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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

Abstract. According to UNHCR, around 12 million people still continue to be denied the right to nationality, and the persistence of “legal ghosts” is likely to be the case on the long run. The article aims at drawing a picture on the legal status and protection of stateless persons, granted principally by public international law and partly, indirectly the law of the European Union. It sheds light to the rather sporadic but noteworthy developments in international law after the adoption of the 1954 New York Convention, then examines the added value of the EU legal order, even if the Community legislator only treated the stateless in an indirect manner. It concludes that the EU law is an extra but thin layer on the international legal framework protecting stateless persons; thus the EU should make steps, using the new legal basis in the Treaty of Lisbon, so as to strengthen the status of these “legal ghosts”.

Keywords: Stateless persons, public international law, EU law, development of the protection regime

I. Introduction to the world of “legal ghosts”

According to UNHCR estimations, 12 million people¹ still continue to be denied the right to nationality, and the persistence of “legal ghosts” is likely to be the case even on the long run. This paper aims at drawing a picture on the legal status of stateless persons, granted principally by public international law and partly, indirectly the law of the European Union (EU). The significance of this topic stems from the fact that as a consequence of the dissolution of the Soviet Union and the state successions in Central-Eastern Europe during the '90s, lots of persons having no nationality arrived in the EU from the ex-Yugoslav countries or from the Commonwealth of Independent States, both to the “old” and the newly acceded Member States. Moreover, with the 2004 enlargement, countries having considerable number of stateless persons residing on their territory (e.g. Baltic States)

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¹ UNHCR: *2009 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons*. Division of Programme Support and Management, 15 June 2010, 2. (available: <http://www.unhcr.org/4c11f0be9.html>). By the end of 2009, UNHCR had identified some 6.6 million stateless persons in 60 countries. However, the UNHCR estimated that the overall number of stateless persons worldwide, given the hidden character of the phenomenon, could be far higher—about 12 million people. According to estimations of the Open Society Institute, being recently involved in the issue of statelessness, this number is even higher, around 15 million (http://www.soros.org/indepth/stateless/where_it_happens.html).

became Member States of the Union. Europe is one of the regions being highly affected by this phenomenon, since around 640 thousand stateless individuals live on the old continent.²

II. Responses of the international community to tackle statelessness

In public international law, after the creation of the United Nations (1945), *two parallel approaches* have been formulated to tackle this negative phenomenon. The first focuses on *identifying the magnitude of the problem; preventing statelessness pro futuro and reducing the existing number of stateless persons* as much as possible. This attempt is marked principally by the *1961 UN Convention on the Reduction of Statelessness*³ on the universal level; and with some other not so comprehensive treaties on the regional (European) level.⁴ This specific legal framework is embedded in *the general human rights law* and completed by provisions relating to the right to nationality.⁵

Nevertheless, despite all these efforts, it is a matter of fact that the number of stateless persons will never reach zero. Therefore *a new, autonomous legal status* has been created by virtue of the *1954 Convention relating to the Status of Stateless Persons*,⁶ aiming at providing an appropriate *standard of international protection*, a status comparable to other forms of international protection such as refugee status. In today's international law, it is still the 1954 New York Convention alone, almost sixty years later, under which stateless people enjoy specific international legal protection, containing the basic rules and rights determining their legal status.

III. Scope and content of the 1954 New York Convention: an overview

As for its scope *ratione personae*, the 1954 New York Convention applies to *non-refugee stateless persons* (the stateless refugees being covered by the 1951 Geneva Convention

² “No one should have to be stateless in today's Europe”—Viewpoint of 9 June 2008 of the Council of Europe Commissioner for Human Rights (available: http://www.coe.int/t/commissioner/viewpoints/080609_EN.asp).

³ Convention on the Reduction of Statelessness of 30 August 1961 (UNTS No. 14458, vol. 989, 175.), entered into force on 13 Dec. 1975.

⁴ See, in chronological order, the CIEC Convention No. 13 to reduce the number of cases of statelessness (signed in Bern, 13 September 1973); then two Council of Europe instruments: the 1997 European Convention on Nationality (CETS No. 166), Chapter VI. and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (ETS No. 200).

⁵ See the 1948 Universal Declaration of Human Rights (Article 15—right to a nationality;—the 1965 Convention on the Elimination of Racial Discrimination (Article 5—non-discrimination; right to a nationality); the 1966 International Covenant on Civil and Political Rights (Article 24—right to acquire nationality); the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Article 9—non-discrimination, re-acquisition, change, retention of nationality, nationality of children); the 1989 Convention on the Rights of the Child (Articles 7 and 8—birth registration, right to acquire nationality, avoidance of statelessness); or the regional human rights treaties such as the 1969 American Convention on Human Rights or the 1990 African Charter on the Rights and Welfare of the Child etc.

⁶ Convention relating to the Status of Stateless Persons of 28 September 1954 (U.N.T.S. No. 5158, Vol. 360. p. 117.), entered into force 6 June 1960.

relating to the Status of Refugees⁷) and its definition strictly covers the so-called *de iure stateless persons*.⁸ The International Law Commission (ILC) has observed that the definition in Article 1(1) is now part of customary international law.⁹ It should be noted however, that not all stateless persons falling under the definition of Article 1(1) are entitled to benefit from this protection regime. According to the *exclusion clause*, the Convention *shall not apply to a) persons receiving from UN agencies other than the UNHCR (e.g. UNRWA) protection or assistance so long as they are receiving it; b) persons recognized by the competent authorities of the country of residence as having the rights and obligations which are attached to the possession of the nationality of that country; and c) persons having committed a crime against peace, a war crime, or a crime against humanity or a serious non-political crime outside the country of their residence prior to their admission to that country or having been guilty of acts contrary to the purposes and principles of the UN.*¹⁰

The set of rights provided for in the Convention is similar to those in the 1951 Geneva Convention. Some 30 provisions of the Convention set out a *minimum standard of treatment* for the stateless, without discrimination, beyond which States are free to extend additional protection and rights to them.¹¹ Three different levels of protection are established: first, treatment at least as favourable as that accorded to aliens generally, secondly, treatment on a par with nationals; thirdly, the absolute rights which are not contingent upon the treatment of any other group, but guaranteed directly.¹² The main *absolute rights* are identity papers (if the person does not possess a valid travel document) (Article 27); travel documents (Article 28); access to courts (Article 16); naturalization (Article 32). The stateless persons shall enjoy the *same protection as is accorded to nationals* of the country of residence with respect to elementary education [Article 22(1)], public relief and assistance (Article 23), social security [Article 24(1)] or duties, charges or taxes [Article 29(1)] etc. The rights in respect to which the *treatment at least as favourable as accorded to aliens generally* apply are, inter alia, acquisition of movable and immovable property (Article 13), right of association (Article 15), right to engage in wage-earning employment [Article 17(1)], right to self-employment (Article 18); right to housing (Article 21) or the right to choose the place of residence and to move freely within the country (Article 26).¹³ It is to be underlined that since there is no persecution (risk of persecution) in case of statelessness, no similar protection against *refoulement* like in the 1951 Geneva Convention is provided for stateless persons. However, the 1954 New York Convention sets forth in Article 31 that the Contracting States shall not expel a stateless person lawfully in their territory save on

⁷ Convention relating to the Status of Refugees of 28 June 1951 (U.N.T.S. vol. 189, 137), entered into force: 22 April 1954, Article 1A(2).

⁸ Article 1(1): "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."

⁹ Draft Articles on Diplomatic Protection with commentaries. In: *Yearbook of the International Law Commission*. 2006, Vol. II, Part Two, 49.

¹⁰ Article 1(2).

¹¹ Article 5.

¹² See also: Van Waas, L.: *Nationality Matters: Statelessness under International Law*. Antwerpen, 2008, 230–231.

¹³ For a comprehensive analysis of protecting civil, political, economic, cultural and social rights of stateless persons under the 1954 New York Convention and general human rights law, see: Van Waas: *op. cit.*, Chapters IX–XI.

grounds of national security or public order, and such an expulsion shall be only in pursuance of a decision reached in accordance with due process of law.¹⁴

The international protection regime of stateless persons *cannot be compared with international refugee law* where apart the 1951 Refugee Convention, the UNHCR ExCom and other judicial and non-judicial bodies developed and detailed the conventional rules, interpreted on several occasion the meaning of different concepts such as the *non-refoulement* etc. International refugee law has been constantly evolving since its creation, while the only one international instrument on the protection of the stateless is the 1954 New York Convention; and we cannot witness such a rich documentation, soft law and jurisprudence in this field either. Another weakness of the system is that the 1954 New York Convention is, by substance, *not a self-executing treaty*; States have to adopt domestic implementing legislation to make it effective. Moreover, the Convention *does not contain* provisions on the *statelessness determination procedure* either (it is up to the individual States to establish such legal channels), which gap makes claiming those rights more difficult if one cannot officially obtain that status. To sum up, statelessness law has almost been forgotten for long decades.

IV. Subsequent developments of the protection regime

1. In spite of the above, progressive developments on specific issues, rather sporadically, are enshrined in certain instruments. Going through these thematically, the progress made in the field of *consular and diplomatic protection* of stateless persons is worth attention. Our starting point is the Schedule to Article 28 of the 1954 Convention, which declares that the delivery of travel document “does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not ipso facto confer on these authorities a right to protection.”¹⁵ As a sign for a different approach, the *1967 Council of Europe Convention on Consular Functions*¹⁶ is the first to mention, since Article 46(1) of this Convention stipulates:

[a] consular officer of the State where a stateless person has his habitual residence, may protect such a person as if [the consular officer is entitled to protect the nationals of the sending State], provided that the person concerned is not a former national of the receiving State.

This Convention, applying the same definition as introduced by the 1954 New York Convention [referring to the latter in Article 46(2)], makes a significant step forward and this rule can be considered as a progressive development of international law in this domain, since according to the classical standpoint of public international law, States are entitled to grant consular protection only to their own nationals. What makes the picture a bit shaded is, however, that the Convention has never entered into force due to the low number of

¹⁴ The ILC is now dealing with the topic of “expulsion of aliens”. The new, restructured draft workplan, presented by the special rapporteur, Maurice Kamto in July 2009 (A/CN.4/618) would devote a separate draft article to the non-expulsion of stateless persons (draft article 6).

¹⁵ Para. 16 of the Schedule to Article 28.

¹⁶ European Convention on Consular Functions (ETS No. 61).

ratifications.¹⁷ This right is therefore not a treaty law in force, but still shows the tendencies of legal developments.

One had to wait a couple of decades until the issue of protecting stateless persons abroad has been put again on the international law-making agenda, this time on the universal level (within the UN system). The ILC included the topic of diplomatic protection into its agenda in 1995¹⁸ and adopted *the Draft Articles on Diplomatic Protection in 2006*, endorsed also by the UN General Assembly.¹⁹ As draft article 1 is definitional by nature it does not mention stateless persons. Article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.²⁰ Draft Article 3(2) opens the door generally for certain categories of persons not being nationals of the State concerned,²¹ including stateless persons. This is explicitly expressed in draft Article 8 which relates to stateless persons and refugees. By virtue of paragraph 1 of this article,

A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

This is clearly an attempt for progressive development of international law, because traditionally the general rule was that a State might exercise diplomatic protection only on behalf of its nationals. This is well illustrated in the *Dickson Car Wheel Company v. United Mexican States case* (1931) when the United States–Mexican Claims Commission held that a stateless person could not be the beneficiary of diplomatic protection: “[a] State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury”.²² As the ILC found, this dictum no longer reflects the accurate position of international law for stateless persons. Contemporary international law reflects a concern for the status of this category of persons, evidenced by specific conventions on statelessness.²³ In line with these efforts, according to draft article 8(1), a State may exercise diplomatic protection in respect of a stateless person, *regardless of how he/she became stateless*, provided that the person was *lawfully and habitually resident* in that State both at the time of injury and at the date of the official presentation of the claim. The requirement of both lawful residence and habitual residence sets a high threshold, notions

¹⁷ As of 10 July, 4 States have ratified it and an additional 5 States have signed it without ratifying yet (source: <http://conventions.coe.int>).

¹⁸ First, a Working Group was created dealing with this topic in 1995. Then, in 1998 after two reports of the Working Group, a special rapporteur was designated who prepared several interim reports on the subject. Finally, The Commission subsequently adopted the draft articles on Diplomatic Protection on second reading as well as decided to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles.

¹⁹ A/RES/62/67. *Diplomatic Protection* (General Assembly of the United Nations).

²⁰ Draft Articles on Diplomatic Protection with commentaries (2006), 26.

²¹ Draft Article 3(2) reads: “Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.”

²² UNRIAA, vol. IV, 669 at 678. See also Weis, P.: *Nationality and Statelessness in International Law*. Alphen aan den Rijn–Germantown (Md.), 1979, 2nd ed., 162. and Draft Articles on Diplomatic Protection with commentaries. 2006, 48.

²³ *Ibid.* 48.

borrowed from the 1997 European Convention on Nationality²⁴ Habitual residence in this context is intended to convey continuous residence. Although this threshold is high and may lead to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is, as pointed out by the ILC in the Commentaries, justified in the case of an exceptional measure introduced *de lege ferenda*,²⁵ since States are more likely to accept such a new rule if enlarging the scope *ratione personae* of diplomatic protection is not without limitations and conditions. I also draw attention to the temporal requirement for the bringing of a claim: the stateless person must be a lawful and habitual resident of the claimant State *both at the time of the injury and at the date of the official presentation* of the claim, even if quite a long time has already elapsed between the two acts. Finally, it is to be noted that the “may clause” contained in draft Article 8(1) emphasizes the *discretionary nature* of the right. In other words, it is not an obligation of States, but an option to include legally and habitually residing stateless individuals into the sphere of diplomatic protection, but States have discretion whether to extend such protection to a stateless person.

By concluding, it can be stated that consular protection and diplomatic protection operate as additional elements of their protection in abroad, even if these rules have not become legally binding yet, but clearly indicate the developments and the will of the international community to move forward.

2. As for other domains or set of rights having been extended to *de iure* stateless human beings by international treaties, the page is blank except *intellectual property rights*. From a human rights perspective, the right to intellectual property forms an element of a cluster of rights broadly referred to as “cultural rights”. For the stateless, a cultural identity distinct from that of the majority of the population is often a contributing factor to their plight; similarly difficulties enjoying that distinct cultural life are not uncommon.²⁶

In 1971, *Protocol No. 1 was annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971*,²⁷ which assimilated stateless persons having habitual residence in a State Party to the nationals of that State (paragraph 1). By doing so, this Protocol builds upon the provisions of the 1954 New York Convention. Article 14 of the latter sets forth the rights concerning artistic rights (which is a synonym for copyright) and industrial property, stating that stateless persons shall be accorded in the country in which they have the habitual residence the same protection as it accorded to nationals of that country. However, they also enjoy protection in any other Contracting Party: they shall be accorded the same protection as provided for the nationals of their country of habitual residence in the territory of that Contracting Party. It can be seen that Protocol No. 1 determines the same level of protection (stateless persons are on equal footing with nationals) and the same condition for benefiting from this right (habitual residence in a Contracting Party). The purpose of these rules is to provide protection of the “totality of creations of the human mind”.²⁸ Although the 1954

²⁴ Article 6(4), point (g), where they are used in connection with the acquisition of nationality.

²⁵ Draft Articles on Diplomatic Protection with commentaries. 2006, 49.

²⁶ Van Waas, *op. cit.* 346–347.

²⁷ Protocol 1 annexed for Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to works of Stateless persons and refugees 1971 (UNTS No. 13444), entered into force on 24 July 1974.

²⁸ Robinson, N.: *Convention relating to the status of stateless persons—Its history and interpretation*. New York, 1955 (reprinted by UNHCR, Geneva in 1997), 55.—in relation to Article 14 of the 1954 New York Convention.

New York Convention does not specify the type of protection and it can thus be assumed that all aspects of protection are covered, the Universal Copyright Convention as revised at Paris on 24 June 1971 lays down specific rules in this regard. Even if the scope *ratione materiae* of the two provisions are roughly the same, the two treaties have significantly different number of State Parties. While Protocol No. 1 has only 38, the 1954 New York Convention has 67 State Parties as of now. Moreover, the geographical coverage is different as well, since despite the lower number of ratifications, Protocol No. 1 also applies to India, the Russian Federation, or the United States not becoming parties to the 1954 New York Convention.

3. Finally, two treaties on the equal treatment of nationals and non-nationals *in social security matters* develop the related provisions of the 1954 New York Convention. The treaty with universal vocation (unfortunately not widely ratified)²⁹ was elaborated by the ILO in 1962 (*Convention No. 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security*)³⁰. The Convention refers to the 1954 New York Convention definition of “stateless person”³¹ and applies to them “without any condition of reciprocity”³² and without the requirement of residence. It prescribes equal treatment between nationals and stateless persons in different branches of social security (medical care; sickness benefit; maternity benefit; invalidity benefit; old-age benefit; survivors’ benefit; employment injury benefit; unemployment benefit; and family benefit). However, the scope of the obligations varies from State to State, since “each Member shall specify in its ratification in respect of which branch or branches of social security it accepts the obligations of this Convention”.³³

As a similar regional international instrument, the *1972 European Convention on Social Security*³⁴ is worth mentioning shortly. After the European Interim Agreements on Social Security done in 1953 under the aegis of the Council of Europe (CoE), the CoE Member States left open the possibility of extending the Agreements to give non-nationals and migrants more complete and effective protection. Thus in 1959, it was decided to draft a multilateral convention to co-ordinate the social security legislations of the CoE member States.³⁵ The Convention, using the 1954 New York Convention definition of „stateless person”, covers stateless persons resident in the territory of a Contracting Party³⁶ who have been subject to the legislation of the Contracting Parties, together with the members of their families and their survivors. It affirms the principle of equality of treatment with nationals in the fields of application of the Convention, such as general and special schemes, whether contributory or non-contributory, including employers’ liability schemes providing benefits. This instrument can be considered as building upon, between a limited number of States in

²⁹ As of 10 July 2010, it has only 36 State parties (the Netherlands denounced it in 2004). However, with important countries of concern such as Iraq or Pakistan. See: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C118>.

³⁰ Entered into force on 25 April 1964.

³¹ *Ibid.* Article 1(h).

³² *Ibid.* Article 10(1).

³³ *Ibid.* Article 2(3).

³⁴ 1972 European Convention on Social Security (ETS 078). It is not a widely ratified convention, with 8 State parties as of 10 July 2010.

³⁵ Explanatory Report to the 1972 European Convention on Social Security, para. 7.

³⁶ Article 4.

Europe, on the provisions relating to social security of the 1954 New York Convention, without prejudice to the provisions of the 1962 ILO Convention.³⁷

V. Statelessness and EU law

1. With the emerging corpus of *acquis communautaire* in field of migration and asylum, stateless people—even in an indirect or implicit manner—have also been treated by the Community legislator. Some legal texts assimilate them with third-country nationals (e.g. the EU-level readmission agreements), and some grant them rights under EU law similar to EU citizens (e.g. the EU social security legislation). As for the definition of “stateless person”, EU law does not have a specific definition but refers to the 1954 Convention.³⁸ The EU thus does not alter the substance of this definition (covering *de iure* stateless persons), the relevant EU legislation, as a main rule, simply reflects international obligations already undertaken. As a consequence, *this paper will not deal with stateless refugees under EU law*, because this category is not covered by the 1954 New York Convention, but falls under the protection regime of the 1951 Geneva Convention relating to the Status of Refugees. In line with the international refugee law obligations, the EU asylum *acquis*³⁹ covers stateless refugees, too, but this is a distinct group of people, with different need of international protection as well as with different legal regime applicable to them.

2. In course of time, the EC law has, in a hidden way, enriched the rights enjoyed by stateless persons residing in the territory of the Member States. In the '70s, Community rules have already been applicable to them by virtue of *Regulation (EC) No. 1408/71*⁴⁰ granting them social benefits. The Regulation lays down equal treatment for stateless persons and nationals of the Member States in different matters of social security, such as sickness and maternity benefits; invalidity benefits, including those intended for the maintenance or improvement of earning capacity; old-age benefits; benefits in respect of accidents at work and occupational diseases; unemployment benefits etc. This Regulation can be conceived as implementing Article 24(1)–(3) of the 1954 New York Convention on the Community level. It was replaced by *Regulation (EC) No. 833/2004*⁴¹ which, with almost identical content, is now the legislation in force in this domain.

³⁷ Article 6(1).

³⁸ See e.g. Article 1, point (e) of Council Regulation (EC) No. 1408/71 and Article 1(h) of the new Regulation (EC) No. 883/2004 replacing the former since 1 May 2010.

³⁹ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; Council Regulation No. 2725/2000 of 11 December 2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

⁴⁰ Regulation No. 1408/71/EC of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [OJ L 149, 5.7.1971, 2–50.].

⁴¹ OJ L 166, 30.4.2004, 1–123.

Some jurisprudence has also been developed concerning the intra-Community status of the stateless in this respect. In the *Khalil and others case*⁴² the plaintiffs were Palestinians from Lebanon who, in flight from the civil war in the Lebanon, had arrived in Germany in the middle of the '80s where they have since lived continuously. Under German law, they were regarded as stateless persons. Since those persons had the grant of child benefit discontinued under new German legislation during the period from December 1993 to March 1994, they submitted in support of their actions challenging the decisions depriving them of those advantages that they and/or their spouses had to be regarded as stateless persons. Consequently they should enjoy family benefits in accordance with Community law, which would enable them to be treated in the same way as German nationals or other nationals of the EU Member States. According to them, payment of those benefits should not have been made conditional on possession of a specific residence document.

The ECJ pointed out in its judgment in 2001 that, in 1957, the original six Member States were all contracting parties to the 1954 New York Convention. The Court also found that the *Council cannot be criticized for having included stateless persons* resident on the territory of the Member States, even though those persons do not enjoy the right of freedom of movement according to the EC Treaty, *within the scope* of the Community regulation on social security for migrant workers and their families. *The Council did so in order to take into account the international obligations of all the Member States.* The inclusion of this category into the Regulation simply reflected international obligations already undertaken (both at the level of the United Nations and within the Council of Europe⁴³). Furthermore,

coordination excluding stateless persons ... would have meant that the Member States, in order to ensure compliance with their international obligations, had to establish a second coordination regime designed solely for that very restricted category of persons.⁴⁴

As a result of those international obligations, national law already assimilated stateless persons to nationals for social security purposes, whereas the treatment of foreign nationals depended upon reciprocity or bilateral as well as multilateral arrangements. As the Advocate General argued, in Europe of the 1950s,

grappling with the aftermath of the Second World War, it was undoubtedly felt that it would be politically and morally unacceptable for one of the very first regulations adopted by the fledgling European Economic Community to exclude a category of persons who had been expressly included in and protected by the earlier agreements and conventions binding on the original Member States.⁴⁵

Another question was to decide whether stateless persons *may rely on the rights* conferred by the Community regulation where they have travelled to that Member State *directly from a third-country and have not moved within the Community.* The Court held

⁴² Joined Cases C-95/99 to C-98/99 and C-180/99 *Mervet Khalil, Issa Chaaban and Hassan Osseili v Bundesanstalt für Arbeit et al*, ECR [2001] I-07413.

⁴³ See the 1972 European Convention on Social Security (CETS No.: 078).

⁴⁴ *Khalil and others*: para. 57.

⁴⁵ Opinion of Advocate General Jacobs delivered on 30 November 2000, Joined Cases C-95/99 to C-98/99 and C-180/99 *Mervet Khalil, Issa Chaaban and Hassan Osseili v Bundesanstalt für Arbeit et al.*: para. 39.

that the objective of Community law in respect of migrant workers is coordinating the social security schemes of the Member States and payment of benefits under those coordinated schemes. Regulation No. 1408/71/EC lays down a whole set of rules founded upon the prohibition of discrimination on grounds of nationality or residence and upon the maintenance by a worker of his rights acquired by virtue of one or more social security schemes which are or have been applicable to him. The Court referred to its earlier case-law according to which those rules do not apply to situations which have no factor linking them to Community law. The advantages derived from the status of migrant worker within the European Union *cannot be granted to stateless persons* residing in a Member State where *they are in a situation which is confined in all respects within that one Member State*.⁴⁶ In other words, the “external element” (*élément d’extranéité*) required for EU citizens to benefit from the rights granted by Community law is also a precondition for stateless persons: without moving from a Member State to another, they are in a purely internal situation where EC law does not come into play.

3. In the middle of the first decade after the new millennium, facilitation was made in favor of stateless persons concerning their *right to travel within the European Union*. The reason behind was that the EU enlargement with ten new Member States on 1 May 2004 had the paradoxical effect of reducing the scope of the possibility of granting a visa exemption, since Regulation No. 539/2001/EC⁴⁷ did not provide for a visa exemption for stateless persons residing in a Member State that does not yet fully apply the Schengen acquis, who have to cross an external Schengen border when entering into the Schengen zone or other non-Schengen Member State. To remedy this situation,⁴⁸ Regulation No. 1932/2006/EC included a new type of automatic visa exemption for stateless persons recognized by the EU Member States. Article 1(1), point b) of the Regulation says as follows: “stateless persons and other persons who do not hold the nationality of any country who *reside in a Member State and are holders of a travel document issued by that Member State*” shall be exempt from the visa requirement. This means that stateless persons residing in a Member State in possession of a travel document (not necessarily that prescribed in the Schedule annexed to the 1954 New York Convention) are not required to have a visa in order to enter into other Member States and reside in their territory up to three months after the first entry within any six-month period (short-term stay). Beside this automatic (compulsory) visa exemption category, the Regulation goes even farther when *giving the discretion to Member States* to exempt those stateless persons from the visa requirement who *reside in a third country listed in Annex II (“the white list”) of Regulation No. 539/2001/EC having issued their travel document*. So does Hungary with regard to stateless persons residing in any Annex II (visa-free) third-countries.⁴⁹

⁴⁶ *Khalil and others*: paras 65–72.

⁴⁷ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ L 81, 21.3.2001, 1–7.].

⁴⁸ The European Commission has been expressly asked to do so by Parliament and the Council in the course of the negotiations on the proposal of the Schengen Borders Code (Regulation No. 562/2006/EC). This exemption was mainly aimed at resolving the situation of “Latvian non-citizens” [see: COM 2006(4) final, 5.].

⁴⁹ Government Decree No. 114/2007. (V.24.), Article 4, point (a).

It is an innovative element in these rules on visa-free travel that *they cover all stateless persons*, both those under the 1954 New York Convention and those outside of the scope of that Convention.⁵⁰ For example, non-citizens of Latvia are given a special passport (not the one according to the 1954 New York Convention) which not only grants them the constitutional right to belong to the State, but it has also been recognised by the EU as valid for visa-free travel.⁵¹ This is thus the first time in EU legislation where a *larger personal scope* (including eventually the *de facto* stateless as well) *applies* than that defined in the 1954 New York Convention.

4. Nevertheless, despite all these developments, provisions of European Union law only lay down *sporadic rules*; a well-developed European system as in case of refugees (beneficiaries of subsidiary protection) does not exist with regard to stateless persons. The Community legislator should put more emphasis on their legal protection. Just to mention an example: *the majority of the Member States do not have specific procedures governing the recognition of stateless status* (exceptions are Spain or Hungary), which shortage was highlighted by UNHCR as well.⁵² As a result, it is impossible to determine the magnitude of this problem within the EU. Knowing the fact the 1954 Convention does not provide a comprehensive regulation (old treaty–new challenges, lack of detailed rules, no procedural rules), the EU should make steps with a view to strengthening the status of these “legal ghosts”.

The most progressive EU institution in this regard, the *European Parliament* has already started raising awareness and putting this issue on the higher political agenda. In the summer of 2007, it organised a seminar on issues relating to statelessness,⁵³ then in 2009, the EP passed a non-legislative resolution on the situation of fundamental rights in the EU (2004–2008),⁵⁴ which devoted a paragraph for the stateless as well. These recommendations call on the Member States concerned “to ratify the Convention Relating to the Status of Stateless Persons (1954), and on the reduction of statelessness (1961)” as well as call on “those Member States which gained or regained sovereignty in the 1990s to treat all persons previously resident in their territory without any discrimination, and [call] on them to systematically bring about just solutions, based on the recommendations of international organisations, to the problems encountered by all victims of discriminatory practices”; and finally “condemns, in particular, practices of deliberate erasure of registered permanent

⁵⁰ Regulation No. 1932/2006/EC amending Regulation (EC) No. 539/2001/EC listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ L 405, 30.12.2006, 23–34.].

⁵¹ Bauböck, R.–Perchinig, B.–Sievers, W. (eds): *Citizenship Policies in the New Europe: Expanded and Updated Edition*. Amsterdam, 2009, 73.

⁵² UN High Commissioner for Refugees, *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation*, October 2003 (available at: <http://www.unhcr.org/refworld/docid/415c3cfb4.html>), 4, 6, 12, 19.

⁵³ *Seminar on Prevention of Statelessness and Protection of Stateless Persons within the European Union* (26 June 2007), Brussels, European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE).

⁵⁴ European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004–2008 (2007/2145(INI)).

residents within the European Union and [call] on the governments concerned to take effective measures to restore the status of those stateless persons”.⁵⁵

These recommendations are, however, not urging the setting up of the EU-level framework for the protection of stateless people, but highlight the importance of undertaking the relevant international obligations by all Member States.⁵⁶ It is not surprising, since there was no legal basis in the founding Treaties, even after the Treaty of Amsterdam, for adopting such specific secondary legislation, exclusively focusing on the protection of the stateless. The existing rules protect stateless 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.

Nonetheless, the *Treaty of Lisbon* opened a new era, since it *explicitly refers*, for the first time in the primary law, to *stateless persons*, which can be a basis for further developments. Article 67(2) TFEU stipulates that “[f]or the purpose of ... Title [V], stateless persons shall be treated as third-country nationals”. It is promising that generally speaking they are on equal footing with the third-country nationals in the area of justice, freedom and security, and this will surely be reflected in the personal scope of the new secondary EU legislation adopted under the provisions of Title V. We will see in the future how far the Union legislator will go on the basis of this treaty provision in order to provide an area of justice, freedom and security for this hardly visible group of human beings.

⁵⁵ *Ibid.* para. 50.

⁵⁶ As of 1 July 2010, 21 EU Member States are parties to the 1954 New York Convention and only 14 of them have ratified the 1961 Convention on the Reduction on Statelessness.