emphasis added).
[179] ibid para 31.

3. INTERNATIONAL LEGAL FRAMEWORK

This chapter overviews the two international conventions directly relating to stateless persons, discusses their limitations in addressing the so-called 'new causes of statelessness', and assesses other relevant IHRL instruments that may fill the gaps of these conventions. The CRC will serve in particular as basis for the assessment of the established international standards, since all provisions and instruments related to children should be read in light of the principles enshrined in the CRC.

As already mentioned, debates on the relationship between nationality and state sovereignty have characterised international relations since the League of Nations. While the 1930 Hague Convention and the subsequent protocol regarding Certain Cases Statelessness[180] advanced some limitations regarding states action that could result in statelessness, it did not provide sufficient safeguards for addressing the already existing causes of statelessness, due to its intentional 'minimal interference in state's sovereignty in the area of nationality'.[181] Since its birth the United Nations (UN) tried to shed light on the issue of statelessness and the concept figures in the most prominent human rights document to date: the UDHR recognizes that 'everyone has the right to a nationality' and that 'no one shall be arbitrarily deprived of his nationality'[182]. In fact, the UN carried out a Study of Statelessness[183] in which it concluded that 'statelessness is a phenomenon as old as the concept of nationality'[184] and recognized that even if isolated cases of the past did not disrupted international peace, in the post World War era 'statelessness assumed unprecedented proportions'[185], hence only an integration of the stateless persons in the framework of international law could improve the situation.[186] The UN's Study of Statelessness is thus identified as the 'first real step towards the creation of an international regime for protecting the unprotected'.[187]

[180] Protocol Relating to Certain Cases of Statelessness (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 115.
[181] Waas, 'The UN Stateless Conventions' (n 95) 69-70.
[182] UDHR (n 1).
[183] UN, "A Study of Statelessness", UN Doc. E/1112 (August 1949) as cited in Waas, 'The UN Stateless Conventions' (n 95) 64-65.
[184] ibid 4.
[185] ibid.
[186] ibid 43.
[187] Waas, 'The UN Stateless Conventions' (n 95) 66.

While initially statelessness was meant to be addressed in a protocol to the 1951 Refugee Convention, it was later recognised as a separate institute in need for a separate convention. The 1954 Convention Relating to the Status of Stateless Persons was thus adopted. Nevertheless, cases of statelessness continued to arise and to remain unaddressed, as the 1954 Convention was largely disregarded and did not provide for a framework to reduce statelessness. Although it is largely recognised that, 'the ultimate goal of the international community's engagement with statelessness was to eliminate past and future cases',[188] it is important to note that the 1961 Convention on the Reduction of Statelessness is the result of two draft conventions prepared by the International Law Commission (ILC) following a request of the General.[189] The ILC presented two substantially different proposals: a Draft Convention on the *Elimination* of Future Statelessness and a Draft Convention on the *Reduction* of Future Statelessness.[190] As evidenced by the titles, the first draft convention foresaw safeguards to prevent new cases of statelessness from arising (in the context identified at the time), whilst the latter allowed states to set some preliminary conditions for individuals to enjoy the safeguards against statelessness. However, in the words of Waas, 'the Draft Convention on the Elimination of Future Statelessness was deemed a step too far'.[191] After heated negotiations the 1961 Convention on the Reduction of Statelessness was therefore adopted. Notwithstanding the acknowledgment of the significance of the problem and the inclusion of the concept in international discussions, it was clear at the time that states were unwilling to limit their domestic jurisdiction and sovereignty, even for the purpose of international protection. In 1966, however, the specific right of every child to 'be registered immediately after birth and have a name' and the 'right of every child to acquire a nationality' were both recognized under the ICCPR. This almost universally ratified Covenant is of crucial importance, as it is one of the cornerstones of IHRL framework.

For decades statelessness had lost its significance at the international and diplomatic levels, but it is now once again at the centre of international discussions, with the launch of the UNHCR Global Plan to End Statelessness and the opening of the Institute on Statelessness and Inclusion.[192] The latter is an independent non-profit organisation that studies the stateless phenomenon and advocates for the right of everyone to a nationality, whilst providing for most of the up-to-date and reliable data in what regards statelessness matters.

[188] ibid 69.
[189] ibid 70.
[190] ibid 70 referring to the ILC Report Sixth Session (1954) A/CN.4/88 (emphasis added).
[191] ibid 71.
[192] See Institute on Statelessness and Inclusion <www.institutesi.org/> accessed 2 July 2017.

3.1 The 1954 Convention Relating to the Status of Stateless Persons

The 1954 Convention was an important recognition of the implications of statelessness by the international community, to the extent that it acknowledged that statelessness is a *legal anomaly* and a violation of IHRL.[193] The main point of this convention was on the one hand the definition of stateless person, already discussed in chapter 2,[194] and on the other hand, the recognition of a 'set of civil, economic, social and cultural rights for which a minimum standard of treatment is guaranteed', once a person is recognised as 'stateless'.[195]

The 1951 Refugee Convention and the 1954 Stateless Convention have many similarities. The rights to be afforded by stateless persons are in general those afforded to 'aliens', except where the 1954 Convention 'contains more favourable provisions'.[196] The non-discrimination principle was also recognised in Article 3, as well as freedom of religion, right of association and access to courts.[197] According to Waas, and again similarly to the 1951 Refugee Convention, the rights enshrined in the 1954 Convention are to be enjoyed in a 'gradual scale', following the 'degree of attachment between the person and the state'.[198] This means that when a person is recognized as stateless, he/she will only be able to avail themselves of some of the Convention rights.[199] Nonetheless, whilst not demanding the grant of nationality by the host-state, the facilitated 'assimilation and naturalization' of stateless persons is laid down in Article 32 of the Convention.

Despite many efforts, the issue of *de facto* statelessness, of those without an effective nationality and their unprotected status, remains unresolved. It is important to highlight that at the time there was a common understanding that, '*de facto* stateless persons were refugees and a State might not wish to accept obligations to both *de jure* and *de facto* stateless persons'.[200] In this respect and with the assumed objective of obtaining 'the greatest possible number of signatures',[201] Article 1 of the 1954 Convention and consequently all the rights

[193] UNHCR handbook (n 56).
[194] See chapter 1.2.
[195] Waas, 'UN Stateless Conventions' (n 95) 73.
[196] 1954 Stateless Convention (n 46) Article 7.
[197] ibid Arts 4, 15, 16.
[198] Waas 'UN Stateless Conventions' (n 95) 73.
[199] ibid.
[200] Batchelor (n 64) 248.
[201] United Nations Conference on the Law of Treaties UN Doc E/CONF.17/SR.10 (New York 1971) 10 as cited in Batchelor (n 64) 247.

enshrined in it encompassed only *de jure* stateless persons, 'in an attempt to avoid abuse, overlap and potential conflicts between States'.[202] If on the one hand it is clear that at the time there was very little knowledge of the crucial significance of this matter for international law and for the states themselves, on the other it was also clear that the need for a holistic approach to protection was necessary. This is evident by the recommendation made in the Final Act of the 1954 Convention,[203] stating that:

> [E]ach Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons.[204]

All in all, notwithstanding the importance of the 1954 Convention for the recognition of stateless persons as vulnerable group protected under IL, its application remains limited. Not only given the lack of State's SDPs, which often preclude stateless persons from being granted the rights they are entitled to, but also due to its limited accession.[205]

3.2 The 1961 Convention on the Reduction of Statelessness

The 1961 Convention on the Reduction of Statelessness was, as already mentioned, the result of extended discussions and concessions by the states in the field of nationality law. As explained in previous chapters, while not imposing new obligations on states, its underlying aim was eradicating statelessness by preventing its appearance in the first place by 'filling gaps created by conflicts of law'.[206] However it still foresees the possibility of states revoking nationality under certain circumstances, creating a balance between state's claim to sovereignty in nationality matters and the pressing need to avoid new cases of statelessness.[207]

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[202] ibid 248.
[203] This recommendation greatly influenced the way IHRL scholars and CSOs approached the issue. CSOs in fact do not distinguish between *de jure* or *de facto* stateless, rather their focus is the need for International Protection.
[204] Final Act of the United Nations Conference on the Status of Stateless Persons, as cited by Batchelor (n 64) 248.
[205] Source: UN Treaty Collection <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en> accessed 04 July 2017; Nonetheless, the definition of Stateless Person (1954 Convention Art 1) has acquired the status of Customary Law and its application is now *erga omnes*.
[206] Batchelor (n 64) 257.
[207] Waas, *Nationality Matters* (n 24) 43.

Even if it does not address the 'new causes of statelessness' [208] – birth and marriage registration and migration – the 1961 Convention establishes safeguards to prevent statelessness in three wide-ranging situations: acquisition of nationality at birth, [209] loss, deprivation or renunciation of nationality, [210] and statelessness resulting from state succession. [211] This dissertation examines more closely Articles 1 to 4, concerning the prevention of absolute statelessness. These articles are analysed in light of the UNHCR's Guidelines on Statelessness Nº 4, to the extent that this instrument provides the necessary 'legal-guidance' in what regards the application of Articles 1-4 of said convention.[212]

Firstly, it is important to point out that this convention reflects a compromise between the two doctrines of acquisition of nationality at birth: *jus soli* and *jus sanguinis*, making them complementary and inter-related. In fact, while not forcing states to choose, it 'seeks a balance in their application, accepting both birthplace and descendance as evidence of a *genuine lin*k',[213] necessary to determine nationality. This is evidenced by the wording of Article 1, which requires state parties to grant nationality to a person born in its territory, if he/she would otherwise be stateless (*jus soli*), whilst Article 4 entails the granting of nationality to a person, who would otherwise be stateless, born outside the territory, if one of the parents had the nationality of that state at the time of birth (*jus sanguinis*).

Although it may seem that statelessness could be prevented by applying these two articles through amendments of the nationality laws of the states, there is a particular case in which conflict of laws may still arise, leaving the child unprotected. This is when a childr born in the territory of one state to foreign parents, assuming that both have a nationality and are able to transmit it to the child. In theory this child would have double nationality,[214] but it can be that each state *assumes* that the other state will grant nationality, thus arising a 'dispute as to which state is required to grant nationality'.[215] Nonetheless, as highlighted by Waas, Article 4 foresees such situation. If the child is born on a non-contracting state party, the transmission of nationality is to be made by *jus sanguinis*. Conversely, if the child is born in the territory of

[208] For further information on the 'new causes of statelessness' ibid 151-192.
[209] 1961 Convention Arts 1-4.
[210] ibid Arts 5-9.
[211] ibid Art 10; See Waas, 'UN Stateless Conventions' (n 95) 74-5.
[212] UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' (2012) UN Doc HCR/GS/12/04 (UNHCR Guidelines).
[213] Waas, *Nationality Matters* (n 24) 54.
[214] Please note that there are states that do not accept double nationality; ibid 55.
[215] ibid 55.

a state party, it is for such state to grant nationality. Therefore, it can be ascertained that, 'the Convention … gives precedence to the attribution of nationality *jus soli* since every contracting state is required to grant nationality *jus soli* in the event that the child would be stateless otherwise'.[216] This fact is of extreme importance to this dissertation, to the extent that it recognizes the *obligation* of contracting states to grant nationality to a child born in its territory who would otherwise be stateless.

There are two specific points related to the 1961 Convention that require further discussion. One point related to the 'proof of a negative' by the individual, i.e. the fact that the individual has to prove that s/he is not entitled to any other nationality. This can foster discriminatory administrative practices.[217] The second point is that it does not require a state party to grant nationality automatically when it is clear that a person 'would otherwise be stateless'. Instead, article 1 establishes that a state shall grant nationality '(a) at birth, by operation of law', i.e. in the case where a child is born in the territory of a state and the child does not acquire any other nationality at birth, she/he will automatically be citizens of the state where they were born (also called the *jus soli* fall-back provision). Or, in the case where the state doesn't want to grant nationality automatically by *jus soli* it shall make the nationality available upon certain conditions. Only once these conditions are met, conferral of nationality is obligatory. Such conditions are exhaustively outlined in Article 1(2):

(a) The period fixed by domestic law to lodge application to be granted nationality is to begin 'not later than at the age of eighteen years' and it is to end 'not earlier than the age of twenty-one years'. Thus allowing for a time-frame of three years, if citizenship was not already granted before.[218]

(b) The state may fix a period of *habitual* residence in the territory, which cannot be more than five years 'immediately preceding the lodging of the application nor ten years in total'.[219]

(c) The state can impose as a requirement that the person concerned has not been sentenced to more than five years in prison nor 'convicted of an offence against national security'.[220]

[216] ibid 55.
[217] Batchelor (n 64) 252-258.
[218] 1961 Convention Art 1(2)(a).
[219] ibid Art 1(2)(b) (emphasis added).

(d) 'That the person concerned has always been stateless'.[221]

For obvious reasons the first option, granting nationality automatically to a child who would otherwise be stateless is, according to the UNHCR, the *preferred* option, as it is ensures that *effectively* no child will grow up stateless.[222] This was also recognized by the ILC, which stated that the first option would in fact prevent new cases of statelessness, eliminating statelessness in the future, whilst the granting of nationality by means of application subject to conditions would only reduce, but not preclude new cases of statelessness.[223]

Article 2 also falls within the scope of this dissertation., This article establishes that foundlings found in the territory of the state shall be automatically considered citizens of that state, if there is no proof of contrary. Article 3, also pertinent to this research, establishes that within the scope of this convention, 'birth on a ship or in an aircraft shall be deemed to have taken place in the territory of the State in which whose flag the ship flies or in the territory of the State in which the aircraft is registered as the case may be'.[224]

It should furthermore be noted that, according to the UNHCR, reservations to the 1961 Convention are only accepted relating to Articles 11, 14 and 15.[225] No reservation is therefore possible in relation to Articles 1-4, which means that all standards set in these Articles will be binding upon all contracting parties.

In sum, if effectively applied this Convention would be capable of preventing statelessness for many children. In reality, however, some key situations remain unaddressed, for instance issues of gender-biased laws which prevent the transmission of nationality when the child is born outside the territory of the state of which the mother is a national;[226] the lack of birth and marriage registration; and lack of documentation. As it will become apparent in the next

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[220] ibid Art 1(2)(c).
[221] ibid Art 1(2)(d).
[222] UNHCR Guidelines (n 212) para 34; UNHCR, 'Good Practices Paper - Action 2: Ensuring that no child is born stateless' (2017) <www.refworld.org/docid/58cfab014.html> accessed 10 June 2017.
[223] Waas, *Nationality Matters* (n 24) 55-6.
[224] 1961 Convention Art 3; In relation to the extent of international protection and the jurisdiction of the state, Giuffrida stresses that, 'the notion of protection is becoming more and more extended by forcing States to ensure respect of fundamental rights under any circumstance and in any place, even outside the territorial borders in which their sovereignty is exercised.', Roberto Giuffrida, 'Subsidiary Protection International and European Law' in Pia Acconci and others (eds), *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi'* (Brill Nijhoff 2017).
[225] UNHCR Handbook (n 56).
[226] Cf Waas, *Nationality Matters* (n 24) 56-58.

section, only a coherent holistic child-based approach to statelessness will effectively address statelessness at birth.

3.3. The International Convention on the Rights of the Child

The CRC is the basis of all the arguments advanced in this dissertation, not only because it establishes all the rights directly afforded to children, but also because it is the most widely ratified human rights instrument in the world.[227] This nearly universal endorsement means that its provisions are considered to be a general requirement for the application of all rights and policies directed to children, i.e. they should be central to all policies relating of affecting children. Particular attention should be given to the definition of the child (Article 1); the principle of non-discrimination (Article 2); the principle of the best interests of the child (Article 3); the right to life, survival and development (Article 6) and lastly the respect for the views of the child (Article 12).[228]

The principle of the best interests of the child and the principle of non-discrimination are of paramount importance in the context of statelessness. On the one hand, denying nationality to a child who would otherwise be stateless using discriminatory and unreasonable grounds is always prohibited. On the other hand, it is important to remember that the principle of the best interests of the child is to be applied horizontally in all matters concerning children. As acknowledged by the ComRC, being stateless is never in the best interest of the child.[229]

The right of every child to acquire a nationality is also established in Article 7 CRC. This provision, whilst not ensuring a right to a nationality from birth,[230] establishes sufficient safeguards to ensure that a child will not grow up to be *legally invisible*.

[227] After Somalia's ratification in 2015, the United States is the only state not to have ratified the CRC.
[228] UNICEF, 'The Convention On The Rights Of The Child Guiding principles: general requirements for all rights' <https://www.unicef.org/crc/files/Guiding_Principles.pdf> accessed 5 July 2017.
[229] ENS 2015 (n 108) 6.
[230] Conversely to the principle 3 of the Declaration on the Rights of the Child which enshrines that, '[t]he child shall be entitled *from his*[/her] *birth* to a name and a nationality'; UNGA, 'Declaration on the Rights of the Child' UN Doc A/RES/14/1386 (emphasis added).

Article 7 CRC reads as follows:

> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.
>
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Thus, there are two rights that are instrumental for the fulfilment of Article 7 in the context of statelessness, namely, the registration of the child immediately after birth and the right to acquire a nationality. Moreover, when implementing these rights, states have to take into account their obligations under other complementary international law. In this respect, EU MS will have to consider inter-alia Article 24 ICCPR, which also establishes the right of every child to be registered immediately after birth to acquire a nationality. Moreover, MS who are contracting parties of the 1961 Convention will have to apply the standards of this Convention when ensuring the right of every child to acquire a nationality, *in particular where the child would otherwise be stateless.*

Notwithstanding the fact that all relevant international instruments provide the right of every child to a nationality, none of them establishes which state should grant nationality to the child. In other words, both the HRCommitte and the ComRC agreed that whilst unconditional *jus soli* was not required, i.e. whilst not obliged to grant nationality to *all* children born on the territory of a state irrespectively of their circumstance, states are required to make sure that 'all necessary measures are taken to prevent the child from having no nationality'.[231]

Taking all the above into consideration, it appears that the ComRC could play a crucial role in what regards the right to every child to acquire a nationality and therefore not to be left stateless or with undetermined status. As the UN Treaty-Body mandated to monitor the implementation of the CRC, the General Comments issued by the ComRC have 'authoritative

[231] Gerard-René de Groot, 'Children, their right to a nationality and child statelessness' in Alice Edwards and Laura vas Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 146-147 citing Jaap Doek, 'The CRC and the Right to Acquire and Preserve a Nationality' 25(2006) 26-32 Refugee Survey Quarterly 26.

guidance'.[232] Its Concluding Observations and Recommendations, as well as their decisions on individual complaints, are of fundamental importance in clarifying the nature and scope of the protection afforded to children.

Although the ComRC has yet to issue a General Comment on article 7, it issued '126 recommendations on the content of children's right to acquire a nationality', as well as 226 recommendations directed at 89 state parties on measures that such states 'should take in order to improve the protection of children's right to acquire a nationality'.[233]

It is important to note that, in its Concluding Observations to Thailand, the ComRC urged the state to 'review and enact legislation in order to ensure that all children who are at risk of becoming stateless', including children of migrant workers, refugees and asylum seekers have access to, in that case, Thai nationality. It furthermore advised the state to accede to the 1954 and 1961 Stateless Conventions and to 'take measures to ensure birth registration for all children born on its territory especially those who are not registered due to the economic status of their parents, ethnicity and immigration status'.[234] Within the text of this particular recommendation we can see a clear recognition that all children without any exception should be registered at birth and when children fail to acquire nationality by any reason, this should be given by *jus soli*, regardless of their parents status.

The position of the ComRC in relation to gender-biased laws in transmitting nationality to descendants, is clear in the Concluding Observations to Iran, urging the State to review its domestic law in order to 'ensure that all children who are born to Iranian mothers, including children born out of wedlock, are entitled to Iranian citizenship on the same conditions as children born to Iranian fathers'.[235]

Lastly, the 'Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 21 of the ComRC on the Human Rights of Children in the Context of International Migration', [236] has now reached

[232] ISI, 'Addressing the Right to a Nationality through the Convention on the Rights of the Child, A Toolkit for Civil Society, Section 3: About engaging with the Committee on the Rights of the Child' (June 2016) 2 <http://www.statelessnessandhumanrights.org/3_role_of_CRC.pdf> accessed 2 July 2017.
[233] ibid.
[234] ComRC, 'Concluding Observations: Thailand' (2012) UN Doc CRC/C/THA/CO/3-4.
[235] ComRC, 'Concluding observations: Iran' (2016) UN Doc CRC/C/IRN/CO/3-4.
[236] Draft Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 21 of the Committee on the Rights of the Child on the Human Rights of Children in the Context of International Migration

its second draft stage , thus representing the latest approach by the Treaty Bodies on the rights of children in the context of international migration. The main aim of this joint general comment is to provide 'authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the two Conventions to fully protect the rights of migrant children and other children affected by migration'.[237] All the text of the draft General Comment is extremely important not only for the rights of stateless and other unprotected children born 'en route' or in the territory of Member-States, but also in what concerns the rights of children more generally. This is particularly significant at a time in which children's rights appear to be the least of states' concerns when it comes to migration policies.[238]

The draft Joint General Comment confirms the centrality and applicability of the CRC to all categories of children, including the ones 'born to migrant parents in countries of transit and destination' and 'regardless of their parents' migration status'.[239] It also recognises the obligation of states to 'ensure that children in the context of migration are treated first and foremost as children', and it determines that in 'international waters or other transit zones where States put in place migration control mechanisms' the obligations of the state parties under the CRC remain applicable. Most importantly, the draft comment highlight the importance of respecting the principle of best interests of the child, for its application 'is critical for the protection and fulfilment of the rights of children in the context of migration'.[240]

Furthermore, the draft addresses the principle of non-discrimination, stressing that this should be 'at the centre of all migration policies and procedures' and points out the fact that 'merely addressing *de jure* discrimination will not ensure *de facto* equality'. In other words, it encourages states to address discrimination not only in law but also in administrative and other practices, as well as 'prevent misinformation' and 'disseminate information' in order to promote the effective enjoyment of fundamental human rights.[241] The draft continues by thoroughly assessing the importance of the principle of the best interests of the child,[242] their

<http://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/INT_CMW_INF_8219_E.pdf> accessed 5 July 2017 (Joint GC).
[237] ibid para 7.
[238] ENOC 2016 (n 147) 1-3.
[239] Joint GC (n 236) para 9.
[240] ibid paras 18-19.
[241] ibid paras 20-24.
[242] ibid paras 25-29.

life, survival and development,[243] the right of children to be heard, express their views and participate in decisions that affect them, taking into consideration their evolving capacities and maturity,[244] and the principle of non-refoulement and the prohibition of collective expulsion.[245] In what regards birth registration, the draft stresses its importance in avoiding 'situations of exploitation and violence'. Moreover, it recalls the specific vulnerability of unregistered children to statelessness, 'particularly when born in an irregular migration situation, due to barriers to acquiring citizenship in the country of origin of the parents, as well as accessing birth registration and citizenship at the place of their birth'.[246] Once again the importance of ensuring birth registration to all children, 'irrespective of their parents' migrant status' is highlighted, as the draft urges the facilitation of late registration of birth, and the removal of all 'legal and practical' barriers to birth registration, including the requirement 'to produce documentation' that parents may not have.[247]

Lastly, in what relates to the *prevention* of statelessness, the draft recalls the principles enshrined in the UDHR, the CRC and other relevant instruments:

> While States are not obliged to grant their nationality to every child born in their territory, they are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he or she is born. One such measure is the conferral of nationality to a child born on the territory of the State if the child would otherwise be stateless.[248]

Thus, the draft general comment seems to give precedence to the automatic acquisition of nationality at birth by *jus soli* when a child would otherwise be stateless, particularly by the choice of words 'ensure that every child has a nationality *when* he or she is born', i.e. at the moment of birth.

Even if the General Comment is still to be formally adopted, it is of crucial significance, since it urges states to put the rights of the child at the centre of all policies and administrative practices, and highlights the need for a holistic and interrelated approach in all matters affecting children, in the delicate and controversial context of migration.

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[243] ibid paras 30-35.
[244] ibid paras 36-40.
[245] ibid paras 41-44.
[246] ibid para 62.
[247] ibid.
[248] ibid para 66; HRCommittee, 'General Comment No. 17: Article 24 (Rights of the Child)' (7 April 1989) <www.refworld.org/docid/45139b464.html> accessed 20 June 2017.

In sum, it is now clear that international law in general and the CRC in particular offer safeguards for children to acquire a nationality as soon as possible after birth.[249] Therefore, and bearing in mind the comprehensive application of the CRC, no child should grow up to be a stateless adult. Many other IHRL instruments and documents clearly reiterate the above mentioned rights, as well as the non-discrimination principle.[250] The next session provides an overall assessment of the applicable international framework, to assess whether it is possible to reconcile the provisions of the 1961 Convention with those of the CRC, in light of the guidelines provided by the UNHCR.

3.4. An Overall Assessment of the Applicable International Instruments

In order to ensure a more uniform interpretation and consequent application of the 1961 Convention, the UNHCR issued several Guidelines on Statelessness, which thoroughly analyse the issue and provide an in-depth legal interpretation of the provisions aimed at protecting stateless people and preventing statelessness from arising. The first three sets of Guidelines were substituted by the 'Handbook on Protection of Stateless Persons',[251] followed by the Guidelines on Statelessness No. 4 on the prevention of statelessness at birth. The analysis of these guidelines will hopefully better explain the need for a holistic approach on the right of every child to acquire a nationality, and its importance in ensuring that no child falls through the cracks because of an inconsistent or limited application of existing international safeguards.

The guidelines explicitly state that all provisions should be read with in mind the aim and purpose of the convention itself, and interpreted in light of the subsequent legal developments, especially in IHRL. They also outline relevant instruments to be taken into consideration when deducing the spirit of the convention, such as the already mentioned UDHR, ICCPR, CEDAW, CERD, as well as regional instruments such as the European

[249] CRC Art 7; UNHCR Guidelines (n 212) 8.
[250] E.g. ComRC, 'Report of the 2012 Day of General Discussion: The rights of all children in the context of international migration' (2012); ComRC, 'General Comment No. 7: Implementing child rights in early childhood' (2006) UN Doc CRC/C/GC/7/Rev.1; CEDAW Committee, 'General Recommendation No. 32' (n 154).
[251] UNHCR Handbook (n 56).

Convention on Nationality (ECN). The relevance of the CRC to a proper interpretation of the convention is also evidenced in the initial paragraphs.[252]

The link between Article 7 CRC and the 1961 Convention is also confirmed in the guidelines. Article 2 CRC, relating to the non-discrimination, is also directly relevant to the convention, especially in relation to the irrelevance of the status of the child's parents (i.e. undocumented, irregular or stateless) as a basis for discrimination or inheritance of the parents' status. The right of the child to be protected from statelessness or comparable status by acquiring a nationality is an independent right, which shall never be affected by discrimination on any grounds.

Moreover, with specific relation to Articles 1 to 4 of the 1961 Convention, a child's best-interest must be a 'primary consideration.[253] Thus, a child must be given a nationality 'at birth or as soon as possible after birth' since it is against the child's best interests to be without a nationality for long period of time.[254] However, it is important to note that neither the CRC, the 1962 Convention or the ICCPR put the obligation of granting nationality exclusively on the state in which the children is born. Rather, the responsibility is of any state with which the child has a 'genuine link', either by being born there or by bloodline through his/her parents. Nonetheless it is consistently affirmed[255] that it is for the state within which territory the child is born to grant nationality to a child who 'would otherwise be stateless'. Given the evident challenges in proving a negative, the Guidelines provide some guidance in this respect:

> '[t]o determine whether a child would otherwise be stateless requires determining whether the child has acquired the nationality of another State, either from his or her parents (*jus sanguinis* principle) or from the State on whose territory he or she was born (*jus soli* principle). Children are always stateless when their parents are stateless and if they are born in a country which does not grant nationality on the basis of birth in the territory. Yet, children can also be stateless if born in a State which does not apply the jus soli principle and if one or both parents possess a nationality but neither can confer it upon their children. *The test is whether a child*

[252] UNHCR Guidelines (n 212) para 8-9.
[253] ibid para 10.
[254] ibid para 11.
[255] E.g. ComRC, 'Concluding Observations: Thailand'(n 234); ComRC, 'Concluding Observations: Chile'(n 176); HRCommittee GC No.17 (n 248).

is stateless because he or she acquires neither the nationality of his or her parents nor that of the State of his or her birth'.[256]

In this respect the UNHCR maintains that the status of the child is independent from that of his/her parents. This is mainly due to the fact that the child can be left stateless for various reasons, including the ones not initially envisaged by the convention – e.g. the lack of birth registration or being unable to prove the link with the father (necessary for instance to pass Syrian nationality through *jus sanguinis* for lack of marriage registration of the parents or absence of the father). Additionally, it is understood that states are not obliged to grant nationality to a child if he/she could acquire it *immediately* through *jus sanguinis* by means of a procedural registration with the state in which the parent is a national, but only if the state concerned cannot refuse nationality.[257] In other words, for a child born 'in transit' or in the territory of a EU MS to Syrian parents having the father present, the father could still pass nationality to his child through *jus sanguinis* if the birth registration proved a genuine-link with the father and the application could be done and automatically accepted. The question is that in the particular case of children born in exile to Syrian parents, it is unreasonable to except that the parents are able to initiate such procedure, or that the Syrian state will immediately grant citizenship to the child.[258] This is true for refugee children because,[259] as clearly expressed at paragraph 27, registration with the respective authorities 'will be impossible owing to the very nature of refugee status which precludes parents from contacting their consular authorities'. But it is also true for children born from parents who are not recognized as refugees but cannot *immediately* acquire nationality through *jus sanguinis*. An argument can be made that Syrian nationality is passed *automatically* through paternal *jus sanguinis*, hence, even without proof, these children would not be *de jure,* but only *de facto* stateless.[260] In this respect, two key points should be clarified. On the one hand, the UNHCR guidelines restate the recommendation made in the final act of the 1961 Convention, regarding the treatment of *de facto* stateless persons as *de jure* stateless persons whenever possible (thus prioritising the need for protection). On the other hand, even if a child would theoretically receive nationality ipso facto by the mere fact of being born to a Syrian national,

[256] UNHCR Guidelines (n 212) para 18 (emphasis added).
[257] ibid paras 24-25.
[258] ibid para 26.
[259] Cases where the UNHCR clearly encourages the granting of nationality through Article 1(1) of the 1961 Convention, i.e. automatically at birth through *jus soli*; ibid para 27.
[260] Albarazi and Waas (n 149) 7; Article 3(A) Syrian Nationality Law (1969) <www.refworld.org/pdfid/4d81e7b12.pdf> accessed 25 June 2017.

the proof of the parentage link can be difficult to the point of being against the purpose of the 1961 Convention and the CRC.[261] In relation to the right of children to acquire a nationality, the baseline is, again, the fact that the child 'would otherwise be stateless'. Bearing this in mind, paragraph 20 explains that the 'burden of proof must be shared between the claimant and the authorities'. In what concerns the 'appropriate standard of proof', article 21 refers to Articles 3 and 7 CRC, i.e. the state should take into account the best-interests of the child and the right of every-child to acquire a nationality, not requiring a higher standard than a 'reasonable degree' of certainty that such child would be stateless, in order not to 'undermine the object and purpose of the 1961 Convention'.

It seems fair, therefore, to assume that if there is sufficient proof, such as birth certificate that establishes the connection of a child to a Syrian father not given refugee status, the State in which the child is born is not required to grant nationality. Conversely, it is unreasonable and against the aim of the 1961 Convention, the CRC and the ICCPR to require proof of this link in unreasonably difficult circumstances, since the child should acquire 'nationality at birth or as soon as possible after birth'.[262]. This point is of particular relevance when children in such cases are considered as being of 'undetermined nationality'.[263] As already explained, many children whose proof of parentage cannot be ascertained and are not classified as stateless (many times with the underlying aim of not giving them the protection afforded to stateless people), they are they characterized as being of 'unknown' or 'undetermined nationality' until nationality (or statelessness) is proven. The problem is that in the current European and Syrian context it cannot be said it is 'reasonable' to expect that the Syrian government will recognize these children as their citizens. In addition, according to the UNHCR Guidelines, the determination of nationality or lack thereof should be done 'as soon as possible', and the undetermined status of the children cannot exceed a period of five years.[264] The period of five years is connected with the requisites applied by a state if choosing to grant nationality to children born in its territory who would otherwise be stateless upon application, in accordance

[261] This is true for the great array of children not registered at birth, children born out of wedlock or to unregistered marriages, children whose father absent or does not have documents.
[262] UNHCR Guidelines (n 212) para 34.
[263] According to ibid paragraph 22, this term covers all the terms used in domestic laws to categorize people as not being stateless, such as classification of nationality status as 'unknown', 'undetermined' or 'under investigation'; See chapter 6.1.
[264] UNHCR Guidelines (n 212) para 22.

with article 1(2)(b) of the 1961 Convention. Five years is the maximum period of *habitual* residence in the territory of a state prescribed to apply for granting of nationality.[265]

Since no EU MS grants nationality automatically to a child who would otherwise be stateless, the last thing to assess are the thresholds of the conditions permitted by Article 1(2) of the 1961 Convention. Taking into consideration IL and IHRL as a whole and in particular the UNHCR Guidelines, the CRC, the ComRC General Comment No. 7,[266] and the CRC Report of the 2012 Day of General Discussion relating to the rights of all children in the context of international migration,[267] as well as the HRCommittee General Comment No. 17 on Article 24 of the ICCPR,[268] it is possible to conclude as follows:

1) The application to be lodged with the appropriate authority to grant citizenship to children who would otherwise be stateless,[269] under the conditions established by Articles 1(1)(b) and 1(2) of the 1961 Convention is preferably to be accepted as soon as possible after birth or during childhood,[270] and when only accepted at a later time the period can begin 'not later than the age of 18 and end not earlier than the age of 21'.[271]

2) The period fixed by domestic law relating to residence in the state is related to habitual residence and should be as short as possible.[272] According to the Guidelines, which refer to a wide range of other international instruments,[273] the term *habitual* residence, 'is to be understood as stable, factual residence. It does not imply a legal or formal residence requirement'.[274] Therefore, states which make the application procedure conditional upon 'lawful residence' in the state or requiring that the parents of the child possess 'a specific type of residence in the state' are in direct contravention of the 1961 Convention.[275] The rationale for this fact is two-folded. On the one hand is due to the principle of non-discrimination and the fact that the granting

[265] Article 1(2)(b) 1961 Convention: 'habitual residence in the Contracting State for a fixed period, not exceeding five years immediately preceding an application nor ten years in total'.
[266] ComRC (n 250).
[267] E.g. ComRC (n 250).
[268] HRCommittee (n 248).
[269] UNHCR Guidelines (n 212) para 9-33.
[270] ibid para 38.
[271] ibid para 39.
[272] ibid para 40.
[273] Art 1 CoE, Convention on the Avoidance of Statelessness in Relation to State Succession (adopted 15 March 2006, entered into force 1 May 2009) CETS 200.
[274] UNHCR Guidelines para 41.
[275] ibid paras 37; 40-41.

of the nationality to a child who would otherwise be stateless is not to be influenced by the child's parents' status. On the other hand, the conditions established by Article 1(2) are exhaustive and additional requirements are not permitted under the 1961 Convention.[276]

3) It is against the letter of the convention for a state to provide for a 'discretionary nationalization procedure for children who would otherwise be stateless'.[277]

4) Once the conditions set by the domestic law of the state are met, the granting of nationality is mandatory.[278]

In light of the above, it is possible to ascertain that in theory this holistic reading of the 1961 Convention in light of the developments in IHRL provides sufficient safeguards to ensure that no child is left stateless. Nevertheless, it is necessary to remember that there are a plethora of administrative, practical and legal hurdles that preclude many children's access to nationality. This is particularly true when the children are classified as being of 'undetermined nationality' and remain in that category due to barriers to proof of the contrary.

Lastly, it is important to remember that, as of July 2017, 19 EU MS [279] are contracting parties to the 1961 Convention. As such, they are required to apply the provisions set out above, which are binding upon them.

[276] Ibid.
[277] ibid para 37; again, the conditions set are exhaustive.
[278] Ibid.
[279] Austria, Belgium, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Portugal, Romania, Slovakia, Sweden and the United Kingdom. Source UN <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en#EndDec> accessed 2 July 2017.

3. EUROPEAN LEGAL FRAMEWORK

The issue of statelessness has been largely overlooked in Europe until recently, but is now 'increasingly recognized as one of Europe's major human rights issues'.[280] This chapter clarifies the obligations of EU MS, in what regards the granting of nationality to otherwise stateless children, both under international law and European law, in order to assess their compliance and ultimately their willingness to contribute to the eradication of statelessness in Europe. This chapter outlines the limited available instruments on nationality, while taking into consideration the Charter of Fundamental Rights of the European Union (EU Charter), the European Convention on Nationality (ECN), and the recommendations of the CoE regarding this issue. This chapter also briefly assesses the compatibility ofEuropean standards with existing international standards. Nonetheless, it is important to bear in mind that whilst only 19 EU MS are contracting parties to the 1961 Convention, all EU MS are parties to the CRC, thus bound to uphold the protections there enshrined, regardless of their ratification of the 1961 Convention or of the ECN.

Firstly, it is important to note that although the EU Charter does not contain any provision directly related to the right to a nationality, it does provides peripheral framework of rights from which this right can be implied. Article 24 EU Charter, for instance, recognizes that children are entitled to the extent of protection needed for their well-being and moreover, in line with the CRC, the 'child's best interests must be a primary consideration' in all matters and policies which affect them. Additionally, nationality is instrumental to the enjoyment of the right of 'respect for private and family life' (article 8 EU Charter).[281]

Nonetheless, law-making at the supra-national level can be the most effective, if not the only way to effectively address statelessness and unprotected status, as it can establish coherent mechanisms for SDP and provide a consistent threshold for the acquisition of citizenship as well as the rights afforded to stateless people. This can prove to be desirable from the point of view of the MS as well, as a way of addressing the issue of so-called 'nationality shopping'. As explained by the Meijers Committee while proposing a EU Directive on this matter:

[280] Nils Muižnieks, CoE Commissioner for Human Rights, 'Stateless but not rightless: improving the protection of stateless persons in Europe' (8 April 2014) 6 as cited in Meijers Committee, 'A proposal for an EU directive on the identification of statelessness and the protection of stateless persons' (13 October 2014) 2<www.statewatch.org/news/2014/oct/eu-meijers-cttee-call-for-an-EU-directive-on-the-identification-and-protection-of-stateles-persons.pdf> accessed 5 July 2017.

[281] Recognized in a landmark decision of the ECtHR; *Genovese v Malta* App no 53124/09 (ECtHR 2011).

> [T]he necessity of 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) and 80 TEU). Member States that offer a (better) protection regime would likely have to have to bear a heavier larger burden than Member States that offer less beneficial protection, or none at all.[282]

From a legislative point of view this was viewed as a grey area, as MS have difficulty in waiving their jurisdiction in what concerns nationality law. Nonetheless, EU Citizenship is recognized in Article 20 of the Treaty on the European Union (TEU) which has greatly affected the ruling of the Court of Justice of the European Union (CJEU) in the *Rottman* case, in which was acknowledged that '[m]ember states must exercise their powers in the sphere of nationality having due regard to European Union Law'.[283] Moreover, the EU is mandated to legislate in the areas of Asylum (Article 78 TFEU) and immigration (Article 79 TFEU), under which not only stateless persons but all persons with comparable status fall under the current context of the European Union. Lastly, Article 352 TFEU recognizes the power of the Council to legislate 'within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties'.[284] Furthermore, the rights of the child are assuming an increasingly important status within EU policies and are often discussed in EU high-level meetings, with the Commission claiming that 'work is underway to employ a comprehensive approach to the protection of children throughout the migration chain'.[285]

In what regards EU Law, however, the question of nationality is almost unaddressed. In 1997, the European Convention on Nationality was finally adopted with the aim of ensuring a minimum set of rights and safeguards in what respects nationality.

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[282] IPOL 2015 (n 116) 56 citing Meijers Committee (n 280) 5.
[283] *Janko Rottman v Freistaat Bayern* Case C-135/08 (CJEU 2010) referring to the case *Micheletti and Others*. C-369/90 (ECR 1992) I-4239.
[284] IPOL 2015 (n 116) 55.
[285] E.g. EC, 10th European Forum on The Rights of the Child: Background Paper (29 April 2017) 3-6 <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34456> accessed 4 July 2017 (Commission Background Paper).

4.1. The European Convention on Nationality

The ECN[286] was the first instrument aimed at regulating questions of nationality within the CoE, but more importantly it remains the applicable European Convention in what regards statelessness safeguards and setting of European standards on the matter. A subsequent convention was adopted to deal with the most prominent cause of stateless in Europe, the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession. Nevertheless, only the former instrument provides the framework for stateless children born in the EU in the migratory context, hence it is analysed next.

When reading the text of the ECN, the first striking feature is the recognition of the importance that international conventions, customary international law and the 'principles of law recognised with regard to nationality' play in this field, to the extent that nationality remains within domestic jurisdiction if consistent with the above international framework and with additional principles, such as the right of everyone to a nationality and the undesirability of statelessness.[287] Being greatly influenced by the 1961 Convention, article 6(2) establishes the granting of nationality to children born in the territory of a state 'who do not acquire at birth another nationality'. According to this article, such nationality can by granted (a) at birth *ex lege*, i.e. automatic *jus soli* fall-back provision (in line with the 1961 Convention) or, for children who remained statelessness (b) upon application subject to certain conditions defined by the domestic jurisdiction of each state. The same article provides that the application can have as an instrumental requisite 'the lawful and habitual residence on its territory for a period not exceeding five years immediately preceding the lodging of the application'.[288]

This point deserves further consideration, as it establishes a substantial different condition for the granting of nationality to a child that remained stateless – *lawful* and *habitual* residence are acceptable requisites to be fulfilled when applying for nationality, by or in name of a child who remained stateless. As explained by Waas, the conditions of the ECN are substantially 'harder to meet because they ignore the duration of residence accrued overall, taking into account only the period immediately prior to application and render ineligible any children who are irregularly present in the state'.[289] This requirement seems to directly contradict the

[286] CoE, European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) CETS166 (ECN).
[287] ECN Art 3-4.
[288] ECN Art 6(2)(b).
[289] Waas, *Nationality Matters* (n 24) 61.

1961 Convention and the UNHCR Guidelines on Statelessness No. 4, since the latter expressly states that it 'does not permit Contracting States to make an application for the acquisition of nationality by individuals who would otherwise be stateless conditional upon *lawful* residence',[290] and that the parents' status, either undocumented, stateless or irregular cannot be taken into consideration.[291] The rationale for this is connected on the one hand to the necessity of taking the best-interests of the child as a primary consideration and, on the other hand, to the fact that a child's right to acquire a nationality is an independent right, which should not be influenced by the child's parents' status.[292]

As for the time limit for lodging the application, the text of the provision ('application being lodged with the appropriate authority, by or on behalf of the child concerned')[293] seems to suggest that the application will have to be made while the child is *still a child*, i.e. 'every person below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'.[294] In fact, according to Waas, '[t]his provision means … that the stateless child be dependent on the action of his parents to acquire nationality.'[295] When looking to the Explanatory Report to the ECN, it is specified that 'the time-limit is 18 years of age', thus '[t]he nationality must be granted to all children fulfilling the conditions specified in sub-paragraph b'.[296] The issue here is that, as evidenced by the ESN Report 'No Child Should be Stateless',[297] even in cases where EU MS have legal safeguards capable of avoiding statelessness at birth, 'procedural requirements and additional stipulations in the law nullify relevant safeguards for some children who should benefit from them'.[298] The same report clearly recognizes that, '[t]he establishment of inclusive legislative safeguards must go hand-in-hand with measures to remove practical and administrative hurdles in accessing or confirming nationality'.[299] This is particularly alarming in what concerns the children that are categorized as being of 'unknown' or 'undetermined' citizenship for extend period of time, as this fact will preclude them from applying for nationality because they are neither stateless, nor nationals of a third-country.

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[290] UNHCR Guidelines (n 212) para 41.
[291] ibid para 37; See also ComRC, 'Concluding Observations: Chile'(n 176).
[292] ComRC, 'Concluding Observations: Netherlands' (2015) paras 24-7; 32-3 UN Doc CRC/C/NDL/CO/4.
[293] ECN Art 6(2)(b).
[294] ECN Art 2(c); See also CoE, 'Explanatory Report to the ECN (1997)' para 50 <https://rm.coe.int/16800ccde7> accessed 6 July 2017.
[295] Waas, *Nationality Matters* (n 24) 62.
[296] ECN Explanatory Report (n 294) para 50.
[297] ENS 2015 (n 108) 1-3.
[298] ibid 1.
[299] ibid.

Despite the ECN's apparent flaws, this is not the only European instrument available. Recommendation CM/Rec(2009)13 of the Committee of Ministers to Member-States on the nationality of children plays a significant role and is frequently cited at European level as setting important standards. The scope and content of this Recommendation is examined in the next section.

4.2. An Overall Analysis of the Relevant Regional Instruments

Recommendation CM/Rec(2009)13 follows a previous recommendation on this matter,[300] and is crucial for assessing the protection afforded to otherwise stateless children under the relevant regional instruments. It recognizes the need for additional measures at both national and international levels to ensure the protection of children and 'avoid and reduce' cases of statelessness.[301] This recommendation sets principles that, if properly applied, would help mitigate the flaws of the ECN, to the extent that these principles provide a comprehensive instruction on provisions to adopt in order to avoid statelessness. However, some authors are of the opinion that 'even if all the rules of the recommendation would be implemented, statelessness among children would still not be eliminated completely'.[302] Although this may be true, and even if this recommendation clearly gives preference to the *jus sanguinis* principle of acquisition of nationality,[303] there is a particularly interesting point in this recommendation that should be highlighted. In relation to the principle concerning the reduction of statelessness of children, point 4 urges MS to 'provide that children who, at birth, have the right to acquire the nationality of another state, but who could not be *reasonably expected* to acquire that nationality are not excluded from the points 1 [unrestricted *jus sanguinis*] and point 2 [grant nationality to otherwise stateless children with the only condition of the *lawful* and *habitual* residence of a parent] above'.[304]

Although *lawful* and *habitual* residence continues to be a requisite for acquisition of nationality, this recommendation, if applied, seems to provide protection for the children that may theoretically acquire automatically the citizenship through the father, but there is serious

[300] CoE Committee of Ministers, Recommendation No. R(99) 18.
[301] CM/Rec(2009)13 (n 77) 8.
[302] IPOL 2015 (n 116) 23.
[303] Cf mitigated approach CRC and 1961 Convention.
[304] CM/Rec(2009)13 (n 77) 9 (emphasis added).

risk of the 'child's nationality being reduced to a mere legal fiction'.[305] Additionally, this recommendation also encourages states to treat *de facto* stateless children as *de jure* stateless children in what respects the acquisition of nationality.[306] This could provide protection for many children that would otherwise fall through the cracks of an almost 'obsessive' preoccupation with the definition and with proof of statelessness, which often leads to the deficient application of necessary safeguards, when they exist. Lastly, the explanatory memorandum of the recommendation explains that, in the framework of the ECN, Article 6(2) 'allows for a children born in the territory to remain stateless for a maximum period of five years. It is therefore necessary to develop additional rules'. The recognition for the need to further regulate in this area may be related to the fact that, according to the Committee of Ministers, leaving a child stateless in the territory in which he/she was born and his/her parents have lived 'should not be allowed'. The Committee of Ministers also states that this kind of statelessness is particularly 'striking' due to the fact that states revoke the nationality acquired by *jus soli* at birth if it is proved that the child has acquired another nationality, according to ECN Article 7(1). Because of this, the Committee opines as follows:

> It is therefore preferable to provide for children born on the territory of a state, who otherwise would be stateless, to acquire the nationality of that state. Ideally, the acquisition of nationality should occur at birth or shortly after birth with retroactivity. However the principle allows for the acquisition of nationality without retroactive effect. In that latter case, it should be ensured that the child concerned enjoys the same rights as children born as nationals. A decision on such an application should be given as soon as possible in order to terminate the statelessness of the child (see principle 8 [which determines that in the cases in which a child is categorized as being of undetermined nationality, this status should be maintained for a brief period of time and that the states should in these cases lower the burden of proof]).[307]

In fact this recommendation and its explanatory memorandum could provide effective safeguards for children, especially through the effective application of principles 2 to 8.[308] However, this is unlikely to happen without the adoption of measures at the supra-national

[305] Gábor Gyulai, 'The long-overlooked mystery of refugee children's nationality' in ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 243.
[306] CM/Rec(2009)13 (n 77) 9.
[307] ibid 17.
[308] ibid 16-21.

level, and particularly without any mechanism for monitoring the effective implementation of such measures.

The Council of Europe, the European Commissioner for Human Rights and other bodies have been increasingly vocal in advocating for the need of effective action against statelessness. In 2015 the first ever 'Conclusions of the Council and the Representatives of the Governments of the Member States on Statelessness'[309] were adopted, with the aim of putting statelessness in the spotlight in the specific contexts of immigration and asylum, and to exchange good practices between MS. At the time Asselborn, as President of the Council, acknowledged the need for the EU to support UNHCR and the international community in its effort to eradicate statelessness. Moreover, in March 2017 the Committee of Ministers of the CoE adopted a new document relating to 'children affected by the refugee crisis',[310] where the extreme vulnerability of children in this context and the urgency in addressing this issue were recognised, stating that, '[p]roviding international protection to children fleeing war, violence and persecution, and guaranteeing their safety and fundamental rights, should therefore be an urgent priority for all Council of Europe member states'.[311] It is interesting to observe a shift towards amore holistic child-rights based approach, recognizing the need to assess the best-interests of the child and act according to the CRC– prioritising international protection for children in need, without focusing on a hierarchy of protection which can lead to unfair and discriminatory treatment. Lastly, in the same document, the necessity and urgency to avoid statelessness for children born in exile to Syrian mothers that 'struggle to proof paternity' has been acknowledged, as well as the need to respect International and European Standards.

This is a rapidly evolving field, in part because just now the extent of the issue, its consequences and its interconnection with other fields are slowly being understood. Consequently, the need for approaching this issue in a holistic manner is slowly but steadily being acknowledged at EU level.[312] The latest development in the field of statelessness is the Joint Hearing on Statelessness which took place on 29 June 2017 at the European Parliament,

[309] CoEU Statelessness Conclusions (n 114).
[310] CoE Committee of Ministers, 'Protecting children affected by the refugee crisis: A shared responsibility Secretary General's proposals for priority actions' SG/Inf(2016)9 final <http://www.refworld.org/docid/58d526c44.html> accessed 7 July 2017.
[311] ibid.
[312] European Parliament, 'resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)) P8_TA(2016)0102 (12 April 2016); CoE, 'Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe' CM(2017)54-final (19 May 2017); European Parliament, 'Resolution of 25 October 2016 on human rights and migration in third countries'(2015/2316(INI)) P8_TA(2016)0404 (25 October 2016).

organized by the LIBE and PETI Committees. Although the outcomes of the meeting remained unknown at the time of finalising this dissertation, this is a crucial recognition of the urgency of this problem in the current EU Context and of its cross-cutting nature.[313]

While it is important to acknowledge the importance of the statements and declarations outlined above, it is also important to ensure the effective implementation of the safeguards to avoid statelessness and comparable unprotected status, such as the ones adopted in the Resolutions 1989(2014) [314] and 2099(2016). Both recognized that notwithstanding the extensive international legal and regulatory framework aimed at avoiding children from being born stateless, 'the national legislation of several European Countries contains provisions which raise serious concern and may cause or prolong situations of statelessness'.[315]

It is time for EU MS to uphold their international and regional obligations and guarantee that no double-standards are applied in practice. It is crucial to recognize in fact that '[t]aking the necessary measures to grant nationality to a child who would otherwise be stateless is not an act of privilege or charity, it is the fulfilment of a fundamental child right protected … under human rights law'. [316] With this particular feature in mind, this dissertation turns to ascertaining whether EU MS are *effectively* ensuring that no child is left unprotect, in line with their supra-national obligations. In this respect is important to stress that, as further evidenced in chapter 5, not all EU MS have the same standards to uphold, to the extent that some MS have acceded only to the ECN, some MS have acceded only to the 1961 Convention and some to neither of them. This points to the need for additional standardizing procedures, not only for the determination of statelessness but also in relation to the level of protection afforded. Only in this way the 'burden', to adopt a term used by the MS, will be equally shared, and only in this way existing legal gaps will be closed, enabling children to be what they should be – children, first and foremost.[317]

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[313] For more information on this Joint Hearing see: <http://www.europarl.europa.eu/committees/en/libe/events-hearings.html?id=20170626CHE02021&mc_cid=317f4ffe9d&mc_eid=339b3e75ac> accessed 7 July 2017.
[314] CoE Parliamentary Assembly, 'Access to nationality and effective implementation of the European Convention on Nationality' Resolution 1989(2014).
[315] Resolution 2099(2016) para 7 (n 113).
[316] ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 126.
[317] PICUM, 'Children First and Foremost: A guide to realising the rights of children and families in an irregular migration situation' (2013) <http://picum.org/picum.org/uploads/publication/Children%20First%20and%20Foremost.pdf> accessed 7 July 2017.

5. SCRUTINIZING COMPLIANCE WITH INTERNATIONAL STANDARDS AMONG THE EU MEMBER-STATESS

Europe, and the European Union are facing one of the most serious humanitarian challenge of its modern history but this cannot be used an 'excuse' to circumvent international obligations. It is apparent, when examining current EU migration policies,[318] that the EU MS and the EU as a whole are simply not doing enough to ensure the international protection of children in the context of migration, both when they are 'in transit' or in the territory of EU MS. Numerous reports, research papers and studies evidence the need for the EU to adopt a child-rights based approach and treat children as children, first and foremost.[319] Nonetheless, this path cannot be taken unless the EU MS find a common ground. From stories of women arriving in EU territory, giving birth immediately upon arrival and continuing their journey one hour later,[320] to images of babies being born inside refugee camps,[321] it does not take much to see that the provisions enshrined in the CRC are mostly disregarded.

The aim of this concluding chapter is to provide acritical analysis of the steps taken by the MS to provide protection to children facing statelessness. This analysis will be made by examining existing reports on existing domestic legal framework, and on the administrative practices currently in place in the EU MS. The aim is to identify existing gaps and discrepancies between law and practice. Moreover, the particular case of Syrian children born to undocumented migrants will be considered, in light of recent changes in immigration policies in some EU MS, to understand how they may have directly or indirectly contributed

[318] CoE Parliamentary Assembly, 'The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016' Resolution 2109(2016); EMN, Policy Brief Conclusions on the Conference 'Statelessness: Exchange of Experiences and Good Practices' (2016) <www.emnluxembourg.lu/wp-content/uploads/2016/03/Policy-Brief-conclusions-Statelessness-conference.pdf> accessed 8 July 2017; Daria Davitti and Annamaria La Chimia, 'A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control', Criminology and Socio-Legal Studies Research Paper Series (April 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2966042> accessed 7 July 2017.

[319] ENOC 2016 (n 147) 4; Commission Background Paper (n 285) 4; EUCommission, Communication from the Commission: Towards an EU Strategy on the Rights of the Child, COM(2006) 367 final (4 July 2006); Lilana Keith, 'Why a rights-based approach to migrant children? The case of undocumented children and families' (PICUM 2014) <www.liverpool.ac.uk/media/livacuk/law/european-childrens-rights-unit/PICUM_Why,a,rights-based,approach,to,migrant,children_Nov2014.pdf> accessed 6 July 2017; Nils Muižnieks CoE Commissioner for Human Rights, 'Reaching the heights for the rights of the child' CommDH/Speech(2016)1.

[320] ENOC (n 147) 16.

[321] Due to the lack of official data most figures are taken from news reports. E.g. Emma Batha, 'European refugee crisis risks creating generation of stateless children <http://news.trust.org//item/20150920230231-jdujs> accessed 6 July 2017; in 2016 more than 1,000 asylum seekers gave birth to children in Greece alone, Aryn Baker, 'The story so far' <http://time.com/finding-home-stories/> accessed 6 July 2017.

to childhood statelessness. This premise is based on the belief that only a holistic rights-based approach to statelessness can ensure effective international protection, whilst accommodating the multiplicity of people and singularity of each particular situation of these children.

This chapter takes as its baseline the CoE 2016 Resolution on 'The need to eradicate statelessness of children',[322] as well as the UNHCR Global Action Plan to End Statelessness until 2024.[323] In doing so, it assesses the state of the art in what concerns accession to the International Conventions on Statelessness and the ECN,[324] the legal safeguards existing in EU MS domestic laws to prevent statelessness,[325] and the trend in national policies and practices to understand if the existing legal safeguards are applied in practice.[326]

5.1 The State of the Art in Relation to the Respect of EU MS International Obligations

While it is true that all the EU MS are bound by the CRC and consequently bound to ensure that every child has the right to acquire a nationality, access to immediate birth registration, and that all the rights should be ensured having in mind the CRC Guiding Principles,[327] it is equally true that these rights are to be implemented through national legislations, having due regard to their international obligations and EU law.[328] Consequently, in order to objectively assess whether MS are legally and effectively complying with their regional and/or international obligations is necessary to identify the relevant standards by which the MS are in effect bound. Action 9 of the UNHCR's Global Plan to End Statelessness is based on the accession to the existing UN Stateless Conventions and MS have been encouraged numerous times by the CoE to do it. Despite many arguments by MS that safeguards are already in place, thus being already complying with the International obligations, taking the responsibility of acceding to the Stateless conventions can be seen as direct way for MS to fulfil their commitment.

[322] Resolution 2099(2016) (n 113).
[323] UNHCR 2014-24 (n 104).
[324] Action 9 of the UNHCR Global Plan and point 12. 1 of the Resolution 2099(2016)
[325] Actions 2, 6 and 7 of the UNHCR Global Plan and point 12. 2 of the Resolution 2099(2016).
[326] Point 12.3 of the Resolution 2099(2016).
[327] CRC Guiding Principles (n 228).
[328] CRC Art 7(2); and *Rottman* Case (n 283).

In what concerns the 1954 Convention, despite the fact that 24 EU MS are contracting parties, it is regrettable that Cyprus, Malta, Estonia and Poland are still not parties to the Convention, especially after the already mentioned EU Pledge at the UN High Level meeting and the CoEU Conclusions on Statelessness.[329] This fact assumes further relevance as none of these states are contracting parties either to the 1961 Convention or the ECN.[330]

In respect of the 1961 Convention, there are 19 EU MS that are contracting parties, these are: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Portugal, Romania, Slovakia, Sweden and the United Kingdom. France has signed the convention in 1962 but has not yet ratified it.[331] 12 of these 19 MS are also parties to the ECN, nevertheless the standards to which they are bound according to IL is the 1961 Convention, which affords the most favourable treatment.

The ECN, in turn has 18 state parties but many MS have only signed the convention without ratifying it. In effect only 12 EU MS are parties to the ECN, namely, Austria, Bulgaria, Czech Republic, Denmark, Finland, Germany, Hungary, Netherlands, Portugal, Romania, Slovakia and Sweden.[332] A very interesting point to notice is that all of these states are also contracting parties to the 1961 Convention and therefore, the 1961 Convention standards are the ones to be applied.

Lastly there are MS that have acceded neither to the 1961 Convention nor the ECN. Cyprus, Estonia, France,[333] Greece, Luxemburg, Malta, Poland, Slovenia and Spain, i.e. nine EU MS, are not contracting parties to any convention directly at protecting children from statelessness.

In sum, due to the fact that all EU contracting parties to the ECN are also contracting parties to the 1961 Convention, the latter will be used as appropriate threshold when assessing compliance. On another note, the nine EU MS that are not parties to any of the two conventions will, when appropriate, be included in the assessment, due to their obligations under the CRC and its guiding principles.

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[329] CoEU Statelessness Conclusions (n 114).
[330] Source UNTC <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en> accessed 8 July 2017.
[331] ibid.
[332] Source CoE Portal <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/signatures?p_auth=U7s9qncR> accessed 8 July 2017.
[333] Signatory party to both the 1961 and ECN Conventions.

5.2 Legal Safeguards in the EU MS Domestic Laws Aimed at Preventing Statelessness

As already ascertained, in a continent that strongly favours blood (*jus sanguinis*) rather than soil (*jus soli*) as principle to acquire nationality, the children of EU MS citizens will be, in principle, shielded from statelessness. Nonetheless, there is then the need to safeguard children that are born in EU territory to non EU citizens, i.e. children that have the link by soil, but not by blood. As elucidated in the ENS Report 'No Child Should be Stateless', there is no need 'to entirely overhaul the way in which European states regulate access to nationality, [as] children could be protected from statelessness by a single fall-back provision based on *jus soli*'.[334] The necessity and scope of these safeguards was already analysed in chapter [add number], now the aim is to understand which EU MS has introduced them and to what extent this is sufficient for the effective prevention and consequent eradication of statelessness.

Ideally and in accordance with the 1961 Convention and the UNHCR Guidelines on Statelessness No. 4, states should grant automatic nationality when a child is born in the territory of the state and 'would otherwise be stateless'. Nonetheless, the state can make the granting of nationality subject to a non-discretionary application process, subject to certain conditions, thoroughly analysed in chapter 3.

In the current European context, however, an additional issue arises, relating to children born 'in transit' when their parents or mother were on their way to seek refuge in the EU.[335] These children will be at an even more acute risk of being stateless mainly for two reasons. On the one hand, most of the times children born 'en route' are not registered at birth, as they should, with the consequence that proof of parentage is even more difficult. On the other hand, they are not born in the territory of EU MS,[336] which make them not legitimately entitled to 'automatic' citizenship at birth in the MS that grant it. In this case the children will have to apply for acquiring citizenship by naturalisation, which according to Article 32 of the 1954 Convention should be facilitated 'as far as possible'.

[334] ENS 2015 (n 108)11.
[335] For more (although limited) information, regarding the current situation of children 'born in transit', identified by the EMN as 'children who physically exist but not legally' see EMN 2016 (n 110) 13.
[336] This could be arguable, especially for children born at sea. See Giuffrida (n 224)113-114.

Birth registration and stateless determination procedures play a crucial role in both situations, as we will see in the following sections. The former is the proof of the legal existence of the child, even if stateless or of undetermined nationality: proof of birth registration will facilitate all the subsequent processes as it contains all the information *available* about the child concerned. Stateless determination procedures, in turn, are instrumental to the whole application of the safeguards. As it will be explained in further detail, on the one hand the requisite 'would otherwise be stateless' calls for a determination of what this expression means; and on the other hand, for children born in exile (or not) who remained stateless and wish to apply for citizenship through naturalisation, the standards applied for the recognition of this *status* and the burden of proof will have a significant weight in the type and extent of protection afforded to the child.

5.3. Domestic Safeguards to prevent statelessness at birth

This section focuses on the existing legal safeguards directly aimed at preventing statelessness at birth according to Article 1 of the 1961 Convention and Article 6(2) of the ECN, either automatically at birth or procedurally, subject to certain exhaustive conditions that when fulfilled constitute a legal right to citizenship, i.e. the granting of nationality cannot be denied.[337] In the assessment of the existing safeguards attention will be paid to the difference of residence requisites, i.e. habitual residence under the 1961 Convention and habitual and lawful residence under the ECN. As mentioned, the international standard to be taken into account will be the 1961 Convention, not only because all the EU MS that are parties to the ECN are also parties to the 1961 Convention, thus the latter assumes precedence, but also because as reiterated throughout this dissertation, the parents' (either migratory or residence) status is irrelevant for the right of the child to acquire nationality of the state in which he/she was born if he/she would otherwise be stateless, under the CRC and in the views of the HRCommittee and the ComRC.[338]

As it will be noted, although the great majority of states have legal provisions that are theoretically in line with international standards, the wording of those provisions often allows for either discretionary interpretation that lead to discrimination, or arduous burden of proof

[337] UNHCR Guidelines (n 212) para 34.
[338] Chapters 3.3 and 3.4.

that the child is stateless or not able to acquire the nationality through bloodline, which according to the UNHCR should be shared between the claimant and the state.[339]

According to a comparative study of the safeguards to ensure the right to a nationality for children born in Europe,[340] commissioned by the ENS,[341] 13 EU MS contain 'full' legal safeguards in their domestic legislation protecting children born in the territory of the state from statelessness that are in accordance with the international standards. In this respect Belgium, Bulgaria, Finland, France, Greece, Ireland, Italy, Luxembourg, Portugal, Slovakia and Spain are the MS considered to have full and automatic safeguards. In other words, these MS have, in their domestic law, provisions that grant automatic citizenship at birth to a child 'who would otherwise be stateless'. These countries are hence seen as existing 'best practice'. Nevertheless, once one takes a closer look to the specific provisions many doubts arise, not only in relation to the principle of the best interests of the child that has to be always taken into account, but also in relation to the principle of non-discrimination, so many times addressed by the ComRC. This is mainly connected to the fact that, as already mentioned the 'who would otherwise be stateless' criterion allows too much discretion in relation to what requirements or standard of proof are required to provide sufficient evidence to the state in which the child is born that he/she will effectively be left stateless if not acquiring the nationality by *jus soli*.

The proof required can be divided in two categories: explicit on the text of the law, or implicit by stating for example that nationality is granted upon birth 'either where both parents are unknown or stateless, *or where he or she does not acquire his or her parents' citizenship according to the law of the State to which the latter belong*'.[342] The domestic laws of Belgium and Luxembourg, for instance, expressly require such proof, while the domestic laws of Finland Greece and Italy implicitly entail the same requirements.[343] This requirement of proof, either implicit or explicit, will in practice preclude many children from acquiring

[339] UNHCR Guidelines (n 212) para 20.
[340] Information was cross-checked with the the EUDO Citizenship Database to avoid errors, according to the parameter 'S01 Born Stateless'; See EUDO Citizenship Database Protection against Statelessness Data <http://eudo-citizenship.eu/databases/protection-against-statelessness> accessed 8 July 2017 and with the EMN 2016 (n 110).
[341] ENS, 'Ending Childhood Statelessness: A comparative study of safeguards to ensure the right to a nationality for children born in Europe', Working Paper 01/16 (May 2016) <www.statelessness.eu/sites/www.statelessness.eu/files/file_attach/ENS_1961_Safeguards_Stateless_children.pdf> accessed 8 July (ENSWP).
[342] Article 1(b) Italian Nationality Law: Act No. 91 of 5 February 1992 <http://eudo-citizenship.eu/NationalDB/docs/IT%20Act%2091%201992%20(consolidated,%20English).pdf> accessed 8 July 2017.
[343] ENSWP (n 341) 7.

nationality at birth. The children who are most vulnerable, the ones in the context of forced migration, will be the most affected for two reasons. On the one hand, because this proof often requires contact with the consular authorities of the state of origin, fact that completely ignores situations in which parents are in no conditions to contact their respective authorities (e.g. refugees or other people are risk of persecution). On the other hand this requirement also ignores the fact that, even if according to the law of the state theoretically grants nationality to children by *jus sanguinis*, or paternal *jus sanguinis* in the case of children born to Syrian parents, the parentage link will more likely not be proven, either because of lack of documents, such as marriage registration, or because the father is absent (either because it is deceased, or displaced or fighting in the war). As highlighted by the ENS comparative study and as already ascertained in this dissertation, the UNHCR's authoritative guidelines provide the burden of proof to be shared between the parents/guardians of the child and that the required proof should be determining 'to a reasonable degree' that the child cannot acquire other nationality, otherwise the 'objective and purpose' of the 1961 Convention would be undermined.[344] Moreover, requiring an almost discretionary decision on the standard of proof acceptable creates endless opportunities to circumvent the granting of nationality to children. To a certain extent it can be said that, although these countries are seen as best practice, they can *in practice* circumvent their obligations under International Law.

Malta and the UK, on the other hand, allow for the acquisition of citizenship through application, that in practice will entail the same obstacles as the above. The evidence to be presented in order for the child to be protected against stateless requires, under the Domestic Nationality Act of the UK, 'over and above that required to establish a claim to citizenship before formally acknowledging a claim'.[345] As explained by the report, the 'pretext' for such a high standard is the safeguard against fraud. However, as already mentioned, stateless persons in need of international protection more often than not lack documentation, which will pose even more obstacles to the ability to provide the required evidence, especially due to the fact that the UK does not accept birth certificates as evidence, rule that is not in line with the UNHCR Guidelines. Conversely, the domestic law of other MS foresee the possibility of revoking the grant of nationality in cases where it is later proved that the child has acquired nationality of another state, for example Belgium and France. Although not against the 1961 Convention, as it would not render the child stateless, attention has to be paid to the time until

[344] ENSWP (n 342) 7.
[345] ibid 6-9.

such nationality can be withdrawn, as if it is later in childhood this can be completely against the best interest of the child, if the latter has lived since birth in the territory of the state who now revokes the nationality.[346]

Within the second category identified by the ENS comparative study fall the States that offer 'partial' safeguards, not in line with international standards. Either because the timeframe for application is too little, because the states make the application contingent upon the residence status of the child,[347] or make it conditional on the child's parents' status, either residential or nationality (or statelessness).[348] For example a child born stateless in Austria, will have to wait until completing 18 years to apply for naturalisation, provided that he/she has *habitual* residence[349] in the state for five years prior to the application and ten years in total and was not convicted for crimes with a sentence superior to five years, but has only a two year window to do it.[350] There are states, however, that fall into more than one of the above 'categories'. Estonia for example, makes the application conditional upon the residence status of the child and the parents, i.e. they have to be legally resident in the territory for at least five years and moreover the application is conditional upon the parents' citizenship status (i.e. the child will only be given Estonian nationality if the parents are stateless themselves).[351] Many other European states make the application for nationality dependent upon the status' of the parents, such as the Czech Republic (parents have to be stateless themselves),[352] Hungary (parents must be both stateless and legally residing in the country),[353] Slovenia (both parents stateless or of unknown citizenship) and many others. In this category of countries that

[346] A similar consequence will arise in the cases in which the child is categorized of being of 'undetermined' nationality, with the hope that the link of paternal parentage and consequently the nationality can be established.
[347] E.g. Netherlands; Cf ComRC Committee, 'Concluding Observations: The Netherlands' (n 292) as cited in ENSWP (n 341) 13.
[348] ENSWP (n 341) 11-12; Cf ComRC, 'General Comment No. 5: Measure of implementation of the convention on the Rights of the Child'(2003) para 12 CRC/GC/2003/5.
[349] In line with the 1961 Convention.
[350] EUDO Citizenship <http://eudo-citizenship.eu/databases/protection-against-statelessness?p=&application=globalModesProtectionStatelessness&search=1&modeby=country&country=Austria> accessed 9 July 2017; In this case if Austria allowed just one more year to timeframe allowed for the lodging of the application it would be in line with the International Convention although it is arguable that this procedure is in the best interests of the child, given that if the child was born there and lives there he/she will have to pass all his/her childhood and part of adulthood stateless in the country with he/she has the 'genuine link'. See ENSWP (n 341) 12.
[351] EUDO Citizenship <http://eudo-citizenship.eu/databases/protection-against-statelessness?p=&application=globalModesProtectionStatelessness&search=1&modeby=country&country=Estonia> accessed 9 July 2017. Similar requirementsin the European post-Soviet states, which have the largest population of stateless persons in Europe, for example Latvia. ENSWP (n 341) 15; EMN 2016 (n 110) 12.
[352] EMN 2016 (n 110) 12.
[353] EUDO Citizenship <http://eudo-citizenship.eu/databases/protection-against-statelessness?p=&application=globalModesProtectionStatelessness&search=1&modeby=country&country=Hungary> accessed 9 July 2017.

directly contravene international standards, attention should be paid to the cases of Sweden, Denmark and Germany, all of them contracting parties to the 1961 Convention. Firstly due to the high number of Syrian asylum-seekers applying to these countries,[354] and secondly, in the particular case of Denmark, because it had the greatest number of Stateless persons applying to asylum in the EU MS in [add year], i.e. 490 persons.[355] Due to these reasons, the fact that these MS make the application for nationality contingent upon the lawful residence of the child, or of the parents in the German case,[356] will possibly leave many children born in these countries at risk of statelessness. To these risks, one has to add the 'difficulties interwoven with obtaining residence permits by stateless persons.[357]

Moreover, there are the cases where EU MS do not offer any kind of legal safeguards to otherwise stateless children born in their territory. This are the cases of Cyprus and Romania, in spite of the latter being a party to both the 1954 and 1961 Stateless Conventions and the ECN.

From this brief screening of the existing domestic legal safeguards, it is possible to detect a pattern of inconsistency with international standards. Fifteen MS have limited or no safeguards at all in their domestic legislation,[358] and although 13 EU MS are considered to be in line with the international standards, it is possible to identify *a priori* many obstacles, not only legal but also practical, that will leave many children at risk of statelessness, for example when the child theoretically has the right to acquire nationality by *jus sanguinis*, but is in practice is precluded from this right. As pointed out by the ENS and also by the CoE Parliamentary Assembly, '[t]he primary focus of legislative safeguards in this area must be to provide children with a much needed nationality whenever statelessness threatens'.[359]

Lastly it is important to highlight the fact that the right of every child to acquire a nationality is enshrined in the CRC, and by this reason even the states which are yet to ratify the Stateless Conventions have to provide safeguards to protect otherwise stateless children in a non-

[354] The numbers of Syrians applying for asylum in these countries in 2016 was, according to the Eurostat 4 710, 1 255 and 266 250, respectively. See Eurostat, 'First time asylum applicants by country of citizenship in 2016' <http://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1> accessed 9 July 2017.
[355] ibid.
[356] ENSWP (n 341) 13-14.
[357] ibid. According to the ENS, '[i]n Germany, where stateless and 'unknown nationality' are not separated in published population statistics, there are over 9,000 people in this category under the age of 20'. See ENS 2015 (n 108) 4.
[358] Eleven of these are parties to the 1961 Convention.
[359] ibid 18.

discriminatory manner and in accordance with the best interests of the child.[360] The ComRC, as discussed in chapter 3, could have a crucial role in addressing this issue.[361]

5.3.1. Domestic Universal and Immediate Birth Registration

By universal and immediate birth registration it is understood registration provided for all children born in the territory of the state, immediately after birth, in accordance with Article 7(1) CRC and Article 24 ICCPR. As it will be elaborated in this section, birth (along with marriage) registration plays a crucial role for the avoidance of stateless in the context of forced migration. As a starting point, it can be said that the great majority of children born in Europe has access to birth registration. Indeed, according to the ENS the percentage of birth registration in EU MS is 100%, compared with 65% in the rest of the world.[362] Nonetheless, the factors taken into consideration by the statistics are, in the words of the UNICEF, inconsistent, and can obscure realities on the ground.[363] Moreover, according to the ENS, taking into account that in many states this percentage was 'assumed', because birth registration is only one of the elements within the civil registration statistics, the gaps persist and there are in fact too many cases of un-registered children at birth, with this having life-long consequences.[364] As briefly mentioned, this is identified as a 'new cause' of statelessness by Waas, not identified as such at the time of draft of the 1961 Convention and therefore not foreseen there. It is now identified, however, as a serious cause for statelessness by the UNHCR, along with migration, and is enshrined in the CRC.[365] In fact, birth registration for children born in the context of forced migration is indispensable, but it can prove to be much more difficult to access. The relevance of birth registration is simple, as it is 'the first legal acknowledgement of a child's existence: without a proof of identity a child is invisible to the authorities'.[366]

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[360] ibid.
[361] E.g. ComRC, 'Concluding observations; Switzerland' (26 February 2015) para 31 UN Doc CRC/C/CHE/CO/2-4 not party to 1961 Convention nor ECN, regarding the right of children born in Swiss territory to birth registration and Swiss nationality 'irrespective of the legal status of their parents'.
[362] Croatia and Romania no data was available: ENS 2015 (n 108) 26
[363] ibid.
[364] ibid 27.
[365] Waas, *Nationatily Matters* (n 24) 151-152.
[366] Monica Bermudez, 'Accessing documents, preventing statelessness' in ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 226.

In particular in the current context, birth registration can be the one factor that protects a child from statelessness, not only because it 'provides a crucial point of contact between the newborn and the state',[367] being key to future claims of nationality by otherwise stateless children, but mainly because it may be the only proof of parentage linkage. If the father is present and can be identified when the birth certificate is issued, this may provide the necessary proof for children born to Syrian citizen fathers to later acquire Syrian citizenship. As highlighted by Refugees International:

> 'concrete steps taken now by host governments to legally record a child's birth and collect specific information about their father's name, location of birth, and family members could facilitate the ability of Syrian children to claim their citizenship and repatriate to Syria when stability is restored'.[368]

In light of the above, it can be said that birth registration can, sometimes,[369] mean that EU MS will not be obliged to grant the child citizenship, insofar as the father is identified and Syrian citizenship can be recognized. While the question is delicate and may differ from person to person, for the families that will want to return home after the conflict, this may be very important. As already stated, it is not the aim of this dissertation nor that of international law to oblige every state to grant nationality to every child that is born in their territories, but rather to the ones that would otherwise be stateless. In other words, when 'it is established to a 'reasonable degree',[370] that an individual would be stateless unless he or she acquires the nationality of the State concerned'.[371]

Returning to the point of birth certification, the ComRC has referred to this issue numerous times in its Concluding Observations,[372] and also in its General Comment No. 7, concerning the implementation of rights in early childhood.[373] Nevertheless, the obstacles to birth-registration endure, especially for children of undocumented asylum-seekers, particularly due

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[367] Waas, *Nationality Matters* (n 24) 155.
[368] ENS 2015 (n 108) 26 citing S. Reynolds and D. Grisgraber, *Birth Registration in Turkey: Protecting the future of Syrian Children* (30 April 2015).
[369] Cases where the father can be officially identified as such. For such purposes, marriage registration can play an important role as well. See Waas , *Nationality Matters* (n 24)153-156.
[370] The terms 'otherwise stateless', 'reasonable degree' or 'appropriate standard of proof' are open to interpretations that may be used by the states in their 'favour'. Nonetheless, the UNHCR Guidelines (n 212) highlight that the consequence for a 'incorrect finding that a child possesses a nationality' is so grave – statelessness, that really close attention should be paid in order not to undermine the whole purpose of the institute.
[371] UNHCR Guidelines (n 212) para 21.
[372] Waas, *Nationality Matters* (n 24) 158.
[373] ComRC GC No.7 (n 250) para 25.

to the fact that only a limited number of European states' domestic legislation ensure the right of birth registration for *all* children, irrespectively of their or their parents status.[374] As coherently advanced by Keith, the right of children of undocumented status to registration at birth can be unclear in law, but in practice it is even more so. In her words, '[b]arriers can include risks of denunciation, lack of knowledge on the part of both civil servants and undocumented parents about rights and procedures for birth registration and discriminatory refusals'.[375]

All in all, it is clear the importance that immediate birth registration assumes in protecting the right of every child to acquire a nationality, in particular those born in the context of forced migration. However, there is yet another factor which is as relevant as birth registration, and that is stateless determination procedures, which this chapter will now consider.

5.3.2. The Importance of Stateless Determination Procedures

Stateless Determination Procedures (SDP), similarly to birth registration, serve a simple, yet crucial purpose: identify the receiver of the protection available to stateless persons. In other words, the decision of if a child 'would otherwise be stateless' or whether a person is recognized as a citizen by the law of another state will influence all the institute and the extent of the protection afforded to such persons. If the person is not recognized as stateless, he/she will not be given special protection under the 1954 or 1961 Conventions and the child will not be granted nationality, being left at risk of permanent statelessness.[376] This risk is aggravated when the child remains living in the country until adulthood, to the extent that, if not identified as stateless and not in possess of a lawful residence permit, a child born in a state with which s/he has acquired the 'effective link' by customs and culture of that state, s/he risks expulsion or marginalization to avoid expulsion. Moreover, the SDP are key to acquiring a residence permit in the few countries which grant it automatically to stateless persons, namely France, Hungary, Italy, Latvia, Spain, Croatia, the UK and Ireland,[377] which in turn will be indispensable for acquiring nationality by naturalization, even for children born in

[374] Lilana Keith, 'Risks of statelessness for children of undocumented parents in Europe' in ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017).
[375] ibid 270.
[376] IPOL 2015 (n 116) 45.
[377] EMN 2016 (n 110) 9; even if, as evidenced in the report, the residence permit granted is temporary, this will allow time for establishment of the persons/families concerned to later apply, if necessary, to a permanent residence permit.

such states, due to inconformity with international standards.[378] In spite of the significance of the SDP for the whole institute of statelessness, neither the 1954 nor the 1961 Conventions establish such procedure or its instrumental necessity. The UNHCR authoritative [379] Handbook on Protection of Stateless Persons, on the other hand, provides that the obligation of having a consistent SDP is implicit in the Conventions, while affording discretionary power to the states 'in the design and operation of stateless determination procedures as the 1954 Convention is silent on such matters'. [380] The Handbook lays down some recommendable procedures as well as ways to access to them, while establishing some criteria, as well as procedural guarantees, such as the formalisation of such procedures in law[381] and right to an appeal.[382] Moreover it is established that the assessment of evidence in order to determine the stateless status of someone 'requires a mixed assessment of law and fact'.[383]

Notwithstanding its relevance and the guidelines provided by the UNHCR, SDP remain largely overlooked in the EU, with only seven MS having dedicated (albeit somewhat dysfunctional) procedures aimed at identifying stateless persons. As briefly mentioned before, these are France, Hungary, Italy, Latvia, Lithuania and Spain,[384] which vary greatly in terms of procedures. According to the EMN, '[s]ome MS use general administrative procedures, an administrative practice or apply the determination procedure within other administrative procedure (i.e. citizenship, residence permit, international protection procedures or ex-officio)'.[385] The concerns and possible drawbacks arising for such inconsistency are endless. The lack of standardised SDP allows for almost complete discretion and unaccountability for the states which fail to recognise stateless persons, thus being in contravention of their international obligations. Moreover, the uncertainty faced by stateless persons when trying to be identified as such will be further aggravated in the cases of undocumented stateless persons, due to the fact that most of the few countries that have a SDP ask for documentation. In addition, it is important to point out that according to the EMN Report, every state which has SDP explicitly places the burden of proof on the applicant, which is clearly in violation of

[378] The 'parents' status'; 1961 Convention and CRC.
[379] Insofar it is the systematisation of the UNHCR's Authoritative Guidelines on Statelessness.
[380] UNHCR Handbook (n 56) para 62.
[381] ibid para 71.
[382] ibid paras 76-77.
[383] ibid 83.
[384] EMN 2016 (n 110) 5.
[385] ibid.

the provisions established in the UNHCR's Handbook.[386] Another interesting fact to point out is that in France and in Italy a copy of a valid residence permit is required in order for the SDP to take place.[387] However, as mentioned above, these states grant automatic residence permit when the stateless status is determined.[388] This circular requirements only exacerbate the already precarious and vulnerable status of stateless persons and in this case children, which will be left at the mercy of the willingness of the MS, completely undermining the fact that stateless children have a legitimate right to be recognized as such.

To all the hurdles outlined, the practices of MS authorities must be added. The fact that the SDP are discretionary, along with their importance to the protection afforded, will in many cases hamper the access of stateless children to the rights to which they are entitled. In fact, as highlighted by Waas in the ISI's 2017 report, '[w]here research … has been undertaken, it shows children – or their parents, on their behalf – face an uphill battle in trying to convince the requisite state that they are 'otherwise stateless' and should be granted nationality on that basis'.[389]

From all of the above it is possible to ascertain that only a standardized procedure adopted at EU level could mitigate the hurdles faced by this already vulnerable group of people. According to the study for the LIBE committee, enactment of legislation at EU level in the specific field of SDP is not only desirable, but also supported by Articles 21(2) TFEU relating to EU Citizenship, and Articles 78 and 79 TFEU concerning respectively asylum and immigration – in accordance with the legislation enacted at the EU level in the field of Common EU Asylum Policy.[390]

[386] UNHCR Handbook (n 56) 89; in the subsequent chapter the UNHCR elaborates that, '[g] Given the nature of statelessness, applicants for statelessness status are often unable to substantiate the claim with much, if any, documentary evidence. Statelessness determination authorities need to take this into account'.
[387] EMN 2016 (n 110) 5-6; In Hungary, however, the requisite of *lawful residence* previously required to the SDP was declared unconstitutional in 2015, consequently the SDP is now available for all stateless persons; ibid 5.
[388] ibid 9.
[389] Laura Van Waas, 'International and regional safeguards to protect children from statelessness' in ISI, *The World's Stateless Children* (Wolf Legal Publishers, January 2017) 350.
[390] IPOL 2015 (n 116) 54-55.

6. TRENDS IN MS POLICY AND PRACTICE

As evidenced throughout this dissertation, one of the main obstacles to the protection of children 'who would otherwise be stateless' born in the territory of the EU MS is not only the law in general, but the implementation of the law in particular. The *jus sanguinis* tradition is likely to play a crucial role, as well as concerns with the allocation of resources. A last aggravating factor can be said to be the lack of EU legislation on this matter, albeit the Conclusions of the Council on Statelessness in 2015.[391] For one reason or the other truth is that, 'implementation problems have been shown to exist, for example when states (mis)use the label 'unknown nationality' to avoid recognising statelessness of individuals and thereby leave people in limbo, unable to claim access to nationality as stateless persons.'[392] This new 'phenomenon' of people with 'undetermined', 'unknown' or 'uncertain' nationality will finally be analysed in this chapter and it will hopefully proof to be the ultimate link with the unwillingness of EU MS to comply with the international standards in matter of acquisition of nationality by *jus soli* for children 'who would otherwise be stateless'.

In this respect, the recent shift in the EU MS approach to migration, not only in law but also in practice, is also likely to play a role on statelessness. The ENOC Taskforce on Children on the move explains this succession of events as a true 'race to the bottom'. From the fences built by Hungary and Slovenia, to the decision of Hungary criminalise illegal entry, all of these actions have effects for the situation of all people in need of international protection.[393] However these consequences will be even worse for stateless undocumented persons, much more likely to be treated as irregular migrants and arbitrarily arrested due to lack of documentation. Some EU MS are taking other approaches, namely by lowering their standards to comply only with the minimum requirements of EU and International Law in matters of asylum, which is clearly alarming from a child rights point of view.[394] As exemplified in the same ENOC report, Denmark and Norway followed the steps of Sweden in what concerns the tightening of their national immigration laws. In this respect, ENOC raised its concerns in relation to the respective IHRL obligations of EU MS, that seem have been

[391] CoEU Statelessness Conclusions (n 114).
[392] IPOL 2015 (n 116).
[393] ENOC 2016 (n 147) 33.
[394] ibid 34.

forgotten.[395] The CoE Commission for Human Rights has already voiced its concern, in particular in a letter directed to Denmark, for the possible clash between this recent political moves and the state's 'human rights obligations, in particular as far as the ECHR is concerned'.[396] These actions taken by the MS will, as highlighted by the ENOC, have serious effects on the most vulnerable: the children. In this light it seems coherent to assume that there will, although indirectly, be aggravated consequences for stateless and/or undocumented children born in EU territory, as the stateless institute and its safeguards for children are still exclusively dependent upon MS domestic law and its implementation.

For all of the above factors and in light of what will be exposed in the next sections, the idea of a coherent standardized approach at the supranational level, integrated in the EU's Common Policy on Asylum seems to be the best, if not the only way to address the issue of childhood statelessness and comparable status, in accordance with Articles 78, 79 and 80 of the Treaty on the Function of the European Union.

6.2. The Arising Phenomenon of the 'Unknown Nationality' Approach

The history of undocumented migrants in Europe is not a new phenomenon.[397] Nonetheless, the shifts in the international context and the uprising of conflicts since the Arab Spring, contributed to the rise of an already high number, as well as for the reasons of lack of documentation. Undocumented migrants arriving to the EU can be asylum-seekers, refugees or so-called 'irregular' migrants, trying to escape the despair of extreme poverty and in search for a dignified life. It is politically and legally reasonable to make a distinction between the persons entitled to international protection and the ones which unfortunately are not. Nevertheless, it is crucially important that EU MS uphold their IHRL obligations, giving protection to the ones entitled to it. If it is true that some migrants may have deliberately 'lost' or destroyed their documents, in order to claim asylum by stating that they are from a state different then their own, there are many undocumented migrants which are in such position because their documents were lost when escaping armed conflicts in their country of origin or were destroyed by the latter.

[395] ibid 35.
[396] ibid.
[397] E.g. Elena Rozzi, 'Undocumented Migrant and Roma Children in Italy: Between Rights and Protection Control', in Jacqueline Bhabha (ed) *Children Without a State: a global human rights chal lenge* (MIT Press 2011) 177-216.

As mentioned above, the lack of standardised procedures for determining 'who is stateless' not only precludes an accurate collection of data for future studies and strategies to tackle the issue, but also increases the prospect of a wrongful determination. In other words, instead of coherently registering someone as stateless in order for the individual to enjoy the rights enshrined in the 1954 Convention and other rights granted specifically to stateless persons by some MS,[398] when lacking adequate SDP, stateless persons can be registered as being of 'unknown nationality'[399] or as being 'non-citizen'.[400] The results of such *categorization* are catastrophic, having a crippling effect on the status of such persons, further contributing for the invisibility of this group of people in the European territory. The concerned authorities may take such approach purposely, to avoid the recognition of the stateless status, making it even harder for such persons to apply for a resident permit, imperative requirement for acquisition of nationality in most of EU MS.[401] In some cases it may also be the result of negligence or lack of appropriate training. Whatever the reasons, the consequences at stake at too serious to be taken lightly, especially because this status will be inherited by children.

The fact that in 2015, 20 000 of the persons applying for asylum in the EU were registered as stateless, while 22 000 were registered as being of 'unknown nationality',[402] shows the severity of the problem. Many CSOs have voiced concerned for those affected by this phenomenon. The ENS, as well as the ISI raised their concerns for this issue in their respective reports. The ENS in particular stated that, 'the phenomenon of registering children as "nationality unknown" has achieved worrying proportions, both in terms of scale and duration, with many thousands of children left in limbo like this and their status still not clarified even by the time they reach adulthood', referring the examples of Germany, Sweden and the Netherlands.[403] Waas also referred to the latter, highlighting the already mentioned high standard of proof when the claimants are trying to provide evidence that the child will be 'otherwise stateless', having therefore the right to the safeguards provided by domestic law

[398] EMN (n 79) ch 6-8.
[399] Waas, *Nationality Matters* (n 24) 10.
[400] ibid, e.g. the Ex-USSR nationals living in Latvia which are *categorized* as 'non-citizens' when they are in fact *de jure* stateless, despite Latvia's adoption of the 'Law on the Stateless Persons' in 2004 under which a stateless determination procedure was adopted; see ENS, 'Ending Childhood Statelessness: A Study on Latvia' (Working Paper 07/15) .
[401] Directly violating the 1961 Convention; IPOL 2015 (n 116) 28; ENS 2015 (n 108) 4.
[402] ENS, 'Briefing Note for joint LIBE/PETI Hearing on Statelessness (29 June 2017) <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/EP%20LIBE_PETI%20Statelessness%20Briefing_June2016.pdf> accessed 5 July 2017.
[403] ENS 2015 (n 108) 17.

aimed at protecting such children. What happens in practice is that children are being 'categorized' as being of 'unknown nationality', and therefore unable to avail themselves of the respective safeguards either in the cases of 'absence of proof of acquisition of a foreign nationality, but also [in the absence] of sufficient proof of statelessness'.[404]

The fact of 'categorizing' a child as being of 'undetermined' nationality, while trying to establish if the child does or not effectively acquire the nationality of their parents, does not automatically constitute a violation of the 1961 Convention. The UNHCR authoritative Guidelines, however, establish that such determination should be done 'as soon as possible', never exceeding a period of five years. In addition, for the states who provide for automatic grant of nationality to 'otherwise stateless children', the children categorized as being of 'undetermined' nationality are to be treated as citizens of the state while pending clarification on their status.[405] Nevertheless, this does not happen in practice. In fact even if the competent authorities determine a child born in its territory of being of 'undetermined' nationality, with the aim for this children to be able to prove the parentage link at a later point, and even if this situation is theoretically resolved and the nationality of the individual can be re-established or proved, two problems may arise. On the one hand, the person will then not be considered as a *de jure* stateless person but there is 'a severe risk of producing a shift from a *de jure* to a *de facto* lack of protection without achieving any real improvement in the status or treatment of the person concerned'.[406] On the other hand there is an issue concerning the 'genuine link'. If nationality is the effective 'genuine link' between an individual and a state, there is the risk that the person concerned may have in fact acquired a genuine link with the host state and completely lost a link with the 'original' state. The fact that a child is born to an undocumented migrant is not sufficient to act as an almost automatic repellent of the available safeguards against stateless. In my view, and as demonstrated throughout this dissertation, the focus must remain on a child' need for, and right to international protection.

The Committee on Migration, Refugees and Population raised their concerns regarding this issue already in 2011 by stating that, '[a] child is first, foremost and only a child … When looking at undocumented migrant children and their rights, one should first look at the issue

[404] Laura Van Waas, 'International and regional safeguards' (n 389) 350.
[405] UNHCR Guidelines (n 212) paras 22-23.
[406] Waas, *Nationality Matters* (n 24) 23 referring to Manley Hudson, *Report On Nationality, including Statelessness* (21 February 1952) 49 A/CN.4/50.

from the child's perspective and not the migration status perspective'.[407] A similar approach may be taken by the ECtHR if a case of such nature is submitted to the Court. The rationale behind this assumption is the ECtHR's ruling of 2014 in the case *Mennesson v France*, where the court established that under the Article 8 ECHR 'everyone must be able to establish the substance of his or her identity'.[408]

A last, but particular important, consideration of this issue is found in the CoE Recommendation on the nationality of children, where the principles concerning a child's access to nationality under the ECN were established. Principle 8 explicitly considers this situation. According to the CoE:

> A borderline case of de jure and de facto statelessness exists if authorities register a person as being of unknown or undetermined nationality, or classify the nationality of a person as being "under investigation". Such classification is only reasonable as a transitory measure during a brief period of time. This is in line with the spirit, for example, of Article 8 of the Convention on the avoidance of statelessness in relation to State succession, *requesting states to lower the burden of proof. It urges states to implement their obligations under international law by not indefinitely leaving the nationality status of an individual as undetermined*.[409]

In light of the above, it seems clear that the practices of EU MS are contributing to the perpetuation and exacerbation of childhood statelessness, since current policies seems to be aimed at circumventing their obligations under IHRL. If on the one hand it is reasonable for MS to be concerned about abuse of the safeguards available for otherwise stateless children, it is unconceivable, on the other hand, that such safeguards are undermined in practice to the point of precluding the universally recognised right of every children to acquire a nationality, immediately or as soon as possible after birth.[410]

[407] CoE Parliamentary Assembly, 'Undocumented migrant children in an irregular situation: a real cause for concern' (16 September 2011) Doc. 12718.
[408] ENS 2015 (n 108) 17 citing ECtHR, *Menesson v France* Application No 65192/11 (26 June 2014).
[409] CM/Rec(2009)13 (n 77) para 22.
[410] Laura Van Waas, 'International and regional safeguards' (n 389) 354.

6.3. Discrimination in Practice: The Italian Example

Several examples were already given showing that, if on the one hand, the compliance with international standards alone does not per se ensures that the principle of best interest of the child is fulfilled, on the other hand this principle and the rights protected by it can be further undermined by the practices of the MS. The present section provides a brief understanding of how the discretion granted to MS in the field of nationality can preclude children from enjoying the right to a nationality enshrined in the most significant IHRL instruments. The case of Italy is emblematic, because Italy is a contracting party to the 1954 and 1961 Conventions, as well as to the CRC. Although not being a contracting party to the ECN, the right to acquire a nationality is, as mentioned before, integrated and reflected in Article 8 ECHR. Moreover, Italy is seen as an example of 'good practice' in terms of legislation, i.e. the domestic nationality law is theoretically in line with the 'optimal method'[411]to protect children from stateless, ensuring nationality to children 'who would otherwise be stateless' at birth *ex lege*. Yet, this does not mean that this right is being implemented in practice. This assessment of evidence will be mainly based on a country study commissioned by the ENS, which analysed the legislation, the implementation of such legislation and the gaps in between, identified through interviews with relevant actors in the field.[412]

Firstly, it is important to clarify that the Italian nationality law is primarily based on the principle of *jus sanguinis*, while the *jus soli* acquisition of nationality is used as a fall-back provision, in order to protect children born in Italian territory to unknown or stateless parents or when the child 'does not acquire his or her parents' citizenship according to the law of the State to which the latter belong'.[413] In the case which the parents are both present and were identified as stateless, through the available SDP, the acquisition of Italian nationality by birth is acquired in a prompt and effective manner. Nevertheless, according to the ENS study, acquisition of Italian nationality at birth due to the stateless recognized status of the parents rarely occurs.[414] The hurdle is related to the fact that the available SDP, either administrative or judicial, requires significant proof and documentation, along with the proof of lawful residence permit in Italy. As mentioned throughout this dissertation, this heavy burden of

[411] ENSWP 01/16 (n 341)6
[412] Daniela Maccioni, 'Ending Childhood Statelessness: A Study on Italy' (2015) <http://www.statelessness.eu/resources/ending-childhood-statelessness-study-italy> accessed 5 July 2017 (ENSWP 07/15).
[413] Italian Nationality Law Art 1(b) Act No. 91 of 5 February 1992.
[414] ENSWP 07/15 (n 412) 8.

proof on the applicant will in many cases preclude the official recognition as stateless. This is particularly true for the many cases arising of undocumented migrants.[415]

Secondly, children in Italy are practically unable to acquire nationality from their parents. As highlighted from the report, the issues start since the moment of birth-registration of the child. In Italy every child has the right to be registered immediately after birth and undocumented migrants may use two witnesses. The child will, however, be in practice registered 'with an assumed nationality, on the basis of that of his/her parents. In some cases where parents have no documents, stakeholders reported that population register officers record the child relying on place of birth of the parents.'[416] In cases where the parents are of 'undetermined' nationality or unable to transmit the nationality to their children (e.g. the case of Syrian mothers) a declaration of the embassy of the country of origin is required, stating that the child is not considered a national by that state.[417] The concerns arising from this requirement are many. Asylum-seekers, refugees and persons which have acquired subsidiary protection status are unlikely to be in a position of contacting their national authorities, nor to pay the fees required to that end. Moreover, it was also ascertained that the authorities fail to provide information or any kind of assistance to the parents of 'otherwise stateless children' about the possibility of acquiring Italian citizenship.[418]

Another important point is the (many) situations where the child remains stateless, having thus to apply for Italian citizenship through naturalization. Although the requirement of lawful residence may many times hamper the rightful access to Italian nationality, some municipal courts have used a more flexible interpretation of the 'legal residence requirement'. In this respect, the ENS study cites a ruling of the Civil Tribunal of Imperia, which established that, for the fulfilment of the required legal residence requirement it will be acceptable to prove that 'the child concerned is born and has continuously lived in Italy, since the purpose of the norm is to facilitate the acquisition of citizenship by persons who are likely to be fully integrated in the Italian social, economic and cultural context'.[419] Moreover,

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[415] In the Italian context the particular issue was with the Roma Population, originating from the former Yugoslavia. Not being able to contact the authorities of their countries and therefore not being able to provide the required recommendation, the Italian citizenship was not acquired at birth and the 'unrecognized' stateless status was passed along generations; ibid 8.

[416] ibid 11.

[417] ibid.

[418] ibid 12.

[419] Civil Tribunal of Imperia, Decision n. 1295/2011 (10 September 2012) 3 <http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2013/febbraio/trib-imperia-cittad.pdf> as cited in

following an amendment of the Italian nationality law it was formally recognized that, 'the requirement of regular stay in Italy of parents is not a condition prescribed by the law in order to acquire Italian citizenship'.[420] These decisions may have a positive impact on children which fulfil all the remaining criteria but were precluded from acquiring Italian citizenship due to their parents' status. Nonetheless, in practice, the proof that a child has a 'continuous, effective residence in Italian soil', may still be difficult.[421] This is mainly due to the fact that the admitted proof by documentation through school and vaccination certificates, apparently has to cover the whole childhood period, since birth until the age of 18, which in many cases is difficult to obtain, especially for children of undocumented parents. These, although being able to register the birth of their children in accordance with domestic law, will many times not do so due to lack of information and/or fear of expulsion.[422]

The main conclusions of this country study were that the obstacles are mainly related to practice and excessive bureaucracy, because of an excessive discretionary law, that allows for broad interpretations and requires high standard of proof. This is true for the official recognition of a stateless person as such, as well as for the acquisition of Italian nationality by children 'who would otherwise be stateless'. In fact, Maccioni pointed out the necessity of Italian authorities to 'recognise that statelessness status determination is a tool for the protection of stateless people, and not a condition to be fulfilled for the application of safeguards to prevent statelessness at birth'.[423] Moreover, in situations were the status of the child is unclear, the admitted practice of registering the child with an assumed nationality, until the parents are able to prove, through a declaration of the authorities or their country of origin, that the child will not acquire another nationality, creates substantial barriers that will prevent children from acquiring Italian nationality when having a right to it, just due to a significant 'impossibility to fulfil the administrative formalities required'.[424]

The example of the practices in this MS can only provide a preview of what is likely to be happening in many other EU MS at the moment. In fact, in a very recent report by the ISI on the specific access to nationality for children born to Syrian asylum seekers in Belgium,

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ibid 17.

[420] Tribunal of Milan (First Civil Section), sentence N. R.G. 80677/2012 (29 January 2015) 8 <http://www.piemonteimmigrazione.it/mediato/images/news_materiali/Sentenza_Tribunale_Milano_cittadinanza_.pdf> as cited in ibid 18.

[421] ibid 20.

[422] ibid 28.

[423] ibid 30.

[424] ibid.

achieved similar conclusions, that in spite of existing legal safeguards to prevent childhood statelessness, 'administrative obstacles or lack of expertise of civil servants who implement the law, … leave the children of asylum seekers at risk of statelessness'.[425]

The discretion given to the MS in these matters and specially the heavy burden of proof required is not only in violation of IL, but also against the best interests of the child, hampering the right to acquire a nationality.

[425] Justine Raymond, 'Preventing Childhood Statelessness in the Migratory Context: Experience of Syrian Asylum Seekers in Belgium', Statelessness Working Paper Series No. 2017/04 (ISI 2017) 18.

7. THE NEED FOR A HOLISTIC APPROACH TO STATELESSNES AND A RESPECTIVE MONITORING BODY

Law without effective implementation is nothing more than a dead-letter. As it was ascertained, more than half of EU MS have legislation in practice that blatantly violates IL and hampers the right of every child to acquire a nationality. Moreover, it is not enough that EU MS appear to be compliant with international standards, there has to be an effective access to the right. As determined by the UNHCR, the consequences of a defective decision on a 'stateless' determination status are too grave to justify such limited application of the safeguards. The lack of standardized SDP, as well as the discretion granted to MS in such matters, undermines the right of children who would otherwise be stateless to acquire the nationality of the state in which he/she was born. Such right is implicitly understood by the MS as an act of charity and not as an obligation under international law. Moreover, the tendency for MS to register stateless persons and children as being of 'undetermined' nationality or even registering the children based on assumptions derived from the country of origin of their parents, can have the effect of further obscuring the childhood stateless phenomenon. In other words, it may give the false impression that the child's right to a nationality was fulfilled, while in fact the child will discover in future that he/she is in fact stateless, because the 'genuine link' was never proven. The disturbing fact is that the consequences of such categorizations or assumptions will only be felt by these children. The fact of categorizing children as being of 'undetermined' nationality is not problematic *per se*, for example in the cases in which there is a reasonable expectation that the parentage link will be proven within a reasonable time. However, this does not seem to be the case of children born to undocumented Syrian parents, let alone children born to Syrian single mothers. In this cases, the nationality of the child is literally reduced to a mere legal fiction, which can cause endless problems for the future. In order to avoid the circumvention of international obligations, the discretion afforded to MS must be minimal. It follows that as it currently stands, the whole stateless institute, and the safeguards to avoid childhood statelessness in particular, are doomed to fail.

One has to bear in mind that despite the increasing recognition of the aggravated vulnerability of children born in the context of forced migration and the need for a child-rights based approach to the issue, 'child rights are not yet adequately visible and integrated into migration

law, policy or practice'.[426] In this respect, the recent Communication from the Commission to the European Parliament and the Council on the protection of children in migration[427] provides sufficient grounds to ascertain that now is the time to act to ensure the effective rights of children in the context of migration. The Commission acknowledged the overlapping challenges faced by all children at all stages of the migratory context, while recognizing the need for all the actions aimed at protecting children to be implemented in synergy, while taking into consideration the principle of best-interest of the child at all stages.[428] Although identifying the need for children to be correctly registered and the difficulties faced by stateless children to be identified as such, the rising number of children being registered as of 'undetermined' nationality was completely overlooked by the Commission. Thus, there still seems to be a lack of awareness of the pressing need to look at this phenomenon from the perspective of international protection. Labels fail to address the complexity and interdisciplinary nature of the matter, while allowing EU MS to circumvent their obligations by accommodating the interpretation of the terms to their own vested interests.

Based on the above assessment, it seems that the only way to effectively tackle the obstacles hampering the right of every child to acquire a nationality is to address this issue at the supranational level, integrating a child-rights based approach, as defined in the ComRC General Comment No. 13,[429] in the CEAS, in accordance with articles 78, 79 and 80 TFEU. With legislation enacted at EU level, a consistent and coherent system for SDP directly aimed to children could be established, providing guidelines 'about the scenario to follow in cases where refugee children's *ipso facto* inherited nationality seems no more than a legal fiction',[430] while at the same time, 'including concrete benchmarks and indicators concerning the applicability of 'otherwise stateless safeguards'.[431] Lastly, and because ensuring effective access to the right is as important as the recognition of the right *per se*, an independent monitoring body at EU level should be created. This can be understood as an additional step to those already taken by the EU since its 2015 Conclusions on Statelessness.[432] As the report

[426] E.g. ENOC 2016 (n 147) 1-5; Commission Background Paper (n 285).
[427] European Commission, 'The protection of children in migration' COM(2017)211 final <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170412_communication_on_the_protection_of_children_in_migration_en.pdf> accessed 11 July 2017.
[428] ibid 1-3.
[429] ComRC GC No.13 (n 123) para 59.
[430] Gyulai (n 305) 247.

[432] Ibid.
[432] CoE Statelessness Conclusions (n 114).

of the EMN has shown, exchange of good practices is not enough to ensure that MS comply with their international obligations. This, albeit important, should be only one of the prongs aimed at addressing this issue.

CONCLUDING REMARKS

Over the last decade, the recognition of the responsibility of the EU as a whole in promoting, advancing and integrating a child-rights based approach has slowly but steadily gained ground at EU level. In 2006 the European Commission acknowledged the insufficiency and inadequacy of child protection mechanisms and the consequent enduring gaps in the safeguards of children's fundamental rights, while recognising the 'essential and fundamental added value' which the EU can provide in this field.[433] Moreover the Commission has recognized the existing disparities in the extent and quality of assistance afforded 'when a child protection need is identified', highlighting the fact that the CRC standards may be not upheld as they should, thus identifying the need for a coordinated child protection system, in accordance with the clear aim of promotion and protection of the rights of the child enshrined in the Article 3(3) TEU.[434] In this context, 10 principles for integrated child protection systems were established, which include inter-alia the recognition of every child as 'rights holder, with non-negotiable rights to protection', the need for standard-setting and effective monitoring and accountability systems with integrated 'child-sensitive and accessible complaint and reporting mechanisms'.[435]

Notwithstanding the prominent relevance assumed by the European Agenda for Migration on the need to protect children 'throughout the migration chain',[436] truth is that the special vulnerability of children at risk of statelessness and the pressing need to ensure the right of every child to acquire a nationality and thus the instrumental safeguards to prevent statelessness remain greatly overlooked. Thus, bearing in mind the 'integrated, sustainable and holistic EU migration policy based on solidarity and fair sharing of responsibilities … which can function both in times of calm and crisis'[437] embraced by the EU, as well as the

[433] COM(2006) 367 final (n 319) 5.
[434] Commission, 'Coordination and cooperation in integrated child protection systems' (Reflection paper 30 April 2015) 1-5 <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/rights_of_the_child_2015_-_reflection_paper.pdf> accessed 12 July 2017.
[435] Commission, '10 Principles for integrated child protection systems' (2015) <http://ec.europa.eu/justice/fundamental-rights/files/rights_child/10_principles_for_integrated_child_protection_systems.pdf> accessed 12 July 2017.
[436] Commission, 'on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration' 15 (Communication) COM(2016) 85 final.
[437] Commission, 'on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' (Proposal for Regulation) 1 COM(2016) 466 final; For further information on the need for a holistic EU approach to migration see European Parliament (n 312).

recognition of the need to 'ensure the quality of the decisions made so that those who are in need of international protection effectively obtain it', and also bearing in mind the urgent need to take into account the 'rights of women and babies during pregnancy, delivery and post-partum' well always advancing the best interest of the child,[438] the proposed holistic child rights-based approach to statelessness protection instruments and safeguards seems fully capable of being integrated within the European Agenda on Migration and the Common European Asylum System (CEAS).

In light of the special vulnerability of children born in the context of migration, as well as the hindrance on the effective enjoyment of the right of every child 'who would otherwise be stateless' to acquire the nationality of the state were he/she was born, and considering the endemic discriminatory practices of the MS as a result of the discretion given on these matters until now, it seems clear that only solution is to address this issue at the supranational level, with the supervision of a monitoring body. This approach would effectively ensure compliance with international standards and the respect for EU values.

As ascertained throughout this dissertation, the concern of the MS regarding the possible abuse of these safeguards is understandable and should be taken into account. Nevertheless, this fact should never be used as a means to undermine the tangible right of children to a nationality. Furthermore, the growing trend of categorizing children as being of 'undetermined' or 'unknown' nationality with the underlying aim of avoiding the recognition of their stateless status is showed to be irreconcilable with the rights enshrined in the CRC and the principle of the best interests of the child. Therefore, a serious consideration of this matter is crucial if the rights of the child are to be effectively promoted in and by the EU.

In my view, the Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 21 of the Committee on the Rights of the Child on the Human Rights of Children in the Context of International Migration, to be enacted later this year, provides the adequate framework to be taken into account in what regards the rights of *all* children born in the context of migration, irrespectively of their parents' status. It is important because it specifically highlights the urgent need to identify 'policies aimed at fulfilling the rights of all the categories of children

in the context of migration, ensuring that the principle of the child's best interest takes precedence over migration management objectives or other administrative considerations'.[439]

The idea advanced in so many official and unofficial documents of a child being a child, 'first and foremost', needs to be transposed into practice and the presumed role of the EU as a beacon in the protection and promotion of human rights and democracy ultimately has to be deserved. Lastly, each and every one of the EU MS has to acknowledge that the 'genuine-link' between an individual and a state does not derive exclusively from blood. Children born on European soil have a legitimate right to be protected, respected and cared for, regardless of their parents' status.

[439] COM(2016) 466 final (n 437).
[439] Joint GC (n 236) paras 11-17.

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