FACULTY OF LAW
Lund University

Matilda Månsson

Reduction of Statelessness and Access to Nationality

– The need for EU-regulation –

The showcase of stateless Roma in Slovenia

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws programme
30 higher education credits

Supervisor: Ida Elisabeth Koch

Semester of Graduation: VT13

Contents

Abstract

The right to nationality codified in article 15 of the Universal Declaration of Human Rights is understood as the *right to have rights.* By possessing nationality, access to fundamental human rights is ensured. A person who is not considered a national of any state according to its laws is *de jure* stateless. *De jure* stateless persons are consequently impeded to enjoy such human rights.

As of today there are several international instruments addressing the issue of statelessness, of which the most important ones are the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the 1997 European Convention on Nationality and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession. According to these, states are urged to provide '*facilitated access to nationality*' as this the only '*durable solution*' to statelessness. This permanent solution is achieved through recognition of nationality or naturalization.

Despite these instruments, states apply nationality laws rendering individuals stateless. For Roma in Central and Eastern Europe this is especially evident. Several reports from human and Roma rights organizations and the CoE Commissioner for Human Rights express great concern for the situation and the number of stateless Roma living in CEE.
Slovenia is just one example where Roma face statelessness as a result of state succession, discriminatory nationality laws and administrative practices, especially concerning naturalization requirements.

This indicates that there are situations where international instruments simply are not enough, mainly due to the weak support for their content. Neither on EU-level can access to nationality be ensured as the issue of *in situ* statelessness is not addressed at all in EU-law. This lacuna of EU-law is a result of lack of legislative competence on the matter and the doctrine of state sovereignty. As such, this thesis regrets that the EU does not have the competence to adopt such legislation, as an EU-instrument would be an alternative and compliment to already existing instruments, in order to more efficiently address reduction of statelessness and access to nationality in an EU-context.

In any case the fact that there are legal obstacles that prevent EU from adopting legislation on the issue does not dismiss the fact that such legal action is needed. If the EU had the competence to regulate, restrictions and standards on naturalization requirements could be imposed which in extension would create facilitated access to nationality through naturalization and consequently reduce statelessness in accordance with principles of international human rights law.

Sammanfattning

Rätten till medborgarskap kodifierad i artikel 15 i FN:s declaration om de mänskliga rättigheterna tolkas som *rätten att ha rättigheter*. Genom medborgarskap säkras tillgång till grundläggande mänskliga rättigheter. Personer som inte betraktas som medborgare i någon stat enligt dess lagar är *de jure* statslösa. Åtnjutandet av mänskliga rättigheter för *de jure* statslösa är följaktligen begränsad.

För närvarande finns det ett flertal internationella instrument som reglerar statslöshet. Några av de mest betydande är 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the 1997 European Convention on Nationality och the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession. I dessa uppmanas stater att ”underlätta tillgång till medborgarskap" eftersom detta är den enda "hållbara lösningen” av statslöshet. Denna permanenta lösning kan uppnås genom erkännande av medborgarskap (vid födsel) eller naturalisation (ansökan om medborgarskap).

Trots ovannämnda instrument, finns det states som tillämpar medborgarskapslagar som försätter individer i statslöshet. För romer i Central-och Östeuropa är detta särskilt tydligt. Flera rapporter från människorätts- och romarättsorganisationer och Europarådets kommissionär för mänskliga rättigheter uttrycker stor oro för situationen och antalet statslösa romer i denna region, där Slovenien utgör ett exempel där många romer är statslösa till följd av secession och ny statsbildning, diskriminerande medborgarskapslagar och administrativa förfaranden, särskilt gällande villkor för naturalisation.

Detta indikerar att det finns situationer där internationella instrument helt enkelt inte är tillräckliga, främst på grund av det svaga stödet för deras innehåll. Inte heller på EU-nivå kan medborgarskap garanteras eftersom frågan om *in situ* statslöshet inte behandlas alls i EU-lagstiftning. Anledningen till detta är bland annat EU’s bristande lagstiftningskompetens i frågan samt principen om staters suveränitet. Denna uppsats beklagar avsaknaden av sådan kompetens, då EU-lagstiftning vore ett alternativ och komplement till redan befintliga instrument, för att mer effektivt begränsa statslöshet samt försäkra rätten till medborgarskap inom EU.

Det faktum att det finns rättsliga omständigheter som hindrar EU från att anta lagstiftning i frågan, avfärdar dock inte sakförhållandet att sådana rättsliga åtgärder behöver vidtas. Genom EU-lagstiftning kan restriktioner och normer för naturalisationsvillkor åläggas medlemsstaterna vilket i förlängningen skulle trygga tillträdde till medborgarskap genom naturalisation och följaktligen minska förekomsten av statslöshet i enlighet med internationella principer om mänskliga rättigheter.

Abbreviations

CEE	Central and Eastern Europe
CoE	Council of Europe
ERRC	European Roma Rights Center
ECHR	European Convention on the Protection of Fundamental Human Rights and Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EUDO	European Union Democracy Observatory
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IGOs	Intergovernmental Organizations
ILC	International Law Commission
NGO	Non-governmental Organization
OSCE	Organization for Security and Co-operation in Europe
TFEU	Treaty on the Functioning of the European Union
UDHR	United Nations Declaration on Human Rights
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

Most people do not reflect over nationality as it is a legal and practical fact we take for granted. For approximately 12 million people worldwide, this is not the case. They are stateless. According to the international definition a stateless person is someone who is not considered a national by any state, either by the law of that state (*de jure* stateless) or due to inability to prove identity (*de facto* stateless). Being stateless thus brings about severe hardships as it prevents full access to fundamental human rights and freedoms. But most importantly, the concept of statelessness is at odds with the right to nationality.

Currently the Council of Europe identifies the number of stateless persons in Europe to be 680,000 of which the Roma constitutes one of the largest groups. For a great part of these Roma, their status as stateless is adding to an already alarming situation of discrimination, marginalization and social exclusion.

As of today there are several international and regional instruments regulating reduction of statelessness and the access to nationality. Unfortunately the general support and recognition of these remains relatively weak. Many states, such as Slovenia did not accede to them, which limit their influence on states' (Slovenian) nationality laws, to the detriment of its stateless Roma population. The way stateless Roma are denied the right to nationality in Slovenia and other EU member states raises the question of the need for a common EU-regulation to more efficiently reduce statelessness and ensure access to nationality.

1.1 Aim and Scope

In the light of this background, this thesis sets out to address and analyze the need of complimentary binding EU-regulation (such as a directive) on the reduction of statelessness and facilitated access to nationality.

A number of Roma in Slovenia and Central and Eastern Europe (CEE) are denied access to nationality due to insufficient naturalization remedies and strict/discriminatory nationality laws and administrative practices in their countries of residence, which deprives them of the right to nationality as laid out in international human rights law. Therefore, they will be used as an example to concretize the need for regional legislation.

The aim is to answer the following question by using the example of stateless Roma in Slovenia and by reviewing the notions of **statelessness** (*in situ, de jure* and *de facto*), **nationality** (granted on *jus soli* or *jus sanguinis*) and **naturalization** in international, EU and national legislation:

Why is there a need of EU-regulation on the reduction of statelessness and access to nationality when there already are international and regional instruments on these issues?
In order to answer this question, the content of international and EU-law and Roma's access to nationality in Slovenia must be reviewed:

- What are international standards on reduction of statelessness and the right to/access to nationality?
- To what extent is reduction of statelessness and right to nationality regulated at the EU level? Are there obstacles that prevent EU to legislate?
- In what way is Roma's access to nationality restricted in Slovenia and CEE? (Insufficient naturalization remedies, discriminatory nationality laws, historical events)

1.2 Method and Material

The method used throughout the writing of this thesis consists of traditional legal method where legal problems are studied and analyzed on the basis of the notions of *lex lata* and *lex ferenda.* With the help of various sources; (such as legislation, case law, legal doctrine and academic writing) the content of current legislation concerning reduction of statelessness and the right to nationality with special regard to the situation and occurrence of statelessness among Roma could be established and examined. Altogether these parts have formed the basis for the argumentation on the need for development of *lex ferenda.*

In addition various legal principles and doctrines such as proportionality and anti-discrimination principles and the doctrine of state sovereignty and genuine and effective link have served as tools to interpret the material at hand. As the legal analysis has been carried out on three different levels; international, regional and national, a comparative method has been applied to distinguish similarities and differences in legal content.

Furthermore, it should be noted that the writing of this thesis was entered with a certain extent of prior knowledge on the topic, and a predetermined argument – namely that there is a need for EU-regulation. As such this hypothesis has been the starting point of the thesis and formed the *modus operandi* of the work process all the way to the analysis.

The selections of sources and examples to illustrate the current situation have been made with regard to importance, range, notion and attention brought within the field of the topic at hand. It is important to emphasize that a large part of the literature of the area in question are subject to an ambition towards international (and regional) change; the authors share a similar purpose of eliminating statelessness, raising awareness and contribute to stateless persons aspiration for acquisition of nationality. Consequently, some of the sources utilized may lack a certain amount of academic objectivity. However, this has been balanced by the diversity of

sources from which the literature originates; legal sources; international treaties and conventions, regional EU-instruments and national legislation, reports and publications from IGOs; UN, EU, CoE and various writings from legal scholars and human rights organizations.

Previous works on the topic is scarce. Unlike closely related areas of international human rights law, such as refugee law, reduction of statelessness remains an underdeveloped area of legal research and literature. What is usually written on the topic of statelessness is the determination of status, protection and treatment of stateless persons, rather than solutions to reduce it. There is however a large number of reports and articles that addresses the problem of statelessness and its causes. These can for instance be found in database on Protection against Statelessness and Comparative Citizenship Analyses, provided by EUDO Observatory on Citizenship in cooperation with the United Nations High Commissioner for Refugees and in the UNHCR's useful database Refworld.

Naturally international, regional and national legal instruments compose the base for this thesis and its conclusions. The main conventions used are the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness* and the *European Convention on Nationality from 1997*. On national level the *Slovenian Citizenship Act* is the main legal source.

In addition reports and publications dedicated to nationality and statelessness in international law and developments at regional and national levels, from international institutions especially the UNHCR and the Council of Europe working in the field have served as important sources for this thesis.

One of the leading authors providing comprehensive overview of the concepts of nationality and statelessness, as well as a presentation of the challenges of dealing with these issues through international law is Paul Weis. Other significant contributions on the mechanisms concerning nationality, which reflect upon contemporary developments in international law, including the influence of human rights law on this field are written by Laura van Waas and David Weissbrodt. On the specific topic of reduction of statelessness through naturalization remedies in a European context Eva Mrekajova's *Naturalization of Stateless Persons: Solution of Statelessness?* (Tillburg, 2012) is a valuable source.

When writing on human rights issues it is inevitable to take reports, recommendation and country analyzes from NGOs and human rights organizations into consideration. With Central and Eastern European focus Gabor Gyulai of the Hungarian Helsinki Committee is a frequent name in the literature in this field along with various researchers of the European Roma Rights Center. Their contributions provide important background to the understanding of Roma statelessness in the region on an overarching European level as well as state level.

1.3 Delimitations

Dealing with such broad and complex notions; statelessness and nationality on three levels; international, regional (EU) and domestic (Slovenia) requires clearly articulated objectives and definitions. In this section clarifications and delimitations are described briefly. Detailed definitions of the various concepts follow in section 2.1

Stateless Refugees and *in situ* Stateless

There are two groups of stateless persons: *stateless refugees* and *non-refugee stateless*. The former category refers to stateless persons who are migrants or of migratory background (i.e. refugees) and thus protected by the *1951 Convention relating to the Status of Refugees*. In order to fall under this category and qualify for the protection of the mentioned convention the person must owe to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and be outside his or her country of origin.[1] In comparison to stateless refugees the latter category – also known as *in situ* (on site) stateless[2] – refers to persons who are stateless in their 'own country' in which they reside and have significant and stable ties with (through birth, long-term residence, etc.). Not qualifying for refugee status, *in situ* stateless persons rely solely on the protection laid out in the *1954 UN Convention relating to the Status of Stateless Persons* and the *1961 UN Convention on the Reduction of Statelessness*.[3]

De jure and *de facto* Stateless

As will be seen in the following section, stateless persons can be further divided into *de jure* (legal)[4] and *de facto* (effective)[5] stateless. Given the range and limitations for this essay only *de jure*, non-refugee (i.e. *in situ)* stateless persons are considered.

Reduction of Statelessness through Naturalization

The concepts of statelessness and nationality are inseparable as they simply are two sides of the same problem; someone who does not possess a nationality is stateless and statelessness is eliminated through acquisition of

[1] Article 1 of the Convention: "The term "refugee" shall apply to any person who: owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; *or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.* (authors emphasis)"

[2] Gyulai, G. 'Statelessness in the EU Framework for International Protection', *European Journal of Migration and Law*, Vol. 14, 2012, p. 279.

[3] Compared to stateless refugees who qualify as both "refugees" and "stateless" and thus enjoys the protection of all three instruments.

[4] Persons who are stateless by the meaning of law and are not legally considered a national of any state. See further explanation in section 2.1

[5] Persons who legally have a nationality but are unable to prove it or to enjoy it effectively See further explanation in section 2.1

nationality. In this thesis reduction of statelessness through facilitated access to nationality (i.e. naturalization) is the emphasis, although other remedies solving statelessness are mentioned as well.

Nationality and Citizenship

Throughout the thesis the term *nationality* is used unless quoting legislation using the term *citizenship.* In legal doctrine and academic writing these notions usually refers to different contexts, where the former pertains to the external relation between the state and the individual (e.g. diplomatic protection and state liability) and the latter to the internal relation (rights and obligations) between the state and the individual. To avoid confusion the two notions are henceforth considered synonymous.

Roma

The Roma are one of the largest ethnic groups in Europe afflicted by statelessness. Being an already vulnerable and marginalized ethnic minority, statelessness affects the Roma drastically. With this background, the population of stateless Roma serves as an indicator of the sufficiency of current international, regional and national legislation on the reduction of statelessness and access to nationality.

CEE and Slovenia

Although the essay sets out to analyze the need of a framework applying to all EU member states, Central and Eastern Europe is the focus area as this region accommodates the majority of Europe's stateless Roma.[6] Many of the countries in this region (e.g., Macedonia, Serbia, and Bosnia Herzegovina) are not yet EU member states and would thus not be affected by an EU-framework. However it can be noted that some of these states have initiated accession procedures, which means that a future framework would also apply to these states. Until then this essay is using Slovenia as a point of reference when studying Roma's access to nationality. Slovenia is chosen for several reasons. In Slovenia there are more than 4,000 stateless persons, including many Roma (one of the largest ethnic minorities in the country). It has a fairly dark history of preventing access to nationality as a successor state of the former Yugoslavia – a practice that despite EU membership and ECtHR rulings still today perpetuates statelessness among many of its residents. Furthermore, Slovenia did not accede to several important international conventions, which makes it an interesting state to study from the perspective of the adoption of EU-regulation. N.B. that the focus lies on the need of such regulation and not on its potential content.

[6] Warnke, A. M. 'Vagabonds, Tinkers, and Travelers: Statelessness among the East European Roma', *Indiana Journal of Global Legal Studies*, Vol.7 Issue. 1, 1999, p. 343.

1.4 Outline

The initial section (2) starts off by defining the key notions of nationality and statelessness and placing them in context. Throughout this section the importance of nationality and sources and solutions to statelessness are explained. The following sections (3 and 4) set the legal framework of the thesis by outlining the content of international and EU-law, including EU's legislative competence in matters of nationality and reduction of statelessness. To create an understanding as to why there is a need for additional legislation on the topic, the subsequent section (5) highlights the historical origins and current situation of stateless Roma and how statelessness is retained by Slovenian nationality law and its naturalization requirements. Eventually leading up to the final section (6) where conclusions and argumentation for EU-regulation are presented.

2 Statelessness and Nationality

"[…] stateless people live in a Kafkaesque netherworld where they do not officially exist and therefore have virtually no rights at all."[7]

As mentioned in the introduction the problem of statelessness concerns more than 600.000 people in Europe. This section provides an introduction to the understanding of the complex notions of statelessness and nationality. It defines the terms of *de jure* and *de facto* statelessness and highlights what reality persons without nationality live in, the reasons behind statelessness, how it occurs and how it could be solved.

2.1 Definitions

The discussion on the different forms of statelessness and what they comprise is a long and intricate one, too complex to cover in a comprehensive way in this thesis. For the understanding of the topic it is however necessary to know the basic terminology referred to in doctrine, legal sources and the following text. Especially since the main international conventions on statelessness only apply to one category of statelessness, viz., *de jure* statelessness.

The two main definitions as already mentioned are *de jure* and *de facto* statelessness. In Prato, Italy in May 2010 the United Nations High Commissioner for Refugees (UNHCR) organized an Expert Meeting to discuss the concept of statelessness under international law. The discussions were based on two background papers: *"The definition of 'Stateless Person' in the 1954 Convention relating to the Status of Stateless Persons: Article 1(1) – The Inclusion Clause"* and *"UNHCR and De Facto Statelessness"*. As a result of this meeting the content and scope of application of the respective definition was concluded.

As of today, the internationally recognized definition of a *de jure* stateless person is *a person who is not considered a national by any state under the operation of its law*[8], thus addressing *de jure* stateless persons as not legally belonging to any state according to its nationality laws. A *de facto* stateless person is defined in relation to this meaning as someone who in fact is unable to enjoy the rights attached to their nationality or who is unable to prove his/her identity and consequently nationality. [9] In other words, *de facto* stateless persons have a legal nationality – but an ineffective one – which results in their protection and rights tied to nationality are neither

[7] UNHCR, *"Protecting Refugees and the Role of the UNHCR 2007-2008"*, September 2007, p. 11.
[8] Convention Relating to the Status of Stateless Persons, 1954, Article 1 (1).
[9] UNHCR, Massey, H. 'UNHCR and De Facto Statelessness', *Legal and Protection Policy Research Series*, April 2010, p. ii.

upheld nor fulfilled; protection, assistance, right to vote, access to health care, education etc. Someone who is *de facto* stateless has as such a legal claim as a national of that state but cannot prove or verify it.[10] Traditionally the term has been used for persons being outside their state of nationality and lacking in that state's (diplomatic) protection. The meaning of the notion today however includes persons within the territory i.e. *in situ* stateless persons.[11]

The most clear and comprehensive definition of *de facto* stateless is made by David Weissbrodt and Clay Collins:

> Persons who are de facto stateless often have a nationality according to the law, but this nationality is not effective or they cannot prove or verify their nationality. De facto statelessness can occur when governments withhold the usual benefits of citizenship, such as protection, and assistance, or when persons relinquish the services, benefits, and protection of their country. Put another way, persons who are de facto stateless might have legal claim to the benefits of nationality but are not, for a variety of reasons, able to enjoy these benefits. They are, effectively, without a nationality.[12]

According to Weissbrodt and Collins most persons considered *de facto* stateless are victims of state repression. Whereas *de jure* statelessness simply is the result from the intentional or unintentional oversight of lawmakers and discriminatory nationality laws, leaving gaps through which these persons fall.[13]

Considering these two categories of statelessness it is clear that *de facto* statelessness refers to the access to rights linked to nationality (e.g. access to health care and education) whereas *de jure* statelessness concerns the right to nationality and *the right to have rights*, as is the focus of the forthcoming text.[14]

Finally, the reader should keep in mind to separate *in situ* stateless persons[15] from stateless refugees and that the terms *nationality* and *citizenship* are used interchangeably.

[10] Massey, H. iii and p. 26 *ff*.
[11] Massey, H. ii.
[12] Weissbrodt, D. & Collins, C; 'The Human Rights of Stateless Persons', *Human Rights Quarterly* Vol. 28, 2006, p. 252.
[13] Weissbrodt, D. & Collins, C; p. 263.
[14] Massey, H. p. 40.
[15] As described earlier as persons who are stateless in their own country of residence.

2.2 The Importance of Nationality

"Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals…"[16]

Nationality is a complex notion with individual significance. As a main understanding nationality establishes who is included or excluded from the political, legal and social community in a particular state. The function of nationality can be viewed from several perspectives. By studying these, the significance of each and every person possessing a nationality becomes evident.

2.2.1 Nationality and Human Rights

As a legal function, nationality creates a bond between a state and an individual that confers both the state's protection of the individual inside and outside of its borders and the individual's obligations towards the state. As such nationality comes to include as well rights and duties.[17] When it comes to the relation between nationality and (human) rights, the German-American political theorist and philosopher Hanna Arendt provided valuable writings on the topic. According to Arendt human rights are established by man (society) and as such being human is enough to be entitled these rights. If there are rights and rights bearers, then there must also be a carrier of the duty to fulfill these rights. However in the aftermath of the Second World War and the Holocaust Arendt realized that being human was simply not enough to ensure this *'right to have rights'*, as a specific duty bearer was not appointed. She concluded that some kind of territorial or political belonging or membership was required and thus she established nationality as the function to make sovereign states the duty bearers.[18]

To summarize Arendt's theory nationality results in the ability of an individual to claim full civil, political, economic and social human rights towards a state, in comparison to a stateless person who, according to Arendt has unwillingly lost the party (i.e. state) towards which rights are to be claimed. She says:

> We became aware of the existence of a right to have rights…and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights.[19]

---

[16] Nottebohm Case, *Liechtenstein v. Guatemala*, p. 20.
[17] For example the duty to follow the laws of the state and the right to diplomatic protection, See Weis, P. "*Nationality and Statelessness in International Law*", Kluwer Academic, Dordrecht, 1979, p. 29*ff*.
[18] Arendt, H, "*The origins of totalitarianism*", Meridian Books, New York, 1958, p. 290*ff*.
[19] Arendt, H. 296*f*.

So even though nationality is not a prerequisite to enjoy fundamental human rights and freedoms it still dictates and prove the legal relationship between rights holder and duty bearer (i.e. the national and the state). The theory of Arendt pinpoints this by stating that statelessness and lack of nationality jeopardizes the access to fundamental human rights and protection when there no longer exists a duty bearer i.e. state to ensure them. [20]

2.2.2 Nationality in Everyday Life

What specific rights a national is entitled to (in addition to the right to have rights) varies from state to state. Minimum rights – such as access to education and health care – are set out in rights declarations but the scope and application is decided upon by each state. In many states rights are granted beyond the minimum standards, like *free* access to education or health care.

For many people Article 25 of the *International Covenant on Civil and Political Rights* (ICCPR) constitutes the everyday life function of nationality:

Article 25

Every *citizen* (authors emphasis) shall have the right and the opportunity, without any of the distinctions mentioned in article 2 (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors?

(c) To have access, on general terms of equality, to public service in his country.[21]

2.2.3 Nationality as a Social Function

Besides the outlined (negative) practical and legal effects lack of nationality brings about, there are mental/psychological consequences as well; feeling of alienation, marginalization and social exclusion. Nationality is a '*powerful instrument of social closure and stands at the very core of*

[20] Weissbrot, D. and Collins, C. p. 248*ff*.

[21] This entails equal treatment between stateless and nationals according to Article 26 of the ICCPR: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, .colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

national identity.'[22] As such it also functions as a determination of status.[23] According to Arendt, the loss of nationality constitutes the loss of human status and expulsion from humanity.[24]

2.2.4 Nationality and EU-citizenship

In the EU-context possession of nationality is yet more important as it conditions EU-citizenship. Only nationals of EU member states can obtain EU-citizenship and acquisition of such status is not based on a common EU-policy, but dependent on the nationality laws of the member states.[25] The EU-citizenship confers rights such as freedom of movement, residence and employment across the EU and the right to vote in European elections.[26] *De jure* stateless persons in the EU not possessing nationality of their state of residence are thus not only omitted rights and benefits every individual is entitled to, but also the 'regional' rights linked to EU-citizenship.

The possession of a legal identity in terms of nationality is not a guarantee for a good life or that rights are respected and protected, but probably more likely. It is however clear that the absence of it evokes severe hardships, especially in everyday situations in the interaction between the individual and the state. For *de jure* stateless persons, the lack of legal status as a national results in lack of administrative existence, incapacity to make claims towards the state which often results in inaccessibility to social and public services and fundamental human rights.[27]

2.3 Sources of Statelessness

Statelessness occurs when a person is denied or deprived (for legitimate or illegitimate reasons) of its nationality.[28] The reasons behind such state actions derive from both internal and external circumstances; discrimination, state succession, conflicts of law to mention a few.[29]

In a report published by the UNHCR causes to statelessness are listed:

---

[22] Levanon, A. & Lewin-Epstein, N. 'Grounds for citizenship: Public attitudes in comparative perspective', *Social Science Research*, 2010, p. 419.
[23] Kivisto, P & Faist, T, "*Citizenship: discourse, theory, and transnational prospects"*, 2007, p. 13 *f.*
[24] Arendt, H. p. 297.
[25] Article 20 (1) of the TFEU reads: Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
[26] Article 21 of the TFEU.
[27] Babha, J. eds. "*Children without a State: a Global Human Rights Challenge*", Massachusetts Institute of Technology, 2011, p. 1.
[28] Blitz, B. K. & Lynch, M. eds. *"Statelessness and the Benefits of Citizenship: A Comparative Study"*, Geneva Academy of International Humanitarian Law and Human Rights, 2009, p. 8 *ff*.
[29] Weissbrot, D. & Collins, C. p. 254 and
UNHCR website on statelessness <http://www.unhcr.org/pages/49c3646c155.html>

- Transfer of territory resulting from state dissolution, succession or breakup is one of the most well-known causes of statelessness.
- Marriage laws and dependent nationality (see note 37)
- Administrative practices and discrimination – where state officials may remove unwanted nationals from the national registrar or otherwise deny nationality.
- Laws on birth registration and the principle of *jus sanguinis* – if nationality is granted solely on the basis of decent children born to stateless parents cannot acquire nationality, which results in inheritance of statelessness for generations.
- Conflict of law – if an individual is born in a state which only recognizes nationality based on descent and heritage (*jus sanguinis*) to parents whose nationality is with a different state that only grants nationality by birth (*jus soli*) this will render that individual stateless since he/she does not qualify for nationality in either state.
- Denationalization – when the state revokes nationality that was acquired through fraud or false information.
- Renunciation of nationality – where a national renounces nationality without obtaining nationality of another state.
- Automatic loss of nationality by operation of law *ex lege* – can occur when an individual loses connection with the state, and no action is taken to maintain nationality; it is revoked.
- Change of nationality laws – where persons who were considered nationals according to old nationality laws might be rendered stateless by new laws.[30]

For this essay as will be seen in the example of Roma, transfer of territory along with, (discriminatory) nationality laws and administrative practices are the most common reasons for statelessness in the CEE region. In the history of the region there have been several startling cases in the early 1990's where many Roma lost their nationality due to what the state referred to as automatic loss of nationality by operation of law, but that in fact was discriminatory practices and laws applied by state officials.[31]

2.4 Solutions to Statelessness

"For non-refugee stateless persons, the only long-term solution is obtaining a new nationality"[32]

Once the origin of statelessness is known it is easier to find solutions. In legal doctrine, '*facilitated access to nationality*' is the only '*durable*

[30] UNHCR, *"Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness"*, 1999, p. 3.
[31] See section 5.
[32] Guylai, G. eds. *"Forgotten Without Reason – Protection of Non-Refugee Stateless Persons in Central Europe"*, Hungarian Helsinki Committee, 2007, p. 29.

solution' to statelessness. This permanent solution is achieved through recognition of nationality (when a person is born) or naturalization (acquisition of nationality by application) by the help of various remedies.

2.4.1 Remedies for Solving Statelessness[33]

The following remedies describe measures states could carry out in order to prevent, reduce and eliminate statelessness. The remedies are mainly developed by human rights defenders and NGOs and are used in their assessments of states. They are also referred to in their recommendations towards states where state actions to reduce statelessness are called for.[34] Not all remedies are reflected in international law and thus not legally binding on states. However some examples can be found *inter alia* in the *1989 Convention on the Rights of the Child* and the *1954 and 1961 Statelessness Conventions*.[35]

Preemptive remedies

Measures of preemptive character prevent statelessness before it occurs. Preemptive remedies are usually linked to laws and regulations on birth registration and certificates. A recommendation of this character towards a state could be to make sure all children born within the state are registered upon birth and provided with a birth certificate. One example is article 7 of the *1989 Convention on the Rights of the Child* according to which states are obliged to register each child immediately after birth and provide the right to acquire a nationality. The obligation to grant nationality to a child at birth is also found in article 10 of the *2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession*. These and similar measures are necessary for the complete eradication of statelessness.

Minimizing remedies

As understood from the name, minimizing remedies set out to alleviate the distress faced by persons without nationality and to protect them from being discriminated. As such this kind of remedies does not aim to eliminate or prevent statelessness but merely facilitate everyday life for stateless persons. Minimizing remedies are typically executed through administrative procedures and anti-discriminatory provisions. Articles 27 and 28 of the *1954 Statelessness Convention* on states' obligation to issue identity papers and travel documents to stateless persons are typical examples.

Naturalizing remedies

Naturalizing remedies are the only measures through which statelessness – once occurred – can be removed, as they secure stateless persons' access to nationality through naturalization processes. These remedies grant nationality to stateless persons by legislative means. It can be through adopting a law that extends nationality to include stateless populations or

[33] Weissbrot, D. & Collins, C., p. 271*ff*.
[34] Especially Human Rights Watch refers to these remedies in their reports.
[35] Meaning the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness.*

that sets out criteria that – once fulfilled – results in the acquisition of nationality. Notably no international instruments oblige states to adopt and implement naturalizing remedies for stateless persons, not even the *1954 and 1961 Stateless Conventions.* Article 32 of the *1954 Convention* merely obliges states to '*as far as possible facilitate the assimilation and naturalization of stateless persons'*.[36]

2.4.2 Recognition of Nationality

According to the notion of state sovereignty, states are the ultimate judge and lawmaker in issues within their jurisdiction and have the sole right to decide whom it grants nationality:

> It is for each state to determine under its own law who are its nationals. This law shall be recognized by other states in so far as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality.[37]

This right is, though – as in other fields of international law where the interests of the states and human rights collide – circumscribed by a set of minimum standards which the states must comply with. Some of these standards will be described further on under the chapter on international legislation, like the prohibition of rendering nationals stateless and the obligation to grant nationality to persons born within its borders. But first general principles on recognition of nationality will be outlined.

The Principles of *jus soli* and *jus sanguinis*

The two main principles[38] through which nationality can be acquired are the principles of *jus soli*[39] and *jus sanguinis.*[40] The former grants nationality based on birth within state territory and the latter on descend and family heritage, where nationality is granted individuals whose parent (usually the father) is a national of the state. These two principles based on which nationality can be granted or denied are found in articles 1 and 4 of the *1961 Convention on the Reduction of Statelessness.* When it comes to national legislation most states apply a mixture of the two principles in their nationality laws, although one or the other usually predominates.[41]

---

[36] Weissbrot, D. & Collins, C., p. 271*ff.*
[37] Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.
[38] There is a third principle: dependent nationality, which refers to the practice where the nationality of married women is linked and dependent on the nationality of the husband. This principle lacks relevance for the topic at hand and will therefore not be further examined. There are also scholars who think that naturalization should be counted as a principle on which nationality is recognized, see note 45.
[39] *Jus soli* is a Latin expression meaning "right of the soil" or "law of the land".
[40] *Jus sanguinis* is Latin for "right of the blood" or "law of blood".
[41] Levanon, A. & Lewin-Epstein, N. p. 421.

There are several examples of how 'pure' *jus sanguinis* nationality laws can generate and perpetuate statelessness for generations; in cases when nationality is granted solely on paternal decent or when a child is born to stateless parents. Because of the negative impacts of 'pure' *jus sanguinis*-based legislation, nationality laws based on the place of birth (*jus soli)* or a combination has emerged as the overriding international norm as reflected in article 1 of the *1961 Statelessness Convention,* tough it is still commonly used among CEE states.[42]

The Doctrine of Effective and Genuine Link

The rationale behind recognition of nationality is based on the doctrine of a genuine and effective link between the individual and the state. According to this doctrine nationality should be granted a person who has a substantial connection or a genuine and effective link to the state. According to the International Court of Justice the link occurs in situations of long-term habitation, birth within its territory, descend, or in cases of state succession.[43]

The doctrine of genuine and effective link was established in the Nottebohm case; Lichtenstein v. Guatemala, where the ICJ stated that *'It (*nationality*) may be said to constitute the juridical expression of the fact that the individual upon […] is in fact more closely connected with the population of the State conferring nationality than with that of any other State.'*[44]

As the Nottebohm case did not concern the right to nationality in terms of statelessness, but rather to establish when nationality invokes the right to diplomatic protection, it remains unclear to what extent the doctrine of the genuine and effective link can be applied in the context of statelessness. However it seems like the principles emanating from the case has been incorporated into some legal instruments and is taken into consideration in naturalization procedures.[45]

Naturalization

The process where someone who was not a national of a state at the time of birth – neither through birth on territory or through descend – applies and acquires nationality of that state is referred to as naturalization. In the strict sense naturalization is defined as *'the grant of nationality to an alien by a formal act, on an application made for the specific purpose by the alien or, if he is under disability, by a person acting on his behalf.'*[46]

---

[42] Weissbrot, D. & Collins, C, p. 255 *f*. and Blitz, B.K. and Lynch, M. eds., p. 9.
[43] Weissbrot,D & Collins, C. p. 276 *f*
and Nottebohm Case, *Liechtenstein v. Guatemala*, ICJ Judgment of 6 April 1955 p. 4.
[44] Nottebohm Case, *Liechtenstein v. Guatemala*, p. 23.
[45] Mrekajova, E. *"Naturalization of Stateless Persons: Solution of Statelessness?"*, Tillburg, 2012, p. 18. In the *1997 European Convention on Nationality* genuine and effective link is mentioned as a circumstance that can allow for acquisition of nationality through naturalization.
[46] Weis, P. p. 99.

In general the naturalization process is based on requirements which must be fulfilled in order for the state to grant nationality. According to the doctrine of genuine and effective link, long-term residence is a factor that can enable granting of nationality through naturalization.[47] Other common prerequisites for naturalization are loyalty oaths where the applicant promises to obey the laws of the state, sufficient financial resources and various integration requirements such as language skills proved in a test. Although residence for a certain period of time is recognized as a universal precondition, there are no comprehensive guidelines which states have to follow, which results in states applying unique nationality laws of varied stringency.[48]

The *1997 European Convention on Nationality* lists the following criteria as central in the evaluation of the eligibility for nationality through naturalization:

- the genuine and effective link of the person concerned with the State;
- the habitual residence of the person concerned at the time of State succession;
- the will of the person concerned;
- the territorial origin of the person concerned.[49]

As a solution to statelessness states are urged to provide a '*facilitated access to nationality*' through naturalization. In the *Explanatory report to the 1997 European Convention on Nationality* such access is inter alia alleviated by reduced length of required residence and less stringent language requirements.[50]

[47] In doctrine naturalization has come to count as an additional principle – to the aforementioned principles of *jus soli* and *jus sanguinins* – referred to as *jus domicile* (law of residence), '*according to which people may gain an entitlement to citizenship by means of naturalization based on residence in a territory or a country.*'
See Levanon, A. & Lewin-Epstein, N. p. 421.
[48] Mrekajova, E. p. 19*f.* Although there exists recommendations as mentioned in section 5.2.3.
[49] Article 18(2).
[50] Council of Europe: *Explanatory report to 1997 European Convention on Nationality*, para 52.

3 Statelessness and Nationality in International Law

There are several instruments governing statelessness and nationality from various perspectives. In the following sections the most pertinent conventions and treaties and relevant provisions will be mentioned.

3.1 International Instruments on Statelessness

2006 Convention on the Avoidance of Statelessness in relation to State Succession[51]

With the understanding that avoidance of statelessness is one of the main concerns of the international community in the field of nationality, the Council of Europe adopted a convention aiming to reduce statelessness. However, since noting that *'State succession remains a major source of cases of statelessness'* the Convention solely addresses statelessness in this context. In this aspect the Convention provides a comprehensive range of provisions ensuring the right to nationality, preventing statelessness, determining the responsibility of the successor and the predecessor states, facilitating the acquisition of nationality by stateless persons and avoiding statelessness at birth.[52]

Article 5(1)

A successor State shall grant its nationality to persons who, at the time of the State succession, had the nationality of the predecessor State, and who have or would become stateless as a result of the State succession if at that time:

a. they were habitually resident in the territory which has become territory of the successor State, or

b. they were not habitually resident in any State concerned but had an appropriate connection with the successor State.

Article 9

A State concerned shall facilitate the acquisition of its nationality by persons lawfully and habitually residing on its territory who are stateless as a result of the State succession.

1954 Convention relating to the Status of Stateless Persons

The *1954 Convention* is the only international treaty aimed specifically at regulating the standard of treatment for stateless persons. It establishes a framework for the international protection of stateless persons and contains

[51] Henceforth also referred to as the *2006 CoE Convention.*
[52] See Articles 2, 3, 5, 6, 9, 10.

basic principles determining the application of its provisions (such as non-discrimination, exemption from reciprocity, etc.) and the juridical status and social rights contracting states shall grant to stateless persons.[53]

The most essential feature of the *1954 Convention* is that it, in article 1(1) defines a stateless person as *'a person who is not considered as a national by any State under the operation of its law.'* For anyone who qualifies under this definition, the Convention establishes a minimum protection and treatment the state parties are bound to provide. According to the preamble of the *1954 Convention* its object and purpose is to ensure that stateless persons enjoy the widest possible exercise of their human rights, including the right to nationality. Hence it is in this light that article 1(1) shall be interpreted.

It is also important to note that the Convention does not permit reservations to this provision, hence making it binding upon all its state parties.[54] Furthermore, the International Law Commission has declared this provision as part of international customary law.[55]

The *1954 Convention* upholds the right to freedom of movement for stateless persons lawfully on the territory and requires states to provide them with identity papers and travel documents.[56] The Convention also prohibits the expulsion of stateless persons who are lawfully on the territory of a state party.[57] As protection of stateless persons is not a substitute for acquisition of nationality and consequently not a durable solution, article 32 on naturalization is of great relevance:

Article 32

The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Even if the term *de jure* stateless is not mentioned in the *1954 Convention* it is this category of stateless persons who fall within the scope of article 1(1). As such both the *1954 and the 1961 Conventions* apply solely to *de jure* statelessness. However, Resolution I of the Final Act leading up to the 1961 Convention recommends that '*persons who are de facto stateless should as far as possible be treated as de jure stateless to enable them to acquire an effective nationality.'*[58]

[53] See Articles 12-32.
[54] Article 38(1).
[55] International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, p. 48 *f.*
[56] Articles 26-28.
[57] Save on grounds of national security or public order, Article 31.
[58] Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness held at Geneva, 1959, Recommendation I, p. 279.

1961 Convention on the Reduction of Statelessness

This Convention is a complement to the *1954 Convention*. It sets out to ensure acquisition of nationality of a state and protects from deprivation of nationality by establishing remedies against statelessness in different contexts i.e. how to avoid the incidence of statelessness. As such this instrument gives effect to the right to nationality as articulated in article 15 of the *UDHR* (see following chapter).

The Convention is based on the notion of states' sovereignty to determine the content and application of their own nationality law. However the understanding of this notion is restricted by international norms and principles outlined primarily in the provisions of the *1961 Convention*. Consequently the Convention fills an important role in balancing these interests.[59]

Although it is a Convention on the *reduction of statelessness* it mainly governs acquisition of nationality when a person is born in the territory of the state concerned or when one of the parents at the time of the person's birth is a national of that State and would otherwise be stateless.[60] It does not regulate reduction of statelessness through naturalization or provide guidelines on prerequisites for naturalization processes. However, the Convention at least indicates the obligation to avoid statelessness as states, as a rule, are prohibited to deprive a person of its nationality if such deprivation would result in statelessness.[61]

3.1.1 UNHCR

The Office of the United Nations High Commissioner for Refugees has been mandated to assist stateless refugees since it was established on 1 January 1951. Since the *1954 Convention* and the *1961 Convention* entered into force the UNHCR has been given a leadership role in assisting non-refugee stateless persons as well. Trough several General Assembly Resolutions and Conclusions adopted by the Executive Committee of the High Commissioner's Programme the UNHCR is tasked to undertake measures to identify, prevent, and reduce statelessness, as well as to promote the protection of stateless persons. However this mandate does not include a monitoring mechanism to supervise states implementation of the provisions in the two Conventions. [62] Hence, out of the UN's ten bodies monitoring the implementation of human rights treaties none is assigned to monitor states' compliance with the obligations to reduce statelessness, which consequently

[59] Text of the 1961 Convention on the Reduction of Statelessness with an Introductory Note by the Office of the United Nations High Commissioner for Refugees, Geneva, January 2011, p. 3.
[60] Articles 1 and 4.
[61] Articles 8 and 9 See Mrekajova, E. p. 12.
[62] Text of the 1954 Convention Relating to the Status of Stateless Persons with an Introductory Note by the Office of the UNHCR, p. 4.

restrains and weakens the effectiveness of the *1954 and 1961 Conventions* and their provisions.[63]

3.1.2 International and European Recognition

In addition to lack of a monitoring body, the instruments inefficiency is enhanced by limited ratification. As of today only six (!) states (of which four are EU member states) have acceded to the *2006 CoE Convention.*[64] 77 states are parties to the *1954 Convention* and the *1961 Convention* currently has 51 parties (compared to *1951 Convention relating to the Status of Refugees*, which has 145 state parties).[65]

The UNHCR Executive Committee urged states in their Conclusion No. 78 from 1995

> To adopt nationality legislation with a view to reducing statelessness, consistent with fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality, and by eliminating provisions which permit the renunciation of a nationality without the prior possession or acquisition of another nationality.

In 2001 the Committee's Conclusion No. 90

> Reiterates its call for States to consider accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

In anticipation of the 50th anniversary of the *1961 Convention*, UNHCR launched the Statelessness Conventions Campaign in 2010 to encourage accession to both statelessness conventions. Despite these efforts, the support of the two instruments remains weak. Among the EU member states (at the time of writing, May 2013) Cyprus, Estonia, Poland and Malta have not become parties to the *1954 Convention* and Belgium, Cyprus, Estonia, Greece, Italy, Lithuania, Luxembourg, Malta, Poland, Slovenia and Spain are still not parties to the *1961 Convention*.

3.2 International Instruments on the Right to Nationality

The significance of the right to nationality in the international community is demonstrated by its frequent reiteration in several international and regional

[63] Weissbrot, D. and Collins, C, p. 272*f*.
[64] See the status of the 1997 and 2006 CoE Conventions at the website of the Council of Europe's Treaty Office: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>.
[65] See the status of the 1951, 1954 and 1961 Conventions at the United Nations Treaty Collection: <http://treaties.un.org/pages/ParticipationStatus.aspx>

instruments within the human rights regime. Below, a selection of articles from the most essential of these is presented.

1948 Universal Declaration of Human Rights

As of today the articles of the Declaration are considered as part of international customary law and are as such in general binding upon all states. The international recognition of the UDHR consequently makes it an indispensable instrument in upholding and protecting fundamental human rights and freedoms. One of the basic human rights listed in the Declaration is article 15, the right to nationality, upon which the possibility to enjoy other human rights is based.

Article 15

Everyone has the right to a nationality.
No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

1997 European Convention on Nationality[66]

The Convention outlines a set of key principles and obligations in article 4 which the states shall observe with special reference to stateless persons and their right to nationality. According to these, every state's rules on nationality shall be based on the principle to *avoid statelessness*, alongside *the right to acquisition of nationality* and *prohibition of arbitrary deprivation of nationality*. The Convention governs all major aspects related to nationality; acquisition, loss, recovery, procedures, multiple nationality, nationality in the context of state succession and nationality, military obligations military obligations in cases of multiple nationality and co-operation between the state parties.

Article 4

The rules on nationality of each State Party shall be based on the following principles:

a. everyone has the right to a nationality;
b. statelessness shall be avoided;
c. no one shall be arbitrarily deprived of his or her nationality;
d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

Of relevance for the forthcoming text is article 6(4) g on facilitated access to nationality.

[66] Henceforth also referred to as the *1997 CoE Convention*. As of today, May 2013, the Convention has but 20 ratifications and many EU member states (including Slovenia) have still not become a party.

Article 6(4) g

Each State Party shall facilitate in its internal law the acquisition of its nationality for the ... stateless persons lawfully and habitually resident on its territory.

1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article 5 (d) (iii)

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
(d) (iii) The right to nationality;

1966 International Covenant on Civil and Political Rights (ICCPR)

Article 24(3)

Every child has the right to acquire a nationality.

1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 9

States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

1989 Convention on the Rights of the Child (CRC)

Article 7 (1)

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

Article 7 (2)

States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

4 Statelessness and Nationality in EU-law

So far, reduction of statelessness has not been part of mainstream European Union policy discussions. There may be several practical and legal explanations to this. Probably the most evident reason is the lack of competence to regulate on the matter. But also lack of awareness and understanding of the severity of the issue contributes to the shortage of EU regulations. As already mentioned the support for the two Statelessness Conventions are limited and some of the member states who acceded to them do not comply with their obligations. The fact that many *de jure* stateless persons 'disappear' from society as they are living in a legal limbo outside its margins is another reason why the issues related to statelessness has remained a hidden reality.[67]

The most crucial human rights instrument in the region – the *European Convention for the Protection of Human Rights and Fundamental Freedoms* – binding upon the EU and its member states through article 6(2) and (3) of the *Lisbon Treaty*[68] does not contain any provisions on reduction of statelessness or the right to nationality. In fact none of the following words: citizen(ship), nationality, stateless(ness) can be found in the ECHR.[69]

Another important EU rights instrument is the *Charter of Fundamental Rights of the European Union* [70] which together with the ECHR forms the human rights regime of the EU. Neither the Charter contains any statelessness-specific provision. The closest it comes to regulate nationality is to declare that '*any discrimination on grounds of nationality shall be prohibited*'.[71]

In the *Lisbon Treaty* it is mentioned that stateless persons shall be treated as third-country nationals in terms of EU-law on freedom, security and justice.[72] In the light of this statement an acknowledgment of stateless persons can be sensed. However this population still find themselves in a legal gap in EU legislation as there is a neither a common regime on the reduction of statelessness nor on determining the status of and offering protection to stateless persons.[73]

---

[67] Gyulai, G. 'Statelessness in the EU Framework for International Protection', p. 280.
[68] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.
[69] Gyulai, G. 'Statelessness in the EU Framework for International Protection', p. 284.
[70] Binding upon member states according to article 6 (1) of the Lisbon Treaty.
[71] Gyulai, G. 'Statelessness in the EU Framework for International Protection', p. 284
[72] Lisbon Treaty article 61 Amendment of Article 67 of the Treaty of the Functioning of the European Union (TFEU).
[73] Guylai, G. 'Statelessness in the EU Framework for International Protection', p. 284. According to Tamás Molnár "*The existing (EU) rules protect stateless persons in an indirect way, where the legal basis is linked to a fundamental freedom (freedom of*

Neither is there in the EU a harmonized regime on the right to nationality and the acquisition of such by birth, descend or naturalization. In this regard '*it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.'*[74] The freedom for each member state to determine its own nationality laws thus results in a great variation. The only common regulation concerns the EU-citizenship which follows from nationality of an EU member state.[75]

Protection of stateless refugees is ensured in *Directive 2011/95/EU* 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. It was first introduced in 2004[76] to harmonize the refugee protection provided by member states and to set minimum standards that persons qualifying for international protection should be treated by. The first Qualification Directive was initiated as one of five legal EU-instruments to establish an EU asylum *acquis*. In 2011 the new text of the Directive was published. As a part of the EU *acquis* on asylum, the Directive serves as an important instrument addressing refugee status and protection. Although the Directive covers stateless persons, article 2 (d) points out that protection shall only be provided refugee stateless persons and not non-refugee (*in situ*) stateless persons.[77] In fact, *in situ* stateless persons do not even qualify for subsidiary protection as article 2 (f) states that eligibility for such protection is only invoked once the stateless person is outside his or her country of habitual residence.[78]

---

movement of workers; their social security) or other EC policy (entry and stay of third country nationals). As a consequence, this category of people has been covered as a result of side effects of the legislation." Molnár, T. 'Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order', *Acta Juridica Hungarica*, Vol. 51, pp. 293–304 p. 304.

[74] C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, ECJ Judgment of 7 July 1992, para. 10.

[75] Article 20 of the TFEU.

[76] Directive 2004/83/EC 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.

[77] Article 2 (d) 'refugee' means 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, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

[78] Article 2 (f) '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 […].

4.1 Obstacles Preventing EU-regulation

4.1.1 EU Competence

The area of freedom, security and justice is one of EU's competence areas where the capacity to legislate is shared between the member states and the EU. Under this area matters like EU citizenship, combating discrimination, drugs, organized crime, terrorism and human trafficking, free movement of people, asylum and immigration, judicial cooperation in civil and criminal matters and police and customs cooperation is included. According to articles 77-79 of the TFEU, the EU has competence to adopt and implement common legislation and policies in the field of asylum and immigration. It is by virtue of these provisions the *Qualification Directive* has been established. As stateless refugees and third country nationals are explicitly mentioned and encompassed by such directives, it would not seem entirely incorrect to take the step to also let the policies in this field include non-refugee stateless. Gabor Guylai of the Hungarian Helsinki Committee formulates these thoughts as follows:

> In the EU context it might be possible to achieve a more effective implementation of relevant international instruments by bringing stateless protection under the scope of the common European asylum policy. […] Should this initiative be successful, a Statelessness Directive could be drafted that would reunite the principles and create a legally binding obligation on member states to establish a *protection regime* (authors emphasis) for (non-refugee) stateless persons, based on already existing good practices.[79]

Where there are lacunas or uncertainties in legal sources, i.e. when a specific issue is not explicitly addressed, analogies may be drawn from similar sources/situations. In this case an analogy might be drawn from article 67 (2) of the TFEU[80] which may suggest that the term stateless includes non-refugee stateless in the EU freedom, security and justice competence area and consequently the aforementioned asylum and immigration regime. Nevertheless – as pointed out by Gyulai – since this regime covers asylum and immigration its scope only allows for EU-regulation on the status and protection of stateless persons and not on the reduction of statelessness. An analogy in this case would include non-refugee stateless persons in current asylum and immigration policies, but it would not extend the *acquis* to include regulation of statelessness beyond issues concerning asylum and immigration, such as regulation on the prevention or reduction of statelessness. Guylai confirms that due to the lack of provisions on statelessness in the ECHR and the Charter of Fundamental Rights of the European Union '*it can be concluded that at present the EU*

[79] Guylai, G. 'Remember the forgotten, protect the unprotected', *Forced Migration Review*, Issue 32, 2009, p. 48.
[80] As amended by article 61 of the Lisbon Treaty.

does not have an explicit entitlement to adopt legislation or common measures on statelessness as a specific issue.'[81]

4.1.2 The Doctrine of State Sovereignty

"Sovereignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion'…"[82]

As mentioned in section 2.4, statelessness is solved through recognition of nationality, based on the principles of *jus soli* and *jus sanguinis* or naturalization; solutions that are regulated in each state's nationality laws. To regulate on reduction of statelessness thus involves interference with member states nationality policies. It is established in international as well as European law that the questions of nationality fall within the domestic jurisdiction of each individual state. The doctrine of sovereignty hence seems to hinder EU to determine the criteria upon which nationality is granted in its member states and how statelessness can be eradicated. By the adoption of the *Race Directive* in 2000[83], the doctrine of sovereignty is sustained.[84] The purpose of the Directive is to '*lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'*[85]

As such one would assume that the Directive hinders the member states to apply discriminatory nationality laws. But from reading article 3(2) it becomes clear that the Directive does '*not cover difference of treatment based on nationality'* and does not affect *'provisions and conditions relating to the entry into and residence of stateless persons on the territory of Member States, and to any treatment which arises from the legal status of stateless persons concerned*.' Due to this lacuna, the *Race Directive* has been criticized by several scholars as it allows member states to grant nationality in discriminatory manners, based on race or ethnicity. In the case of stateless Roma this has been and is still one of the main reasons to *de jure* statelessness in CEE.[86]

Despite the initial quote and the maintenance of sovereignty, there is a trend in recent years of the doctrine of sovereignty eroding. In the light of globalization and development of (international) refugee and migration law

---

[81] Guylai, G. 'Statelessness in the EU Framework for International Protection', p. 284.
[82] Arendt, H. p. 278.
[83] Directive 2000/43/EC Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[84] As the Directive does not apply to member states nationality policies it shows how member states have the exclusive competence in this field.
[85] Article 1
[86] Parra, J. 'Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness', *Fordham International Law Journal,* Vol. 34, Issue 6, 2011, 1676*ff* and Dedic, J, *"Roma and Statelessness"*, European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2007, p.7, note 13.

and harmonization within the EU, state sovereignty is challenged. Freedom of movement within the EU where member states no longer have the sole right to determine who enters their territory is one example of this erosion. When it comes to nationality, certain limitations of the doctrine of state sovereignty have developed as well as member states' sole competence in determining conditions for acquisition and deprivation of nationality is becoming circumscribed.[87] This is mainly supported by the *Micheletti* case from the European Court of Justice, which was the first to challenge member states exclusive competence in nationality matters. In this case the ECJ highlighted that member states' competence over nationality matters must be exercised in conformity with EC law.[88] In the more recent *Rottman* case[89] from 2010 this standpoint was confirmed and even extended.

> The ECJ ruled very clearly that the exercise of the member state competence to regulate the conditions of their nationality falls within the scope of Union law, a ruling which also has certain consequences for the application and judicial review of nationality regulations.[90]

According to several legal scholars the ruling implies that the ECJ is challenging member state sovereignty in nationality law, although it remains unclear in what way and to what extent the case influences national nationality regimes. The present case though makes clear that the exercise of member states' competences is limited by the principle of proportionality. Furthermore, the Advocate General Maduro[91] states in his findings, that the types of norms in EU law that could constrain such competence are those deriving from international law, such as rules on the avoidance of statelessness. Altogether the *Rottman* case makes nationality an area where the EU may limit member states application of their nationality laws. [92]

In an opinion piece on the website of The European Network on Statelessness, Laura van Waas argues forth that even though the starting point of the discussion of the right to nationality is the existence of state sovereignty and state's freedom to regulate who are their nationals, states

---

[87] Parra, J. p. 1682 *ff.*

[88] More precise that one member states conditions on recognition of nationality may not restrict the effects of nationality being attributed by another member state. See note 72.

[89] C-135/08, *Janko Rottmann* v. *Freistaat Bayern*, ECJ Judgment of 2 March 2010

[90] Van Eijken, H. 'European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals', *Merkourios Utrecht Journal of International and European Law*, Vol. 27, Issue 72, 2010, p. 68.

[91] Opinion of Advocate General Poiares Maduro delivered on 30 September 2009, in the case C-135/08, *Janko Rottmann* v. *Freistaat Bayern*, para. 29.

[92] See for instance the analyzes and commentaries of the case presented in Shaw, J. eds. *"Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?"*, European University Institute, Florence, 2011, p. 29, 40 *ff.* <http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf> [accessed 2013-05-15]
and Van Eijken, H, p. 65.
It should also be pointed out that the cases, although challenging member state sovereignty in nationality law does not mean legislative competence in nationality matters is ascribed to the EU.

here and now *'have clear obligations in relation to the right to citizenship, including specifically in the area of non-discrimination in nationality policy and in the avoidance of statelessness'* – which questions the hierarchy between state sovereignty in nationality matters, on one hand, and international obligations set forth in human rights treaties, such as the right to nationality on the other.[93]

To conclude, there are changes in international and EU-law pointing in the direction of the possibility of a future competence for EU to legislate on the matters at hand. In order for such competence to arise court rulings and international opinion is however not sufficient. The legislative competence must rather be transferred from the member states to the EU by amendments of the Community treaties. Nevertheless, EUs current lack of competence does not contradict the necessity of EU-legislation. On the other hand awareness on the topic could be one step in the direction of interstate cooperation towards harmonization within the EU that in extension could bring about Union legislation. In this regard there are various arguments put forward for EU-actions to address reduction of statelessness and access to nationality. Jasminka Dedic of the ERRC writes:

> The EU institutions should act towards the integration of stateless persons in the EU-citizenship; adopt the mechanisms for the evaluation of the practices granting nationality in the member states based on the UN and the Council of Europe standards for the prevention of statelessness and the protection of stateless persons. As EU-citizenship is contingent on member state nationality, the discriminatory practices concerning citizenship within some member states will be legitimized at the EU level as well.[94]

Furthermore, obligations stemming from international human rights law yet set forth additional arguments for EU to regulate:

> It is well established both in scholarly writing and case law from various jurisdictions that IGOs are subjects of International Law and as such are endowed with both rights and obligations, which may derive from Customary International Law (including peremptory norms, or jus cogens), treaty commitments, general principles of law, and their own internal law.[95]

One example of such state responsibility is the obligation for states to comply with international law when adjudging on questions concerning

---

[93] Van Waas, L. *Debating the 'right to citizenship'*, <http://www.statelessness.eu/blog/debating-%E2%80%98right-citizenship%E2%80%99> [accessed 2013-05-02]

[94] Dedic, J, *"Roma and Statelessness"*,European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Brussels, 26 June, 2007, p. 5f.

[95] OHCHR, Regional Office for Europe;*"The European Union and International Human Rights Law"*, p. 22.

nationality.[96] Consequently, if the nationality laws of the member states are not in compliance with such obligations, member states can be held liable for breaches committed by the EU.[97]

Finally it can be mentioned that there are examples of other fields of international human rights law where regional instruments have been adopted despite already existing effective international legislation. In these cases the regional instruments are intended to complement international conventions and treaties to ensure tailored human rights protection according to specific regional needs. For instance the Organisation of African Unity (OAU) adopted the *Convention Governing the Specific Aspects of Refugee Problems in Africa* in 1969, in addition to the *1951Refugee Convention* to better cover refugee issues in Africa that were of different character than those addressed internationally.[98]

[96] As codified in Article 1 of the Hague Convention of 12 April 1930 on Certain Questions relating to the Conflict of Nationality Laws.
[97] OHCHR, p. 31,
See also Posch, A. 'The Kadi Case: Rethinking the Relationship between EU Law and International Law', *The Columbia Journal of European Law*, Vol. 15 Issue 2, 2009, p. 4.
[98] See preamble of the OAU Convention.

5 Stateless Roma

"As a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority […] and they therefore require special protection […]"[99]

With an estimated population of between 10 and 12 million Roma in Europe – of which approximately six million resides in EU member states – the Roma makes up the largest ethnic minority on the continent.[100] Due to absence of (reliable) data there are no precise statistics on the number of stateless Roma. According to CoE, estimations indicate thousands of Roma, mainly in Bosnia Herzegovina, Serbia and Slovenia (states of former Yugoslavia) are stateless.[101]

> In many European countries the Roma population is still denied basic human rights and made victims of flagrant racism. […] Their exclusion from society feeds isolationism, which in turn encourages prejudice against the Roma among xenophobes.[102]

The quote above is taken from one of numerous reports from human rights agencies, NGOs, UN, EU and CoE institutions attesting the severe hardships faced by the Roma population across Europe. Despite the *EU Framework for National Roma Integration Strategies up to 2020* adopted by the European Commission, with the aim to improve the situation of the Roma and thwart social and economic marginalization within the member states, antiziganism, ethnic discrimination, marginalization, prejudice and racist attitudes in the European society continues to affect the living conditions and equal treatment of Roma in key areas of social life, such as employment, education, housing, health and social assistance.[103]

According to CoE Commissioner for Human Rights, Roma populations are *'grossly under-represented in local and national assemblies and government administrations all over the world'*.[104] And in terms of educational attainment, health standards, employment they remain far

[99] Case of *D.H. and Others v. the Czech Republic*, ECtHR, judgment of 13 November 2007, para. 182.
[100] In this essay the term Roma refers to Roma, Travellers, Kale, Sinti and other related groups, including groups identifying themselves as Gypsies.
[101] Commissioner for Human Rights, "*Many Roma in Europe are stateless and live outside social protection"*, Council of Europe, July 2009, p.1.
[102] Commissioner for Human Rights, *"Human rights in Europe: no grounds for complacency"*, Council of Europe, April 2011, p. 57.
[103] European Union Agency for Fundamental Rights, "*The situation of Roma EU citizens moving to and settling in other EU Member States"*, November 2009, p. 6ff.
[104] Commissioner for Human Rights, *"Human rights in Europe: no grounds for complacency"*, Council of Europe, April 2011, p. 71.

behind the rest of the population in the region. Life expectancy for Roma is an average of 10 years less compared to the general population of the EU.[105]

This situation is exacerbated by the lack of nationality. In addition to being stigmatized and marginalized, Roma in several European countries lack personal identity documents and residence permits which impairs their access to nationality and consequently basic social rights. According to estimates thousands of Roma have never obtained a birth certificate and are thus without administrative and legal existence. Accordingly, statelessness among Roma in Europe remains a hidden problem as there is little or no statistical data to confirm its gravity.[106]

Despite several rulings on states' violation of the right to 'effective citizenship' for Roma in the past decade, The European Court of Human Rights shows restrained power to directly challenge discriminatory denial of nationality, and has had limited opportunities to use its powers in this area.[107]

The averse attitudes towards Roma that still remains in many states – embodying mistrust and perceptions based upon prejudices – makes the Roma an unwanted population and ethnic minority to include among its nationals. This results in ongoing application of discriminatory nationality practices to prevent Roma from becoming nationals of certain states.[108]

5.1 Historical Perspective

"Whenever state borders are changed, there are individuals who end up on the wrong side with the wrong kind of documents."[109]

To understand the current implications statelessness has on Roma and in order to address the problem and find solutions, the occurrence of statelessness must be known. If there is an understanding how historical events and changes and nationality laws have inflicted statelessness the chances of its absolute eradication increase.

The root to the discriminatory nationality laws and practices can be traced back to sentiments – based upon perceptions of Roma as 'dirty', lazy or

[105] COM/2011/173, *"An EU Framework for National Roma Integration Strategies up to 2020"*, p. 6.
[106] European Commission Directorate-General for Employment and Social Affairs, *"The Situation of Roma in an Enlarged Europe"*, 2004, para. 63*ff*
and Commissioner for Human Rights, *"Human rights in Europe: no grounds for complacency"*, p. 75.
[107] Cahn, C. 'Minorities, Citizenship and Statelessness in Europe', *European Journal of Migration and Law*, Vol. 14, 2012, pp. 297-316, p. 315.
[108] Warnke, A. M, p. 336.
[109] Lloyd Dakin, UNCHR's regional representative in Budapest, cited in UNHCR News Stories 26 February 2007, *"UNHCR urges Slovenia to resolve the problem of its "erased cases"*, p. 1.

criminal in nature – from centuries ago when they first entered the region. During the course of history Roma populations have been subjected to persecution and forced migration and assimilation. During the Holocaust 500.000 Roma were killed and during the Cold War, communist regimes employed forced sterilization to reduce the Roma population, a practice that remained – even in western countries – until a few decades ago. In a more modern chapter of Roma history, featured by the fall and break-up of former regimes; new states and borders, EU enlargement, free movement, and social and economic migration, an even more instable situation has occurred. The break-up of Czechoslovakia and Yugoslavia and the following devastating Balkan wars throughout the nineties has caused large numbers of displaced Roma in the region and left them in a limbo of statelessness.[110]

As mentioned in section 2.3 transfer of territory by dissolution of states is one of the most common sources of statelessness. Since the conflicts and break-up of Czechoslovakia and Yugoslavia partly derived from and were followed by ethnic tensions, the succession governments made sure the 'right' people were included in the new state and that those 'unwanted' were excluded. By adopting new restrictive nationality laws, which *per se* obstructed access to nationality, or applying them in an arbitrarily and discriminatory manner, access to nationality in the new founded states became constrained and Roma were impeded from becoming nationals.[111]

Jasminka Dedic from the European Roma Rights Center describes how nationality laws have had most devastating impact on Roma communities in the successor states of Czechoslovakia and Yugoslavia as they are particularly vulnerable to the occurrence of statelessness and the lack of nationality.

> Although the phenomenon of statelessness is practically inavoidable in the circumstances of states' dissolution, successor states sometimes exacerbate the situation by creating insurmountable administrative burdens in the access to citizenship and/or to legalization of residence status of marginalized social groups, such as Roma. Such cases are the Czech Republic and Slovenia (both EU member states), which have actively engaged in ethnically discriminatory practices in relation to nationality and immigration issues.[112]

---

[110] For a historic exposé on the situation of Roma see for example:
Warnke, A. M. 'Vagabonds, Tinkers, and Travelers: Statelessness among the East European Roma', *Indiana Journal of Global Legal Studies*, Vol.7 Issue. 1, 1999, pp. 335-367,
Berkeley, B. 'Stateless People, Violent States', *World Policy Journal*, Vol. 26 Issue, 2009, pp. 3-15, and
Guylai, G. eds. "*Forgotten Without Reason – Protection of Non-Refugee Stateless Persons in Central Europe"*, Hungarian Helsinki Committee, Budapest, 2007.

[111] Cahn, C. p. 314f.

[112] Dedic, J, "*Roma and Statelessness"*, European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Brussels, 26 June, 2007, p. 4.

5.1.1 Czechoslovakia

First of January 1993 in the peaceful dissolution known as the Velvet Divorce, the sovereign state of the Czech and Slovak Federal Republic (hereafter Czechoslovakia) split into the two independent states of Czech Republic and the Slovak Republic (hereafter Slovakia). Following the dissolution new territory and borders were drawn which brought about various administrative and legal changes.

In legal terms it was mainly the issue of nationality that became problematic as new nationality laws came into effect and dual nationality between the two states was prohibited. Persons who had been nationals of the common state of Czechoslovakia now found themselves living within the borders of one or the other and had to renew their nationality. This mainly concerned the large number of Roma who were born and officially registered in what became Slovakia but who were residents on the Czech territory. In order to solve the occurring nationality confusions both states adopted new nationality laws that were to determine who could and could not obtain nationality in the respective state.[113]

After the split, the Slovakian nationality law allowed all former Czechoslovak nationals who so desired to obtain Slovak nationality, regardless of where they had been living on the day of the split. The Czech Republic, however, passed a more stringent nationality law[114], where Czech nationality was only granted former nationals of Czechoslovakia (by declaration)[115] if the person possessed Czech *state citizenship*.[116] Whereas individuals, with Slovak *state citizenship* who wanted to obtain Czech nationality had to apply for such through naturalization – even if they had been living in the Czech Republic for a long time. In order to be granted nationality through naturalization, strict requirements such as residence of

[113] Linde, R. 'Statelessness and Roma Communities in the Czech Republic: Competing Theories of State Compliance', *International Journal on Minority and Group Rights*, Vol. 13, 2006, pp. 341-365, p. 342 and
Human Rights Watch, *Roma in the Czech Republic Foreigners in Their Own Land*, 1 June 1996, <http://www.refworld.org/docid/3ae6a7ea0.html> [accessed 2013-05-07].

[114] Act No. 40/1993 on the Acquisition and Loss of Citizenship of the Republic [Czech Republic].

[115] Article 18 (1) A citizen of the Slovak Republic may opt for citizenship of the Czech Republic by a declaration made on December 31, 1993 at the latest, provided:
a) he/she has a continual permanent residence on the territory of the Czech Republic for the period of at least two years,
b) he/she submits a document on exemption from citizenship of the Slovak Republic
c) he/she was not sentenced in the past five years on charges of intentional crime.

[116] Nationals of Czechoslovakia before the split could possess an internal Czech or Slovak *state citizenship* in addition to the Czechoslovakian nationality. After the split the former nationals of Czechoslovakia needed to renew their nationality by obtaining either Czech or Slovak *state nationality* (which is what the Czech Republic granted holders of Czech *state citizenship* automatically upon declaration, whereas holders of Slovak *state citizenship* had to acquire such by application of naturalization).

minimum five years in the territory, clean criminal record and Czech language proficiency had to be fulfilled.[117]

As the new Czech nationality law came into effect it created a clear distinction between Czech and Slovak *state citizenship* which had not existed before. This distinction became particularly apparent for the Roma population in the two states. After the Second World War approximately 95 percent of the Roma moved from Slovakia to the Czech Republic. Of these, only a few changed their internal *state citizenship* from Slovak to Czech since these internal citizenships did not have practical meaning (identity documents in Czechoslovakia were issued based on residence and not internal citizenship). Even though 'Czech' Roma had been living on the territory belonging to the Czech Republic since the 1950's, they were considered Slovak nationals under the new law. According to estimations, the adoption of the new nationality law rendered 10,000 to 25,000 Roma stateless.[118]

The Czech law did not address Roma specifically but from what is mentioned above it is clear that its naturalization requirements affected the Roma population unfairly as many Roma could not cope with the complex administrative procedures and expensive application fees required by the new law.[119] Nor did they possess documentation needed to verify their internal citizenship or residence, which rendered their applications invalid. There are also examples of Roma who despite fulfilling all requirements were denied nationality by local authority officials. As the Roma in the Czech Republic (originating from Slovakia), were required to apply for Czech citizenship even though they were born on the territory of the former and had lived there all their lives, the law became a tool for the Czech state to force as many Roma as possible back to Slovakia.[120]

The controversial issue of the new nationality law received great international attention and pressure on the Czech lawmakers was exerted by the international community; the CoE, the UNHCR and the OSCE during the following years. With the Czech Republic's application for EU membership in 1996, the incentive to amend the law to meet with EU

[117] Article 7 (1) A natural person can become at his/her request a naturalized citizen of the Czech Republic upon meeting the following conditions: (a) has continual residence on the territory of the Czech Republic for at least five years on the day of submitting his/her application; (b) proves that he/she has been exempted from citizenship of another state or by becoming a naturalized citizen of the Czech Republic loses his/her citizenship of another state, provided he/she is not a stateless person; (c) no sentence was pronounced on him/her in the past five years on charges of intentional crime; (d) proves mastery of the Czech language.

[118] Human Rights Watch, *Roma in the Czech Republic Foreigners in Their Own Land*.

[119] In its "*Report on the Czech Citizenship Law: The Effect of the Citizenship Law on the Czech Republic's Roma Community*", the Tolerance Foundation (Czech NGO) wrote: 'The law was aimed at limiting the Roma population's possibility of acquiring Czech citizenship because it imposed a set of requirements that are particularly difficult for this ethnic group to comply with.' p. 40.

[120] Linde, R. p. 342 and Cahn, C., p. 304*ff*
See also Dedic, J, *"Roma and Statelessness"*.

policy[121] and with CoE recommendations grew stronger and in 1999 legal reform was eventually undertaken. The amendment to the law made the '*Czech Republic compliant with norms regarding statelessness'* as it removed the discriminatory clauses and restored access to Czech nationality for most Roma by granting Czech nationality to those who resided on Czech territory on 31 December1992.[122]

5.1.2 Yugoslavia

The Socialist Federal Republic of Yugoslavia (hereafter Yugoslavia) is the formal name of the federal state founded during the Second World War including the six republics of Bosnia and Herzegovina, Croatia, Serbia, Slovenia, Montenegro and Macedonia. As a result of a series of political and ethnic upheavals and conflicts in the early 1990's the Yugoslav state dissolved as the six republics one after each other broke away from the federal state and claimed independence. Slovenia and Croatia were first to separate from Yugoslavia in 1991 and receive international recognition and UN membership in 1992, followed by Macedonia, Bosnia and eventually Serbia and Montenegro.[123] In Slovenia independence was declared on 25 June 1991 after 88, 5 percent of voting constituents voted in favor of an independent Slovenian Republic in a referendum held on the 23 December 1990. [124]

As in the case with Czechoslovakia, the break-up of Yugoslavia resulted in changes and challenges on many different levels. To reach solutions the Yugoslav agreement on succession issues was adopted. However nationality matters was not addressed in the agreement and there was no separate succession treaty regulating issues of nationality following the disintegration of the former Yugoslavia either.[125]

In the federal state, as in Czechoslovakia was there a two leveled nationality system, where individuals possessed a republic (e.g. Croatian) citizenship and a federal (i.e. Yugoslavian) citizenship. As such all nationals were citizens of both Yugoslavia and one of the six republics (republic citizenship could only be held by a Yugoslav citizen). Until 1974, federal citizenship prevailed over republic citizenship and it was on the former access to state rights and identity was based. However the internal citizenship was necessary for the right to vote. As the federal citizenship was predominant,

[121] The EU disapproved of Czech nationality policy and therefore introduced an incentive-based approach by conditioning future membership in the Union on desired changes of the nationality law.
[122] Linde, R., p. 351*ff*.
[123] Montenegro gained independence from Serbia in 2006.
[124] Results of voting at the plebiscite on sovereignty and independence of the Republic of Slovenia, 23 December 1990, available at:< http://www.stat.si/letopis/2011/05_11/05-11-11.htm> [accessed 2012-05-07].
[125] UNHCR, Regional Bureau for Europe, "*Report on Statelessness in South Eastern Europe"*, 2011, p. 7.

relatively few people changed their republican citizenship when moving from one republic to another.[126]

> In all six republics acquisition of nationality was similarly based on the principle of *jus sanguinis*. In principle, a child acquired his or her parents' citizenship. On the date of acquisition of the citizenship of another republic, a person's prior republic citizenship came to an end.[127]

After the dissolution, the successor states avoided statelessness to a great extent by allowing continuity of the republic citizenship in their new nationality legislation. As acquisition of nationality in the successor states became based on possession of republic citizenship, many persons were rendered stateless. Former nationals of Yugoslavia did not always (have the right to) acquire citizenship of the republic in which they lived and as such the new solution only avoided statelessness in theory as those who were not registered in the successor state in which they had permanent residence were made foreigners of that state overnight.[128]

Some of the new laws and immigration policies were aimed at excluding members of (certain) ethnic minorities from access to nationality. In addition to deliberate gaps in the legislation and disregard to the doctrine of the genuine and effective link, several Roma consequently experienced problems with civil registration and documentation, which left them either *de jure* or *de facto* stateless. As of today, successor states of former Yugoslavia still practice nationality laws which retain Roma in the legal uncertainty of statelessness. This is for example the situation in the case of Slovenia.

5.2 Slovenia

"The problem Slovenia had when it established its own state in 1991 was a lack of historical experience with statehood."[129]

In creating its own nationality policies the lack of experience of independence and sovereignty evoked features of exclusionism and an

[126] Article 249 of the 1974 SFRY Constitution: Yugoslav citizens shall have a single citizenship of the Socialist Federal Republic of Yugoslavia. Every citizen of a republic shall simultaneously be a citizen of the Socialist Federal Republic of Yugoslavia. Citizens of a republic shall on the territory of another republic have the same rights and duties as the citizens of that republic and UNHCR, Regional Bureau for Europe, "*Report on Statelessness in South Eastern Europe"*, 2011, p. 7.
[127] Case of *Kuric and others v. Slovenia*, ECtHR Judgment of 26 June 2012, para. 23.
[128] UNHCR, Regional Bureau for Europe, "*Report on Statelessness in South Eastern Europe"*, p. 5*ff*.
[129] Kuhelj, A. 'Rise of xenophobic nationalism in Europe: A case of Slovenia' *Communist and Post-Communist Studies*, Vol. 44, 2011, p. 275.

unfavorable legal distinction between 'Slovenians' and other ethnic groups.[130]

Although the new government granted nationality to more than 170,000 Slovenian residents who were citizens of other Yugoslav republics, a great number remained stateless due to the new *Slovenian Citizenship Act*. In addition to residents unable to acquire nationality under the new provisions and prerequisites, the succession government removed some 30,000[131] Slovenian residents, originating from other republics of Yugoslavia from its new Register of Permanent Residents on February 26, 1992, invoking statelessness of thousands of persons altogether. More than 20 years later over 4,000 including a large number of Roma still remain stateless in Slovenia.[132]

5.2.1 The Citizenship Act and the Erasure

The *Slovenian Citizenship Act* from 1991[133] is, as mentioned in the previous section, based on the principle of continuity of the republican citizenship possessed under the Yugoslavian state.[134] Through application – within six months from the day the *Citizenship Act* entered into force – all citizens of the republics of former Yugoslavia who had permanent residence in Slovenia on the day of independence could acquire Slovenian nationality.[135] In the end of 1991 two new paragraphs was added to this provision which limited its application. According to the amendment the provision did not longer apply if a person would commit a criminal act against the Republic of Slovenia or pose a threat to public order, security, or defense of the State.[136]

Even though the transitional provisions: articles 39 and 40 of the *Citizenship Act* provided Slovenian nationality to former Yugoslavian nationals, several thousands of Slovenian residents were unable to obtain Slovenian nationality (many of these *non-autochthonous* Roma). For a substantial number this happened as they did not apply for nationality within the

---

[130] Kuhelj, A., p. 275.

[131] According to government figures from June 2002 29,064 persons were erased, but Monitoring organizations claim as many as 130,000 persons were erased. In 2009 the Ministry of Interior released new figures, according to these 25,671 were removed from the Register of Permanent Residents as of 26 February 1997.

[132] UNHCR News Stories 26 February 2007, *"UNHCR urges Slovenia to resolve the problem of its "erased cases"*, p. 1 and
UNHCR Global Trends, 2010, Annexes, Table 7 Stateless Persons 2010, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4e5228096&query=stateless%20persons%202010> [accessed: 2013-05-10].

[133] Citizenship of the Republic of Slovenia Act No. 1/1991 as amended in 1999.

[134] Meaning Yugoslav nationals with Slovenian republic citizenship acquired Slovenian nationality after the independence, Article 39.

[135] Article 40

[136] Article 40 (2) and (3) These provisions, in particular 40 (3) was used by state officials in several cases as grounds for denial of nationality until it was struck down and annulled by the Constitutional Court through decision No. U-I-89/99 of 10 June 1999.

prescribed six months time limit.[137] Others did not meet the requirements to be considered Slovenian residents[138] and were simply denied status as a permanent resident which resulted in refusal of their applications.[139]

Citizens of former republics of Yugoslavia who either failed to apply for Slovenian nationality within the prescribed time-limit or whose requests were not granted were determined aliens, according to article 81(2) of the *Aliens Act*.[140] On 26 February 1992 the Ministry of the Interior instructed municipal authorities to 'regulate the legal status' of these individuals. As a result they were removed from the Register of Permanent Residents and transferred into the Register of Aliens without a Residence Permit. As their names were erased, *ex lege*, from the Register of Permanent Residents, they became known as 'the erased'. In losing their permanent residence status they were now aliens or stateless persons illegally residing in their homeland, Slovenia.[141]

As 'the erased' received no prior notification on their changed legal status, since it was carried out by the government secretly, there were no opportunities for them to file complaints or seek remedy for their unjust treatment. Instead they were faced with the loss of all social and economic rights attached to the status of permanent resident/national. They were denied access to social security, health care, housing and education and experienced difficulties keeping their jobs, driving licenses and obtaining retirement pensions. Nor were they able to leave the country, since they could not re-enter without valid documents. The situation after the erasure was especially devastating for *non-autochthonous* (meaning non-native, see below 5.2.2) Roma.[142]

> The results of research on the erasure indicate that the erasure and all its legal consequences were systematically carried out by Slovene authorities in order to force thousands of ethnic non-Slovenes (i.e. Albanians, Bosniaks, Croats, Roma, Serbs, etc.) to leave Slovenia.[143]

Throughout the nineties the Constitutional Court and the Supreme Court ruled on complaints filed by erased individuals to annul article 81 of the *Aliens Act* and on appeals on decisions refusing nationality applications. In 1999 the Constitutional Court eventually declared the erasure an unconstitutional act and ordered the legal status of 'the erased' to be

[137] The six month time limit is removed from the Act.
[138] For example, they did not possess a valid travel document or proof of residence.
[139] UNHCR, Regional Bureau for Europe, 'Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia', *European Series*, Vol. 3 Issue. 1, 1997, p. 13.
[140] Slovenian Aliens Act no. 1/91.
[141] Case *Kuric and Others v. Slovenia*, para. 38*ff*.
[142] Dedic, J. 'The Erasure: Administrative Ethnic Cleansing in Slovenia', *Roma Rights Quarterly*, Vol. 3, 2003, p. 3.
[143] Ibid, p. 4.

regulated.[144] In order to do this the *Act on the Settling of the Status of Citizens of Other SFRY Successor States in the Republic of Slovenia* was adopted.[145] In this new Act erased individuals were allowed to apply for permanent residence under certain conditions within a three months time limit. Although the purpose of the Act was to settle the legal status of 'the erased' and retroactively recognize permanent residence in order to apply for nationality the effect was the opposite. Again the Roma were disproportionately affected as they did not apply within the prescribed time limit, because they were not informed about the opportunity in time. At the same time, many Roma who did apply accordingly had their applications rejected for various reasons.[146]

In 2010, the ECtHR made an important judgment in the case *Kuric and others v. Slovenia.* In this case the Court ruled in favor of 'the erased' applicants alleging they had been arbitrarily deprived of the possibility of acquiring Slovenian nationality as they were unlawfully erased from the Register of Permanent Residents on 26 February 1992. The ECtHR found – like the Constitutional Court – that the erasure was unlawful as there existed no legal grounds for it.[147]

According to official data, 171,132 citizens of the former Yugoslavian republics, residing in Slovenia applied for and were granted nationality under article 40 of the new *Citizenship Act*, whereas around 30,000 were denied nationality and erased from the Register. Out of these some 11,000 persons left Slovenia immediately while the rest remained to regain their nationality. Estimations indicate around 14,000 since, have managed to regulate their status and acquire nationality, while 4,000 still remain stateless.[148]

It is notable that despite rulings of its own Constitutional Court and the ECtHR, the Slovenian state has still neither recognized the rights and legal status of 'the erased' nor acknowledged and accepted its legal shortcomings and wrongdoings in dealing with the matter, let alone offered an apology. As such the remaining situation of the erasure and Slovenian nationality policies continue to perpetuate statelessness, particularly affecting the marginalized ethnic minority of the Roma.[149]

---

[144] Constitutional Court decision No. U-I-284/94 of 4 February, 1999.
[145] Settling of the Status of Citizens of Other SFRY Successor States in the Republic of Slovenia Act No. 61/99.
[146] Dedic, J. 'The Erasure: Administrative Ethnic Cleansing in Slovenia', p. 4*f.*
[147] Case *Kuric and Others v. Slovenia*, para. 316 and 348*ff.*
[148] Case *Kuric and Others v. Slovenia*, para. 37 and
UNHCR News Stories 26 February 2007, *"UNHCR urges Slovenia to resolve the problem of its "erased cases"*, p. 2.
[149] Kuhelj, A., p. 272.

5.2.2 Roma in Slovenia[150]

There are no accurate, reliable figures of the number of Roma and stateless Roma in Slovenia. In the 2002 census there were 3,246 Roma in Slovenia but estimates from CoE's European Commission against Racism and Intolerance show there could be as many as 10,000 Roma in the country.[151] According to the president of the Romani Association, Ljubljana, around 70 percent of the Roma lack Slovenian nationality. Field research carried out by the ERRC indicates that around 50 percent of these have no personal documents, which increases the level of statelessness among the Roma.[152]

In Slovenia Roma are divided into two categories: *autochthonous* and *non-autochthonous* Roma, the latter in clear majority. Although Slovenian legislation does not contain a definition or criteria to determine which Roma belong to which group, the general understanding among state officials and the way the law is applied shows there is a clear distinction between the two. *Autochthonous* (meaning native) Roma refer to Roma who traditionally lived in Slovenia, belonging to the Hungarian and Italian minorities (which are the two *autochthonous minorities* that, according to Slovenian legislation enjoy special minority protection.[153]). As opposed to *non-autochthonous* Roma who, mainly for economic reasons, migrated to Slovenia, in the 1970's from other parts of Yugoslavia prior to its dissolution.[154] Minority Rights Group International along with other watchdog organizations criticize the distinction made between *autochthonous* and *non-autochthonous* and claim it has been used by a number of Slovene authorities, especially local, to delay taking measures to improve the situation and access to nationality of the Roma.[155]

5.2.3 Acquisition of Slovenian Nationality

In 1999 the *Citizenship Act* was amended to comply with the decisions of the Constitutional Court. Today, apart from acquiring nationality based on the principle of continuity of the republican citizenship, Slovenian

[150] For further reading on the situation of Roma in Slovenia see Kuhelj, A. 'Rise of xenophobic nationalism in Europe: A case of Slovenia', *Communist and Post-Communist Studies,* Vol. 44, 2011, pp. 271-282.
[151] Minority Rights Group International, the World Directory of Minorities and Indigenous Peoples, Country Profile Slovenia, available at: <http://www.minorityrights.org/5177/slovenia/roma.html> [accessed 2013-05-10].
[152] According to numbers from 2003 and earlier, Dedic, J. 'The Erasure: Administrative Ethnic Cleansing in Slovenia', p. 2.
[153] In comparison to members of all other ethnic minorities, who only enjoy individual rights and freedoms. In Slovenia Roma have the legal status of an autochthonous ethnic group; however the Roma community does not have the status of a national minority.
[154] Dedic, J. 'The Erasure: Administrative Ethnic Cleansing in Slovenia', p. 2
See also Peric, T. 'Insufficient Governmental Programmes for Roma in Slovenia' *Roma Rights*, Vol. 2, Issue, 3, 2001 and Kuhelj, A.. 273.
[155]Minority Rights Group International, the World Directory of Minorities and Indigenous Peoples, Country Profile Slovenia.

nationality can be acquired based on origin, birth on the territory, or through naturalization.[156]

Acquisition of citizenship by origin
Article 4

A child shall obtain citizenship of the Republic of Slovenia by origin:

1. if the child's father and mother were citizens of the Republic of Slovenia at the time of the child's birth;

2. if one of the parents was citizen of the Republic of Slovenia at the time of the child's birth and the child was born on the territory of the Republic of Slovenia;

3. if one of the parents was citizen of the Republic of Slovenia at the time of the child's birth and the other was unknown or of unknown citizenship or without citizenship and the child was born in a foreign country.

Acquisition of citizenship by birth on the territory
Article 9

A child born or found on the territory of the Republic of Slovenia of unknown parentage or whose parents are of unknown citizenship or have no citizenship at all shall acquire citizenship of Republic of Slovenia.

As the provisions regulating nationality at the time of birth is based on both *jus soli* and *jus sanguinis*, there is nothing that questions their compliance with international standards. The naturalization provision however, is more dubious and occasionally criticized for not providing facilitated access to nationality accordingly. The transitional provisions that impeded Roma (and others) from acquiring Slovenian nationality in the aftermath of the independence has today been replaced by the naturalization requirements listed in article 10.

Acquisition of citizenship through naturalization
Article 10

The competent authorities may within their discretion admit the petitioner through naturalisation to the citizenship of the Republic of Slovenia if the State is interested in such an act for national reason. The person shall fulfil the following conditions:

1. that the person has reached 18 years of age;

2. that the person has a release from current citizenship or can prove that such a release will be granted if he/she acquires citizenship of the Republic of Slovenia

3. that the person has been actually living in the Republic of Slovenia for the period of 10 years, of which at least five years prior to the petition for citizenship must be without interruption;

[156] Article 3.

4. the person should have a guaranteed residence and guaranteed permanent source of income of an amount that enables material and social welfare;

5. the person must demonstrate active command of the Slovenian language in an obligatory written and oral examination;

6. that the person has not been sentenced in the state of which he/she was a citizen or in the Republic of Slovenia to a prison term longer than one year and for a criminal offence prosecuted by law if such an offence is punishable by the laws of its own country or by the laws of the Republic of Slovenia;

7. that there is no ban on the person's residence in the Republic of Slovenia;

8. that the person's admission to citizenship of the Republic of Slovenia poses no threat to public order or the security and defence of the State.

9. the person must discharge his/her tax obligations.

Facilitated Access to Nationality

When analyzing naturalization requirements the principle of not raising *'unreasonable impediments'* can serve as a point of reference. As long as requirements (even though legitimate) does not raise *impediments when applied with respect to the stateless* they can be deemed just.[157]

Residence (for a certain period of time) is for instance *'generally accepted as a legitimate requirement for naturalization and is recognized as a credible indicator of a genuine link between an individual and a state.'*[158] In general a maximum ten years[159] is considered a reasonable time period, but it terms of stateless persons *Recommendation 564(1969) of the Consultative Assembly of the Council of Europe* suggests no more than five years of lawful residence as a requirement to naturalization.[160]

Language requirements are also generally accepted as a reasonable condition and do not usually amount to discrimination. For instance the UNHCR states that *'language is fundamental to integration and cohesion of communities'*.[161] Also economic resources requirements can be justifiable, although states should allow for exceptions under certain circumstances.[162]

---

[157] Van Waas, L. *'Nationality Matters: Statelessness under International Law'* School of Human Rights Research Series, Vol. 29, 2008, p. 368.
[158] Mrekajova, E., p. 24.
[159] Council of Europe: *Explanatory report to 1997 European Convention on Nationality,* para 52.
[160] The Recommendation originally addresses refugees, but could *per analogiam* apply to stateless persons.
[161] UNHCR, "*Borders, Citizenship and Immigration Bill",* Parliamentary Briefing, February 2011, para 11.
[162] Mrekajova, E., p. 29*ff*.

One of the most discussed prerequisites of article 10 is number eight; *that the person's admission to citizenship of the Republic of Slovenia poses no threat to public order or the security and defence of the State*. Although, this is a common, 'obviously defensible' consideration it may be interpreted very broadly which leaves room for arbitrarily/discriminatory application. The condition was previously used as a ground for dismissing nationality applications of citizens of republics of former Yugoslavia according to article 40 (3), but was annulled by the Constitutional Court in 1999. Even though annulled, the condition still remains in the current *Citizenship Act* under the mentioned article 10 (8).[163]

> One example of its effect is the case of a Roma with Macedonian citizenship who was denied Slovene nationality although he had lived in Slovenia for fourteen years, had permanent residence and applied for Slovene citizenship within the prescribed period. However, he had been sentenced for various misdemeanors six times in the period 1974-1990. Therefore, the Ministry of Interior rejected his application on the basis of its discretionary powers under article 40 (3), with the explanation that he posed a threat to the public order of the Republic of Slovenia. The Supreme Court upheld the Ministry's decision.[164]

One may argue that separately, the conditions of article 10 do not contradict international standards regarding naturalization prerequisites. However, when studying their content and evaluating their application the question of proportionality arises. According to CoE certain conditions '*should exclusively be used and regarded as [elements] of integrating non-nationals and should not be used as a discriminatory means for a State to select its nationals.'*[165] In this respect the Slovenian naturalization requirements are numerous and far-reaching and from a stateless person's point of view disproportionate. To prescribe ten years of permanent residence along with the fulfillment of all other conditions may thus come across as '*unreasonable impediments'* to acquisition of Slovenian nationality through naturalization, to stateless persons in general and stateless Roma in particular.

The Hungarian Helsinki Committee addresses this in the report "*Forgotten without Reason"*, where Slovenia is urged to amend its nationality legislation in order to provide facilitated access to nationality of stateless persons residing permanently on their territory, with particular attention to those in a vulnerable position (such as the elderly or sick).[166] According to the Committee's recommendations such amendments should include facilitated access to nationality of those stateless persons residing on their territory on a long-term basis, notably by exempting stateless applicants

[163] Dedic, J. 'The Erasure: Administrative Ethnic Cleansing in Slovenia', p. 3.
[164] Supreme Court decision No. VS 10311 of July 8, 1993 as explained by Jasminka Dedic in 'The Erasure: Administrative Ethnic Cleansing in Slovenia', p. 3.
[165] Council of Europe, Committee of Experts on Nationality: "*Report on Conditions for the Acquisition and Loss of Nationality"*, Strasbourg, 14 January 2003, para. 36.
[166] Recommendation 15 – Facilitating access to citizenship.

from the obligation of passing any sort of examination (either of constitutional studies or language skills).[167]

As mentioned previously, facilitated access to nationality is the most enhanced durable solution to statelessness promoted in international law, such as the *1961 Statelessness Convention* and the *1997 European Convention on Nationality*. Accordingly states are encouraged to adopt less stringent naturalization requirements and apply a 'permissive attitude' towards stateless naturalization applicants and focus on conditions such as long-time residence and genuine and effective link rather than language qualifications and income.[168]

In addition to the naturalization requirements a number of comments regarding 'erased' Roma citizen have been made by CoE's Human Rights Commissioner, Thomas Hammarberg and the UNHCR.[169] Also Slovenia's accession to the *1961 Statelessness Convention* and the two *CoE Conventions of 1997 and 2006* are urged by several parties of the international community.[170]

[167] Recommendation 16 – Access to citizenship: exemption from examinations.
[168] Guylai, G. eds. *"Forgotten Without Reason – Protection of Non-Refugee Stateless Persons in Central Europe"*, Hungarian Helsinki Committee, Budapest, 2007, p. 42.
[169] See for instance the publications referred to in notes 103, 104 and 134.
[170] See for instance the website of the UNHCR <http://www.unhcr-centraleurope.org/en/what-we-do/protecting-the-stateless.html>
Hungarian Helsinki Committee <http://helsinki.hu/wp-content/uploads/books/en/Forgotten-without-reason.pdf>
Council of Europe <http://www.humanrightseurope.org/2013/01/slovenia-nils-muiznieks-urges-janez-jansa-to-help-the-%E2%80%98erased%E2%80%99/>
[accessed 2013-05-13].

6 The Need for EU-regulation – Conclusions

The analysis of the presented material leading up to this section clearly shows the devastating impact lack of nationality has on an individual on several levels. Statelessness impairs access to fundamental human rights and societal service and influences everyday life affairs. Today there are 680, 000 stateless persons in Europe and that is 680,000 too many. This is why reduction of statelessness and access to nationality must be addressed further. The question is thus how?

This thesis suggests EU-regulation on the matter as one important way of reducing and eventually eliminating statelessness, not only within the EU but within all of Europe (by future EU-enlargement). This suggestion might be questioned for several reasons; that there already exists sufficient regulation on the area, both on international and regional level and that a distinction should not be made between EU and the rest of Europe (why create a separate instrument on the reduction of statelessness within the EU?) To some extent these objections are valid. As presented in section three, there are comprehensive instruments on the matter, so perhaps then what is needed is not yet another legal instrument. But rather the creation of incentives and political will to accede to already existing instruments. The discussion can nonetheless be made so simple as to concern the number of instruments, but rather their efficiency, content and binding character.

The following section forms a discussion based on the abovementioned statements and objections, where the question *why there is a need of EU-regulation on the reduction of statelessness and access to nationality* will be answered.

The Lacuna of EU-law

It is remarkable that a notable democratic institution such as the EU does not address the issue of statelessness in any of its regimes. The fact that its fundamental instruments on human rights such as the ECHR and Human Rights Charter do not even address the issue is a true shortcoming of Union human rights law. How can access to nationality be ensured within the Union without any legislation? This *per se* is one argument as to why EU-regulation on the reduction of statelessness and access to nationality should be enacted.

The result of the current lacuna; no harmonized rules, allows each member state to adopt and apply its own nationality laws; nationality laws that might even be discriminatory towards certain ethnic groups, as shown in the case of Slovenia. As the *Race Directive* does not cover issues regarding nationality and since the ECtHR shows restrained power to directly challenge discriminatory denial of nationality there is nothing in the EU-law

that invalidates the content of the *Slovenian Citizenship Act*. An EU-directive containing provisions on facilitated access to nationality through permissive naturalization requirements or at least prohibition of *unreasonable impediments,* binding upon its member states would impel Slovenia to change its naturalization requirements and thus allow Roma access to nationality to a greater extent (for example by lowering the period of permanent residence or removal of the condition of not posing a threat to public order or the security and defense).

EU-directive v. International Instruments

The binding character of EU-law and its appertaining judiciary upon the member states is advantageous as it brings eventual regulation on the issue to a higher legal source level. EU-directives are binding upon its member states (once an EU-directive is adopted, member states have to comply with it) whilst CoE Conventions are voluntary – in the sense that each state decides whether it wants to accede. As such EU-rules on statelessness would coerce both current and coming member states to adopt their nationality legislation accordingly. This binding character, in comparison to states voluntary accession to human rights treaties makes EU-regulation more desirable. However, it is important to remember that this desirable effect can only arise once the member state agrees to (voluntarily) transfer their competence to the EU. In this regard binding EU-law can only be established if the member states allow it.

Although there is a need for EU-regulation to coerce states to facilitate access to nationality and reduce statelessness, section four shows that at present, this is not possible unless fundamental principles of EU-law, such as division of competence and the doctrine of state sovereignty are changed. Case law like the *Rottman* case, implicates that such a process of change is initiated, nevertheless it is obvious considering the lack of EU member states ratifications of the two CoE Conventions (only four states in the EU have acceded to the 2006 Convention) that the ambition among the states to reduce statelessness and consequently transfer legal competence to the EU remains weak.

On the other hand EU-regulation does not necessarily have to contradict the doctrine of state sovereignty concerning nationality matters. The purpose of EU-legislation would not be to entirely regulate member states conditions of granting nationality, that is whether they should grant nationality based on the principles of *jus soli* or *jus sanguinis.* As was seen in section five the issue of statelessness in the successor states of Czechoslovakia and Yugoslavia derived from insufficient or too rigid naturalization requirements – that the applicants for various reasons were unable to fulfill – not on acquisition of nationality at birth. As such EU-regulation would not determine the conditions on acquisition of nationality at birth. Instead a directive would set minimum standards on naturalization processes and conditions to provide solutions to cases were statelessness already occurred. In this aspect eventual EU-regulation would not really encroach upon states' sovereignty as it would not dictate what conditions they have to apply but

merely which ones they cannot. In any case the fact that there today might be legal obstacles that prevent EU from adopting legislation on the issue does not dismiss the fact that such legal action is needed!

Future Perspective

Furthermore, as was seen in the case of Czech Republic and the change of its nationality law in the mid 90's, the EU can be a powerful and effective institution when it comes to exerting pressure and create incentives. The actions carried out by EU at that time were crucial for the enacting of the amendments of the Czech Act of Acquisition of Citizenship. This already shows EU's capability and influence on member states nationality laws, and with legislation as support, the influence might be even more efficient. As such the EU plays an important role in strengthening the right and access to nationality in the region. However as was noted in the introductory section stateless persons in general and stateless Roma in particular are not facing hardships only in EU member states. In fact there are several states not yet members of the EU with vast stateless populations, including stateless Roma. That the problem of statelessness exists outside the borders of the EU is nonetheless not an argument against adopting EU-legislation. In a future perspective such legislation will be applied when other states in Europe negotiate EU-accession (such as the successor states of former Yugoslavia, with a large stateless population at present) in a future EU enlargement.

The need for EU-regulation is also supported by international human rights law. To reduce statelessness and ensure access to nationality as a part of securing human rights protection is a duty for the EU. As international human rights law, for example article 15 of the UDHR forms part of Community law and EU is subjected to the obligations therein; EU is obliged to ensure the right to nationality. Adopting EU-regulation hindering member states from applying restrictive and discriminatory nationality laws is thus one way for the EU to ensure fulfillment of its obligations under mentioned article.

The 1954 and 1961 Statelessness Conventions

One argument against adoption of EU- regulation is that there is no need for the EU to legislate in this field of law as there already are sufficient international instruments to which the member states have become parties. It is true that international conventions and treaties as listed in section three are binding upon the majority of EU member states; however, there are still a number of states that did not yet ratify them, especially the *1961 Convention* (which Slovenia is not a party to). As their recognition is still relatively weak their influence on individual states' nationality laws remains the same.

Another important point why these current international instruments are considered insufficient is that they lack monitoring mechanisms. So even if their provisions set out to reduce statelessness and facilitate naturalization for stateless persons there is no assigned monitoring body to ensure states' compliance with the obligations therein.

Furthermore, the wording used in these instruments is rather broad and not very far-reaching. For example the *1961 Convention* is aimed at reduction, not elimination of statelessness, which can be told from its name; Convention on the *Reduction* of Statelessness. Another example is article 32 of the *1954 Convention*, which, according to its formulation does not oblige member states to secure access to nationality through facilitated naturalization remedies, but merely that they *shall, as far as possible* facilitate the assimilation and naturalization of stateless persons. This formulation allows for wide interpretation, which states (like Slovenia) could use to adopt less ambitious nationality law with more stringent naturalization requirements. In this respect EU-regulation could provide an alternative similar to the *1961 Convention* but with sharper formulations where acquisition of nationality through naturalization is not only facilitated as far as possible, but puts further demands on the states. Such formulation can be found in the *CoE 1997 Convention on Nationality*, where article 6 states that *Each State Party shall facilitate in its internal law the acquisition of its nationality for the ... stateless persons lawfully and habitually resident on its territory.* Unfortunately as in the case with the aforementioned Conventions also the 1997 Convention holds few accessions.

The 1997 CoE Convention on Nationality

Since Slovenia is neither party to the *1961 Convention*, nor the *1997 or 2006 CoE Conventions*. Perhaps then a simpler solution would be to exert pressure on Slovenia to accede to these existing conventions rather than to adopt a new one. Nevertheless, as a party to the *1954 Convention*, it does not seem like the provisions therein are strong enough to bring about changes in its nationality laws. Perhaps due to the vague formulation of article 32 that was just mentioned. According to which Slovenia's obligation towards stateless persons within its territory is 'only' to *facilitate the assimilation and naturalization of stateless persons as far as possible* and not bring an ultimate solution to the status of stateless persons. In the case of the 'erased' this formulation is evidently not strong enough. During the past decades court rulings and international pressure, in addition to article 32 of the *1954 Convention* have urged Slovenia to determine the status of the 'erased', but this has still not been carried out. And even though article 4 of the *1997 Convention* is phrased differently than its equivalent in the *1954 Convention*, it seems likely to assume (considering the *status quo* of Slovenian naturalization requirements and the unwillingness to settle the status of the 'erased') that it will not accede to this (1997) Convention any time soon. As such EU and EU-law might be the only institution to impel Slovenia to amend its legislation accordingly.

The 2006 CoE Convention

The 2006 Convention is the newest and consequently the least recognized – with only six state parties – of all current instruments on statelessness. For stateless Roma in the CEE and Slovenia this is unfortunate as the Convention specifically addresses avoidance of statelessness in relation to state succession and provides solutions to statelessness occurring as a result of the break-up of states (e.g. Czechoslovakia and Yugoslavia). Pursuant to

article 5 of the *2006 Convention,* the predecessor state (i.e. Slovenia) is compelled to grant nationality to otherwise stateless persons who habitually reside on its territory or who have an appropriate link with the state. Accordingly, the naturalization conditions in article 10 of the Slovenian Citizenship Act and the arbitrarily denial of nationality to Roma and other ethnic groups following the Slovenian independence is to be considered a breach of mentioned article 5. That is if Slovenia were a party to the 2006 Convention…. Again, this shows how access to naturalization can reduce and eradicate statelessness through simple provisions and stresses the significance of such obligations to be incorporated in the EU-regime.

Overall the content of the four Conventions in general and the CoE Conventions in particular is comprehensive and substantial. Thus, to make it effortless for the EU to respond to the need of EU-law on the reduction of statelessness and access to nationality it would be enough adopting EU-regulation simply making it an obligation for all member states to accede to these four conventions.

To Conclude

In order to reduce statelessness and ensure access to nationality (through naturalization) for stateless Roma and others in the EU, EU-legislation is required. Such legislation would formulate binding guidelines on naturalization requirements which all states would have to implement in their nationality laws. As is shown in the case of stateless Roma in Slovenia (and other countries of CEE) it is their access to nationality through naturalization that is severely impaired. Due to strict and comprehensive prerequisites few Roma are able to fulfill these requirements and thus qualify for nationality through naturalization.

When it comes to matters of nationality this is not (yet) a competence area the member states has transferred to the EU. And it is farfetched to think such a major project as harmonization of the 27 member states nationality laws will be carried out in the nearest future. Especially since EU-citizenship is acquired regardless on what basis member state nationality is granted. However if the obligation to provide facilitated access to nationality would exist within EU-law, the reduction of statelessness might be more efficient and naturalization conditions would have the same content and would be applied equally towards stateless persons residing in all member states.

Through EU-regulation, restrictions on minimum residence, economic resources and language skills could be imposed which in extension would create facilitated access to nationality through naturalization and consequently reduce statelessness in accordance with principles of international human rights law such as the right to nationality.

Bibliography

Legal Instruments

International

Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930

Universal Declaration of Human Rights (UDHR), 1948

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950

Convention relating to the Status of Stateless Persons, 1954

Convention on the Reduction of Statelessness, 1961

Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965

International Covenant on Civil and Political Rights (ICCPR), 1966

Convention Governing the Specific Aspects of Refugee Problems in Africa, OAU, 1969

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979

Convention on the Rights of the Child (CRC), 1989

European Convention on Nationality, 1997

Convention on the Avoidance of Statelessness in relation to State Succession, 2006

European Union

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 OJ C306/01

Treaty of the Functioning of the European Union (TFEU), 2010 OJ C83/47

Charter of Fundamental Rights of the European Union, 2000 OJ C364/1

Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive), 2000 OJ L180/22

Directive 2011/95/EU 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 (Qualification Directive), 2011 OJ L337/9

National
The Constitution of the Socialist Federative Republic of Yugoslavia, February 21, 1974

Act No. 40/1993 on the Acquisition and Loss of Citizenship of the Czech] Republic

Slovenian Aliens Act no. 1/91

Citizenship of the Republic of Slovenia Act No. 1/1991 as amended 1999

Settling of the Status of Citizens of Other SFRY Successor States in the Republic of Slovenia Act No. 61/99

Reports and Publications

Council of Europe
Consultative Assembly of the Council of Europe, "*Recommendation 564 (1969) on the Acquisition by Refugees of the Nationality of their Country of Residence"*, 30 September 1969

Council of Europe, Committee of Experts on Nationality: "*Report on Conditions for the Acquisition and Loss of Nationality"*, Strasbourg, 14 January 2003

Council of Europe, *Explanatory report to 1997 European Convention on Nationality*, November 1997

Commissioner for Human Rights, "*Many Roma in Europe are stateless and live outside social protection"*, Council of Europe, July 2009

Commissioner for Human Rights, *"Human rights in Europe: no grounds for complacency – Viewpoints by Thomas Hammarberg"*, Council of Europe, April 2011

European Union
European Commission Directorate-General for Employment and Social Affairs, "*The Situation of Roma in an Enlarged Europe"*, 2004

European Union Agency for Fundamental Rights, "*The situation of Roma EU citizens moving to and settling in other EU Member States"*, November 2009

COM/2011/173, *"An EU Framework for National Roma Integration Strategies up to 2020"*

United Nations
Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness held at Geneva from 24 March to 18 April 1959

International Law Commission, Articles on Diplomatic Protection with commentaries, 2006

Office of the United Nations High Commissioner for Human Rights, Regional Office for Europe;*"The European Union and International Human Rights Law"*, http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf
[Accessed 2013-02-16]

UNHCR Executive Committee Conclusions No. 78 of 1995 and No. 90 of 2001

UNHCR, Regional Bureau for Europe, 'Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia', *European Series*, Vol. 3 Issue. 1, 1997

UNHCR, *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, 1999

UNHCR News Stories 26 February 2007, *"UNHCR urges Slovenia to resolve the problem of its "erased cases"*

UNHCR, *"Protecting Refugees and the Role of the UNHCR 2007-2008"*, September 2007

UNHCR, Massey, H. 'UNHCR and De Facto Statelessness', *Legal and Protection Policy Research Series*, April 2010

UNHCR, Global Trends, 2010

UNHCR, *"Borders, Citizenship and Immigration Bill"*, Parliamentary Briefing, House of Lords Second Reading, February 2011

Text of the 1961 Convention on the Reduction of Statelessness with an Introductory Note by the Office of the United Nations High Commissioner for Refugees, Geneva, January 2011

UNHCR, Regional Bureau for Europe, *"Report on Statelessness in South Eastern Europe"*, September 2011

Others
Human Rights Watch, *Roma in the Czech Republic Foreigners in Their Own Land*, 1 June 1996

Tolerance Foundation, "*Report on the Czech Citizenship Law: The Effect of the Citizenship Law on the Czech Republic's Roma Community*, Prague, 25 May 1994

Literature

Arendt, Hanna. "*The origins of totalitarianism*", Meridian Books, The World Publishing Company, New York, 1958

Berkeley, Bill. 'Stateless People, Violent States', *World Policy Journal*, Vol. 26 Issue, 2009, pp. 3-15

Blitz, Brad K. & Lynch, Maureen. eds. *"Statelessness and the Benefits of Citizenship: A Comparative Study"*, Geneva Academy of International Humanitarian Law and Human Rights and the International Observatory on Statelessness, Geneva, 2009

Babha, Jacqueline. eds. "*Children without a State: a Global Human Rights Challenge*", Massachusetts Institute of Technology, Cambridge MA, 2011

Cahn, Claude. 'Minorities, Citizenship and Statelessness in Europe', *European Journal of Migration and Law*, Vol. 14, 2012, pp. 297-316

Dedic, Jasminka. 'The Erasure: Administrative Ethnic Cleansing in Slovenia', *Roma Rights Quarterly*, Vol. 3, 2003

Dedic, Jasminka. *"Roma and Statelessness"*, European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Brussels, 26 June, 2007

Guylai, Gabor. eds. "*Forgotten Without Reason – Protection of Non-Refugee Stateless Persons in Central Europe"*, Hungarian Helsinki Committee, Budapest, 2007

Guylai, Gabor. 'Remember the forgotten, protect the unprotected', *Forced Migration Review*, Issue 32, 2009, pp. 48-49

Gyulai, Gabor. 'Statelessness in the EU Framework for International Protection', *European Journal of Migration and Law*, vol. 14, 2012, pp. 279-295

Levanon, Asaf & Lewin-Epstein, Noah. 'Grounds for citizenship: Public attitudes in comparative perspective', *Social Science Research*, Vol. 39 Issue 3, 2010, pp. 419-431

Linde, Robyn. 'Statelessness and Roma Communities in the Czech Republic: Competing Theories of State Compliance', *International Journal on Minority and Group Rights,* Vol. 13, 2006, pp. 341-365

Kivisto, Peter & Faist, Thomas. "*Citizenship: discourse, theory, and transnational prospects"*, Blackwell Publishers, Malden MA, 2007

Kuhelj, Alenka. 'Rise of xenophobic nationalism in Europe: A case of Slovenia' *Communist and Post-Communist Studies,* Vol. 44, 2011, pp. 271-282

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

Mrekajova, Eva. *"Naturalization of Stateless Persons: Solution of Statelessness?",* Tillburg, 2012

Parra, Jessica. 'Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness', *Fordham International Law Journal,* Vol. 34, Issue 6, 2011, pp.1666-1694

Peric, Tatjana. 'Insufficient Governmental Programmes for Roma in Slovenia' *Roma Rights,* Vol. 2, Issue, 3, 2001

Posch, Albert. 'The Kadi Case: Rethinking the Relationship Between EU Law and International Law', *The Columbia Journal of European Law,* Vol. 15, Issue 2, 2009, pp.1-5

Shaw, Jo. eds. *"Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?",* European University Institute, Florence, 2011

Van Eijken, Hanneke. 'European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals', *Merkourios Utrecht Journal of International and European Law,* Vol. 27, Issue 72, 2010, pp. 65-69

Van Waas, Laura. '*Nationality Matters: Statelessness under International Law'* School of Human Rights Research Series, volume 29, 2008

Warnke, Adam. M. 'Vagabonds, Tinkers, and Travelers: Statelessness among the East European Roma', *Indiana Journal of Global Legal Studies,* Vol.7 Issue. 1, 1999, pp. 335-367

Weis, Paul. "*Nationality and Statelessness in International Law*", Kluwer Academic, Dordrecht, 1979

Weissbrodt, David & Collins, Clay. 'The Human Rights of Stateless Persons', *Human Rights Quarterly*, Volume 28, Number 1, 2006, pp. 245-276

Web

Council of Europe
http://www.humanrightseurope.org/2013/01/slovenia-nils-muiznieks-urges-janez-jansa-to-help-the-%E2%80%98erased%E2%80%99/
[Accessed 2013-04-22]

Council of Europe Treaty Office
http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG
[Accessed 2013-04-22]

Minority Rights Group International, the World Directory of Minorities and Indigenous Peoples
http://www.minorityrights.org/3/home/mrg-directory-homepage.html
[Accessed 2013-05-19]

Refworld, UNHCR Database
http://www.refworld.org/
[Accessed 2013-05-19]

Results of voting at the plebiscite on sovereignty and independence of the Republic of Slovenia, 23 December 1990
http://www.stat.si/letopis/2011/05_11/05-11-11.htm
[Accessed 2012-05-07]

United Nations Treaty Collection
http://treaties.un.org/pages/ParticipationStatus.aspx
[Accessed 2013-04-22]

Van Waas, Laura. *Debating the 'right to citizenship'*, online post on the website of The European Network on Statelessness, 11 March 2013
http://www.statelessness.eu/blog/debating-%E2%80%98right-citizenship%E2%80%99
[Accessed 2013-05-02]

Table of Cases