

Statelessness in the EU Framework for International Protection

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Abstract

Every year Europe faces the arrival of thousands of stateless migrants in search of a more dignified life. Most of them are in need of protection. In most EU member states, statelessness is predominantly a migratory phenomenon and often linked to forced migration. Yet, statelessness has to-date not been part of mainstream European policy discussions on international protection. Consequently, statelessness frequently remains a hidden phenomenon in the EU, making persons without a nationality invisible and living on the margins of society. This article examines the EU framework for international protection and the forms of protection stateless forced migrants can currently count on in the Union.

Keywords

Statelessness; EU protection mechanism; EU protection legislation; EU policies; migration

1. Introduction

Recent years' nascent literature on statelessness often refers to an important distinction between two contexts in which this phenomenon may arise. The first covers stateless populations who are migrants or of a migratory background. The second includes situations where stateless persons are in their 'own country', meaning a country with which they have significant and stable ties (through birth, long-term residence, etc.).¹ These two contexts usually require different solutions. According to the consensual opinion of experts and the UNHCR, the appropriate solution for the second type (statelessness *in situ*) is naturalisation or the recognition of nationality.² For those who lack such a clear attachment to a specific state, appropriate protection machinery should be accessible. This should include an effective determination mechanism, as well as offer a meaningful protection status, until naturalisation – the actual 'durable solution' – becomes a

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¹) On the interpretation of this concept see: UN Human Rights Committee (HRC), 2 November 1999, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, para. 20.

²) UN High Commissioner for Refugees, December 2010, *Expert Meeting – Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)*, para. 24.

realistic option. In most cases, the dividing line between these two contexts is not crystal-clear.

In most of the European Union, statelessness is not a massive phenomenon (as it is in certain regions of the Middle East, Southeast Asia or Central Africa). Latvia and Estonia constitute an important exception, as hundreds of thousands of Russian-speakers lack a nationality in these two EU member states. Historically, these populations are of a migratory background,³ nevertheless their ties to these countries are so strong (through birth, long-term residence, social and economic integration, etc.) that they are usually considered as belonging to the above-described *in situ* stateless populations. Other member states also show examples of stateless persons who can be seen as living in their ‘own country’, even if on a much smaller scale. For instance, nearly 30% of Germany’s officially estimated 13 000-strong stateless population was actually born in the country, and one quarter of them has lived there for more than three decades.⁴ These situations are usually either the result of specific historical-political factors, or they are related to dysfunctional or ineffective mechanisms for the prevention of statelessness at birth.

At the same time, hundreds or even thousands of stateless migrants arrive in Europe year after year in search of protection and a more dignified life. Most of them are in need of protection, as statelessness frequently involves vast human rights violations and vulnerability. In most EU member states, statelessness is predominantly or exclusively a migratory phenomenon, often linked to forced migration. Yet, statelessness has so far not been part of mainstream European policy discussions on international protection. There may be a number of practical explanations for this. Probably the most evident reason is the simple lack of awareness. At the time of writing, five EU member states⁵ are not party to the 1954 Convention relating to the Status of Stateless Persons; and even many of those who ratified this treaty ignore the determination and protection obligations emanating from it.⁶ Rather low figures in most European countries also contribute to limited awareness. Moreover, statelessness frequently remains a hidden phenomenon, making persons without nationality invisible, living on the margins of society.

This article attempts to show where statelessness is or could be situated in the EU framework for international protection and what forms of protection stateless forced migrants can currently count on in the Union.

³ Russians had been settling in the Baltic region for centuries, and the Russian population of Latvia and Estonia multiplied during the communist era.

⁴ Federal Statistical Office of Germany (March 2011) (rectified on 4 April 2011), *Bevölkerung und Erwerbstätigkeit – Ausländische Bevölkerung, Ergebnisse des Ausländerzentralregisters*, pp. 28–29, 32–33, 59 and 64–65.

⁵ Cyprus, Estonia, Malta, Poland and Portugal.

⁶ Cf. UN High Commissioner for Refugees (December 2010) *Expert Meeting – Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)*, paragraph 1.

2. EU-Harmonisation of International Protection: Who is In and Who is Out

Since the 1990s, asylum and immigration have gradually gained importance as an area of cooperation and harmonisation in the European Union. The 1997 Treaty of Amsterdam allowed member states to adopt common and legally binding instruments related to asylum and immigration policies, with the European Commission being entitled to initiate such legislation. In the framework of the 1999–2004 Tampere Programme,⁷ the EU created its primary legislation on asylum matters, covering qualification and definition issues, asylum procedures, temporary protection, the reception of asylum-seekers, family reunification, as well as internal ‘burden-sharing’ and responsibility determination mechanisms. The effort to harmonise national asylum systems in *all* main aspects in a certain region is unquestionably a historical initiative, with no like precedent since the adoption of the universal legal framework for refugee protection after the Second World War. Yet, the officially envisaged 2012 date for the establishment of the Common European Asylum System is illusory and seems more a ‘motivating target’ rather than a realistic deadline. A number of crucial areas (such as appeal and judicial review procedures, humanitarian or compassionate grounds for protection, etc.) remain untouched by the harmonisation process,⁸ and even where clear joint standards exist, diverging practices often prevail.⁹ The recent *M.S.S.* judgment of the European Court of Human Rights has also confirmed that there are member states, which fail to fulfil even the most basic requirements set by the EU asylum *acquis*.¹⁰

It falls beyond the scope of this article to discuss all the shortcomings and contradictions of the harmonisation process. From the viewpoint of the issue in focus it may suffice to point out that EU legislation foresees clear protection obligations and joint minimum standards for certain categories of forced migrants, while it does not cover others. The different types of categories can be summarised as follows.

⁷ Council of the European Union (October 1999), Presidency Conclusions, Tampere European Council, pp. 15–16.

⁸ See, for example: Gábor Gyulai and Tudor Roşu (July 2011) *Structural Differences and Access to Country Information (COI) at European Courts Dealing with Asylum*, Hungarian Helsinki Committee, Chapter II; European Migration Network (December 2010) *The different national practices concerning granting of non-EU harmonised protection statuses*.

⁹ See, for example: European Council on Refugees and Exiles (October 2008) *The Impact of the EU Qualification Directive on International Protection*; UN High Commissioner for Refugees (27 July 2011) *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*; UN High Commissioner for Refugees, (November 2007), *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*.

¹⁰ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights (21 January 2011).

2.1. *EU-Harmonised Protection Statuses*

This group includes protection statuses the legal ground of which is clearly elaborated in EU law, as well as minimum or common standards for the determination of entitlement to the given status and the content of protection. At the time of writing, three protection regimes belong to this group:

- refugee status;
- subsidiary protection;¹¹ and
- temporary protection.¹²

2.2. *Non-EU-Harmonised Protection Statuses*

A great variety of national protection regimes complement the above-mentioned harmonised statuses. The 2010 comparative study of the European Migration Network (EMN) identified at least 60 different statuses in EU member states.¹³ This colourful conglomerate can be classified along a number of different factors:

- Nexus with international legal obligations. Some protection regimes are based on protection obligations set forth by international legal instruments, such as EU law, universal or regional human rights treaties. For example, victims of trafficking in the EU are entitled to protection based on an EU directive; nevertheless this instrument only stipulates general rules and principles, without providing detailed common standards for determination procedures and protection status.¹⁴ National statuses foreseen for stateless persons or unaccompanied minors are rooted in the provisions of the respective UN conventions.¹⁵

¹¹ Based on Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('Qualification Directive') and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ('Procedures Directive').

¹² Based on Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a Balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Note that by the time of writing, the EU temporary protection regime has not been applied in practice.

¹³ European Migration Network (December 2010) *The different national practices concerning granting of non-EU harmonised protection statuses*.

¹⁴ Cf. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

¹⁵ The 1954 Convention relating to the Status of Stateless Persons and the 1989 Convention on the Rights of the Child, respectively. Note that Article 10 of the 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 ('Return Directive') may further indicate the necessity of a protection status for unaccompanied minors.

At the same time, no clear international obligations necessitate the protection of victims of specific (for example racist) crimes or environmental disasters, as practiced in a number of member states.

- The comprehensiveness of protection grounds. Some protection regimes cover highly specific groups or situations (stateless persons, medical needs, unaccompanied minors or witnesses to criminal proceedings), while others set forth more general and flexible (for example humanitarian) grounds.
- Determination procedures. Most relevant procedures start upon request by the person interested, but in some cases an *ex officio* initiation is also possible (or is the only allowed option). Competent decision-making authorities may include asylum, immigration or other authorities, such as the police. The procedural framework significantly differs between member states and also between individual statuses within one country.
- The content of protection. The set of rights attached to non-EU-harmonised protection statuses also demonstrate great diversity. Some statuses grant a high level of protection (long or unlimited residence entitlement, unrestricted access to education and the labour market, integration services, etc.), while others are strictly limited both in time and in scope. Serious contrasts can be witnessed even in the case of similar protection grounds. For instance, ‘tolerated stay’ offers a set of important rights in Poland, in Hungary it is widely considered as a dead-end street for integration opportunities, while in Germany, it – rather absurdly – does not even confer a right to lawful residence.

Without aiming at a comprehensive analysis it may suffice to conclude that the existence of a widely diverging mass of non-harmonised protection statuses can easily prove to be a major obstacle to a true harmonisation of international protection practices in the EU. To put it simply: it is difficult to imagine a common area of protection, while foreigners with a serious medical condition or non-refugee stateless persons can have access to meaningful protection statuses in some member states, while in others they may face lengthy immigration detention or destitution. Yet, it is unrealistic to expect a significant approximation of relevant national frameworks in a Union, which already faces hardly surmountable difficulties in harmonising its refugee and subsidiary protection regime. All these factors should be considered when exploring the current framework for the protection of stateless persons in the European Union.

3. EU Policies: Statelessness Out of Sight

Statelessness *per se* is not a ground for obtaining an international protection status in EU law. The Treaty on the Functioning of the European Union stipulates that the EU has competence to establish and operate common policies in the field of

asylum and immigration.¹⁶ However, more elaborate provisions which define the scope of this competence do not refer to statelessness or any other open category which could include measures for a common protection policy towards stateless persons. The Charter of Fundamental Rights of the European Union does not contain any statelessness-specific provision either. Therefore, it can be concluded that at present the EU does not have an explicit entitlement to adopt legislation or common measures on statelessness as a specific issue. The only pioneering initiative to suggest the inclusion the protection of the stateless under the umbrella of EU asylum policies was made by the Hungarian government in its response to the European Commission's 2007 Green Paper on the Future Common European Asylum System. However, even this rather timid motion has so far remained un-echoed.

EU legislation on migration and asylum matters, population censuses or cooperation in the field of criminal justice and law enforcement contain references to stateless persons, but these appearances are – to say the least – sporadic. As Tamás Molnár concludes,

The existing rules protect stateless persons in an indirect way, where the legal basis is linked to a fundamental freedom (freedom of movement of workers; their social security) or other EC policy (entry and stay of third country nationals). As a consequence, this category of people has been covered as a result of side effects of the legislation.¹⁷

The 2007 Lisbon Treaty¹⁸ indicates potentially growing awareness on behalf of EU institutions, when it stipulates that with regards to EU law on freedom, security and justice *'stateless persons shall be treated as third-country nationals'*.¹⁹ This provision – the first of this sort in primary EU law – may seem to be of minor importance at a first sight; however, it does constitute an important step towards the creation of a proper legal framework for statelessness in the Union. Community legislation frequently operates with the term 'third-country national' when stipulating the rights and obligations of foreigners in the EU (including family reunification, guarantees in expulsion procedures, etc.). While many member states may have automatically considered those without any nationality to fall under this category, it is far from being ensured that without this clarification stateless persons would not find themselves in a legal gap (and consequently in legal limbo) in the usual EU citizen *versus* third-country national dichotomy (not

¹⁶ Treaty on the Functioning of the European Union, Articles 77–79.

¹⁷ Tamás Molnár (2010) 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order', 51 *Acta Juridica Hungarica*, pp. 293–304 at 304.

¹⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007.

¹⁹ See the relevant provision as amended by the Lisbon Treaty in the Treaty on the Functioning of the European Union, Article 67(2).

belonging to either of these groups). The 2009 resolution of the European Parliament, which evaluates the situation of human rights in the Union between 2004 and 2008, appears to follow the same line. This text highlights human rights concerns related to statelessness (explicitly naming the latter) in various aspects, such as discrimination, exploitation, integration difficulties or the lack of a proper legal status.²⁰

4. Forms of International Protection Available to Stateless Persons in the EU

Unfortunately, the impact of this recent promising tendency and the previously referred positive ‘side effect’ of certain pieces of EU legislation has been modest in practical terms. They do not envisage a common area of protection for stateless persons, let alone a comprehensive and effective determination and protection mechanism. Meanwhile, stateless migrants (or at least certain categories of them) can still benefit from a range of protection statuses throughout the Union.

4.1. EU-Harmonised Protection Statuses

Statelessness is frequently linked with political oppression, ethnic, religious or gender-based discrimination and various other persecutory practices. Stateless persons having a well-founded fear of being persecuted can benefit from refugee status, while those running a real risk of suffering a serious harm (as defined by EU law) can enjoy a subsidiary protection status in any member state of the Union.²¹ Even if the current EU asylum machinery suffers from numerous shortcomings, inequalities and quality concerns (the analysis of which would fall beyond the scope of this article), the existence of a supranational protection framework is undoubted. This means that a stateless Syrian Kurd or a stateless Rohingya from Myanmar who flees enduring and grave discrimination, social marginalisation or ill-treatment may find protection in the EU under the umbrella of the common asylum legislation. This phenomenon is significant in statistical terms, as hundreds of stateless forced migrants are granted an EU-harmonised protection status through this channel year by year. In 2010, for instance, 2122 stateless persons applied for asylum in the 27 member states.²² The ‘recognition rate’ of stateless asylum-seekers is relatively high; in 2010, one third of them were granted a protection status already at first instance.²³

²⁰ European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004–2008 (2007/2145(INI)).

²¹ Qualification Directive, Articles 2(c) and 2(e), 13 and 18.

²² UN High Commissioner for Refugees (29 March 2011) *Asylum Levels and Trends in Industrialised Countries 2010*, UNHCR, p. 19.

²³ Among the 1800 first-instance decision passed in 2010, 580 were positive. 340 of them were recognised as refugees, 135 applicants were granted subsidiary protection, while 105 of them received another

Article 1D of the 1951 Convention relating to the Status of Refugees²⁴ deserves special mention in this context. According to this provision, persons who received protection or assistance by a UN Agency other than the UNHCR, if such protection or assistance has ceased for any reason, shall *ipso facto* be entitled to the ‘benefits of the Convention’. Currently, the only such ‘alternative’ UN body providing assistance to – mainly stateless – refugees is the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Many consider this article the most problematic provision of the 1951 Refugee Convention, as states and other actors in the field have extremely divergent (and sometimes even constantly changing) understandings about its proper application. Two consecutive research reports by the BADIL Research Centre showed not only disturbing discrepancies between national practices even within Europe, but also the scarce application of this provision in general.²⁵ Even though exact statistics about persons recognised as refugees under this article are not available, experience shows that its use is marginal in the EU; most stateless Palestinians obtaining refugee status may rather do so under Article 1A of the 1951 Refugee Convention (falling under the scope of the ‘general’ refugee definition).

In the 2010 *Bolbol* case,²⁶ the Metropolitan Court (*Fővárosi Bíróság*) in Hungary sought the guidance of the European Court of Justice on how to apply Article 1D.²⁷ However, those who anticipated concrete and authoritative standards on this provision could only note with disappointment that the Court of Justice avoided providing an answer to two out of the three questions raised by the Hungarian court.²⁸ The *Bolbol* judgment therefore – regardless of one technical clarification on who can be considered as having benefited from the UNRWA’s assistance – is not of much assistance to EU member states. In response to this rather disappointing development, the Metropolitan Court referred another Palestinian asylum case to the Court of Justice in 2011.²⁹ Since the Hungarian judge united three different cases in order to cover all main aspects of Article 1D, it is significantly less likely that the EU Court can avoid formulating clear guidance

(non-EU-harmonised) protection status (rounded figures). Source: Anthony Albertinelli (May 2011) *Asylum applicants and first instance decisions on asylum applications in 2010*, Eurostat.

²⁴ Article 12(1)(a) of the Qualification Directive is the parallel provision in EU law.

²⁵ BADIL Resource Centre for Palestinian Residency and Refugee Rights (2005) *Closing Protection Gaps – Handbook on Protection of Palestinian Refugees in States Signatory to the 1951 Refugee Convention*; BADIL Resource Centre for Palestinian Residency and Refugee Rights (2010) *Closing Protection Gaps – Handbook on Protection of Palestinian Refugees in States Signatory to the 1951 Refugee Convention, Jurisprudence Regarding Article 1D 2005–2010*, revised second edition.

²⁶ *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, European Court of Justice, 17 June 2010. Ms Bolbol was represented by Gábor Győző, staff attorney at the Hungarian Helsinki Committee.

²⁷ Referring to the parallel provision of the Qualification Directive.

²⁸ Arguing that based on the answer given to first question, Ms Bolbol does not qualify for the application of Article 1D, therefore the other two questions need not to be answered.

²⁹ *Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Court of Justice of the European Union, case in progress.

this time. The case is pending at the time of writing this article, and the impact of this judgment on the actual use of Article 1D is unpredictable.

4.2. *Statelessness-Specific Protection Statutes*

Stateless persons who do not qualify for refugee status or subsidiary protection can also obtain a legal status on the mere ground of statelessness in some EU member states. Yet unfortunately, only a small minority of the 22 member states currently party to the 1954 Statelessness Convention operate a specific protection regime for those without a nationality. As stated in the introduction, for decades most European countries have been lacking awareness about stateless persons' protection needs. The recent modest positive tendencies in this respect have not yet been reflected by a rapidly growing number of protection machineries, yet a promising trend is apparent.

At the time of writing, only six member states' legislation defines statelessness as a protection ground *per se*. Spain and Hungary have both established a sophisticated procedural framework for statelessness determination, the rules of which are set by a legislative act. France has been operating a protection regime for several decades; however, it has failed to establish a clear procedural regulation in law. Italy offers two parallel routes to protection: a rather dysfunctional administrative, and a functioning, but unregulated judicial determination framework. There is hardly any information available about Latvia's protection machinery, while the impact of Slovakia's recent cautious steps towards a statelessness-specific protection regime also remains to be researched and reported. The next section of this article will briefly elaborate on those among these national systems that may have the most pivotal international impact as 'exemplary practice'.

The six national regulations (and the practices based thereon) share two key characteristics:

- They all define statelessness as a separate ground for claiming and obtaining protection. Statelessness determination is therefore conducted separately from asylum procedures.
- They all envisage a meaningful protection status to stateless persons (including a right to residence, identity documents and a travel document, as well as a set of social and economic rights).

At the same time, important differences can also be witnessed, for example as to:

- the authority in charge of statelessness determination (asylum authority in Spain and France, immigration authority in Hungary or civil courts in Italy);
- the elaborateness and sophistication of the procedural framework (from detailed legislative rules in Hungary or Spain to yet only basic protection provisions in Slovakia); or

- the actual content of the legal status (from a protection-oriented status aiming at quick integration in France, Italy or Spain to a rather unfavourable condition with several limitations in Hungary); etc.

One crucial advantage of these systems from a human rights point of view is that they drag into the light the so unfairly overlooked problem of statelessness, by offering a clearly signposted route towards protection and raising awareness within a larger community of state officers and lawyers, or even the public. The above countries' experience helps to understand that by creating a statelessness-specific protection regime states can avoid forced 'practical solutions', never-ending status determination or expulsion procedures, or – in the worst-case scenario – an enduring legal limbo. Statistics prove that such a step does not trigger a so-called 'pull factor'; the statelessness determination caseload is marginal as compared to asylum procedures in all the countries concerned.³⁰ It may therefore not be surprising that a number of EU member states appear to recognise and accept their protection obligation *vis-à-vis* stateless persons in recent times, usually leading to the adoption of domestic legal provisions or even a separate legislative act.³¹ In addition to the six existing schemes, Belgium pledged in December 2011 to establish a statelessness-specific protection mechanism, while Austria pledged that it would be '*ready to review her implementation of the convention relating to the Status of Stateless persons on the basis of the guidelines which are currently being elaborated by UNHCR*'.³² The author hopes that this tendency will continue and a number of EU member states will adopt similar provisions in forthcoming years. The recently established European Network on Statelessness³³ will also work to this end.

4.3. *Non-EU-Harmonised and Non-Statelessness-Specific Protection Statuses*

Stateless persons who do not qualify for refugee status or subsidiary protection and who find themselves in an EU member state where statelessness is not considered a protection ground may still have some options for a protection status. The extremely diverse body of non-EU-harmonised protection statuses includes some national regimes that can rather easily be applied to stateless migrants. For instance, statelessness in case of forced migrants is often manifested by insurmountable legal and/or practical obstacles to the person's return to her/his country of origin or previous residence. Thus the usual alternative 'protection option' for stateless persons is some sort of a 'tolerated' or 'humanitarian' status, the legal

³⁰ For example, the number of applicants in 2011 was only in 74 Spain and 28 in Hungary.

³¹ Spain: 2001; Latvia: 2004; Hungary: 2007; Slovakia: 2011.

³² See for state pledges <http://www.unhcr.org/pages/4d22fd496.html>.

³³ For more information on the network, visit: <http://www.statelessness.eu>.

basis of which includes the practical impossibility of return (as, for example, in Germany, the Netherlands, Austria, Poland or the Czech Republic).³⁴ Some legislators furthermore deemed necessary to point out in regulation that the enduring obstacle to return is due to factors beyond the control of the person concerned or not at her/his own fault.

Such non-statelessness-specific protection regimes may offer a *de facto* solution for a number of stateless migrants, providing them with lawful stay and ensuring that they will not be held in lengthy immigration detention. Nevertheless, the ‘quality’ of this protection may easily fall short of the bench-marks set by statelessness-specific regimes, for a number of reasons:

- These statuses usually offer less favourable conditions with regard to residence entitlement, social or economic rights (for instance, access to the labour market, state-funded education, health care services, etc.). As a consequence, the durable character of these solutions (as to integration or naturalisation opportunities) is less apparent.
- Such protection measures contribute to the concealment of the statelessness phenomenon, or at least the true dimensions thereof. Beyond its overall negative impact, this ‘invisibility’ may cause practical difficulties as well, since it can seriously limit the awareness of both decision-makers and persons concerned about the availability of such forms of protection.
- Non-statelessness-specific protection regimes often prove to be much slower in providing a solution. It takes time to prove the impossibility of return (the usual ground for granting a status in such cases), and the lack of proper, specialised determination mechanisms can also delay the due resolution of such cases.³⁵

5. Existing National Protection Models in the EU

As stated previously, some European states have already established a statelessness-specific determination and protection mechanism which policy-makers can observe when looking for exemplary (or at least functioning) practices. Currently, no single ‘good practice model’ exists within the growing, but yet small group of countries operating such a system. All of these models show positive examples, but they all suffer from important shortcomings as well. In the following, the

³⁴ See above, note 13, p. 3.

³⁵ For example, a stateless person can obtain protection in a Spanish or Hungarian statelessness determination procedure within a few months, while in Germany the same person would have wait for at least eighteen months, and demonstrate that at no fault of hers/his, deportation could not take place throughout this period, in order to obtain a legal status and a residence permit.

three national mechanisms which are based on a more or less clear and transparent regulatory framework will be briefly presented.³⁶

5.1. *France*

The French statelessness-specific protection mechanism (the oldest in the world) was created in 1953, thus it actually pre-dates the 1954 Statelessness Convention. Since then, a centralised administrative authority, namely the French Office for the Protection of Refugees and Stateless Persons (*Office Français de Protection des Réfugiés et Apatrides, OFPRA*) has been in charge of assessing claims for stateless status. French law does not stipulate detailed and specific rules on how such claims should be dealt with (e.g. on evidentiary matters), however, the procedural framework can still be considered settled, partly based on the OFPRA's brief guidance published on its website. Applicants are commonly (yet not obligatorily) invited to an oral hearing by the determining authority. The OFPRA's negative decision can be appealed in the regular framework of judicial review of administrative decisions, before a local administrative court (*tribunal administratif*), and at second instance, before a regional administrative court of appeal (*cour administrative d'appel*). These courts can only quash decisions made in breach of law and refer the case back to the OFPRA for a new procedure, they are not entitled to rectify an erroneous legal conclusion and grant stateless status themselves.³⁷ In cases of an error of law, further review can be sought with the Council of State (*Conseil d'État*).

Statelessness determination represents a minuscule proportion of the OFPRA's caseload. Between 2006 and 2010, for example, 931 persons claimed stateless status in France, while the country registered hundreds of thousands of asylum-seekers in this five-year period. Applicants come from various parts of the world; yet Europe (in particular Southeast Europe) regularly constitutes a significant region of origin. The 'recognition rate' in the administrative phase usually verges around 30 percent (a higher proportion than in asylum cases). Between 2006 and 2010, the OFPRA recognised 311 persons as stateless.³⁸

The French system's main achievement is the well-established and favourable legal status created for stateless persons. This legal condition offers unrestricted access to the labour market, the possibility of family reunification with preferential conditions, access to health care and social benefits, as well as to all levels of education. The mere functioning of such a regime for several decades (and its

³⁶ This assessment is also reflected by the fact that – according to the author's experience – countries wishing to establish their own protection framework usually focus on the observation of these three national models.

³⁷ It is interesting to note that in asylum cases (also decided by the OFPRA) a specialised body, the National Asylum Court (*Cour Nationale du Droit d'Asile, CNDA*) is in charge of the judicial review, and in addition to quashing administrative decisions, it is entitled to grant protection as well.

³⁸ Source of statistical data: OFPRA.

solidified framework) can also be looked at as a good practice *per se*. Meanwhile, some important shortcomings darken the overall picture. A number of legal and practical obstacles encumber the access to protection of those in need. For instance, claims for stateless status can only be submitted to the OFPRA office in Paris, in a written form and in the French language.³⁹ French law does not recognise the concept of an ‘applicant for stateless status’; therefore, those claiming this form of protection (unlike asylum-seekers) are not provided with any temporary residence entitlement and accommodation services while their case is being processed. The claim does not even have a suspensive effect on expulsion measures, meaning that *ad absurdum*, an applicant can be deported or put in immigration detention during the procedure.

5.2. Spain

Spain was the first country in the world to adopt a specific legislative act (a royal decree) dealing exclusively with the protection of stateless persons in 2001.⁴⁰ Similar to France, the task of determining whether an applicant is stateless is delegated to the Office of Asylum and Refuge (*Oficina de Asilo y Refugio, OAR*). Claims for stateless status are admitted at immigration offices, police stations and the asylum authority’s premises. Quite uncommonly, the OAR is entitled to initiate a statelessness determination procedure *ex officio*. The Royal Decree sets a number of rules for the determination process. The hearing of applicants in the administrative phase is optional, as is the issuance of a temporary residence permit while the instruction is pending. The OAR’s negative decisions can be appealed before the National High Court (*Audiencia Nacional*) and, in the second instance, before the Supreme Court (*Tribunal Supremo*). These courts usually refrain from hearing the applicants and decide on the basis of the case file. Unlike in the French procedure, Spanish judges can themselves grant stateless status. In recent years, both courts have developed important jurisprudence on statelessness.

The number of applicants is usually low, in comparison with that of asylum-seekers in Spain. Between 2001 and 2011, 1532 persons applied for stateless status, more than half of them (832) in 2008. The majority of the claimants are usually from Western Sahara. During this decade, only 34 persons were granted stateless status.⁴¹

The current Spanish protection machinery can serve as exemplary practice in some important aspects. The elaborate and transparent legal framework, the delegation of this task to centralised administrative and judicial bodies and the

³⁹) While asylum claims can be submitted at local *prefecturas*, as well.

⁴⁰) Royal Decree No. 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons (*Real Decreto No 865/2001, de 20 de julio, por el que se aprueba el Reglamento de Reconocimiento del Estatuto de Apátrida*).

⁴¹) Sources of statistical data: OAR, UNHCR.

significant body of interpretative jurisprudence can be referred to in particular. The characteristics of the Spanish stateless status also provide a positive example in most regards (unlimited residence entitlement, unrestricted access to education and the labour market, etc.).

The main shortcoming of the Spanish system does not lie in the regulation, rather in practice, as the extremely low ‘recognition rate’ puts the numerous positive aspects in perspective. There appears to be a discrepancy between the clear (favourable) jurisprudence established by both the National High Court and the Supreme Court on the assessment of Saharawi applicants for stateless status and the persistently low grant rate of the OAR. While access to procedure is definitely less problematic than in France, it still fails to offer a proper and transparent temporary legal condition for applicants pending the determination process.

5.3. Hungary

Hungary’s statelessness-specific protection regime has existed since 2007. The administrative authority in charge of statelessness determination is the Office of Immigration and Nationality (*Bevándorlási és Állampolgársági Hivatal, OIN*), but unlike in the previous two cases, the Hungarian legislator delegated this task to the immigration (rather than the asylum) branch of this entity. At present, Hungarian law undoubtedly offers the most sophisticated procedural framework for statelessness determination, including elaborate rules on evidentiary assessment.⁴² Legal remedy against the OIN’s negative decision can be sought before the Metropolitan Court (*Fővárosi Törvényszék*),⁴³ which has the right to grant stateless status as well. Both the OIN and the Metropolitan Court are obliged to personally hear the claimant. In specific cases, further extraordinary judicial review may be requested from the Supreme Court (*Kúria*).⁴⁴

The number of applicants is very low in Hungary, too. Between the entry into force of the relevant regulation in July 2007 and the end of 2010, 117 persons applied for stateless status, and 61 were granted this form of protection. Persons originating from the former Yugoslavia and the former Soviet Union and Palestinians constitute the majority of both applicants and those recognised as stateless.

The Hungarian regulatory framework definitely serves as the best currently existing model for designing a protection-oriented statelessness determination procedure, based on clear standards. The lowered standard and shared burden of proof, the flexible rules for the submission of the claim, practical rules facilitating

⁴² Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (*2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról*), Chapter VIII; Government Decree 114/2007. (V. 24.) on the execution of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (*170/2001. (IX. 26.) Korm. rendelet a külföldiek beutazásáról és tartózkodásáról szóló 2001. évi XXXIX. törvény végrehajtásáról*), Chapter VIII.

⁴³ Before 1 January 2012: *Fővárosi Bíróság*.

⁴⁴ Before 1 January 2012: *Legfelsőbb Bíróság*.

the establishment of facts, access to legal aid, the mandatory oral hearing and the special entitlements of the UNHCR should all be emphasised in this respect. Sadly though, two major shortcomings question all these achievements. First, only lawfully staying non-nationals can apply for stateless status in Hungary – a provision which is not only unprecedented and senseless according to common logic,⁴⁵ but also appears to be in breach of the 1954 Statelessness Convention, which sets forth an exhaustive list of exclusion clauses (not including this particular ground). It is then not surprising that Hungarian law does not grant any right or legal conditions to applicants for stateless status, not even a suspensive effect on expulsion measures. The second significant shortcoming of the Hungarian system is the weak legal status of those finally recognised as stateless (seriously restricted access to the labour market, no access to state-funded higher education, no preferential treatment with regard to access to health care, etc.).⁴⁶

6. Conclusions

It has been made clear that stateless migrants can count on extremely diverging forms and levels of protection in different member states of the European Union. But where would then statelessness fit into the EU international protection agenda? Or could it fit at all? On the basis of the information presented in this article, as well as several years of both asylum and statelessness-related experience in Europe, the following conclusions can be drawn.

1. Non-EU-harmonised protection statuses continue to play an important role in national protection environments. Given the apparently profound difficulties in implementing the EU asylum *acquis* in a manner that it could reflect truly harmonised (or *horribile dictu* common) standards, it is unlikely that EU institutions and the 27 member states would decide to create other harmonised statuses (e.g., enlarging the scope of community legislation to other protection categories). Should this highly unlikely scenario take place, it would definitely concern a status with respect to which common European legislative standards already exist and all member states share a common understanding that the category in question constitutes a ‘protection issue’. At the time of writing, two possible candidates for this could be (non-refugee) unaccompanied minors and victims of trafficking.

⁴⁵ The lack of a valid identity and/or travel document is a common phenomenon of statelessness; expecting stateless persons to obtain a legal status before being recognised as such is as absurd as, for example, requiring refugees to demonstrate that they have decent livelihood, accommodation and health insurance in the host country prior to and as a condition of granting them protection.

⁴⁶ For a more detailed analysis of the Hungarian protection mechanism see: Gábor Gyulai (December 2010) *Statelessness in Hungary: The Protection of Stateless Persons and the Prevention and Reduction of Statelessness*, Hungarian Helsinki Committee.

2. Due to the lack of an explicit legal fundament in community law and the reluctance of member states, it is very unlikely that the protection of (non-refugee) stateless persons would at any point be brought under the scope of common EU policies and legislation. Contemplating that harmonisation efforts has actually led to weakening protection standards from many aspects in several member states,⁴⁷ this scenario may even appear undesirable from a human rights and statelessness advocate's point of view.
3. On the other hand, European countries (and to a lesser extent, EU institutions) seem to show increasing awareness and interest in the protection-related aspect of statelessness, in particular thanks to the various efforts made by the UNHCR and its partners for example on the occasion of commemorating the fiftieth anniversary of the 1961 Convention on the Reduction of Statelessness. Europe apparently has reached the *momentum* of rectifying several decades of neglect and make significant steps towards the due recognition of stateless persons' protection needs. It can therefore be realistically expected that within a few years, all EU member states will ratify the 1954 Convention on the Status of Stateless Persons, which could open up a way for common action under the aegis of the Union. The recent 'propagation' of national statelessness-specific protection mechanisms is likely to continue. The number of member states operating such a system may reach a 'critical mass' in the forthcoming years, thus putting a stronger pressure on those yet lacking a domestic framework.

While a common protection policy and regulation seems unrealistic, the EU can still do a lot in order to improve the protection of stateless persons in its member states. The following modest and definitely non-exhaustive list of examples aims to set a starting point for these efforts:

- The EU should encourage member states to ameliorate the visibility of stateless persons in statistics and should elaborate relevant common guidelines (for example: how to apply a common methodology of disaggregating data on stateless asylum-seekers, how to reduce the use of categories such as 'unknown' or 'unclear nationality' and its undue conflation with statelessness, how to better assess the number of stateless persons in a census, etc.).
- The EU and its various institutions should constantly encourage those member states that have not ratified one of the statelessness-related UN conventions to do so and should cooperate with the UNHCR to this end.
- The EU and its various institutions should – whenever and wherever adequate – promote the idea of creating a national statelessness-specific protection mechanism, highlighting already existing model practices.

⁴⁷⁾ The UNHCR, the European Council on Refugees and Exiles (ECRE) and academic literature have repeatedly reported about this so-called 'race to the bottom' phenomenon in recent years.

- The EU should strive to mainstream the issue of statelessness within its own structure; relevant EU institutions (dealing with issues such as asylum, migration, anti-discrimination, gender, national minorities, Roma inclusion or fundamental rights) should appoint statelessness focal points and statelessness should be integrated into the standard training programme of these bodies.
- The EU’s Fundamental Rights Agency (FRA) should regularly report on human rights concerns related to statelessness in member states and should integrate this topic into his standard working programme.
- In these efforts, relevant EU institutions should closely cooperate with the UNHCR and the European Network on Statelessness.

The moral obligation of protecting vulnerable human beings whom no one else wants to protect is a crucial pillar of European civilisation. Europe has waited for unjustifiably long to recognise that those deprived of the protecting tie of nationality should also benefit from the application of this principle. This article cannot be concluded without expressing hope and optimism that this decade will bring a radical improvement in the treatment and protection of stateless persons in Europe.

