BORN WITHOUT NATIONALITY

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Submitted to

Central European University

Department of Legal Studies

In partial fulfillment of the requirements for the degree of LLM Human Rights

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Budapest, Hungary

2016

ABSTRACT

The present paper aims to bring to the forefront the issue of childhood statelessness which takes place even in a place like the European Union where most Member States signed the relevant international conventions and have additional tools to protect human rights in place.

The paper looks at the various causes of statelessness and how Member States, in particular the United Kingdom and Romania, go about tackling this problem. The main question is whether a top to bottom action in the form of an EU directive would help Member States become more efficient in preventing and reducing their statelessness population.

Chapter I discusses the cycle of causes for statelessness and methods of acquiring nationality by children in the EU. Chapter II focuses on two countries which although bound by the same international treaties and provisions in EU law have quite different reactions and solutions to this issue.

The authority of European judicial bodies (such as the ECtHR and the CJEU) is discussed through the relevant case-law. While valuable principles were formulated by these two courts, it is obvious that they do not have the authority to be the main actor of change.

While several Member States have recently adopted statelessness determination procedures, the research will show that this initiative needs to be encouraged and supported in a more formal manner – one which would convince all members of the EU to tackle the problem of stateless people in an efficient manner.

Contents

List of Abbreviations

CRC = United Nations Convention on the Rights of the Child

CEDAW = United Nations Convention on the Elimination of All Forms of Discrimination against Women

CJEU = Court of Justice of the European Union

ECHR = European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR = European Court of Human Rights

ECN = European Convention on Nationality

ENS = European Network on Statelessness

EU = European Union

EUDO = European Union Observatory on Democracy

ILPA = Immigration Law Practitioners' Association

NAC = National Authority for Citizenship

TEU = Treaty on European Union

TFEU = Treaty on the Functioning of European Union

UDHR = Universal Declaration of Human Rights

UN = United Nations

UNHCR = UN Refugee Agency

Introduction

The United Nations High Commissioner on Refugees (hereinafter "UNHCR") describes the phenomenon of statelessness as follows:

> Statelessness is a man-made problem and occurs because of a bewildering array of causes (…) Families endure generations of statelessness despite having deep-rooted and longstanding ties to their communities and countries. Some have become stateless due to administrative obstacles; they simply fall through the cracks of a system that ignores or has forgotten them.[1]

As stated in the Universal Declaration of Human Rights Article 15. (1), "everyone has the right to a nationality".[2] The importance of this right to a nationality is that it constitutes:

> a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.[3]

Article 7 of the United Nations Convention on the Rights of the Child (hereinafter "CRC") provides children "the right to acquire a nationality".[4] Moreover, article 8 of CRC establishes an obligation for the States "toundertake to respect the right of the child to preserve his or her identity, including nationality".[5] Despite this, in light of the UNHCR's report, in 2014, at least ten million people were affected by statelessness worldwide.[6]

A stateless person, as defined by the United Nations Convention relating to the Status of Stateless Persons (hereinafter "the 1954 Convention"), "means someone who is not

[1]United Nations High Commissioner for Refugees UNHCR, *A special report- Ending Statelessness within 10 Years*:, 2014, pp 2-3. http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=546217229&query=Special%20Report:%20Ending%20Statelessness%20Within%2010%20Years (accessed 3 April 2016).
[2]Universal Declaration of Human Rights, article 15.(1).
[3] *Nottebohm Case (Liechtenstein v. Guatemala)* Second Phase Judgment of April 6th, 1955, International Court Of Justice, Reports Of Judgments, Advisory Opinions and Orders, p.23. http://www.icj-cij.org/docket/files/18/2674.pdf (accessed 12 August 2016).
[4] United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25 (CRC) art. 7(1).
[5] Ibid. art. 8(1).
[6]The United Nations High Commissioner for Refugees UNHCR, *Global Trends Forced displacement in 2014- World at War*, 2015, p.2. http://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html (accessed 13 August 2016).

considered as a national by any State under the operation of its law".[7] Stateless people are denied nationality; they do not have a citizenship and, thus, they do not belong to any state. As Hannah Arendt and Earl Warren, the Chief Justice of US Supreme Court, stated citizenship is "the right to have rights".[8] Without a nationality people cannot access and enjoy fundamental rights, as education, health and employment.[9] History shows us that person without a citizenship are more vulnerable to abuses and mass atrocities.

Research on statelessness mentions two categories of stateless persons.[10] The first category includes the stateless persons who are migrants or have migratory roots.[11] The second one encompasses stateless persons that are in their countries, which whom they have "significant and stable ties", such as: they were born there; or they spent their entire life there.[12] The second type is referred to as statelessness *in situ*.[13]

Statelessness has a particularly severe impact on children because most human rights are interrelated and interconnected with the right to a nationality. Without a nationality children are deprived from the right to identity, right to education, right to health and right to freedom of movement. Stateless children are also exposed "to exploitation, including child labour, sexual exploitation and human trafficking, and illegal adoption".[14] In addition to this, research shows that statelessness has a severe impact on the psyche of children because this condition makes them feel embarrassed, stigmatized, invisible, humiliated and different in

[7] United Nations Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 art 1.
[8] Somers, Margaret R., "Genealogies of Citizenship: Markets, Statelessness and the right to have rights", *Cambridge: Cambridge University Press*, 2008, p.5.
[9] European Network on Statelessness, *Preventing Childhood Statelessness in Europe: Issues Gaps and Good Practices*, April 2014, p.2. http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/Preventing%20childhood%20statelessness%20in%20Europe%20-%20issues%2C%20gaps%20and%20good%20practices.pdf (accessed on 6 September 2016).
[10] Gyulai, Gábor, "Statelessness in the EU Framework for International Protection", *European Journal of Migration and Law 14 (2012) 279–295, Martinus Nijhoff Publisher, p.279.*
[11] Ibidem.
[12] Ibidem.
[13] Ibidem.
[14] Mr. Nils Muižnieks, the Council of Europe's Commissioner for Human Rights, speaks exclusively to ENS (2013) http://www.statelessness.eu/communications/mr-nils-mui%C5%BEnieks-council-europes-commissioner-human-rights-speaks-exclusively-ens (accessed 6 September 2016).

comparison with the children from their community and most of all makes them question their place in the society.[15] As Nils Muižnieks, the present Council of Europe Commissioner for Human Rights, remarks, statelessness can have "particularly negative consequences for children, whose future can irremediably be harmed by long-lasting lack of nationality".[16] The negative impact of statelessness on children is underlined also by the African Committee on the Rights and Welfare of the Child, which stated: "being stateless as a child is generally antithesis to the best interests of children".[17] Therefore, the importance of ending and preventing statelessness in cases of children is undisputed, because "the intergenerational cycle will be broken and it will contribute to the eradication of statelessness".[18]

The main principle of the international conventions on the topic of statelessness and nationality is that all human beings should be equal in accessing their rights.[19] Everyone should have the right to acquire a nationality in order to live freely and to enjoy all his/her social, cultural and economic rights and opportunities. Stateless persons should not be treated anymore as "invisible". Statelessness does not attract the same attention as migration and asylum usually do and for this reason it has garnished less interest and a more modest mobilization for solutions. It has gotten to the point where there is no objective and

[15] United Nations High Commissioner for Refugees (UNHCR), *I am Here, I Belong: the Urgent Need to End Childhood Statelessness*, November 2015. http://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf (accessed 13 April 2016).

[16] Keynote address by Nils Muižnieks Council of Europe Commissioner for Human Rights Global Forum on Statelessness (The Hague, 15-17 September 2014), CommDH/Speech(2014)8, p. 4. http://www.refworld.org/pdfid/54bf81184.pdf (accessed 14 April 2016).

[17] The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Decision on the Communication Submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) against the Government of Kenya*, 22 March 2011, p.10. https://www.opensocietyfoundations.org/sites/default/files/ACERWC-nubian-minors-decision-20110322.pdf (accessed 20 April 2016).

[18] European Network on Statelessness, *Preventing Childhood Statelessness in Europe: Issues Gaps and Good Practices*, April 2014, p.2. http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/Preventing%20childhood%20statelessness%20in%20Europe%20-%20issues%2C%20gaps%20and%20good%20practices.pdf (accessed on 6 September 2016)

[19] 1954 Convention Relating to the Status of Stateless Persons. The Convention, when referring to the rights of stateless persons, uses terms such as: "same";"favorable as possible"; "not less favorable", which implies equality between nationals and stateless persons, underlining the fact that people should be equal no matter what their nationality status is.

unanimously accepted measurement of the problem but currently efforts are put into this stage. While the challenges are smaller, at least numbers-wise, the effects of being stateless result in no access to fundamental rights for the population of concern.

Jurisdictions

The thesis will address the problem of stateless children by comparing the situation of stateless children in Romania and the United Kingdom (hereinafter "the UK"). These two jurisdictions are appropriate because they have completely different legislative safeguards and practices regarding the issue of statelessness, specifically stateless children. On one hand Romania is relatively inexperienced with migration and protection mechanisms, while on the other hand the UK has a long experience with migration and developing mechanisms and procedures to identify and protect vulnerable persons. Another important aspect, which is taken into consideration in the thesis, is the size of the problem: the UK has a large and partially invisible number of stateless persons and Romania has a low number of stateless persons, but a concerning number of children without birth registration.[20] The socio-political context plays an important role in choosing these countries: the UK is a multi-cultural society with designated government structures for immigration (has a minister for immigration within the Home Office), Romania has a very small immigrant community with far less understanding about the phenomenon.

Romania is a *good* example of "no legislative safeguards" for the prevention of statelessness amongst children.[21] Romania is directly violating its international obligations in respect to the prevention of childhood statelessness.[22] Romania made reservations to the 1954

[20] United Nations Committee on the Rights of the Child, *Fifty-First Session, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, Concluding Observations Of The Committee On The Rights Of The Child: Romania*, CRC/C/ROM/CO/4, 30 June 2009, p.8.

[21] European Network on Statelessness, *No Child Should be Stateless*, report, 18 September 2015, p.18. http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf(accessed 14 April 2016)

[22] European Network on Statelessness, *Ending Childhood Statelessness: A Study on Romania*, 2015, p.2. http://www.statelessness.eu/sites/www.statelessness.eu/files/Romania.pdf (accessed 14 April 2016)

Convention relating to the Status of Stateless Persons, [23] and to the 1997 European Convention on Nationality[24]. According to the Romanian nationality law, it is only possible to apply for a standard naturalization procedure, which imposes numerous conditions to be fulfilled.[25]

The United Kingdom, on the other hand, at a first sight, one may think that is one of the European states with "full safeguards", but after a detailed research the conclusion is different. In the United Kingdom, children can apply for nationality through a procedure which is compliant with the 1961 Convention on Reduction of Statelessness.[26] However, children they have to "wait" for a significant period after birth before acquiring any nationality, which is incompatible with the provisions of the Convention on the rights of the

[23] Romania acceded to the 1954 Convention through Law no. 362/2005 (Legea nr.362 din 13 decembrie 2005 pentru aderarea României la Convenţia privind statutul apatrizilor, adoptată la New York la 28 septembrie 1954) published in the Official Journal no. 1146 of 19 December 2005.
Reservation:
"1. With reference to the application of Article 23 of the Convention, Romania reserves its right to accord public relief only to stateless persons which are also refugees, under the provisions of the Convention of 28 July 1951 relating to the Status of Refugees and of the Protocol of 31 January 1967 relating to the Status of Refugees or, as the case may be, subject to the provisions of the domestic law;

2. With reference to the application of Article 27 of the Convention, Romania reserves its right to issue identity papers only to stateless persons to whom the competent authorities accorded the right to stay on the territory of Romania permanently or, as the case may be, for a determinate period, subject to the provisions of the domestic law;

3. With reference to the application of Article 31 of the Convention, Romania reserves its right to expel a stateless person staying lawfully on its territory whenever the stateless person committed an offence, subject to the provisions of the legislation in force."

[24] Romania ratified the Convention through Law no. 396/2002 (Legea nr. 396 din 14 iunie 2002, publicată în „Monitorul Oficial al României", Partea I, nr. 490 din 9 iulie 2002.
[25] European Network on Statelessness, *No Child Should be Stateless*, report, 18 September 2015, p.18.
[26] European Network on Statelessness, *No Child Should be Stateless*, report, 18 September 2015, p.18

Child.[27] Furthermore, such a comparative work has the potential to underline the gaps of both systems and to develop suitable recommendations to improve the legal protection framework.

The research question I will address through my dissertation is: How do EU member states tackle statelessness amongst children? I propose to answer this question in several stages: empirical, evaluative and normative. Several sub-questions represent these stages:

1. The analytical/ empirical sub-question: What non-harmonized types of protection statuses are available for stateless persons?

2. The evaluative sub-question: How existing practices respect specific legal norms?

3.The normative/ explorative sub-question: Is the EU a suitable actor to trigger progress in this field and what tools does it have at its disposal to act in this regard?

Methodology

In order to answer my research questions and sub-questions I plan to carry out a legal analysis of international legal framework and regional legal instruments in the area of statelessness, nationality and child rights, of Romanian and the UK national laws on acquiring nationality and other laws related to statelessness. The paper will also analyze the relevant case-law on this matter of the European Court of Human Rights and Court of Justice of the European Union.

In the first chapter I would like to underline the fact that childhood statelessness is an issue, also in Europe, and more specifically in EU; and it should be regarded more seriously as a human rights problem. I will highlight the main causes of statelessness including the new concerns that emerged as a consequence of the migration crisis in Europe, in order to better understand the consequences of this phenomenon. I will describe how children acquire nationality in Europe; focus on how the application of *jus sanguinis* and *jus soli* principle

[27] European Network on Statelessness, *No Child Should be Stateless*, report, 18 September 2015, p.18

may affect in a positive or negative way the childhood statelessness. In addition, the different naturalization practices will be assessed.

In the second chapter, I will describe how the two EU Member States, Romania and the United Kingdom, parties to international conventions on statelessness and to the Convention on the Right of the Child, have different approaches when it comes to protect, prevent and end childhood statelessness; proving that more has to be done in order to address this issue.

In the third chapter, I will refer to the European Court of Human Rights and Court of Justice of European Union case-law on nationality and statelessness. And how this interpretative institutions play a role in establishing a common EU procedure on statelessness determination.

Finally, in the last chapter, I will look at what EU institutions did in order to tackle the issue of statelessness and what may be done in the future. In order to prove my point regarding the need for an united EU action and EU Directive on Statelessness, that will ensure common standards in addressing the statelessness issue in EU, I put forward the failures of the present statelessness determination procedures, especially the one from the United Kingdom.

Chapter 1 – The Statelessness Childhood Phenomenon in Europe

This Chapter presents general aspects of the statelessness childhood phenomenon in Europe and especially in the European Union. In order to better understand the problem, it is important to know how children become stateless and what the causes of statelessness are. In this respect, a list of main causes is illustrated. In addition to this, how children acquire nationality in Europe is of great significance, also.

1.1 Stateless children in the European Union

Statelessness is a widespread phenomenon and Europe makes no exception, even if European states ratified the Convention Relating to the Status of Stateless Persons of 1954, the Convention on the Reduction of Statelessness of 1961 and the European Convention on Nationality, of 1997.[28] UNHCR estimates that today in Europe there are more than 600 000 stateless persons[29] and over 400.000 in the European Union (hereinafter "EU").[30] However,

[28] Vonk, Olivier Willem; Vink Maarten Peter; de Groot Gerard-René, "Protection against statelessness: Trends and Regulations in Europe", EUDO-Citizenship Observatory, European University Institute, Robert Schuman Centre for Advanced Studies, Florence, May 2013, p.7.
[29] United Nations High Commissioner for Refugees (UNHCR), *Global Trends 2014: World at War*, 2015, p. 48.

this number represents only the cases that are reported; in addition to this, there are more people affected by statelessness that are invisible, not taken into consideration by statistics. European Network on Statelessness (hereinafter "ENS") points out, in its research paper, that there is a scarcity of statistics and in some cases no numbers of stateless children at all.[31] However, UNHCR reports that over a third of the world's stateless population are children.[32] Using this general proportion, this means that in Europe there are more than 200 000 stateless children. This number can easily increase due to the Syrian refugee situation. Alarmingly high numbers of children are born on the way to a safe country and their situation is problematic because it is not clear if they receive the Syrian citizenship or the citizenship of the host country.[33] These children are deprived of the most basic civil, cultural, social rights, which children with nationality are taking for granted.

Moreover, EU Member States are obliged, under the provisions of the Convention on the Rights of the Child, which they have all ratified, to ensure that every child acquires a nationality.[34] However, studies show that Member States are failing to comply with international law and to identify and address the problem of statelessness childhood.[35] This explains why there are no reliable statistics on the number of stateless children in Europe.[36]

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[30] United Nations High Commissioner for Refugees, *UNHCR welcomes the Conclusions of the EU Justice and Home Affairs Council on Statelessness*, Press Release, 4 December 2015. http://www.unhcr.org/news/press/2015/12/5661c1d06/unhcr-welcomes-conclusions-eu-justice-home-affairs-council-statelessness.html (accessed 25 October 2016).

[31] European Network on Statelessness, *No Child Should Be Stateless*, 18 September 2015, p.4.

[32] United Nations High Commissioner for Refugees (UNHCR), A Special Report -Ending Statelessness Within 10 Years, , July 2014, p.5. http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=546217229&query=Special%20Report:%20Ending%20Statelessness%20Within%2010%20Years (accessed on September 6, 2016)

[33] Council of Europe Commissioner for Human Rights, Keynote address by Nils Muižnieks, *Global Forum on Statelessness* (The Hague, 15-17 September 2014), CommDH/Speech(2014)8, p.3. https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2838595&SecMode=1&DocId=2188890&Usage=2 (accessed on September 10 2016).

[34] Convention on the Rights of the Child, Article 7(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.

[35] European Network on Statelessness, *No Child Should be Stateless*, report, 18 September 2015, p.1.

[36] Ibid. p.4.

For a long time the problem of statelessness was ignored, even in Europe.[37] Studies explain why this issue occurred, putting a lot of emphasis on the lack of understanding of the statelessness phenomenon, which is considered to be

> an heterogeneous issue—it encompasses many different people, causes, potential solutions, and linked problems—it entails a high level of complexity and cannot easily achieve the step of issue definition needed for successful emergence[38]

In addition to this, statelessness was considered a national issue, strictly connected to state sovereignty.[39] Any international action on this matter would have been seen as an intrusion in the states' domestic affairs.[40] But in the recent years the issue of statelessness started to attract a widespread of international, regional and national actors.[41] As a consequence statelessness is not anymore a national issue; rather it is an international human rights problem.

In September 2012, at the High-Level Meeting on the Rule of Law, the Delegation of the European Union to the United Nations, in the name of its Member States pledges that

> the EU Member States which have not yet done so pledge to address the issue of statelessness by ratifying the 1954 UN Convention relating to the Status of Stateless Persons and by considering the ratification of the 1961 UN Convention on the Reduction of Statelessness [42]

Furthermore, in 2015, the Council of the European Union adopts Conclusions on Statelessness, acknowledging "the importance of exchanging good practices among Member

[37] Gyulai,Gábor, "Statelessness in the EU Framework for International Protection", *European Journal of Migration and Law 14* (2012) 279–295, Martinus Nijhoff Publisher, p.280.
[38] Kingston, Lindsey N., "A Forgotten Human Rights Crisis: Statelessness and Issue (Non)Emergence", *Hum Rights Rev* (2013) 14:73–87 DOI 10.1007/s12142-013-0264-4, Published online: 28 April 2013, Springer Science and Business Media Dordrecht 2013, p.80.
[39] Ibid. p.82.
[40] Ibid.p.82.
[41] Open Society Justice Initiative, ENS, UNHCR, UNICEF, Plan International, national NGOs, such as Praxis organization from Serbia, national governments, etc.
[42] European Union, Delegation of the European Union to the UN, Note Verbale, *High-level Meeting on the Rule of Law at the National and International Levels, Pledge Registration Form*, pledge no.4. https://www.un.org/ruleoflaw/files/Pledges%20by%20the%20European%20Union.pdf (accessed 8 September 2016).

States concerning the collection of reliable data on stateless persons as well as the procedures for determining statelessness".[43]

1.2 The Main Causes of Childhood Statelessness

In order to provide solutions to end and prevent childhood statelessness, and to grasp the protection needs for these children it is important to understand the causes of statelessness. Statelessness is caused not by one reasons, but by "bewildering series of sovereign, political, legal, technical, or administrative directives or oversights",[44] such as: "political restructuring and law changes, triggered by the state succession; discrimination or arbitrary deprivation of nationality; and even causes linked to climate change".[45]

1.2.1 State succession

One of the causes of statelessness, whose consequences can still be noticed in the present day, is state succession. The transfer of territory or sovereignty has an impact on the people living on that territory owing to the fact that legislation and administrative procedure are changing.[46] As a consequence people may become statelessness if they fail to acquire

[43]European Council, Council of the European Union, *Council adopts conclusions on statelessness*,04/12/2015, Press release, 893/15, Justice, Home Affairs. http://www.consilium.europa.eu/en/press/press-releases/2015/12/04-council-adopts-conclusions-on-statelessness/ (accessed 8 September 2016).
[44] Kingston, Lindsey N., "A Forgotten Human Rights Crisis: Statelessness and Issue (Non)Emergence", *Hum Rights Rev* (2013) 14:73–87 DOI 10.1007/s12142-013-0264-4, Published online: 28 April 2013 # Springer Science+Business Media Dordrecht 2013,p.75.
[45] Blitz, Brad K., Lynch, Maureen, "Statelessness and the Deprivation of Nationality", in: "Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality", edited by Brad K. Blitz, Maureen Lynch, *Cheltenham: Edward Elgar*, UK, 2011, p.5.
[46] Blitz, Brad K., Lynch, Maureen, "Statelessness and the Deprivation of Nationality", in: "Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality", edited by Brad K. Blitz, Maureen Lynch, *Cheltenham: Edward Elgar*, UK, 2011, p.5.

nationality under the new laws and new administrative procedures.[47] A good example of the effects of state succession is the dissolution of Soviet Union and the Socialist Federal Republic of Yugoslavia.[48] The dissolution of these states caused a high number of people to become stateless, which were forced to live like minorities in the countries where they were born or lived for their entire life.[49]

The restoration of states, such as Latvia and Estonia in the 90s produced a significant amount of stateless people.[50] The Russian citizens that moved during the Soviet Union to the territory which is Latvia today were not granted citizenship after the country gained its independence.[51] As a consequence 30 percent of the country's population remained stateless.[52] After more than 25 years, Latvia is still the European country with the biggest number of stateless population of 252,195, according to UNHCR statistics.[53]

1.2.2 Discrimination and Arbitrary Deprivation of Nationality

Even though international laws[54] prohibits discrimination based on race, colour, descent, national or ethnic origin, gender[55] to the right to nationality, many individuals across

[47] Ibid, p.6.
[48] Ibid. p.6.
[49] Ibid, p.6.
[50] Ibid, p.6.
[51] Ibid, p.6.
[52] Ibid, p.6.
[53] United Nations High Commissioner for Refugees, *Global Trends Forced Displacement in 2015*, 20 JUNE 2016, p.63. http://www.unhcr.org/576408cd7.pdf (accessed 15 August 2016).
[54] 1965 Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (d) (iii):In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (…) (d) (…) (iii) The right to nationality;
1989 Convention on the Rights of the Child, Article 2. 1.States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

the Globe are victims of discrimination and, as a consequence, are unable to acquire the nationality of the country of habitual residence.[56] Discrimination can prevent people from passing on their nationality to their children and this can create the vicious cycle of intergenerational statelessness.[57]

1.2.2.1 Gender discrimination in nationality laws

Statelessness can affect children where a nationality law does not allow women to transfer their nationality to their children in the same conditions with their fathers.[58] This can create problems when the father is unknown or stateless or he does not want or he is unable to complete the administrative procedures of transferring his nationality or the child is born out of wedlock.[59] However, there are also cases of "'reversed' gender discrimination in nationality law"[60], when the father cannot pass his nationality to his children. According to UNHCR, there are 27 states, which do not allow children to acquire their mothers' nationality.[61] It is true that none of these states are European, still the consequences of these nationality laws may occur on European territory, because many of these states produce refugee population. For example, a child born in Romania to a Syrian woman and an

[55] 1979 Convention on the Elimination of All Forms of Discrimination against Women, Article 91. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

[56] Blitz, Brad K., Lynch, Maureen, "Statelessness and the Deprivation of Nationality", in: "Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality", edited by Brad K. Blitz, Maureen Lynch, *Cheltenham: Edward Elgar*, UK, 2011, p.6.

[57] European Network on Statelessness, *Preventing Childhood Statelessness in Europe: Issues, Gaps and Good Practices*, April 2014, p.25.

[58] Gyulai, Gabor, "Nationality Unknown?", An Overview of the Safeguards and Gaps Related to the Prevention of Statelessness at Birth in Hungary, published by Hungarian Helsinki Committee, January 2014, p.13. http://helsinki.hu/wp-content/uploads/Nationality-Unknown.pdf (accessed 17 August 2016).

[59] European Network on Statelessness, *Preventing Childhood Statelessness in Europe: Issues, Gaps and Good Practices*, April 2014, p. 25.

[60] Köhn, Sebastian, *ECHR and citizenship: The case of Genovese v. Malta*,11 OCTOBER 2011, http://www.statelessness.eu/blog/echr-and-citizenship-case-genovese-v-malta (accessed on 16 September 2016). Since then the Maltese law changed.

[61] UNHCR, *Background Note on Gender Equality, Nationality Laws and Statelessness*, 8 March 2014, http://www.refworld.org/docid/532075964.html (accessed 7 October 2016).

unknown or stateless father will become stateless at birth, because Syrian women cannot pass their nationality to their children. Of course, this happens if the national authorities, specially the registrar, are aware of these nationality laws from the country of origin of the migrants.

1.2.2.2 Other cases of discrimination

Whilst nationality laws may not be discriminatory, their effects are, and practice shows that the most vulnerable to these laws are minorities. For example, after the dissolution of Yugoslavia, Roma people, which wanted to acquire or to confirm their nationality, were required by the authorities, to lodge documents that prove their right to nationality, documents that they never possessed.[62] In this case, the respective nationality law failed to take into consideration the special situation of the Roma community and placed them in a disproportionate position in comparison with the other populations.[63]

1.2.3 Conflict of Laws

Statelessness may occur as a consequence of conflict of laws.[64] This, mostly, happens when the child is born in a state, which applies the *jus sanguinis* principle of acquiring nationality at birth and the parents of the child are born in a state that confers nationality according to *jus soli* principle.[65]The majority of Latin American countries apply the principle of *jus soli*, consequently, children born to Latin Americans in a country, which applies the *jus sanguinis* principle are at risk of statelessness.[66]Even though many of these countries enacted laws, which apply the *jus sanguinis* principle to cases of nationals born outside their territory,

[62]Ibid., p. 25.
[63] Ibidem
[64] Vonk, Olivier Willem, Vink, Maarten Peter, de Groot Gerard-René, "Protection against Statelessness: Trends And Regulations In Europe", European University Institute, Robert Schuman Centre for Advanced Studies EUDO Citizenship Observatory, Florence, May 2013, p.10.
[65] Ibidem.
[66] Ibidem.

there are still some gaps.[67] For example, if a child is born to Chilean parents in Romania, he/she is stateless at birth, because the Chilean Constitution[68] prescribes that the child should reside for at least one year before he/she will be granted nationality.[69]

1.2.4 Parents' Own Statelessness

The most frequent cause of childhood statelessness is the parents' own statelessness status. The hardship of statelessness is transmitted from the parents to their children. This creates "the multi-generational" phenomenon and an interminable "vicious circle" of statelessness.[70] A child born to stateless parents is a stateless child and when he/she becomes a parent the statelessness will be passed to his/her children and so on. This happens because states do not have special safeguards in place to guarantee "that children do not inherit their parents' plight".[71]

1.2.5 The Lack of Birth Registration

The absence of birth registration is another cause of childhood statelessness. According to UNHCR, millions of children around the world are not registered at birth.[72] Birth registration is

> the continuous, permanent and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national

[67] Gyulai, Gabor, "Nationality Unknown*?"*, An Overview of the Safeguards and Gaps Related to The Prevention Of Statelessness at Birth in Hungary, published by Hungarian Helsinki Committee, January 2014, p.14.
[68] See Constitución Política de la República de Chile, 21 October 1980, Section 10 (3).
[69] Gyulai, Gabor, *Nationality Unknown?*, An Overview of the Safeguards and Gaps Related to The Prevention Of Statelessness at Birth in Hungary, published by Hungarian Helsinki Committee ,January 2014, p.14.
[70] Köhn, Sebastian, "Statelessness: Denied the right to have rights", 24 September 2009, http://www.crin.org/resources/infoDetail.asp?ID=20946 . (accessed on 12 September 2016).
[71] European Network on Statelessness, *No Child Should Be Stateless*, 2015, p.4.
[72] United Nations High Commissioner for Refugees, C*hild protection Issue Brief: Birth Registration*, August 2013, Geneva, August 2013, p.1.

> legal requirements. It establishes the existence of a person under law, and lays the foundation for safeguarding civil, political, economic, social and cultural rights. As such, it is a fundamental means of protecting the human rights of the individual.[73]

Reports show that the most affected regions by the lack of birth registration are: South Asia and sub-Saharan Africa.[74] Within Central and Eastern Europe birth registration rates are high, reaching 98%.[75] However, the literature on this topic notes that Roma community is affected by the lack of birth registration, especially in Serbia.[76]

The CRC prescribes the right of every child to be "registered immediately after birth",[77] and states have an obligation to issue birth certificate to all the children born on their territories.[78] The lack of birth registration around the World is due to "government practices or parental inaction."[79] Even though lack of birth certificate does not mean that the child is stateless, the absence of this document is the reason for not granting citizenship and qualifying for different services.[80] Birth registration is a "legal proof of existence".[81] It is an important proof of whether the child can acquire nationality on the basis of *jus soli* or *jus sanguinis.*[82] Due to its significance in the process of prevention and resolution of childhood

[73] UN Office of the High Commissioner for Human Rights (OHCHR), *Birth registration and the right of everyone to recognition everywhere as a person before the law, 19 February 2015, p.9.* . https://plan-international.org/publications/birth-registration-and-right-everyone-recognition#download-options(accessed 7 October 2016)

[74] United Nations Children's Fund, *Every Child's Birth Right*: *Inequities and trends in birth registration*, UNICEF, New York, 2013,p.15. http://data.unicef.org/wp-content/uploads/2015/12/Birth_Registration_lores_final_24.pdf (accessed 10 October 2016).
[75] Ibidem.
[76] Committee on the Rights of the Child, *SERBIA Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC*, 74th Pre-Sessional Working Group (06 Jun 2016 - 10 Jun 2016), 1 March 2016, pp . 4-5. http://www.institutesi.org/CRC_Serbia_2016.pdf (accessed 10 October 2016).
[77] Convention on the Rights of the Child, art.7 (1).
[78] Waas, Laura van, "Nationality Matters, Statelessness under International Law", Antwerp/ Portland: *Intersentia*, 2008, p.159.
[79] Youth Advocate Program International, Stateless Children-Youth Who Are Without Citizenship, Booklet no.7, in a series on International Youth Issues, 2002, p.8.
[80] Blitz, Brad K., Lynch, Maureen "Statelessness and the Deprivation of Nationality", in: "Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality", edited by Brad K. Blitz, Maureen Lynch, *Cheltenham: Edward Elgar*, UK, 2011, p.5.
[81] Waas, Laura van, "Nationality Matters, Statelessness under International Law", Antwerp/ Portland: *Intersentia*, 2008, p.153.
[82] UN Office of the High Commissioner for Human Rights (OHCHR), *Birth registration and the right of everyone to recognition everywhere as a person before the law*, 19 February 2015, p.14.

statelessness, birth registration is also part of UNHCR's Campaign to End Statelessness in 10 Years.[83]

1.2.6 Migration

The present-day migration situation brings new concerns related to statelessness and nationality. One of the concerns is an increased rate of conflict of laws matters- informal marriages; children born outside the country of origin of their parents; contradictions between the nationality laws of the host country and the country of origin.[84] Authors refer to these situations as "technical causes of statelessness".[85] In case the of Europe's refugee crisis the most noteworthy is the situation of Syrian refugees. Hundreds of thousands of Syrian refugees have fled to Europe.[86] Some of them are already stateless, such as Kurds, who have been stripped of their Syrian nationality in 1962[87] and some of them are at risk of statelessness –Syrian children.[88] This may happen due to gender-biased nationality laws in Syria coupled with the lack of legal safeguards in the EU for preventing childhood statelessness.[89] In Syria, but also in Lebanon and Jordan, countries that host the highest numbers of Syrian refugees, the mother cannot pass their nationality to their children.[90] In

[83] United Nations High Commissioner for Refugees, *I am Here, I Belong - The Urgent Need to End Childhood Statelessness*, November 2015, p.3.
[84] Waas, Laura van, "Nationality Matters, Statelessness under International Law", Antwerp/ Portland: *Intersentia*, 2008 , p.163.
[85] Ibidem.
[86] Institute for Statelessness and Inclusion, *Statelessness- A Year in Review-2015*, p.1, http://institutesi.org/statelessness2015.pdf (accessed 3 October 2016).
[87] McGee, Thomas, *Statelessness Displaced: Update on Syria's Stateless Kurds*, Statelessness Working Paper Series No. 2016/02 June 2016,p.1, http://www.institutesi.org/WP2016_02.pdf (accessed 4 October 2016). The number of stateless Kurds dropped significantly in 2011, when president Bashar al-Assad adopted a Legislative Decree no. 49, which grants Syrian nationality to "foreigners" from north-eastern part of Syria.
[88] Institute for Statelessness and Inclusion, *Statelessness- A Year in Review - 2015*, p.1, http://institutesi.org/statelessness2015.pdf (accessed 3 October 2016)
[89] Berényi, Katalin, "Statelessness and the refugee crisis in Europe", Revista Migraciones Forzadas, Oct2016, Issue 53, *p.69.*
[90] Ibidem.

addition to this, there are problems regarding birth registration practices in Turkey, Jordan and Lebanon.[91]

From the description made above one may conclude that there are various causes of childhood statelessness and are not exhaustive. Sometimes, children are stateless because of unintentional effects of nationality laws, but more frequently, because "of poor, discriminatory or even malignant nationality policy".[92] The list of causes set out in this chapter the righteousness of the UNHCR claim that "statelessness is a man-made problem".[93] This means that it can also be solved by man.[94] In order for this to happen, policy makers and also the general public have to understand the phenomenon, the causes and consequences, of statelessness.[95] Further researches should be conducted in all EU Member States on this topic and information, state practice, jurisprudence, and statistics regarding the concerned group of people should be made available, as reports demonstrate an acute absence of these.[96]

1.3 How Children Acquire Nationality in the European Union

The literature on this subject concluded that, all the European countries apply the *jus sanguinis* principle in granting nationality to children at birth and that only a small minority

[91] Ibidem.
[92] Directorate-General for External Policies of the Union, Directorate B, Policy Department, *Addressing the Human Rights Impact of Statelessness in the EU's External Action*, EXPO/B/2014/2014/07 November 2014, p. 11, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534983/IPOL_STU(2014)534983_EN.pdf (accessed 6 October 2016).
[93] United Nations High Commissioner for Refugees, *Ending Statelessness within 10 Years*: A special report, 2014, pp 2-3.
[94] Directorate-General for External Policies of the Union, Directorate B, Policy Department, *Addressing the Human Rights Impact of Statelessness in the EU's External Action*, EXPO/B/2014/2014/07 November 2014, p. 11, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534983/IPOL_STU(2014)534983_EN.pdf (accessed 6 October 2016).
[95] Kingston, Lindsey N., "A Forgotten Human Rights Crisis: Statelessness and Issue (Non)Emergence", *Human Rights Review*, Jun2013, Vol. 14 Issue 2, p.81.
[96] European Network on Statelessness, *Preventing Childhood Statelessness in Europe: Issues, Gaps and Good Practices*, April 2014, p.38.

of countries apply the *jus soli* principle in addition to *jus sanguinis*.[97] *Jus sanguinis* was reintroduced in Europe after the French Revolution, in order to get rid of the feudal idea[98], that everyone and everything born on a certain territory is subjected to the ruler of the land.[99] The EUDO CITIZENSHIP Database on Modes of Acquisition of Citizenship outlines 27 ways in which nationality may be acquired.[100] The current paper will discuss only the two general modes of acquiring nationality, at birth ("birthright citizenship") and after birth through naturalization.[101]

1.3.1 Birthright citizenship

Birthright citizenship is the usual way of acquiring nationality all over the Globe. There are two modes of acquiring birthright citizenship: through descent from parents, who at the time of their child birth have the nationality of the respective state (*jus sanguinis*) and on the basis of birth on the territory of the state (*jus soli*).[102] While *jus sanguinis* protects children born to European parents from becoming stateless, wherever in the world they are born, it does not protect migrant children or non-European children, leaving some of them at risk of statelessness.[103] *Jus sanguinis* may also create problems in cases of surrogacy[104] and

[97] Dumbravă, Costică, "Super-foreigners and Sub-citizens: Mapping Ethno-national Hierarchies of Foreignness and Citizenship in Europe", Ethnopolitics; June 2015, Vol. 14 Issue 3, p. 297.
[98] Dumbravă Costică, Bauböck, Rainer, "Bloodlines and belonging: Time to abandon ius sanguinis?", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2015/80, p.1.
[99] Bauböck Rainer, "Ius affiliationis: a defence of citizenship by descent", In: *Bloodlines and belonging: Time to abandon ius sanguinis?*, European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2015/80, p.6.
[100] Vink, Maarten, Vonk, Olivier, Bauböck, Rainer, Honohan, Iseult, Groot, Gerard-René de, *EUDO citizenship database on modes of acquisition of citizenship in Europe.* San Domenico di Fiesole: European University Institute. http://eudo-citizenship.eu/databases/modes-of-acquisition (accessed 11 October).
[101] Dumbravă, Costică, "Super-foreigners and Sub-citizens: Mapping Ethno-national Hierarchies of Foreignness and Citizenship in Europe", *Ethnopolitics; June 2015, Vol. 14 Issue 3*, p.298.
[102] Ibidem.
[103] Vlieks Caia (Tilburg University), Swider Katja (University Of Amsterdam), *The* Jus Sanguinis *Bias of Europe and What it Means for Childhood Statelessness,* ENS Blog, *http://www.statelessness.eu/blog/jus-sanguinis-bias-europe-and-what-it-means-childhood-statelessness (accessed 12 October 2016)*
[104] Directorate General For Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs, Legal Affairs, *A Comparative Study On The Regime Of Surrogacy In EU Member States*, Study, 2013, pp. 88-92. http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf (accessed 12 October 2016)

assisted reproductive technologies, when it becomes very hard to establish the legal parenthood, especially in cases of cross-border arrangements.[105] In these cases, children are at risk of becoming stateless when the state of the surrogate mother does not grant citizenship to the child and the state of the commissioning mother does not afford it either, because the mother did not give birth to the child.[106] The Council of Europe recommends state parties to "apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognized by law".[107] Departing from this, professor Bauböck proposes a solution, which is already applied in most of nationality laws, the transmission of nationality trough adoption, to resolve this complicated nationality matter.[108] He proposes a reformed *jus sanguinis*, a new *jus affiliation, "*which refers to social rather than biological parenthood".[109]

The *jus soli* rule is always accompanied by other conditions, such as residence of the parents in the respective country.[110] Therefore in the EU there is no pure *jus soli* rule.[111] In some EU Member States[112] jus soli applies to children of foreigners, which were also born in

[105] Maarten P. Vink and Gerard-René de Groot, *Birthright Citizenship: Trends and Regulations in Europe*, European University Institute, Florence Robert Schuman Centre for Advanced Studies EUDO Citizenship Observatory, in collaboration with Edinburgh University Law School Comparative Report, RSCAS/EUDO-CIT-Comp. 2010/8 Badia Fiesolana, San Domenico di Fiesole (FI), Italy, November 2010, p.8. http://eudo-citizenship.eu/docs/birthright_comparativepaper.pdf (accessed 16 October 2016)
[106] Ibidem.
[107] Recommendation CM/Rec(2009)13 of the Committee of Ministers to member states on the nationality of children, Adopted by the Committee of Ministers on 9 December 2009 at the 1073rd meeting of the Ministers' Deputies. Explanatory memorandum on Principle 12, p.10. https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2009)13E_NationaliteDesEnfants.pdf (accessed 17 October 2016).
[108] Bauböck, Rainer, *Ius affiliationis: a defence of citizenship by descent, In: Bloodlines and belonging: Time to abandon ius sanguinis?,* European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2015/80, p.7.
[109] Ibid., p.8.
[110] Dumbravă, Costică, "Super-foreigners and Sub-citizens: Mapping Ethno-national Hierarchies of Foreignness and Citizenship in Europe", Ethnopolitics; June 2015, Vol. 14 Issue 3, p.300.
[111] Honohan, Iseult, "The Theory and Politics of Jus Soli", EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, in collaboration with Edinburgh University Law School, Comparative Report, RSCAS/EUDO-CIT Comp. 2010/2, Badia Fiesolana, San Domenico di Fiesole (FI), Italy, June 2010, p.10.
[112] Belgium, France, Greece, Luxembourg, the Netherlands, Portugal, and Spain

the respective country (double *jus soli*).[113] In addition to *jus soli*, that implies acquisition of nationality at birth, there are also after birth *jus soli* norms, which facilitate the naturalization procedures.[114] According to the EUDO CITIZENSHIP Database on Modes of Acquisition of Citizenship, nine EU Member States did not adopt any kind of *jus soli* provisions.[115] This is particularly an issue in Latvia and Estonia, because they are the EU states with the biggest number of stateless persons.

Jus soli provisions may protect and confer migrant children born on the EU territory and children who otherwise would be stateless the chance to acquire nationality immediately after birth. However, relying solely on the *jus soli* rules does not prevent or end statelessness. The best example here is the situation in the Americas, where, as mentioned above, *jus soli* applies in most of the countries, with a special emphasis on the Dominican Republic. Here, Dominican children with Haitian descendents are not granted citizenship at birth, even though the nationality law clearly prescribes the *jus soli* doctrine.[116] This is possible due to a constitutional exception provision, which stipulates that children born to parents "in transit" do not qualify for Dominican citizenship.[117] As a result, 200.000 people were left stateless.[118]

Some EU countries, which primarily applied the principle *jus sanguinis* have gradually started to introduce *jus soli* provisions in their nationality laws.[119] This is a clear

[113] Costică Dumbravă, *Super-foreigners and Sub-citizens: Mapping Ethno-national Hierarchies of Foreignness and Citizenship in Europe*, Ethnopolitics; June 2015, Vol. 14 Issue 3, p.300
[114] Ibidem.
[115] Maarten Vink, Olivier Vonk, Rainer Bauböck, Iseult Honohan, Gerard-René de Groot, *EUDO citizenship database on modes of acquisition of citizenship in Europe. San Domenico di Fiesole: European University* Institute. Cyprus, Denmark, Estonia, Latvia, Lithuania, Luxemburg, Malta, Poland, Sweden. http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=new_globalModesAcquisition&search=1&modeby=country&country=Cyprus&year=&idmode=A05
[116] Laura van Waas, *Nationality Matters, Statelessness under International Law*, Antwerp/ Portland: Intersentia, 2008, p.100.
[117] Ibidem.
[118] Ibidem.
[119] Maarten Peter Vink and Gerard-René de Groot, *Birthright Citizenship: Trends and Regulations in Europe*, EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, in collaboration with Edinburgh

sign that the European political actors are finally recognizing "immigration as a permanent phenomenon" and willing to put an end to second and third generations of considerable groups of 'immigrants'.[120] It is an important step towards preventing and ending statelessness in Europe, but still it is not enough. And countries, such as the UK, which formerly applied pure *jus soli* have limited its application, due to the new immigration trends.[121]

As described above, both methods present issues and shortcomings, but also advantages. These two doctrines in themselves cannot prevent and end statelessness. Therefore, *jus soli* is not the answer for the legal gaps of *jus sanguinis* and vice-versa. States should take the necessary safeguards in order to ensure that children do not become stateless. The 1961 Convention and the ECN outline the measures that states have to transpose in their legislation, to guarantee that "children acquire nationality in situations where they would otherwise be stateless". [122]

1.3.2 Naturalization

Naturalization is described by academic literature as "the most volatile and contentious" aspect of nationality policies[123] and "a complex procedure and a privileged site where states could employ ethno-national rules of citizenship".[124] It is the principal mode of

University Law School, Comparative Report, RSCAS/EUDO-CIT-Comp. 2010/8, Badia Fiesolana, San Domenico di Fiesole (FI), Italy, November 2010, p.4. (Belgium, Germany, Greece).

[120] Maarten Peter Vink, Gerard-René de Groot, *Citizenship Policies in the European Union*, In: *Adjusting to a World in Motion: Trends in Global Migration and Migration Policy*, 2016, Oxford University Press, p.215.

[121] Iseult Honohan, *The Theory and Politics of Jus Soli*, EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, in collaboration with Edinburgh University Law School, Comparative Report, RSCAS/EUDO-CIT Comp. 2010/2, Badia Fiesolana, San Domenico di Fiesole (FI), Italy, June 2010, p.3. http://eudo-citizenship.eu/people/96-honohan-iseult (accesses 17 October 2016).

[122] European Network on Statelessness, No Child Should Be Stateless, 2015, p.8.

[123] Sara Wallace Goodman, *Naturalisation Policies in Europe: Exploring Patterns of Inclusion and Exclusion*, EUDO Citizenship Observatory Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School Comparative Report, RSCAS/EUDO-CIT-Comp. 2010/7 Badia Fiesolana, San Domenico di Fiesole (FI), Italy, November 2010, p.1. http://eudo-citizenship.eu/docs/7-Naturalisation%20Policies%20in%20Europe.pdf (accessed 19 October 2016).

[124] Costică Dumbravă, *Super-foreigners and Sub-citizens: Mapping Ethno-national Hierarchies of Foreignness and Citizenship in Europe*, Ethnopolitics; June 2015, Vol. 14 Issue 3, p.301.

acquisition of nationality by immigrants.[125] Naturalization is the process through which an immigrant becomes a part of the national of o particular political community.[126] The immigrant or the "outsider", how it is called by Rogers Brubaker, in order to become an "insider",[127] has to fulfill a certain number of conditions (residence; renunciation or automatic loss of citizenship of another country, for example in the Netherlands;[128] "criminal record, 'good character', financial, and health requirements"; "membership requirements: language, country knowledge, value, and integration").[129] Comparative studies show that naturalization is a dynamic process, which is influenced by the national politics, the role of immigration in the EU, cost and benefits.[130]

With respect to stateless persons or persons without a clear citizenship, which are not protected in any other way against statelessness, EU Member States have very different approaches, which prove that the practice is not harmonized. According to the EUDO CITIZENSHIP database, the majority of states impose a requirement of residence from two to 15 years for naturalization.[131] French nationality law, which prescribes 15 years of

[125] Sara Wallace Goodman, *Naturalisation Policies in Europe: Exploring Patterns of Inclusion and Exclusion*, EUDO Citizenship Observatory Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School Comparative Report, RSCAS/EUDO-CIT-Comp. 2010/7 Badia Fiesolana, San Domenico di Fiesole (FI), Italy, November 2010, p.1.
[126] Idib., p.2.
[127] Brubaker, Rogers, "Citizenship and nationhood in France and Germany", Cambridge, Mass.: Harvard University Press, 1992, pp.29-31.
[128] Maarten Vink, Olivier Vonk, Rainer Bauböck, Iseult Honohan, Gerard-René de Groot, *EUDO citizenship database on modes of acquisition of citizenship in Europe.* San Domenico di Fiesole: European University Institute. http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=new_globalModesAcquisition&search=1&modeby=country&country=Netherlands&year=&idmode=A06 (accessed 19 October).
[129] Sara Wallace Goodman, *Naturalization Policies in Europe: Exploring Patterns of Inclusion and Exclusion*, EUDO Citizenship Observatory Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School Comparative Report, RSCAS/EUDO-CIT-Comp. 2010/7 Badia Fiesolana, San Domenico di Fiesole (FI), Italy, November 2010, pp.6-19.
[130] Ibid., 36.
[131] Maarten Vink, Olivier Vonk, Rainer Bauböck, Iseult Honohan, Gerard-René de Groot, *EUDO citizenship database on modes of acquisition of citizenship in Europe.* San Domenico di Fiesole: European University Institute. http://eudo-citizenship.eu/databases/modes-of-acquisition (accessed 20 October 2016).

residency,[132] is breaching the ECN clause, which clearly states that naturalization law "shall not provide for a period of residence exceeding ten years before the lodging of an application".[133] Some countries are requiring a legal residence[134], which places a higher burden on the applicant; this can take the form of auxiliary fees, bureaucracy, etc. In addition to residence requirements, the naturalization laws in some states require also a permanent residence. [135]

The most alarming fact is that 11 EU Member States do not have any provisions regarding the possibility of stateless persons and persons without a clear citizenship to acquire nationality through a naturalisation procedure.[136] This group includes Latvia and Estonia, the countries with the most numerous persons of concern.

Ireland is the only Member States which has a discretionary exemption from the residence requirement. At first sight Ireland may show more favorable conditions but after an in depth analysis of the legal provision one may conclude that the competent authority has the discretion of applying or not this exemption, not to mention that Ireland has the highest naturalization fee in Europe, 950 Euro.[137]

A peculiar provision, which cannot be seen in the any other EU Member States, is the Swedish legislation, which requires that the applicant "has led and can be expected to lead a

[132] Maarten Vink, Olivier Vonk, Rainer Bauböck, Iseult Honohan, Gerard-René de Groot, *EUDO citizenship database on modes of acquisition of citizenship in Europe.* San Domenico di Fiesole: European University Institute. http://eudo-citizenship.eu/databases/modes-of-acquisition (accessed 20 October 2016).
[133] European Convention on Nationality, article 6 par.3.
[134] Maarten Vink, Olivier Vonk, Rainer Bauböck, Iseult Honohan, Gerard-René de Groot, *EUDO citizenship database on modes of acquisition of citizenship in Europe.* San Domenico di Fiesole: European University Institute. Belgium, Germany.
[135] Ibidem. Bulgaria, Czech Republic, Finland, Poland, Sweden.
[136] Ibidem. Austria, Croatia, Cyprus, Estonia, Latvia, Lithuania, Luxemburg, Malta, Portugal, Romania and Spain.
[137] Cosgrave, Catherine, *Ireland's ad-hoc approach is failing stateless persons: Dublin seminar highlights shortfalls and need for formal procedures*, ENS Blog, 6 May 2016.

respectable life".[138] This clause leaves room for subjective interpretation and unfair naturalization procedures.

Even if advocates for the rights of stateless children may believe that "naturalization is an avenue"[139] for these children to acquire nationality, from EU Member States' laws it seems that in practice this means complicated procedures with difficult-to-attain requirements. It should be added that being a national of one of the Member States implicitly means that the persons is a citizen of the EU[140]. The Charter for Fundamental Rights of the European Union (hereinafter "the Charter") protects some rights related to this citizenship[141], which is strictly connected to the access to nationality of one of the EU Member States and shows the importance of nationality in the EU context.[142] Therefore, even though Member States are the ones who are establishing the conditions of acquisition and loss of nationality, this competency shall be "exercised 'in due regard' to the Union law".[143]

In the debate about the role of EU law in protecting the right of children to acquire citizenship, it is important to note that the Charter does not include any provisions guaranteeing the right to nationality.[144] However, article 24 of the Charter clearly states that "children shall have the right to such protection and care as is necessary for their well-being" and that "primary consideration" must be given to "the best interest of the child" in "all actions relating to children".[145]

[138] Maarten Vink, Olivier Vonk, Rainer Bauböck, Iseult Honohan, Gerard-René de Groot, *EUDO citizenship database on modes of acquisition of citizenship in Europe.* San Domenico di Fiesole: European University Institute. http://eudo-citizenship.eu/databases/modes-of-acquisition (accessed 20 October 2016).
[139] European Network on Statelessness, *No Child Should Be Stateless*, 2015, p. 38.
[140] Treaty on the Functioning of the European Union, C 326/49, 2012, article 20.
[141] Charter of Fundamental Rights of the European Union, (2012/C 326/02), Title V.
[142] European Network on Statelessness, *No Child Should Be Stateless*, 2015, p. 9.
[143] Sergio Carrera and Gerard-René de Groot, *European Citizenship at a Crossroads Enhancing European Cooperation on Acquisition and Loss of Nationality*, CEPS Liberty and Security in Europe No. 72/November 2014, (Policy Paper), p.1.
[144] European Network on Statelessness, *No Child Should Be Stateless*, 2015, p.9.
[145] Charter of Fundamental Rights of the European Union, (2012/C 326/02), article 24, par. 1 and 2.

Chapter 2 – State Practice regarding Access to Nationality for Stateless Children in Romania and the United Kingdom

This chapter discusses the provisions in the national legislations of Romania and the United Kingdom regarding the obligation to prevent and to reduce childhood statelessness, with a special focus on the right of every child to acquire a nationality. The obligation is prescribed not only by the 1961 Convention on the Reduction of Statelessness, but also by the Convention on the Rights of the Child and the European Convention on Nationality. The present part analyzes how the two EU Member States fulfill the international and European obligations and what are their methods and procedures to avoid statelessness.

2.1 The International Obligations of Romania and the UK Regarding the Right to Nationality

The right of every child to acquire a nationality is established by the 1961 Convention on the Reduction of Statelessness (hereinafter "1961 Convention"). The object and the purpose of the 1961 Convention is to reduce statelessness and to prevent the phenomenon of statelessness from spreading.[146] The 1961 Convention is the international instrument that "gives effect to article 15 of the Universal Declaration of Human Rights, which states that

[146] The 1961 Convention on the Reduction of Statelessness, Introductory Note by the Office of the United Nations High Commissioner for Refugees (UNHCR), p.3. http://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf (accessed 10 February 2016).

'everyone has the rights to a nationality'"[147] and to article 7 of the CRC, which lays down the right to acquire a nationality as a universal right of every child.[148]

Articles 1-4 concerning the acquisition of nationality for children, "born in the territory of a Contracting State who would otherwise be stateless"[149] are the core of the 1961 Convention. The 1961 Convention emphasizes the fact that even if States enjoy certain discretion in creating and developing their nationality law and deciding who is eligible for its nationality, they have an obligation to grant citizenship to every child born on their territory, who would otherwise be stateless.[150] The importance of articles 1-4 of the Convention is also underlined by the prohibition to make reservations to them, imposed by article 17 of the Convention.[151] However, the provisions of the 1961 Convention allow States to choose the method to address the problem of statelessness.[152]

According to the *Guidelines on Statelessness no. 4* published by the United Nations High Commissioner for Refugees, the "best interest of the child" principle plays an important role in how the 1961 articles on the right of acquiring a nationality are interpreted.[153] Therefore several articles from the CRC shall be taken into account when articles one - four are interpreted.[154] Article 7 of the CRC has a clear connection with the first four articles of the 1961 Convention and establishes an important obligation for State Parties:

[147] Ibidem.
[148] European Network on Statelessness, *No Child should be Stateless*, report, 18 September 2015, p.7.
[149] Article 1-4 of The 1961 Convention on the Reduction of Statelessness.
[150] The 1961 Convention on the Reduction of Statelessness, Introduction Note by the Office of the United Nations High Commissioner for Refugees (UNHCR), p.3.
[151] The 1961 Convention on the Reduction of Statelessness, Article 17 (1). At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15; (2). No other reservations to this Convention shall be admissible.
[152] United Nations High Commissioner for Refugees, *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, p.2. http://www.un.am/up/library/Guidelines%20on%20Statelessness%20No%204_eng.pdf (accessed 15 August 2016).*
[153] Ibid. p.3.
[154] Ibid. p.3.

> 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.
>
> 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.[155]

Furthermore the UNHCR emphasizes on the importance of article 8 of the CRC, which states that" the child has the rights to preserve his or her identity, including nationality"[156] and article 3 which obliges the State Parties to apply "the principle of the best interest of the child" in all actions concerning children.[157] The Guidelines on Statelessness no. 4 underlines that according to articles 3 and 8 of the CRC children should be granted a nationality "at birth or as soon as possible after birth "in order not to leave them in limbo for a long period of time.[158]

Both states, Romania and the UK are party to the international instruments that address the issue of statelessness and CRC. In 2005, Romania acceded to the 1954 Convention relating to the Status of Stateless Persons (hereinafter "the 1954 Convention")[159] with three reservations regarding the articles 23, 27, 31 and the 1961 Convention on the Reduction of Statelessness. [160] In 2010 the United High Commissioner for Refugees and a national non-governmental organization tried to persuade the Romanian authorities to lift these reservations and to establish a statelessness status determination procedure[161] and in

[155] Convention on the Rights of the Child, article 7 par.1 and 2.
[156] Convention on the Rights of the Child, Article 8.
[157] United Nations High Commissioner for Refugees, *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*, HCR/GS/12/04 Date: 21 December 2012, p.3.
[158] Ibid. p.3.
[159] Romania acceded to the 1954 Convention through Law no. 362/2005 published in the Official Journal no. 1146 of 19 December 2005.
[160] Romania acceded to the 1954 Convention through Law no. 361/2005 published in the Official Journal no. 1156 of 20 December 2005.
[161] The UNHCR Romania, *Romania is open for lifting the reservation to the Convention relating to the Status of Stateless Persons*, 17.11.2010. http://www.unhcr-centraleurope.org/ro/stiri/2010/romania-este-deschisa-la-ridicarea-rezervelor-la-conventia-privind-statutul-apatrizilor.html

2011 the UNHCR even launched a campaign in this regard but they were unsuccessful until the present time.[162]

On the other hand the UK was one of the champions in advocating for the right to nationality since the 1930s, when it ratified the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws[163] and to the Protocol[164] Relating to a Certain Case of Statelessness.[165] The UK ratified the 1954 Convention and it was, also, one of the first states, which ratified the 1961 Convention.[166] The momentum has shifted over the years and recently the UK has not shown the same enthusiasm when it comes to becoming party to international treaties, which aim to protect the rights of the stateless children. Firstly, the UK entered the CRC with two reservations to articles 22 and 37 of the Convention.[167] Until 2008, when these reservations were lifted, the reservation to article 37 (c) allowed the UK authorities to detained children and adults in the same facilities[168] and the reservations to article 22 excluded children seeking asylum or underage refugees from the benefits of the present Convention.[169]

Romania ratified the European Convention on Nationality (hereinafter "ECN") in 2002,[170] but has entered reservations and made declarations to several articles. The most

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[162] The UNHCR Romania, *UNHCR launches the campaign to eliminate statelessness*, 25 August 2011. http://www.unhcr-centraleurope.org/ro/stiri/2011/unhcr-lanseaza-campania-pentru-combaterea-apatridiei.html

[163] 179 LNTS 89, in force 1 July 1937, ratification for Great Britain and Northern Ireland and all parts of the British Empire.

[164] 179 LNTS 15, in force 1 July 1937, ratification for the UK deposited January 14th, 1932.

[165] The United Nations High Commissioner for Refugees (UNHCR) /Asylum Aid, *Mapping Statelessness in the United Kingdom*, London, November 2011, p. 132 http://www.refworld.org/docid/4ecb6a192.html (accessed 15 April 2016).

[166] The United Nations High Commissioner for Refugees (UNHCR) /Asylum Aid, *Mapping Statelessness in the United Kingdom*, London, November 2011, p. 132.

[167] House of Lords House of Commons Joint Committee on Human Rights Children's Rights, *Twenty-fifth Report of Session 2008– 09 Report, together with formal minutes and oral and written evidenc*e, Ordered by the House of Lords to be printed 13 October 2009, p.6. http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157.pdf (accessed 16 August 2016).

[168] House of Lords House of Commons Joint Committee on Human Rights Children's Rights, *Twenty-fifth Report of Session 2008– 09 Report, together with formal minutes and oral and written evidence*, Ordered by the House of Lords to be printed 13 October 2009, p.28.

[169] Ibid. p.36.

[170] Romania ratified the Convention through Law no. 396/2002.

problematic reservation is to article 6 paragraph 4, sub-paragraphs e,f,g of the Convention, which stipulates the following:

> Romania reserves its right to grant its nationality to persons who were born on its territory from parents with foreign nationality and to persons who are lawfully and habitually resident on its territory, including stateless persons and recognized refugees, at request, in accordance with the conditions stipulated by the domestic law.171

This reservation limits "the object and the purpose" of the ECN, by restricting the right to acquire a nationality for stateless persons.[172] The issue of the effectiveness of the Convention was also raised by the EUDO Citizenship Observatory, which stated that even if a high number of states ratified the Convention, it also registered the highest number of reservations compared to other international human rights treaties.[173]

The UK decided neither to ratify nor to sign the ECN, due to several reasons. Firstly, article 7 of the Convention imposes an exhaustive list of grounds for loss of nationality and the UK legislation provides a wider framework for stripping someone's nationality than the Convention.[174] Secondly, article 13 requires states to refrain from imposing unreasonable fees for the national procedures and the UK continues to maintain its fees which it would have to reduce or cut, altogether, in case of ratifying the Convention.[175]

[171] European Convention on Nationality, Status as of: 1/5/2009, *List of declarations and reservations made with respect to treaty No. 166 Romania*, Strasbourg, 6/11/1997, available at: http://eudo-citizenship.eu/InternationalDB/docs/ROM%20ECN%20Reservations.pdf
[172]European Network on Statelessness, *Ending Childhood Statelessness: A Study on Romania*, 2015, p.2.
[173] Lisa Pilgram, *International Law and European Nationality Laws*, European Union Democracy Observatory on Citizenship (EUDO Citizenship Observatory), European University Institute, Florence, March 2011, p.11.
[174] Ibid. p.16.
[175] Ibid. p.16.

2.2 The National Legal Framework in Romania

The Romanian Constitution, which was revised by Law no. 429 from 2003[176] includes several articles related to citizenship and stateless persons, such as: article 5 which speaks about the acquisition and loss of citizenship; article 18 which sets out the general protection for foreigners; article 20 which establishes the principle of supremacy of international human rights legislation over the national legal framework and the principle of conformity and interpretation of the citizens rights and liberties in the light of the Universal Declaration of Human Rights.[177] This indicates that all conventions and treaties that Romania ratified or acceded are part of the national law.[178] Therefore, international legislation can be directly invoked and applied by the national courts of justice.[179] Moreover, when it comes to fundamental rights and liberties the Romanian Constitution uses the term "persons", which embodies the protection of citizens and foreigners alike.[180] In addition to this, article 27 of the Civil Code stipulates that foreign citizens and stateless persons are assimilated to Romanian citizens when it comes to their civil rights and liberties.[181]

The present Romanian nationality law was adopted in 1991.[182] Although it came into being only two years after the fall of communism, the Romanian nationality law was considered liberal because it allowed foreign citizens to apply for Romanian citizenship after five years of residency.[183] However, all the amendments following 1991 changed this positive

[176] The Law Amending the Constitution no.429 from 2003 Available at: http://www.cdep.ro/pls/dic/site.page?id=340
[177] European Network on Statelessness, *Ending Childhood Statelessness: A Study on Romania*, 2015, p.2.
[178] European Network on Statelessness, *Ending Childhood Statelessness: A Study on Romania*, 2015, p.3.
[179] Ibid.
[180] Ibid.
[181] Romanian Civil Code (amended), Law no.287/2009, article 27.
[182] Law no. 21/1991, Published in the Official Journal no. 576 from 13 August 2010.
[183] Barbulescu, Roxana, "Naturalization Procedures for Immigrants Romania", European Union Democracy Observatory on Citizenship (EUDO Citizenship Observatory), European University Institute, Florence, February 2013, p.1.

policy and imposed stricter conditions.[184] For example, the five years of residency period which was a precondition for obtaining the citizenship was increased at first to seven years in 1999 and afterwards to eight in 2003.[185]

There are two main methods of acquiring the Romanian citizenship: automatic acquisition at birth and naturalization.[186]

2.2.1 Acquisition of Nationality at Birth in Romania

The Romanian Nationality Law is governed by the principle of *jus sanguinis* with respect to acquisition of Romanian citizenship at birth.[187] The 1991 Law[188] stipulates the ways of acquiring citizenship at birth: children born on the territory to two Romanian citizen parents; children born on the territory to one Romanian citizen parent; and children born abroad to at least one Romanian citizen parent.[189] The *jus soli* rules have no application in the Romanian context. It cannot be argued that the principle of *ius soli* is applied in cases of children born from unknown parents, because foundlings are not granted citizenship on the basis of being born on Romanian territory, but under the presumption that their parents were Romanian citizens.[190]

This point of view is proved by the content of article 30 of the Nationality Law which states that the foundling loses the Romanian citizenship if, by the age of 18, affiliation is

[184] Ibid. p.1.
[185] Barbulescu, Roxana, "Naturalisation Procedures for Immigrants Romania", European Union Democracy Observatory on Citizenship (EUDO Citizenship Observatory), European University Institute, Florence, February 2013, p.1.
[186] Iordachi, Constantin, "Country Report: Romania", European Union Democracy Observatory on Citizenship (EUDO Citizenship Observatory), European University Institute, Florence, Revised and updated April 2013, p.7.
[187] Ibid.
[188] Article 5 of Law no. 21/1991 amended through Government Emergency Ordinance no.37/2015, published in the Official Journal no. 697 from 15 September 2015
[189] Iordachi, Constantin, "Country Report: Romania",, European Union Democracy Observatory on Citizenship (EUDO Citizenship Observatory), European University Institute, Florence, Revised and updated April 2013, p.7.
[190] Ibid.

established in relation with both parents and they are foreign nationals.[191] The citizenship is withdrawn, also, when affiliation is established in relation to one parent, foreign national and the other parent is still unknown.[192] The child in question loses the Romanian citizenship automatically from the day when affiliation was established.[193] The law presumes that the child has acquired the citizenship of his/her parent(s) due to the establishment of affiliation, and fails to protect the child from statelessness in case his/her parent(s) are stateless.[194] Therefore, automatic lose of nationality should not be applied, primarily, because the best interest of the child cannot be assessed. This clause is not in compliance with the international standards.[195]

It should be noted that, according to the Concluding Observations of the UN Committee on the Rights of the Child, Romania is facing an increased number of children without birth certificates.[196] This phenomenon especially affects Roma children, street children and new born babies abandoned in hospitals.[197] In addition, the Committee, also, expresses its concern regarding the "long procedure of late registration of births", chiefly in cases of children born at home or to parents without birth certificates.[198]

2.2.2 Naturalization in Romania

The 1991 Law also affords the possibility, upon request, to foreigners and stateless persons to acquire Romanian citizenship in the following cases: he/she was born on the Romanian territory and continued to live there at the time of the application; he/she was born

[191] Article 30 par.1 of Law no. 21/1991.
[192] Article 30 par.2 of Law no. 21/1991.
[193] Article 30 par.3 of Law no. 21/1991.
[194] European Network on Statelessness, No Child Stateless, 2015, p.23.
[195] Article 5 of 1961 Convention on the Reduction of Statelessness; article 7 par.3 of European Convention on Nationality.
[196] United Nations Committee on the Rights of the Child, *Fifty-First Session, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, Concluding Observations Of The Committee On The Rights Of The Child: Romania,* CRC/C/ROM/CO/4, 30 June 2009, p.8.
[197] Ibidem.
[198] Ibid., pp. 8-9.

abroad but had lived in Romania at least eight years; or he/she is married and lives with a Romanian citizen for at least five years from the day of the civil wedding.[199]

In addition to this, the applicant also has to fulfill a set of criteria: to prove through his/her conduct loyalty for the country; cannot initiate or support legal actions against the public order or national security and declares he/she has never performed such actions; he/she has to be 18 years old; he/she has sufficient legal means to live a decent live; he/she is known for good behavior and was never convicted in the country or abroad for a crime that makes him unworthy of being a Romanian citizen; he/she has sufficient knowledge of Romanian language, culture and civilization in order to integrate in the social life; and he/she has knowledge about the Romanian Constitution and the national anthem.[200]

Even though the Romanian Nationality Law underwent several amendments as a requirement for the EU accession, the requirements for the naturalization process become stricter.[201] However, the Government Emergency Ordinance no. 37/2015 introduced two additional articles which extended the right to apply for nationality to stateless persons or foreigners which had "particularly contributed to the protection and promotion of Romanian culture, civilization and spirituality"[202] or "which can significantly promote the image of Romania through outstanding performance in sports".[203] The Romanian Government considered these amendments "necessary and not adopting them urgently will significantly affect the nationality acquisition and reacquisition process".[204]

[199]Law no. 21/199 1, Article 8, par.1 a).
[200] Law no.21/1991,Article 8, paragraph (1),b,c,d,e,f,g.
[201]European Network on Statelessness, *Ending Childhood Statelessness: A Study on Romania*, 2015, p.7.
[202]Art. 8^1 of Law no. 21/1991 amended through Government Emergency Ordinance no.37/2015, published in the Official Journal no. 697 from 15 September 2015
[203]Art. 8^2 of Law no. 21/1991 amended through Government Emergency Ordinance no.37/2015, published in the Official Journal no. 697 from 15 September 2015
[204]Law no. 21/1991 amended through Government Emergency Ordinance no.37/2015, published in the Official Journal no. 697 from 15 September 2015

The new amendments are a clear proof that the issue of childhood statelessness is still under a low recognition at the governmental level and also at the level of civil society organizations, since there is only single non-governmental organization dealing, in limited amount, with this problem. Still, after all these years since the accession to the international conventions on statelessness, Romania does not have any safeguards for children born in the country who would otherwise be stateless.[205] Naturalization remains the only way through which stateless persons may acquire the Romanian citizenship. As described above the naturalization process presupposes that a stateless child has to wait for eighteen years to apply for citizenship, along with the other rigid conditions.[206] This means that for a prolonged period of time the child is deprived from fundamental rights, such as the right to identity, right to education, right to health and right to freedom of movement.

At the same time the naturalization procedure proved to be problematic regarding "the costs and the length of the process" and also "the interpretation of the legal conditions" by the competent authority – the National Authority for Citizenship (hereinafter "NAC").[207] It was often the case that the employees of NAC were interpreting the legal conditions in their individual capacity, which can also show lack of oversight.[208]

Moreover, the Romanian legislation does not protect children born on the Romanian territory to stateless parents.[209] As a result, these children, also become stateless and their status depends, on one hand, on the parent's decision to apply for the naturalization

[205] European Union Democracy Observatory on Citizenship (EUDO Citizenship Observatory), *Protection against Statelessness Data, Romania: modes of protection against statelessness*, available at: http://eudo-citizenship.eu/databases/protection-against-statelessness?p=&application=globalModesProtectionStatelessness&search=1&modeby=country&country=Romania
[206] European Network on Statelessness, *Ending Childhood Statelessness: A Study on Romania*, 2015, p.7.
[207] Ibid, p.8.
[208] Ibidem.
[209] Ibidem.

procedure, as it is prescribed by article 9 of the 1991 Law,[210] and on the other hand on the decision of NAC.

In addition to this, it should be underlined that the Nationality Law imposes even harsher conditions on stateless persons, than on recognized refugees. One such example is the reduced term of lawful residency,[211] one of the conditions of naturalization, which is five for refugees and eight for stateless persons. This legal provision breaches article 2 (1) of the 1961 Convention, which sets out "the permissible conditions for the acquisition of nationality", from two points of view.[212] Firstly, the condition of "lawful residency" breaches the article 2 (1) of the 1961 Convention, which allows states to request from the stateless applicant only "habitual residence"- "understood as stable, factual residence and it does not imply a legal or formal residence requirement".[213] Secondly, the 1961 Convention stipulates that the habitual residence should not exceed five years preceding the application for nationality.[214] Article 6 (2) b) of the ECN refers to "lawful and habitual residence on its territory for a period not exceeding five years immediately preceding the lodging of the application".[215] Therefore, Romania did not opt for simplified procedures or facilitated conditions for stateless persons, not even for stateless children.[216]

The application for citizenship can be lodged, personally, by the stateless child only when he/she reaches the age of 18. From the interpretation of article 9 of 1991 Law it can be concluded that stateless children cannot file an application to acquire Romanian nationality

[210] Law no.21/1991,Article 9 paragraph (1):"The child born to foreign or stateless parents and who has not reached the age 18 acquires Romanian citizenship along with his/her parents".
[211] Law no. 21/1991, Article 8 paragraph (2).
[212] United Nations High Commissioner for Refugees, *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,* HCR/GS/12/04, 21 December 2012,p.8.
[213]Ibid., p.9.
[214]Ibid.,p.8.
[215] European Convention on Nationality, article 6 par.2.b).
[216] European Network on Statelessness, *Ending Childhood Statelessness: A Study on Romania,* 2015, p.8.

personally, but not even through a legal representative, when he/she reaches the age of 14.[217] According to the Romanian Civil Code, a person acquires legal capacity to enter contracts with the approval of his/her parents or guardian at the age of 14.[218]

Romania is in breach of the principle of the best interest of the child, stipulated by the CRC[219] by imposing lengthy residence requirements, lengthy periods of time until applying for nationality and, also, making the child's status dependent on the status of his/her parent. Therefore, it can be concluded that the Romanian Nationality Law is far from being in compliance with the standards set up by the 1961 Convention, the CRC and the ECN, when it comes to establish safeguards to prevent and end childhood statelessness.

2.3 The National Legal Framework in the United Kingdom

At the beginning of the 20th century the UK's approach regarding the national immigration legislation was characterized as being "inclusive", encompassing anyone who wanted to make a leaving in the UK.[220] The nationality law was also inclusive, comprising anyone who was born on the territory of the kingdom.[221] After the Second World War the legal context changed and the UK became "increasingly unwelcoming".[222] The rules of residency were restricted and nationality and citizenship laws were changed under the British

[217] European Network on Statelessness, *Ending Childhood Statelessness: A Study on Romania*, 2015, p.8.
[218] Article 41 paragraph (2) of the Romanian Civil Code amended through Law no. 287/2009.
[219] UN Convention on the Rights of the Child, article 3. 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
[220] Sawyer, Caroline, Blitz, Brad K., Otero-Iglesias, Miguel, "De Facto Statelessness in the United Kingdom" chapter VII, in: "Statelessness in the European Union : displaced, undocumented, unwanted" / edited by Caroline Sawyer and Brad K. Blitz., *Cambridge University Press*, Cambridge, 2011, p.160.
[221] Ibidem.
[222] Sawyer, Caroline, Blitz, Brad K., Otero-Iglesias, Miguel, "De Facto Statelessness in the United Kingdom" chapter VII, in: "Statelessness in the European Union : displaced, undocumented, unwanted" / edited by Caroline Sawyer and Brad K. Blitz., *Cambridge University Press*, Cambridge, 2011, p.161.

Nationality Act 1981.[223] The UK used to be considered one of the "classic *jus soli* countries".[224] The power of *jus soli* was reduced, which can be translated into the fact that British citizenship was granted only to those born on the territory and only if one of the parents were British citizens or "settled".[225]

The UK regulates the issue of acquisition and loss of nationality through the British Nationality Act from 1981.[226] As signatory State of the 1961 Convention the UK has the duty to grant citizenship to "children born on its territory who would otherwise be stateless".[227] As the 1961 Convention allows state parties to choose one of the methods of reducing and preventing childhood statelessness, the UK opted for granting citizenship on request according to article 1 par.1 b of the 1961 Convention[228] and not automatically at birth.[229] In the analysis of ENS, four conditions are allowed for the application, under Article 1 par.1 b):

> *1. The person has always been stateless.*
> *2. No convictions of an offence against national security or sentences of five or more years of imprisonment.*
> *3. The application process must be available no later than the age of 18 and must remain available until at least the age of 21.*
> *4. Habitual residence of not more than 10 years in total, nor 5 years immediately preceding the application*[230]

[223] Ibidem.
[224] Vink, Maarten P. and Groot, Gerard-Rene de, "Citizenship Attribution in Western Europe: International Framework and Domestic Trends", *Journal of Ethnic and Migration Studies Vol. 36, No. 5,* May 2010, p.715.
[225] Sawyer, Caroline, Blitz, Brad K., Otero-Iglesias, Miguel, "De Facto Statelessness in the United Kingdom" chapter VII, in: "Statelessness in the European Union : displaced, undocumented, unwanted" / edited by Caroline Sawyer and Brad K. Blitz., *Cambridge University Press*, Cambridge, 2011, p.161
[226] United Nations High Commissioner for Refugees (UNHCR) /Asylum Aid, *Mapping Statelessness in the United Kingdom*, London, November 2011, p.134.
[227] 1961 Convention on the Reduction of Statelessness, Article 1(1) b)
[228] United Nations High Commissioner for Refugees (UNHCR) /Asylum Aid, *Mapping Statelessness in the United Kingdom*, London, November 2011, p.135.
[229] 1961 Convention on the Reduction of Statelessness, Article 1(1) a).
[230] European Network on Statelessness, *Ending Childhood Statelessness: A comparative study of safeguards to ensure the right to a nationality for children born in Europe*, Working Paper 01/16, p.9.

2.3.1 Acquisition of Nationality at Birth in the UK

Based on the provisions of British Nationality Act the citizenship may be granted at birth to: children born to at least one British citizen parent; children born to at least one parent who has a resident permit without restrictions; children born to at least one parent who is enrolled in the UK armed forces.[231]

Children born abroad acquire British citizenship by descent if either the mother or the father was a British citizen otherwise than by descent.[232] Therefore the application of *jus sanguinis* is limited to the first generation born abroad.[233] Furthermore, children born stateless may only acquire British citizenship if either his or her parent

> *(a) was a British citizen by descent at the time of the birth; and*
> *(b) that the father or mother of the parent in question—*
> *(i) was a British citizen otherwise than by descent at the time of the birth of the parent in question; or*
> *(ii) became a British citizen otherwise than by descent at commencement, or would have become such a citizen otherwise than by descent at commencement but for his or her death*.[234]

In addition to these conditions, the British nationality law imposes a supplementary condition, which requires the parent's presence in the UK three years before the birth of the child.[235] It can be concluded that the British nationality law does not protect children which had a nationality, but lost it due to a different nationality law, as they were not born statelessness. Instead of contributing to the reduction of statelessness these conditions imposes additional hurdles on acquiring the British nationality by stateless children.

[231] Sawyer Caroline, Wray Helena, *Country Report: United Kingdom*, European Union Democracy Observatory on Citizenship (EUDO Citizenship Observatory), European University Institute, Florence, Revised and updated in December 2014,p. 11. http://cadmus.eui.eu/handle/1814/33839 (accessed 18 August 2016).
[232] British National Act 1981, Part I, section 2(1).
[233] Vink, Maarten P. and Groot, Gerard-Rene de, "Citizenship Attribution in Western Europe: International Framework and Domestic Trends", *Journal of Ethnic and Migration Studies Vol. 36, No. 5,* May 2010,.*717.*
[234] British National Act 1981, Part I, section 3(3).
[235] British National Act 1981, Part I, section 3(3), c).

Moreover, in the view of the British nationality law, "foundlings" are only "new-born infants".[236] Therefore, only these children will be granted citizenship.[237] According to the Nationality Instructions of the UK Border Agency a "new-born" is "not more than a few months old when he or she is found".[238] On the contrary the UNHCR Dakar Summary Conclusions recommend that

> at a minimum, the safeguard for Contracting States to grant nationality to foundlings should apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth. This flows from the object and purpose of the 1961 Convention and also from the right of every child to acquire a nationality. A contrary interpretation would leave some children stateless.[239]

Therefore, the British law does not protect foundlings that are no longer new-born from becoming stateless.

[236] British National Act 1981, Part I, section 1 (2).
[237] Ibid.
[238] UK Border Agency, Nationality Instructions", Chapter 3 AUTOMATIC ACQUISITION BY BIRTH, ADOPTION OR PARENTAL ORDER, at par. 3.5.2.2. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262095/chapter3.pdf (accessed 20 February 2016)
[239] United Nations High Commissioner for Refugees and the Open Society Justice Initiative, *Expert Meeting Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children Summary Conclusions*, Dakar, Senegal, 23-24 May 2011, par. 44.

2.3.2 Naturalization in the UK

As regulated by the British nationality law, naturalization procedures are not available for children, since it foresees that the applicant should be "a person of full age and capacity".[240] The available option is the registration procedure. The British Nationality Act allows children born in the UK who are stateless since their birth to register for British nationality.[241] In order for the application to be successful the child should prove that he/she is and always has been stateless, is under the age of 22, had residency for five years in the UK and has not been absent from the country for more than 450 days.[242]

The Act allows children to register for British citizenship if they were born on the territory and at least one of their parents becomes a British citizen or settled, while they are still minors.[243] Further on, children born on the territory are able to register for citizenship if they reached the age of ten and they lived their first ten years in the UK without absenting more 90 days in a year.[244] In addition to this, the British Nationality Act confers discretionary powers to the Secretary of State to register any child (minor), "if he thinks fit".[245]

Even though the legislation of the UK is considered to be in compliance with the international norms there are some deficiencies that affect the stateless population.[246] The Country Report: United Kingdom of 2014 states that applicants are facing, in addition to specific requirements, high fees, which makes this procedure difficult to access and at the

[240] British National Act 1981, Part I, section 6.
[241] Migrants Resource Centre, University of Liverpool Law Clinic, European Network on Statelessness and Institute on Statelessness and Inclusion, *Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review*, United Kingdom, 22 September 2016, p. 4. http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ISI-MRC-LLC-ENS-UK-UPR-Submission-Session-27-2016.pdf (accessed 30 October 2016).
[242] British National Act 1981, Schedule 2 paragraph 3, Provisions for Reducing Statelessness.
[243] British National Act 1981, Section 1 par.3.
[244] British National Act 1981, Section 1 par.4.
[245] British National Act 1981, Section 3 par.1.
[246] European Network on Statelessness, *Ending Childhood Statelessness: A comparative study of safeguards to ensure the right to a nationality for children born in Europe*, Working Paper 01/16, p. 9. http://www.statelessness.eu/sites/www.statelessness.eu/files/file_attach/ENS_1961_Safeguards_Stateless_children.pdf (accessed 28 October 2016).

same time has a discouraging effect on the applicants.[247] The cost of a registration application was £669 in 2014.[248] Furthermore, according to the Chapter 5 of UK Visas and Immigration nationality instructions on automatic acquisition for people born stateless[249] a child has to prove his/her identity in order to benefit from the safeguards mentioned in the legislation for stateless children born on the territory.[250] This requirement has the purpose to avoid fraud.[251] As mentioned in the previous sub-chapter, in many cases stateless persons do not posses any identity documents. This means that these persons are excluded from the possibility to acquire British nationality. Moreover, the nationality instruction on this issue clearly stipulates that birth certificates are not "evidence of identity, but of an event",[252] placing more hurdle on the applicant.

European Network on Statelessness pointed out that some other European countries opted for other ways to deal with the "possibility of fraud and misapplication of legal safeguards for stateless children" that is to include into the nationality law the loss of citizenship in case it is discovered, before a certain age, that the child acquired another citizenship.[253] These provisions may be in compliance with the international standards, because they temporarily avoid childhood statelessness.[254] However, to withdraw the

[247] Sawyer, Caroline, Wray Helena, "Country Report: United Kingdom", European University Institute, Florence Robert Schuman Centre for Advanced Studies EUDO Citizenship Observatory, Revised and updated in December 2014, p.14.
[248] Ibidem.
[249] UK Visas and Immigration Nationality Instructions on Automatic Acquisition for People Born Stateless, Chapter 5, par. 5.5.5.1.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262124/chapter5.pdf
[250] European Network on Statelessness, *Ending Childhood Statelessness: A comparative study of safeguards to ensure the right to a nationality for children born in Europe*, Working Paper 01/16, p. 9. http://www.statelessness.eu/sites/www.statelessness.eu/files/file_attach/ENS_1961_Safeguards_Stateless_childrен.pdf (accessed 28 October 2016).
[251] UK Visas and Immigration Nationality Instructions on Automatic Acquisition for People Born Stateless, Chapter 5, par. 5.5.5.1.
[252] Ibidem.
[253] European Network on Statelessness, *Ending Childhood Statelessness: A comparative study of safeguards to ensure the right to a nationality for children born in Europe*, Working Paper 01/16, p.9. This kind of provisions, which allows "the withdrawal of citizenship if another citizenship is or can be acquired" are already in place in several countries, such as Bosnia and Herzegovina, Belgium , France , Montenegro, and Serbia.
[254] Ibidem.

nationality of a child at the age of 12 or 13 may disregard his/her best interest.[255] This may affect the child's family and private life and also he/she is vulnerable to deportation to another country.[256] This situation is very similar with the situation of foundlings in Romania, when affiliation is established in relation to one or both parents, foreign nationals. European Network on Statelessness call upon states to not apply automatic lose of citizenship, due to the impossibility to assess the best interest of the child and "the proportionality of withdrawal of nationality".[257]

At first sight, the UK seems "to live up to the letter of the 1961 Convention", but the legal safeguards prescribed are nevertheless problematic in terms of international law,[258] as they do not take into consideration the best interest of the child. As it is mentioned in the UNHCR Guidelines no.4, CRC plays a "paramount importance" in the interpretation of the obligations prescribed by the 1961 Convention.[259] Leaving the child for a period of time without a nationality and therefore, stateless, is not in the best interest of the child. The *ex lege* acquisition of nationality at birth is protecting the child in this sense.[260] Acquiring nationality at birth or as soon as possible after birth is in the best interest of the child.[261] Moreover, the UN Committee on the Rights of the Child, during its activity, has made recommendations regarding states obligations under article 7 of CRC, the child's right to

[255] Ibidem.
[256] European Network on Statelessness, *Ending Childhood Statelessness: A comparative study of safeguards to ensure the right to a nationality for children born in Europe*, Working Paper 01/16, p.9.
[257] Ibidem.
[258] Ibid., p.10.
[259] United High Commissioner for Refugees, *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*, 21 December 2012, HCR/GS/12/04 , par.9, p.3. http://www.refworld.org/docid/50d460c72.html (accessed 23 August 2016).
[260] European Network on Statelessness, *Ending Childhood Statelessness: A comparative study of safeguards to ensure the right to a nationality for children born in Europe*, Working Paper 01/16, p.10. There are 11 EU Member States that provide automatic acquisition of nationality at birth, such as: Belgium, Bulgaria, Finland, France, Greece, Ireland, Italy, Luxemburg, Portugal, Slovakia and Spain.
[261] Ibid., p.10.

acquire nationality.[262] The Committee established that article 7 does not impose rules that states should apply in order to fulfill their obligations, nor should states grant nationality to all children born on their territory.[263] However, the Committee stated that states are obliged "to guarantee access to nationality to children born on their territory *who would otherwise be stateless*".[264] Moreover, in a very recent Concluding Observation on the Report on South Africa, the Committee "strongly recommended" that South Africa should create the legal framework "to grant nationality to *all* children under the jurisdiction of the State party who are stateless or are at risk of being stateless".[265] Emphasising that, all children *who would otherwise be stateless* have the right to nationality. In addition, the UK has in place a statelessness determination procedure since 2013,[266] which will be discussed in detail in the final chapter.

Even though the UK state practice and legislation are better in terms of legal safeguards than the Romanian practice, there is no legal framework through which states can transfer or share best practices, because there is no European Directive that regulates the issue of childhood statelessness. The lack of standardized indicators at the EU level has, also, the effect that any deficiencies of the UK system are difficult to pin point. Both EU Member States, which were analyzed in this chapter, are bound by the international conventions regarding the stateless persons and the rights of the child, which would imply that they have to enact legislation that fulfils the principle of the best interest of the child.

[262] Institute on Statelessness and Inclusion, *About Engaging with the Committee on the Rights of the Child*, http://www.statelessnessandhumanrights.org/about/role-of-the-crc (accessed 17 October 2016).
[263] Ibidem.
[264] Ibidem.
[265] United Nations Committee on the Rights of the Child, *Concluding observations on the second periodic report of South Africa*, CRC/C/ZAF/CO/2, 27 October 2016, par.32 b), p.7. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5 (accessed 5 November 2016).
[266] United Nations High Commissioner for Refugees, *UK's new determination procedure to end legal limbo for stateless*, This is a summary of what was said by UNHCR spokesperson Melissa Fleming – to whom quoted text may be attributed – at today's press briefing at the Palais des Nations in Geneva, 9 April 2013 http://www.unhcr.org/news/briefing/2013/4/5163f0ba9/uks-new-determination-procedure-end-legal-limbo-stateless.html

Chapter 3 - Principles and Standards in Statelessness Case-Law

The present chapter will analyze to what extent the existent European Court of Human Rights and Court of Justice of the European Union case-law can point out that there is an obligation for Member States to establish a statelessness determination procedure. For this purpose different aspects of article 8 of the European Convention on Human Rights will be examined. It will also analyze the downfalls and the favorable outcomes of the Grand Chamber's of CJEU decision in case of *Rottmann v. Freistaat Bayern.*

3.1 European Court of Human Rights

Statelessness is a phenomenon that affects all parts of the world and Europe makes no exception.[267] Although the majority of European states ratified the two United Nations Conventions related to the statelessness issue, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness – as well as the 1997 European Convention on Nationality,[268] in Europe there are still more than 600.000 stateless persons.[269] Under this international and regional instruments European states have obligations "to protect" the rights of stateless persons and "to prevent and reduce" the phenomenon of statelessness from arising.[270] Beside these international laws, the European Convention on Human Rights plays an important role in the struggle to eradicate the statelessness phenomenon in Europe, due to the fact that "all state members of Council of

[267] Vonk, Olivier Willem, Vink, Maarten Peter, Groot Gerard-René de, *Protection against statelessness: Trends and Regulations in Europe*, EUDO-Citizenship Observatory, European University Institute, Florence Robert Schuman Centre for Advanced Studies, May 2013, p.7.
[268] Ibid.,p7.
[269] United Nations High Commissioner for Refugees (UNHCR), *Global Trends 2014: World at War*, 2015, p.48.
[270] Vonk, Olivier Willem, Vink, Maarten Peter, Groot Gerard-René de, *Protection against statelessness: Trends and Regulations in Europe*, EUDO-Citizenship Observatory, European University Institute, Florence Robert Schuman Centre for Advanced Studies, May 2013, p.8

Europe are parties to this instrument".[271] Even if the ECHR does not include the provision of the right to nationality, the European Court of Human Rights has dealt with cases which raised issues regarding nationality and statelessness. [272] The European Network on Statelessness considers the ECtHR "a tool in litigating" for prevention of statelessness and protection of stateless persons.[273]

The United Nations High Commissioner for Refugees stated, in the Guidelines on Statelessness no. 2, that in order to ensure the rights mentioned in the 1954 Convention to stateless persons, it is necessary "to identify the stateless persons" within a state's jurisdiction.[274] The UNHCR considers that for identifying a stateless person, states should establish a statelessness determination procedure.[275] At this moment only a few European countries have a statelessness determination procedure, even though they have obligations under international law to protect stateless persons.[276]

In *Kuric and others v. Slovenia*, the eight applicants which were part of a group of people called the "erased", alleged a violation of article 8 due to the fact that they were arbitrarily deprived of their permanent residence status, after Slovenia declared independence.[277] The consequence of the "erasure" for the applicants was that they became aliens or stateless illegally residing in Slovenia[278] and were denied access to Slovenian citizenship.[279] The Grand Chamber evaluated the legality of the erasure in relation with their

[271] European Network on Statelessness (ENS), *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* , Discussion Paper September 2014, p.1.
[272] Ibidem.
[273] Ibidem.
[274] United Nations High Commissioner for Refugees, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, HCR/GS/12/0, 5 April 2012, p.2.*
[275] Ibid.
[276] European Network on Statelessness (ENS), *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* , Discussion Paper September 2014, p.2.
[277] *Kurić and others V. Slovenia* (Application No. 26828/06) Judgment, ECtHR, Strasbourg, 26 June 2012, Par.4.
[278] Ibid.par.33.
[279] Ibid.par.319.

private life or family life in Slovenia.[280] The Court found that the national law "lacked the necessary standards of accessibility and foreseeability" developed in the Court's case-law.[281] The "erasure" was implemented automatically, without notice, without the possibility to challenge the measure. The Court considered that domestic law "failed to adequately regulate the consequences of the 'erasure' and the residence status of those subjected to it".[282] This means that the erasure was not implemented "in accordance with the law".[283] The Grand Chamber concluded in this sense:

> in the particular circumstances of the present case, the regularization of the residence status of former SFRY citizens was a necessary step which the State should have taken in order to ensure that failure to obtain Slovenian citizenship would not disproportionately affect the Article 8 rights of the "erased". The absence of such regulation and the prolonged impossibility of obtaining valid residence permits have upset the fair balance which should have been struck between the legitimate aim of the protection of national security and effective respect for the applicants' right to private or family life or both.[284]

Moreover, the Court found that the "erased" were discriminated against in comparison with aliens which were legally living in Slovenia.[285] The Court also highlighted "the situation of vulnerability and legal insecurity" which was caused by the "erasure".[286] The Grand Chamber did not follow the Chamber's view with regard to the fact that the "erasure" being unlawful it also violates "the relevant international-law standards aimed at the avoidance of statelessness".[287] However, it can be concluded from this case that where

[280] Ibid. par.339.
[281] Ibid.par.346.
[282] Ibid. par.348.
[283] Ibid.par.350.
[284] Ibid.par.359.
[285] *Kurić and others V. Slovenia* (Application no. 26828/06) JUDGMENT, ECtHR, STRASBOURG 26 June 2012, para.395 and 396.
[286] Ibid.par.302 and 303.
[287] Ibid.par.338.

the situation of a stateless person is comparable with the situation of the applicants (some of them also stateless), "statelessness in itself is a violation of article 8".[288]

While the ECHR does not necessarily oblige states to issue residence permit for every person under its jurisdiction, it obliges states to take all the necessary measures (positive obligations) to avoid the situations where "persons are left in legal limbo therefore in a state of vulnerability and legal insecurity".[289] Failing to live up to this obligation can lead to a breach of article 8 of the Convention.

The necessity of a statelessness determination procedure in cases of legal uncertainty can be delivered in the *Velimir Dabetić v. Italy* case, which is still pending at the ECtHR.[290] He was born in Slovenia, but lives in Italy from 1989.[291] He is one of the "erased" citizens, which tried unsuccessfully to regain his citizenship and therefore applied for a statelessness determination in Italy nine years ago but he is yet to receive an answer.[292] Due to the lack of legal status he was arrested several times for illegal residency and deportation orders were issued on his name.[293] Moreover this situation has also a negative impact on his private and family life as it is mentioned in the application of the case: "maintaining individuals in a situation of uncertain legal identity has a profound impact on their ability to establish personal identity and develop ties to society, a facet of personal autonomy protected under Article 8".[294]

[288] European Network on Statelessness (ENS), *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* , Discussion Paper September 2014, p.15.
[289] *Kurić and others V. Slovenia* (Application no. 26828/06) JUDGMENT, ECtHR, STRASBOURG 26 June 2012, para.395 and 396
[290] European Network on Statelessness (ENS), *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* , Discussion Paper September 2014, p.16.
[291] European Network on Statelessness, *Statelessness Status Determination in Italy: Quality Assurance Needed!* 23 January 2013, - See more at: http://www.statelessness.eu/blog/statelessness-status-determination-italy-quality-assurance-needed#sthash.F2LNk3U5.dpuf (accessed 16 May 2016).
[292] Ibidem.
[293] Ibidem.
[294] European Network on Statelessness (ENS), *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* , Discussion Paper September 2014, p.16.

Another important aspect of private live that is protected under article 8 and it is relevant for the development of the statelessness determination procedure is nationality. In the case of *Karassev v. Finland*, the Court mentions for the first time that a "denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual", even if the right to citizenship is not guaranteed by the Convention.[295] However the case was declared inadmissible.[296]

A landmark decision was delivered by the Court in the case of *Genovese v. Malta* concerning this issue. The Court explained that access to nationality falls within the scope of protection of the ECHR as a part of a person's identity, which is embedded in private life.[297] The applicant was a British young man born out of wedlock to a British mother and a Maltese father.[298] He applied for Maltese nationality but he was rejected because, according to the Maltese Citizenship Law, if a child is born out of wedlock, he/she is eligible for the Maltese citizenship only if the mother has the same nationality.[299] The Court found a violation of article 14 in conjunction with article 8 in the case.[300] Even if the Government of Malta argued that there is no family life as interpreted by the Court's jurisprudence, between the applicant and his father, the Court adopted a broader interpretation of the concept of "private life".[301] The Strasbourg Court went further stating that private life incorporates

[295] *Karassev and family v. Finland*, Application No. 31414/96,Decision of Admissibility, p.10.
[296] Ibid.p.13.
[297] Groot, Rene de and Vonk, Olivier, "Nationality, Statelessness and ECHR's Article 8: Comments on Genovese v. Malta", *European Journal of Migration and Law 14* (2012) 317–325, p.319.
[298] *Case of Genovese v. Malta* (Application no. 53124/09) Judgment, Strasbourg 11 October 2011,par.8.
[299] *Case of Genovese v. Malta* (Application no. 53124/09) Judgment ,Strasbourg 11 October 2011,par.12.
[300] Ibid.p.11.
[301] Ibid.par.30.

multiple aspects of the person's identity[302] and found that the denial of citizenship had a negative impact on the applicant's social identity:[303]

> (…)even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that Article.304

The Court found that the applicant was discriminated against because he was born out of wedlock[305] and decided not to examine if there was a discrimination based on sex.[306]

In this case the applicant already has a citizenship and the Court stated that a denial of the second citizenship can have a negative impact on his social identity. Therefore, the Court recognizes that nationality is part of one's personal identity although the arguments are made on the denial of citizenship. Departing from this argumentation and a non-exhaustive interpretation of "private life", it can be stated that no-citizenship is part of a stateless person's identity. However, in order to reach this conclusion it is necessary to identify who is a stateless person through a statelessness determination procedure. The argument used in the Genovese case can be successfully employed also in cases regarding persons determined as being stateless through a dedicated procedure.

In order to give a decisive answer to the relevance of the ECHR in imposing an obligation on states to have a statelessness determination procedure, an extensive analyze should be made. This should take into account all the relevant articles of the Convention. It is worth mentioning that the argumentation found in the case law under article 8 creates the

[302] Ibid.par.30.
[303] Ibid.par.33.
[304] Ibid.par.33.
[305] Ibid.par.48.
[306] Ibid.par.50.

expectation that the Court is inclined to further develop these principles and perhaps formulate direct links between private life and a statelessness status.

3.2 Court of Justice of the European Union

The jurisprudence of the Court of Justice of the European Union (here in after "CJEU) is equally significant and proves similar developments in case of scrutiny of nationality policies.[307] The recent case of *Rottmann v. Freistaat Bayern*[308] represents an important "jurisprudential development", which examines how states apply the nationality law.[309] The case is "shaping the new *status quo* in the interaction between the EU and the Member States in the sphere of nationality".[310] According to a comment regarding this case, the judgment establishes "the position of the individual vis-à-vis the national, European, international legal orders in a situation where his very personhood is at issue: the problem of statelessness is at the centre stage".

Janko Rottmann was an Austrian National who emigrated in Germany in 1995.[311] He applied for naturalization and was granted German citizenship in 1999 and as a consequence he lost his Austrian citizenship.[312] He failed to mention to the German authorities the criminal proceedings that were taking place in Austria.[313] When the German authorities found out about these procedures, they decided to annul the citizenship because it was granted under fraudulent facts.[314] In the light of the facts, Rottmann will lose his German citizenship (and

[307] Waas, Laura van, "Fighting statelessness and discriminatory nationality law in Europe", Published in: *European Journal of Migration and Law 14* (2012) 243–260, page 254.
[308] *Janko Rottmann v Freistaat Bayern***,** Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010.
[309] Waas, Laura van, "Fighting statelessness and discriminatory nationality law in Europe", Published in: *European Journal of Migration and Law 14* (2012) 243–260, page 254.
[310] Kochenov, Dimitry, "Case C-135/08, Janko Rottmann v. Freistaat Bayern, judgment of 2 March 2010 (Grand Chamber)", not yet reported, *Common Market Law Review, Forthcoming in 47 CMLRev*., 2010, November 2010, p.1.
[311] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, par 22 and 23.
[312] Ibid., par. 25.
[313] Ibid., par. 23-25.
[314] Ibid., par. 27.

already lost his Austrian citizenship, without an automatic right to require it).[315] In addition, "he would also lose his EU citizenship and thus all the rights that are attached to the status (free movement; non-discrimination; voting in European Parliament and local elections; diplomatic protection; etc)"[316] and as a consequence he would become stateless.[317] According to article 20 par.1 of the Treaty of the Functioning of the European Union, nationals of the Member States are citizens of the Union.[318] This may be interpreted that every national measure regarding the scope of national citizenship affects also the scope of EU citizenship and implicitly the EU rights.[319]

The Court of Appeal asked for preliminary ruling from the CJEU, since losing his German citizenship and rendering him stateless also implies loss of European Union citizenship.[320] The following questions were addressed to the CJEU for preliminary ruling:

> (1) Is it contrary to Community law for Union citizenship (and the rights and fundamental freedoms attaching thereto) to be lost as the legal consequence of the fact that the withdrawal in one Member State (the Federal Republic of Germany), lawful as such under national (German) law, of a naturalisation acquired by intentional deception, has the effect of causing the person concerned to become stateless because, as in the case of the applicant [in the main proceedings], he does not recover the nationality of another Member State (the Republic of Austria) which he originally possessed, by reason of the applicable provisions of the law of that other Member State?
>
> (2) [If so,] must the Member State … which has naturalised a citizen of the Union and now intends to withdraw the naturalisation obtained by deception, having due regard to Community law, refrain altogether or temporarily from withdrawing the naturalisation if or so long as that withdrawal would have the legal consequence of loss of citizenship of the Union (and of the associated

[315] Ibid., par. 29.
[316] Shaw, Jo, *"Setting the Scene: The Rottmann case introduced", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law",* European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.1.
[317] *Janko Rottmann v Freistaat Bayern***,** Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, par. 29.
[318] Treaty of the Functioning of the European Union, Article 20, par.1.
[319] Davies, Gareth T., "The Entirely Conventional of EU Citizenship and Rights, in: Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.6.
[320] Waas, Laura van, "Fighting statelessness and discriminatory nationality law in Europe", Published in: *European Journal of Migration and Law 14* ((2012) 243–260, page 255.

> rights and fundamental freedoms) …, or is the Member State … of the former nationality obliged, having due regard to Community law, to interpret and apply, or even adjust, its national law so as to avoid that legal consequence?'[321]

The opinion of the Advocate General (hereinafter "AG"), M. Poiares Maduro, is "quite cautious" [322] and "timid".[323] The AG considers that the withdrawal of naturalization is not directly linked to the fundamental freedom of movement and other rights and freedoms prescribed by the Treaty of the Union.[324] Therefore, "there is no reason based on this connection to the EU law for the Court to scrutinize the national legislation".[325] Moreover, when, national law complies with the international law[326] which does not prohibit the withdrawal of naturalization "where the nationality has been obtained by misrepresentation or fraud".[327] Some observations should be made to these findings of the AG. Mr. Rottmann, as an Austrian national and, as a consequence, an EU citizen, enjoyed his freedom of movement and moved to Germany. Once he settled there he obtained the German nationality, which led to the loss of his Austrian nationality. It is logical and of common sense that the withdrawal of naturalization is directly linked to the freedom of movement under the EU law.[328]

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[321] *Janko Rottmann v Freistaat Bayern,* Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010 , par.35 (1) and (2).

[322] Shaw, Jo, "Setting the Scene: The Rottman case introduced", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.1.

[323] Kochenov, Dimitry , "Case C-135/08, Janko Rottmann v. Freistaat Bayern, judgment of 2 March 2010 (Grand Chamber)", not yet reported, *Common Market Law Review, Forthcoming in 47 CMLRev*., 2010, November 2010, p.5.

[324] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Opinion Of Advocate General Poiares Maduro, delivered on 30 September 2009, par.13 and par.33. http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d0f130decca782f13b72499783f483518eb334c3.e34KaxiLc3eQc40LaxqMbN4OaNuOe0?doclang=EN&text=&pageIndex=0&docid=72572&cid=268754 (accessed 10 November 2016).

[325] Shaw, Jo, "Setting the Scene: The Rottman case introduced", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law",, European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.2.

[326] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Opinion Of Advocate General Poiares Maduro, delivered on 30 September 2009, par.29, 31, 33.

[327] 1961 Convention on the Reduction of Statelessness, article 8, par.2 b).

[328] Kochenov. Dimitry, "Two Sovereign States vs. A Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States

It should be noted that AG Maduro underlined that EU citizenship and the nationality of one of the Member States are "two coexistent meaningful legal statutes",[329] by stating that "Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality".[330] Therefore, there are two independent legal statuses, which are connected through acquisition: making one a precondition of the other.[331] Scholars pointed out three solutions in case of conflicts, such as: "total separation of EU law and national law", "total harmonization of nationality laws", which seems impossible due to the present climate at the EU level and the last one, which appears to be the more plausible, the creation of "clear supranational constraints" on the right to regulate at national level. [332]

Regarding the second question, the AG states that it is a matter of the Austrian law and EU law cannot impose rules on this.[333] AG Maduro, also, specifies that Rottmann is in this situation (without Austrian nationality and at the risk of statelessness) due to his "personal decision" to acquire German citizenship.[334]

The Grand Chamber of the CJEU has a different point of view. In delivering the judgment, the CJEU refers to previous case-law on nationality issues (*Micheletti and others v Delegación del Gobierno en Cantabria*).[335] In both cases, the CJEU ruled that the Member States have to establish "the conditions for the loss and acquisition of nationality with due regard to Community law". [336] The Court acknowledges that even if the regulation of

Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.13.
[329] Ibid., p.12.
[330] Janko Rottmann v Freistaat Bayern, Case C-135/08, Opinion Of Advocate General Poiares Maduro, delivered on 30 September 2009, par.23.
[331] Kochenov, Dimitry, "Two Sovereign States vs. A Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.12.
[332] Ibidem.
[333] Janko Rottmann v Freistaat Bayern, Case C-135/08, Opinion Of Advocate General Poiares Maduro, delivered on 30 September 2009, par. 34.
[334] Ibidem.
[335] *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria,* C-369/90 [1992], ECJ.
[336] *Janko Rottmann v Freistaat Bayern,* Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, par. 39.

nationality is primarily a matter of domestic law, the freedom of states is restricted by the EU law.[337] It stipulates that "in situations covered by European Union law, the national rules concerned must have due regard to the latter".[338] Nationality law is not anymore a matter of the Member States and it falls under the scope of the EU law.[339]

The Grand Chamber goes further in making a "very strong statement" about the EU citizenship and the authority of Member States to withdraw the nationality, which also triggers the loss of EU citizenship:[340]

> It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalization, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.[341]

Reading the judgment of the Grand Chamber, one may conclude, that it does not focus on the issue of statelessness, the consequences that this status entails and the obligation of Member States to prevent statelessness.[342] It rather focuses on "EU-specific rights which a person will lose",[343] as the Court often refers to "citizenship of the Union is intended to be the fundamental status of nationals of the Member States".[344]

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[337] Waas, Laura van, "Fighting statelessness and discriminatory nationality law in Europe", Published in: *European Journal of Migration and Law 14* (2012) 243–260, page 255.
[338] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, par. 41.
[339] Kochenov, Dimitry , "Case C-135/08, Janko Rottmann v. Freistaat Bayern, judgment of 2 March 2010 (Grand Chamber)", not yet reported, *Common Market Law Review, Forthcoming in 47 CMLRev*., 2010, November 2010, p.1.
[340] Shaw, Jo, "Setting the Scene: The Rottman case introduced", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.3.
[341] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, par.42.
[342] Shaw, Jo, "Setting the Scene: The Rottman case introduced", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.3.
[343] Ibidem.
[344] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, par.43.

As mentioned, also in the EUI Working Paper,[345] the Court did not interpret the 1961 Convention "in the light of its object and purpose", which is, indubitable, to reduce statelessness. Moreover, the Court interpreted the 1961 Convention "in a way that goes against its fundamental principal".[346] The decision analyzed the 1961 Convention only "through the lens of the exception" prescribed by it,[347] breaching the general rule of interpretation described by the Vienna Convention on the Law of Treaties.[348]

The Grand Chamber of the CJEU stipulates that states that Members States can legitimately withdraw one's nationality with all the consequences in order "to protect the special relationship of solidarity and the good faith between it and its nationals".[349] The Court ruled that deception (fraud) can be a legitimate reason to withdraw someone's citizenship.[350] Furthermore, it closely analyzed if denaturalization because of a fraudulent conduct, which renders the persons stateless, is breaching the international instruments (UDHR, 1961 Convention on the Reduction of Statelessness, ECN) and concluded that it "cannot be considered an arbitrary act".[351] However, the Court decided that this legitimate interest should be subjected to the proportionality test.[352]

It is very controversial that after establishing that the issue falls within the ambit of the EU law, the Court concluded that the one that should apply the proportionality test is no other than the national court,[353] even though the case regarded the loss of EU citizenship.[354] The

[345] Kochenov, Dimitry, "Two Sovereign States vs. A Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.13.
[346] Ibidem.
[347] Ibidem.
[348] 1969 Vienna Convention on the Law of Treaties, article 31.
[349] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, ,par.51.
[350] Ibid. para. 51.
[351] Ibid para. 52-53
[352] Eijken, Hanneke van, "European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their National", *Merkourios 2010 – Volume 27/Issue 72*, Case Note, p.67.
[353] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, par.55.

Court failed to set up "clear supranational constraints".[355] It seems that the Court made a step forward and, in the same time, took a step backwards. It shows not only restraint but also a contradictory position towards the present case. Scholars are criticizing the decision of "not going to far enough in introducing at least minimal logic and predictability into the current context of interaction between the EU law and national law on issues of nationality".[356] It is argued that the approach of the Court is

> unfortunate, as it undermines the autonomous nature of the EU citizenship. Refusing to take fundamental decision having a direct bearing on its essence will ensure EU citizenship never becomes a true 'fundamental status of the nationals of the Member States', exposing the half-hearted nature mantra employed by the Court. [357]

In the present case proportionality test means that loss of citizenship should be weight against "the consequences it entails for the situation of the person concerned in the light of European Union law (…) and national law".[358] All the rights of Mr. Rottmann are at stake.[359] In this situation, is right to question ourselves which state interest prevails against the obligation to prevent statelessness?[360]

Looking at the case from a human rights perspective is what the decision of the Grand Chamber lacks.[361] Mr. Rottmann is at risk of being left stateless and deprived of his "right to

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[354] Kochenov, Dimitry, "Two Sovereign States vs. A Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.14.
[355] Kochenov, Dimitry, "Two Sovereign States vs. A Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.13.
[356] Ibid., p.11.
[357] Ibid., p. 14.
[358] *Janko Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, par.56.
[359] Kochenov, Dimitry, "Two Sovereign States vs. A Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.14.
[360] Ibidem.
[361] Kochenov, Dimitry, "Two Sovereign States vs. A Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters", in J. Shaw (Ed.), "Has the European Court of Justice Challenged Member States

have rights" because he exercised his EU citizen right to move to another country and because he is suspected for committing a fraud.[362] Apparently, these facts are sufficient to render Mr. Rottmann stateless under the German and Austrian nationality law.[363] It is rightly described as a Kafkaesque situation.[364]

Even though the case has its downfalls, which were mentioned above, it, also, has favorable outcomes. The *Rottmann* case is the first case, where the CJEU ruled that nationality laws are not a "reserved domain" of Member States and EU law does apply.[365] The *Rottmann* judgment established the jurisdiction of the CJEU in cases regarding nationality law and also underlined the paramount importance of the proportionality test in cases of nationality and statelessness.[366] The judgment may represent "important guidance for the national courts and legislative and administrative authorities on what and EU standard of proportionality might demand in case of loss and acquisition of nationality".[367] The judgment may have an impact on Member States' nationality laws. As Jo Shaw rightly acknowledged that this case "opens the way for further potential incursions in the sphere of nationality sovereignty, as aspects of nationality law are held up for scrutiny against the standards inherent in EU law".[368] For example the proportionality test should be applied in cases, such as the Romanian nationality law which prescribes automatic loss of nationality in case of establishing affiliation in relation

Sovereignty in Nationality Law", European University Institute Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, EUI Working Paper RSCAS 2011/62, p.14.

[362] Ibidem.

[363] Ibidem.

[364] Ibid., p.15.

[365] Kochenov, Dimitry , "Case C-135/08, Janko Rottmann v. Freistaat Bayern, judgment of 2 March 2010 (Grand Chamber), not yet reported*", Common Market Law Review, Forthcoming in 47 CMLRev*., 2010, November 2010, p.9.

[366] Waas, Laura van, "Fighting statelessness and discriminatory nationality law in Europe", Published in: *European Journal of Migration and Law 14* (2012) 243–260, page page 257.

[367] Shaw, Jo, "Concluding Thoughts: Rottman in Context", in J. Shaw (Ed.), "Has the European Court of Justice challenged member state sovereignty in nationality law?", EUI Working Papers, RSCAS 2011/62, European University Institute, Italy, p.33.

[368] Shaw, Jo, "Setting the Scene: the Rottmann case introduced", in J. Shaw (Ed.), "Has the European Court of Justice challenged member state sovereignty in nationality law?", EUI Working Papers, RSCAS 2011/62, European University Institute, 2011, p.4.

to one or both parents, who are foreigners,[369] when the person in question is at risk of becoming stateless. The Court clearly ruled that the proportionality test should be applied in cases of deprivation of nationality, which render the persons stateless.[370] René de Groot and Anja Seling concluded that Member States should take into consideration EU legal principles, also, in cases of acquisition of nationality.[371]

Analyzing the relevant case-law leads to the conclusion that in matters of right to nationality and prevention of statelessness international courts play a crucial role. It is up to these institutions to not just redress any violations committed by states, but also to advance principles and standards against which the right to nationality to be measured. However, the courts solely cannot change the future.[372] National political actors in all Member States and also the EU Parliament and the Council should take a stand and work together in order to put in place a harmonized nationality law.

[369] Law no. 21/1991, Article 30 par.2 .
[370] *Janko Rottmann v Freistaat Bayern,* Case C-135/08, Judgment of the Court (Grand Chamber), 2 March 2010, , par.55-59.
[371] Groot, René de and Seling, Anja, "The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters", in J. Shaw (Ed.), "Has the European Court of Justice challenged member state sovereignty in nationality law?", EUI Working Papers, RSCAS 2011/62, European University Institute, Italy, p. 29.
[372] Shaw, Jo, "Concluding Thoughts: Rottman in Context", in J. Shaw (Ed.), "Has the European Court of Justice challenged member state sovereignty in nationality law*?",* EUI Working Papers, RSCAS 2011/62, European University Institute, Italy, p.40.

Chapter 4 - How is the EU Addressing the Statelessness Phenomenon

This Chapter aims to discuss the possibility to introduce an EU Directive on Statelessness. It also looks at the favorable context for such legislative instrument. It pin points the failures of the existent statelessness determination procedures, especially the procedure from the UK.

4.1 The Paradigm Shift at EU Level

After a long period of ignorance towards the issue of statelessness in the EU, the paradigm shifted and EU institutions and other actors "recognized as a priority preventing and reducing the phenomenon of statelessness".[373] In 2007 the European Parliament organized a seminar on prevention of statelessness and protection of stateless persons within the European Union.[374] In addition to this, the European Parliament recognizes that "statelessness is a significant human rights challenge", gives instructions to the Commission and the European External Action Service to fight against statelessness[375] and stresses that the situation of these people has to be addressed according to the recommendations of international organizations,[376] in its reports and resolutions. As mentioned in Chapter I, EU

[373] Directorate-General for Internal Policies, Policy Department, Citizens' Rights and Constitutional Affairs, Justice, Freedom and Security, Civil Liberties, Justice and Home Affairs, *Practices and Approaches in EU Member States to Prevent and End Statelessness*, Study, European Union, 2015, p.14.
[374] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Seminar on Prevention of Statelessness and Protection of Stateless Persons within the European Union, Tuesday 26 June 2007. http://www.europarl.europa.eu/hearings/20070626/libe/programme_en.pdf (accessed 27 October 2016).
[375] European Parliament Resolution of 12 March 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter (2014/2216(INI)), par.192. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0023+0+DOC+XML+V0//EN (accessed 27 October 2016).
[376] European Parliament resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010 2011) (2011/2069(INI)), par. 59.

Member States pledged at the UN High Level Rule of Law Meeting in New York "to address the issue by ratifying the 1954 UN Convention Relating to the Status of Stateless Persons and considering the ratification of the 1961 UN Convention on the Reduction of Statelessness".[377] The EU Action Plan on Human Rights and Democracy 2015-2019 defines as "fostering better coherence and consistency" as one of the objectives, which includes also

> To continue to address the issue of statelessness in relations with priority countries; focus efforts on preventing the emergence of stateless populations as a result of conflict, displacement and the break-up of states.[378]

The Court of Justice of the European Union has made it clear in *Janko Rottmann v Freistaat Bayern and Micheletti and others v Delegación del Gobierno en Cantabria*, that Member States should have "due regard to community law when laying down the conditions for acquisition and loss of nationality".[379] The CJEU through its case-law of the underlines the importance of applying the EU legal principles, such as non-discrimination and proportionality, to nationality laws of the Member States.[380]

Furthermore, the first Conclusions on statelessness of the Council of the European Union made in December 2015,[381] also, prove that the EU understands "the importance of identifying stateless persons and strengthening their protection". [382] This represents an

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http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0500&language=EN (accessed 27 October 2016).

[377] European Union, Delegation of the European Union to the UN, Note Verbale, High-level Meeting on the Rule of Law at the National and International Levels, Pledge Registration Form, September 2012, pledge no.4.

[378] General Secretariat of the Council of European Union, *EU Action Plan on Human Rights and Democracy*, Luxembourg: Publications Office of the European Union, 2015, Objective 24, action h), p.39. https://eeas.europa.eu/human_rights/docs/eu_action_plan_on_human_rights_and_democracy_en.pdf (accessed 1 November 2016).

[379] Court of Justice of the European Union, Rottmann v Freistaat Bayern, Case C-135/08, 2 March 2010 at par. 39 and *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria***,** C-369/90,1992, par.10.

[380] Directorate-General for External Policies of the Union, Directorate B, Policy Department, *Addressing the Human Rights Impact of Statelessness in the EU's External Action*, EXPO/B/2014/2014/07 November 2014, p.20.

[381]European Council, Council of the European Union, *Council adopts conclusions on statelessness,* 04/12/2015, Press release, 893/15, Justice, Home Affairs.

[382] United Nations High Commissioner for Refugees, *UNHCR welcomes the Conclusions of the EU Justice and Home Affairs Council on Statelessness*, press Release. http://www.unhcr.org/news/press/2015/12/5661c1d06/unhcr-welcomes-conclusions-eu-justice-home-affairs-council-statelessness.html (accessed 2 November 2016).

important step forward in addressing the statelessness phenomenon in the EU. The Conclusions welcome the recent developments in some of the Member States regarding the creation of statelessness determination procedures and underlines the importance to share the good practices of these procedures among Member States.[383]

4.2 Statelessness Determination Procedures. General Considerations.

Statelessness determination procedures (hereinafter "SDP")[384] prove that statelessness is not overlooked by the governments of some Member States. According to ENS until October 2016 there were only six Member States which have in place a protection system for stateless persons.[385] However, the numbers seems to be growing and in October 2016, the Netherlands amended its legislation and introduced a SDP.[386] Belgium, also, has pledged at the Ministerial Intergovernmental Event on Refugees and Stateless Persons of 2011, to establish a SDP.[387]

The growing interest of Member States in protecting stateless population is welcomed. SDPs play a primary role in this protection system. It is impossible to protect stateless persons if we don't know who these beneficiaries are. Therefore, it is important to identify stateless

[383]European Council, Council of the European Union, *Council adopts conclusions on statelessness*, 04/12/2015, Press release, 893/15, Justice, Home Affairs.
[384] Similar with the Refugee Status Determination which recognizes the applicant as a refugee.
[385] European Network on Statelessness, *Determination and the Protection Status of Stateless Persons*, A summary guide of good practices and factors to consider when designing national determination and protection mechanisms, 2013, p.7. France, Italy, Spain, Latvia, Hungary, the UK. http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/Statelessness%20determination%20and%20the%20protection%20status%20of%20stateless%20persons%20ENG.pdf (accessed 4 November 2016).
[386]Swider, Katja, Vlieks, Caia, *Proposal for legislation on statelessness in the Netherlands: A bittersweet victory*, European Network on Statelessness Blog. http://www.statelessness.eu/blog/proposal-legislation-statelessness-netherlands-bittersweet-victory (accessed 20 October 2016).
[387] United Nations High Commissioner for Refugees, *PLEDGES 201, Ministerial Intergovernmental Event on Refugees and Stateless Persons*, UNHCR ministerial meeting to commemorate the 60th anniversary of the 1951 Convention relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness, Geneva, Palais des Nations, 7-8 December 2011, p.37. http://www.unhcr.org/4ff55a319.pdf (accessed 5 November 2016).

persons in order to protect them.[388] The identification of stateless people also helps reducing the number of stateless population.[389] Even though international conventions on statelessness do not prescribe an obligation for the signatory states to establish a SDP, the UNHCR Guidelines on Statelessness assert that the responsibility of states to identify stateless persons is implied in the Conventions.[390]

Nevertheless, SDPs established by the Member States are highly criticized. According to the existing literature,[391] the SDPs from the Member States differ very much from one to another, for example in the case of the authority in charge of statelessness determination ("asylum authority in Spain and France, immigration authority in Hungary or civil courts in Italy"); the legislative framework (detailed in Hungary and Spain and basic in Slovakia); the content of the legal status ("protection-oriented status aiming at quick integration in France, Italy or Spain" and "unfavorable condition with several limitations in Hungary").[392]

In some Member States, such as Hungary and France, the SDP applies only to *de jure* stateless persons as defined by the 1954 Convention.[393] On the other the Italian judiciary applies a wider definition.[394] Moreover, it is argued that these policies compromise the "proper implementation of the 1954 Convention" and may breach the provisions of the 1961

[388] Directorate-General for Internal Policies, Policy Department, Citizens' Rights and Constitutional Affairs, Justice, Freedom and Security, Civil Liberties, Justice and Home Affairs, *Practices and Approaches in EU Member States to Prevent and End Statelessness*, Study, European Union, 2015, p.45. http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU(2015)536476_EN.pdf (accessed 1 November 2016)
[389] Ibidem.
[390] United High Commissioner for Refugees, *Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, p.52, par.144.
[391] See: Gabor Gyulai, *Statelessness in the EU Framework for International Protection*, European Journal of Migration and Law 14, 2012, pp. 279-295; Giulia Bittoni, *Statelessness in the European Union, The Case of Cuban Migrants*, Tilburg Law Review 19, 2014, pp.52-63; Gerard-René de Groot, K. Swider, O. Vonk, *Practices and Approaches in EU Member States to Prevent and End Statelessness'*, Study for the LIBE Committee, Nov. 2015, pp. 48-51.
[392] Gabor Gyulai, *Statelessness in the EU Framework for International Protection*, European Journal of Migration and Law 14, 2012, 287-288.
[393] Bittoni, Giulia, "Statelessness in the European Union, The Case of Cuban Migrants", *Tilburg Law Review 19*, 2014, p.57.
[394] Ibidem.

Convention.[395] Research shows that even though UNHCR elaborated guidelines on the design, procedural guarantees and how SDP should operate,[396] Member States do not respect the standards prescribed by UNHCR.[397] These practices demonstrate that the national policies are made *ad-hoc* and "there is a need for a more concerted, comprehensive and coordinated response to addressing statelessness within the EU".[398] In order to prove this point I would like to describe in more detail the SDP of the UK.

4.2.1 Statelessness Determination Procedure in the United Kingdom

The UK's SDP is effective since 6 of April 2013.[399] Technically, Part 14 of the Immigration Rules describes it as a procedure for "limited leave to remain as a stateless person".[400] The procedure was established two years after Asylum Aid and UNHCR published the report *Mapping Statelessness in the United Kingdom.*[401] The report encompasses a detailed research "into the number, profile and situation of stateless people in the UK"[402], "puts a human face on their situation"[403] and underlines the importance of the

[395] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons", ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p. 13. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2823627 (accessed 5 November 2016).
[396] United High Commissioner for Refugees, *Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, pp.27-30, par.62-67.
[397] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons", ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p. 13.
[398] Directorate-General for External Policies of the Union, Directorate B, Policy Department, *Addressing the Human Rights Impact of Statelessness in the EU's External Action*, EXPO/B/2014/2014/07 November 2014, p.22.
[399] Asylum Aid, *Briefing Note on the Introduction of a UK Stateless Determination Procedure effective from 6 April 2013,p.1. http://www.asylumaid.org.uk/wp-content/uploads/2013/08/STATELESSNESS_BRIEF.pdf (accessed 8 November).*
[400] Immigration Rules Part 14: stateless persons.https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons (accessed 8 November 2016).
[401] United Nations High Commissioner for Refugees/Asylum Aid, *Mapping Statelessness in the United Kingdom*, November 2011, http://www.refworld.org/pdfid/4ecb6a192.pdf
[402] Asylum Aid, Key Successes, http://www.asylumaid.org.uk/statelessness/. (accessed 6 November 2016).

SDP in addressing the statelessness phenomenon.[404] The report makes recommendations for improvement and notes the need of establishing a SDP.[405] The Home Secretary promised to fulfill these requirements and as a proof Part 14 of the Immigration Rules was adopted.[406] It is one of the few successes of this kind of actions. The Romanian Government did not have any kind of reaction after the study regarding childhood statelessness was published by ENS.[407] This is particularly worrisome since, as described in the previous chapters, there are multiple avenues through which groups of children become vulnerable and experience stateless-like situations (such as lack of documents, difficult access to basic services, marginalization and segregation etc.); not a having a remedy and prevention mechanisms only means that this phenomenon will increase without a mechanisms to close this loop.

The Immigration Rules grant some stateless persons a lawful temporary stay and a way to acquire a permanent stay.[408] According to the Rules, if applicant meets the requirements he/she may be granted limited stay not longer than 30 months.[409] After five years of continuous lawful residence he/she is entitle to apply for indefinite leave to remain as a stateless person.[410]

Whilst the new Immigration Rules are welcomed, representing a step forward in protecting stateless people, there are still deficiencies in the SDP of the UK. First of all, the

[403] Asylum Aid, *Briefing Note on the Introduction of a UK Stateless Determination Procedure effective from 6 April 2013,p.1.* *http://www.asylumaid.org.uk/wp-content/uploads/2013/08/STATELESSNESS_BRIEF.pdf (accessed 8 November).*
[404] United Nations High Commissioner for Refugees/Asylum Aid, *Mapping Statelessness in the United Kingdom*, November 2011,p. 7, 9.
[405] Asylum Aid, *Briefing Note on the Introduction of a UK Stateless Determination Procedure effective from 6 April 2013,p.1.*
[406] Ibidem.
[407] European Network on Statelessness, *Ending Childhood Statelessness, A Study on Romania*, Working Paper 01/15.
[408] Migrants Resource Centre, University of Liverpool Law Clinic, European Network on Statelessness and Institute on Statelessness and Inclusion, *Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review* ,United Kingdom 22 September 2016, p.3. http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ISI-MRC-LLC-ENS-UK-UPR-Submission-Session-27-2016.pdf (accessed 8 November 2016).
[409] Immigration Rules Part 14: stateless persons, par. 405.
[410] Immigration Rules Part 14: stateless persons, par. 407.

number of applications and the recognition rate are low.[411] According to the Immigration Law Practitioners' Association (hereinafter "ILPA") and Liverpool Law Clinic, between 9 April 2013 and 31 March 2016 the Home Office received 1592 the applications for limited leave to remain as a stateless person.[412] Out of this number only 39 applications were granted and 715 were refused, therefore the success rate is approximately 5%.[413] Research shows that this could be the cause of different factors, such as: lack of awareness of possible applicants and also the actors involved, lack of legal aid, stateless persons which are already granted refugee status, impossibility for failed asylum-seekers to contact their counselors.[414]

As regards to burden of proof, the Immigration Rules state that the applicant has to provide "all reasonable available evidence".[415] Furthermore, the Home Office's policy instructions on statelessness stipulates that "the caseworker must assist the applicant by interviewing them, undertaking relevant research and, if necessary, making enquiries with the relevant authorities and organizations".[416] This is not exactly in line with the UNHCR Guidelines which advices on a shared burden of proof.[417] Moreover, Asylum Aid presents its concerns regarding the insufficient assistance of the caseworkers of the Home Office afforded to the applicants, in order to collect evidence that prove their statelessness.[418]

[411] Immigration Law Practitioners' Association and University of Liverpool Law Clinic, *Statelessness and Applications for Leave to Remain: A Best Practice Guide*, 3 November 2016, p.7. http://www.ilpa.org.uk/resource/32620/statelessness-and-applications-for-leave-to-remain-a-best-practice-guide-dr-sarah-woodhouse-and-judi (accessed 10 November 2016).
[412] Ibidem.
[413] Ibidem.
[414] Immigration Law Practitioners' Association and University of Liverpool Law Clinic, *Statelessness and Applications for Leave to Remain: A Best Practice Guide*, 3 November 2016, p.7.
[415] Immigration Rules Part 14: stateless persons, par.403 (d) has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless.
[416] Home Office, *Asylum Policy Instruction Statelessness and Applications for Leave to Remain*, Version 2.0, 18 February 2016, section 4.2, p.11.
[417] United High Commissioner for Refugees, *Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, p. 34, par. 89.
[418] Asylum Aid, *The UK's Approach to Statelessness: Need for Fair and Timely Decisions*, Asylum Aid Policy Briefing, September 2016, p. 2.

The poor quality of the decisions and misapplication of law and policy, as a result of, at least in part, poor professional abilities, also, raises concerns because the SDP in the UK does not prescribe a right to appeal against the decision of the Home Office,[419] only an administrative review.[420] Again, this is against the UNHCR's Guidelines, which recommends an effective, independent and full right to appeal against a negative decision.[421]

Decision-making proves to be a very slow process in most of the cases, since only 754 applications were solved from the total of 1592.[422] It takes at least one year to reach a decision and "one case has been pending for 3 years".[423] ILPA argues that the extreme length of the procedure is not due to the lack of human resources.[424] The Home Office falls short in respecting the 6 months term prescribed by the UNHCR Guidelines.[425]

Another important issue highlighted by Asylum Aid is the absence of legal aid for stateless applicants, who do not possess the means to pay a lawyer to represent them, not even at the administrative review stage.[426] Although UNHCR's Handbook on Statelessness makes clear recommendations that free legal assistance should be available to applicants who cannot afford to pay for it.[427] The SDP, akin the asylum procedure, would benefit from support in

[419] Ibid., 3.
[420] Immigration Rules Appendix AR: administrative review, AR2.3. The eligible decision will be reviewed to establish whether there is a case working error, either as identified in the application for administrative review, or identified by the Reviewer in the course of conducting the administrative review. https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-ar-administrative-review (accessed 10 November 2016).
[421] United High Commissioner for Refugees, *Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, p.30, par. 76-77.
[422] Asylum Aid, *The UK's Approach to Statelessness: Need for Fair and Timely Decisions*, Asylum Aid Policy Briefing, September 2016, p. 3. http://d2t68d2r9artlv.cloudfront.net/wp-content/uploads/2016/09/Policy-briefing-statelessness-22-September-final.pdf (accessed 10 November 2016).
[423] Immigration Law Practitioners' Association and University of Liverpool Law Clinic, *Statelessness and Applications for Leave to Remain: A Best Practice Guide*, 3 November 2016, p.7.
[424] Ibidem.
[425] United High Commissioner for Refugees, *Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, p.30, par.77.
[426] Asylum Aid, *The UK's Approach to Statelessness: Need for Fair and Timely Decisions*, Asylum Aid Policy Briefing, September 2016, p.4.
[427] United High Commissioner for Refugees, *Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, p.30, par.71 and 76.

form of free legal advice.[428] This will result in a more effective procedure, one which would have additional guarantees that the protection is awarded.

The UK should be commended for its work on reducing and preventing statelessness. When comparing the UK policies with the policies of other Member States is obvious that the UK is ahead in a positive manner. However, when comparing these policies with the principles of the 1954 Convention there is still work to be done.

These positive and voluntary developments made by the seven Member States should be applauded and followed by the rest of the Member States. The absence of a SDP may lead to a "serious risk that stateless persons are not properly identify as such".[429] Moreover, it is doubtful that without an adequate identification mechanism of stateless persons, they would receive the treatment stipulated in the international conventions.[430]

It should be emphasized that even though Member States have "broad discretion in the design and operation of statelessness determination procedures", they have to respect some crucial safeguards established in the UNHCR Guidelines on Statelessness.[431] Thus, for SDPs to be "fair and efficient" states should ensure access to them [432] to all stateless persons present on the territory of these countries.[433] A decision has to be issued not later than six months, after an application was registered.[434] The right to appeal to an independent body should be guaranteed.[435] The burden of proof should be "in principle shared".[436] Nevertheless, it is clear

[428] Asylum Aid, *The UK's Approach to Statelessness: Need for Fair and Timely Decisions*, Asylum Aid Policy Briefing, September 2016, p.4.
[429] Directorate-General for Internal Policies, Policy Department, Citizens' Rights and Constitutional Affairs, Justice, Freedom and Security, Civil Liberties, Justice and Home Affairs, *Practices and Approaches in EU Member States to Prevent and End Statelessness*, Study, European Union, 2015, p.53.
[430] Ibidem.
[431] United High Commissioner for Refugees, *Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, p.27, par. 62.
[432] Ibid., p.28, par.68.
[433] Ibid., p.28, par.69.
[434] Ibid., p.30, par.75.
[435] Ibid., p.30, par.76.
[436] Ibid., p.34, par.89.

that Member States could make use of a supranational tool which would help in establishing quality standards, harmonized procedures, and an authority to interpret in a unitary way the provisions of the statelessness international conventions.

4.3 Reasons for an EU Directive on Statelessness

In my view, the gaps in the protection of stateless persons and the failure to comply with the 1954 Convention as described under the previous sub-chapters could be solved with the introduction of an EU Directive on Statelessness. The absence of SDPs in 21 Member States, the different interpretations of the definition of 'stateless person' and "the lack of effective supervision and monitoring" could be addressed through an EU Directive. [437]

It is argued that the advancement of this kind of legislative instrument will encourage the proper application and implementation of human rights obligations of EU Member States under the international conventions on statelessness.[438] It would put into practice the EU's objective to set the conditions for entry and residence of third-country nationals and stateless persons and define the rights of third country nationals.[439] This objective is prescribed by article 79 of the TFEU.[440] The rationale behind this objective is that the EU, an area without

[437] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons", ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.15.
[438] Meijers Committee, 'A proposal for an EU Directive on the identification of statelessness and the protection of stateless persons', 13 October 2014, p.2. http://www.statelessness.eu/resources/proposal-eu-directive-identification-statelessness-and-protection-stateless-persons (accessed 10 November 2016).
[439] Ibidem.
[440] Treaty on the Functioning of European Union, article 79. 1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

internal borders, would like to avoid the effects of 'pull' and 'push' factors.[441] In the asylum area, this phenomenon is called *'asylum-shopping'* and technically means that an asylum-seeker applies for international protection in more than one country and would choose the Member State which is more socially and economically developed.[442] The rationale of the EU law on statelessness is to create "a leveled legal playing field" which impedes '*statelessness-shopping'* and "ensures in all Member States a minimum level of protection in accordance with international obligations".[443] It should be added that the same rationales were used in establishing the Common European Asylum System stipulated in the Tampere Programme.[444]

Furthermore, the EU Directive on statelessness would harmonize "the treatment of stateless persons", including the protection and residence procedures.[445] Moreover, regulating the legal status of stateless persons guarantees "more effective compliance", because, on one hand, EU law has direct application in national laws of Member States and, on the other hand, EU has institutional enforcement mechanisms.[446]

Nonetheless, protecting the stateless people and ensuring their integration on the social and economic level adheres to the values on which the EU was founded,[447] such as respect for

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(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
(d) combating trafficking in persons, in particular women and children.

[441] Maarten den Heijer and Katja Swider, *Why Union Law Can and Should Protect Stateless Persons*, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.16.

[442] European Commission, DG Migration and Home Affairs, *European Migration Network Glossary & Thesaurus*
http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/glossary/index_a_en.htm (accessed 9 November 2016).

[443] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.16.

[444] Tampere European Council 15 And 16 October 1999 Presidency Conclusions, part A. http://www.europarl.europa.eu/summits/tam_en.htm (accessed 10 November 2016).

[445] Meijers Committee, 'A proposal for an EU Directive on the identification of statelessness and the protection of stateless persons', 13 October 2014, p.2

[446] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.16.

[447] Treaty on the European Union, Article 2 The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

human dignity, human rights, combating social exclusion and discrimination, promoting social justice and protection.[448]

4.4 Legal Feasibility for an EU Directive on Statelessness

The provision of article 67(2) TFEU regarding the Area of Freedom, Security and Justice, stipulating that "stateless persons shall be treated as third-country nationals"[449] represents an acknowledgement "of the need to address the situation of stateless persons",

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Article 3 1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
It shall promote economic, social and territorial cohesion, and solidarity among Member States.
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

[448] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.17.
[449] Treaty on the Functioning of the European Union, Title V, Area of Freedom, Security and Justice, General Provisions, article 67, par.2.

through EU regulations.[450] This provision is the first of this kind in EU primary law.[451] It is argued, that even though it may appear insignificant at first sight, the clause does represent an important step towards the establishment of an EU legislative instrument.[452] Article 67(2) TFEU allows the EU to set out the conditions for entry and residence for stateless persons in the same way it does in case of third-country nationals.[453] Furthermore, the EU secondary legislation, adopted according to article 78 TFEU (common asylum policy)[454] and 79 TFEU (common immigration policy)[455] applies, also, to stateless persons.[456] Research shows that articles 78 and 79 TFEU apply to all third-country nationals and stateless persons no matter where they are born or "whether they crossed the borders or not".[457] As a consequence of this, stateless persons may fall under the provisions of the directives established on the basis of article 78 and 79 TFEU.[458] However, none of the directives created until now contains specific provisions on the protection of stateless persons as described in international conventions.[459] This means that not all of the persons who are stateless fall under the scope of the existent directives.[460]

[450] Directorate-General for External Policies of the Union, Directorate B, Policy Department, *Addressing the Human Rights Impact of Statelessness in the EU's External Action*, EXPO/B/2014/2014/07 November 2014, p.20.
[451] Gyulai, Gabor, "Statelessness in the EU Framework for International Protection", *European Journal of Migration and Law 14*, 2012, p.284.
[452] Ibidem.
[453] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.20.
[454] Directive 2011/95/Eu of the European Parliament and of the Council, 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, of 13 December 2011, article 1. http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=en (accessed 10 November 2016).
[455] For example: Students Directive (2004/114/EC), the Family Reunification Directive (2003/86/EC), and the Long-Term Residence Directive (2003/109/EC).
[456] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.20.
[457] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.20.
[458] Ibidem.
[459] Ibidem.
[460] Ibidem.

Article 78 TFEU cannot be ground for an EU Directive on Statelessness, because the objectives enshrined in it ("international protection",[461] "*non-refoulment*",[462] "subsidiary protection"[463], "temporary protection",[464] "asylum"[465]) are "too narrow".[466] Nevertheless, article 67(2) TFEU read in conjunction with article 79 TFEU offers the legal basis for the EU protection directive on statelessness and the establishment of a SDP.[467] Paragraph 2(a) of article 79 TFEU puts forward, for the purpose of establishing a common immigration policy, the "legal basis"[468] for establishing "the conditions of entry and residence of third-country nationals".[469] Paragraph 2 (b) of the same article gives substance to the "legal basis"[470] for defining the rights of third-country nationals.[471] As stated in article 67(2) TFEU these clauses apply, also, to stateless persons.

[461] Treaty on the Functioning of the European Union, Title V-Area of Freedom, Security and Justice, Chapter 2-Policies on Border Checks, Asylum and Immigration, article 78 (1).
[462] Ibidem.
[463]Ibid., article 78 (2) b).
[464] Ibid., article 78(2) c).
[465] Ibid., article 78 (1),(2).
Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.21. In Case C-377/12 of 11 June 2014, CJEU states the following: "According to settled case-law, the choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the various corresponding legal bases. However, no dual legal basis is possible where the procedures required by each legal basis are incompatible with each other. (see, inter alia, Case C-130/10 *Parliament* v *Council* EU:C:2012:472, paragraphs 42 to 45 and the case-law cited)."
[467] Meijers Committee, 'A proposal for an EU Directive on the identification of statelessness and the protection of stateless persons', 13 October 2014, p.5.
[468] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.21.
[469] Treaty on the Functioning of the European Union, Title V-Area of Freedom, Security and Justice, Chapter 2-Policies on Border Checks, Asylum and Immigration, , article 79 (2)a).
[470] Heijer, Maarten den and Swider, Katja, "Why Union Law Can and Should Protect Stateless Persons",, ACIL Research Paper 2016-14, University of Amsterdam, 15 August 2016, p.21
[471] Treaty on the Functioning of the European Union, Title V-Area of Freedom, Security and Justice, Chapter 2-Policies on Border Checks, Asylum and Immigration, article 79 (2)b).

Besides articles 79 TFEU and 67(2) there is, also, article 5 par.3 and 4 of the Treaty on European Union, which stipulates the subsidiarity principle.[472] According to the subsidiarity principle the EU "shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States" and because of "the scale or effects of the proposed action, be better achieved at Union level".[473] Therefore, this should be considered another legal ground for the creation of an EU Directive on Statelessness.

[472] Treaty on European Union, article 5 par. 3 and par.4.
[473] Ibid., article 5 par.3.

Conclusion

Estimates put the number of stateless persons in the EU at around half a million people. While the number seems high, in reality there are probably even more people with no nationality. The lack of statistics and the invisibility in the traditional population counting algorithms means that there is a large vulnerable group amongst us and probably around 200 000 of them are children.

This phenomenon is caused by a wide range of causes of various natures. While in some cases there are political events which lead to a certain group being left without their nationality, in other instances legal amendments, technical interpretations of laws and administrative directives have a similar effect.

Romania and the United Kingdom are two countries which, in theory, should have similar mechanisms to tackle this phenomenon. They are both parties to the international instruments connected to statelessness (except, Romania has entered the 1954 Convention with three reservations) and to children's rights, they both are, for the time being, part of the EU and adhered to its principles on respecting human rights. The reality is that their handling of the problem is very different. Certainly, the UK is a few steps ahead of Romania in protecting stateless persons and preventing and ending the statelessness phenomenon.

While the UK has in place a procedure of granting citizenship upon request to stateless person, in compliance with the 1961 Convention, Romania has no facilitated procedures for this group of persons; the only way of acquiring Romanian nationality for stateless persons is naturalization. While the UK has established a statelessness determination procedure, Romania has no such thing in place. Moreover, Romania has difficulties in registering all its citizens and, therefore creates new avenues for people to become vulnerable and at risk to

become stateless. However, both Member States analyzed in this paper have registered failures in giving paramount importance to "the best interest of the child" when they enacted laws on childhood statelessness.

Although the two countries are affected differently by this phenomenon, the differences between their practices can be seen as an example relevant at a larger scale in the EU. Only seven states have procedures to identify and grant protection to stateless persons.[474] These procedures are quite different from each other – from the authority which is responsible to carry this out, to the length, conditions, and protection awarded. One thing they do have in common is that they are still a long way from respecting the principles set out in the 1954 Convention and the recommendations of the UNHCR.

In the absence of a clear obligation to establish such a procedure, any progress on this topic is mostly up to the benevolence of governments, efforts of the civil society and advocacy of the UNHCR. While there has been a more frequent mentioning of the statelessness phenomenon by officials of the EU and European politicians, no irreversible momentum has been achieved yet to find solutions to this problem in all Member States.

This paper suggests EU law and a directive on statelessness as a positive drive for states in their quest to stop and reduce the phenomenon. This method had good results in similar fields (e.g. asylum and immigration) until a certain point.

Other actors of change can be supra-national courts, namely the ECtHR and the CJEU. Both instances had cases related to statelessness and have decided based on the ECHR and EU legislation respectively. While there have been several land-mark decisions which provide

[474] See European Network on Statelessness, *Statelessness Determination and the Protection Status of Stateless Persons*, A summary guide of good practices and factors to consider when designing national determination and protection mechanisms, 2013, p.7. France, Italy, Spain, Latvia, Hungary, the UK; Katja Swider, Caia Vlieks, *Proposal for legislation on statelessness in the Netherlands: A bittersweet victory*, European Network on Statelessness Blog. The Netherlands.

guidance on how human rights provisions should be interpreted in connection to one's claim to a nationality, it is perhaps unrealistic to expect these judicial bodies to come up with sustainable solutions to prevent and reduce statelessness. It is the role of states to carry out this exercise and recognize the invaluable role that international courts, supra-national forms of government and the example of other European countries can have in the process.

Recommendations

The following actions should be taken in order to prevent and childhood statelessness in EU:

1. In view of the 2012 EU pledge,[475] Cyprus, Estonia, Malta and Poland should accede to the 1954 Convention. Moreover, based on the same pledge, Member States that did not acceded to the 1961 Convention should be urged to do so.

2. Member States that entered the 1954 Convention or 1961 Convention with reservations, such as Romania, should remove them immediately.

3. All Member States should implement nationality laws and procedures that comply with "the best interest of the child" principle enshrined in article 3 of CRC or review the existing legislations.

4. All Member States should implement measures that respect the provisions of article 7 of CRC.[476]

5. Member States should ensure that legislative safeguards that they enact in order to avoid childhood statelessness "must go hand-in-hand with measures to remove practical or administrative hurdles in accessing or confirming nationality".[477]

[475] European Union, Delegation of the European Union to the UN, Note Verbale, High-level Meeting on the Rule of Law at the National and International Levels, Pledge Registration Form, pledge no.4.
[476] European Network on Statelessness, No Child Should Be Stateless, 2015, p.31.

6. All Member States should ensure visibility of the statelessness phenomenon. In order to do this, they have to conduct further research on this issue, collect and publish disaggregated data regarding the groups of people affected, by gender and age. The problem of statelessness, in general, and childhood statelessness may be properly addressed only if Member States are aware of the size of the problem.

7. Necessary measures should be taken in order to "develop effective communications strategies, including the harnessing of social and digital media, in order to share knowledge of the causes and consequences of childhood statelessness with a much wider audience and thereby increase societal and political pressure".[478]

8. All Member States should take all the necessary measures to ensure birth registration of children born on their territories.

9. In order to protect stateless persons, Member States should identify them, through statelessness determination procedures. Statelessness determination procedures should not impose arbitrary conditions.

10. Statelessness determination procedures should be implemented in accordance with the UNHCR Handbook on Protection of Stateless Persons.[479]

11. Statelessness determination procedures should ensure the following safeguards:
    - Member States should ensure access to the procedure to all stateless persons present on the territory of these countries;[480]
    - A decision should be taken in a reasonable time frame;[481]

[477] European Network on Statelessness, "No Child Should Be Stateless", 2015, p.30.
[478] Ibid., p.31.
[479] United Nations High Commissioner For Refugees, "Handbook on Protection of Stateless Persons, Under the 1954 Convention Relating to the Status of Stateless Persons Geneva", 2014.
[480] Ibid., p.28, par.68 and 69.

- A right to appeal to an independent body should be guaranteed;[482]
- The burden of proof has to be shared.[483]

12. In order to avoid and end statelessness in EU, but, also, to ensure a harmonized statelessness determination procedure, that is in line with the international provisions on statelessness, EU has to take action in establishing a EU Directive on Statelessness.

[481] Ibid., p.30, par.75.
[482] Ibid., p.30, par.76.
[483] Ibid., p.30, par. 89.

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