ANALYSIS OF CURRENT PRACTICES AND CHALLENGES REGARDING THE AVOIDANCE AND REDUCTION OF STATELESSNESS IN EUROPE

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Analysis of current practices and challenges regarding the avoidance and reduction of statelessness in Europe

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Introduction

1. In the context of the Council of Europe Action Plan on protecting refugee and migrant children for 2017-2019, the Council of Europe European Committee on Legal Co-operation (CDCJ) decided, at its 93rd plenary meeting (Strasbourg, 14-16 November 2018), to undertake a preliminary review of protocols and procedures used by member States to determine and resolve cases of statelessness, in particular of migrant children.

2. To seek how best the Committee can provide its expertise and contribute to the on-going efforts undertaken in this field, the CDCJ decided to organise, within the framework of this review, an Ad-hoc meeting bringing together national experts and key stakeholders in Europe to exchange views and experiences on national practices, recent gaps or new challenges and practical difficulties encountered by both national authorities and stateless persons.

3. The Ad-hoc meeting took place in Strasbourg on 11 and 12 June 2019 with the overall objective of identifying the current gaps and difficulties encountered, in practice, by authorities and stateless persons and a step-by-step strategy of possible activities to be undertaken by CDCJ in this field. The outcome of the discussion was taken into account in this analysis.

4. At its 94th plenary meeting (13-15 November 2019) CDCJ considered the analysis and, as a follow-up, the Committee agreed to carry out the following activities set out below:

- an international conference on statelessness to raise awareness and promote implementation of Council of Europe standards in this field and, subsequently,
- a series of technical meetings on targeted statelessness issues.

5. In view of the international conference on “Statelessness and the right to a nationality in Europe: Progress, challenges and opportunities” (24 September 2021), the analysis has been updated.

International standards

Council of Europe legal framework

6. The Council of Europe has been very active in the field of nationality law and statelessness. The most important achievements are the 1997 European Convention on Nationality (ETS No. 166; hereinafter: ECN) and the 2006 Convention on the Avoidance of Statelessness in relation to State Succession (CETS No. 200). Furthermore, several recommendations of the Committee of Ministers gave guidance to member States in respect of the principles to be followed in nationality law. For the avoidance and reduction of statelessness, two of these recommendations deserve special attention: Recommendation No. R (99) 18 of the Committee of Ministers on the avoidance and the reduction of statelessness and Recommendation CM/Rec(2009)13 of the Committee of Ministers on the nationality of children.

7. Also, the Parliamentary Assembly repeatedly adopted resolutions and recommendations related to nationality and statelessness issues, amongst them Recommendation 2042 (2014) on Access to nationality and the effective implementation of the European Convention on Nationality and Resolution 2099 (2016) on the need to eradicate statelessness of children.

8. Furthermore, the European Court of Human Rights (hereinafter: the "ECtHR") delivered judgments with great relevancy to the access to nationality. Although the European Convention on Human Rights(ETS No. 5; hereinafter: the "ECHR") does not mention the right to nationality as such, the ECtHR ruled on 11 October 2011 in *Genovese v. Malta* (application No. 53124/09) that the right of access to a nationality constitutes a part of the social identity of a person, which is protected under Article 8 of the ECHR (right to respect for private and family life). See also the Advisory Opinion of the ECtHR of 10 April 2019. Also the case law of the ECtHR in cases of deprivation of nationality are very relevant (ECtHR 7 February 2017 in *K2 v. the United Kingdom* and ECtHR 25 June 2020 in *Ghoumid and Others v. France*). Important are also the judgments ECtHR 30 January 2020 in *Ahmadov v. Azerbaijan* (on non-recognition of the acquisition of nationality in the context of State succession and *de facto* deprivation) and ECtHR 22 December 2020, in *Usmanov v. Russia* (on annulment of a naturalisation because of fraud committed during the naturalization procedure ten years earlier; violation of Article 8 ECHR).

United Nations legal framework

9. In the framework of the United Nations, two important treaties were adopted in the field of statelessness: the 1954 Convention Relating to the Status of Stateless Persons (United Nations Treaty Series (UNTS), vol. 360, p. 117; hereinafter: 1954 Convention) and the 1961 Convention on the Reduction of Statelessness (UNTS, vol. 989, p.175; hereinafter: CRS). Moreover, the 1979 Convention on the Elimination of all Discrimination of Women (UNTS, vol. 1249, p. 13) and the 1989 Convention on the Rights of the Child (UNTS, vol. 1577, p. 3) are of great importance for access to nationality by children. The principles enshrined in these last-mentioned treaties influence considerably the interpretation of the obligations arising from the 1961 CRS notably.

10. In recent years, the UNHCR, which was entrusted by the General Assembly of the United Nations with responsibility for the identification, prevention and reduction of statelessness and the protection of stateless persons (see UNGA Resolution 61/137 of 2006), worked on detailed guidance on the interpretation of the 1954 and the 1961 conventions by organising expert meetings and formulating guidelines. The guidance resulted in the 2014 publication of the UNHCR Handbook on stateless persons (hereinafter: UNHCR Handbook), the UNHCR Guidelines on statelessness No 4: Ensuring every child's right to acquire a nationality through Articles 1-4 of the 1961 Convention on the reduction of statelessness (hereinafter: UNHCR Guidelines No 4) and the UNHCR Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality (hereinafter: UNHCR Guidelines No 5) under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness.

11. The UNHCR further initiated the United Nations Global Action Plan to End Statelessness 2014-2024, within which amongst others, it promotes very actively and successfully the accession to both UN statelessness conventions. Additionally, the UNHCR

initiated several mapping studies in which the prevention and reduction of statelessness and protection of stateless persons in several countries are assessed and recommendations on improvements to law, policy and practice are given. Mapping studies have to date been carried out in several European countries (for example, in Albania, Austria, Belgium, Denmark, Estonia, Finland, Iceland, Netherlands, Norway, Poland, Portugal, Sweden and the United Kingdom).

Activities of other institutions and NGOs in the field of statelessness

12. Besides the activities of the Council of Europe and the UNHCR, several other institutions and NGOs are also active in encouraging States to improve their rules and policies on the avoidance and reduction of statelessness, as well as the protection of stateless persons on their territory. During the Ad-hoc meeting mentioned above, representatives of several of these institutions and NGOs were invited to give a brief presentation on their activities. This initiative was particularly relevant, firstly, to avoid duplication or overlapping projects, and, secondly, for stimulating co-operation between the different institutions and NGOs.

European Network on Statelessness (ENS)

13. The European Network on Statelessness (ENS) gathers and analyses comparative information about European countries' efforts to address statelessness. This information is now presented online in the Statelessness Index: Assessing law, policy and practice in Europe. The information on how a country performs against international norms and good practice are organised into five themes: 1) Accession to international and regional instruments; 2) Statelessness population data; 3) Statelessness determination and status; 4) Detention; 5) Prevention and reduction of statelessness. The website includes a comparator tool, which enables users to select up to four different countries and to create a page with key information on the legal situation in these countries in respect of statelessness, presented in a comparative table. The index allows users to quickly identify where good practices exist as well as which areas of law, policy and practice need to be improved by countries to fulfil their international obligations. The Index is based on in-depth surveys developed by ENS in collaboration with national experts. The situation in each country is benchmarked against international norms and good practice. The Index includes currently twenty-seven European States (Albania, Austria, Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, North Macedonia, Malta, Republic of Moldova, Netherlands, Norway, Poland, Portugal, Serbia, Slovenia, Spain, Switzerland, Ukraine and the United Kingdom). ENS aims to develop the Index to include data on other European countries, as well as additional tools and resources. It is evident that the Index is an excellent tool for lawyers and NGOs working in the field of nationality law or advocating for reforms, but it is also for government officials looking for good practices when drafting new legislation. The Index, in addition, provides valuable information for international organisations working on standard-setting, including the Council of Europe. In July 2021 ENS also launched the Statelessness Case Law Database. The database contains summaries of national and regional case law covering Europe, as well as international jurisprudence.

European Migration Network (EMN)

14. The European Migration Network (EMN), which is co-ordinated by the Directorate for Migration and Home Affairs of the European Commission in co-operation with national contact points in the EU member States plus Norway, collects information in the field of asylum and migration policies, which includes attention to the avoidance and reduction of statelessness. Following the Council conclusions of 3-4 December 2015 under the Luxembourgish presidency, the EMN Platform on Statelessness was created. The main objective of the platform is to launch exchanges of good practices among member States and to invite member States' national contact points of the EMN to actively participate in the platform, providing all relevant information with a view to ensuring that it will be a useful instrument in order to achieve the objectives of reducing the number of stateless persons, strengthening their protection and reducing the risk of discrimination. This platform is co-ordinated by the EMN Luxembourg. The EMN published, in 2020 an updated EMN Inform 2020: Statelessness in the European Union, see EMN Informs and in July 2020 Pathways to citizenship for third-country nationals in the EU Member States.

European Union Agency for Fundamental Rights (FRA)

15. The European Union Agency for Fundamental Rights (FRA) has paid attention to standards for the protection of stateless persons and access to nationality rights for stateless persons, in the course of its work. Publications such as the 2014 Handbook on European law relating to asylum, borders and immigration und updated in 2020 (sub-section 3.10) and the 2015 Handbook on European law relating to the rights of the child (sub-sections 4.1 and 4.5) (both jointly published with the Council of Europe), alongside a 2017 report on the European legal and policy framework on immigration detention of children (chapter 4) and an online tool mapping minimum age requirements and birth registration, are also relevant in this regard.

European Parliament

16. In recent years, the European Parliament has also been active on the issues of prevention and reduction of statelessness and protection of stateless persons, including through the commissioning of reports (such as the 2015 LIBE Committee Study on Practices and Approaches in EU Member States to Prevent and End Statelessness), adopting resolutions on this issue, and organising a Hearing on Statelessness in 2017, as well as events and debates, including and particularly in relation to preventing childhood statelessness.

Other actors

17. Furthermore the World Conference on Statelessness has to be mentioned, which took place from 25-28 June 2019 in The Hague, hosted by the Institute Statelessness and Inclusion (ISI). During the Conference, attention was paid, for instance, to strategies to be followed in order to eradicate statelessness worldwide. ISI also published three "The World Statelessness' Reports", the last of which was published in 2020 and is dealing with deprivation of nationality. ISI also edits since 2019 the Statelessness & Citizenship Review.

18. Very relevant for comparative data on the prevention and reduction of statelessness is also the Global Citizenship Observatory (GLOBALCIT) which is committed to fact-based

analysis of nationality laws and policies around the world. The observatory includes a database on the grounds for acquisition and loss of nationality in 177 countries and provides detailed information on, for instance, the rules of countries in respect of statelessness.

Definition of a stateless person

19. The obligations to prevent and reduce statelessness stemming from the relevant international treaties, in particular the 1997 ECN and the 1961 CRS, are triggered when a person would (otherwise) be stateless or rendered stateless in case of loss or withdrawal of nationality. It is therefore essential to identify and determine statelessness and risk of statelessness.

20. Neither the 1997 ECN nor the 1961 CRS contain a definition of a stateless person. However, the UN Convention Relating to the Status of Stateless Persons (1954) provides in its Article 1(1) that "*For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law*." This definition of who qualifies as a "stateless person" is accepted as customary international law and is also relevant for the scope of application of other instruments (see UNHCR Handbook, para 13-17; UNHCR Guidelines No 5, para 8). If a person satisfies the conditions of this definition (s)he is at that moment a *de iure* stateless person. The finding that a person is stateless is declaratory and not constitutive in nature (UNHCR Handbook, para 16).

21. Sometimes reference is made to '*de facto* statelessness'. However, this term - *de facto* stateless - is not defined in any international treaty and can cause confusion. As such, it is best to avoid this qualification. A more useful term, used by UNHCR and other statelessness experts, may be 'a person at risk of statelessness'. When such persons are encountered, it must be determined carefully whether they are (*de iure)* stateless or establish that they possess a certain nationality and are considered as a national by that State. Moreover, it has been recommended that states should treat children who are factually (*de facto*) stateless as far as possible as legally (*de iure*) stateless with regard to the acquisition of nationality. (See Recommendation CM/Rec(2009)13, principle 7 and its Explanatory Memorandum, para 19-21 and UNHCR Handbook, para 7. See also OSCE handbook on statelessness p. 14-15).

22. In several member States, it is possible to register the nationality status of a person as "undetermined", "under investigation" or "unknown". Such classification is only acceptable as a transitory measure during a brief period. The statelessness of these persons or their possession of a certain foreign nationality must be established within a reasonable time in order to give them the protection they are due under the 1954 Convention if they are stateless outside their country of origin, and/or access to a nationality in the case of children or in situ populations. This is particularly important in the case of (otherwise stateless) children born on the territory of a State party to the 1997 ECN or 1961 CRS. A State cannot avoid the obligations enshrined in these three treaties by such classifications. Doing so for children would furthermore be contrary to the best interests of the child principle and Article 7 of the UN Convention on the Rights of the Child (see Recommendation CM/Rec(2009)13, principle 8 and its Explanatory Memorandum, para 22 and the UNHCR Guidelines 4, paras 22-23). The UN Human Rights Committee 29 December 2020 in *Denny Zhao v. Netherlands* came also to this conclusion.

23. In some member States, a policy exists that stateless children born in the State's territory, who could by registration acquire the foreign nationality of a parent, may be excluded from the safeguard/s in nationality law providing for acquisition of nationality by otherwise stateless children born on the territory. If a State follows this approach, children whose parents cannot reasonably be expected to use that possibility on their behalf, such as the children of asylum seekers and beneficiaries of international protection, should not be excluded from the safeguard in force in the State of birth (see Recommendation CM/Rec(2009)13, principle 4 and its Explanatory Memorandum, para 22; UNHCR Guidelines 4, paras 24-26).

Protocols and procedures to determine statelessness

24. It follows from the Conventions, Recommendations and Guidelines that the rules regarding the prevention and reduction of statelessness and the protection of stateless persons imply an obligation to have in place statelessness determination procedures (see UNHCR Handbook, para 8). This was also recognised by the Parliamentary Assembly of the Council of Europe. In its Recommendation 2042 (2014), para 2.3, the Parliamentary Assembly asked the Committee of Ministers to *"stimulate and supervise, in co-ordination with the United Nations High Commissioner for Refugees, the member States in the establishment of a statelessness determination procedure at the national level, in accordance with their obligation under the European Convention on Nationality to avoid statelessness."* And in its Resolution 2099 (2016), para 12.2.3 the Parliamentary Assembly called upon member States to "*introduce or upgrade existing statelessness determination procedures in accordance with the guidelines of the Office of the United Nations High Commissioner for Refugees (UNHCR), in order to ensure that all stateless persons in their territories can be identified, protected and ultimately acquire nationality through facilitated naturalisation*".

25. In 14 European States, a dedicated statelessness determination procedure and stateless protection status exists (Bulgaria, France, Georgia, Hungary, Italy, Kosovo[1], Latvia, Luxembourg, Republic of Moldova, Spain, Switzerland, Turkey, Ukraine and the United Kingdom). Montenegro has established a determination procedure but a mechanism to grant a stateless protection status as a consequence of statelessness determination, is yet to be established. In some other countries, discussions are underway in Parliament towards the introduction of such a procedure and/or a stateless protection status (for example, in Armenia, Belgium, the Netherlands).

26. In some countries with no formal statelessness determination procedure or protection status, statelessness may be identified and determined in the context of another procedure, in others, a stateless person is not defined in law and/or there are no legal grounds for determining statelessness at all. One reason for not introducing a formal statelessness determination procedure and protection status is sometimes considered to be the avoidance of possible "pull factors" or "calling effect". However, there is no evidence to support that statelessness specific procedures constitute a "pull factor", and the experiences of countries with statelessness specific protection regimes in place demonstrate a stable (and relatively low) number of applications. There are only two possible outcomes of a statelessness

[1] This designation is without prejudice to positions on status of Kosovo and is in line with UN Security Council Resolution (UNSCR) 1244 and the International Court of Justice (ICJ) Opinion on the Kosovo Declaration of Independence.

determination procedure: the identification and confirmation of an individual's foreign nationality and their subsequent documentation as such or, the determination of an individual's status as a stateless person and granting them rights under the 1954 Convention.

27. States have broad discretion in the design and operation of statelessness determination procedures. An appropriate and effective national procedure will depend on several factors (e.g., the number and location of potential stateless persons in the country, the complexity of the legal and evidentiary issues, the general structure of the administration and the judiciary). However, centralised procedures are preferable due to the necessary expertise needed in order to assess the statelessness/nationality status of a person appropriately (see for more details UNHCR Handbook, paras 62-67).

28. An important question to consider is whether it would make sense to "integrate" competency for statelessness determination within an existing authority (for example, the competent authority for refugee status determination). In some countries the competent authority for statelessness determination is the same as the asylum authority (e.g., France, Latvia, Republic of Moldova, Spain). In others, the competent authority is separate from the asylum authority.

29. If statelessness determination takes place in the context of an asylum claim or in a parallel procedure, it is key that the confidentiality requirements for refugees are also upheld during the assessment of the statelessness determination request (UNHCR Handbook, paras 78-82). Priority must be given to the asylum claim, but it is also important that statelessness determination continues following the final decision on the application for asylum, regardless of the outcome. This is because a person's nationality status continues to be relevant, for example, to the nationality rights of any children born in the host country, and in the context of cessation of refugee status, attempted return or removal proceedings, family reunion and naturalisation procedures.

30. An important characteristic of any statelessness determination procedure should be that, if the result is that an individual is determined to be stateless, this decision should be binding on all other authorities of the country *(erga omnes* effect). Indeed, it must be avoided that any other authority can challenge a positive decision on statelessness and re-open the assessment.

Information and access to procedures

31. All individuals in a State's territory must have access to a statelessness determination procedure, regardless of whether a person has lawful stay or residence in the country. There is, in particular in the 1954 Convention, no basis for requiring that applicants for statelessness determination be lawfully staying within the State. Access to statelessness determination must also, for instance, be ensured to a person who is staying irregularly in the country but is challenging the lawfulness of removal or detention (see UNHCR Handbook, para 69). See also the UN Human Rights Committee 29 December 2020 in *Denny Zhao v. Netherlands*. However, it was observed during the Ad-hoc meeting that in some countries, some restrictions exist (e.g., applicant must have legal residence or not be subject to a removal order).

32. Access to a statelessness determination procedure should not be subject to any time limit (see UNHCR Handbook, para 70). Nevertheless, there should be a reasonable time limit for the authorities to come to a decision on the determination of statelessness and protection status.

33. In order to improve the accessibility of statelessness determination procedures, the dissemination of information on such procedures to the concerned population is essential. Good practices stemming from the countries represented in the Ad-hoc meeting include information available via a special dedicated website (where the relevant forms for an application can be downloaded), videos on how to apply, information via NGOs working with refugees or minorities. It is also of importance not only to provide this information in the national language(s) of the State, but also in the language(s) of groups of potential applicants for statelessness determination. If needed, linguistic assistance via free translation and interpretation should be provided during the preparation of a statelessness determination request and during the procedure.

34. Good co-operation between authorities is key. It should also be possible for the authorities to initiate an ex officio statelessness determination procedure when approached by potentially stateless persons. This possibility is especially important in cases of unaccompanied children (UNHCR Handbook, para 68).

35. Participants in the Ad-hoc meeting called for special attention to be paid to any fees charged for statelessness determination and/or the acquisition of nationality (either by naturalisation or by a procedure in place to grant an otherwise stateless child born on the territory nationality). These fees should never constitute a barrier to accessing the statelessness determination procedure nor any procedure for the acquisition of nationality by a stateless person or (otherwise) stateless child.

Procedural safeguards

36. Procedural safeguards are essential in order to ensure the fairness and efficiency of a statelessness determination procedure. The participants of the Ad-hoc meeting took note of the detailed clarifications made by the UNHCR on this issue in its Handbook, paras 71-77. Special attention was paid to the question of whether there should always be a right to an interview with a decision-making official. In several countries such right is lacking, however, an interview is possible in a few countries (e.g., France, Georgia, Latvia, Spain, Switzerland and the United Kingdom). In Hungary, Luxembourg, Republic of Moldova and Turkey, an interview is guaranteed, and, if necessary, translation and interpretation services are provided. The participants agreed that an interview with the applicant is essential, except in cases where the grant of stateless protection status is possible on the basis of the information available. To facilitate interviews, attention was also paid to the possibility of conducting an interview on-line, if appropriate (e.g., using Skype or Zoom). Interviews should be carried out using open-ended questioning conducted in a non-adversarial way (see UNHCR Handbook, para 100).

37. An important aspect of procedural fairness is that an applicant should not be detained or removed from the territory of the State pending the outcome of the determination procedure (see UNHCR Handbook, para 72). For example, in some countries, an applicant may not be removed from the territory pending the statelessness determination outcome. In most other

countries, a judge can order the suspension of a removal order on application. In a certain number of countries, this suspension can be denied in case of a threat to national security or public order.

38. A right to appeal to an independent authority against a first instance negative decision is considered an essential element of procedural fairness. The independent appeal body must be able to reassess both facts and law, and grant stateless protection status (see UNHCR Handbook, paras 76 and 77).

Forms of evidence

39. During the Ad-hoc meeting, extensive attention was paid to the importance of gathering all relevant forms of evidence, given that statelessness determination often requires a complex assessment of fact and law. The conclusion made was that all kinds of evidence, oral or written, should be taken into consideration without any restriction (see UNHCR Handbook, para 87).

40. Evidence concerning the personal history of the applicant helps to identify the States where the applicant may possess nationality. This evidence is very important in determining an applicant's nationality status. In respect of evidence regarding the relevant personal circumstances of the applicant, reference was made to the non-exhaustive list included in the UNHCR Handbook, para 84. It was noted that this list includes an interview with the applicant.

41. In order to assess whether an applicant – given their personal history – is considered a national of a foreign country, accurate information on the laws and practices of the relevant foreign countries are indispensable. This information must be updated continuously (see UNHCR Handbook, paras 85-86). The participants to the Ad-hoc meeting agreed that sharing this country-specific information is essential. There is an urgent need for a platform to share relevant country-specific information and discuss the consequences of available information for statelessness determination procedures. Furthermore, during such exchanges, a co-ordinated strategy could also be agreed regarding how to get access to additional and more recent information. In the past, the meetings of national experts on nationality issues organised within the Council of Europe played a role in this respect. It is regrettable that these meetings no longer take place.

Burden and standard of proof

42. In a statelessness determination procedure, the burden of proof should be shared between the applicant and the national authorities. The applicant must provide a full account of their position and submit all evidence reasonably available to them. The competent authorities must also submit all evidence they may require both on the facts of the case, and country-specific information on the nationality law and other relevant laws and their implementation in practice in the relevant country or countries. The shared burden of proof is also a logical consequence of the fact that, not only the applicant should be able to initiate the statelessness determination procedure, but also the authorities should be able to do so *ex officio* (see UNHCR Handbook, paras 89-90; Guidelines No 4, para 20; UNHCR Guidelines No 5, para 45). Participants stressed the importance of legal aid to ensure that best evidence is presented to the competent authority.

43. A reasonable degree of certainty that an individual is not considered a national by any State must be enough to conclude that the person is stateless. In assessing evidence as to whether a child is (or would otherwise be) stateless under any procedure, the standard of proof must also consider the best interests of the child principle as reflected in Articles 3 and 7 of the Convention on the right of the child (CRC) (See UNHCR Handbook, para 91; Guidelines No 4, para 21). Protective measures should also be in place to ensure equal access to and fair treatment within any procedure for women, people with disabilities, separated children, survivors of torture or gender-based violence, and other groups where there is a risk of discrimination.

44. In general, the lack of nationality does not need to be established for every State in the world. It is enough to establish that the applicant does not possess the nationality of a country with which they have relevant links (through birth on the territory, parentage, marriage, adoption or habitual residence, etc.) (see also UNHCR Handbook, para 92). The language spoken by an applicant may also be relevant to indicating links with a country or countries.

45. If an applicant refuses to co-operate in establishing the facts by not submitting evidence reasonably available to them or providing false evidence, this may lead to the rejection of the application to recognise them as stateless (see UNHCR Handbook, para 93).

Evidence assessment

46. In the context of evidence assessment, the question was raised as to whether the possession of an authentic, unexpired passport of a State constitutes full evidence of the possession of the nationality of that State. This question can be answered in the affirmative, but this presumption can be rebutted (e.g., issue with passport of convenience or a passport issued in error or by a non-competent authority) (see UNHCR Handbook, para 95). Participants at the Ad-hoc meeting underlined that expired passports can also have evidentiary value, in particular in the context of state succession, (civil) war or if it is known that a country does not often renew passports (as is currently the case with Venezuela).

Contact with foreign authorities

47. Enquiries with and responses received from foreign authorities are often of central importance during a statelessness determination procedure (see UNHCR Handbook, para 96-99; Guidelines No 4, para 21).

48. On the question of who, between the applicant and the national authorities of the country where the statelessness determination takes place, should contact the foreign authorities, a flexible approach is required. Some foreign authorities will accept enquiries directly from another State, whereas others will only respond to requests by the individual concerned (see UNHCR Handbook, para 97). If the contact is made by the person concerned, it is desirable that legal aid is made available by the State where the statelessness determination takes place, in particular if the applicant has no financial means. If the person concerned must submit their request for information or documentation in person in a consulate

or embassy, this should happen ideally in the presence of an independent person including, if necessary, through the provision of legal aid to facilitate this.

49. Difficulties may arise when foreign authorities take a long time to respond. In this case, sending one or two reminders is appropriate. Waiting for a response should not unduly delay the statelessness determination procedure. A State could decide to set time limits. In the absence of response, the decision on the determination of statelessness must nevertheless be made. The Republic of Moldova provides for a good practice example, whereby if there is no reply from the Embassy/Consulate within six months since the request has been made, the authorities presume that the person concerned is not a national of that country. During the Ad-hoc meeting, attention was paid to the fact that consulates and embassies sometimes indicate that it is not their task to provide information on the nationality status of a person.

50. If the statelessness determination procedure concerns a person with a pending asylum application or a child of an asylum applicant, the national authorities should never contact or require contact with foreign authorities (see UNHCR Handbook, para 96).

Specific training

51. Given the fact that statelessness determination is a complex matter, training of national and local authorities (including judges) dealing with statelessness determination is essential. Training should also be provided to social workers and NGOs working with potentially stateless groups. Where such training should be provided depends inter alia on the institutional location of the determination procedures. Attention should be drawn to the fact that the UNHCR also offers free on-line training consisting of six modules on statelessness issues.

Protection during determination procedure

52. During the statelessness determination procedure, the person involved should, at a minimum, be provided with identity documentation, have the right to self-employment, freedom of movement and protection against expulsion. Furthermore, they should be protected against arbitrary detention and receive assistance to meet their basic needs. It is recommended that applicants for statelessness determination receive the same rights and services as people seeking asylum (see UNHCR Handbook, paras 144-146).

Status

53. Where the statelessness of an individual has been determined, all States with a procedure represented during the Ad-hoc meeting grant a residence permit. This is in conformity with the guidance given by the UNHCR, which recommends granting a residence permit for at least two years and preferably for longer (e.g., five years) (see UNHCR Handbook, paras 147-152). For example, Latvia grants a residence permit for five years, the Republic of Moldova and Spain grant a permanent residence permit, and Croatia grants a renewable residence permit for one year.

Access to nationality

54. Both Article 6 ECN and Article 32 of the 1954 Convention prescribe the facilitation of the acquisition of nationality through naturalisation or similar procedures for a stateless person. Still, in several countries represented during the Ad-hoc meeting, such facilitation is absent. However, in some countries the length of residence required to qualify for naturalisation is reduced for stateless persons. For example, Poland allows for the acquisition of nationality after two years, Greece after three years (instead of the standard requirement of seven years) and the Republic of Moldova allows naturalisation after eight years (instead of ten years).

55. Particular attention should be paid to the situation of stateless children who were not born on the territory of the State. Recommendation CM/Rec(2009)13 calls on member States to provide that stateless children may acquire their nationality after lawful and habitual residence on the territory for a period not exceeding five years, immediately preceding the lodging of the application (see also the Explanatory Memorandum, para 17). However, in many States minors cannot apply for naturalisation, which is highly problematic. A good practice was reported by Spain, where a parent or a guardian can apply for naturalisation on behalf of a stateless minor.

Resolving cases of statelessness

Case examples:

Children born in a country at risk of being stateless

56. Special attention was paid to the conditions under which children born in a country, who would otherwise be stateless, should be entitled to (acquire) the nationality of their country of birth. Both Article 6(2) ECN and Article 1 of the 1961 Convention provide that a State must either provide for an automatic (*ex lege*) acquisition of the nationality of the country of birth (*iure soli)* or provide for access to nationality on application after a residence period not exceeding five years immediately preceding the lodging of the application. However, the ECN allows the requirement of a lawful and habitual residence, whereas the 1961 Convention only allows for habitual residence (compare also Principle 2 of Recommendation CM/Rec(2009)13 and its Explanatory Memorandum, para 10-12 and the Explanatory Report on the ECN, paras 49 and 50. See the obligations under the 1961 Convention in light of more recent human rights norms extensively the UNHCR Guidelines No 4, paras 29-48 and its Annex). Recommendation CM/Rec(2009)13 recommends member States to provide that children born on their territory acquire their nationality subject to no other condition than the lawful and habitual residence of a parent, in order to avoid that children remain stateless for a period of up to five years, which is evidently not in the best interests of the child (see the Explanatory Memorandum of Recommendation CM/Rec(2009)13, paras 10-12 and the conclusions of the UN Human Rights Committee 23 December 2020 in *Denny Zhao v. Netherlands*).

Foundlings

57. Particular attention was also given to foundlings' access to nationality. Both Article 6(1)(b) ECN and Article 2 of the 1961 Convention provide that foundlings found on the territory

of a State should acquire the nationality of that State (see also the Explanatory Memorandum of the ECN, para 48). However, the question arises whether only new-born infants found in a country of unknown parentage should be entitled to the nationality of the country where they were found or also abandoned children with no known parentage. In this respect, principle 9 of Recommendation CM/Rec(2009)13 asks that such children are treated – as far as possible – as foundlings (see also the Explanatory Memorandum, paras 23-25). The UNHCR Guidelines No 4, para 58 underpin that States should apply the foundlings' provision also to all young children who are not able to accurately communicate information pertaining to the identity of their parents or their place of birth. In some of the States represented at the Ad-hoc meeting, a wide application of the foundlings' provision is guaranteed, for example in Estonia (age limit of 15 years), Georgia (age limit of 18 years) and the Republic of Moldova (no age limit). See on the nationality position foundlings: Mai Kaneko-Iwase, *Nationality of 'foundlings'. Are your parents really 'unknown'? Assessment of 'foundlinghood' under international law to avoid statelessness*, PhD Maastricht 2020.

58. Another question is whether the foundlings provision should also apply to a child born in the territory of a State with no legally recognised parent, for example where the child is born out of wedlock and the woman who gave birth to the child is not legally recognised as the mother (due to a surrogacy arrangement or because the child was delivered anonymously). The UNHCR Guidelines No 4, para 61 point out in this respect that such children should also be treated as foundlings. Some participants at the Ad-hoc meeting stressed the sensitivity of surrogacy and anonymous birth arrangements. However, if a State decides to provide or recognise for such arrangements in law, nationality legislation should be amended accordingly to prevent the possibility of statelessness arising consequently (see surrogacy and nationality law: Recommendation CM/Rec(2009)13 principle 12 and its Explanatory Memorandum, paras 31-33).

59. The question of what should happen if it is discovered later that the child who was treated as a foundling and acquired the nationality of the country where he/she was found, acquires the nationality of another country? In such cases, Article 7(1)(f) ECN and Article 2 of the 1961 Convention allow for the nationality acquired as a foundling to be lost. UNHCR Guidelines No 4, para 60 underpin, that – in conformity with Article 7(2) ECN - loss of nationality acquired as a foundling after the discovery of an entitlement to a foreign nationality, may only cause loss of nationality if this does not result in statelessness. Furthermore, Article 7(1)(f) ECN limits this loss to cases where the discovery of the possession of another nationality is made while the person concerned is a minor. However, this would mean that a foundling may be at risk of losing their nationality for up to 18 years if their parentage is discovered. The Explanatory Memorandum to Recommendation CM/Rec(2009)13, para 47 mentions that serious doubts have arisen in several States regarding this age limit and expresses the desirability of a much shorter time limit, which should be specified in domestic law.

Children whose parents lost the citizenship of a country

60. The nationality position of a minor whose parents lose the nationality of a country was also discussed during the Ad-hoc meeting. Article 6 of the 1961 Convention forbids the extension of loss of nationality to children if this would result in statelessness (see also UNHCR Guidelines No 5, para 28-30). Article 7(3) ECN also forbids such extension of loss of

nationality except in the case of loss of nationality because the acquisition took place by means of fraudulent conduct, false information or concealment of any relevant fact (See also the Explanatory Report on the ECN, para 77. Compare also ILEC Guidelines 2015 (Guidelines on involuntary loss of European citizenship, Principles IV.6). It follows also from the judgment of the Court of Justice of the European Union of 12 March 2019 in *M.G. Tjebbes and Others*, C-221/17, ECLI:EU:C:2019:189 (in particular para 47), that for an extension of the loss by a parent to children who are minors, a separate proportionality test is necessary with special attention to the best interests of the child, also in cases where the extension of the loss does not result in statelessness.

Way(s) forward

61. Considering the discussions during the Ad-hoc meeting and the presentations made by key international and European organisations on their respective work and recent initiatives on determining and resolving cases of statelessness, particularly for migrant children, the following actions would be most desirable and feasible for the CDCJ to undertake:

(i) Awareness raising and promotion of the implementation of Council of Europe standards

62. CDCJ should organise an international conference **promoting the accession of all member States** to **the 1997 European Convention on Nationality[2] and the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession.**[3] Furthermore, the Council of Europe should **encourage all member States to accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness and to pay attention to the guidance given by the UNHCR in their Handbook on the Protection of Stateless Persons and the UNHCR Guidelines on Statelessness No 4 and No 5.**

63. During the international conference member States should also be reminded to **implement in their national law the principles enshrined in Recommendation No. R(99)18 of the Committee of Ministers on the avoidance and the reduction of statelessness and Recommendation CM/Rec(2009)13 of the Committee of Ministers on the nationality of children**.

64. During the international conference, **specific attention should be paid to the need to introduce or upgrade existing statelessness determination procedures** as an implicit obligation following from the conventions mentioned above in para 62. The guidelines provided by the UNHCR Handbook on the Protection of Stateless Persons regarding the way to structure a statelessness determination procedure should be presented as a source of inspiration.

[2] Total number of ratifications: 21 member States
[3] Total number of ratifications: 7 member States

(ii) *Technical meetings in the field of nationality law, with a special emphasis on statelessness issues*

65. Considering all the information already available **on how member States perform in respect of the prevention and reduction of statelessness**, in particular the data and assessments provided by the Statelessness Index of the European Network on Statelessness, the databases of the GLOBALCIT project and the information collected by the EMN Platform on Statelessness, the CDCJ should initiate actions which are not yet covered by these projects and which are relevant to the challenges experienced in all member States. Therefore, it is desirable to organise furthermore special technical meetings which **focus on the nationality and statelessness related issues of recent migrants (in particular asylum-seekers) and their children in Europe with roots in certain States or regions outside of Europe, e.g. refugees coming from Syria and their children.**

66. When assessing the nationality status of these asylum-seekers and their children and the possible application of rules to prevent statelessness, member States authorities are confronted with an urgent need for country of origin information. In the case of refugees with roots in Syria, information on the laws, policies and practices in Syria is required. This information is often difficult to find and to interpret, which can influence the correct application of rules to prevent statelessness in force in the member States of the Council of Europe.

67. It is therefore important that member States share their country-of-origin information and their experiences of applying **rules to prevent statelessness in such cases**. Of great importance is that this sharing of information on nationality laws and their implementation in practice also considers information on other relevant fields of law. In order to assess nationality status (and determine statelessness) information is often needed on the following topics:

- National family law, notably the law of parentage and the law on marriage;

- Religious laws (in those cases where the applicable rules depend on the religion of the persons involved, which is the case in Syria, for example);

- Interreligious laws i.e., the rules that determine which religious law is applicable in case of a relationship between persons belonging to different religious communities;

- Private international law, i.e., which law applies in instances of trans-boundary cases;

- Issues related to (weak) civil registration practices (for example birth and marriage registration).

68. Attention also must be paid to:

- Problems with loss of documents, especially due to conflict;

- General problems with the recognition of documents issued in a third country. These rules differ from State to State. Recognition in one-member State of the

Council of Europe is not necessarily recognised in another member State, which is highly problematic in the case of reallocation of asylum-seekers and refugees within Europe. Also, in the European Union there is no obligation to recognise documents issued by a third country even if this is already recognised in another member State of the European Union.

69. An extremely important related issue is **whether statelessness determination carried out in one-member State of the Council of Europe will be recognised in another member State**. A travel document issued to a person who is determined to be stateless will be recognised as such in other States. The same applies for identity cards. However, **a formal obligation to recognise the statelessness determination carried out in another State is still lacking**. This is highly problematic in the case of reallocation of recognised stateless persons within Europe.

70. It is desirable that the **CDCJ organises a series of technical meetings of experts on nationality to exchange information and good practices focusing on specific groups of (children of) migrants and refugees.** For such meetings, other key stakeholders such as UNHCR, EMN, ENS and FRA should be invited in order to foster good co-operation. Selected academics with specific expertise in nationality and statelessness issues or with specific knowledge of the country of origin should also be invited. **The result of the discussions during these meetings could be subject to one or more publications to the attention of decision makers and to practitioners in the field.**

71. Such meetings of experts on nationality would **fill an important gap in terms of improving the identification and determination of statelessness** and more broadly in ensuring the proper implementation of the ECN and other international commitments**.**

72. The legal basis for such expert meetings can be found in Article 23(2) ECN: "*States Parties shall co-operate amongst themselves and with other member States of the Council of Europe within the framework of the appropriate intergovernmental body of the Council of Europe in order to deal with all relevant problems and to promote the progressive developments of legal principles and practice concerning nationality and related matters."*

73. The invitation to participate in such meetings should be sent to all member States of the Council of Europe and not be restricted to the State Parties of the ECN. **The meetings should also be used to promote accession to the 1997 ECN and the 2006 Convention and to raise awareness of the principles enshrined in Recommendations No. R.(99) 18 and CM/Rec (2009)13.** Furthermore, member States should be encouraged to properly implement the obligations following on from these instruments. ENS's Statelessness Index should be used as a tool to support information-sharing, monitoring and benchmarking of standards.

74. The meetings should also be used to identify elements and materials necessary for the training of officials, including judges.

75. The first of the proposed technical meetings should be devoted to **the concrete challenges in the field of nationality law and statelessness determination of refugees and other beneficiaries of international protection with roots in Syria and their children.**

Due to the complex issues which must be discussed, it is advisable to schedule a four-day meeting or, alternatively, two meetings of two days.

76. During this proposed first technical meeting it should also be discussed whether follow up meetings are desirable. Moreover, it should be discussed other technical meetings, again with a special focus on migrants (and particularly refugees) and their children with roots in other countries or regions should be organised. Particular mention was given to Eritrea, Bidoons from Kuwait, Kurds from the Middle East, Libya, Palestinians and Venezuela.