



Amsterdam International Law Clinic

THE CONCEPT OF ‘STATELESS PERSONS’ IN EUROPEAN UNION LAW

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TABLE OF CONTENTS

1. Introduction.....	5
1.1. The Causes of Statelessness	7
1.2. Statelessness in the Netherlands.....	8
2. The Concept of Statelessness under International and European law	10
2.1. Definitions.....	10
2.1.1. Third-Country Nationals and Stateless Persons	11
2.1.2. Refugees and Stateless Persons.....	11
2.2. The Challenges of Mapping Statelessness	12
2.3. Legal Issues Encountered by Stateless Persons	13
3. The European Union and Statelessness	14
3.1. The Division of Competence between EU and its Member States (Article 2(2) of the TFEU): Shared Competences, pre-emption	
3.2. Legislative Competence under Article 352 & 67(2) of the TFEU	15
4. Triggering a Preliminary Ruling under Article 267 of the TFEU.....	15
4.1. Subject Matter of Preliminary Rulings.....	16
4.2. The Capacity to Initiate Preliminary Ruling Procedure	17
4.3. Obligation to Refer.....	18
4.4. Preliminary Ruling Procedure: General Criteria for Referring a Case to the CJEU	19
4.5. Effect of the Judgment	19
4.6. Expedited Procedure under Article 105 of the Rules of the Court.....	20
5. Lack of Clarity in European Union Law	20
5.1. The Problems of Assimilation and Referencing in European Union Treaties ..	21
5.1.1 The Assimilation of Stateless Persons to Third-Country Nationals under Article 67(2) of the TFEU	21
5.1.2. Making Referencing to International Law on Statelessness	23
5.2. Lack of Clarity within European Union Secondary Law	23
5.2.1. Directives.....	23
5.2.2. Regulations	29
5.2.3. International Law on Statelessness: A Source of or a Barrier to Clarity?	31
5.2.4 The Rottmann Case: Statelessness and the Loss of Citizenship.....	32
6. ‘Stateless Persons’ as an Autonomous Concept in EU Law.....	34
7. The Role of the Charter of Fundamental Rights of the European Union	37
6.1. The Scope of Application of the Charter of Fundamental Rights of the European Union.....	38
6.2. Analysis of Relevant Articles in the Charter of Fundamental Rights of the European Union.....	41
6.2.1. Right to Human Dignity	41
6.2.2. Further Combination of Relevant Rights	42
8. General Conclusions	45



Executive Summary

This report has been prepared by the Amsterdam International Law Clinic and commissioned by the law firm Prakken d'Oliveira Human Rights Lawyers. It is sponsored by the Euro-Mediterranean Human Rights Monitor.

The report highlights currently existing gaps or 'grey areas' within European Law in relation to the legal definition of 'Stateless Persons' and its practical applications within the domestic legal frameworks of EU Member States (EUMS). It particularly addresses the legal status and determination procedure(s) of stateless persons in the Netherlands, and aims at serving as the basis for the formulation of a litigation strategy that could result in a request by Dutch courts for a preliminary ruling from the Court of Justice of the European Union (CJEU).

Firstly, the report puts to the test the following primary and secondary EU Law: **Articles 67, 78, 79** of the Treaty on the Functioning of the EU (TFEU), **Directives 2004/83** (Qualification Directive), **2011/95** (Recast Qualification Directive), **2013/33** (Recast Reception Directive), **2003/86** (Family Reunification Directive), and **2003/109** (Long-Term Residents Directive); as well as **Regulations (EC) No. 883/2004** (Coordination of Social Security Regulation), **No. 1932/2006** (Visa Regulation), and **No. 604/2013** (Dublin Regulation). In its conclusions on those components and provisions of EU law, the report highlights that the definition of the term 'Stateless Persons' is surrounded by many ambiguities stemming from, for example, their interchangeable use of the concept 'Stateless Persons' with other terms such as 'Third Country Nationals.'

In addition, it is underscored that since not all EU Member States are signatories to the **1954 UN Convention Relating to the Status of Stateless Persons**, and the **1961 UN Convention on Reduction of Statelessness**, it is problematic for any EU-wide initiative to aim at binding all EUMS to the provisions of those two main international treaties. Furthermore, while acknowledging the main contributions of those treaties, such as the definition of statelessness that can be found in Article 1 of the **1954 Convention**; the report speaks on the inchoate nature of those two treaties themselves, particularly relevant to the development of a standard recognition procedure for statelessness.

Secondly, the report suggests that a preliminary ruling by the CJEU could potentially be triggered through the characterisation of the term 'Stateless



Persons' as **an autonomous concept of EU law**, keeping in mind that under EU law only EU institutions, not the domestic systems of EUMS, are able to interpret such a concept.

Lastly, the report turns to **The Charter of Fundamental Rights of the European Union** and suggests that a request for an interpretation of the term 'Stateless Persons' by the CJEU could also be triggered by examining the term in relation to a combination of the provisions of the Charter, particularly **Article 1** (Right to Human Dignity), **Article 21** (Principle of Non-Discrimination), **Article 41** (Right to Good Administration) and **Article 47** (Right to an Effective Remedy).

The underlying purpose of such a ruling by the CJEU would be to clarify the 'grey areas' in European law that the report identifies, thereby generating pressure on the Dutch government to proceed with its plans to establish an effective statelessness determination procedure. It is worth mentioning that the CJEU is the EU body that is mandated with the task of interpreting EU law in a harmonised manner with the provisions of applicable International Law treaties. By offering its own interpretation of the exact meaning of the concept 'Stateless Persons' and its practical applications, the CJEU would also facilitate the arrival at a standard statelessness determination procedure by all EUMS, thereby alleviating the situation of 'legal limbo' that an unknown percentage of more than 760,000 stateless people continue to experience in different parts of the Union.



1. INTRODUCTION

A stateless person is a ‘person who is not considered as a national by any State under the operation of its law’.¹ Stateless people are therefore excluded from the protection, rights and benefits offered by a nationality. This state of affairs results in a ‘protection gap’, which poses a number of political, legal and human rights challenges. Exclusion from both the protection offered by the state of nationality and the benefits of European Union (EU) citizenship prevents people from accessing fundamental civil, political, economic, cultural and social rights and puts them at risk of repeated or prolonged detention and destitution. In this sense, statelessness is an undesirable situation and action is needed to combat and eradicate it.

Today, millions of people around the world still live without a nationality, and therefore without the rights, privileges and protection that nationality of a state provides. According to the Office of the United Nations (UN) High Commissioner for Refugees (UNHCR) at least 10 million people worldwide continue to suffer the hardship and indignity of being denied nationality.² In Europe alone, there are more than 760,000 stateless persons.³ Many of them were born in Europe and have lived here their entire lives, while others have migrated to Europe.⁴

As a result, the European Union has over the last few years taken an increasingly active part to eradicate statelessness and it has achieved a ‘nearly universal accession’ to the 1954 UN Convention relating to the Status of Stateless Persons.⁵ EU Member States have also collectively stated that they would ‘consider’ accession to the 1961 UN Convention on Reduction of Statelessness if they have not done so already. At the same time, a number of problems still persist. While one of the key issues in the fight against statelessness is the establishment of a statelessness determination procedure, such a procedure remains missing in most EU Member States, with the exception of France, Italy, Spain, Latvia, Hungary, United Kingdom, Slovakia and Belgium.⁶ Further, while the EU has implemented a number of legislations in the fields of asylum and immigration that touch upon the status of “stateless persons,” the way the concept ‘stateless persons’ is addressed in EU law

¹ Article 1 of the Convention relating to the Status of Stateless Persons, signed 28 September 1954, entered into force 6 June 1960.

² UNHCR, *Addressing Statelessness* (2014 -2015) available at <http://www.unhcr.org/528a0a1316.html>, at 2.

³ Institute on Statelessness and Inclusion, *The World's Stateless* (2014) available at <http://www.institutesi.org/worldsstateless.pdf>, at 95.

⁴ Council of Europe Parliamentary Assembly, *The Need to Eradicate Statelessness of Children* (2015) available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21562&lang=en>.

⁵ European Network on Statelessness, *Campaign for statelessness conventions gains traction, at last* (2012) available at <http://www.statelessness.eu/blog/campaign-statelessness-conventions-gains-traction-last>. Only Malta, Cyprus, Poland and Estonia have yet to accede.

⁶ For a detailed analysis of the fragmented picture emerging out of EU Member States vis-à-vis statelessness, see K Swider & M den Heijer, ‘Why Union Law Can and Should Protect Stateless Persons’ (2017) 19 *European Journal of Migration and Law* 101-135.



may open up protection gaps and give rise to normative ‘grey areas’ due to lack of clarity.

This report is prepared by the Amsterdam International Law Clinic (The Clinic), as commissioned by the law firm *Prakken d'Oliveira* Human Rights Lawyers and sponsored by the *Euro-Mediterranean Human Rights Monitor*, and it focuses on the manner in which the concept ‘stateless persons’ is treated in EU law.

It is worth mentioning that The Clinic has compiled its first Report on the issue of the right of residence of stateless persons in October 2015, which was drafted by Mari Gjefsen, Delia Grigoras and Nikki Leander and submitted to *Prakken d'Oliveira*. As a result of follow-up consultations with *Prakken d'Oliveira* Human Rights Lawyers after the submission of that report, it has been agreed that The Clinic would prepare the present report with the objective of focusing the research on strategic litigation. The drafting of this current Report commenced at the end of 2016, and was undertaken by Uliana Ermolaeva, Elisabeth Faltinat and Dārta Tentere under the supervision of Dr. M. Karavias.

This report focuses on European Union law and aims at highlighting any gaps or ‘grey areas’ within EU law in relation to the concept of ‘stateless persons.’ Indeed, the purpose of the report is to serve as a basis for the formation of a litigation strategy resulting in a request by Dutch courts for a preliminary ruling from EU courts. Such litigation may result in clarification of the status of “stateless persons” under EU, and/or may place pressure on the Dutch government to proceed with its plans to establish a statelessness determination procedure. Indeed, a preliminary ruling of the Court of Justice of the European Union (CJEU) on the concept of ‘stateless persons’ may remedy the lack of an EU legislative instrument on the issue at hand. Such a ruling could provide a common understanding of the concept ‘stateless person’, in a manner similar to how the EU Qualification Directive has provided an analysis of the definition of ‘refugee’ in light of the 1951 Refugee Convention. In particular, a clear and uniform definition of ‘stateless persons’ would directly address the need to alleviate disparities in the treatment of stateless persons across EU Member States.

In order to achieve the objectives set out above, this Report will make an attempt at answering the following sub-questions:

1. What are the legal requirements for a preliminary procedure ruling by the CJEU?
2. Are there any ‘grey areas’ within EU law with regards to the implementation of the concept ‘stateless persons’?
3. Can the concept ‘stateless persons’ be considered an ‘autonomous concept’ of EU law?

4. What role could be played by the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights or the Charter) in arriving at the right mechanism for a preliminary ruling by the CJEU?

In order to answer those questions, primary and secondary EU law will be examined, as well as the case-law of the CJEU. More specifically, the Report will make a particular focus on Articles 67, 78, 79 of the Treaty on the Functioning of the EU (TFEU), while examining). A number of Directives, including: Qualification Directive (2004/83), Recast Qualification Directive (2011/95), Recast Reception Directive (2013/33), Family Reunification Directive (2003/ 86), Long-term Residents Directive (2003/ 109), as well as relevant Regulations. The Report does not delve into domestic Dutch law on statelessness, nor does it focus on a specific factual pattern.

The Report will first introduce the concept of statelessness, as well as the situation of stateless persons residing in the Netherlands. Section 2 will further map out the concept of statelessness. Section 3 will address the legislative competence of the EU in the field of statelessness. Subsequently, Section 4 will turn to the preliminary ruling procedure before the CJEU, setting forth its requirements and modalities. On the basis of this, the Report will then develop three options, each of which could be pursued with a view of triggering the preliminary ruling procedure of the CJEU: Section 5 addresses the lack of clarity in EU law, Section 6 examines the prospect of codifying the concept ‘stateless persons’ as an autonomous concept of EU law, and Section 7 examines the role of the Charter of Fundamental Rights of the European Union in this respect. General conclusions are provided in Section 8.

1.1. The Causes of Statelessness

Statelessness may be the result of a combination of factors, and in many instances stateless persons find themselves in such situations through no fault of their own. Some stateless people are intentionally excluded from the legal protections of the nationality of a State, others by accident. Decolonization in Asia and Africa left many people stateless, as did the break-up of the former Soviet Union and former Yugoslavia in the 1990s. Entire communities have been arbitrarily deprived of nationality because of either racial or religious discrimination.

Statelessness could also be the result of immigration; for example, amongst individuals who lose or are deprived of their nationality without having acquired the nationality of another country, such as the country of their habitual residence. However, most stateless persons have never crossed an international



border. For those individuals, statelessness is often the result of the wording and implementation of nationality laws.

Being without a nationality, stateless persons are in a precarious legal position. More often than not, actions such as the purchase of land, the opening of bank accounts, and registering children at birth require having the nationality of the host state. Without a nationality, it may not be possible to claim a right of residence or to invoke diplomatic protection. Therefore, stateless persons have been referred to as ‘persons without a legal identity;’ those who ‘from the point of view of international law, are without legal existence.’⁸

1.2. Statelessness in the Netherlands

In the Netherlands, more than 4.000 people have now been registered as stateless in the Personal Records Database.⁹ The registered groups of stateless persons in the Netherlands include Moluccans, Roma people, people of Surinamese origin, migrants from the former Soviet Union and stateless Palestinians from Syria. That said, the number of stateless persons in the Netherlands is probably much higher, as a large number of individuals do not have the requisite documents ordained by Dutch legislation to prove their ‘statelessness.’¹⁰ Those people face insurmountable practical difficulties and live in a state of limbo, which potentially infringes upon their rights under international law.

In order to be registered as stateless, aliens holding a residence permit need to be in position of documents proving that no country recognizes them as its citizens, such as a declaration from the relevant authorities or an endorsement in their passport indicating that they are stateless.¹¹ Furthermore, approximately 80.000 persons registered in the Personal Records Database of the Netherlands are of ‘unknown nationality.’¹² The designation ‘unknown nationality’ refers to individuals that possess a nationality, but lack documents considered by the Dutch government to be an adequate proof thereof.

The official position of the Dutch government is that it complies with its international treaty obligations and provides sufficient protection to stateless persons. Meanwhile, the need for a determination procedure of statelessness has been acknowledged by the Dutch government and some steps have been made in its direction.¹³ The two procedures that have been repeatedly referred to as fulfilling the goal of statelessness determination are the registration in the main population database (*Basisregistratie personen* or BRP) and the ‘no-fault’ (*buitenschuld*) immigration procedure.¹⁴

In order to be registered as stateless in accordance with the BRP, aliens need to be in possession of documents that prove no country recognises them as its



citizens, such as a declaration from the authorities or an endorsement in their alien's passport indicating that they are stateless.¹⁵ Thus, the burden of proof lies completely on the applicant's side, and obtaining such means of proof could be near to impossible. There is an option to register as 'stateless' in the BRP. Nonetheless, official guidelines for municipal authorities do not specify on which basis this entry should be made and even affirm that statelessness 'rarely ever occurs.' In this manner, the 'unknown nationality' category becomes prone to misuse.

This situation drastically affects the stateless population of the Netherlands on two levels. Firstly, not being recognised as 'stateless' prevents the affected persons from gaining access to certain procedures specifically designed under the Dutch law, which provides that individuals who are registered as stateless in the BRP can:

- ☐ Apply for a travel document; and/or
 - ☐ Apply for Dutch nationality through a special procedure after only three years of legal residence in comparison to the timeframe of five years that is established under the ordinary procedure.¹⁷

Therefore, if a person is registered as 'unknown nationality' under the BRP determination procedure, he or she will experience difficulties in obtaining a travel document. Furthermore, he or she will be barred from benefiting from the expedited procedure for obtaining Dutch nationality.

Secondly, the lack of a more efficient statelessness determination procedure leads to a misrepresentation of facts. Without such a procedure in place, it is impossible to arrive at accurate statistics reflecting the real number of stateless persons in the Netherlands. At the same time, the commitment of the Netherlands to eradicate statelessness in Europe could only be achieved through a clear record of stateless persons and major groups affected by this situation.¹⁸ It follows that the procedure for registration under the BRP system is uncommonly used, and by shifting the burden of proof completely on the applicant- it is hardly comparable to an actual administrative determination procedure.

Moreover, the 'no-fault' residence permit system is not an effective avenue for guaranteeing international protection for the statelessness population in the Netherlands. On the contrary, it applies to a broader spectrum of aliens, since applicants comprise rejected asylum seekers, as well as irregular or undocumented migrants. To obtain a 'no-fault' residence permit, an alien has to meet a set of cumulative requirements. The threshold to prove the impossibility to leave the Netherlands is very high and depends on the willingness of cooperation of the applicant's country of origin. In fact, statistics show that only



a few ‘no-fault’ residence permits are granted annually and they are decreasing in numbers.⁷

Consequently, none of the determination procedures that are currently in place is fully effective in addressing the unique situation of stateless persons, which leaves thousands of people in a state of ‘legal limbo’ or a constant state of uncertainty regarding their legal status. Thus, there is an urgent need for an effective statelessness determination procedure to be devised.

2. THE CONCEPT OF STATELESSNESS UNDER INTERNATIONAL AND EUROPEAN LAW

2.1. Definitions

The definition of ‘statelessness’ that is used by various international legal instruments varies from one instrument to the other. The 1954 UN Convention relating to the Status of Stateless Persons (‘1954 Statelessness Convention’) is the first UN instrument aimed at the protection of the rights and freedoms of stateless persons. In the introductory note to the text of the Convention, the UNHCR states: ‘The 1954 Convention’s most significant contribution to international law is its definition of a “stateless person” as someone “who is not considered as a national by any State under the operation of its law.”’²⁰ This definition assigns particular importance to the domestic rules on acquiring nationality²¹ and shows why statelessness is often described as a ‘man-made problem’.

An individual qualifies as a stateless person from the moment the conditions of Article 1(1) of the 1954 Statelessness Convention are met. Therefore, any finding by a State or the UNHCR that an individual is a stateless person according to said Article 1(1) is declaratory in nature.⁸ Article 1(1) posits two conditions, namely that the person concerned is ‘not considered as a national by any State ... under the operation of its law’ and ‘by any State’.⁹ The definition appears self-explanatory on its face. Yet, there might be a fine line between being recognized as a national without being treated as one, and not being recognized as a national at all. These two situations should be considered separately: the former problem is related to the rights attached to nationality, whereas the latter problem is connected with the right to nationality itself.¹⁰ Article 1(1) applies in both migration and non-migration contexts. That is, it applies to individuals who are both inside and outside the country of their habitual residence or origin.¹¹

⁷ Vrije Universiteit Migration Law Clinic, *Forced to leave but nowhere to return to: Rights of non-returnable stateless Palestinians in the Netherlands* (2016) available at <https://migrationlawclinic.org/2016/04/12/forced-to-leave-but-nowhere-to-return-to>, at 18-20.

⁸ UNHCR (n 7) 18.

⁹ Ibid 19.

¹⁰ UNHCR, *Expert Meeting - The Concept of Stateless Persons under International Law* (2010) available at <http://www.refworld.org/docid/4ca1ae002.html>.

¹¹ Ibid.

The persons who fall within the scope of Article 1(1) of the 1954 Statelessness Convention are sometimes referred to as ‘*de jure*’ stateless persons even though that term is not used in the Convention itself. Besides, in a 2010 background paper for an Expert Meeting organized by the UNHCR on the concept of Stateless Persons in International Law, the term *de facto* stateless persons was employed in the following terms: ‘*De facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Persons who have more than one nationality are *de facto* stateless only if they are outside all the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of any of those countries.’¹²

2.1.1. Third-Country Nationals and Stateless Persons

“Third-Country National” (‘TCN’) is a term often used in the context of migration and/or labour. Under the EU law, the term is often used together with ‘foreign national’ and ‘non-EU national,’ and is defined by several Directives as a non-EU citizen who does not enjoy the extensive freedom of movement rights that are granted to EU citizens and to some categories of privileged non-EU citizens.²⁸ Since 2009, the concept ‘stateless persons’ has been assimilated with TCN, in line with Article 67(2) TFEU, which explicitly states that legislation based on Chapter V concerning the Area of Freedom, Security and Justice applies equally to stateless persons, who ‘shall be treated as third-country nationals.’²⁹

2.1.2. Refugees and Stateless Persons

According to the 1951 Refugee Convention, a refugee is someone ‘who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.’³⁰ Refugees are deprived of protection by their state of nationality, as in some cases it is often their own government that is persecuting them. They are thus dependent on their States of refuge for protection. Such protection is of an international character, as opposed to the protection normally offered by the national State. The recognition of refugee status does not make a person a refugee; it merely declares him or her to be one.³¹ The definition is limited to persons who have crossed an international border and are therefore outside their country of origin. As to the inter-relationship between refugees and stateless persons, not all refugees are stateless,

¹² UNHCR, *Expert Meeting – UNHCR and ‘De facto’ Statelessness* (2010) available at <http://www.unhcr.org/4bc2ddeb9.html>, at 61.

and not all stateless persons are refugees. Refugees who are not stateless are those who are unable or unwilling to avail themselves of the protection of the country of their *nationality*. In juxtaposition, stateless persons are unable to invoke protection *as nationals*.

Stateless persons may, under certain conditions, be eligible for complementary protection, namely protection accorded by States to people on their territory, who do not meet the criteria set forth in the 1951 Refugee Convention.¹³ Such measures of protection can vary from ‘humanitarian protection to temporary asylum.’³³ Complementary protection falls outside the scope of this research, and is as such not one of the research objectives of this report.

2.2. The Challenges of Mapping Out Statelessness

The manifold causes of statelessness, and its different manifestations thereof, make it hard to determine when someone is in fact stateless. In addition, the lack of an internationally agreed upon statelessness determination procedure creates a very fragmented practice within the European Union. While the 1954 Statelessness Convention is innovatory, in setting forth a legal definition of stateless persons, it does not prescribe any mechanism for the determination of who is stateless,³⁴ nor does it place an express obligation on contracting States to establish such a procedure.³⁵

It is in this context that a proposal from the Meijers Committee was raised in 2014, calling on the EU to develop a ‘fair procedure for determining whether a person is stateless.’³⁶ The Meijers Committee’s proposal argued that without such a determination procedure, which would establish whether a person is stateless, a national of a specified country or a national of an unknown country, the provisions of the 1954 UN Convention ‘remain without useful effect.’³⁷ The Committee underlined the need for a Directive that would set a common standard for the determination of statelessness so that the procedures thereof would be harmonized throughout the Union.

While the EU does refer to stateless persons in its legal instruments, it has a ‘very limited’ involvement in effectively addressing the issue of statelessness.³⁸ In other words, despite the fact that the Union has the competence to legislate the procedure of determination for stateless persons based on its mandate in migration affairs and its well-established competence in the field of migration,³⁹ it is in no way obliged to legislate on matters of determining statelessness, and has not done so.

¹³ UNHCR, *Legal and Protection Policy Research Series – Protection Mechanisms Outside of the 1951 Convention* (2005) available <http://www.refworld.org/docid/435e198d4.html>, at viii.

2.3. Legal Issues Encountered by Stateless Persons

Being stateless could raise legal concerns from a number of perspectives. The most prominent problem for stateless persons is the lack of any type of documentation. Most EU Member States lack a statelessness determination procedure, and if that procedure does exist, it is usually not an adequate one. For instance, since no State is either willing or able to provide the necessary documents to prove a person's 'statelessness,' the excessive burden of proof falls on the individual, who finds him/herself unable to fulfil this condition.

The lack of proper identification documents can also lead to the refusal of family reunification, the failure to travel within the Union and the risk of detention. In the case of the Netherlands for example, stateless people have reported incidents of 'lengthy, repeated and hopeless'¹⁴ periods of detention because of their inability to provide identification documents. Since there is no country willing to provide consular protection for stateless persons, a 'vicious circle' is created, in which stateless people are arrested and then sent back to alien detention centres.¹⁵ The lack of documentation can have severe 'knock-on effects', besides the one mentioned above: stateless people are generally unable to work legally, own a land, enter into contracts, inherit property or open bank accounts; and children cannot be registered at birth or go to school.⁴²

Many stateless people live in a constant fear of being detained and struggle with psychological and physical health problems because of stress, legal uncertainty and concerns about their legal procedures.¹⁶ Statelessness is legally relevant not only in relation to protection against arbitrary detention¹⁷ but also in relation to the right of women to receive treatment equal to men with regard to nationality,¹⁸ the right of every child to a nationality¹⁹ and the right to residence.²⁰ Moreover, the prospect for stateless young adults to pursue their desired studies; or work, have a family and be able to travel is significantly reduced by an endless waiting period for a residence permit and a 'regularized stay'.⁴⁸

¹⁴ K Hendriks, *Stateless in the Netherlands: Stuck in paradise?* (2012) available at <http://www.statelessness.eu/blog/stateless-netherlands-stuck-paradise>.

¹⁵ Ibid.

¹⁶ S Jaghai, *The Story behind Finding some of Europe's Invisible People* (2014) available at <http://www.statelessness.eu/blog/story-behind-finding-some-europe%E2%80%99s-invisible-people>.

¹⁷ Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), signed 16 December 1966, entered into force 23 March 1976.

¹⁸ Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), signed 18 December 1979, entered into force 3 September 1981.

¹⁹ Article 24(3) of the ICCPR and Article 7(1) of the Convention on the Rights of the Child (CRC), signed 20 November 1989, entered into force 2 September 1990.

²⁰ UNHCR (n 7) 52.

3. THE EUROPEAN UNION AND STATELESSNESS

The field of immigration policy concerning TCNs was brought within the competence of the European Community by the Treaty of Amsterdam.²¹ The Area of Freedom, Security and Justice ('AFSJ') is regulated by Title V of the Treaty of the Functioning of the European Union ('TFEU'), and gives the Union the competence to act within the fields of asylum, immigration and external border control.²² This is explained further in articles 78 and 79 TFEU, which specify that the Union shall develop common policies on asylum and temporary protection of third-country nationals,⁵¹ as well as policies on immigration.⁵² Since the entry into force of the Treaty of Lisbon, the legal basis for a common European immigration policy can be found in Article 79 of the TFEU.

3.1. The Division of Competence between the EU and its Member States (Article 2(2) of the TFEU): Shared Competences, Pre-emption

The competence to act within the AFSJ is shared between the EU and the Member States.²³ As a starting point, this means that both the Union and the Member States can adopt legally binding acts within this area.²⁴ However, there is an important proviso to this starting point, and this is the one of pre-emption.²⁵

Pre-emption means that Member States are only able to exercise competence to the extent that the Union has not done so.²⁶ In other words, Member States can only make legally binding acts within the field of freedom security and justice if the EU has not regulated the matter already, or in cases where the Union has ceased to regulate the matter.²⁷ The extent of Member States being excluded from exercising their competence to act depends on the manner in which the Union has exercised competence.⁵⁸ While some acts, such as the Directives imposing minimum standards, leave room of discretion for the Member States, others do not. It is also possible for the Union to regulate an area completely, even though the competence is shared.⁵⁹

Since the Union has the discretion to choose how it wants to regulate an area, it is not possible to give a general answer to the scope of how it exercises its shared competence. While the Union will regulate some matters in a very comprehensive manner, it will leave more room for discretion to the Member States in other areas.²⁸

²¹ Boeles et al (n 8) 127.

²² Article 67(2) TFEU.

²³ Article 4(2)(j) TFEU.

²⁴ Article 2(2) TFEU.

²⁵ D Craig and G de Burca, *EU Law: Text Cases and Materials* (5th edn, 2011) 84.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid 85.

This means that the delineation of power must be assessed on a case-by-case basis.²⁹

3.2. Legislative Competence under Articles 352 & 67 (2) of the TFEU

Subject to specific procedures set out therein, Article 352 of the TFEU gives the Union competence to act in cases where it has not been conferred the power to do so, if this is ‘necessary (...) to attain one of the objectives set out in the Treaties.’⁶² In other words, Article 352 of the TFEU creates opportunities for exercising implied powers, as opposed to the principle of conferral set out in Article 5 of the TFEU. Molnár argues that Article 352 of the TFEU, in combination with Article 67(2) of the TFEU, gives the Union the competence to pass legislation concerning the rights of stateless persons.⁶³

Additionally, the last sentence in Article 67(2) reads: ‘For the purpose of this Title, stateless persons shall be treated as third-country nationals.’ It follows from the wording of this provision that any act created with a legal basis in Title V of the TFEU, where TCNs are mentioned, will automatically apply to stateless persons as well. An issue arises out of this assimilation between stateless persons and TCNs, which will be reviewed below in greater details. Specifically, one needs to question whether such an assimilation is a novel post-2009 phenomenon, and what its normative implications are.

4. TRIGGERING A PRELIMINARY RULING UNDER ARTICLE 267 OF THE TFEU

By means of a preliminary ruling, the Court of Justice of the European Union (CJEU) is able to provide an opinion on the interpretation or validity of EU law upon a request made by a court or a tribunal of a Member State. Its practical significance can be gleaned from the fact that ‘more than half of the procedures pending before the CJEU are based on a preliminary ruling.’⁶⁴ Indeed, in 2015, the CJEU recorded a total of 713 cases, 436 of which (approximately 61 per cent) were references for preliminary rulings.

By allowing national courts and tribunals to make a referral to the CJEU on the basis of Article 267 of the TFEU, EU law ensures and, in fact, requires cooperation between these courts and the courts of the EU. As Wägenbaur observes, ‘[u]nlike all other legal remedies, the referral for preliminary rulings is not a contentious procedure, but an instrument of cooperation and coordination between the [CJEU] and the national courts and tribunals, based on a strict division of labour for the implementation of EU law.’⁶⁵ Thus, the preliminary ruling procedure links European constitutions in pursuit of the duty of loyal

²⁹ Ibid.

cooperation and coherence, and the need to ensure that EU law is interpreted uniformly across Member States. It should be emphasised that Article 267 of the TFEU does not establish an appellate jurisdiction. Rather, it is an institution of a ‘system of cooperation’⁶⁶ and gives rise to an interaction ‘vital to the uniform interpretation and the effective application of Community law.’⁶⁷

4.1. Subject Matters of Preliminary Rulings

The purpose of the preliminary ruling procedure is dual. As per Article 267 of the TFEU:

‘The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.’

Thus, the main subject matter of the preliminary ruling procedure is (a) the interpretation of a provision of EU law (either enshrined in the Treaties or legislation or principles arising therefrom), so that ‘in all circumstances [it] has the same effect in all Member States’;³⁰ and (b) the ‘validity’ of an act of a Union institution or body. When deliberating upon the question, the CJEU seeks to ‘comprise all Union law provisions which are of relevance to the question posed, although they do not have to be explicitly mentioned in the reference by the Member State.’ It thus appears that if a domestic court requests an interpretation of the term ‘statelessness’ in explicit reference to the Qualification Directive, then the CJEU would review all relevant EU law provisions or those provisions posing similar difficulties, such as the Family Reunification Directive. Moreover, the Court might be required to look into international agreements as well. Namely, ‘according to the [CJEU], international agreements are of relevance for the assessment of [whether the question can be referred for a preliminary ruling] only in so far as they are directly applicable.’ Thus, it is crucial to emphasise that ‘in addition to harmonising the application of EU law within Member States, the [CJEU] is furthermore expected to harmonise EU and international law by interpreting EU law in accordance with international legal principles, statutes, and precedents.’³¹ For the purposes of this research the CJEU would potentially take into account, for instance, fundamental human rights and principles enlisted in the 1954 Statelessness Convention.

³⁰ Opinion 1/09 *Re the European Patent Convention*, [2011] ECR I-01137, para. 11.

³¹ Wägenbaur (n 65) 68 [emphasis added]. See also Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010], .s. 22 and 24.

However, the Court of Justice has no jurisdiction under Article 267 of the TFEU to rule upon the interpretation of *purely* national law,⁷² and will refuse to entertain a reference to that effect. That being said, in the case of a question that has the face value of asking for an interpretation of national law, but is in reality seeking guidance as to the interpretation of relevant EU law, the Court may reformulate the question so as to be able to provide guidance to the national court. Besides, in a dispute involving solely national law, but where such law *expressly* incorporates or refers to EU law provisions, the Court may produce a ruling, if requested, *not* on the national law but on the EU law provisions relevant to its interpretation.

Moreover, the CJEU is always obliged to give preference to that ‘interpretation of secondary law which is the most consistent with the TFEU and general principles’.³² Regarding the reference to the general principles of law, the Court has affirmed that such principles as proportionality and non-discrimination are central to the deliberations within the Union’s legal system.³³ It was affirmed in *Woodspring District Council* that ‘the validity of acts of the Community institutions may be reviewed on the basis of those general principles of law’.³⁴

4.2. The Capacity to Initiate Preliminary Ruling Procedure

All courts and tribunals of EU Member States are entitled to initiate the preliminary ruling procedure. As to what constitutes a court or tribunal, the Court has noted that ‘it requires a permanent, independent body that is established by law to rule on legal disputes’.³⁵ Besides, it has been held that ‘the [national] court has to be concerned with questions of interpretation or validity, deciding *ex officio* and regardless of the legal views of the parties whether to pose such a question.’³⁶ This means that the court needs to arrive at the necessity to request a preliminary ruling independently from the wishes of the involved parties. Therefore, the CJEU’s jurisprudence has

³² *Wägenbaur* (n 65) 69. See also Case C-314/89 *Rauh* [1991] ECR p. I-01647, para. 1.

³³ See Case C-27/95 *Woodspring District Council/Bakers of Nailsea*, [1997] ECR I-1947, para. 17; Joined cases 117/76 and 16/7 *Ruckdeschel and Others v. Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, para. 7 and ECJ Case 265/87 *Shcräder v. Hauptzollamt Gronau* [1989] ECR 2237, para. 15.

³⁴ *Woodspring District Council/Bakers of Nailsea* (n 75)

³⁵ Case C-24/92 *Corbiau* [1993] ECR I-1277; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961; Case C-92/00 *HI* [2002] ECR I-5574; Case C-258/97 *Landeskrankenstalten* [1999] ECR I-1405; Case C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v. Stadt Wien* [2002] ECR I-5553.

³⁶ *Geiger et al* (n 64) 897.

affirmed that ‘it is for the national court to decide whether the question of integration or validity raised by the case is relevant’.³⁷ Hence, the parties shall demonstrate that there is a genuine dispute between them and *shall not obviously indicate* that the proceedings have been initiated for the purpose of obtaining an answer to specific legal questions.³⁸

The Rules of Procedure of the Court of Justice affirm that ‘parties to the action pending before the national Court or Tribunal are not entitled to make a direct request to the CJEU for a preliminary ruling³⁹ [...] nor may they address any injunction to the national Judge to refer a given question to the CJEU.’⁸² In addition, ‘both the CJEU and the parties are bound by the wording of the preliminary questions, which means that they cannot alter said question’s content at a later stage.’⁸³ The referral might be deemed inadmissible if it appears that ‘the referral has been diverted from its true purpose and that the referrers sought in fact to use a contrived dispute in order to induce the CJEU to give a ruling.’⁸⁴ However, ‘the mere fact that the main proceedings have been initiated or even provoked in order to generate a referral for preliminary ruling is not a reason for inadmissibility, as long as said dispute is genuine.’

4.3. Obligation to Refer

The discretion of a national court to refer a question to the Court of Justice is subject to two key exceptions. First, where a question of interpretation or validity is at issue before a national court or tribunal from which there is no appeal, that court or tribunal is *obliged* to refer the question to the CJEU. The rationale of this exception lies in the need to ensure that no authoritative body of national case law, which contravenes EU law, comes into existence in any of the Member States.⁴⁰ This obligation ceases when the matter has been already decided by the CJEU⁴¹ (*acte éclairé* doctrine) or where the correct interpretation of EU law is so obvious that no scope for reasonable doubt exists (*acte clair* doctrine).⁴² As to the *acte éclairé*, the national court wishing to avoid submitting a reference must be certain that the Court of Justice has previously ruled on the question. The CJEU deems that an *acte éclairé* has occurred where ‘the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.’⁴³ The CJEU has explained that ‘the same effect ... may be produced where previous decisions of

³⁷ Case C-348/89 *Mercanarte* [1991] ECR I-3277.

³⁸ Geiger et al (n 64) 897.

³⁹ Joined Cases 31/62 and 33/62 *Wohrmann v. Commission* [1962] ECR 965. [footnote in the original]

⁴⁰ Case 107/86 *Hoffmann-La Roche v. Centrafarm* [1977] ECR 957; Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECR I-6013.

⁴¹ Cases 28-30/62 *da Costa en Schaake and ors b. Nederlandse Belastingadministratie* [1963] ECR 31.

⁴² *CILFIT* (n 82).

⁴³ *da Costa* (n 87).

the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.’⁴⁴ As to the existence of an *acte clair*, the Court has imposed a set of criteria to define when a court of last instance may invoke ‘obviousness.’ Overall, the national court itself must not only be convinced that the ‘correct’ interpretation is obvious, but it must also be convinced that it is equally obvious to the courts of other Member States and to the CJEU. The national court must also be convinced that the particular terminology of EU law is equally unambiguous in all national legal systems of the various Member States. Finally, the national court must be convinced that any other interpretation than its own is impossible also when ‘interpreted in light of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.’

Regarding the second key exception, where the question concerns the *validity* of a European Union act, the CJEU alone has jurisdiction to declare the act invalid. Such prerogative is an integral part of the competence of the Court of Justice, and flows from the requirement of uniformity, which forms the heart of Article 267 of the TFEU. This has been affirmed in the landmark decision of *Foto-Frost*, where it was established that it is the responsibility of the Court of Justice to find that invalidity of the provision.⁴⁵ The position of the Court in this regard correlated with the need to ensure cooperation and unity within the EU legal order as well as legal certainty.

4.4. Preliminary Ruling Procedure: General Criteria for Referring a Case to the CJEU

The procedure of preliminary ruling is initiated by the national court’s order to make a reference in which it needs to provide with a ‘(short) substantiation in order to explain the question in view of the crucial merits of the dispute.’⁴⁶ As stipulated in Article 23 of the Statute of the Court, there are no formalities that need to be addressed in the submission.⁴⁷ Regarding the procedure itself, it must be noted that ‘the parties to the main dispute are entitled to make proposals in this proceeding but they have no right of motion.’⁴⁸

4.5. Effect of the Judgment

Based on the purpose of Article 267 of the TFEU as well as the relevant case-law, when the question touches upon the interpretation of a provision of EU law,

⁴⁴ *CILFIT* (n 82) para. 14.

⁴⁵ Case 314/85 *Foto Frost* [1987] ECR 4199.

⁴⁶ *Ibid.*

⁴⁷ Article 23 of the Statute of the European Court of Justice.

⁴⁸ Geiger et al (n 64) 900.

‘the judgement is binding at least on the referring court and all other courts which have to decide in the same dispute.’⁴⁹ The national court thus must apply the ruling in disposing of the main proceedings. As to questions touching on validity, the ruling of the Court of Justice is binding *erga omnes*, meaning that ‘Union institutions and governmental entities are entitled to rely on the invalidity of the act that has been found to be Invalid.’

4.6. Expedited Procedure under Article 105 of the Rules of the Court

In regard to the possibility to initiate an expedited procedure, Article 105 of the Rules of the Court is noteworthy. Reasons that are sufficient enough for an expedited procedure include urgent protection of human health or environment, provided that the national court or tribunal specifies the magnitude of risk;⁵⁰ the right to respect for family and private life within the meaning of Article 8 of the European Convention on Human Rights (ECHR);⁵¹ if there is a risk of being deported to another country⁵² or if deportation will affect a personal link between siblings;⁵³ or if the expedited procedure is likely to prevent illegal imprisonments or to shorten their duration.⁵⁴ Therefore, it could be argued that depending on the particular factual circumstances, at least some of the above-mentioned reasons could be applicable in order to initiate an expedited procedure. However, it must be noted that cases concerning the *duration* of a criminal procedure⁵⁵ or detention in prison⁵⁶ ‘do not constitute a case of extreme urgency.’⁵⁷

5. LACK OF CLARITY IN EUROPEAN UNION LAW

As noted above, one of the main objectives of the preliminary ruling procedure is the uniform interpretation of the Treaties as well of acts that have been adopted by the institutions of the Union. This of course presupposes that the content and scope of such provisions are not immediately clear and thus their application would create a risk of normative variation among EU Member States. One of the key grounds that would prompt a national court or tribunal to refer a question to the CJEU for a preliminary ruling is the lack of clarity in a provision of EU law. Indeed, the current

⁴⁹ Case 52/76 *Benedetti* [1977] ECR 163.

⁵⁰ See Case C-189/91 *Jippes and Others* [2001] ECR I-5689, at 5694 and Case C-240/09 *Lesoochránárske zoskupenie VLK* [2011] ECR I-01255, para. 12.

⁵¹ Case C-127/08 *Blaise Baheten Metock A.O.* [2008] ECR I-06241, paras. 13-14.

⁵² Case C-300/11 *ZZ v. Secretary of State of the Home Department* [2013][published electronically] paras. 9 et seq.

⁵³ Case C-296/10 *Bianca Purucker* [2010] ECR I-11163, paras. 7-9 .

⁵⁴ Case C-329/11 *Alexandre Achughabian* [2011] ECR I-12695, paras. 10 et seq.

⁵⁵ Case C-375/08 *Pontini A.O.* [2010] ECR I-05767, paras. 9-10.

⁵⁶ Case C-264/10 *Kita* [2010] [not reported yet] para. 9 et seq.

⁵⁷ Wägenbaur (n 65) 349.

section will scrutinise provisions referring to ‘stateless persons’ and try to assess the extent to which such reference gives rise to normative ‘grey areas,’ which may call for a preliminary ruling.

5.1. The Problems of Assimilation and Referencing in European Union Treaties

At the heart of this section lies the proposition that the normative ‘grey areas’ in relation to ‘stateless persons’ in EU secondary law cannot be viewed in isolation from the manner in which this term has been dealt within EU primary law. Indeed, such ‘grey areas’ can be traced directly to formulation of EU primary law. There are two key problems, which stand out in this respect, namely the *assimilation* of stateless persons with third-country nationals (TCNs) in Article 67 (2) of the TFEU, as well as the inchoate *referencing* to international law on statelessness, as exemplified by Article 78 of the TFEU.

5.1.1 The Assimilation of Stateless Persons to Third-Country Nationals under Article 67(2) of the TFEU

As noted above, the TFEU has brought about an equation or *assimilation* of stateless persons to third-country nationals (‘TCNs’) for the purposes of Title V of the TFEU on the ‘Area of Freedom, Security and Justice.’ Thus, Article 67 (2) of the TFEU reads ‘[The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, *stateless persons shall be treated as third-country nationals*.’⁵⁸ This provision – the first in primary EU law to speak to stateless persons specifically – has been characterized as an ‘important step towards the creation of a proper legal framework for statelessness in the Union’.⁵⁹ The significance attached to this provision can be understood when assessed against the silence of EU primary law pre-Lisbon. As has been noted, ‘third country nationals had practically been invisible as far as the treaties were concerned’.⁶⁰ Furthermore, to the extent that (then) Community legislation provided for the rights of aliens it did so under the chapeau of ‘third-country nationals’. While a number of EU Member States considered stateless persons to fall under this category, it was far from guaranteed that ‘stateless persons would not find themselves in a legal gap (and consequently in legal limbo) in the usual EU citizen *versus* third-country national dichotomy.’⁶¹

⁵⁸ [emphasis added]

⁵⁹ G Gyulai, ‘Statelessness in the EU Framework for International Protection’ (2012) 14 *European Journal of Migration and Law* 284.

⁶⁰ J Apap (ed.), *Freedom of Movement of Persons* (2002) 104.

⁶¹ Gyulai (n 107).

Still, whereas the assimilation of stateless persons to TCNs may be welcomed, it raises a host of questions in light of the need to ensure legal certainty. First and foremost, a number of directives were adopted under the previous versions of the Treaties, which did not expressly speak to stateless persons, let alone assimilate them to TCNs. Hence, there is an interpretative issue as to whether the reference within the text of such pre-Lisbon Directives to ‘third-country nationals’ nowadays comprise TCNs *and* stateless persons. What is more, some of the Directives adopted post-Lisbon are formulated in such a manner as to uphold a differentiation between stateless persons and TCNs despite the legal *assimilation* effected by Article 67 (2) TFEU. This state of affairs is problematic.

5.1.2. Making Reference to International Law on Statelessness

Article 78 of the TFEU stipulates that the Union ‘shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*’. It then adds that such a policy must be in accordance with the 1951 Refugee Convention, the 1967 Protocol, ‘and other relevant treaties.’ First and foremost, one should note that the reference to ‘any third-country national’ should be seen as encompassing stateless persons due to the operation of Article 67 (2) TFEU. Second, Article 78 of the TFEU evidences the openness of the TFEU towards existing international law. Indeed, the Union is to design and develop its international protection policy in accordance with existing international law rules. The key of course to the Union meeting its obligations under international law is the interpretation of the term ‘other relevant treaties’. It is perhaps striking that the TFEU makes an explicit references solely to the Refugee Convention and the 1967 Protocol, but makes no mention of any of the international conventions on statelessness, especially in light of the fact that a stateless person may be in need of international protection. Indeed, the term ‘other relevant treaties’ seems to suggest at least on its face value that besides granting asylum to refugees in the sense of the 1951 Convention, the policy of the EU also covers all aspects of subsidiary and temporary protection of third-country nationals (and stateless people should be treated as third-country nationals), as far as these third-country nationals need international protection and therefore require an appropriate (residence permit) status within the Union. The reluctance of the drafters to include the 1954 Statelessness Convention within the text of Article 78 of the TFEU may stem from the fact that not all EU Member States are parties to this Convention. Moreover, Hailbronner has argued that reference to ‘other relevant treaties’ in the field of European asylum law does not include treaties to which not all Member States are party, as this would bind the Union to obligations, which those States have not themselves undertaken.⁶² There is an ambivalence at play, when it

⁶² K Hailbronner, *Immigration and Asylum Law and Policy of the EU* (2002) 46.

comes to making reference to international law agreements on statelessness, which runs through both primary and secondary law, as analysed below, and which contributes to the lack of clarity in the law.

5.2. Lack of Clarity within European Union Secondary Law

The analysis of EU secondary law in relation to statelessness will proceed on the basis of two clusters of reasons, which give rise to legal uncertainty. It is argued that such legal uncertainty can be attributed to (i) the assimilation of stateless persons to TCNs under Article 67 (2) of the TFEU, (ii) variation in referencing to the 1954 Statelessness Convention within EU secondary law. Each relevant Directive and Regulation will be assessed under these two heads hoping to shed a light on the treatment of the term ‘statelessness’ and its normative discontents.

5.2.1. Directives

5.2.1.1. Qualification Directive 2004/83/EC and Recast Qualification Directive 2011/95/EU

Both Qualification Directive 2004/83/EC of 29 April 2004⁶³ and Recast Qualification Directive 2011/95/EU of 31 December 2011⁶⁴ deal with the minimum standard for the qualification and status of third-country nationals or stateless person as refugees or as persons who otherwise need international protection and the content of the protection granted, as well as the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

To begin with, it is somewhat peculiar that the titles of both Directives use the wording ‘third-country national or stateless person’ as in the light of Article 67(2) of the TFEU both categories are supposed to be assimilated. Indeed, the Recast Qualification Directive was adopted post-Lisbon, i.e. after the *assimilation* in Article 67(2) of the TFEU was introduced. But the heading suggests that the same treatment stemming from Article 67(2) of the TFEU in fact may not apply. If an assimilation operates under EU primary law, a distinction between TCNs and stateless persons in secondary EU law may no longer be necessary. This, however, is not supported by the specific wording of the two Directives.

⁶³ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter Qualification Directive).

⁶⁴ Directive 2011/95/EU of 31 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (hereafter Recast Qualification Directive).

As to the scope of the application, Article 1 and Article 2(c) of the 2004 Qualification Directive and Article 1 and Article 2(d) of the Recast Qualification Directive provide a definition of a refugee in accordance with 1951 Refugee Convention, namely a ‘third-country national, who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.’ The second part of Article 2(d) of the Recast Qualification Directive speaks of ‘a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above (...).’ The juxtaposition of a third-country national to a stateless person seems to be running counter the language of Article 67(2) of the TFEU, which *assimilates* the two statuses.

However, by analysing the wording in the Recast Qualification Directive, it remains unclear whether the statuses are meant to be assimilated from a legal point of view or rather contrasted to each other. If the assimilation stands, why is an explicit reference to ‘stateless persons’ required? The situation is even more convoluted if one were to refer to the corresponding article in the 2004 Qualification Directive, which uses the exact same wording.

What is interesting is that the Qualification Directive in Article 11 (1) (f) on cessation of a refugee status stipulates that ‘[a] third country national *or a stateless person* shall cease to be a refugee, if, while *being a stateless person with no nationality*, he or she is able to return to the country of former habitual residence’ because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist.⁶⁵

One could argue in this respect that the term ‘stateless person with no nationality’ to a certain extent corresponds to Article 1 of the 1954 Statelessness Convention, which states that ‘the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.’ At the same time, no explicit reference is made to said convention. Furthermore, the wording is used in Article 11 concerning cessation, but not in Article 2, which lays down the definitions for the purpose of the Directive. By employing two different formulations on statelessness within one Directive, one could wonder whether such variance in formulation produces legal consequences. In any case, the reasons for such variance are not clear, and one can only speculate as to whether this should be attributed to intention or oversight. Yet, the addition of the term ‘with no nationality’ creates ambiguity.

Such normative ambiguity becomes readily apparent when surveying the Recast Qualification Directive. In its respective Article 11 on cessation, the term ‘with no nationality’ has been dropped. Indeed, the proposal for the Recast Qualification Directive emphasised in its explanatory memorandum that one reason for the recast was the ambiguity of the original Directive in several of the directive’s

⁶⁵ [emphasis added]

provisions, as well as the existence of administrative errors.⁶⁶ Still, the proposal does not offer any explanation as to why Article 11 of the Qualification Directive was unclear in the first place, and why such deletion was necessary.

Moreover, the Recast Qualification Directive leaves room for discussion vis-à-vis the coherence of its *referencing* to international agreements. The CJEU has stated that the context of the Qualification Directive is ‘essentially humanitarian’ as it aims at identifying those people who ‘genuinely and legitimately need international protection in the European Union.’⁶⁷ Whereas both the Qualification and its Recast are replete with references to the 1951 Refugee Convention, there is no reference to the 1954 Statelessness Convention, which is that cornerstone of international protection of stateless persons, despite the fact the stateless persons come expressly within the ambit of the Directives’ scope of application. Taking into account the explicit references to a number of international conventions, including the European Convention on Human Rights (Article 9 (1) (a) Recast Qualification Directive) and the Conventions on the Rights of the Child (Preamble Recital 18 Recast Qualification Directive) one can conclude that the omission of any reference to the 1954 Statelessness Convention is intentional.

One could at this point counter-argue that the term ‘statelessness’ is clear enough, and that for this reason no reference to the 1954 Convention is required. Still, the need to recast the Directive does not support this proposition. What is more, this proposition does not shed light on the need to explicitly refer to the 1951 Refugee Convention, when arguably the definition of a ‘refugee’ is now settled.

5.2.1.2. Recast Reception Directive 2013/33/EU

The Recast Reception Directive 2013/33/EU¹¹⁶ [when was this adopted/entered into force?] outlines the standards for the reception of applicants for international protection and is a recast of Council Directive 2003/9/EC of 27 January 2003. The first recital states that the Recast of the Directive was necessary for purposes of clarity. However, the language of the Recast Directive gives rise to a number of questions regarding its actual scope, especially in light of the *assimilation* between stateless persons and TCNs that is evident by Article 67 (2) of the TFEU.

The Recast Reception Directive employs the term ‘applicant’ instead of third-country national’ or ‘stateless person.’ The purpose of this substitution is to ‘ensure equal treatment amongst all applicants for international protection and guaranteeing consistency with current EU asylum acquis. [F]or a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted it is appropriate to extend the scope of this

⁶⁶ Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast) COM/2009/551 final 4.

⁶⁷ Case C-472/13 *Andre Lawrence Shepherd v Bundesrepublik Deutschland* [2015] [not reported yet] para. 32.

Directive in order to include applicants for subsidiary protection.¹¹⁷ In Article 2(b) of the Recast Reception Directive the term applicant is defined as ‘a third-country national *or* a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken.’¹¹⁸ Thus, the term ‘applicant’ does not cast any light on the definition of a ‘stateless person.’ To the contrary, the explicit reference to both TCNs and stateless persons creates confusion.

That being said, the Recast Reception Directive further highlights the practical problems that stateless persons face the continued absence of a statelessness determination procedure. For instance, Article 8(3)(a) of the Recast Reception Directive on detention states that an applicant may be detained only in order to determine or verify his or her identity or nationality. However, nationality could be impossible to prove for a stateless person. Furthermore, it is problematic for a stateless person to prove his/her identity because they usually cannot provide any official documents. This issue was underlined by a 2012 UNHCR report, which criticised the wide scope of Article 8(3)(a).¹¹⁹ Thus, the question arises as to how the verification of the nationality or identity of the ‘applicant’ is to be effective without a determination procedure in place.¹²⁰ Furthermore, the Directive can be criticized for being silent on how such determination procedure is to be effectuated uniformly across EU Member States.

The Recast Reception Directive presents stateless persons with a normative ‘catch-22’. It offers very little guidance on the actual definition of the term ‘stateless persons’, whilst comprising stateless persons within its scope of application. At the same time, it fails to take into account the consequences arising from the status of these same people as ‘stateless.’

5.2.1.3. Family Reunification Directive 2003/86/EC

The Family Reunification Directive 2003/86/EC was adopted by the Council on 22 September 2003 and entered into force on 3 October 2003.¹²¹ Member States had to comply with it no later than 3 October 2005. The Kingdom of the Netherlands transposed the Directive into its national legal order by amending the Aliens Decree in 2004.

The right to respect for one’s family life is a fundamental right guaranteed by Article 7 of the EU Charter of Fundamental Rights, as well as Article 7 of the European Convention of Human Rights. Directive 2003/86/EC introduces family reunification as a free-standing right and establishes a common framework in this respect. The objective is to enable family members of non-EU nationals residing lawfully on the territory of the EU to join them in the EU country in which they are residing. The Directive determines the

conditions under which non-EU nationals residing lawfully in the territory of EU countries could exercise the right to family reunification. The Family Reunification Directive is in this respect an instrument of minimum harmonization, allowing EU Member States discretion to adopt or maintain more, but not fewer, favourable provisions.

The key area that needs to be scrutinized for the purposes of the present Report is Article 2(a), setting forth the personal scope of application, which states that a ‘third country national means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty.’ The espousal of the term ‘third-country national’ brings us back to the point made above. Namely, that the term ‘third-country national’, whose definition is derived *a contrario* from Article 17 of the EC Treaty (which defined the citizen of the Union as ‘every person holding the nationality of a Member State’) is silent on stateless persons. *Prima vista* the argument could be made that stateless persons fell within the definition of the term ‘third-country nationals’ for the purposes of the Family Reunification Directive. Indeed, a stateless person present in an EU Member State is neither an EU citizen nor a person enjoying the right of free movement.

The proposition that stateless persons were indeed thought of as falling within the ambit of the term ‘third country national’ is not as uncontroversial as it appears. In the original proposal for the Directive, presented by the Commission, reference was made to ‘third-country nationals’ only. According to the Commission, ‘the concept of third-country nationals is given a default definition: all residents of the Union, excluding Union citizens as defined by the EC Treaty. This refers to persons having the nationality of a non-member State, plus stateless persons within the meaning of the New York Convention of 28 September 1954.’¹²² Nevertheless, in the Amended proposal, the Commission explicitly sought to include in the scope of application a reference to stateless persons. The proposed Article 2 reads: “‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty, including stateless persons.’”¹²³ Indeed, the Commission stated in its Explanatory Memorandum that the inclusion of stateless persons in the term ‘third – country nationals’ was only ‘implicit in the original proposal.’¹²⁴ Further, any reference to stateless persons was eventually dropped from the adopted text, leaving the matter of interpretation open.

However, if one is to further scrutinise the text of the Family Reunification Directive, references to ‘stateless persons’ in other provisions could be noted. Article 2(b) of the Directive defines the term ‘refugee’ as any third country national or stateless person enjoying refugee status.’ Similarly, ‘unaccompanied minors’ comprise ‘third country nationals or stateless persons below the age of eighteen’ who meet the requirements of the Directive. The explicit reference to ‘stateless persons’ in Articles 2 (b) and (f) of the Directive points to the conclusion that this category is discrete from that of ‘third country nationals,’ and that stateless persons were not intended to be included in the scope of Articles 1 and 2(a) of the Directive

Whereas such a reading of ‘third country nationals,’ excluding stateless persons, was possible pre-2009, it is hard to uphold such separation in the light of the assimilation effectuated by Article 67(2) of the TFEU. It could be argued that in fact the Directive is limited in its own scope, since the Family Reunification Directive was still adopted as a Community law, and thus, excluding an automatic assimilation between third-country nationals and stateless people. In any case, the scope of application of the Directive, relevant to the status of ‘stateless persons’ and the extent to which they are entitled to the full protection of the Directive, remain unclear primarily due to the change in EU primary law.

5.2.1.4. Long-Term Residents Directive 2003/109/EC

The Directive concerning the status of TCNs who are long-term residents was adopted on 25 November 2003 and it entered into force on 23 January 2004.¹²⁶ Its associated deadline of transposition for EU Member States was 23 January 2006.

The Long-Term Residents Directive aims to ensure that legally residing non-EU citizens can obtain a long-term residence status in an EU Member State after five years of legal residence in said Member State. The long-term resident status confers a right to equal treatment with nationals of the host Member State, subject to some exceptions, and a certain degree of protection against expulsion. The definition of long-term resident is attributed to ‘any Non-EU Member Country national who has the status provided for in the Directive,’ while family members are the ‘persons defined as family members by the Directive on the right to family reunification.’

The family members of long-term residents have the right to accompany or join the long-term resident if the family union existed before they moved to the host Member State. This does not mean that the family members automatically acquire long-term resident status, but only that they obtain the right to accompany or join the long-term resident. In accordance with Article 16(5) of the Long-Term Residents Directive, if the family was not already constituted in the first Member State, the Family Reunification Directive (Directive 2003/86/EC) will be applicable.

Article 1(a) of the Long-Term Residents Directive states that the Directive determines the terms for conferring and withdrawing long-term residence status granted by a Member State in relation to third-country nationals legally residing in its territory. No explicit reference is made to stateless persons, neither in the

⁶⁸ See also K Hailbronner et al, ‘Family Reunification Directive 2003/86/EC’ in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law: A Commentary* (2016) 316.

heading of the Directive nor in Article 2, which sets out the definitions used for the purposes of the Long-Term Residence Directive. The Directive was still adopted under Community law prior to the TFEU assimilation. In this manner, one could make a recourse to the argument on the scope of application of the Family Reunification Directive above. Indeed, there seems to be a space to make an argument in this respect, as even in the relevant literature the scope of application and the position of ‘stateless persons’ is somewhat unclear. To take but one example, Thym argues that ‘stateless persons’ are included within the scope of the Long-Term Residents Directive through a *renvoi* to Article 67(2) of the TFEU.¹²⁷ Meanwhile, this retrospective projection of the assimilation under Article 67(2) of the TFEU to legislation adopted under the EC Treaty does highlight a lack of clarity.

5.2.2. Regulations

5.2.2.1. Coordination of Social Security Regulation (EC) No. 883/2004

Recital 7 of Regulation (EC) No. 883/2004 of the European Parliament and the European Council of 20 April 2004 on the coordination of social security¹²⁸ speaks to the necessity of coordination of social security and posits that ‘due to the major differences existing between national legislation in terms of the persons covered, it is preferable to lay down the principle that this Regulation is to apply to nationals of a Member State, stateless persons and refugees resident in the territory of a Member State who are or have been subject to the social security legislation of one or more Member States (...).’ Thus, the scope explicitly includes stateless persons. Indeed, Article 1(h) contains a reference to the Statelessness Convention, stipulating that ‘a “stateless person” shall have the meaning assigned to it in Article 1 of the Convention relating to the Status of Stateless Persons.’

5.2.2.2. Visa Regulation (EC) No. 1932/2006 amending Regulation (EC) No 539/2001

Recital 6 of the Visa Regulation (EC) No. 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2001 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 requirement⁶⁹ states that ‘Member States may exempt from the visa requirement recognised refugees, all stateless persons, both those under the Convention relating to the Status of Stateless Persons of 28 September

⁶⁹ Regulation 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention [2006] OJ L 405 (hereafter Visa Regulation).

1954 and those outside of the scope of that Convention, and school pupils travelling on school excursions where the persons of these categories reside in a third country listed in Annex II to the Visa Regulation.’

Furthermore, the scope of application in Article 1 of the Visa Regulation includes stateless persons. Comparing the reference made to the Statelessness Convention in this Regulation to the one made in the Social Security Regulation it can be noticed that in the current Visa Regulation the reference is only made in a recital but not under one of the adopted articles. Furthermore, it does not refer to Article 1 of the Statelessness Convention but simply states that ‘both those under the Convention relating to the Status of Stateless Persons of 28 September 1954 and those outside of the scope of that Convention’ fall under the scope of exemption from the visa requirement. The Visa Regulation, again, uses a different wording than in other EU secondary legislation. Here, the scope shall be wider than the one stemming from Article 1 of the Statelessness Convention. Is it explicitly wider just for this Regulation or could it mean that under the application of EU law the term of a stateless person shall be wider in general.

5.2.2.3. Dublin Regulation (EU) No 604/2013 (Recast)

Regulation (EU) No 604/2013 of the European Parliament and the European Council of 26 June 2013 establishes the criteria and mechanisms for determining the responsible of Member States to examine an application for international protection lodged in one Member State, by a third-country national or a stateless person (recast).⁷⁰ This regulation refers to stateless persons in its title and includes this vulnerable group within its scope of application.⁷¹ Meanwhile, the Regulation makes a distinction between third-country nationals and stateless persons, despite their assimilation under Article 67 (2) of the TFEU. According to Article 2 (a) of the Regulation, the term ‘third-country national’ means ‘any person who is not a citizen of the Union within the meaning of Article 20(1) of the TFEU and who is not a national of a State which participates in this Regulation by virtue of an agreement with the European Union’. Yet, according to Article 2 (c) of the same Regulation, ‘applicant’ means a ‘third-country national or a stateless person who has made an application for international protection.’ What is more, in contrast to the two Regulations surveyed above, the Dublin Regulation does not contain an explicit reference to the 1954 Statelessness Convention.

⁷⁰ Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180 (hereafter Dublin Regulation).

⁷¹ Article 2(f) of the Dublin Regulation which itself refers back to the Qualification Directive.

5.2.3. International Law on Statelessness: A Source of or a Barrier to Clarity?

One of the key conclusions to be reached from the overview of EU secondary law is that the 1954 Statelessness Convention occupies a rather peculiar position as a legal yardstick. Whereas it is explicitly referred to in Regulations, such as the Social Security and Visa Regulations analysed above, it is wholly absent from the analysed Directives. One could argue here that a reference to the Convention in the text of a Regulation, as opposed to a Directive, is striking. The Regulation is a binding legislative act, which is self-executing and must be applied in its entirety across the EU. By adopting a Regulation, which refers to the definition of ‘stateless person’ in the 1954 Statelessness Convention, such a definition applies – in the context of the Regulation – across all EU Member States, irrespective of whether they have ratified the 1954 Statelessness Convention. On the contrary, the Directives allow a measure of leeway to individual Member States that are called upon to transpose them into their national legislation, with a view to reaching the goals described in the Directive. The lack of a definition of a ‘stateless person’ or the lack of reference to the definition provided for in the 1954 Statelessness Convention within a Directive opens up the potential for variations in the application of the Directive. In principle, Member States have to meet their obligations under EU law, whilst at the same time upholding their obligations under international law. If all EU Member States were parties to the 1954 Convention, then one could argue that a reference to the Convention would be redundant. However, that is not the case.

Be that as it may, one needs to think whether a reference to the 1954 Statelessness Convention in itself is sufficient as a way of clearly circumscribing the normative content of the term ‘stateless person’ in EU law. One could go one step further in this sense and argue that the definition included in Article 1 of the 1954 Statelessness Convention is not unambiguously clear or entirely settled. The definition includes –persons termed as– *de jure* stateless persons, but it has been debated whether *de facto* stateless people also fall within the scope of the definition and if so, what *de facto* statelessness does imply. The UNCHR Expert meeting on the ‘Concept of Stateless Persons under International Law’ held in 2010 reached a number of conclusions on the definition of *de facto* statelessness.⁷² Amongst others it was argued that *de facto* statelessness has traditionally been linked to the notion of effective nationality,⁷³ meaning that a person could be *de facto* stateless even if the person resides inside his or her country of nationality. However, a new approach was favoured defining ‘a *de facto* stateless person on the basis of one of the principal functions of nationality in international law, the provision of protection by a State to its nationals abroad.’⁷⁴ Thus, the definition found by the Expert Meeting is the following: ‘*de facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of

⁷² UNHCR, *Expert Meeting on the Concept of Stateless Persons under International Law: Summary Conclusions* (2010) available at <http://www.refworld.org/docid/4ca1ae002.html>.

⁷³ Ibid 6.

⁷⁴ Ibid.

the protection of that country.’⁷⁵ It was agreed upon that the definition from the Statelessness Convention shall not include *de facto* stateless persons, keeping mind, however, that the Final Act of the 1961 Convention links the two when it recommends that ‘persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.’

On the basis of the above, one could make the argument that even when it comes to Article 1 of the 1954 Statelessness Convention, views may differ as to how far the definition of a ‘stateless person’ reaches under international law. Thus, an express reference to the Convention, as is the case with the Social Security Regulation, would give rise to the question as to whether for example *de facto* stateless persons fall within the scope of the Convention and by definition of the Regulation.

Of course, legal concepts are not mathematical equations, and thus they are to be interpreted. Still, the point that is made here is not so much that the concept of ‘stateless persons’ can never be clearly defined. The point is that the inchoate referencing to the Convention within EU secondary law gives rise to questions as to whether there exists *varieties* or *categories* of ‘stateless persons,’ which necessitate a differing legal treatment. In order to create a harmonised and uniform usage of the application of the concept of ‘statelessness’ and to support the *effet utile* of EU law, a common clarification under Union law can only be obtained by means of a preliminary ruling by the CJEU, on the basis of which any determination procedure is to build.

5.2.4 The Rottmann Case: Statelessness and Loss of Citizenship

The *Rottmann* case displays another layer of consequences, which arise from the lack of clarity on the concept of statelessness and illustrates the possible impact of such lack of clarity on other fields of EU law. The CJEU held in its judgement C-135/08 that the principles – as regards to both the sovereign powers of the Member States in the sphere of nationality, and the duty of Member States to exercise those powers with due regard to EU law – apply both to the Member State of naturalisation and to the Member State of nationality.⁷⁶ Despite the judgement’s focus on the loss of Union citizenship, it may still be analysed in relation to the concept of statelessness, because the possibility of statelessness ensuing from the deprivation of nationality is a circumstance for the assessment of whether the loss of citizenship of the Union meets the requirements of proportionality. More generally, it can be assumed that EU law would appear to prohibit any arbitrary deprivation of nationality that results in loss of citizenship of the Union, which would include any situation where such deprivation also results in statelessness.

⁷⁵ Ibid.

⁷⁶ Case C-135/08 *Janko Rottmann v. Freistaat Bayern (Germany)* [2010] ECR I-01449 para.62.

This conclusion does not resolve any uncertainty flowing from the concept of statelessness under EU law, but it shows that the CJEU connects the loss of its citizenship and the possibility of statelessness under the principle of proportionality. Both statuses (statelessness and loss of the EU citizenship) can interrelate closely as can be seen in the *Rottmann* case. This makes it even more imperative for the Court to shed light on the meaning of the term ‘stateless person.’

Important to notice is that the CJEU referred to Article 8(2) of the 1961 Convention on Reduction of Statelessness in acknowledging the general possibility for a country to deprive a person of its nationality leading to statelessness if nationality was obtained by means of fraud or misrepresentation.⁷⁷ This reference could indicate that the Court recognises the authority that the Convention has for its parties (as the Union itself is not a party to the Convention, but in the current case Germany is, which issued the withdrawal decision for Mr. Rottmann) and also uses the wording of the Convention as a reference for its own decision. The question. However, the question remains if this really clarifies the concept of statelessness under the EU legal order by a mere reference. In fact, the reference towards Article 8(2) of the 1961 Convention does not clarify if the Statelessness Convention and its definition in Article 1 shall be applicable within EU law.

It can be argued that the judgement has been perceived as the leading case on nationality,⁷⁸ rather than on statelessness, even though those two fields of law may be connected. Thus, no great measure of clarification derives from this ruling because in its essence, it did not deal with the question of statelessness. However, the national court (*Bundesverwaltungsgericht*) in referring to that case considered that the significance and purpose of the provision in *Micheletti and Others* had not yet been clarified in the Court’s decisions. According to the national court, it is not sufficiently clear whether the status of being stateless and the loss of citizenship of the Union validly acquired previously, linked to the withdrawal of naturalisation, was compatible with European law, and in particular with Article 17(1) of the EC Treaty.⁷⁹ Thus, this preliminary ruling asked for clarification in regard to the loss of EU citizenship as well as on the concept of statelessness. The strong interrelation of the loss of EU citizenship and the status of being stateless, unfolded by the *Rottmann* ruling, indicates that further elaboration on the scope of the definition of a stateless person is required by the CJEU.

In conclusion, the *Rottmann* case highlights the need for a clarification of the concept of statelessness because statelessness may be linked to any proportionality test conducted for a loss of citizenship. Statelessness may come up in the reasoning of a court related to the loss of EU citizenship and further legal consequences. For this purpose, the concept must be sufficiently clear in order to be taken correctly into consideration within the regime of EU citizenship and nationality.

⁷⁷ Ibid para. 52.

⁷⁸ N Cambien, ‘Case C-135/08 Janko Rottmann v. Freistaat Bayern’ (2011) 17 *Columbia Journal of European Law* 379.

⁷⁹ *Rottmann* (n 136) para. 33.

6. 'STATELESS PERSONS' AS AN AUTONOMOUS CONCEPT IN EU LAW

A second avenue towards a preliminary ruling may be the legal characterization of the term 'stateless persons' as an autonomous concept of EU law, which must be defined by the EU itself. The idea of an autonomous concept follows from the necessity for the uniform application of EU law across Member States, as well as from the principle of equality. As the Court has held

'the terms of a provision of EU law which makes no express reference to the law of the Member State for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation through the EU, having regard to the context of the provision and the objective pursued by the legislation in question'.⁸⁰

This means that a particular concept can be assigned an independent meaning in EU law, implying that it cannot be defined by referring to concepts of national law.

Naturally, for a term to be characterized as an autonomous concept of EU law, it has to form part of an EU law provision. Furthermore, EU law must be silent in terms of any further guidance vis-à-vis the normative contours of such term. Obviously, for a term to be characterized as an 'autonomous concept,' such term cannot refer or defer to the national laws of Member States. As the Court of Justice has explained in this regard

when the European Union legislature has made an express reference to national law ... it is not for the Court to give the terms concerned an autonomous and uniform definition under European Union law. Such a reference means that the European Union legislature wished to respect the differences between the Member States concerning the meaning and exact scope of the concepts in question.⁸¹

The consequences of a finding of an 'autonomous concept' can be summarised as follows. First, a term designated as an 'autonomous concept of EU law' must be interpreted in a uniform manner throughout the Member States. Second, the scope of interpretation is limited to the purposes of application of the concerned EU law provision.

A number of terms have been considered to be 'autonomous concepts' of EU law. Indeed, there is a wide variety in the sense of what may constitute such a concept. Indicatively, the Court of Justice has held the following terms to amount to an 'autonomous concept of EU law':

- The terms 'who have resided legally' in Directive 2004/38 (Joined Cases C-424/10 and C-425/10)

⁸⁰ Case C-467/08 *Padawan* [2010] ECR I-10055, para. 32 and Case C-201/13 *Deckmyn and Vrijheidsfonds* [published electronically] para. 14.

⁸¹ Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] [published electronically] para. 77.

- The terms ‘specific act of national legislation’ and ‘project’ in the Council Directive 85/337/EEC (Case C-287/98)
- The term ‘social assistance system of the Member State’ in the Council Directive 2003/86 (Case C-578/08)
- The term of an ‘human embryo’ in the Directive 98/44/EC (Case C-34/10)
- The term ‘fair compensation’ in the Directive 2001/29 (Case C-467/08)
- The term ‘parody’ in the Directive 2001/29 (Case C-201/13)

In this vein, one could inquire as to the extent to which the concept of ‘stateless person’ may be perceived as having an ‘autonomous’ meaning in EU law. Such inquiry may depart from the assumption that legal variance exists with respect to the implementation of the concept in various Member States.⁸² It would be thus plausible to argue that the term ‘stateless person’ could be considered an ‘autonomous concept of EU law’ with a view to securing equality and legal certainty.

Admittedly, the Directives and Regulations do not provide any guidance on how the term ‘stateless person’ is to be understood and do not consistently contain a reference to an international agreement. On the contrary, the Directives analysed above use the term ‘stateless person’ either interchangeably or in contrast to the term ‘third party national.’ What is more, references to the definition enshrined in Article 1 of the 1954 Statelessness Convention are inchoate. Besides, the secondary EU law assessed does not defer to the national law of EU Member States. In this vein, an argument could be made that the requirements of an ‘autonomous concept’ are to some extent met.⁸³

The final question that needs to be addressed is whether the concept of ‘stateless persons’ can be interpreted autonomously despite the fact that it is being defined in the 1954 Statelessness Convention, which has been ratified by the majority of EU Member States. In other words, one needs to assess whether international legal concepts, which are presumed to have an identifiable normative core, are susceptible to autonomous interpretation by the CJEU. The recent case law of the Court seems to suggest an affirmative answer to this question.

Two judgments are relevant in this respect both of which turn on the interpretation of Article 15(c) of the Qualification Directive. According to Article 2(e) of the Directive, the phrase

‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15.

⁸² C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-01839, para. 45.

⁸³ Cf Joined cases C-424/10 and C-425/10 *Tomasz Ziolkowski (C-424/10) and Barbara Szeja and Others (C-425/10) v Land Berlin* [2011] ECR I-14035 paras. 32,33, 43.

In turn, Article 15(c) posits that serious harm consists of ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’

In *Elgafaji*, the national referring court sought guidance on the protection guaranteed under Article 15(c) of the Directive, in comparison with that offered by Article 3 of the ECHR as interpreted in the case-law of the European Court of Human Rights. In particular, the Court of Justice was called upon to decide whether eligibility for subsidiary protection requires the applicant to demonstrate the existence of a real risk that he or she will be targeted individually upon return to his or her State of nationality. The Court of Justice held that Article 15(c) of the Qualification Directive ‘is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.’⁸⁴ Thus, despite the conceptual links between Article 3 of the ECHR and Article 15(c) of the Qualification Directive, the Court treated the latter as an autonomous concept of EU law, without establishing any explicit relationship to international human rights law or the law of armed conflict, espousing a ‘judicial policy of “encapsulation.”’⁸⁵

The Court of Justice followed a similar reasoning in a later preliminary ruling concerning the interpretation of the term ‘internal armed conflict’ also enshrined in Article 15(c) of the Qualification Directive. The referring court sought guidance on whether Article 15(c) had to be interpreted in accordance with international humanitarian law, and more specifically by reference to Common Article 3 of the four Geneva Conventions. The Court of Justice replied that ‘EU legislature has used the phrase “international or internal armed conflict,” as opposed to the concepts on which international humanitarian law is based (international humanitarian law distinguishes between “international armed conflict” and “armed conflict not of an international character”).’⁸⁶ It went on to add that ‘the EU legislature wished to grant subsidiary protection not only to persons affected by “international armed conflicts” and by “armed conflict not of an international character”, as defined in international humanitarian law, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence.’⁸⁷ Again, as in *Elgafaji* referred to above, the Court of Justice proceeded to ‘encapsulate’ the content of Article 15(c) obscuring clear links to international humanitarian and criminal law on the basis of the difference in formulation between the Directive and the terms espoused in the latter fields of law.

The Court of Justice does not shy away from autonomously interpreting concepts that are used in other fields of international law, especially when there

⁸⁴ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921 para. 28.

⁸⁵ A Zimmermann et al (eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (2011) 702.

⁸⁶ Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2014] [published electronically] para. 20.

⁸⁷ *Ibid* para. 21.

appears to be a variation in the manner in which such concepts are applied by national tribunals. In a detailed critique of the case *Diakité*, Bufalini presents the contrasting views held by national courts in relation to the interpretation of the term ‘internal armed conflict’ as enshrined in Article 15(c) of the Qualification Directive. Indeed, whereas the Court of Appeal of the United Kingdom held ‘internal armed conflict’ not to be governed by international humanitarian law, the Dutch Supreme Court squarely interpreted Article 15(c) in line with Common Article 3 of the 1949 Geneva Conventions and Article 1 of the 1977 Second Additional Protocol to the Geneva Conventions.⁸⁸

This state of affairs has important ramifications in relation to the concept of ‘stateless persons’ and the extent to which it may be interpreted autonomously. One could argue that if the Court of Justice is willing to autonomously interpret concepts closely linked to international agreements binding all of EU Member States, then it should *a fortiori* and with a view to achieving uniform application also interpret concepts that are to be found in agreements not binding all of EU Members States, thus presenting more of a risk of conceptual fragmentation. Autonomously interpreting the term ‘stateless person’ could be a viable means of achieving legal uniformity, to the extent that it can be shown that EU Member States have interpreted the relevant EU provision in a contradictory way. One could further argue that seeking an autonomous interpretation of the term ‘stateless person’ as it appears in the Qualification Directive may be conducive and in line with the policy of ‘encapsulation’ followed by the Court of Justice.

7. THE ROLE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Since the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union⁸⁹ has become a pillar of reference used in the development of nearly all EU policies. Thus, it is beyond mere contention that the Charter impacts and shapes EU policies. What is more, the text of the Charter is considered to be progressive and innovative, ensuring the EU’s pioneering commitment in terms of human rights.⁹⁰ The proliferation of judgments based on the provisions of the Charter indicates that the Charter is a promising tool to address the defence of economic and social rights and points out the new role of the Court as a human rights adjudicator.⁹¹ There are two directions that can be taken in that regard. First, it is possible to argue that there is an inconsistency between the EU secondary law (i.e. the Qualification Directive) and the Charter. Second, national measures, to the extent that they implement EU law, are may

⁸⁸ See for a detailed analysis of such case law, A Bufalini, ‘An autonomous notion of non-international armed conflict in EU Asylum Law: Is there any role for International Humanitarian Law?’ (2015) available at http://www.qil-qdi.org/autonomous-notion-non-international-armed-conflict-eu-asylum-law-role-international-humanitarian-law/#_ftn3.

⁸⁹ Charter of Fundamental Rights of the European Union [2012] OJ C 202.

⁹⁰ T Kerikmäe (ed.), *Protecting Human Rights in the EU* (2014) 1-4

⁹¹ S Peers et al (eds.), *The EU Charter of Fundamental Rights: A Commentary* (2014) 5-6.

be reviewed against the Charter as potentially violating fundamental rights and freedoms contained therein. However, the challenge would then become twofold: first, to assess whether recourse to the provisions of the Charter is possible with regard to the scope of application laid down in Article 51(1); and second, what is the extent of the substantive content of the right protected by the Charter.

Therefore, the first requirement for a successful preliminary ruling on the compliance of a national measure with the Charter is the connection of the measure to EU law in terms referred to above. For purposes of ruling on statelessness for example, national measures on nationality and citizenship are exclusively under the competence of the Member States and proving the connection to EU law could be difficult. That being said, measures involving asylum and European citizenship can be a promising link as most *de facto* stateless persons are treated as irregular immigrants or asylum seekers. In any case, the need to respect fundamental rights does not require the existence of secondary EU law. According to the case law of the CJEU, Member States must respect fundamental rights wherever ‘national legislation falls within the field of application of Community law.’⁹²

Before diving into the study of the specific articles of the Charter and its value for the purposes of statelessness litigation, the first part of this chapter analyses the material and personal scope of application of the Charter in order to clarify the connection between national measures and EU law required by Article 51. The second part of the chapter is dedicated to the analysis of relevant articles and how those are connected to some of the existing national measures on statelessness.

7.1. The Scope of Application of the Charter of Fundamental Rights of the European Union

The material scope of application of the Charter is provided for in Article 51, which reads:

Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

However, the interpretation of those provisions by the CJEU, as well as relevant scholarship, leaves some room for discussion on the limits of *ratione materiae*

⁹² Case C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR I-02629, para. 15.

scope.⁹³ This report will only deal with application of the Charter to Member States, leaving outside of the current focus the institutions and bodies of the Union.

In its leading *Åkerberg Fransson* judgment, the CJEU understood that the Charter applies not only where Member States explicitly act to apply EU law, but also where the national measure at stake has a *strong connection* with EU law.⁹⁴ However, the approach of the CJEU to the nature of such connection varies according to the EU interests involved in the case.⁹⁵ That is definitely motivated by the fear of ‘competence creep’ as reflected by Article 51(2) and Article 6(1) of TFEU.⁹⁶ The jurisprudential trends show that the CJEU applies the Charter less strictly when the national measure at stake deals with exclusive EU competences since there is a smaller risk of tension between EU and Member States’ competences. In the *Åkerberg Fransson* case for instance, the national measure involved was not specifically applying EU law as stipulated by Article 51; in fact only one part of the measure was dealing with EU law (objective collection of the VAT). In that occasion, the Court affirmed that the Charter would apply to any national measure falling under the scope EU law. Despite the relevance of such decision, the nature of the connection between a national measure and EU law was not specified.

One year later, the CJEU had the opportunity to refine the criteria for application of the Charter in the *Siragusa* judgment. According to the CJEU, one needs to assess:

- (1) Whether the legislation is intended to implement a provision of EU Law;
- (2) The nature of the legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU Law; and
- (3) Whether there are specific rules of EU law on the matter or capable of affecting it.⁹⁷

In addition, the Court held that the Charter does not apply to situations where relation to EU law ‘did not impose any obligation on the Member States with regard to the situation in issue in the main proceedings.’⁹⁸ The ruling in *Siragusa* was reaffirmed

⁹³ Peers et al (n 151) 1413-1446.

⁹⁴ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] [not reported yet] paras. 18-19.

⁹⁵ E Spaventa, *The Interpretation of Article 51 of the EU Charter of Fundamental Rights: the Dilemma of Stricter or Broader Application of the Charter to National Measures* (2016) available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU\(2016\)556930_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf), at 24-25.

⁹⁶ Ibid 14.

⁹⁷ Case C-2016/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* [2014] ECR I-11315, para. 25.

⁹⁸ Ibid para. 26.

in later judgments, in which the criteria spelled out above were used to exclude the application of the Charter despite the clear connection to EU law.⁹⁹

Following that, the first requirement for a successful preliminary ruling on the compliance of a national measure with the Charter is the connection of the measure to EU law in terms referred to above. As previously mentioned, due to the fact that nationality and citizenship are exclusively under the competence of the Member, measures involving asylum law and European citizenship may prove to be a more promising legal avenue in the effort to prove a strong connection.

Secondly, another important aspect to consider is the individual scope of the application. In principle, stateless persons enjoy the protection effected under the Charter. However, in practice only certain rights enshrined in the Charter apply to everyone, regardless of nationality, or migration status or lack of both. The text of the Charter delimitates different protected groups and the personal scope has to be interpreted depending on the specific right and the CJEU case law.¹⁰⁰ A pertinent example of such differentiated treatment is Article 15 of the Charter on the right to work, which includes distinct provisions in respect of nationals, European citizens and third-country nationals with legal residence.¹⁰¹ Consequently for the purpose of this report it is important to distinguish between stateless persons legally residing in the EU and those stateless persons staying illegally on the territory of a State. At the same time, there appears to be a consensus on the Charter provisions that apply indiscriminately, namely:

- Right to human dignity (Article 1)
- Right to life (Article 2) and to physical integrity (Article 3)
- Prohibition of torture, inhuman and degrading treatment (Article 4)
- Right to liberty and security (Article 6)
- Right to respect for private and family life (Article 7)
- Non-discrimination (Article 21)
- Rights of the child (Article 24)
- Right to health care (Article 35) (subject to restrictions in national law)
- Right to an effective (judicial) remedy and to a fair trial (Article 47)

Some of the aforementioned rights and freedoms are bestowed upon all individuals due to their universal nature (those are rights contained in Chapters I-II of the Charter).¹⁰² Conversely, rights such as freedom of movement, the freedom to choose an occupation and the right to engage in work, or the right to social assistance amongst others, seem to be limited only to EU citizens and third-country nationals

⁹⁹ See Case C-198/13 *Víctor Manuel Julian Hernández and Others v Reino de España* [2014] [published electronically].

¹⁰⁰ R van Ooik, 'The Sting is Always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights' (2001) 8 *Maastricht Journal of European and Comparative Law* 103-104.

¹⁰¹ Ibid.

¹⁰² Ibid

legally residing on the territory of one of the Member States.¹⁰³ Consequently, depending on the legal status of the stateless person in the Netherlands different rights and freedoms may be invoked before the Court.

7.2. Analysis of Relevant Articles in the Charter of Fundamental Rights of the European Union

In principle, all possible combinations of the aforementioned rights and freedoms can be invoked before the Court. However, considering the most common difficulties faced by stateless persons, the following rights merit further consideration: the right to human dignity (Article 1), the principle of non-discrimination (Article 21), the right to good administration (Article 41) and the right to an effective remedy (Article 47). This choice also reflects the frequency of citation of such rights in the legal discourse of the Court of Justice in relevant cases. Since statelessness-related case law on the Charter is non-existent, this section analyses the case law on asylum and immigration with a view to construct legal arguments to be espoused in a statelessness case.

7.2.1. Right to Human Dignity

Human dignity is perhaps the most far-reaching right of the Charter in terms of applicability. It is an absolute and inviolable right, which always prevails, even where the limitation or restriction of a right contained in the Charter is possible.¹⁰⁴ The reason behind this is that dignity constitutes an independent and a free-standing right enshrined by Article 1 and the cornerstone of the rest of the rights and freedoms spelled out by the rest of the Charter; it is a ‘mother basic right.’¹⁰⁵ Furthermore, the Court has held that States have the obligation to ensure ‘full protection of human dignity,’ and consequently the obligation to remove the obstacles that interfere with human dignity.¹⁰⁶ As a reflection of its importance, practically all EU policies and EU secondary law contain a clause on the fulfilment of the obligation to observe the Charter and particularly to uphold the protection of human dignity. For instance, both the Reception Directive and the Qualification Directive refer to the Charter and human dignity in their preambles. Particularly in the field of migration law litigation, the right to dignity is a recurrent argument.¹⁰⁷ However, even if in principle it is possible to base the whole case on human dignity as an inviolable right, such approach would be rather weak. Indeed, all cases that

¹⁰³ Ibid.

¹⁰⁴ Peers et al (n 151) 10-12.

¹⁰⁵ Ibid.

¹⁰⁶ J Jones, ‘Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice’ (2012) 33 *Liverpool Law Review* 281-300.

¹⁰⁷ See F Ippolito, ‘Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?’ (2015) 17 *European Journal of Migration and Law* 1-38.

involve arguments revolving around the right to human dignity do so in combination with other rights and freedoms of the Charter.

In part, the potential of the ‘human dignity’ argument resides not only in its importance across the entire spectrum of EU law, but also in the broadness of its definition. So far, the Court has not given a conclusive definition on human dignity and it probably does not have an intention to deliver one soon. Human dignity may comprise multiple aspects of human life such as integrity of the person, equality, security, privacy, development of the personality, fair employment, and decent housing.¹⁰⁸ For example, it would be possible to construct an argument that the aforementioned lack of clarity in secondary EU law interferes with the dignity of stateless applicants since it is not possible to specify exactly to what sort of protection they are entitled under the relevant Directives or whether they are covered at all by some of them.

Thus, there is space for extensive interpretation of the scope of dignity. In consequence, the right contained in Article 1 can be used in combination with other rights, which will be further assessed to argue that a specific national measure, in implementation of EU law, violates the rights contained in the Charter, or as an argument to request a clarification of the content of ‘statelessness’ or ‘stateless person’ within secondary EU law.

7.2.2. Further Combination of Relevant Rights

As has been mentioned already, case law is replete with analysis based on various combination of rights. Taking into consideration that stateless persons in the Netherlands are facing major practical problems in their relations with the administering governmental bodies, the right to good administration contained in Article 41 of the Charter deserves consideration. In this regard, the scope of application of the right is quite limited as it speaks to the individual’s ‘right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.’ However, and despite the wording of Article 41 of the Charter, which suggests that the Article applies only to EU bodies and institutions, the Court has interpreted the scope of its provisions more broadly, meaning that Article 41 also applies to the administrations of Member States when they are implementing EU law.¹⁰⁹ That said, it should also be noted Article 41 does not bind Member States in the sense of giving rise to a right for individuals to good administration. The jurisprudential treatment of the provision seems to present it rather as a general principle of EU law. It remains unclear when exactly the article

¹⁰⁸ Jones (n 166) 299 ; see also Peers et al (n 151) 15-25.

¹⁰⁹ Case C-604/12 *H. N. v Minister for Justice, Equality and Law Reform and Others* [2014] [published electronically] paras. 49-51; cf Case C-75/08 *The Queen, on the application of Christopher Mellor v Secretary of State for Communities and Local Government* [2009] ECR I-03799.

would apply; it seems that the default criteria would be the ones set for Article 51, at least vis-à-vis its application to national measures. As with human dignity, the right to good administration is a very broad concept, which can be applied to multiple aspects of the relationship between the applicant and the national administrative bodies.¹¹⁰

The key then is to define what exactly is meant by ‘good administration’ in the sense of the Charter. First, Article 41 defines good administration as the right to have ‘affairs handled impartially, fairly and within reasonable time.’ Obviously, the wording is quite unprecise and it seems that other administrative principles fall under the same provision.¹¹¹ Second, it should be noted that the list of rights directly mentioned in Article 41(2) is not exhaustive. Consequently, the right to a good administration is an umbrella provision and it can be interpreted extensively.¹¹² Indeed, it has been argued that the objective of adding Article 41 to the Charter was to codify some of the most important principles of good administration and to give them the status of a fundamental right.¹¹³

Accordingly, if a sufficient connection between administrative Dutch procedures with regard to stateless persons and EU law can be found, it could be argued that such practice, to the extent that it is not fair or oversteps ‘reasonable time’ is in contravention of ‘good administration’ as enshrined in Article 41. For example arguments revolving on the disproportional burden of proof of statelessness, which is shifted completely on the applicant, the lack of tailored guidance on registration within the Municipalities, the discretion of Municipality officers to register an applicant as stateless or as ‘nationality unknown’ could be constructed. Furthermore, it could be argued that such administrative practice also interferes with the human dignity of stateless persons since the lack of appropriate administrative procedure prevents them from access to rights protected under national, European and international law. It creates a legal limbo, within which the dignity of a person is undermined by uncertainty and the impossibility to integrate, develop a new life or receive any sort of assistance.

In addition, Article 21 of the Charter on non-discrimination could be employed to allege discrimination in administrative practices caused by the existence of two different categories of stateless persons in the Netherlands, namely those recognized as stateless properly so called and entitled to specific rights, and the category of stateless people who are granted a ‘no-fault’ residence permit as default status that is not stateless-tailored.

¹¹⁰ H Hofmann and B Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ (2013) 8 *European Constitutional Law Review* 73-101.

¹¹¹ Ibid 84.

¹¹² Ibid 84-85.

¹¹³ D Galetta et al, *The General Principles of EU Administrative Procedural Law* (2015), available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA\(2015\)519224_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA(2015)519224_EN.pdf), at 11.

Moreover, the right to an effective remedy in Article 47 of the Charter is closely related to human dignity and good administration, particularly in cases of expulsion or detention.¹¹⁴ Article 47 of the Charter states: ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’ Essentially, Article 47 restates and codifies the general principle of effective judicial protection, which constitutes both a principle of EU law and a fundamental right.¹¹⁵ Article 47 may be relied upon by individuals alleging a violation of any rights conferred upon them by EU law, i.e. rights besides those recognized by the Charter. It is generally assumed that the term ‘rights and freedoms’ do not have a set, specific meaning.¹¹⁶ As to the scope of Article 47, it is considered an ‘umbrella provision’ comprising ‘various elements, which themselves constitute rights or principles of their own; this is in particular true for the right of access to a tribunal, the principle of equality of arms and the rights of the defence.’¹¹⁷

As stated above, statelessness-related case-law touching upon the application of the Charter of Fundamental Rights is lacking. One could perhaps put forward the argument that the situation of stateless persons may be similar to those of irregular migrants. Thus, *de facto* stateless persons without documentation, who are thus unable to prove their statelessness and cannot regularize their legal status, may be treated in the same manner as irregular migrants by the authorities and can face detention, expulsion and incarceration.

The Charter of Fundamental Rights has been instrumental in cases involving the procedural standards on reviewing and extending detention. Thus, in *Mahdi* the CJEU was called upon to interpret Articles 15 (3) and (6) of the Directive 2008/115, namely the Return Directive. Article 15(3) of the Directive provides that detention of a third-country national must, in every case, be reviewed at reasonable intervals of time, either on application of the person concerned or ex officio. In the case of prolonged detention, reviews must be subject to the supervision of a judicial authority. Reading the provision in question in light of Articles 6 and 47 of the Charter, the CJEU held that it must be interpreted as ‘meaning that any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision.’¹¹⁸

¹¹⁴ Joined Cases C411/10 and C493/10 *N.S. (C-411/10) v. Secretary of State for the Home Department M.E. et al (C-493/10) v. Refugee applications Commissioner et al.* [2011] ECR I-13905.

¹¹⁵ See Case T-111/96 *ITT Promedia v. Commission* [1998] ECR I-2937, para. 60.

¹¹⁶ Peers et al (n 151) 1199.

¹¹⁷ S Prechal, ‘The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?’ in C Paulussen et al (eds.), *Fundamental Rights in International and European Law* (2016) 149.

¹¹⁸ C-146/14, *Bashir Mohamed Ali Mahdi* [2014] [published electronically] para. 52.

8. GENERAL CONCLUSIONS

This report was commissioned to the Amsterdam International Law Clinic by the law firm *Prakken d'Oliveira Human Rights Lawyers*, and it is sponsored by The Euro-Mediterranean Human Rights Monitor. It's main objective has been to cast some light on various litigation strategies that could be employed with a view to triggering a preliminary ruling by the CJEU on statelessness, and the definition and applicability of the concept 'stateless persons' in EU Law.

First and foremost, arriving at the end result of a preliminary ruling is of key significance in light of the potential effect of such a ruling and the broad scope of the CJEU's capacity to interpret EU law also in light of existing international law. In this sense, a preliminary ruling may additionally cast additional light on the normative content of the 1954 Statelessness Convention itself.

Several arguments have been considered as the basis for a preliminary question. Those are: lack of clarity in the manner in which EU primary and secondary law addresses the concept of 'stateless persons;' the possibility for the concept of 'stateless persons' to be interpreted by the Court of Justice as an autonomous concept of EU law; and finally, the possibility to review the conformity of national measures implementing (and thus having a strong connection to) EU law with the Charter on Fundamental Rights of the European Union.

The strongest argument in respect of moving towards a preliminary ruling would be the lack of clarity and inconsistent use of the term 'stateless persons' across EU law. Such lack of clarity can be traced back to two provisions of the TFEU, namely Articles 67(2) and 78. On the one hand, Article 67(2) of the TFEU assimilates third country nationals and stateless persons from a legal point of view. On the other hand, Article 78 of the TFEU highlights the role of international agreements in the common policy on asylum and subsidiary protection. In this vein, the two provisions exemplify two of the key drivers behind the lack of clarity in EU law on statelessness, namely *assimilation* and *referencing to international law*.

These two drivers operate within the context of EU secondary law, and it is in their light that relevant Directives, (Qualification Directive (2004/83) Recast Qualification Directive (2011/95), Recast Reception Directive (2013/33), the Family Reunification Directive (2003/ 86), and Long-term Residents Directive (2003/ 109)) and Regulations (Coordination of Social Security Regulation (EC) No. 883/2004, Visa Regulation (EC) No. 1932/2006, and the Dublin Regulation (EU) No 604/2013 (recast)) are examined. The overall conclusion is that the way in which the concept of the 'stateless person' is treated in EU law creates a normative ambiguity that impacts the rights of said persons. Indeed, it is difficult to determine whether stateless persons are covered by some

of the Directives and Regulations, or exactly what regime of protection they are entitled to.

The comparison of Directives on the use of term ‘stateless persons’ also reveals that referencing to international law rules is inchoate and inconsistent, and that the assimilation between the terms ‘third-country nationals’ and ‘stateless persons’ underlines such lack of clarity. Thus, a clarification of the concept ‘stateless persons’ is necessary. Besides, the Regulations analysed conjure an image of variance vis-à-vis the definition of ‘stateless persons’. The analysis shows that despite the fact that two of the Regulations are making a reference to the 1954 Statelessness Convention, the quality of such a reference cannot be considered as sufficient to provide any clarity on the concept of statelessness. The constantly divergent use of the term of a stateless person makes it impossible to identify the scope of application for a stateless person under EU secondary law and calls for a substantive clarification.

A second avenue towards a preliminary ruling is the argument that the term ‘stateless persons’ has to be interpreted autonomously by the Court of Justice. Indeed, the relevant EU secondary law does not provide any guidance as to how the term should be interpreted, whilst the Directives and Regulations assessed do not defer to national legislation. What is more, an argument that the term should be interpreted autonomously, and independently of the 1954 Statelessness Convention, may dovetail with the recent practice of the Court of Justice to ‘encapsulate’ and autonomously interpret concepts in the Qualification Directive despite the fact that international law provides for their definition.

Finally, the report assesses the relevance and significance of the EU Charter on Fundamental Rights in an effort towards a preliminary ruling. It is suggested that a preliminary question could be raised on the violation of certain rights contained in the Charter by national measures on statelessness to the extent that they are connected to EU law. In particular, Articles 1, 41 and 47 of the Charter are put forth as viable legal grounds for the preliminary question. However, the analysis of the Charter also suggests that it has a limited scope of application as the Member States are only obliged to observe the Charter when they act within the scope of European Union Law. In the *Torralbo Marcos* decision, the CJEU made it clear that any Charter provisions relied upon cannot, by themselves, form the basis for its jurisdiction where a legal situation does not fall within the scope of Union law.¹¹⁹ Considering that there is no specific EU law on statelessness and the lack of determination procedure in Dutch law, finding the connection link that would trigger the application of the Charter (Article 51) may amount to a cumbersome task. However, many of the Regulations and Directives surveyed, which touch upon

¹¹⁹ Case C-265/13 *Emiliano Torralbo Marcos v Korota SA and Fondo de Garantía Salarial* [2014] [published electronically] para. 30.



migration and asylum, are fully transposed by the Netherlands and may also affect the legal status of stateless persons. Therefore, a link between the national laws transposing those regulations and the rights contained in the Charter could be potentially established.