

# IDENTIFYING AND PROTECTING STATELESS PERSONS IN EUROPE



TECHNICAL MEETING OF EXPERTS  
(Strasbourg, 23 September 2021)

Issue paper



## Session 1 - Identifying and protecting stateless persons in Europe

### **Expected outcomes**

Participants are invited to discuss and develop concrete technical recommendations on the aspects covered by the session. In this respect, participants will:

- Discuss outstanding gaps, share challenges and practical difficulties and promote good practices;
- Identify areas where member States can benefit from targeted technical support to develop and implement appropriate responses to statelessness;
- Identify concrete follow-up actions by member States and where appropriate, provide further suggestions for follow-up

### **Modalities**

Participants are invited to participate in the discussions as actively as possible in order to maximise the sharing of experience, national policies and practice, difficulties encountered and to provide input on issues to be addressed, either at national or international level.

Each session is led by a moderator who will act as a facilitator and direct the discussions. The General Rapporteur will take note of the views expressed by participants and present concluding remarks at the end of the meeting and at the international conference on 24 September. The outcome of the discussions will be presented in the final report of the technical meeting.

### **Pointers for discussion**

To facilitate the exchange of views, a few issues are highlighted below and prioritised for discussion. The question below are pointers only, participants are welcome to raise other issues they consider relevant if time allows. The topics for discussion have been regrouped under different but complementary themes. Participants may therefore be called upon to share their views on these issues from the different angles of the themes covered.

#### *Establishing and implementing statelessness determination procedures (SDPs) and procedural guarantees, including access to legal aid and assessment of evidence*

- What are the key obstacles to the establishment of SDPs? How can these be overcome? Based on your practical experience, how could the procedure(s) be more efficient and accessible to the concerned population across your country, particularly the dissemination of information on such procedure (s)?
- Which procedural safeguards are in place in your country for stateless individuals, to ensure fairness and efficiency? Do all individuals have access to SDP, regardless of whether or not a person has already a lawful stay or residence? How and what kind of information and counselling services are provided? By whom? In what languages? Is access to legal aid available in the context of an SDP? If so, under what conditions? Is there in place a quality assurance mechanism for SDPs?

- What rights are granted to individuals during SDPs? Can individuals during the SDP have access to a (temporary) residency permit? Are they entitled to other socio-economic rights (access to healthcare, education, labour market, etc.)?
- How is the right of not being detained or expelled during the procedure guaranteed?

Access to residency and related rights for recognised stateless persons, including access to healthcare and socio-economic rights, such as access to work

- Do recognised stateless individuals have access to residence permit and if yes, under which conditions? What is the duration of validity of the permit ? Is it renewable? Are they entitled to any support to help them apply for residence permit? Based on your practical experience, what other support should be made available?
- What document (travel or identity) are provided to recognised stateless individuals?
- Do stateless individuals have access to healthcare? What social aid are provided? Are there facilities on access to health information, appointments, and registration with healthcare? If yes, are they inclusive of and targeted to stateless people taking account their location, language and communication preferences? What is the role of NGOs and community organisations to ensure stateless people's access to information?
- Do recognized stateless persons have access to facilitated naturalization? If not, and given the fact that the 1954 Convention requires States to facilitate the naturalization of stateless persons as far as possible, what are the key impediments for the State to provide for facilitated naturalization?
- Where States provide for facilitated naturalization, what are the key barriers to naturalization (e.g., high fees, long residence requirements, inflexible documentation requirements) and how can these be overcome?

## Introduction

1. The global policy on statelessness consists of four main goals: identification and protection of stateless persons, and prevention and reduction of statelessness. This background paper<sup>1</sup> focuses on the first two, the identification and protection of stateless persons, which together constitute the international statelessness protection regime.<sup>2</sup>
2. The international statelessness protection regime finds its roots in the 1954 Convention relating to the Status of Stateless Persons (the 1954 Convention), but has only acquired wide recognition and operational capacity in recent decades. Under UNHCR's statelessness mandate,<sup>3</sup> the organisation has put tremendous effort into developing and enhancing the 1954 Convention's impact, by issuing policy documents to assist with interpretation and implementation, encouraging accessions, and promoting the introduction or improvement of statelessness determination procedures.
3. The protection regime for stateless persons embodies one of the core principle of the international human rights regime, namely that every individual should have their human rights respected regardless of their nationality status.

### I. Statelessness Protection Regime under the 1954 Convention

4. The 1954 Convention relating to the Status of Stateless Persons lies at the foundation of the international protection regime for stateless persons by establishing the universal definition of a statelessness persons and setting out rights specifically for stateless persons. As of August 2021, 96 States are Parties to the Convention, including 40 Council of Europe member States, making it a widely supported Convention in the region.
5. Regardless of whether a State has acceded to the 1954 Convention, the definition as set out by Art. 1(1) has been accepted as part of international customary law as concluded by the International Law Commission.<sup>4</sup> Practically this means that this definition is binding upon all States, not just States who joined the 1954 Convention.

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<sup>1</sup> The elements of this background paper have been prepared with the support of Katja Swider, Assistant Professor at the Amsterdam Center for Migration and Refugee Law. The paper is aimed at informing discussions to be held at the expert meeting (23 September 2021) by highlighting relevant international norms and guidance, recent legal developments, and outstanding challenges. The opinions expressed are the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe nor of the UNHCR.

<sup>2</sup> See, for example, UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, No. 106 (LVII), (6 October 2006); and General Assembly Resolution No. A/RES/50/152 of 9 February 1996.

<sup>3</sup> The mandate was gradually established and expanded in a series of UN General Assembly Resolutions, specifically Resolution No. 3274 (XXIX) of 10 December 1974; Resolution No. 31/36 of 30 November 1976; Resolution No. 50/152 of 21 December 1995; Resolution No. A/RES/50/152 of 9 February 1996; Resolution No. 61/137 of 19 December 2006; Resolution No. 67/149 of 20 December 2012; and Resolution No. 68/141 of 18 Dec 2013. See more in M. Manly, 'UNHCR's Mandate and Activities to Address Statelessness' in *Nationality and Statelessness under International Law* by A. Edwards and L. van Waas (eds.), (CUP 2014), p. 111; and M. Seet, 'The Origins of UNHCR's Global Mandate on Statelessness', *International Journal of Refugee Law*, Vol. 28, No. 1, (1 March 2016), pp. 7–24.

<sup>4</sup> Page 49 of the International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, accessible at <http://www.refworld.org/docid/525e7929d.html>

6. The 1954 Convention's Preamble considered it important to: *regulate and improve the status of stateless persons; and assure stateless persons the widest possible exercise of [...] fundamental rights and freedoms.*

## 1. Rights set out by the 1954 Convention

7. The 1954 Convention contains a list of rights that should form part of the minimum level of protection for stateless persons. These rights are guaranteed to a different extent depending on the legal status of the stateless person and his/her degree of attachment with the Contracting State.<sup>5</sup> Some of the rights, according to the Convention, are accessible to any stateless person who is present on the territory of a State Party, such as the right to identity documents (art. 27), the right of access to courts (art. 16), and the right to primary education (art. 22). The enjoyment of other rights is dependent on whether the person has legal residence rights or whether the State Party is his or her place of habitual residence.<sup>6</sup> These concern *inter alia* the right to work (art.17) , the right to social security benefits (art.24) and the right to obtain travel documents (art. 28). In addition, accessing some rights may be made conditional with the same requirements that apply to foreigners generally,<sup>7</sup> for example the right to move freely within the territory of the state, (art.26) while other rights need to be provided on the same basis as for nationals, such as the freedom of religion (art.4) and right to primary education (art. 22.(1)).
8. When interpreting the content of the Convention it is important to take into account developments within international law that took place since its adoption, both with regard to statelessness specifically, as well as with regard to human rights more generally. Many of the rights listed in the Convention have been subsequently included in international human rights treaties of general application and formulated in absolute terms, so their enjoyment does not depend on the complex web of factors that feature in the 1954 Convention. Such subsequent treaties may offer stronger wording, better enforcement possibilities, and wider geographical application. Therefore, stateless persons may be more protected under those legal instruments with regard to the enjoyment of some rights. The right to primary education is, for example, guaranteed in the Convention on the Rights of the Child as an absolute right of every child (art. 28). The Convention on the Rights of the Child has stronger implementation monitoring mechanisms than the 1954 Convention,<sup>8</sup> and a significantly wider accession rate.<sup>9</sup> Since all state parties to the 1954 Convention are also parties to the Convention on the Rights of the Child, effectively this means that stateless children have a right to primary education in all the countries that have ratified the 1954 Convention. Similarly, the freedom of religion is guaranteed to everyone without discrimination under the International Covenant on Civil and Political Rights (art 18), while the 1954 Convention merely requires states to treat stateless persons as favourably as nationals in their exercise of the freedom of religion (art. 4). Another

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<sup>5</sup> See for a detailed discussing of the system of rights protection of the 1954 Convention, also in light of other relevant human rights conventions, in L. van Waas, *Nationality Matters. Statelessness under International Law*, (Intersentia 2008), pp. 215-410; See also K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015, pp. 70-71. UNHCR interprets the scales of rights in UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), paras. 129-139.

<sup>6</sup> See also UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), paras 132-139.

<sup>7</sup> Such requirement should not be impossible to comply with for stateless persons because of their statelessness, see 1954 Convention relating to Status of Stateless Persons, art. 6.

<sup>8</sup> Such as the Committee on the Rights of the Child with its periodic reporting system, in accordance with arts. 43-44 of the UN Convention on the Rights of the Child of 1989.

<sup>9</sup> Acceded to by all eligible States except the USA, 196 States.

example is freedom of association, which is guaranteed under the 1954 Convention's Article 15 only to the extent it is non-political and non-profit-making, and only if stateless persons are lawfully staying on the territory of the state; it needs to be protected only to the extent that other foreigners' right to freedom of association is protected. The International Covenant on Civil and Political Rights guarantees freedom of association to everyone without restrictions on the type of association, and without explicitly limiting it to those with a legal residence.<sup>10</sup> In 2014 UNHCR clarified the protection regime for stateless persons in light of the subsequent developments in international law in its [Handbook on the Protection of Stateless Persons](#).

9. Due to these subsequent developments in international human rights law, the 1954 Convention cannot be applied to contemporary situations of statelessness in isolation from the more recent human rights norms, which have the effect of supplementing the list of rights stateless persons are entitled to, and simplifying some of the 1954 Convention's complexities.

## 2. Unique rights of the 1954 Convention

10. There are, however, certain unique rights guaranteed in the 1954 Convention, which are important to stateless persons and cannot be derived from other human rights treaties of more general application.<sup>11</sup> These are, for example, the right to identity documents for stateless persons,<sup>12</sup> the right to travel documents for stateless persons who have a residence permit in the host state (art. 28), the protection against expulsion of legally residing stateless persons (art. 31), and the right to administrative assistance of the type that other foreigners would normally be able to obtain from the state of their nationality (art. 25). A crucial principle enshrined in the 1954 Convention is that, in access to the Convention rights, no requirements can be imposed on stateless persons which they cannot comply with due to being stateless (art.6). This principle seems almost too obvious to be mentioned, as not applying it would invalidate the rights enshrined in the Convention, but in practice stateless persons are often required to comply with (often bureaucratic) requirements which they cannot fulfil because of not having nationality.<sup>13</sup> Such requirements do not necessarily intend to discriminate against the stateless, but are simply the result of an assumption that everyone has a nationality which can provide its nationals with basic documentation.

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<sup>10</sup> UN International Covenant on Civil and Political Rights of 1966, art. 22. This article is not absolute, and can be limited, specifically if the restrictions are 'prescribed by law and [...] necessary in a democratic society in the interests of national security or public safety, public order [...], the protection of public health or morals or the protection of the rights and freedoms of others'.

<sup>11</sup> See the UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 143. See also K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015, p. 69, pp. 71-75; L. van Waas, *Nationality Matters. Statelessness under International Law*, (Intersentia 2008), pp. 359-387.

<sup>12</sup> 1954 Convention relating to Status of Stateless Persons, art. 27. Some states that have acceded to the 1954 Convention made a reservation regarding the right to identity documents, among which Austria, Bulgaria, Czech Republic, Germany, Latvia, and Moldova.

<sup>13</sup> The Dutch Committee for Migration Affairs, for example, relied on this Convention provision to argue that Dutch administrative procedures for registering statelessness where in tension with the Dutch international obligations under the 1954 Convention, since stateless persons were required to provide documentation which they were unable to obtain by virtue of being stateless. See Adviescommissie Vreemdelingenzaken (Dutch Advisory Committee on Migration Affairs), *Geen land te bekennen. Een advies over de verdragsrechtelijke bescherming van staatlozen in Nederland*, (December 2013) [available only in Dutch], p. 72.

### 3. Right to legal residence

11. Stateless persons are not explicitly guaranteed a right to legal residence by the 1954 Convention. However, being authorised to be present in the country is often the first step and an important pre-requisite to accessing legal rights and essential services, including those set out by the 1954 Convention. As legal residence of non-nationals is often established on the basis of foreign travel documents, and an assumption that everyone is a national of at least one state, stateless persons may face significant challenges in legalizing their stay anywhere if no state is willing and able to provide them with appropriate (travel) documentation, or in the absence of a specific legal identity for stateless persons. Therefore, even without an explicit right to legal residence contained in the 1954 Convention, UNHCR deems legal residence for a stateless person necessary to 'would fulfil the object and purpose'<sup>14</sup> of the 1954 Convention. This is similar to the international legal discourse on refugees – the 1951 Convention does not explicitly contain a right to a legal residence status (merely the non-refoulement principle), but it has been widely accepted that without granting refugees some form of legal residence permit it is impossible to fulfil the object and purpose of the 1951 Convention. The legalization of residence of stateless persons is seen as part of the contemporary understanding of a protection regime for stateless persons, and most states that have SDPs attach automatic residence rights to the recognition of an individual as stateless.<sup>15</sup> Belgium is currently the only known exception where residence rights are not an automatic consequence of being determined to be stateless, but a recognised stateless person can apply for a residence permit after the determination of their statelessness status. The Netherlands has also announced an intention not to link residence rights to the statelessness status determination, although the relevant legislation has not been passed yet.<sup>16</sup>

## II. Identification of Stateless Persons and Determination of Statelessness Status

12. Identification of stateless persons is not, and should not, be an end-goal in itself, but rather a means towards achieving other policy goals. In order to implement any policies that specifically target statelessness, it is important to know who is stateless. The implementation of a statelessness-specific protection regime requires identifying beneficiaries of the relevant rights, but also some mechanisms for the prevention of statelessness require knowing whether a person is stateless or at risk of statelessness. For example, the 1961 Convention on the Reduction of Statelessness Art. 1 lays out rules for the acquisition of nationality based on

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<sup>14</sup> UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), p. 52, para 147.

<sup>15</sup> Most states with an SDP grant a right to legal residence for those who have been determined to be stateless. See ENS Briefing Paper of September 2021 (p. 21), and ENS, *Good Practice Guide on Statelessness Determination and the Protection Status of Stateless Persons*, (December 2013), p. 36. This does not mean all stateless persons need to be granted legal residence. For example, State Parties to the 1954 Convention are not obliged to legalize residence of those stateless persons who have a 'realistic prospect, in the near future, of obtaining protection consistent with the standards of the 1954 Convention in another State' and those who 'voluntarily renounce a nationality because they do not wish to be nationals of a particular State or in the belief that this will lead to grant of a protection status in another country' (See UNHCR, *Handbook on the Protection of Stateless Persons*, (Geneva 2014), pp. 54-56.) The 1954 Convention also, just like the 1951 Refugee Convention, contains a number of exclusion grounds for certain categories of stateless persons.

<sup>16</sup> See Legislative Proposal of 18 December 2020, Nr. 35 687 (version 2), available here:

<[www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35687](http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35687)> , [accessed on 30 August 2021, in Dutch]. See more in K. Swider 'Wat is de betekenis van nieuwe staatloosheidwetgeving voor de praktijk?', *Verblijflog* 3 March 2021 [in Dutch]. See also K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015, pp. 143-144.

birth on the territory of a Contracting State if a person would otherwise be stateless. If such a child wants to benefit from this right, the fact of being ‘otherwise stateless’ needs to be established; or, if the acquisition is delayed, the actual statelessness of a child needs to be established. Similarly, facilitation of naturalization for stateless persons requires establishing who is stateless and therefore entitled to facilitated naturalization.

13. Stateless person may have an interest in establishing the legal fact of their statelessness outside of the context of accessing the 1954 Convention rights or attempting to acquire a nationality. Statelessness might also be relevant in private law disputes, such as marriages, divorces and laws governing (sur-)names.<sup>17</sup> It is therefore important that identification mechanisms for stateless persons are not strictly limited to the implementation of protection and prevention or reduction policies on statelessness, but are widely accessible to everyone who might want to establish the legal fact of their statelessness for whatever reason.
14. The establishment of well-functioning statelessness determination procedures are a crucial element within the identification goal, and remains a central challenge.
15. The 1954 Convention does not impose an explicit obligation on the State Parties to establish statelessness determination procedures. The implicit obligation to do so has, however, been derived from the 1954 Convention by the UNHCR,<sup>18</sup> in a similar manner to the way an obligation to determine refugee status has been derived from the 1951 Refugee Convention by the UNHCR.<sup>19</sup> Indeed, it is impossible to establish who is entitled to rights listed in the 1954 and 1951 Conventions without a status determination procedure. The 1954 Convention’s aim to regulate and improve the status of stateless persons cannot be achieved if this status is not formalized, and access to it is not adequately regulated.<sup>20</sup> Many States have introduced statelessness determination procedures, or are working on introducing one, thus supporting this interpretation with state practice. Moreover, the Human Rights Committee in its recent decision from December 2020, *Zhao v. the Netherlands*, confirmed the importance of statelessness determination procedures in safeguarding access of the children’s right to acquire a nationality under the ICCPR.<sup>21</sup>
16. In 2014, UNHCR published the Handbook on the Protection of Stateless persons, containing detailed guidelines on establishing and implementing national statelessness determination procedures. Since the obligation to establish statelessness determination procedures is only implicit in the treaties, the UNHCR acknowledges that ‘[s]tates have broad discretion in [their]

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<sup>17</sup> For example, see judgment of the Dutch Council of State (in Dutch - *Raad van State*) No. 201310945/1/A3 (ECLI:NL:RVS:2014:2760) of 23 July 2014.

<sup>18</sup> UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014). See also European Network on Statelessness, *Good Practice Guide on Statelessness Determination and the Protection Status of Stateless Persons*, (December 2013), pp. 5-6.

<sup>19</sup> See, for example, the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1979, as re-edited in January 1992), No. HCR/IP/4/Eng/REV.1, in particular para. 189.

<sup>20</sup> It is theoretically possible to protect stateless persons without identifying them if stateless persons can be adequately and effectively covered by protection regimes of general application. Katia Bianchini, however, shows in her thesis that states which do not have statelessness-specific protection regimes in Europe offer a lower level of protection to stateless persons than states which do have such specific protection regimes. See K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015.

<sup>21</sup> *Zhao v. the Netherlands* (2020) CCPR/C/130/D/2918/2016 (UN Human Rights Committee, 28 December 2020), para. 10.



design and operation'. A procedure qualifies as a statelessness determination procedure if 'the determination of statelessness [is] a specific objective of the mechanism in question'.<sup>22</sup>

17. Some studies have shown that states without statelessness-specific protection regimes often do not fully implement the provisions of the 1954 Convention, even if there are some mechanisms within the national systems available to stateless persons to improve their humanitarian situation.<sup>23</sup> It is thus important for states to include statelessness determination as a specific objective of a dedicated procedure.
18. States that have explicit legal mechanisms for identifying beneficiaries of the protection under the 1954 Convention also largely ensure that those who are recognized as stateless access the minimum set of rights as required by the Convention. This does not, however, mean that all stateless persons in such States enjoy a level of protection in line with the requirements of the 1954 Convention. Gaps in the mechanisms for the identification of statelessness may lead to stateless persons not being recognized as stateless, and consequently not being able to benefit from the national protection regimes.
19. It is important to remember that statelessness determination is a declaratory and not a constitutive act. The procedure of determining that a person is stateless does not *create* statelessness, but merely *recognizes* the legal fact of statelessness, which exists regardless of whether it is recognised through a determination procedure or not. Determination procedures merely declare the legal fact of statelessness, and incorporate it into the relevant legal and bureaucratic mechanisms. Determination of statelessness is thus inevitably an imperfect process, and some persons who are stateless will not be able to be recognised as such, for example because relevant evidence may be lacking or incorrectly interpreted, or there may be various formal and informal barriers to accessing the procedure etc.<sup>24</sup>
20. UNHCR has developed guidelines on how to reduce such barriers and imperfections of statelessness determination procedures and reduce under-inclusion as much as possible. A common obstacle that is important to avoid is requiring stateless persons to already have a residence permit before applying for statelessness status. Many stateless persons are unable to legalise their residence precisely because of their statelessness, and thus requiring them to have a permission to reside creates a catch-22 situation, making the statelessness determination procedure ineffective for those who need it most. UNHCR stresses the fact that statelessness determination procedures should not be conditioned to prior permission to reside, and this principle has also been confirmed by state practice. None of the states that operate effective statelessness determination procedures require individuals to hold a residence status before accessing the procedure.<sup>25</sup>

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<sup>22</sup> See UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), and Guidelines which preceded the publication of the Handbook in particular UNHCR, *Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, (20 February 2012); UNHCR, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, (5 April 2012); and UNHCR, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level*, (17 July 2012).

<sup>23</sup> K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015.

<sup>24</sup> K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015; See also K. Swider, 'Statelessness Determination in the Netherlands', *Amsterdam Centre for European Law and Governance Working Paper Series*, No. 2014-04, (May 2014). See also UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 69.

<sup>25</sup> ENS Briefing Paper of September 2021.

21. Another important barrier to accessing the status of a stateless person relates to the voluntariness of the statelessness status. It is irrelevant for the definition of a stateless person whether the person caused his or her own statelessness in any way, and therefore this factor should also be irrelevant for the outcome of a statelessness determination procedure.<sup>26</sup>
22. Under-inclusion can also occur if a determination procedure excludes those stateless persons who had a nationality in the past or can acquire a nationality in the future. The international definition of a stateless person does not define a stateless person as someone who has never had a nationality or cannot obtain one in the future, and therefore statelessness determination procedures should focus on the status of an individual at the moment of determination<sup>27</sup> in order to avoid under-inclusion. Finally, sometimes persons who fall under the exclusion clauses of the 1954 Conventions are prevented from being recognized as stateless by rules of national determination procedures, which also leads to under-inclusion.<sup>28</sup> Such practice contradicts the UNHCR's interpretation of the exclusion clauses under which exclusion clauses merely preclude certain categories of persons from benefitting from protection, but are not meant to prevent establishing the legal fact of statelessness of a person who does not have any nationality.
23. While under-inclusion results in excluding stateless persons from protection they need, and is the primary concern for UNHCR, some Member States of the Council of Europe operate definitions of a stateless persons that may result in over-inclusion, in comparison to the international definition of a stateless person. Some states define 'a stateless person' not through their lack of nationality, but through their lack of *proof* of nationality. The UNHCR advocates against over-inclusive definitions of a stateless person,<sup>29</sup> in order to have a consistent and coherent global statelessness protection regime.
24. The UNHCR Handbook on Protection of Stateless Persons addresses a number of other practicalities that the authorities may be faced with when introducing a new procedure for determining statelessness status, such as which states need to be considered as potential states of nationality, which evidence should be admissible and how it should be evaluated, what to do if a stateless person is also seeking asylum and so on.
25. One major persisting challenge of determining statelessness relates to evidentiary requirements. There is by definition no 'default' state which, based on the nationality link, can be expected to supply the individual with identity or travel documents or any other relevant documentary evidence. That is not to say that in all cases of statelessness there would be no state willing and able to provide documentary evidence of the individual's identity, family links or residence history. Some cases of statelessness are in fact very well documented.<sup>30</sup> Those are, however, rather exceptional, and therefore no blanket requirement can be placed on every individual to supply specific types of state-issued documents in the course of a statelessness determination procedure. UNHCR's handbook therefore emphasizes the

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<sup>26</sup> Voluntariness might under the current statelessness regime, however, become relevant when deciding on the form and the scope of protection a stateless individual is entitled to, see UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), paras. 51, 158-162. See more in chapter 7, section 7.3.

<sup>27</sup> UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 50.

<sup>28</sup> For example, UK Immigration Rules, part 14: stateless persons, section 402, which state that a 'person is excluded from recognition as a stateless person' if he or she belongs to the category of persons excluded from the application of the 1954 Convention.

<sup>29</sup> See, for example, UNHCR Armenia, *Question on Nationality and Statelessness in Armenia*, (March 2013), p. 60.

<sup>30</sup> See, for example, the Dutch judgment Court of 's Gravenhage (in Dutch *Rechtbank 's Gravenhage*) Nos. AWB 11/39533 and AWB 11/39534 of 8 December 2011. See also K. Swider, 'Statelessness Determination in the Netherlands', *Amsterdam Centre for European Law and Governance Working Paper Series*, No. 2014-04, (May 2014), 'Any's story' on pp. 19-20.

importance of considering a broad range of legal and factual evidence which the applicant might be able to provide, including the testimony of the applicant, marriage certificate, military service record, school certificates, medical certificates, identity and travel documents of direct relatives, and record of sworn oral testimony of neighbours and community members. The standard of proof must take into account the inherent challenges in proving statelessness and therefore statelessness should be established to a “reasonable degree”, and the burden of proof is to be shared between the state and the individual, as the state may be better equipped for conducting necessary investigations.(see paras. 83-93)

26. In order to be effective, statelessness determination procedures need also to comply with procedural standards of a more general character, rooted in the principles of good governance, rule of law and protection of human rights. These include easy linguistic and practical accessibility of the procedure for the target population, as well as its fairness, transparency and clarity. In relation to making the procedure practically accessible, UNHCR sets standards for the minimum protection for applicants awaiting the determination of their statelessness,<sup>31</sup> and urges states to avoid arbitrary detentions, and to safeguard the best interests of the child in the course of such procedures.<sup>32</sup> UNHCR also emphasizes that the decisions on statelessness determination should be reasoned, should not take too much time, and that there should be a possibility to appeal against an unfavourable first instance decision.

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<sup>31</sup> Individuals awaiting the determination of their statelessness status are entitled to a set of rights on the basis of the 1954 Conventions, among which are the right to property, access to courts, rationing, public education, administrative assistance, freedom of religion, the right to identity papers, the right to engage in self-employment, freedom of movement within a state and protection from expulsion. It is also recommended to grant such individuals the right to engage in wage-earning employment. See UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), paras. 147-152.

<sup>32</sup> UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), paras 68-70, 71, 112-115, 119.