

European Network on Statelessness Submission to the European Commission Consultation on the future of Home Affairs policies: An open and safe Europe – what next?

The European Network on Statelessness (ENS) is a civil society alliance with 50 member organisations in over 30 countries committed to address statelessness in Europe. We believe that all human beings have a right to a nationality and that those who lack nationality altogether are entitled to adequate protection – including the right to regularise their status and enjoy their fundamental civil, economic, social and cultural rights owing under international human rights law.

ENS welcomes this opportunity to contribute to the debate launched by the European Commission on the future of EU Home Affairs policies, and in particular to promote improved protection for stateless persons – an issue that hitherto has not received adequate attention at the European Union level or in the framing of Home Affairs policy under previous programmes. The time is now ripe to address this relative lack of attention and action.

1) Introduction

There are over 400,000 stateless people living in the European Union, and several hundred thousand more in the EU's neighbours to the East and across the Mediterranean.¹ A relatively small minority has arrived within mixed migration flows into the EU, and was either stateless prior to departure from the country of origin or has since become stateless. The hitherto slow-paced development of effective identification and protection mechanisms for stateless migrants means that they are among the most vulnerable people in Europe, often facing years of uncertainty, destitution and repeated, lengthy immigration detention. Yet, the majority of stateless people who call the EU home were born here and are stateless in the only country they have ever known. Despite their strong and evident ties to their country of residence, they are not recognised as nationals and remain excluded from both the protection that nationality offers and the benefits of EU citizenship.

Statelessness presents a significant challenge for EU migration management, while also being a 'home-grown' problem that threatens the inclusive aspirations of EU citizenship. Statelessness has become an issue with regard to which not just EU member states, but also EU institutions, are increasingly aware of the need for concerted action. On the occasion of the debate on the future JHA agenda for DG Home Affairs, ENS urges the Commission to include the issue of statelessness more prominently within its strategic planning and consideration. This submission provides a brief overview of some of the ways in which statelessness already features in the work of or debate in the EU institutions, as well as potential scope to expand activities.

The submission is structured around the following themes: Responding to statelessness in the migration context, statelessness and EU citizenship, the eradication of statelessness in the EU, and statelessness in EU foreign policy and external relations.

2) Responding to statelessness in the migration context

Over the past few years, several EU migration policy meetings have considered the question of the identification and treatment of stateless people in the migration context. Most recently, at an EU conference on the post-Stockholm agenda, hosted by the Ministry of Security and Justice in the Netherlands in December 2013, participants in a

¹ UNHCR, Global Trends 2012: Persons under UNHCR's statelessness mandate (table 7), available at: http://www.unhcr.org/globaltrends/2012GlobalTrends_0913.zip.

workshop on statelessness agreed that the EU must consider the coordination of EU member states' policy responses towards stateless migrants within its broad competence in the field of migration.

The building blocks for such a coordinated response are already in place. The EU has pledged² that all of its member states will become state parties to the 1954 Convention relating to the Status of Stateless Persons, and only four member states are yet to do so. Such universal accession by member states will provide a common normative foundation for an EU-wide response to statelessness in the migration context (similarly to the role of the 1951 Convention relating to the Status of Refugees as the foundation for the common asylum policy). Some, although relatively few, EU countries have already taken important steps towards the implementation of the protection regime of the 1954 Convention relating to the Status of Stateless Persons through the introduction of a statelessness determination procedure and related protection status. The number of such dedicated protection regimes is growing and is expected to rise further in the coming years.³ In this respect, the fact that many member states have yet to introduce a dedicated procedure arguably increases the rationale for greater cooperation and coordinated action which would enhance efficiency as well as help to ensure a consistent and common approach from the outset (i.e. unhindered by existing diverging state practices). Already, EU member states are looking to one another to share experiences of statelessness determination and protection as a migration policy tool, with increasing use of inter-government consultations and study visits. This signals an existing interest in consultation and coordination which could lay the ground for regional policy agreements.

In addition to the normative value of near universal accession by member states to the 1954 Statelessness Convention, the EU's existing powers in the field of migration already provide a strong basis for addressing at least some aspects of statelessness. While prevention and reduction of statelessness is usually addressed through nationality laws, the protection of stateless persons takes place predominantly within the sphere of migration law, and the EU migration and asylum *acquis* already includes stateless people within its scope. Primary EU law (e.g. Article 67(2) TFEU) and some secondary law instruments assimilate stateless persons with third-country nationals, (e.g. the long-term residence directive 2003/109/EC and various readmission agreements). Equally some EU law provisions grant stateless persons rights similar to those enjoyed by recognised refugees or EU citizens, for example with regard to social security legislation (such as equality of treatment between stateless people and EU nationals moving within the EU under Regulation 883/2004). Moreover, various rights owing to stateless persons have been expanded by EU law (e.g. Regulation No 883/2004/EC granting them social benefits or Regulation No. 1932/2006/EC and No. 1289/2013/EC facilitating their entry to/movement within the EU, i.e., the possibility for member states to exempt them from visa requirements). Article 14 of the EU Returns Directive (and particularly related principles of due diligence, proportionality, non-discrimination and non-arbitrariness) also offers potential to address the protection needs of stateless persons in detention situations.

It can therefore be established that the EU has competence regarding stateless persons in a migratory context (the legal basis being Article 67(2) TFEU in conjunction with Article 352 TFEU), and therefore an important question follows regarding the principle of subsidiarity. In this regard a number of arguments have been raised in support of EU involvement, including at the above-mentioned EU conference on the post-Stockholm JHA agenda, hosted by the Ministry of Security and Justice in the Netherlands in December 2013.⁴

- *the 'equal treatment' argument*

² Delegation of the European Union to the United Nations, 'Note Verbale' (New York, 19 September 2012), available at <http://www.unrol.org/files/Pledges%20by%20the%20European%20Union.pdf>.

³ European Network on Statelessness, *Good Practice Guide on Statelessness Determination and the Protection Status of Stateless Persons*, December 2013, available at <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/Statelessness%20determination%20and%20the%20protection%20status%20of%20stateless%20persons%20ENG.pdf>.

⁴ For a report of the meeting see Katja Swider, *Time to put statelessness on the EU agenda!*, ENS blog, 16 December 2013, available at <http://www.statelessness.eu/blog/time-put-statelessness-eu-agenda>.

It is unfair that persons in a similar situation within the EU are treated differently. Only an EU-wide coordination can ensure equal treatment of stateless persons across all member states.

- *the 'race to the bottom' argument*

Without concerted EU coordination, in the context of open internal borders, there is a risk that member states will try to offer less protection to stateless persons than the neighbouring state, in order to avoid attracting stateless persons who need assistance. This risks eventually leading to a very low overall standard of protection for stateless persons in the EU, and to potential violations of relevant international obligations by member states.

- *the 'practice what you preach' argument*

If the EU does not take measures on statelessness within its borders, then how can it credibly address statelessness in its foreign policies? This argument is less relevant for the considerations on subsidiarity, but is nevertheless a very important reason for the EU to take a strong stance on statelessness within its borders.

These arguments, combined with the existing momentum and dialogue by and among several individual member states (described above), reinforce the urgent need for the inclusion of far greater and more embedded coordination of policies addressing statelessness in a migratory context within the EU Home Affairs priorities agreed for the years to come.

3) *Statelessness and EU Citizenship*

The EU does not have any competence when it comes to the regulation of nationality – this remains the sovereign prerogative of member states. However, the fact that nationality is the gateway to EU citizenship has opened the door for the EU to consider member states' nationality policy where there is a threat that the benefits of EU citizenship will be interrupted and in particular in the context of statelessness. The Court of Justice of the EU's ruling in the *Rottmann case*⁵ in 2010 has left no doubt that EU member states' nationality policy is not entirely beyond the scrutiny of EU institutions. With EU citizenship an ever more valuable commodity due to the increased benefits that it brings, nationality policy that renders people stateless or unjustifiably impedes access to nationality for the stateless is likely to become increasingly contested. The EU needs to prepare itself to navigate the ever more precarious line between member state competence, EU interest and individual rights when it comes to nationality matters.

Moreover, debate continues on how the EU can achieve a participatory model which is more inclusive, and the foundations for EU citizenship are being reconsidered. In its 2013 opinion on "A more inclusive citizenship open to migrants", the European and Economic Social Committee (EESC) called for the extension of EU citizenship to long-term residents.⁶ The EESC determined that the current status quo, in which EU member states decide through their individual nationality policy which people are European citizens, "must change, so that Union citizenship can be at the heart of European integration". The EU's stateless long-term residents are an obvious group for whom exclusion from the benefits of EU citizenship is hard to justify (the legal basis would be Article 25 TFEU in conjunction with Article 352 TFEU). A better understanding of and more considered attention for statelessness in Europe must inform any discussion around the reinvention of EU citizenship.

4) *The eradication of statelessness in the EU*

As mentioned at the outset of this submission, there are over 400,000 stateless people living in the European Union and several hundred thousand more in the EU's neighbours to the East and across the Mediterranean. Most of these people became stateless due to political developments that were beyond their control and that now lie many years

⁵ Court of Justice of the European Union, 2 March 2010, *Rottmann v Freistaat Bayern*, Case C-135/08.

⁶ A call first made in 2003 in its Opinion on Access to European Union Citizenship.

in the past. In particular, the break-up of the Soviet Union and of Yugoslavia in the 1990s created statelessness on a massive scale in Europe. Two decades on, these situations are yet to be fully resolved. More worryingly, new cases of statelessness are emerging as the children and grandchildren of those who were rendered stateless by the dissolution of their state are now also born into statelessness, due to the absence of sufficient safeguards to guarantee their right to a nationality. This means that a new generation of EU-born children is facing political exclusion and social marginalisation.

Yet statelessness is solvable, and this year the Office of the United Nations High Commissioner for Refugees (UNHCR) will launch a ten-year campaign for the eradication of statelessness globally. A first and vital step in achieving this goal is to ensure that the spread of statelessness is halted. Every effort must be made to ensure that no child born in the EU has to face life without a nationality. The right of every child to a nationality is widely recognised in international instruments to which all EU member states are parties (including the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women) and EU accessions to conventions which contain specific safeguards for the prevention of childhood statelessness are significant and increasing (1961 Convention on the Reduction of Statelessness and 1997 European Convention on Nationality). The EU Charter of Fundamental Rights reaffirms that children shall have the right to 'such protection and care as is necessary for their well-being' and that states must act in their best interests - tolerating childhood statelessness in Europe stands at odds with these principles. Moreover, the European Court of Human Rights has recognised nationality as an inherent part of a person's social identity, protected as such as an element of private life⁷ – a right that is also laid down in the EU Charter of Fundamental Rights.

The EU must consider the social, political and economic effects of the continued exclusion of generations of stateless long-term residents from both the nationality of a member state and from EU citizenship (under the current EU citizenship framework, see further above). Renewed effort is needed to promote inclusion and address any obstacles that prolong and perpetuate statelessness in Europe.

5) *Statelessness in EU foreign policy and external relations*

The individual insecurity experienced by stateless persons becomes a communal, national or even international issue when it escalates into collective insecurity of a large stateless group. There is a well-established link between statelessness and mass displacement. Examples of stateless groups who have fled their country of former nationality or habitual residence include the Bidoons from Kuwait and the Rohingyas from Myanmar. Incidents of mass expulsion of stateless persons from their country of habitual residence add to the numbers of stateless living in exile – for example the ethnic Nepali minority in Bhutan who were both stripped of their nationality and expelled from the country. The creation of large groups that flee across international borders puts a heavy strain on the resources of the reception country as well as on the relations between the states involved. The continuing existence of statelessness can, therefore, contribute to instability in international relations. Not only has a link been traced between statelessness and forced migration, which can lead to international insecurity, but a more direct connection has been made between nationality issues and armed conflict. This is because when a community resides in a country for many years but is denied the right to citizenship, the outcome is a population of second-class persons which is dangerous to democracy and has the potential to engender civil revolt. Hence, addressing nationality issues is generally recognised as an important element of conflict prevention efforts and can also be a vital aspect of post-conflict peace-building. All this reinforces the fact that statelessness is not only a pervasive issue, but also one that demands international attention.

The EU has pledged that it will develop a framework for raising issues of statelessness with third countries by 2014.⁸ The increased recognition by the EU of statelessness as a global phenomenon which threatens human rights, spurs

⁷ European Court of Human Rights (2011) *Genovese v. Malta*, Application No. 53124/09.

⁸ See footnote 2 above, section B 3.2.

displacement and can strain international relations is not only important for how it conducts its foreign policy, but also in terms of the example it sets to countries which produce large stateless populations. A very current example is the need for the EU to play a greater role with regard to the mass denationalisation of Dominican Republic citizens of Haitian descent. In order for EU member states to credibly intervene in such developments they must themselves have in place robust nationality laws and policies towards stateless persons that fully comply with their obligations under international law. This is equally important if EU member states are to be able to engage in effective dialogue with states concerning the treatment and re-documentation of their nationals, including enquiries to establish whether an individual enjoys the nationality of the country in question. This is important because where nationality is established the individual is no longer at risk of statelessness and (barring the existence of any other protection consideration) can be returned to his or her country of nationality.

6) Conclusion

Given the current political context and reported EU migration ‘fatigue’, including through efforts to establish a Common European Asylum System, ENS recognises the challenges inherent in pushing a previously hidden issue higher up on the EU’s agenda. However, an apparent preference among EU member states for an ‘implementation mode’ regarding the next phase does not negate either the urgency or the potential to increase coordination and practical cooperation regarding nationality and statelessness policies at the EU level. Citizenship and the rights attached to it are an integral cornerstone and ideal of the European Union project. The moral obligation to protect vulnerable human beings is a crucial pillar of European civilisation, and one that should be protected at all costs.

“To be stripped of citizenship is to be stripped of worldliness; it is like returning to a wilderness as cavemen or savages [...] A man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow man [...] they could live and die without leaving any trace, without having contributed anything to the common world.” (HANNAH ARENDT, *The Origins of Totalitarianism*, 1951)

This year, the 60th anniversary of the 1954 Statelessness Convention, provides a timely opportunity for the EU to lend its weight to efforts to unblock the problem of statelessness in Europe today. In so doing it would be joining the significant momentum already achieved by other actors in recent years. In terms of institutional responses to the problem of statelessness, the Council of Europe has for several decades played an active role in adopting binding instruments and recommendations. In recent years an increased concentration of effort and resources by UNHCR leading up to and beyond its December 2011 Ministerial meeting in Geneva, and the related State pledges, has achieved impressive results.⁹ This has also increased opportunities for effective collaboration with civil society. In October 2013 ENS launched its pan-European campaign to improve protection for stateless persons in Europe,¹⁰ and the Network stands ready to work with the European Commission and other actors in order to make this a reality.

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For further information about ENS and its activities visit www.statelessness.eu
or email ENS Coordinator Chris Nash at info@statelessness.eu

⁹ For a detailed summary of recent progress see UN High Commissioner for Refugees, ‘Note on statelessness’ (4 June 2013) EC/64/SC/CRP.11, available at <http://www.refworld.org/docid/51d2a8884.html>.

¹⁰ <http://www.statelessness.eu/node/417>.