



European
Network on
Statelessness

Statelessness and the EU Pact on Asylum and Migration: Analysis and Recommendations

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Contents

1. Introduction.....	3
1.1. The European Network on Statelessness.....	3
1.2. The EU Pact on Migration & Asylum	3
1.3. Structure of this paper	4
2. Why is statelessness relevant to the Pact?.....	5
3. General Comments on the Pact Proposals	6
3.1. Lack of consideration of statelessness	6
3.2. Definition of a 'stateless person' and reference to the 1954 Convention	7
3.3. Lack of focus on fundamental rights and protection	8
3.4. Rights of children in migration	8
4. Detailed Analysis and Recommendations	9
4.1. Proposal for a Regulation introducing a screening of third country nationals at the external borders.....	9
4.2. Proposal for a Regulation on asylum and migration management	13
4.3. Amended proposal for a Regulation establishing a common procedure for international protection	15
4.4. Proposal for a Regulation addressing situations of crisis and force majeure.....	17
4.5. Amended proposal for a Regulation on the establishment of Eurodac.....	18
4.6. The Recast Return Directive.....	19
4.7. The EU Agency for Asylum	20
5. Conclusion	21
6. Summary of recommendations.....	22

1. Introduction

1.1. The European Network on Statelessness

The European Network on Statelessness (ENS) is a civil society alliance of NGOs, community representatives, activists, lawyers, academics, and other independent experts committed to addressing statelessness in Europe. Coordinated by its Secretariat, ENS currently has over 150 members in 41 European countries.¹ ENS organises its work around three pillars – law and policy development, awareness-raising, and capacity-building. We regularly provide expert advice and support to a range of stakeholders, including governments and regional institutions.

1.2. The EU Pact on Migration & Asylum

In September 2020, the European Commission presented a New Pact on Migration and Asylum (the Pact) setting out a ‘comprehensive approach, bringing together policy in the areas of migration, asylum, integration and border management’.² The Commission Communication was accompanied by a set of five legislative proposals and a Roadmap³ to implement the New Pact:

1. Proposal for a Regulation introducing a screening of third country nationals at the external borders (Screening Regulation)⁴
2. Amended Proposal for a Regulation establishing a common procedure for international protection in the Union (Asylum Procedures Regulation)⁵
3. Proposal for a Regulation on asylum and migration management (AMMR)⁶
4. Amended Proposal for a Regulation on the establishment of ‘Eurodac’ (Eurodac Regulation)⁷

¹ <https://www.statelessness.eu/about/members>

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum COM(2020) 609 final, p. 2: https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF

³ Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum COM(2020) 609 final, https://ec.europa.eu/info/sites/info/files/1_en_annexe_autre_acte_part1_v6.pdf

⁴ Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291190831&uri=COM%3A2020%3A612%3AFIN>

⁵ Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM/2020/611 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291268538&uri=COM%3A2020%3A611%3AFIN>

⁶ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291110635&uri=COM%3A2020%3A610%3AFIN>

⁷ Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/817 COM/2020/614 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295417610&uri=COM%3A2020%3A614%3AFIN>

5. Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum (Crisis Management Regulation)⁸

The Pact builds on previous proposals to reform the Common European Asylum System (CEAS), which remain under negotiation at different stages in the legislative process. These include the Qualification Regulation,⁹ Recast Reception Conditions Directive,¹⁰ Proposal for a European Union Agency for Asylum,¹¹ Proposal for a Union Resettlement and Humanitarian Admission Framework Regulation,¹² and the Recast Return Directive.¹³

1.3. Structure of this paper

This paper sets out ENS's analysis of the Pact proposals focusing on their potential impact on the fundamental rights of stateless people in a migratory context in Europe. It first explains why statelessness is relevant to EU migration and asylum policy debates. It then provides a series of general comments and recommendations, before analysing each of the five proposals and making specific recommendations for legislative reform as the negotiations move forward. It also reiterates recommendations regarding the Recast Return Directive and suggests further ways to ensure statelessness is mainstreamed in asylum and migration debates both in relation to the Pact and wider CEAS reform.

It should be noted that this paper does not attempt to assess the wider fundamental rights implications of the Pact proposals nor comment on whether they are fit for purpose. It seeks rather to bring a statelessness perspective to the debate, building on the analysis and recommendations of other civil society organisations, including ECRE,¹⁴ Caritas Europa,¹⁵ KIND and Child Circle,¹⁶ and PICUM.¹⁷

⁸ Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum COM/2020/613 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295614020&uri=COM%3A2020%3A613%3AFIN>

⁹ Proposal for a Regulation 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents COM(2016) 466 final 2016/02223 (COD), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_beneficiaries_of_international_protection_-_subsidiary_protection_eligibility_-_protection_granted_en.pdf

¹⁰ Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM(2016) 465 final 2016/0222 (COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0465&qid=1610987209767>

¹¹ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM/2016/0271 final - 2016/0131 (COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0271>

¹² Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council COM/2016/0468 final - 2016/0225 (COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0468>

¹³ Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) COM/2018/634 final, https://eur-lex.europa.eu/resource.html?uri=cellar:829f8ece-b661-11e8-99ee-01aa75ed71a1.0001.02/DOC_1&format=PDF

¹⁴ Catherine Woollard, 'Editorial: Progress on the Pact: not in our name' *European Council on Refugees and Exiles* (Editorial, 18 December 2020), <https://www.ecre.org/progress-on-the-pact-not-in-our-name/>

¹⁵ Caritas Europa, 'Position Paper: Caritas Europa's analysis and recommendations on the EU Pact on Migration and Asylum' (Position Paper, December 2020), https://www.caritas.eu/wordpress/wp-content/uploads/2020/12/Position_Paper_EU_Pact_migration_Caritas_Europa_Dec_2020.pdf

¹⁶ Kids in Need of Defence Europe and Child Circle, 'Advanced protection for unaccompanied children in Europe by strengthening legal assistance' (January 2021)

¹⁷ PICUM, 'More detention, fewer safeguards: how the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations' (Statement, 14 October 2020), <https://picum.org/more-detention-fewer-safeguards-how-the-new-eu-pact-on-migration-and-asylum-creates-new-loopholes-to-ignore-human-rights-obligations/>

2. Why is statelessness relevant to the Pact?

The binding international treaty law definition of a stateless person included in the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) establishes that a stateless person is ‘a person who is not considered as a national by any State under the operation of its law’.¹⁸ In addition, according to the International Law Commission this definition is part of customary international law.¹⁹ To be stateless, is to have no nationality. For the more than 10 million stateless people around the world, this can mean denial of many basic rights most people take for granted: to go to school or work, get married or register the birth of your child, to legally ‘exist’.²⁰ In Europe, statelessness affects over half a million people – both recent migrants and those who have lived in the same place for generations.²¹ Statelessness is often intertwined with other root causes of forced displacement, such as the persecution of ethnic, religious or other members of minority groups, armed conflicts, and discrimination.

Among the stateless people living in Europe today are individuals who arrived seeking international protection and were either stateless prior to leaving their country of origin or have since become stateless.²² According to Eurostat, on average, around 3% of first-time asylum applicants to the European Economic Area each year are recorded as being stateless or of ‘unknown nationality’.²³ This is very likely an underestimate due to the lack of awareness, capacity, and tools to accurately identify and record statelessness in the migratory context.²⁴ A high proportion of refugees come from countries (such as Syria, Iraq, Iran, Afghanistan, Eritrea, Somalia, and Sudan, among others) where, as a result of discrimination in nationality laws, state succession, or deprivation of nationality practices, they or their children may be stateless or at risk of statelessness.²⁵

The fact that an asylum applicant may be stateless is often critical when assessing their claim for international protection. Whether someone is stateless or a national of their country of origin not only impacts on the decision-making process, but also on the nationality rights of their children, and access to procedures such as family reunification, resettlement, or naturalisation (as well as the possibility of return) because they are unlikely to have documentary proof of their identity and family links.²⁶ Stateless people are due specific rights under international law and risk further discrimination and rights violations if their statelessness is not identified and acted upon.

Despite almost all EU Members States (EU MS) being party to relevant international instruments, such as the 1954 Convention²⁷ (which, as well as the definition of a stateless person, provides a set of rights and clear entitlements for stateless people in a migratory

¹⁸ Convention Relating to the Status of Stateless Persons 1954, Article 1, https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf

¹⁹ United Nations, *Draft Articles on Diplomatic Protection with commentaries* (2006), p. 49, <https://www.refworld.org/docid/525e7929d.html>

²⁰ For more information about statelessness around the world, see: <https://www.unhcr.org/ibelong/>

²¹ For more information on statelessness in Europe, see: www.statelessness.eu

²² For more information on statelessness and the refugee context in Europe, see: www.statelessjourneys.org

²³ Eurostat, Asylum and first-time asylum applicants by citizenship, age and sex - annual aggregated data:

https://ec.europa.eu/eurostat/databrowser/view/migr_asyappctza/default/table?lang=en

²⁴ ENS and Institute on Statelessness & Inclusion, ‘Addressing statelessness in Europe’s refugee response: gaps and opportunities’ (2019), https://statelessjourneys.org/wp-content/uploads/StatelessJourneys-Addressing_statelessness_in_Europ_refugee_response-FINAL.pdf

²⁵ See: www.statelessjourneys.org

²⁶ ENS and Institute on Statelessness & Inclusion, ‘Addressing statelessness in Europe’s refugee response: gaps and opportunities’ (2019), https://statelessjourneys.org/wp-content/uploads/StatelessJourneys-Addressing_statelessness_in_Europ_refugee_response-FINAL.pdf

²⁷ Only three EU MS have not yet acceded to the 1954 Convention: Cyprus, Estonia, and Poland.

context), there continues to exist a gap between this international framework and awareness of and respect for these rights in practice. Stateless people often face years of uncertainty, destitution, and repeated, lengthy immigration detention.²⁸ Yet the solution to address these problems is relatively simple and can be achieved through the establishment of improved mechanisms for identifying stateless people encountered by the authorities in the context of asylum and migration procedures, and dedicated Statelessness Determination Procedures (SDPs) that are fair, efficient, and easily accessible. This would enable States to identify and determine who is stateless on their territory and to ensure that they are granted protection, thereby both fulfilling their obligations under international law and providing a comprehensive, sustainable solution for individuals who cannot return to their country of origin or former residence.

Currently only a handful of European countries have such dedicated procedures in place²⁹ and despite multiple references to ‘stateless persons’, the EU Asylum Acquis contains no reference to the 1954 Convention and the rights due to stateless persons in Europe, nor any mechanism to accurately identify and address statelessness. Article 67(2) of the Treaty on the Functioning of the European Union (TFEU) establishes that in the area of freedom, security and justice “stateless persons shall be treated as third-country nationals” which, read in conjunction with other provisions in the treaties, brings stateless persons within the scope of EU law and enables the EU to set the conditions for their entry and residence. Secondary legislation in the area of asylum and migration must uphold the EU’s values³⁰ and the rights enshrined in the Charter of Fundamental Rights of the European Union, and, where necessary, distinguish the particular protection needs of stateless persons from third-country nationals. The importance of harmonisation and establishing a common framework for the identification and protection of stateless persons across the EU has also been noted.³¹

3. General Comments on the Pact Proposals

3.1. Lack of consideration of statelessness

Despite the relevance of statelessness to the EU migration and asylum policy agenda as set out above, the growing numbers of stateless people among those seeking protection in Europe, and an increasing awareness of how statelessness impacts on asylum in the EU,³² the issue is not addressed anywhere in the Pact. This despite multiple past pledges and commitments by the EU³³ to promote the exchange of information and good practices in the field of statelessness, prevent and reduce statelessness, and protect the rights of stateless

²⁸ ENS, ‘Protecting stateless persons from arbitrary detention: an agenda for change’ (2017), https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_LockInLimbo_Detention_Agenda_online.pdf

²⁹ For more detail on national law, policy, and practice, see: <https://index.statelessness.eu>

³⁰ Treaty on European Union, Articles 2 and 3.

³¹ For more detail see Katja Swider and Maarten den Heijer, ‘Why Union Law Can and Should Protect Stateless Persons’ *European Journal of Migration and Law* 19 (2017) 101–135; Gábor Gyulai, ‘Statelessness in the EU Framework for International protection’ *European Journal of Migration and Law* 14 (2012) 279–295; Prof. Gerard-René de Groot, Katja Swider, Dr Olivier Vonk, *Practices and Approaches in EU Member States to Prevent and End Statelessness, Study for the LIBE Committee* (European Parliament, November 2015); Noémi Radnai, ‘Statelessness Determination in Europe: towards the implementation of regionally harmonised national SDPs’ *Statelessness Working Paper Series No. 2017/08, Institute on Statelessness and Inclusion* (2017), https://files.institutesi.org/WP2017_08.pdf.

³² EASO, ‘EASO Asylum Report 2020’, pp. 18-21 & 170-172, <https://easo.europa.eu/sites/default/files/EASO-Asylum-Report-2020.pdf>

³³ See for example, Conclusions of the Council and The Representatives of the Governments of the Member States on Statelessness, December 2015, <https://www.consilium.europa.eu/en/press/press-releases/2015/12/04/council-adopts-conclusions-on-statelessness/>

people, including children.³⁴ In our view, this is a significant missed opportunity to more clearly highlight the need to mainstream statelessness in asylum and migration debates and ensure adequate law and policy responses to protect the rights of stateless refugees and migrants in line with international law. This gap is particularly regrettable considering the ambitious action plans and recent multilateral commitments made in other regions of the world to eradicate statelessness and protect stateless persons.³⁵ In order to remain credible in its vital engagement with third countries and external partners on issues relating to migration, asylum and human rights, the EU must now put in place a comprehensive strategy to address statelessness and ensure it is mainstreamed in all relevant policy areas.³⁶

3.2. Definition of a 'stateless person' and reference to the 1954 Convention

There are multiple references to 'stateless persons' in the EU migration and asylum acquis, but the 1954 Convention international law definition of a 'stateless person' is nowhere referenced, despite EU law incorporating this definition in the 2004 Regulation on the coordination of social security systems (Article 1(h)) and related jurisprudence.³⁷ As noted above, the TFEU assimilates 'stateless persons' with 'third-country nationals' for the purposes of EU asylum and migration law;³⁸ however, it is crucial to take into consideration the particular protection needs of stateless persons, as well as their rights under international and human rights law. The adequate protection of stateless persons requires early identification of statelessness or risk of statelessness, which is currently a major gap in the EU Asylum Acquis. Furthermore, the UN Human Rights Committee has recently found that failure to identify statelessness and assess a child's nationality status led to a violation of the right to nationality.³⁹

In order to assert existing obligations under international law and facilitate the identification of stateless persons and those at risk of statelessness among refugees and migrants, it is vital to incorporate explicit reference to the 1954 Convention into the Pact proposals and to include a definition of the term 'stateless person' in line with Article 1 of the 1954 Convention, as has already been included in existing EU law (Article 1(h) of the 2004 Social Security Regulation). The implementation of a common framework for the protection of stateless persons at the EU level would contribute to upholding human rights and ensuring that EU MS respect their international obligations under the 1954 Convention and in line with global commitments to end statelessness.⁴⁰

³⁴ European Parliament resolution of 3 May 2018 on the protection of children in migration 2018/2666(RSP), https://www.europarl.europa.eu/doceo/document/TA-8-2018-0201_EN.html?redirect

³⁵ See for example, Regional Refugee Instruments & Related, *Brazil Declaration and Plan of Action* (3 December 2014), <https://www.refworld.org/docid/5487065b4.html>; Regional Treaties, Agreements, Declarations and Related, *Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness* (25 February 2015), <https://www.refworld.org/docid/54f588df4.html>; Regional Treaties, Agreements, Declarations and Related, *Declaration of International Conference on the Great Lakes Region (ICGLR) Member States on the Eradication of Statelessness* (16 October 2017) CIRGL/CIMR/DEC/15/10/2017, <https://www.refworld.org/docid/59e9cb8c4.html>

³⁶ Recommendations are underlined throughout the text and summarised at the end of the paper.

³⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R0883>. See also Judgment of the Court of 11 October 2001, *Khalil and Others*, Joined Cases C-95/99 to C-98/99 and C-180/99, ECLI:EU:C:2001:532: in this judgment concerning a regulation on the application of social security schemes, the Court of Justice stated that the Council cannot be criticised for having also included stateless persons and refugees resident on the territory of the Member States in the regulation in order to take into account the Member States' international obligations, including in light of the 1954 Convention.

³⁸ Treaty on the Functioning of the European Union, Article 67(2).

³⁹ *Zhao v. the Netherlands* (2020) CCPR/C/130/D/2918/2016 (UN Human Rights Committee, 28 December 2020).

⁴⁰ UNHCR, #IBelong Campaign, <https://www.unhcr.org/ibelong/>

3.3. Lack of focus on fundamental rights and protection

We share the concerns of other civil society actors⁴¹ that the Pact proposals overall introduce significant complexity with a focus on externalisation, deterrence, containment and return, over procedural guarantees, fundamental rights, and identification of protection needs. These trends are particularly concerning for stateless people or those at risk of statelessness, as, without adequate legal and policy frameworks in place to identify and determine who is stateless and to provide due protection under the 1954 Convention, they are often trapped in systems that criminalise their irregular migration status and subject them to detention and return procedures, pushing many into destitution without there being any real prospect of either regularisation or return.

It is therefore even more essential that the specific rights and circumstances of stateless people are recognised in the Pact proposals, and mechanisms are incorporated to effectively identify and determine statelessness to prevent more people being left in limbo, as well as to monitor the fundamental rights of stateless persons.

3.4. Rights of children in migration

We welcome the enhanced role of guardians, an increased focus on monitoring, the relaxation on rules of evidence for family reunification, and the increase in references to the best interests of the child included within the Pact proposals. However, we share the concerns of other civil society actors⁴² regarding the impact of the Pact proposals overall on the rights and best interests of children in migration, including stateless children or those at risk of statelessness.⁴³

Children are not excluded from the new mandatory pre-entry screening at the border (see 4.1), meaning that all children arriving irregularly at the border could be detained for five or even up to ten days. Moreover, children aged 12-18 travelling with families are not exempt from the border procedure and are, therefore, at risk of further detention of up to ten months in crisis situations (see 4.3). This arbitrary distinction between children over or under the age of 12 violates both the UN Convention on the Rights of the Child (UNCRC) and the EU Charter of Fundamental Rights⁴⁴, as well as existing legal instruments comprising the EU Asylum Acquis, which define a 'minor' as anyone under the age of 18.⁴⁵ This, combined with the lack of mechanisms to identify statelessness, mean that accompanied stateless children over the age of 12 may be at risk of prolonged detention at the border⁴⁶ and violation of their

⁴¹ Joint Statement on the Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded (6 October 2020), <https://www.ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/>

⁴² Joint statement on the impact of the Pact on Migration and Asylum on children in migration (December 2020): <https://reliefweb.int/sites/reliefweb.int/files/resources/Joint-Statement-on-EU-Pact-on-Migration-and-Asylum.pdf>

⁴³ UNHCR, ExCom Conclusion on Children at Risk No. 107 (LVIII) - 2007, <https://www.unhcr.org/excom/exconc/4717625c2/conclusion-children-risk.html>

⁴⁴ UN Convention on the Rights of the Child, Article 1; Charter of Fundamental Rights of the European Union, Article 24.

⁴⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Article 2(l), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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, Article 2(k), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>

⁴⁶ UNHCR, 'UNHCR's position regarding the detention of refugee and migrant children in the migration context' (2017), <https://www.refworld.org/pdfid/5885c2434.pdf>

rights under the 1954 Convention and the UNCRC, including the right to acquire a nationality.⁴⁷

This further underlines the need for the Pact proposals to recognise the specific rights and circumstances of stateless people, including stateless children, and to strengthen screening mechanisms to be able to effectively identify stateless persons, those at risk of statelessness or who claim to be stateless, as well as to ensure that such persons are referred away from the border as soon as possible to relevant international protection procedures, including Statelessness Determination Procedures. For children in families, this may also require an individual assessment when their circumstances indicate that they may be at risk of statelessness, for example, where the child has not been able to acquire the nationality of one of their parents.⁴⁸ It should not automatically be assumed that children possess the nationality of their parents. The provision of key safeguards including free, quality legal assistance⁴⁹ and, where children are unaccompanied, the timely appointment of a guardian, must be ensured for all children to assist with the accurate identification and determination of statelessness and the best interests of the child.

4. Detailed Analysis and Recommendations

In this section, we set out our analysis of each of the five proposals and their potential impacts on stateless persons. We make recommendations for amendments and highlight considerations for the implementation of each of the proposals to ensure the rights of stateless people in a migratory context are protected. We also address and make recommendations in relation to wider CEAS reform (specifically on the Recast Return Directive and the EU Asylum Agency).

4.1. Proposal for a Regulation introducing a screening of third country nationals at the external borders⁵⁰

This proposal introduces a pre-entry screening process for international protection applicants and those arriving irregularly at an EU border, including children, and those disembarked after a search and rescue operation. The screening is also to be applied to people inside the territory of an EU MS under some circumstances. The stated aim is to strengthen the control of people entering the Schengen area and refer them to an appropriate procedure. It proposes to do this by way of a new five-day procedure (extendable in exceptional circumstances) consisting of:

- (a) A preliminary health and vulnerability check;
- (b) An identity check, including by verifying information against European databases;
- (c) Registration of biometric data;
- (d) A security check through a query of relevant national and Union databases.

⁴⁷ UN Convention on the Rights of the Child, Articles 7 & 8.

⁴⁸ Initiative for Children in Migration, *No child should be stateless: ensuring the right to a nationality for children in migration in Europe* (2020), https://www.statelessness.eu/sites/default/files/2020-09/ENS_Right-to-a-nationality-for-children-in-migration.pdf

⁴⁹ Kids in Need of Defence Europe and Child Circle, '[Advanced protection for unaccompanied children in Europe by strengthening legal assistance](https://static1.squarespace.com/static/5fa53b246a2b4b04df87d4a3/t/6010275b3d4e0f50867a1b00/1611671395682/Child-circleKINDreport.pdf)', (January 2021), <https://static1.squarespace.com/static/5fa53b246a2b4b04df87d4a3/t/6010275b3d4e0f50867a1b00/1611671395682/Child-circleKINDreport.pdf>

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291190831&uri=COM%3A2020%3A612%3AFIN>

The proposal also provides for EU MS to set up independent monitoring mechanisms to monitor and deal with complaints relating to fundamental rights at the border. A role for Frontex and the European Union Agency for Asylum to accompany and support screening is envisioned, as is a role for the Fundamental Rights Agency to develop general guidance and, at the request of EU MS, to support the development of the independent national monitoring mechanisms.

We share the general concerns articulated by others around the introduction of a complex new procedure at the border, the ‘fiction of non-entry’,⁵¹ the lack of clarity on use of detention, the move from detention of children as a last resort to a potential inevitability,⁵² reception conditions, NGOs’ access to people subject to border procedures, implications of decisions made at screening, and the use of data collected.⁵³ With respect to the particular impact of the proposals on the rights of stateless people, we focus our comments on four key areas: fundamental rights monitoring, identification and recording of statelessness, the debriefing form, and the outcome of screening.

I. Monitoring of fundamental rights (Article 7)

The introduction of a monitoring mechanism to ensure compliance with EU and international law is welcome, but measures should be put in place to ensure its effective implementation and we support the recommendations of other civil society actors in this regard.⁵⁴ The specific rights of stateless persons in international law (including under the 1954 Convention) should be integral to the monitoring process, and the guidance to be issued by FRA (Article 7(2)) should contain reference to relevant norms for the prevention and reduction of statelessness as well as the identification, referral and protection of stateless persons in the migratory context.

II. Identification of statelessness (Articles 2 & 9)

As highlighted above, it is vital to identify statelessness as early as possible in asylum and migration procedures, as this may impact on the assessment of a claim for international protection, the assessment of the best interests of a child, on inclusion, and on the feasibility of return and lawfulness of detention. We therefore recommend that explicit reference is made to stateless persons, with statelessness or risk of statelessness being identified as a vulnerability factor, recorded at screening, and requiring an immediate referral away from the border. We also support amendments proposed by other civil society organisations to ensure

⁵¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration* CMW/C/GC/3-CRC/C/GC/22, para. 12: <https://www.refworld.org/docid/5a1293a24.html>; UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin* CRC/GC/2005/6, para. 12: <https://www.refworld.org/docid/42dd174b4.html>

⁵² Joint statement on the impact of the Pact on Migration and Asylum on children in migration (December 2020): <https://reliefweb.int/sites/reliefweb.int/files/resources/Joint-Statement-on-EU-Pact-on-Migration-and-Asylum.pdf>; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* CMW/C/GC/4-CRC/C/GC/23, para. 5 available at: <https://www.refworld.org/docid/5a12942a2b.html>

⁵³ ECRE, ‘Screening out rights? Delays, detention, data concerns and the EU’s proposal for a pre-entry screening process’ (Policy Note, December 2020), <https://www.ecre.org/wp-content/uploads/2020/12/Policy-Note-30.pdf>

⁵⁴ ECRE, ‘ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612’ (December 2020), pp. 36-39, <https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf>

that ‘an adequate vulnerability check of *all people* subject to the screening should *always* be performed’.⁵⁵

Article 9(2): ~~Where relevant, it shall be checked~~ Member States shall assess whether persons undergoing the screening referred to in paragraph 1 are in a vulnerable situation, victims of torture, stateless or at risk of statelessness, or have special reception or procedural needs within the meaning of Article ~~20~~ 21 of the [recast] Reception Conditions Directive.

Article 9(3): Where there are indications of vulnerabilities or special reception or procedural needs, the third-country national concerned shall receive timely and adequate support in view of their physical and mental health. In the case of minors, support shall be given by personnel trained and qualified to deal with minors, and in cooperation with child protection authorities. Where an individual claims not to have any nationality or when there are reasonable grounds to believe an individual may be stateless, this should be clearly registered pending a full determination of whether the individual is stateless in a separate procedure.

In addition to amending Article 9, it is also suggested that the definition of a stateless person be included in Article 2 as a new subparagraph, as per the definition already provided in other EU legislation:⁵⁶

Article 2(6): ‘stateless person’ shall have the meaning assigned to it in Article 1 of the Convention relating to the Status of Stateless Persons, signed in New York on 28 September 1954.

III. De-briefing form (Article 13)

The de-briefing form referred to in Article 13 and annexed to the Regulation sets out the information that should be recorded following screening. This is the only document issued following screening and will contain information that may be crucial to the referral and procedure that follows.

To date there has been no standardised procedure to identify and record statelessness on arrival in an EU MS, so stateless refugees and migrants, including children, are often wrongly assigned a nationality by officials during screening procedures based on their country of origin or language(s) spoken, or may be recorded as having ‘unknown nationality’,⁵⁷ which has led to violations of the right to nationality.⁵⁸ If statelessness is missed or nationality is mis-recorded at this stage, it could be very difficult to correct later. Officials responsible for identifying and recording nationality data often lack awareness about statelessness and who might be affected. Very little training or information resources are available to competent authorities, which can lead to misconceptions about nationality and statelessness. Even if statelessness is identified, officials may not know how to proceed without systems in place to record it and refer people to an SDP to have their status as a stateless person determined.

⁵⁵ *ibid*, pp. 19-20

⁵⁶ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Article 1(h).

⁵⁷ ENS and Institute on Statelessness & Inclusion, ‘Addressing statelessness in Europe’s refugee response: gaps and opportunities’ (2019), https://statelessjourneys.org/wp-content/uploads/StatelessJourneys-Addressing_statelessness_in_Europ_refugee_response-FINAL.pdf

⁵⁸ *Zhao v. the Netherlands* (2020) CCPR/C/130/D/2918/2016 (UN Human Rights Committee, 28 December 2020).

We echo the concerns raised and support the recommendations made by other civil society actors to amend Article 13.⁵⁹ In addition, we recommend that a specific reference to statelessness is inserted in Article 13(b), as well as a reference to 'information about family members' in Article 13(c), to facilitate the recording of statelessness and risk of statelessness of all family members during screening:

Article 13: On completion of the screening, the competent authorities shall, with regard to the persons referred to in Article 3 and in Article 5, complete the form in Annex I containing:

- (a) name, date and place of birth and sex;**
- (b) initial indication of nationalities or statelessness, countries of residence prior to arrival and languages spoken;**
- (c) information about family members; [...]**

In line with the above, the Annex to the Proposal for a Regulation introducing a screening of third country nationals at the external borders⁶⁰ should also be amended to reflect the amendments to Article 13.

IV. Outcome of screening (Article 14)

We support the recommendation by other civil society actors that the decision on the outcome of screening involve asylum authorities and be subject to appeal, as it has far reaching consequences for access to protection, and that people should have access to legal assistance to seek an effective remedy.⁶¹ For stateless people, who may face additional hurdles to proving their identity and protection needs and who may have different routes to protection as a stateless person under the 1954 Convention depending on the EU MS in which they find themselves,⁶² it is critical that there are safeguards in place to ensure that screening authorities do not prevent access to international protection procedures and/or to dedicated SDPs.⁶³ Child-specific safeguards are also essential in this regard to ensure that stateless children or those at risk of statelessness have access to appropriate protection in line with their best interests, including where this requires referral to a child rights-based and child-sensitive SDP.

We recommend that specific consideration is given to stateless persons in the outcome of the screening, by introducing the following provision:

Article 14(8): Notwithstanding the above provisions, persons identified as stateless or at risk of statelessness during the screening shall be referred to the competent

⁵⁹ ECRE, 'ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612' (December 2020), pp. 29-30, <https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf>; Joint statement on the impact of the Pact on Migration and Asylum on children in migration (December 2020): <https://reliefweb.int/sites/reliefweb.int/files/resources/Joint-Statement-on-EU-Pact-on-Migration-and-Asylum.pdf>

⁶⁰ Annex to the Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291190831&uri=COM%3A2020%3A612%3AFIN>

⁶¹ ECRE, 'ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612' (December 2020), pp. 32-36, <https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf>; Kids in Need of Defence Europe and Child Circle, 'Advanced protection for unaccompanied children in Europe by strengthening legal assistance', (January 2021), <https://static1.squarespace.com/static/5fa53b246a2b4b04df87d4a3/t/6010275b3d4e0f50867a1b00/1611671395682/Child-circleKINDreport.pdf>

⁶² For more information on national law, policy, and practice in this area, see: <https://index.statelessness.eu>

⁶³ See also our recommendation under 4.4 that stateless persons be excluded from asylum border procedures.

authorities to conduct a full determination of whether the individual is stateless and offer adequate protection, in accordance with national law. If the individual has made an application for international protection, the statelessness determination shall be conducted either in parallel with or following the consideration of the application for international protection, without prejudice to the primacy of international protection status and with full respect of the principle of confidentiality.

We also note that Article 14 provides that persons who did not apply for international protection may, in certain conditions, be refused entry or referred to return procedures. The lack of consideration of other possible outcomes for people identified as stateless or at risk of statelessness is concerning. Stateless people are protected under the 1954 Convention and, beyond applying for international protection, may be entitled to other forms of protection according to national law. As highlighted in the EU Returns Handbook⁶⁴ and by the Frontex Consultative Forum on Fundamental Rights,⁶⁵ the specific situation of stateless persons must be taken into consideration in return procedures. Without adequate mechanisms in place to identify stateless people they remain at risk of being arbitrarily detained when there is no real prospect of removal (see section 4.6).⁶⁶

Article 15(4) of the Return Directive⁶⁷ establishes that when it appears that a reasonable prospect of removal no longer exists, detention ceases to be justified and the person concerned shall be released immediately. It is crucial that the screening process takes into account past attempts to return a person and any factors impacting on the removability of a person, to ensure that stateless persons are not repeatedly subject to screenings, return procedures and detention. As has been noted by other civil society actors⁶⁸ and emphasised by the European Parliament,⁶⁹ we reiterate that the authorities should consider offering a right to stay under Article 6(4) of the Return Directive if the screening shows that the person has already been subject to a return procedure in the past and the obstacles to return are still present.

4.2. Proposal for a Regulation on asylum and migration management⁷⁰

The stated aim of the Asylum and Migration Management Regulation (AMMR) is to replace the current Dublin Regulation and provide a new 'flexible and responsive' solidarity mechanism. The proposal also aims to facilitate cooperation with third countries on return and readmission by putting in place 'an ambitious and broad-ranging external policy based on

⁶⁴ Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks C(2017)6505 ANNEX 1, Para. 14.4.1, p. 72, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_recommendation_on_establishing_a_common_return_handbook_annex_en.pdf

⁶⁵ European Border and Coast Guard Agency (Frontex), 'Seventh Annual Report of the Frontex Consultative Forum on Fundamental Rights' (2019), p. 60, <https://www.statewatch.org/media/1381/consultative-forum-on-fundamental-rights-seventh-annual-report-2019.pdf>

⁶⁶ ENS, 'Protecting stateless persons from arbitrary detention: an agenda for change' (2017), https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_LockInLimbo_Detention_Agenda_online.pdf

⁶⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁶⁸ ECRE, 'ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612' (December 2020), p. 33, <https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf>

⁶⁹ European Parliament resolution of 17 December 2020 on the implementation of the Return Directive (2019/2208(INI)), para. 23, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0362_EN.html

⁷⁰ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291110635&uri=COM%3A2020%3A610%3AFIN>

partnership with third countries'. It includes a new option for EU MS to assist each other in carrying out returns in the form of 'return sponsorship'. It also includes an amendment to the Long-Term Residence Directive to shorten the period within which beneficiaries of international protection may obtain long-term resident status.

We focus our comments on the AMMR on three areas: the proposed new return sponsorship mechanism, the amendment to the Long-Term Residence Directive, and the rules on evidence for family reunification.

I. Return Sponsorship (Preamble 27 & Article 55)

The Regulation proposes that EU MS may choose to provide their solidarity contribution in the form of 'return sponsorship', which may entail measures such as counselling on return and reintegration, assisted voluntary return programmes, and policy dialogue with third countries to facilitate readmission and ensure the delivery of a valid travel document. If efforts to return the individual remain unsuccessful after eight months, the sponsoring EU MS would then transfer the individuals concerned from the benefitting EU MS to their territory and continue their efforts to return them in accordance with the Return Directive.

The proposal does not explicitly include stateless persons in the return sponsorship mechanism, referring to 'illegally staying third-country nationals' (Article 55), and suggesting participating MS 'should indicate the nationalities of the third countries for which they are willing to support the return'. We would urge that stateless persons are explicitly excluded from return sponsorship due to the significant barriers to return they face. Should a person's statelessness become apparent or be evidenced during return sponsorship procedures, the person should be referred to a relevant procedure to determine their statelessness and protection needs. For this to happen in practice, it is essential that competent authorities have a proficient awareness of statelessness, the rights of stateless persons under international law, and relevant procedures to which people may be referred from return procedures for determination of their statelessness.

We propose the addition of a new paragraph to Article 55:

Article 55(5): This Article is without prejudice to the rights of stateless persons and their referral to relevant procedures under national law to determine their statelessness and offer adequate protection.

II. Amendment to Directive 2003/109/EC (Long-Term Residence Directive) (Preamble 39 & Article 71)

It is very welcome that, as a measure to facilitate inclusion, the AMMR proposes shortening the period of time that beneficiaries of international protection should have to wait to obtain long-term resident status to three years. We strongly recommend that beneficiaries of protection under the 1954 Convention ('stateless status') (in those EU MS that provide dedicated protection status for stateless persons) be explicitly included in this provision:

Preamble (39): At the same time, and given the importance of facilitating the full integration of beneficiaries of international protection in the Member State of residence, the prospect of obtaining long-term resident status in a shorter period of time should be provided for. Beneficiaries of international protection, as well as beneficiaries of protection under the 1954 Convention Relating to Stateless Persons,

should be able to obtain long-term resident status in the Member State which granted them international protection after three years of legal and continuous residence in that Member State. As regards other conditions to obtain the status, beneficiaries of international protection should be required to fulfil the same conditions as other third-country nationals. Council Directive 2003/109/EC⁴² should therefore be amended accordingly.

Article 71(1): Directive 2003/109/EC is amended as follows: Article 4 is amended as follows: (a) in paragraph 1, the following sub-paragraph is added: “With regard to beneficiaries of international protection, as well as beneficiaries of protection under the 1954 Convention Relating to Stateless Persons, the required period of legal and continuous residence shall be three years”.

III. Rules on evidence for family reunification (Preamble 49)

The stated aim in Preamble (49) of facilitating swifter family reunification through a relaxation of the rules on evidence is welcomed, as stateless people may not have the types of documentation (such as a family book or birth certificate) required by European authorities to prove family links and can often face insurmountable barriers to acquiring formal proof of family links and identity.⁷¹

4.3. Amended proposal for a Regulation establishing a common procedure for international protection⁷²

With this new APR proposal, the Commission builds on the previous 2016 proposal, focusing on where negotiations did not yet find agreement between EU MS. The new proposal therefore mainly focuses on conditions for the use of the border procedure, and the extent to which this should be an obligation for EU MS. The proposal links closely to the new Screening Regulation proposal (see 4.1). The new APR provides that, following screening, it is determined whether an asylum application should be assessed in a swifter asylum border procedure or in a standard asylum procedure. Where the asylum border procedure determines an individual is not in need of protection, it provides that a return border procedure will follow, with asylum and return decisions being issued simultaneously.

We focus our comments on the APR in two key areas: application of the border procedure to stateless people, and registering applications for international protection.

I. Application of the border procedure to stateless people

Civil society actors have raised significant concerns that the new APR proposal ‘will effectively result in two standards of asylum procedures, largely determined by the country of origin of the individual concerned’ and that it will ‘deprive people of the possibility to

⁷¹ ENS, ISI and ASKV, ‘From Syria to Europe: experiences of stateless Kurds and Palestinian refugees from Syria seeking protection in Europe’ (January 2019), <https://statelessjourneys.org/wp-content/uploads/2019/01/ENS-ISI-From-Syria-to-Europe-Jan-2019.pdf>

⁷² Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM/2020/611 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291268538&uri=COM%3A2020%3A611%3AFIN>

access residence permits for grounds other than asylum'.⁷³ The latter is of significant concern for the rights of stateless people who, even if they do not qualify for refugee or subsidiary protection, may have another route to protection under the 1954 Convention through an SDP (depending on the MS they find themselves in), which the APR as set out currently would exclude them from accessing (Article 35a). Regardless of the availability of such a procedure, all but three EU MS are signatories to the 1954 Convention⁷⁴ and owe specific obligations under international law to stateless people on their territory, which the border procedure as envisioned would preclude them from fulfilling.

Given the requirement in the EU Return Handbook to pay attention to the 'specific situation of stateless persons'⁷⁵ and the complexity of return for those who hold no nationality, we recommend that stateless persons are excluded from application of the return border procedure. The 1954 Convention contains an exhaustive list of grounds under which a stateless person may be excluded from protection and return to 'a country of former habitual residence' (Article 40) is not in itself a permitted ground for refusal of protection under the 1954 Convention. For return to a country of former residence to fit within the exclusion grounds in the 1954 Convention, the person must be able to enjoy '*the rights and obligations which are attached to the possession of the nationality of that country*'.⁷⁶

Following on from our recommendation in 4.1 that statelessness be identified and recorded during screening as a factor increasing vulnerability and requiring special procedural considerations, and building on the amendments proposed by others to ensure that those applicants identified as being in need of special procedural guarantees or who present indications of vulnerability, are excluded from the border procedure,⁷⁷ we further recommend that stateless persons are excluded from the asylum border procedure.

II. Registering applications for international protection (Article 27 with Article 4)

ENS proposed three amendments to the 2016 APR proposal, two of which were partially adopted in the European Parliament's Resolution on the proposal.⁷⁸ All three amendments remain key to facilitating the accurate identification and recording of statelessness and ensuring the referral of stateless persons to relevant procedures to determine their international protection needs. This includes protection needs both under the 1951 Convention in the first instance and, at an appropriate juncture in any asylum proceedings, under the 1954 Convention. The provisions of Article 27 remain unchanged in the new APR proposal, except for the addition of two new paragraphs (5 & 6) to ensure consistency with the new Screening Regulation. We therefore reiterate our recommended amendments to the 2016 proposal.

⁷³ ECRE, 'ECRE Comments on the Amended Proposal for an Asylum Procedures Regulation COM(2020) 611: Border asylum procedures and border return procedures' (December 2020), pp. 5-6, <https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM-2020-611-2-December-2020.pdf>

⁷⁴ The three EU MS yet to accede to the 1954 Convention are Cyprus, Estonia, and Poland.

⁷⁵ Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks C(2017) 6505 ANNEX 1, para. 14.4.1, p. 72, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_recommendation_on_establishing_a_common_return_handbook_annex_en.pdf

⁷⁶ 1954 Convention Relating to the Status of Stateless Persons, Article 1(2)(ii), https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf

⁷⁷ ECRE, 'ECRE Comments on the Amended Proposal for an Asylum Procedures Regulation COM(2020) 611: Border asylum procedures and border return procedures' (December 2020), pp. 14-16, <https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM-2020-611-2-December-2020.pdf>

⁷⁸ European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU A8-0171/2018 (22 May 2018), https://www.europarl.europa.eu/doceo/document/A-8-2018-0171_EN.pdf

The definition of a stateless person should be inserted in Article 4(2), as per the definition already provided in other EU legislation⁷⁹:

'stateless person' shall have the meaning assigned to it in Article 1 of the Convention relating to the Status of Stateless Persons, signed in New York on 28 September 1954.

Article 27(1)(a) should be amended to include reference to statelessness:

the name, date of birth, gender, nationality or statelessness, and other personal details of the applicant; ...

And a new separate indent should be added under Article 27(1)(a):

Where an individual claims not to have a nationality or when there are reasonable grounds to believe that an individual may be stateless, that fact shall be clearly registered pending a full determination of whether the individual is stateless, either in parallel with or following the consideration of the application for international protection. That determination shall be conducted without prejudice to the primacy of international protection status and with full respect of the principle of confidentiality.

4.4. Proposal for a Regulation addressing situations of crisis and force majeure⁸⁰

The Crisis Management Regulation proposal aims to put in place a framework to deal with crisis situations and force majeure, in order to 'avoid ad hoc responses'.⁸¹ It provides for a series of derogations from procedural rules, an extension of the scope of the border procedure, and a rapid triggering of compulsory solidarity measures. The Commission sets out that the instrument covers 'exceptional situations of mass influx [or risk of this] of third-country nationals or stateless persons arriving irregularly in a Member State, being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional'.⁸²

We share the concerns of others around the implications of extending the scope of the asylum border procedure in situations of crisis, extending time limits, and the determination of crisis situations.⁸³ In particular, given our comments and recommendations outlined above (see 4.3) in which we set out why we consider EU MS obligations under the 1954 Convention cannot be met in the context of the proposed border procedures, we recommend that border procedures are not extended in situations of crisis and reiterate our recommendation that stateless persons are excluded from all border procedures. We also reiterate our concerns

⁷⁹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Article 1(h).

⁸⁰ Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum COM(2020) 613 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295614020&uri=COM%3A2020%3A613%3AFIN>

⁸¹ *ibid*, p. 1

⁸² *ibid*, p. 2

⁸³ Meijers Committee, 'Meijers Committee Comments on the Migration Pact – Crisis and Force Majeure Regulation' CM2013 (November 2020), <https://www.statewatch.org/media/1499/eu-migration-pact-meijers-committee-crisis-force-majeure-comments.pdf>

regarding return sponsorship (see 4.2) and recommend that stateless persons are excluded from return sponsorship under the Crisis Management Regulation.

Integral to the Commission's proposals for improved crisis management is the Migration Preparedness and Crisis Blueprint.⁸⁴ The Blueprint establishes a Migration Preparedness and Crisis Network (Preamble 16), tasked with collecting and channelling migration-related information in a new, more coordinated, and integrated manner. FRA, Frontex and the EU Asylum Agency will be members of the network and all have experience dealing with issues relating to statelessness. We recommend that statelessness is mainstreamed in the work of the Network and that a subsection of the Commission's periodic Migration Management Reports (Article 6 AMMR) is dedicated to statelessness.

4.5. Amended proposal for a Regulation on the establishment of Eurodac⁸⁵

The new Eurodac proposal builds on the previous 2016 proposal,⁸⁶ restating the aim to transform Eurodac into a common European database to support EU policies on asylum, resettlement, and irregular migration. The scope of Eurodac is significantly enlarged under the new proposal and a number of amendments are made to support Eurodac functionality within the new interoperability framework.

We share the human rights concerns already articulated by others in the context of the 2016 proposal with regards to the expansion of powers to collect and retain increasing amounts of personal data, and the implications of the proposals on the right to dignity, physical and mental integrity, freedom from inhuman or degrading treatment, liberty, and access to an effective remedy.⁸⁷ We further share the concerns articulated by others about the lack of clarity regarding safeguards in place for children within the Eurodac Regulation, given the reduction in fingerprinting age from 14 to six years old, and the potential implications for children, including stateless children (or those at risk of statelessness).⁸⁸

We recommend that it is ensured that fields allowing for the capture of data on statelessness are included in all relevant data collection tools for clarity, to enable accurate collection of nationality data.

⁸⁴ Commission Recommendation of 23.9.2020 on an EU mechanism for Preparedness and Management of Crises related to Migration C(2020) 6469 final,

https://ec.europa.eu/info/sites/info/files/commission_recommendation_on_an_eu_mechanism_for_preparedness_and_management_of_crises_related_to_migration_migration_preparedness_and_crisis_blueprint_0.pdf

⁸⁵ Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818 COM/2020/614 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295417610&uri=COM%3A2020%3A614%3AFIN>

⁸⁶ Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/eurodac_proposal_en.pdf

⁸⁷ ECRE, 'ECRE Comments on the Commission Proposal to recast the Eurodac Regulation COM(2016) 272' (July 2016), <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-Eurodac-proposal.pdf>

⁸⁸ UNHCR et al, 'Joint Statement: coercion of children to obtain fingerprints and facial images is never acceptable' (28 February 2018), https://eea.iom.int/sites/default/files/publication/document/Joint_statement_Coercion_EURODAC_03.2018.pdf

Articles 12-14 and Articles 40a-b set out the data that shall be recorded. In all cases, 'or statelessness' should be inserted to enable accurate collection of nationality data:

Article 12(d): nationality(ies) or statelessness

Article 13(2)(d): nationality(ies) or statelessness

Article 14(2)(d): nationality(ies) or statelessness

Article 14a(2)(d): nationality(ies) or statelessness

Article 40a(1)(a) (a) surname (family name), surname at birth, first name(s) (given name(s)), date of birth, place of birth, sex, current nationality or statelessness;

Article 40b(6) the data referred to in Article 5(1), point (b), and (2) and the following data listed in Article 5(1), point (a) of Regulation (EU) 2019/816: surname (family name), first names (given names), date of birth, place of birth (town and country), nationality or nationalities or statelessness, gender, previous names, if applicable, where available pseudonyms or aliases, as well as, where available, information on travel documents.;

Article 40b(10)(b) the following point (aa) is inserted in paragraph 3: '(aa) surname(s); forename(s); name(s) at birth, previously used names and aliases; date of birth, place of birth, nationality(ies) or statelessness, and sex as referred to in Article 12 to 14a of Regulation (EU) XXX/XXX [Eurodac Regulation];'

4.6. The Recast Return Directive

The Recast Return Directive⁸⁹ remains under negotiation as part of wider CEAS reform initiated prior to the publication of the Pact. Given its relevance to the Pact proposals, we take this opportunity to reiterate our recommendations and proposed amendments to the Recast Return Directive. We share the wider concerns of other civil society actors about the Recast Directive and contributed to detailed comments on the proposal published in November 2018.⁹⁰

As emphasised throughout this paper, the very nature of statelessness can mean that a stateless person has no country to which they can return. If someone's statelessness is not identified, and they find themselves with no route to protection or regularisation in Europe, they can end up subject to repeated, unsuccessful removal attempts, and forced to live in destitution. In many cases, this can mean enduring repeated or prolonged periods of detention, which may be arbitrary. Assessing the lack of a reasonable prospect of removal is therefore particularly relevant for stateless persons. The Court of Justice has clarified the concept of "reasonable prospect of removal" and stated that where the maximum period of detention laid down by the Returns Directive has expired, Member States must immediately release the person concerned, even in the absence of valid documents and if the individual has no means of subsistence.⁹¹

It is essential that statelessness is mainstreamed throughout EU asylum and migration policy to ensure the rights of stateless migrants and refugees under international law are respected.

⁸⁹ Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) COM/2018/634 final, https://eur-lex.europa.eu/resource.html?uri=cellar:829f8e8c-b661-11e8-99ee-01aa75ed71a1.0001.02/DOC_1&format=PDF

⁹⁰ ECRE, 'ECRE Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634' (November 2018), <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-Commission-Proposal-Return-Directive.pdf>

⁹¹ Judgment of the Court (Grand Chamber) of 30 November 2009, *Kadzoev*, C-357/09 PPU, ECLI:EU:C:2009:741.

Inserting reference to international legal norms for the protection of stateless people into the Recast Return Directive would serve to highlight the existing international obligations of EU MS towards stateless people on their territory in the context of returns, as acknowledged by the Frontex Consultative Forum on Fundamental Rights⁹² and the EU Returns Handbook.

We have proposed amendments to Recitals 4 and 44 of the Return Directive to reflect the duty to protect stateless persons in the context of returns, which are also in line with the Opinion of FRA⁹³:

Recital 4: That European return policy should be based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity, as well as international law, including refugee protection, the protection of stateless persons, and human rights obligations. Clear, transparent and fair rules need to be established to provide for an effective return policy which serves as a deterrent to irregular migration and ensures coherence with and contributes to the integrity of the Common European Asylum System and the legal migration system .

Recital 44: Application of this Directive is without prejudice to the obligations resulting from both the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, and the New York Convention relating to the Status of Stateless Persons of 28 September 1954.

We also echo and welcome the calls by actors, including the UN Special Rapporteur on the human rights of migrants⁹⁴ and the European Parliament⁹⁵, to encourage States to offer protection from return to people who do not qualify for refugee status but are in need of human rights protection. We emphasise here the importance of referral to SDPs as a vital mechanism in this context to determine where an individual is due protection as a stateless person under the 1954 Convention, so they may be granted residence and rights in line with international law.

4.7. The EU Agency for Asylum

The 2016 Commission Proposal for a Regulation on the European Union Agency for Asylum also remains under negotiation.⁹⁶ The stated key objective of this proposal is to strengthen and expand the role of EASO, equipping it with the tools to:

- (1) enhance practical cooperation and information exchange on asylum;
- (2) promote Union law and operational standards to ensure a high degree of uniform application of the legal framework on asylum;
- (3) ensure greater convergence in the assessment of protection needs across the Union;

⁹² European Border and Coast Guard Agency (Frontex), 'Seventh Annual Report of the Frontex Consultative Forum on Fundamental Rights' (2019), p. 60, <https://www.statewatch.org/media/1381/consultative-forum-on-fundamental-rights-seventh-annual-report-2019.pdf>

⁹³ FRA, 'The recast Return Directive and its fundamental rights implications, Opinion of the European Union Agency for Fundamental Rights' FRA Opinion -1/2019 (10 January 2019), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-recast-return-directive-01-2019_en.pdf, pp. 27-29

⁹⁴ United Nations General Assembly, Report of the Special Rapporteur on the human rights of migrants, HRC 38th Session A/HRC/38/41 (4 May 2018), para. 90, <https://www.undocs.org/A/HRC/38/41>

⁹⁵ European Parliament resolution of 17 December 2020 on the implementation of the Return Directive (2019/2208(INI)), para. 23, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0362_EN.html

⁹⁶ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271 final, https://eur-lex.europa.eu/resource.html?uri=cellar:ce773c1e-1689-11e6-ba9a-01aa75ed71a1.0001.02/DOC_1&format=PDF

- (4) monitor and assess the implementation of the CEAS;
- (5) provide increased operational and technical assistance to Member States for the management of asylum and reception systems (in particular in cases of disproportionate pressure).⁹⁷

The proposal establishes a monitoring mechanism that should be based on information provided by intergovernmental organisations or bodies, in particular UNHCR, whose mandate includes the protection of stateless persons.⁹⁸ We highlight this as a further opportunity to mainstream statelessness across asylum policy and practice and draw the attention of EU MS to the rights of stateless persons and prevention of statelessness in the context of asylum procedures. We welcome the attention EASO has given to the issue of statelessness in recent publications,⁹⁹ and recommend that statelessness is integral to future cooperation, information exchange, promotion of standards, and monitoring and operational assistance provided by the new EU Asylum Agency. ENS stands ready to work with the Agency and other stakeholders to provide and signpost to technical expertise to support this objective.

5. Conclusion

In this paper, we have set out ENS's analysis of the Pact proposals focusing on their potential impact on the fundamental rights of stateless people in a migratory context in Europe. We have also endeavoured to shine a light on why it is vital that statelessness is considered and acted upon not only by legislators in this area, but also by those responsible for implementation at regional and national levels. Our recommendations seek to promote a more harmonised approach to the issue of statelessness across EU asylum and migration law and policy. This begins with improved identification and recording of (indications of) statelessness at the border, through to referral to appropriate procedures for status determination (including dedicated Statelessness Determination Procedures), access to protection, and inclusion. The EU undoubtedly has a key role to play in facilitating such a harmonised approach. In parallel, this regional approach must be complemented by a concerted effort on the part of States in Europe and beyond to eradicate statelessness, by facilitating the acquisition of nationality by stateless persons on their territory and ensuring nationality laws prevent new cases of statelessness arising.

In addition to the specific recommendations in this paper, we urge all actors to consider how statelessness may impact on implementation of the Pact, wider CEAS reform, and other relevant policy areas such as the Action Plan on Integration and Inclusion.¹⁰⁰ The EU's role in operational procedures and practical measures of support for MS and third countries on asylum, migration, and inclusion means that much can already be done to improve the identification, referral, protection, and inclusion of stateless migrants and refugees in Europe and beyond. ENS stands ready to support and cooperate with the European Commission, Council, Parliament, EU agencies, civil society, and refugees, migrants and stateless people

⁹⁷ *ibid.*, p. 6-10.

⁹⁸ Council Doc. 14985/17, Brussels, 4 December 2017, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (First reading) = Endorsement.

⁹⁹ EASO, 'EASO Asylum Report 2020', pp. 18-21 & 170-172, <https://easo.europa.eu/sites/default/files/EASO-Asylum-Report-2020.pdf>

¹⁰⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Integration and Inclusion 2021-2027 COM(2020) 758 final, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/pdf/action_plan_on_integration_and_inclusion_2021-2027.pdf

and community representatives, to share our expertise and improve the EU response to statelessness in a migratory context.

6. Summary of recommendations

Our recommendations for legislative amendments and practical implementation of the Pact proposals and wider CEAS reform can be found throughout the paper (underlined text). Here we provide a summary overview of these recommendations:

- I. The EU should put in place a comprehensive regional strategy to address statelessness and ensure it is mainstreamed in all relevant policy areas.
- II. Explicit reference to the 1954 Convention should be inserted in relevant Pact proposals, which should clearly define the term 'stateless person' in line with Article 1 of the 1954 Convention (as per existing EU legislation (Article 1(h) of the 2004 Social Security Regulation).
- III. The specific rights of stateless persons should be integrated in fundamental rights monitoring mechanisms, and FRA guidance should refer to relevant norms for the prevention and reduction of statelessness, identification, referral, and protection of stateless persons in the migratory context.
- IV. Explicit reference to stateless persons (within the meaning of the 1954 Convention) should be inserted in the Screening Regulation as well as a requirement to identify and record indications of statelessness as a vulnerability factor with procedural consequences. Member States should consider offering a right to stay (under Article 6(4) of the Return Directive) if screening shows that the person has already been subject to a return procedure and the obstacles to return are still present.
- V. Stateless persons should explicitly be excluded from return sponsorship and the application of the return border procedure due to the significant barriers to return they face, and which are acknowledged in the EU Returns Handbook as well as by FRA and the Frontex Consultative Forum, among others.
- VI. Beneficiaries of protection under the 1954 Convention ('stateless status') should explicitly be included alongside other beneficiaries of international protection in the proposed amendment to the Long-Term Residence Directive.
- VII. Stateless persons should explicitly be excluded from the asylum border procedure, and the outcome of identification of indications of statelessness at screening should be to refer away from the border to appropriate determination procedures. This should include referral at an appropriate juncture to a Statelessness Determination Procedure, either in parallel with or following the consideration of any application for international protection, without prejudice to the primacy of refugee status and with full respect of the principle of confidentiality.
- VIII. Border procedures should not be extended in situations of crisis and stateless persons should be excluded from all border procedures and return sponsorship including under the Crisis Management Regulation.

- IX. Statelessness should be mainstreamed in the work of the Migration Preparedness and Crisis Network, and the European Commission should include a dedicated subsection on statelessness in its periodic Migration Management Reports.
- X. References to statelessness should be inserted in the Eurodac Regulation to allow for the capture of data on statelessness and risk of statelessness in all relevant data collection tools to enable accurate collection of nationality data.
- XI. References to the international legal norms for the protection of stateless people should be inserted in the Recast Return Directive.
- XII. The EU Asylum Agency should integrate statelessness in all future cooperation, information exchange, promotion of standards, and monitoring and operational assistance.



Statelessness is often overlooked in asylum and migration debates. It is a hidden but very real issue affecting many refugees and migrants in Europe.

#StatelessJourneys is an initiative designed to highlight gaps, identify solutions, and deliver evidence-based advocacy and tools to secure the protection of stateless refugees and migrants, and to prevent new cases of statelessness arising in Europe.

For more information about the issue and the initiative, please visit:
<https://statelessjourneys.org>

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