A European Human Rights Obligation for Statelessness Determination?
The picture on the front page is part of the project ‘Nowhere People – The Global Faces of Statelessness’ by Greg Constantine ©. The child in the picture is an 11-year-old girl who was born in Abkhazia, but has lived most of her life in Ukraine – stateless. For more information visit http://www.nowherepeople.org.
A European Human Rights Obligation for Statelessness Determination?

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Acknowledgements

My journey into statelessness started somewhere last year, in the process of figuring out what subject interested as a topic for the papers and research within the context of the Research Master in Law. Eventually, statelessness was the issue that grabbed my attention, also because of the enthusiasm of the people at the Statelessness Programme that were working on this matter that, until recently, received relatively little attention from researchers. The topic of statelessness determination was something that fascinated me right away; how can stateless persons be protected if they are not identified as such? However, the European Convention on Human Rights has been, from the beginning of my Bachelor onwards, an instrument that has inspired me greatly due to its influential status and strong protection of human rights. To combine statelessness determination and the European Convention on Human Rights in research has been a challenging and wonderful experience. It would not have been possible without the help and guidance of others though.

First of all, I would like to thank the people at the Statelessness Programme for the great work they do. Their research, passion, and the opportunities they offer are truly inspiring. I would like to express my gratitude to Laura and Zahra in particular. Laura, as my supervisor you were always available for discussions and advice. Your remarks have been extremely valuable, constructive, and were exactly what I needed to see how I could improve my piece. Zahra, I am also indebted to you for your kind words of encouragement and assessing my Master’s Thesis.

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1. Introduction

Statelessness has been characterised as a “forgotten human rights issue”. However, due to campaigns of the United Nations High Commissioner for Refugees (UNHCR) and initiatives focused at raising awareness for statelessness and research on the subject, such as the Statelessness Programme at Tilburg Law School, the issue has started to attract more (academic) attention. Nonetheless, statelessness remains a huge problem. This is demonstrated by the fact that an estimated 12 million people worldwide are stateless today. However, it is also connected to the poignant circumstances that stateless people often live in. They are unable to enjoy all sorts of human rights, including access to health care, education, but also different civil and political rights, because they lack the most basic human right of them all: a nationality. Different international legal instruments that seek to protect stateless persons and prevent statelessness are already addressing this. In order to contribute to solving the problem of statelessness, this Master’s Thesis seeks to link statelessness, and in particular, statelessness determination, to the European Convention of Human Rights, one of the most influential human rights documents at this moment, but with no specific provisions regarding statelessness or nationality. Below, the research problem and topic, research goal, research questions, the relevance of this research and the methods used will be elaborated upon.

1.1. The problem and topic

In international law has recently been clarified that the 1954 United Nations (UN) Convention relating to the Status of Stateless Persons implies an obligation for states to determine who is stateless in order to accord them with their (basic) human rights. Statelessness determination and procedures to this end are therefore

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2 For more information about the Statelessness Programme at Tilburg Law School please visit: <http://www.tilburguniversity.edu/research/institutes-and-research-groups/statelessness/> accessed 23 March 2013.
3 UNHCR estimates, please refer to: <http://www.unhcr.org/pages/49c3646c15e.html> accessed 23 March 2013.
4 The right to a nationality is laid down in Art. 15 of the Universal Declaration of Human Rights (UDHR). Nationality has been characterised as “the right to have rights”, meaning that nationality “can not only provide sense of membership – of belonging and of identity – but it also paves the way for the enjoyment of various rights.” See Laura van Waas, Nationality matters. Statelessness under International Law (Intersentia 2008) 217ff.
5 Hereinafter ‘ECHR’ or ‘the Convention’.
6 Hereinafter 1954 Convention. In Art. 1, stateless people are defined as people who are “not considered a national by any state under the operation of its law”. This definition implies that a state has to determine who is “not considered a national by any state under the operation of its law” in order to afford them with the rights set forth in the 1954 Convention. See also Laura van Waas, Nationality Matters. Statelessness under International Law (Intersentia 2008); and UNHCR, Geneva Conclusions (Expert Meeting on Stateless Determination Procedures and the Status of Stateless Persons, Geneva, Switzerland, 6-7 December 2010). <http://www.unhcr.org/refworld/docid/4d9022762.html> accessed 23 March 2013.
indispensable from an international human rights perspective. Accordingly, the UNHCR has issued several guidelines, including one on statelessness determination, that reaffirm the necessity of statelessness determination and procedures to this end to effectively protect stateless persons.\(^7\)

At the European level the issue of statelessness has also gained firm foothold. Currently, an estimated 640,000\(^8\) people remain stateless within the borders of (the Council of) Europe, even though a majority of European states is party to the 1954 Convention.\(^9\) Both the Council of Europe (CoE) and the European Union (EU) have taken steps with regard to preventing statelessness and the protection of stateless persons. Relevant in CoE context are the ECHR, European Convention on Nationality and the CoE Convention on the Avoidance of Statelessness in Relation to State Succession and case law of the European Court of Human Rights\(^10\) on the ECHR, e.g. *Genovese v Malta*.\(^11\) With regard to the EU system, for instance the Returns Directive\(^12\) and the Qualification Directive\(^13\) are of importance, and case law of the European Court of Justice (ECJ), e.g. *Janko Rottman v Freistaat Bayern*.\(^14\) Also, Europe is home to several groups of stateless persons, such as parts of the Roma population, but also people that were not regarded by the ‘new’ countries as their citizens after the break up of Soviet Union, Yugoslavia and Czechoslovakia.\(^15\) The attention for the issue at the European level combined with the fact that a large number of people remain stateless in today’s Europe shows the need for more effective protection of stateless persons, and therefore determination of who is actually stateless. At the same time, it is

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\(^7\) UNHCR, ‘Guidelines on statelessness no. 1: the definition of “stateless person” in Article 1 (1) of the 1954 Convention relating to the Status of Stateless Persons’ (UNHCR 2012); UNHCR, ‘Guidelines on statelessness no. 2: procedures for determining whether an individual is a stateless person’ (UNHCR 2012); UNHCR, ‘Guidelines on statelessness no. 3: the status of stateless persons at the national level’ (UNHCR 2012); UNHCR, ‘Guidelines on statelessness no. 4: ensuring every child’s right to acquire a nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness’ (UNHCR 2012). These and forthcoming guidelines are building blocks for a ‘Handbook on statelessness’.


\(^10\) Hereinafter ‘ECtHR’ or ‘the Court’.

\(^11\) *Genovese v Malta* App no 55124/09 (ECtHR 11 October 2011).


interesting that the ECtHR has dealt with issues regarding nationality and statelessness, even though these do not appear to be explicitly present in the ECHR.\(^\text{16}\) The Convention could therefore potentially be of great influence on the protection of stateless persons, and could reinforce the international obligations of states regarding statelessness and statelessness determination. However, to what extent the ECHR might be helpful, and contains obligations in this sense, is currently unclear.

In the meantime, states, in their national legislation, finally have to carry out their implicit, international obligation to determine who is stateless and ensure compliance with relevant European legislation, including the ECHR. In national laws references to statelessness can definitely be found; attention is thus being paid to the issue by individual states.\(^\text{17}\) Still, statelessness determination is a difficult subject for many states, because it is hard to establish whether a person is truly stateless. Not all people without personal identity documents are stateless: sometimes people have lost their identity documents on purpose in the hope of obtaining some status in the country of arrival, but in other cases they might have lived their entire life in a country that left them stateless. In order to determine who is stateless, some European states already have a specific procedure for stateless persons.\(^\text{18}\) In other states no such procedure exists and stateless people end up in procedures that are not aimed at statelessness determination.\(^\text{19}\) This shows the difficulty of recognising a person as being stateless, which is acknowledged by many,\(^\text{20}\) and illustrates that within Europe problems still arise with regard to statelessness determination and that there is a great variety between countries when it comes to procedures to this end.

From the above, it appears that both at the international and national level – at least by some states – attention is being paid to statelessness determination. Even though statelessness is an issue that is definitely on the agenda of, in particular, the CoE, the determination of it does not seem to be present here as much. Obviously, the CoE’s legal framework does not provide for an explicit obligation for states to determine who is stateless. However, in view of the (implicit) obligation to

\(^{16}\) Some of the important cases that were brought before the ECtHR regarding nationality and statelessness included: Andrei Karassev and family v Finland App no 31414/96 (ECtHR 12 January 1999); Kuric and others v Slovenia App No 26828/06 (ECtHR 26 June 2012); ECtHR, Genovese v Malta App no 53124/09 (ECtHR 11 October 2011).


\(^{18}\) For example Hungary. However, this procedure is far from perfect. See Gabor Gyulai, Statelessness in Hungary: the protection of stateless persons and the prevention and reduction of statelessness (Hungarian Helsinki Committee 2010).

\(^{19}\) For example The Netherlands, where stateless persons resort to the “no-fault procedure” (buitenschuldprocedure). See also UNHCR, Mapping Statelessness in the Netherlands (UNHCR 2011).

determine statelessness in international law and developments in case law of the Court, there might be some (implicit) obligation for statelessness determination present in the Convention. This could advance statelessness determination in the individual states. However, it is completely unclear to what extent such obligation exists or might be derived from the ECHR.

1.2. Research goal
The general aim of this Master’s Thesis is of course to add to the existing knowledge and comprehension of statelessness and statelessness determination. The goal of the project is to describe the current state of affairs of the Convention, and its interpretations by the Court, with regard to statelessness and statelessness determination. However, this descriptive research is taken a step further by conceptualising and explaining to what extent states could be obliged to determine statelessness and ensure access to a procedure for stateless persons. Relevant articles of the ECHR and interpretations of the ECtHR will be reviewed and evaluated to this end. This research will therefore also contain explanatory and evaluative elements. Ultimately, this Master’s Thesis hopes to provide some framework for future reference for stateless persons, their representatives and other organisations and institutions involved that could help provide better protection of stateless persons by identifying to what extent statelessness determination is obligatory for states according to the ECHR.

1.3. Central research question and sub questions
In view of the problem and topic, but also the research goal described above, the central research question that this Master’s Thesis will try to answer is: “To what extent does the ECHR oblige European states to determine statelessness?”

To research this question, this Master’s Thesis focuses on several specific articles of the Convention that will be explained further in the next section, which will consider the theoretical framework of this project. The sub questions therefore consider these articles. The following sub questions will be answered to provide an answer to the central research question:

- To what extent can the prohibition of torture and inhuman or degrading treatment in the ECHR oblige states to determine statelessness?
- To what extent can respect for private and family life, as guaranteed by the ECHR, oblige states to determine statelessness?
- To what extent can the right to an effective remedy, as ensured by ECHR, oblige states to determine statelessness?
- To what extent can the prohibition of discrimination in the ECHR oblige states to determine statelessness?

1.4. Relevance
The issue of statelessness has only recently started to attract more (academic) attention. Statelessness and statelessness determination have therefore not been
studied extensively, and a possible relation between those topics and the ECHR has not been the subject of academic research so far. The theoretical relevance of this project is that it could fill this gap, and provide new insights on statelessness, statelessness determination and the ECHR. With regard to the social relevance it is important to bear in mind that statelessness is an immense problem that currently affects an estimated 640,000 people in Europe and 12 million people worldwide. The fact that so many people are not being recognised and are deprived of rights, and – as a consequence – are unable to access for example health care and education,\textsuperscript{21} is not only unacceptable in this world from a human rights perspective, but it can be considered a human security issue as well, because it could affect the integration of people in society, and even result in conflict.\textsuperscript{22} By appealing to statelessness determination, possibly via the ECHR, stateless people could be given a place in society again, which clearly has social relevance.

\textbf{1.5. Methods of research}

The project will rely on the method of legal research. This means that the ECHR, relevant case law, and other legal sources (where necessary) will be systematised and analysed while considering legal theory. Furthermore, secondary sources from academic authors on the topic, in particular those reviewing relevant case law and developments of the ECHR, will be assessed critically while taking into account the reliability and topicality of them. As a complementary source, the work of the UNHCR and non-governmental organisations (NGO’s) will be used – only after critical appraisal – because especially UNHCR documents cannot be overlooked in a study regarding statelessness and statelessness determination. Below is generally described what sources and data are used to answer the sub questions. Per sub question, which deals with a specific article of the ECHR, the following sources and data are consulted:

- The ECHR, which will be used as a starting point of the research.
- Academic literature on the ECHR, and in particular on the article at hand, for a good understanding of this article, its interpretation and development. The characteristics, interpretations and developments of the ECHR and the specific article will be systematically reviewed.
- Academic literature on statelessness and statelessness determination, because this could include references to the particular article of the ECHR or more generally, to the right(s) and/or obligation(s) ensured by the article. These references will be assessed critically and consistently.
- Case law of the ECtHR on the article at hand: to provide concrete examples of interpretations that might imply the necessity or obligation to determine


\textsuperscript{22} See Laura van Waas, 'Statelessness: A 21\textsuperscript{st} Century Challenge for Europe' (2009) 2 \textit{Security and Human Rights} 155-156.
statelessness. Special attention will be paid to the relevance of the vast amount of case law to the topic of this research in order to select case law.

- Reports and recommendations (UNHCR, others), because these might include references to (interpretations of) the particular article of the ECHR, or to the right(s) and/or obligations that it contains more generally. These will again be assessed critically and systematically.
2. The European Convention on Human Rights and statelessness determination

The aim of this section is threefold. First of all, it defines the concepts that will be used in this project. It furthermore explains the main features of the ECHR, so that the general workings of the legal instrument are clear to the reader. Moreover, it will elaborate upon the choices of the specific articles of the ECHR that will be studied. By bringing these three important preconditions for a research project together, this section thus presents a comprehensive theoretical framework.

2.1. Definitions of important concepts

Some of the theoretical framework was already touched upon in the introduction of this Master’s Thesis. The background of this research will therefore not be discussed again here, but attention will be paid to core concepts and a framework for researching the problem.

This Master’s Thesis is grounded in international law on statelessness, because the issues of statelessness and statelessness determination are the most developed here. For definitions of concepts, this international framework will therefore be used. Two important concepts that are in need of definition here are of course statelessness and statelessness determination. Statelessness, or better, a stateless person, is defined in international law in Article 1 of the 1954 Convention as “not considered a national by any state under the operation of its law.” Laura van Waas explains:

"Whether an individual qualifies under this definition is purely dependant on a point of law – an arguably unremarkable approach, since nationality is itself a legal connection between a person and a state. The focus is on the existence (or absence) of a formal bond of nationality, without pausing to consider the quality or effectiveness of citizenship."

Her remark shows why the international, legal definition of stateless is often referred to as de jure statelessness. Furthermore, it demonstrates that this definition excludes people who lack protection de facto because their country of nationality is not protecting them.

As is explained by the UNHCR Guidelines on Statelessness, Article 1 of the 1954 Convention thus “establishes the international legal definition of a stateless person and the standards of treatment to which such individuals are entitled, but does not prescribe any mechanism to identify stateless persons as such. Yet, it is implicit in the 1954 Convention that states must identify stateless persons within

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23 The definition exactly means is spelled out in UNHCR, ‘Guidelines on statelessness no. 1: the definition of ”stateless person” in Article 1 (1) of the 1954 Convention relating to the Status of Stateless Persons’ (UNHCR 2012).
their jurisdictions so as to provide them appropriate treatment to comply with their Convention commitments.\textsuperscript{25}

Statelessness has been identified as a juridically relevant fact,\textsuperscript{26} because the finding that an individual is stateless is juridically relevant for examining the human rights obligations owed to that person. Statelessness determination should therefore be some kind of mechanism that aims to identify whether a person has a nationality or is stateless. Statelessness determination as used here is thus solely directed at identifying whether a person is stateless, and does not entail specific procedures. The reason for this is quite simple: the Court shall never order a specific procedure to be used by the Contracting Parties, because the different states have a broad discretion on these matters. This can be seen throughout the system the ECHR uses, which is subsidiary to the national protection of human rights. This is evidenced, for example, by the requirement of exhaustion of domestic remedies before an application may be lodged with the ECtHR.\textsuperscript{27}

Statelessness determination can take different forms, as states have a broad discretion in the design and operation of statelessness determination. A (specific) procedure would indeed be the best way for identifying stateless persons. UNHCR Guidelines on Stateless No. 2 “advise on the modalities of creating statelessness determination procedures, including questions of evidence that arise in such mechanisms”\textsuperscript{28} and include information on – \textit{inter alia} – the location and design of determination procedures, access to procedures, procedural guarantees and the assessment of evidence in such procedures. An indication of what such procedure can encompass in practice is furthermore shown by statelessness determination procedures that have been enacted in different European countries.\textsuperscript{29} However, it should be noted here that these ‘statelessness-specific protection statuses’,\textsuperscript{30} where statelessness is a ground for protection, are not necessarily the only statuses or procedures that can qualify as a statelessness determination procedure. Even if a state has no protection ground specifically for statelessness, a stateless person might be able to obtain a protection status. Even though Gyulai is writing about EU member states, his words can still be quoted here:

“The extremely diverse body of non-EU-harmonised protection statuses includes some national regimes that can rather easily be applied to stateless migrants. For instance, statelessness in case of forced migrants is often manifested by insurmountable legal and/or practical obstacles to the person’s return to her/his country of origin or previous residence. Thus the usual alternative

\begin{itemize}
    \item \textsuperscript{25} UNHCR, ‘Guidelines on statelessness no. 2: procedures for determining whether an individual is a stateless person’ (UNHCR 2012) 2.
    \item \textsuperscript{26} As noted in UNHCR, \textit{Geneva Conclusions} (Expert Meeting on Stateless Determination Procedures and the Status of Stateless Persons, Geneva, Switzerland, 6-7 December 2010).
    \item \textsuperscript{27} Art. 35 ECHR.
    \item \textsuperscript{28} UNHCR, ‘Guidelines on statelessness no. 2: procedures for determining whether an individual is a stateless person’ (UNHCR 2012) 1.
    \item \textsuperscript{29} Statelessness determination procedures have so far been enacted in Spain, Italy, France, Hungary, Latvia and Slovakia. See also Gabor Gyulai, ‘Statelessness in the EU framework for international protection’ (2012) 14 \textit{European Journal of Migration and Law} 279-295.
    \item \textsuperscript{30} \textit{Ibid}.
\end{itemize}
‘protection option’ for stateless persons is some sort of a ‘tolerated’ or ‘humanitarian’ status, the legal basis of which includes the practical impossibility of return (...).”

Problem with these non-statelessness specific protection statuses is often that they are unable to protect the particular rights that stateless persons are entitled to on the basis of the 1954 Convention and that the residence permit has less favourable social, economic and residence-rights attached to it when comparing it to determination procedures following the UNHCR Guidelines on Statelessness. The Dutch ‘no fault-procedure’ is often considered as an example of a non-statelessness-specific protection status. However, recent research shows that this Dutch procedure cannot qualify as a non-statelessness-specific protection status yet and is in need of some adjustments.

2.2. A general introduction to the European Convention on Human Rights

This research is furthermore based in the regional laws of the CoE, specifically the ECHR. The Convention is considered to be an influential document, and so are the judgments of its supervisory body, the Court. As was explained in the introduction, the ECHR does not explicitly mention statelessness or statelessness determination, but the ECtHR has dealt with issues regarding nationality and statelessness under the ECHR. In order to understand the workings of the Court and the interpretation of the Convention, the next paragraph shall therefore deal with these issues generally.

The ECHR, and its Protocols, are part of the framework of the CoE, which currently has 47 European member states. One of the main aims of the CoE is the protection of human rights. Therefore, the ECHR has been drafted. On the basis of Article 1 of the Convention, all states have to secure the rights and freedoms set forth in the Convention to everyone within their jurisdiction, which would include stateless persons. To ensure compliance with the ECHR, the ECtHR has been enacted. Complaints regarding violations of the Convention can be brought to the Court by both (groups of) individuals and states. However, state submissions are rare. It is furthermore important to mention that the ECtHR may receive applications from any person, NGO or group of persons claiming to be a victim of violation(s) of the ECHR by a member state. This criterion is thus not based on nationality of one of the member states and can therefore be used by migrants and stateless persons as well. Originally, the rulings on applications were a

31 Ibid. 288-289.
32 Ibid.
35 Art. 19 ECHR.
36 Arts. 54 and 53 ECHR.
37 Art. 34 ECHR.
responsibility shared by three institutions: the European Commission of Human Rights, the Court and the Committee of Ministers of the CoE. However, with Protocol No. 11, a new institutional system was created, and the Commission was abolished. Due to the enormous case load and the consequent backlog the ECtHR experienced, Protocol No. 14 changed the system again and introduced – *inter alia* – a stricter admissibility criterion. Without elaborating further on the more procedural issues, such as admissibility criteria, different compositions of the Court and execution of judgements, some of the important interpretation methods that the ECtHR has developed will be discussed for a better understanding of its reasoning in the cases that will be considered in the next sections. Furthermore, this illustrates the way in which the Court is able to extend the reach of the Convention beyond the provisions written down in it.

According to Article 32 of the Convention, the task of the Court is to interpret and apply the ECHR. In order to do so, the ECtHR has used the rules of international law on the interpretation of treaties, which are laid down in the Vienna Convention on the Law of Treaties. Two main ‘interpretations’ can be distinguished: the purposive or teleological interpretation, which permits interpretations that are in line with the object and purpose of the treaty as is indicated in the Vienna Convention on the Law of Treaties, and the evolutive interpretation or interpretation of the ECHR as a living instrument in order to ensure its effectiveness. However, the Court has also used the ‘ordinary meaning of words’ as a way of interpretation, which “may involve reference to dictionaries to determine the ordinary and natural meaning of words”. Another important concept that has been used often by the ECtHR in its interpretations is that of the ‘margin of appreciation’.

“[T]he doctrine of the margin of appreciation, which cannot easily be defined, is a principle that is used by the Court in order to strike a proper balance between a Convention human right and a legitimate restriction ground that might be employed by the States Parties to the Convention. It allows the Member States of the Council of Europe to have a certain degree of discretion not only when deciding to limit human rights by issuing laws or establishing practices for the sake of

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38 For more information about this system and the changes that Protocols Nos. 11 and 14 brought about, please refer to Alastair Mowbray, *Cases and material on the European Convention on Human Rights* (Oxford University Press 2007) 11-58.  
43 Ibid. 64, 73-78. See also the case of *Tyrer v UK* App No 5856/72 (ECtHR 25 April 1978).  
44 Ibid. 68.
When a limitation of human rights is within the margin of appreciation of a state, the ECtHR shall not interfere. Using the margin of appreciation, the ECtHR can, however, retain some influence on the conduct of states while recognising that the ECHR does allow room for different applications of its provisions. When consulting the case law on the margin of appreciation, one will see that “the scope of the margin will vary according to the circumstances, subject matter, and the background to the issue before the Court as well as the presence or absence of common ground among the States Parties to the Convention”.

When considering the different interpretation methods of the Court it should be remembered though that the ECtHR decides on cases on a case-by-case basis. However, from the overall approach taken by the Court, the means of interpreting that were discussed above can be distinguished. These are of importance to the present research on statelessness determination because it shows how issues that are not explicitly mentioned in the Convention – like statelessness determination – can be interpreted to fall within the rights protected under the ECHR. These interpretation methods and the Court’s innovativeness are thus something to keep in mind while attempting to link statelessness determination to specific Convention rights. This brings us to a last issue that cannot be overlooked when speaking of the ECtHR. Lately, the Court has been criticised for being too activist, which is related to the dynamic interpretations of the ECtHR that have made the ECHR such an influential document and not just a set of minimum guarantees for human rights. Caution with linking statelessness to the Convention is therefore needed, but because of its tradition of dynamic interpretation and activism, the Court shall remain quite innovative in its decisions. However, only time can tell whether the critique shall truly influence the interpretations of the Court...

2.3. Linking statelessness determination to the ECHR
A total of four articles of the ECHR have been carefully chosen – even though other indications might be found in the ECHR – because the interpretations of these articles in certain situations so far might point to an obligation for statelessness determination, but also to make the research manageable. Below will

45 Mieke van der Linden and Evgeni Moyakine, ‘Judicial lawmaking by the European Court of Human Rights through its interpretation techniques: the doctrine of margin of appreciation and the principle of proportionality’ in Maartje de Visser & Willem Witteveen (eds), The jurisprudence of Aharon Barak. Views from Europe (Wolf Legal Publishers 2011) 89.
47 One of the most famous critiques was that of Lord Hoffmann. Lord Hoffmann, The universality of human rights (Judicial Studies Board Annual Lecture 2009).
48 The articles mentioned here that might be related to cases of statelessness and statelessness determination were also considered by the former Dutch Judge to the ECtHR, Professor Egbert Myjer, as possibly relevant to statelessness and statelessness determination, in the workshop
be explained why these articles are so relevant to the current subject, which is justified by indications in reports and other literature, but also by presenting cases that have been decided by the Court that have links to statelessness and statelessness determination. Unfortunately, the ECtHR has so far not dealt with a case on statelessness determination. Therefore, this thesis searches for grounded pointers and possibilities in this regard.

The first article that will be examined in detail during the research is Article 3 ECHR, because the destitution of stateless persons in States Parties to the Convention could constitute the inhuman and degrading treatment that is prohibited by this provision. This was indicated for example in a UNHCR study mapping statelessness in the United Kingdom (UK). It should be noted though that the UK has introduced a specific procedure for stateless persons. Article 8 ECHR, the right to respect for private and family life, should be the next article to be included, as the Court has brought issues regarding nationality within the scope of this article. In the case of Kuric and others v Slovenia the Court seems to interpret the right guaranteed by Article 8 ECHR in such a way that it could prevent the denial of a nationality to people who would otherwise be stateless. Furthermore, the ECtHR has made a “broad statement on the meaning of nationality and the link to the European Convention on Human Rights [that] will allow the court a wide margin in the exercise of its jurisdiction over questions of nationality policy in future” in Genovese v Malta. Determination of nationality is thus an issue that could fall within the scope and ambit of the Convention. Determining nationality implicitly means that also could be determined who is not

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49 UNHCR, *Mapping Statelessness in The United Kingdom* (UNHCR 2011) 93. For this report, 37 participants were interviewed, of which 28 had experienced destitution. Of these, 11 participants had experienced rough sleeping or homelessness. According to the report, “their testimony and the analysis of their case files raises a complex set of issues relating to the compatibility of their treatment with obligations under the 1954 Convention and international human rights law; in particular, obligations that aim to ensure access to employment, housing and social assistance. Further, the circumstances in which the destitution of stateless and “unreturnable” persons on the UK territory can constitute prohibited “inhuman and degrading treatment” are particularly important as this obligation is enforceable in domestic law.”


51 Kuric and others v Slovenia App No 26828/06 (ECtHR 13 July 2010); Kuric and others v Slovenia App No 26828/06 (ECtHR 26 June 2012).


53 Genovese v Malta App no 55124/09 (ECtHR 11 October 2011).
a national, and thus stateless, which shows the relevance of Article 8 ECHR to the master’s thesis.

Article 13 ECHR, guaranteeing the right to an effective remedy, is considered separately as well, because the Court found a violation of this article in relation to stateless persons in the case of Kuric and others v Slovenia. In the on-going case of H.P. v Denmark, in which a torture victim was left stateless, Article 13 ECHR is at stake as well, because there was no adversarial process available to challenge the decision of the Danish authorities refusing the applicant Danish citizenship. Furthermore, a link between this article and statelessness determination procedures seems evident, as (the lack of) statelessness determination procedures could be (a breach of the right to) an effective remedy.

Last but not least, Article 14 ECHR, prohibiting discrimination, is relevant to the research. That the prohibition of discrimination might include some pointers for statelessness determination is clear from, for example, again the case of Kuric and others v Slovenia, but also in the on-going case of H.P. v Denmark.

2.4. Concluding remarks

Having considered the ECHR and ECtHR generally, defined the concepts of statelessness and statelessness determination, and discussed the relevance of the particular articles to be studied to statelessness determination, it is important to stress that this research takes the perspective of the ECtHR. This means that the analysis of the extent to which statelessness determination is obligatory according the selected articles of the ECHR uses case law – the interpretations and methods of interpretations of the ECtHR – on those articles as the starting point, while utilising the theoretical framework as sketched above for reference. It should furthermore be noted that the current research is of a theoretical nature, as the Court has not (yet) decided any cases on statelessness determination. However, due to its dynamic and often progressive interpretations, it might predict the future to a certain extent, as it realistically tries to uncover the course that the Court might take on statelessness determination.

54 Kuric and others v Slovenia App no 26828/06 (ECtHR 13 July 2010); Kuric and others v Slovenia App No 26828/06 (ECtHR 26 June 2012).
55 H.P. v Denmark App no 55607/09 (lodged on 1 October 2009).
56 Kuric and others v Slovenia App no 26828/06 (ECtHR 13 July 2010). Kuric and others v Slovenia App No 26828/06 (ECtHR 26 June 2012). Here Article 14 in conjunction with Article 8 ECHR was breached. The ECtHR found that the applicants had been discriminated against due to their disadvantaged situation compared to other foreigners in Slovenia.
3. The prohibition of torture and inhuman or degrading treatment

Article 3 of the ECHR contains the prohibition of torture and inhuman and degrading treatment. It reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Below some general aspects to the prohibition of torture will be explained, because these are fundamental to its interpretation. This is important, as it shows that not only ‘hard-core’ torture, often associated with bodily injuries, but also other issues with a lower level of severity fall within the scope of this Article, which might make it easier to link statelessness determination to it. In the other paragraphs, some more specific interpretations that seem to be closer to statelessness determination will be considered.

3.1. Fundamental aspects of Article 3 ECHR

When reading the Article 3 of the Convention, a couple of things stand out. First of them is the fact that it is a very short, simple and to-the-point provision. The wording also shows the absolute nature of the prohibition; a clause containing exceptions or the possibility of derogation has not been provided for. The fact that Article 3 contains a non-derogable right is laid down by the ECHR in Article 15(2). Article 3 has furthermore been characterised to “enshrine one of the fundamental values of the democratic societies making up the Council of Europe”. This phrase was repeated by the Court in the Saâdi case, in which it also confirmed some other elements that cannot influence the absolute nature of the prohibition of torture from its earlier judgements. Examples are the victim’s own conduct and the nature of the offence the victim allegedly committed.

Even though the prohibition in Article 3 ECHR is commonly known as the prohibition of torture, it is also a prohibition of inhuman and degrading treatment or punishment. Obviously, these different terms reflect different things. This deserves some further elaboration. According to the judgement of the Court in the case of Ireland v the UK the distinction between torture and inhuman or degrading treatment or punishment “derives principally from a difference in the intensity of the suffering inflicted”.

\[58\] Art. 15 ECHR is about derogation in time of emergency. Art. 15(2) ECHR reads as follows: “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”


\[60\] Saâdi v Italy App No 37201/06 (ECtHR 28 February 2008) para. 127.

\[61\] The distinction in words was intended by the drafters of the ECHR according to the ECtHR. See also Aisling Reidy, The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights, Human rights handbooks no. 6 (Council of Europe Publishing 2005) 11.

\[62\] Ireland v the UK App No 5310/71 (ECtHR 18 January 1978) para. 167.
ECtHR in different cases, names three essential elements are needed in order to come to a qualification of torture:

“the infliction of severe mental or physical pain or suffering; the intentional or deliberate infliction of the pain; the pursuit of a specific purpose, such as gaining information, punishment or intimidation”.

Inhuman treatment and degrading treatment are somewhat more ambiguous concepts, as the Court sometimes does distinguish between the two and sometimes does not. Inhuman or degrading treatment does not have to be intentional (or intentionally humiliating) and all circumstances of a case have to be taken into account. On this matter the ECtHR has often said:

“Treatment has been held by the Court to be “inhuman” because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (…). Treatment has been considered “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (…), or when it was such as to drive the victim to act against his will or conscience (…). Furthermore, in considering whether treatment is “degrading” within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (…). In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (…).”

However, the concepts remain closely linked and much depends on the facts and circumstances in finding inhuman and/or degrading treatment.

A last distinction that should be considered is the fact that Article 3 distinguishes between ‘treatment’ and ‘punishment’. “Punishment is given its ordinary meaning, but it is normally not necessary to distinguish between treatment and punishment. Punishment and treatment are often not subject to separate analysis, since in many cases punishment must involve treatment”.

The term ‘severity’ has been mentioned a couple of times above. It relates to whether a certain form of treatment or conduct can fall within the scope of Article 3. How should this be interpreted then? Again in the case of Ireland v the UK the Court stated:

“(…) ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the

64 Jalloh v Germany App No 54810/00 (ECtHR 11 July 2006) para. 68. See also the cases of T. c3 V. v the UK App Nos 24724/94 & 24888/94 (ECtHR 16 December 1999).
circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.\textsuperscript{66}

A certain form of treatment or punishment for a trivial offense might therefore fall within the scope of Article 3, whilst the same treatment or punishment could not be an issue under Article 3 when it concerns a more serious crime. National authorities are often allowed a wide margin of appreciation,\textsuperscript{67} but over time conduct that was earlier viewed as being inhuman or degrading treatment might be qualified as torture due to the interpretation of the Convention as a ‘living instrument’.\textsuperscript{68} This could make it easier to bring issues concerning statelessness and the lack of statelessness determination within the scope and ambit of Article 3.

The evidence brought by the applicant in cases regarding Article 3 ECHR must demonstrate beyond reasonable doubt that the violation took place.\textsuperscript{69} However, in depending on the facts and circumstances of a case, this criterion might not be applied this strict, for example in cases regarding detention or asylum.\textsuperscript{70} This is something that will be discussed further in paragraph 3.5.

An important characteristic of positive obligations of the state under Article 3 is ‘drittwirkung’. Not only must the state make sure that there are measures in place that “constitute effective deterrence”\textsuperscript{71} and that effective investigations resulting in “prosecution of well-founded allegations of ill-treatment”\textsuperscript{72} can take place, it also has to make sure that the people within its jurisdiction are not subjected to treatment within the scope of Article 3 at the hands of private individuals. The ECtHR has especially considered this ‘drittwirkung’ in relation to cases involving children that were ill treated by private individuals and found breaches of Article 3 in these cases.\textsuperscript{73}

Reidy mentions certain groups at risk that the authorities should be aware of when implementing Article 3 of the Convention, because they “are often particularly at risk of being tortured or ill-treated”.\textsuperscript{74} Among these groups at risk are members of minorities, refugees and foreigners. Stateless persons can fall within at least one of these categories, and they have more than once been identified as perhaps even more vulnerable due to their lack of documentation and

\textsuperscript{66} Ireland v the UK App No 5310/71 (ECtHR 18 January 1978) para. 162.
\textsuperscript{67} Pieter van Dijk, Fried van Hoof, Arjen van Rijk & Leo Zwaak (eds), \textit{Theory and practice of the European Convention on Human Rights} (Intersentia 2006) 413.
\textsuperscript{68} Robin White & Clare Ovey, \textit{The European Convention on Human Rights} (Oxford University Press 2010) 168-169. This was indicated by the ECHR in the case of Selmouni v France App No 25803/94 (ECtHR 28 July 1999).
\textsuperscript{69} E.g. Ireland v the UK App No 5310/71 (ECtHR 18 January 1978) para. 161.
\textsuperscript{70} Pieter van Dijk, Fried van Hoof, Arjen van Rijk & Leo Zwaak (eds), \textit{Theory and practice of the European Convention on Human Rights} (Intersentia 2006) 410.
\textsuperscript{72} Ibid.
\textsuperscript{73} A. v the UK App No 25599/94 (ECtHR 25 September 1998); Z. and others v the UK App No 29392/01 (ECtHR 10 May 2001).
\textsuperscript{74} Aisling Reidy, \textit{The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights}, Human rights handbooks no. 6 (Council of Europe Publishing 2003) 48.
– most importantly – a nationality. Therefore, this should definitely be kept in mind when turning the possible links between Article 3 and statelessness determination.

3.2. Administrative practice
A concept that the Court has developed in its interpretations of the prohibition of torture is that of ‘administrative practice’. This has been mentioned in the case of Ireland v the UK as well and can be described as:

“an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches.”75

As Ovey and White put it, this has a ‘double significance’, meaning that the requirement of exhaustion of domestic remedies can be disregarded [since legal action in respect of a single action may not address the repetitive nature of the conduct] and that the qualification as ‘administrative practice’ clearly is a lot more serious than it being an incident.76 When the facts of a case show repeated conduct of a certain kind by (an agent of) the state that – even though unlawful – was tolerated (at a higher level), we can thus speak of an administrative practice.

In the context of this research, on statelessness and the necessity to determine statelessness, it is interesting to consider the concept of an administrative practice. Reports on statelessness in different European countries have more than once identified that stateless persons are often confronted with repeated periods of detention when awaiting (impossible) expulsion.77 This, at least, points to a practice, taking place in some countries, of a repetitive nature. However, the fact that (stateless) persons are kept in detention awaiting expulsion is not unlawful, nor does it necessarily fall within the ambit of Article 3 of the Convention. The latter will be considered further below though. It would seem for now that an administrative practice cannot be found when considering detention. However, the destitution that some (unidentified) stateless persons face because they are not being afforded with the rights they should be able to enjoy according to international law, might constitute an administrative practice if states continue to close their eyes to stateless persons that ask for help from the state. As statelessness determination would be the only way to at least identify who is stateless, it is something that might be linked to administrative practices, if the destitution can be proved to fall within the scope of Article 3 and the applicant(s) can demonstrate beyond reasonable doubt that the state, after being notified by the applicant(s) in question, has repeatedly left unidentified persons live in destitution.

75 Ireland v the UK App No 5310/71 (ECtHR 18 January 1978) para. 159.
77 UNHCR, Mapping Statelessness in The United Kingdom (UNHCR 2011) 95; UNHCR, Mapping Statelessness in The Netherlands (UNHCR 2011) 34; UNHCR, Mapping Statelessness in Belgium (UNHCR 2012) 41, 71.
An example of how destitution and ignorance statelessness of the state might play out in practice can be found in a mapping study of the UNHCR in the UK. Even though this country now has a statelessness determination procedure, the study showed us that undocumented Kuwaiti Bidouns, who are excluded from Kuwaiti nationality, were refused asylum. Still, the UK Border Agency was unable to remove them from the UK, which resulted lengthy time spent in a limbo, often facing destitution. Different Kuwaiti Bidouns in the UK, such as Ghanim (aged 67), Imad (aged 28) and Amani (aged 25) describe their hopeless situation of destitution as no different from their situation in Kuwait, and have experienced that they are entirely reliant on the help from friends for their most basic needs. This situation of destitution could therefore fall within the scope of Article 3 of the Convention. Furthermore, it shows that their claim of statelessness, which might be a good reason for their lack of official documentation, is being ignored by the state. That undocumented Kuwaiti Bidouns are consistently being denied asylum while the state cannot enforce removal, thus leaving them destitute in a (legal) limbo, seems evident of a state repeatedly closing its eyes to the relevance of (possible) statelessness, and its consequences. This might not only breach Article 3 of the Convention, but also points to the necessity to determine statelessness in order to afford these persons with the protection they clearly need.

3.3. Mental suffering: uncertainty

The Court has included mental suffering under Article 3 ECHR. The prohibition of torture as laid down in the Convention thus does not only refer to the infliction of physical suffering. This means that torture, inhuman and degrading treatment might also encompass the uncertainty that unidentified stateless persons face on a daily basis. Stateless persons per se experience a lack of nationality and documents to prove their nationality. Not only does this cause uncertainty in general about their status and leaves them unable to participate in society like other citizens or migrants, it can also lead to destitution, repeated detention and repeated expulsion. These issues have been addressed generally in interpretations of the ECHR. Destitution was, for example, already mentioned in paragraph 3.2.

With regard to the uncertainty and doubt in which stateless persons are due to their lack of documents, home, and nationality, it might be concluded that this

79 This might help to fill the limbo that Kuwaiti Bidouns face. However, the extent to which it does cannot be concluded at this point. Further research and the implementation in practice might be able to say more in this issue in the future. See also supra note 50 for more information about the new procedure in the UK.
80 For more information about stateless Kuwaiti Bidouns, please refer to (for example) Sarnata Reynolds & Kirsten Cordell, *Kuwait: Bidoun nationality demands can’t be silenced* (Refugees International Field Report 2012).
81 UNHCR, *Mapping Statelessness in The United Kingdom* (UNHCR 2011) 99-101. These basic needs include a roof over their head, food, etc.
amounts to a violation of Article 3 due to the interpretation of Article 3 by the Court in a case regarding a disappearance. The mother of the victim of the disappearance was the applicant in this case, and she contended that she herself was a victim of inhuman and degrading treatment on account of her son’s disappearance at the hands of the authorities. She requested the Court to find that the suffering she had endured engages the responsibility of the respondent State under Article 3 of the Convention. In this case the ECtHR accepted that the lack of serious consideration given by authorities to applicant’s complaint made the applicant a victim of authorities’ complacency in face of her anguish and distress, which was suffered over a prolonged period of time, to be ill treatment within scope of Article 3.

How could this be related to the uncertainty that a stateless person can face? When a stateless person explains to governmental officials that he or she is stateless and asks the state for some sort of status and help, the state can respond in different ways. However, when the state does not even try to identify a (possibly) stateless person and/or take into account the statelessness of this person, but rather ignores him or her and the fact that he or she is stateless over a prolonged period of time, the person involved could suffer not only destitution, but also severe distress and fear. This is related to the consequential uncertainty that this person faces, and might even result in detention and/or expulsion. Even though the interpretations of the Court relate to a specific case of disappearance, one could imagine that the circumstances of such stateless persons could be more or less compared to that of persons confronted with a disappearance, as their constant anxiety seems to be comparable. The ignorance of unidentified applicants and lacking to determine their (possible) statelessness could, due to the distress and fear it might cause, be considered a breach of Article 3 of the ECHR that points to a positive obligation for states to determine statelessness.

3.4. Detention

A number of times, the (repeated) detention of stateless persons has been mentioned. How this relates to stateless persons deserves some more explanation. Nationality is what gives a person access to a country. However, people with no nationality, stateless persons, do not have this kind of access. This means that (possibly) stateless persons are very vulnerable to detention awaiting (impossible) expulsion. The link with expulsion is definitely there, but this paragraph wants to look at detention, while the next paragraph shall consider expulsion further.

A first question that one might ask is whether the detention of stateless persons (awaiting expulsion) in itself is a breach of the prohibition of torture, because they do not have a nationality and therefore will generally have no hope of release, as there is no country they can be expelled to. The ECtHR provides some answer in this regard, as it has decided on a case that involves the hope of release.

84 Kurt v Turkey App No 24276/94 (ECtHR 25 May 1998) 130.
85 Ibid. 134.
This case, *A and others v the UK*\(^\text{86}\) concerned a number of foreign nationals that were suspected of terrorism and where detained without a trial because they could not be deported. They claimed — *inter alia* — that the high security measures in detention were inappropriate and damaging to their health, and that the indeterminate nature of the detention, with no end in sight, and its actual long duration gave rise to abnormal suffering.\(^\text{87}\) The Court acknowledged that the uncertainty and fear of indeterminate detention are to be taken into account, which also confirms the findings on uncertainty in the above paragraph to a certain extent. However, it did not find a violation of Article 3 (or Article 3 in conjunction with Article 13) because of the availability of proceedings and remedies to challenge the legality of their detention and the conditions of detention.\(^\text{88}\) Accordingly, the ECtHR did not find that the detention of the applicants reached the high threshold of inhuman and degrading treatment.\(^\text{89}\) The conclusion on the basis of this case can therefore be that detaining stateless persons as such does not reach the threshold of the prohibition of torture, inhuman and degrading treatment under the Convention, as long as adequate remedies to challenge this are available.

Furthermore, there might be issues regarding the conditions of detention. On this matter, the Court has decided a number of cases. The case law of the Court includes interpretations regarding prison conditions, medical attention for detainees, the treatment of detainees and solitary confinement.\(^\text{90}\) Without going deeper into the different circumstances in detention that might amount to a breach of Article 3 ECHR that stateless persons could possibly face, it is noteworthy that there is a lot of case law on this matter and that it might be helpful in individual cases of stateless persons that face certain conditions while in detention.

**3.5. Expulsion**

Because stateless persons do not possess a nationality of any country, they could be subjected to expulsion in all of these countries. It is therefore interesting to consider the interpretations of the Court regarding expulsion under Article 3 of the Convention.

The ECtHR has held that expulsion may infringe Article 3 ECHR due to its direct physical or mental effects, which can definitely be present in cases of stateless persons due to uncertainty about their status. Furthermore, when states do not determine statelessness, a person could be expelled to a country where he or she does not have any relation or link to, or could end up as an illegal in that state, because he or she has no other country to go to. This could result in destitution. However, the interpretations of the Court demonstrate that strict criteria apply to cases regarding expulsion and its physical or mental effects. An example is a case in

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\(^\text{86}\) *A and others v the UK* App No 3455/05 (ECtHR 19 February 2009).

\(^\text{87}\) Ibid., 116.

\(^\text{88}\) Ibid., 131 & 135.

\(^\text{89}\) Ibid., 134.

which the applicant suffered post-traumatic stress disorder already before being expelled and in which his mental health worsened after returning to Chile. This case was considered not to reach the threshold of Article 3.91 Keeping this in mind, the inclusion of physical and mental effects of expulsion might be pointing to the necessity to identify statelessness though.

Furthermore, the Commission, declared an application admissible that dealt with the repeated expulsion and detention of a person whose identity was impossible to establish as an issue under Article 3 of the ECHR.92 The Court never decided on this case because a friendly settlement was reached. Nonetheless, this case does show that a Member State should determine the identity of a person, which includes the nationality or – in absence of a nationality – statelessness of a person. This again points to the importance of determining statelessness from an Article 3-perspective in cases of expulsion.

For expulsion, the extraterritorial effect of Article 3 is of interest too. If a person, on the basis of objective facts, may be expected to be subjected to ill treatment in the country to which he or she will be deported, this could constitute a breach of Article 3 ECHR. When considering statelessness in a migratory context, it is important to note that stateless persons are often part of vulnerable groups that are denied citizenship in other countries. Examples are the Maktoum Kurds in Syria93 and Rohingya in Burma.94 The fact that they are denied citizenship and left stateless is an indication of the way they are treated in the country of origin or former residence; often statelessness is but one of the problems they are facing. These might include systematic discrimination, destitution, persecution, and lack of adequate food, housing, health care and education. It is important to keep this in mind when looking at the prohibition of refoulement under Article 3 of the Convention. On this matter, the ECtHR has held:

“In its Cruz Varas judgment of 20 March 1991 the Court held that expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.”95

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It should, however, not be about “a general risk – a mere possibility.”\textsuperscript{96} In recent cases, the ECtHR seems to be more liberal in its approach though,\textsuperscript{97} which indicates that proof beyond reasonable doubt is not (always) necessary in asylum cases.

The expulsion of a stateless person to a country of former residence might thus give rise to a breach of Article 3 of the ECHR, as statelessness is a relevant indication – a sort of ‘marker’ – of circumstances in violation of Article 3 that that person might face when being expelled. When a state does not determine whether a person is stateless, it might ignore the real risk of a stateless person being exposed to treatment breaching the prohibition of torture in the Convention. Especially given the liberal approach that the ECtHR seems to take, there seems to be a necessity to determine statelessness to avoid expulsions that violate Article 3. This is evidenced by the case of \textit{Auad v Bulgaria} concerning the expulsion of a stateless Palestinian. In this case the Court acknowledged the importance of the applicant’s statelessness to the judgement on the merits, by saying:

“It is true that the situation in [Lebanon] as a whole does not appear so serious that the return of the applicant there would constitute, in itself, a breach of Article 3. However, it cannot be overlooked that the applicant is a stateless Palestinian originating from a refugee camp in Lebanon.”\textsuperscript{98}

Due to the violent situation in the specific refugee camp the applicant would have to return to and the lack of the government in this case to assess the risk of ill treatment here, the ECtHR concludes that there would be a violation of Article 3 ECHR if he were deported to Lebanon.\textsuperscript{99}

The case shows that the status of a person – that of stateless Palestinian – is important to judge the risk of ill treatment that he or she may or may not be subjected to. This strongly points towards an obligation to determine statelessness for states in order to meet the standards regarding expulsion under Article 3 of the Convention.

3.6. Article 3 ECHR: statelessness determination is necessary

The analysis of the interpretations of Article 3 ECHR by the ECtHR demonstrates that statelessness is an issue that is of importance to the examination of cases under this Article. In the situation of expulsion, for example, statelessness can function as a marker of circumstances in violation of Article 3 of the Convention that a person may face when being expelled. That the status of an individual as a stateless person is important to judge the risk of ill treatment in another country is evidenced by the

\textsuperscript{97} Which is noted in Pieter van Dijk, Fried van Hoof, Arjen van Rijk & Leo Zwaak (eds), \textit{Theory and practice of the European Convention on Human Rights} (Intersentia 2006) 436 on the basis of, for instance, Jabari v Turkey App No 40035/98 (ECtHR 11 July 2000) and Said v The Netherlands App No 2345/02 (ECtHR 5 July 2005).
\textsuperscript{98} \textit{Auad v Bulgaria} App No 46390/10 (ECtHR 11 October 2011) 103.
\textsuperscript{99} \textit{Ibid.} 108.
reasoning of the Court in the case of Auad v Bulgaria. Furthermore, the destitution and prolonged uncertainty of stateless persons resulting from ignorance of a state of their questions for help and pleas of statelessness seem to raise an issue under Article 3. This again points to the importance of establishing who is stateless so it can be taken into account in order to comply with Article 3 ECHR. It can therefore be concluded that Article 3 of the Convention contains an obligation for the state to determine statelessness.
4. The right to respect for private and family life

Article 8 of the European Convention on Human Rights

Article 8 of the ECHR enshrines the right to respect for private and family life. This article read as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 8 thus explicitly guarantees the right to respect for private life, family life, home and correspondence. However, under these concepts a broad range of issues can be brought, which will be seen when considering the Court’s interpretations of this Article. The second paragraph of the Article furthermore reflects the rights enshrined in it can be limited in certain circumstances. Therefore, a general overview of the most important interpretations, including the workings of the second paragraph, will be given before linking it to statelessness determination again.

4.1. General interpretations of Article 8 ECHR

Article 8 in principle obliges the state to refrain from interferences in private and family life. However, this is subject to some limitations. For a good understanding of this Article, these limitations and the interpretations of the Court on this matter will be considered first in order to draw a complete picture of the scope of Article 8.

4.1.1. Limitations

Article 8 of the ECHR is one of articles of the Convention that contains express limitations in the second paragraph of the Article, and in that sense does not contain an absolute right. This means that the second paragraph allows for interference with this right by public authority. However, only the restrictions that are expressly permitted by the ECHR are allowed. The system of express limitations, which is also used in Articles 9-11, is often justified by the need to balance public interests against those of the individual.100

In deciding whether the reliance of a States Party on a limitation in one of the articles of the Convention, the ECtHR considers three steps:101

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1. Is the interference in accordance with the law or prescribed by law?
   The Court uses these conditions to test this: (1) interference must have some
   legal basis in national law; (2) that law must be accessible; (3) the law must
   be foreseeable.
   Under Article 8 the Court has expressed that procedures or guarantees have
   to be enshrined in national law for that national law to meet this standard;
   adequate (and effective) procedural safeguards need to be in place against
   (arbitrary) interference with the right to respect for private and family
   life. ¹⁰²

2. Does it serve a legitimate aim?
   These aims limiting the right to respect for private and family life are
   exhaustively set out in Article 8: in accordance with law; necessary in a
   democratic society, interests of national security, interests of public safety,
   interests of economic well-being of the country, prevention of disorder or
   crime, protection of health or morals, and protection of the rights and
   freedoms of others. However, as Ovey and White rightly point out, these
   justifications for interference can comprehend many actions of the state, and
   thus the ECtHR regularly finds that a measure falls within one of the
   exceptions.

3. Is the limitation necessary in a democratic society?
   The Court has also developed sort of a basic test for this step:

   "On a number of occasions, the Court has stated its understanding of the phrase "necessary
   in a democratic society", the nature of its functions in the examination of issues turning on
   that phrase and the manner in which it will perform those functions. It suffices here to
   summarise certain principles: (A) the adjective "necessary" is not synonymous with
   "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary",
   "useful", "reasonable" or "desirable"; (B) the Contracting States enjoy a certain but not
   unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for
   the Court to give the final ruling on whether they are compatible with the Convention; (C)
   the phrase "necessary in a democratic society" means that, to be compatible with the
   Convention, the interference must, inter alia, correspond to a "pressing social need" and be
   "proportionate to the legitimate aim pursued"; (D) those paragraphs of Articles of the
   Convention which provide for an exception to a right guaranteed are to be narrowly
   interpreted."¹⁰³

The doctrine of the margin of appreciation, which was discussed earlier,¹⁰⁴
comes back here. It is very hard to define this concept, but it seems to be
somewhat of a sliding scale depending on its context.¹⁰⁵

¹⁰² Pieter van Dijk, Fried van Hoof, Arjen van Rijk & Leo Zwaak (eds), Theory and practice of the
¹⁰³ Silver and others v The UK App Nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75
(ECtHR 25 March 1983).
¹⁰⁴ See para. 2.2.
¹⁰⁵ More information on the margin of appreciation in relation to the application of Article 8 ECHR
can be found in Ursula Kilkelly, The right to respect for private and family life. A guide to the implementation
of Article 8 of the European Convention on Human Rights, Human Rights Handbooks No. 1 (Council of
Keeping these remarks on the express limitations to Article 8 of the Convention in mind, the substantive issues that can be considered under this Article are elaborated upon.

4.1.2. Private life and family life

Article 8 of the Convention does not only cover a right to respect for private life, but also for family life, the home and correspondence. Given the focus of this research, only private life and family life are discussed here further. Starting with the right to respect for private life it is important to note that the ECtHR has refused to give a definition of this broad concept. In the case of Niemietz v Germany, the Court did not attempt to find an exhaustive definition of the notion of private life, as it considered this impossible and unnecessary. Additionally, the Court has found many different circumstances to be part of private life. Some of these will be discussed below in separate paragraphs due to their relevance to this study.

Article 8 of the Convention does not only include a right to respect for private life, it also contains a right to respect for family life. The Court sometimes takes private and family life together, as they are concepts that have links with each other. Still, some specific issues have mainly been classified under family life. These include custody, access and care proceedings, adoption, inheritance rights, and the family life of prisoners. However, the family life of non-nationals can also raise an issue under Article 8. This will be considered further in paragraph 4.5. The concept of family life under Article 8 is considered to be autonomous and should be interpreted as de facto family life. Furthermore, the interpretations of ECtHR on the nature of family life seem to indicate a hierarchy of relationships. The married, heterosexual couple would be at the top of this hierarchy.

4.1.3. Positive obligations

The wording in Article 8 of the ECHR with “respect to…” seems to refer primarily to non-interference of the state. However, there may be positive obligations inherent in an effective respect for private and family life. This is of importance to the present study, as it is a search for an obligation to determine statelessness. According to Ovey & White, positive obligations can arise when a state has to take action to secure respect for the rights under Article 8, or where the state has to protect a person from interference with their rights under Article 8 by (an)other individual(s). Furthermore, whether such positive obligation exists should be determined by considering whether a fair balance between the general interests of

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107 Ibid. 538-552.
110 Markx v Belgium App No 6835/74 (ECtHR 15 June 1979) 31.
the community and those of the individual, and boundaries between positive and negative obligations can thus not be defined. States do have a considerable margin of appreciation here though.\textsuperscript{112}

4.2. Individual circumstances
The right to respect for private life has – relatively recently – been used to protect migrants in certain circumstances. This seems more related to the topic of this study, as stateless persons are no nationals of any state and therefore often treated like migrants. It is therefore interesting to consider this a little more elaborate here. In the case of \textit{Slivenko v Latvia}, the ECtHR held that the removal of individuals from a country “where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being”\textsuperscript{113} constituted an interference with their private life under Article 8 of the ECHR. This because the removal scheme was a scheme without any possibility of taking into account the individual circumstances of persons not exempted by the domestic law from removal.\textsuperscript{114} These individual circumstances may be said to include statelessness, as the applicants in this case became stateless when Latvia regained independence in 1991. To a stateless person – living in a country since birth and facing removal – his or her statelessness can be highly relevant to his or her personal circumstances due to the consequences that statelessness can have.\textsuperscript{115} However, in order for statelessness to be taken into account by the state, a state should first at least identify whether a person is truly stateless. On top of this, statelessness is a “juridically relevant fact”, meaning that it legally is relevant to be taken into account in procedures. Therefore, it would seem that the state might be obliged to determine statelessness for the purposes of taking into account personal circumstances when deciding on removal.

4.3. Uncertainty
The uncertainty of stateless persons, but also other migrants, can be considered under Article 8 of the Convention, as is evidenced by the case of \textit{Sivojeva and others v Latvia}. The case concerned Russian nationals and a stateless person living in Latvia, whose residence was based on a series of temporary residence permits. The applicants argued that this uncertainty interfered with their private life.

“The Grand Chamber’s decision was to strike the case out of the list in so far as it related to Article 8. The respondent State had offered to regularise the residence of the applicants by the time that the Court came to consider the issue, but the Court’s judgement makes clear that the effect of uncertainty in relation to immigration status can interfere with private life, but went on to observe

\textsuperscript{112}Ibid. 561.
\textsuperscript{113} \textit{Slivenko v Latvia} App No 48321/99 (ECtHR 9 October 2003) 96.
\textsuperscript{114} Ibid. 122.
\textsuperscript{115} These were already considered earlier, but one could think of destitution, reduced or no access to health care, education, dependence on help from others, etc.
that the Convention did not guarantee any right to a particular type of residence permit. That was a matter for the discretion of the Contracting Parties.”

That uncertainty is an issue that stateless persons are often confronted with was already considered in paragraph 3.3. As stateless persons in any country have to rely on residence permits *per se* due to their lack of any nationality, uncertainty is something that is common and touches heavily upon their personal life (except of course in cases where permanent residence permits have been granted). Uncertainty about a status leads to more uncertainty, which can include issues regarding housing, education, health care, freedom of movement. If a stateless person remains unidentified, and as a consequence, kept in the dark about his or her immigration status, the lack of statelessness determination by the state could interfere with the private life of this person. In such case, identifying a person as being stateless could be a necessity in order to provide this person with more certainty and the possible scenarios for his or her status. However, this concerns a quite specific situation and it is therefore debatable whether the Court would be inclined to accept that statelessness determination is a necessity in these cases.

### 4.4. Freedom of movement

The right to respect for private life might also be of importance to cases in which persons are prevented from leaving a country.

“At a time when freedom of movement, particularly across borders, is considered essential to the full development of a person's private life, especially when, like the applicant, the person has family, professional and economic ties in several countries, for a State to deprive a person under its jurisdiction of that freedom for no reason is a serious breach of its obligations.”

As deprival of the freedom of movement is considered to be a breach of the obligations of the state under the Convention, it would seem that this can be turned around: the state has an obligation to ensure freedom of movement, as it is essential to the development of a person’s private life. If a stateless person lacks freedom of movement due to the fact that a state does not identify him or her as being stateless (or as being a national of a state), this would interfere with person’s right to respect for private life and could breach Article 8 ECHR. Stateless persons often have issues with official (identity) documents, because of the fact that they are not considered a national by any state. This often results in no state feeling the responsibility to issue identity documents to that person, as they are usually associated with some sort of (immigration) status or nationality. This causes problems when they would like to enjoy their freedom of movement. In order to lawfully cross borders, proof of identity (and nationality) usually has to be shown, which is something that stateless persons in particular may be unable to do due to the reasons set out above. The problems that stateless persons face in this regard

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117 *İletmiş v Turkey* App No 29871/96 (ECtHR 6 December 2005) 50.
could be solved to a large extent by giving them an official document that confirms their identity and status. This is usually achieved by issuing a residence permit. However, as Article 8 of the Convention does not include a right to this, it seems that it could not point to an obligation for the determination of statelessness in this case. It should be remembered though that statelessness determination in this study has been defined as the identification of stateless persons. A simple identity document that identifies a person as being stateless can already help to facilitate freedom of movement,\textsuperscript{118} but whether it truly will contribute to the effective freedom of movement of a person is debatable. Constructed in this way, statelessness determination can be a solution to the interference with Article 8 due to the impossibility to exercise freedom of movement, and thus implies the necessity to identify stateless persons.

4.5. Family life of non-nationals
As stateless persons are essentially viewed by the state as non-nationals, it is therefore interesting to consider family life as interpreted in relation to migrants. The ECtHR has repeatedly held that the Convention does not guarantee the right of an alien to enter or to reside in a particular country. However, the removal or refusal of admission of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life.\textsuperscript{119} An interesting case in view of this is that of Al-Nashif v Bulgaria.\textsuperscript{120} This case concerned a stateless man of Palestinian origin (in possession of a Syrian stateless person's identity document) and his family, who lived in Bulgaria. His residence permit was withdrawn and he was to be deported because he allegedly posed a threat to national security. All three applicants, the man and his family, complained – inter alia – that there had been an arbitrary interference with their right to respect for their family life contrary to Article 8 of the ECHR. In view of this complaint, the ECtHR reminds us of the fact that:

"(…) no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 (1) of the Convention."

The Court goes on to test whether the interference meets the requirements of Article 8 (2) of the Convention. With regard to whether the interference was in accordance with law the ECtHR found that the deportation was ordered pursuant

\textsuperscript{118}\textsuperscript{118} UNHCR, Statelessness: An analytical framework for prevention, reduction and protection (UNHCR 2008) 20.
\textsuperscript{119}\textsuperscript{119} \textit{Ibid.} 545.
\textsuperscript{120}\textsuperscript{120} Al-Nashif and others v Bulgaria App No 50965/99 (ECtHR 20 June 2002).
\textsuperscript{121}\textsuperscript{121} \textit{Ibid.} 114.
to a legal regime that does not provide the necessary safeguards against arbitrariness, as an individual must be able to challenge the executive’s assertion that national security is at stake. Therefore, the interference was not based on legal provisions that pass the test of ‘in accordance with the law’ of the Court. On this basis, the ECtHR holds that it follows that there has been a violation of Article 8 and that there is no need to consider legitimate aim and proportionality. In these kinds of cases, the Court thus recognises the margin of appreciation of the state, but supervises this by determining whether the exclusion is a well-balanced exercise between the rights of the applicants and the interests of society. Similarly, admission should be examined on merits. In this sense, the ECHR does not ensure a right to family life in a certain country, but it ensures effective family life independent from where that family life is taking place. This might be different in cases involving children that are dependent on their parents though.

This case does not directly give us many pointers for a necessity to identify statelessness, but it does show us that a(n identified) stateless person, who has built up his or her life and raised his or her family in a certain country, can be protected under Article 8 of the Convention when facing deportation to a country of former residence. This generally does reinforce the importance that the identification of statelessness has in certain circumstances, but an obligation in this regard cannot follow, because the identification of statelessness does not have a direct influence on the protection offered – other non-nationals and foreigners (which can include unidentified stateless persons) are also protected by this scheme.

### 4.6. Nationality

Furthermore, the development of case law under the notion of private life in Article 8 of the Convention on matters of nationality is highly relevant to this research. An important step on this subject was taken in the case of Karasev v. Finland, in which the Court observed that the fact that the right to a nationality as such is not guaranteed by the Convention does not exclude that arbitrary denial of citizenship might raise issues under Article 8 under certain circumstances because of the impact of such denial on the private life of an individual. It also referred to the definition of nationality as established by the International Court of Justice (ICJ). However, the ECHHR did not find a violation of Article 8 in this case.

The Court did observe a violation of – *inter alia* – the right to respect for private and family life in a more recent case regarding 11 applicants who belong to a group of stateless persons known as the ‘erased’. They complained that the Slovenian authorities prevented them from acquiring citizenship of the new

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122 The necessary safeguards are considered in *ibid.* 124.
123 Ibid. 128-129.
124 Ibid. 114.
125 Andrei Karasev and family v Finland App No 51414/96 (ECtHR 12 January 1999).
126 Ibid. As established by the ICJ in the Nottebohm Case.
127 Ibid.
Slovenian State that was established in 1991, and from retaining their status as permanent residents. The ECtHR has held in this case:

“...the Court is of the opinion that, in the particular circumstances of the present case, the regularisation of the residence status of former SFRY citizens was a necessary step which the State should have taken in order to ensure that failure to obtain Slovenian citizenship would not disproportionately affect the Article 8 rights of the ‘erased’. The absence of such regulation and the prolonged impossibility of obtaining valid residence permits have upset the fair balance which should have been struck between the legitimate aim of the protection of national security and effective respect for the applicants’ right to private or family life or both.”

Furthermore, the Court held that the ‘erased’ were discriminated against as they were disadvantaged when compared to other non-nationals in Slovenia. The Court particularly noted that the ‘erasure’ led to insecurity, legal uncertainty and a number of adverse consequences, such as the destruction of identity documents, the loss of job opportunities and the loss of health insurance, which amounted to a violation of Article 8. Even though the applicants were not (all) de jure stateless, their situation was factually the same. The applicants in this case were thus effectively left stateless due to the ‘erasure’ and this erasure, in combination with the lack of regularising the status of these persons, interferes with the rights under Article 8 of the Convention. If the situation of a stateless person can be compared to that of the applicants, which given the adverse consequences of this case may seems very possible, statelessness in itself might violate Article 8 ECHR if the state does not respond appropriately to it without justification, for example by denying them a certain status. Statelessness is therefore seems to be highly relevant to considerations under Article 8, which demonstrates a necessity to establish it. It furthermore does seem that the right guaranteed by the articles under consideration in this case – Articles 8, 13 and 14 of the Convention, of which Article 8 is really the only substantive right and thus most important – could possibly prevent the denial of some status (or even a nationality) to people who would otherwise be (effectively) stateless. Even though a residence permit might be a step too far in these cases, due to the often-repeated statement of the Court that Article 8 does not guarantee this, the establishment of statelessness is a relevant factor, and demonstrates the necessity to identify someone as stateless. This line of reasoning is definitely debatable, but lately the Court, with these cases, has shown a “new readiness to extend the protective reach of Article 8 ECHR in the field of immigration.” Whether the Court will continue this remains to be seen. However, if the innovative interpretations of the ECtHR that were considered in section 2 of this piece are any indication, this may well be possible. Also, the next case is another one in which the Court has gone beyond the expectations of some.

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128 Kuric and others v Slovenia App No 26828/06 (ECtHR 26 June 2012).
129 Ibid. 559.
130 Ibid. 596.
In *Genovese v. Malta* 132 a further clarification of nationality issues under Article 8 of the Convention was given. The applicant was a British national that was born out of wedlock to a British mother and a Maltese father. However, he also wanted to become a Maltese national, but this was denied because he was born out of wedlock and – at that time – only the mother could confer Maltese nationality according to the relevant domestic laws. The Court found in this case that there has been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8. 133 In order to find this violation, the Court first had to bring this issue regarding nationality within the scope and ambit of Article 8. It did so by observing that: 134

“(…) even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person’s social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant’s social identity was such as to bring it within the general scope and ambit of that Article.”

The reasoning of the Court continued by demonstrating that, even though the Maltese Government had gone beyond its obligations under Article 8 of the Convention by expressly granting the right to citizenship by descent and establishing a procedure to that end, this must be ensured without discrimination. 135 Malta failed this test, because it discriminated both on the basis of illegitimacy and of gender. 136 In finding this, the ECtHR presents in this case a “broad statement on the meaning of nationality and the link to the European Convention on Human Rights will allow the court a wide margin in the exercise of its jurisdiction over questions of nationality policy in future (…)”. 137

The nationality policies of different European countries include provisions on the prevention of statelessness, in particular concerning children born in a state who would otherwise be stateless. 138 In such cases citizenship can be granted, though this is often subject to conditions. According to the database regarding protection against statelessness of the EUDO Observatory on Citizenship in cooperation with UNHCR, 32 out of the 36 European countries listed in the database have a provision in their nationality law that may grant citizenship to

132 *Genovese v. Malta* App No 53124/09 (ECtHR 11 October 2011).  
133 Ibid. dictum.  
134 Ibid. 53.  
135 Ibid. 54.  
136 Ibid. 48-50.  
children who would otherwise be stateless.\textsuperscript{139} Even though this does not correspond with the number of States Parties to the ECHR, 32 out of 36 is a significant number and shows some ‘common ground’ in Europe in this regard. It is furthermore noteworthy that a provision regarding children who would otherwise be stateless generally includes a reference to the statelessness of the parent(s) of and/or of the child. In order to apply this provision in an effective manner however, it is necessary that the statelessness of the parent(s), and consequently, the child is established. This definitely shows the need for determination of statelessness, because these kinds of provisions otherwise can never be applied effectively. As a person, born stateless and living ever since in a country that does not grant him or her citizenship because statelessness of that person and/or the parent(s) cannot be established, this can furthermore definitely have a huge impact on that person’s social identity. This scenario and the interpretations of the Court in \textit{Genovese v Malta} therefore clearly point to an obligation for states to determine statelessness.

Furthermore, the case demonstrated that the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept includes aspects of a person’s social identity. Could this be construed as statelessness – having no citizenship whatsoever and substantially affecting a person’s social identity – raising an issue under Article 8? It would seem that it might. The Court has held that private life is a concept that cannot be defined. The interpretations of Article 8 show that the ECtHR is not afraid to include relevant issues under it, which can include statelessness. That being the case, lack of the determination of statelessness might raise an issue under Article 8 of the Convention, which indicates the necessity to identify who is in fact stateless.

\textbf{4.7. Article 8 ECHR: pointers and potential for statelessness determination}

In conclusion, it seems that Article 8 ECHR is certainly an interesting Article in relation to an obligation for states to determine statelessness. When considering individual circumstances as interpreted in relation to Article 8 of the Convention, it was clarified that statelessness is legally a relevant fact that strongly points to the determination of statelessness. Furthermore, uncertainty – an issue that stateless persons due to their lack of nationality are vulnerable to – may interfere with private life. In this sense, statelessness can be a factor of importance that should be taken into account, especially where the determination of statelessness could help to clarify the situation of the person involved, thus showing the need for statelessness determination. Deprival of the freedom of movement is another issue that may breach Article 8. As such, freedom of movement should therefore be ensured by the state. Identification of a person as being stateless could help to facilitate freedom of movement, and therefore can point to a necessity for statelessness determination. With regard to family life, the case that was considered

showed that identified stateless persons could enjoy respect to private and family life in certain situations. This further reinforces the thesis that statelessness is a relevant fact that needs to be taken into account under Article 8 ECHR, which can be linked to the importance of determining it again. Also, the course that the Court has taken with regard to citizenship and nationality under Article 8 is a bold one, and definitely demonstrates great potential for obliging states to determine statelessness, mainly when considering their own provisions to prevent statelessness. Even though it should be remembered that obligations under Article 8 will always involve balancing the interests of the community and that of the individual, the interpretations of the Court demonstrate that an obligation to determine statelessness can be read into them. It is furthermore of importance to stress that these findings are not exhaustive. Due to the specific circumstances that a stateless individual can find him- or herself in, there might be more interpretations of Article 8 that include links to statelessness determination, especially when considering the broad range of issues that can be raised under the right to respect for private and family life.
5. The right to an effective remedy

Article 13 of the Convention provides for the right to an effective remedy:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Even though Article 13 seems to be an independent provision, its development in the ECtHR’s interpretations shows that situations involving this Article are increasingly taken in conjunction with specific provisions of the ECHR. In that sense, it may be said that there is some similarity with Article 14 of the Convention. When Article 13 is under consideration, the Court will examine whether the applicant has an ‘arguable complaint’ under a substantive article of the Convention. This means that Article 13 can be violated even where there is no violation of another ECHR right, as long as there is an arguable violation of another right in the Convention. Article 13 is thus not as straightforward as it seems. Therefore, some of its general features shall be considered in the paragraph below, before elaborating on its links to statelessness and determination thereof.

5.1. General features of Article 13 ECHR

In the case of Silver and others v the UK the Court conveniently mentioned some of the general features of Article 13:

“The principles that emerge from the Court’s jurisprudence on the interpretation of Article 13 (art. 13) include the following:

(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress [...];

(b) the authority referred to in Article 13 (art. 13) may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective [...]

(c) although no single remedy may itself entirely satisfy the requirements of Article 13 [...], the aggregate of remedies provided for under domestic law may do so [...];

(d) neither Article 13 [...] nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law [...]”.

In view of these principles and the development of the Article in case law (also after this judgement), two questions can be asked when an application concerns the

149 Klass and others v Germany App No 5029/71 (ECtHR 6 September 1978).
150 Silver and others v the UK App Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 & 7136/75 (ECtHR 25 March 1985) 115.
right to an effective remedy. The first one is whether there is an arguable complaint, as is mentioned above under (a). The second is whether the remedy in the national order is an effective one.

With regard to the requirement of an arguable complaint, it should be noted that the ECtHR has not provided a definition of the concept of arguability under Article 13 ECHR. Whether there is an arguable complaint in a certain case will thus be considered on a case-by-case basis, while taking the specific facts and nature of the legal issues raised into account.

On the effectiveness of the remedy at the national level, a little more can be said, as the Court has indicated what the nature of the remedies should generally be. These can be traced back to the principles that were set out earlier in (b), (c) and (d). The state can determine the form of the remedy at the national level, as the machinery of complaint to the Court is subsidiary to national systems safeguarding human rights. The remedy provided for by the state need not be judicial; the criterion is effectiveness, in law as well as in practice. If a process is not judicial, the powers and guarantees it offers should be considered to determine effectiveness. When the process is judicial, a violation of Article 13 ECHR occurs when the authorities do not implement a court order. However, certain issues deserve some further clarification, and can be linked to statelessness determination. Therefore, these will be considered separately below.

5.2. Arguable complaint and effective remedy applied

In the case of Al-Nashif v Bulgaria a stateless person was deported because he posed a threat to national security. The applicants claimed, inter alia, that his deportation had infringed the right of all three applicants to respect for their family life, as guaranteed by Article 8 ECHR, and that they did not have an effective remedy in this respect pursuant to Article 13 of the Convention. The Court was therefore able to deal with the extent to which considerations of national security can impose limitations on the right to an effective remedy. While holding that there might be some limitations, the ECtHR clarified that there are minimum requirements to an effective remedy:

"Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive’s assertion that there is a threat to national security."

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143 See also Robin White & Clare Ovey, The European Convention on Human Rights (Oxford University Press 2010) 133.
145 Kudla v Poland App No 30210/96 (ECtHR 26 October 2010) 152.
147 Ibid. 136, see also Iatriklis v Greece App No 51107/96 (ECtHR 25 March 1999).
148 Al-Nashif and others v Bulgaria App No 50965/99 (ECtHR 20 June 2002). The background to this case has also been explained in paragraph 4.5.
security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual’s right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual’s rights must be examined.”

As there was no such remedy available to the applicants, the Court found a violation of Article 13 ECHR. With a focus on statelessness and statelessness determination, this Article shows us a couple of things. First of all, it may be deduced from this case that stateless persons, like any other person in Europe, definitely have a right to an effective remedy under Article 13 to enforce the substance of the ECHR rights and freedoms. Second, the case shows us a minimum standard for national remedies in view of Article 13 of the Convention. However, it should be remembered that the scope of the obligation of the state under Article 13 varies depending on the nature of the applicant’s complaint. Third, it demonstrates how Article 13 works within the ECHR framework. The applicants had an arguable complaint under Article 8 of the Convention, and were therefore entitled to an effective remedy, which had to be – even given the particular circumstances of the case – guaranteed in some manner. The ECtHR put it as follows: “[t]here is no doubt that the applicants’ complaint that the deportation of Mr. Al-Nashif infringed their right to respect for their family life was arguable. They were entitled, therefore, to an effective complaints procedure in Bulgarian law.” The somewhat ancillary nature of Article 13 ECHR compared to substantive provisions in the Convention is demonstrated here: Article 13 can only be invoked when there is an arguable complaint under another, substantive Article of the Convention. For statelessness determination to play a role under Article 13 ECHR, it seems that statelessness has to be an issue in some way, for example in the substantive complaint or when weighing the violation. This was not the case here: even though the applicant was stateless, this remained uncontested, the real issue was the way in which was dealt with the applicant’s family life and the threat to national security by the state.

The case of *Auad v Bulgaria*, which was discussed earlier, also involved a stateless person. Here, the statelessness of the person in question was a factor of interest under a substantive article. The expulsion to Lebanon as such was not an issue that could amount to violation of Article 3 of the Convention, but the fact that the applicant was a stateless person of Palestinian origin and that it was therefore likely he would have to return to a Palestinian refugee camp where violent clashes persisted did. With regard to Article 13 ECHR, the Court, after finding that the applicant had an arguable complaint, spelled out the two components of an effective remedy in an Article 3-situation:

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149 Ibid. 137.
150 See, inter alia, *A v The Netherlands* App No 4900/06 (ECtHR 20 July 2010).
151 *Al-Nashif and others v Bulgaria* App No 50965/99 (ECtHR 20 June 2002) 154.
152 *Auad v Bulgaria* App No 46390/10 (ECtHR 11 October 2011). This case was discussed in paragraph 3.5 as well.
“Firstly, it imperatively requires close, independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 […]. That scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State […]. The second requirement is that the person concerned should have access to a remedy with automatic suspensive effect.”\textsuperscript{153}

However, the Bulgarian courts had explicitly refused to deal with the question of risk and they had no power to suspend the enforcement of expulsion orders. Therefore, the applicant did not have an effective remedy in relation to his complaint related to the risk of ill treatment, in violation of Article 13 of the Convention. Does this point to the importance of statelessness being taken into account, and consequently, to the necessity to determine statelessness for a state to fulfill the obligations under Article 13? The risk of being subjected to ill treatment in this case involved the status of the applicant as a stateless Palestinian, because this meant that he would probably have to return to a Palestinian refugee camp in Lebanon. In the particular refugee camp that the applicant would have to return to a risk of being subjected to treatment contrary to Article 3 ECHR existed. In this case, the statelessness of the applicant was thus linked to the risk, which had to be part of the considerations of the Bulgarian courts. The establishment that a person was stateless was therefore relevant. The ECtHR remains silent on how the risk should generally be considered and what should be taken into account, thus making it unclear to what extent the personal situation of the applicant, which could include statelessness, can be an issue. The conclusion may be that statelessness in this case was an issue under Article 3, and therefore may be a factor of interest under Article 13. Nonetheless, this case shows that the risk of ill treatment after expulsion should be part of the considerations of the court for a remedy to be effective. Here, statelessness was part of that risk, which demonstrates that statelessness that should be part of that risk-assessment for the remedy to be effective. In this sense, it could be said that statelessness is relevant under Article 13 of the Convention and that therefore the determination thereof is too.

In \textit{Kuric and others v Slovenia},\textsuperscript{154} considered earlier as well, the state was found to be breaching – \textit{inter alia} – Article 13 of the Convention. The Court assessed Article 13 in light of the present case by looking at the remedies that applicants had at their disposal and what their effect was. It was noted that the fact that the applicants, who did not have any Slovenian identity documents, were left in a state of a legal limbo for several years, and therefore in a situation of vulnerability and legal insecurity could not be overlooked.\textsuperscript{155} Also, the duration of proceedings was considered to be an issue.\textsuperscript{156} Stateless persons are often confronted with issues of

\textsuperscript{153} Ibid. 120.  
\textsuperscript{154} Kuric and others v Slovenia App No 26828/06 (ECtHR 26 June 2012). See also paragraph 4.6.  
\textsuperscript{155} Ibid. 502.  
\textsuperscript{156} Ibid. 505.
vulnerability and legal insecurity, as well as lengthy proceedings,\textsuperscript{157} in this case the ‘erased’ applicants contended to be (factually) in the same position as stateless persons. It seems that, if such issues present themselves in a case, they could influence the (nature of the) effective remedy required by Article 13 of the Convention. In what way is not explained by the ECtHR, but the fact that these circumstances are mentioned as something that cannot be overlooked does mean that they were relevant in some way. The determination of statelessness, or at least of its consequences, may therefore be carefully considered to be of importance to the effective remedy that needs to be provided at the national level.

5.3. Article 13 ECHR: statelessness can influence the remedy required

The cases that were dealt with here demonstrate that statelessness often is primarily of interest for the substantive article under consideration, but may (also) be of importance to the reasoning of the Court when weighing the violation under Article 13 of the Convention. In the analysis of the interpretations of Article 13 was identified that statelessness can influence the nature of the remedy required. In this sense, it can be concluded that Article 13 does point to a necessity to establish statelessness, because statelessness may influence the nature of the right to an effective remedy and therefore is a relevant fact to be determined.

However, in view of the topic that Article 13 addresses, a justified further question to ask is whether statelessness determination in itself could not be an effective remedy to breaches of substantive articles of the ECHR. In answering this question, it needs to be observed that the ECtHR shall never order a specific sort of remedy to be available, due to its subsidiary nature. However, one could imagine that statelessness determination could constitute an effective remedy in a case where the lack of determination of statelessness results in circumstances that violate one or more of the substantive articles of the Convention, for example in cases of prolonged uncertainty or severe destitution. This could actually be solved when statelessness is determined and the person involved is accorded the rights pursuant to the 1954 Convention.

\textsuperscript{157} E.g. UNHCR, \textit{Mapping Statelessness in the Netherlands} (UNHCR 2011).
6. The prohibition of discrimination

Article 14 of the European Convention on Human Rights

Article 14 of the ECHR contains the prohibition of discrimination. It reads as follows:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The wording of this Article immediately shows the fundamental difference of it from the Articles that were discussed before, as the prohibition of discrimination seems to be directly linked to the rights and freedoms that the ECHR contains. This specific trait, as well as some other general interpretation issues and important cases, shall be discussed in the next paragraph for a complete understanding of this Article, which is again somewhat different from the ones discussed before. Obviously, these considerations will be connected to the specific topic at hand – statelessness determination – again in the other paragraphs by considering the specific issues arising under Article 14 that are close to statelessness and the determination thereof.

6.1. Some general points regarding Article 14 ECHR

The accessory nature of Article 14 was already touched upon above. It means that the prohibition of discrimination as laid down there does not prohibit discrimination in any situation, but only in conjunction with the enjoyment of the rights and freedoms set forth in the ECHR. This does however not express that another article of the Convention has to be breached in order to find a violation of Article 14. In the Belgian Linguistic Case,\(^{158}\) the ECtHR already clarified that – even though there can be no breach of Article 14 when it is considered in isolation – Article 14 can be violated when it is considered together with another article of the ECHR, even in cases where the latter article alone would not be breached. It is thus possible that a violation of Article 14 is found when another article of the Convention is breached as well, but it is also possible that only Article 14 read in conjunction with that article is violated.

When considering Article 14 of the Convention it is noteworthy that Article 1 of Protocol No. 12 introduced a general prohibition of discrimination. However, it does not replace Article 14 ECHR and the relation between the two articles is supposed to be harmonious. As Article 14 ECHR remains important and is the focus here, Article 1 of Protocol No. 12 shall not be considered further, especially

\(^{158}\) Case “relating to certain aspects of the laws on the use languages in education in Belgium” v Belgium App Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR 25 July 1968) para. 9 and has been confirmed numerous times since.
as it is of limited relevance due to the low number of ratifications so far. Nonetheless, Article 1 of Protocol No. 12 may play a role similar to that of Article 14 ECHR in the future, and has potential the be further reaching due to its general prohibition, which made it important to at least note this possibility here.

6.1.1. The Court’s methodology

The next step in a general exploration of Article 14 of the ECHR is to consider the ECtHR’s methodology in cases involving this provision. According to Ovey and White, the Court concerns itself with four questions in many decisions on complaints under Article 14:159

- Does the complaint of discrimination fall within the scope of a protected right?
- Is the alleged reason for the discrimination one of the grounds listed in Article 14?
- Can the applicants properly compare themselves with another class of persons that is treated more favourably?
- Is the difference of treatment capable of objective and reasonable justification?

The first question relates to the accessory nature of Article 14 ECHR that was already considered earlier. The second one refers to the prohibited grounds of discrimination. Article 14 contains the following prohibited grounds of discrimination: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, and birth.160 However, this list is not exhaustive, because Article 14 also prohibits discrimination on ‘other status’. For the concept of ‘other status’ to apply, the difference in treatment has to be based on “a personal characteristic by which persons or groups of persons are distinguishable from each other” though.161 Statelessness could be identified as a personal (inherent) characteristic by which a stateless person or stateless persons can be distinguished from others, as it is a specific situation of lack of a nationality.

The third question requires a comparison with a class of persons that are treated more favourably, which – according to the Court’s terminology when considering this – means that the comparators need to be in ‘similar situations’, in ‘relevantly similar situations’, or in ‘analogous situations’. The situation of the applicant and the comparator thus must be analogous in all material aspects, so that the difference between them can be concluded to arise from an Article 14 ECHR-

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161 Kjeldsen, Buak Maiben and Pedersen v Denmark App Nos 5095/71, 5920/72 and 5926/72 (ECtHR 7 December 1976) 56.
Article 14 also applies in cases of indirect discrimination: where the same requirement is imposed on both groups, but where a substantial number of one group is unable to comply with it. The existence of discrimination can therefore relate to the effects of state measures. Even though the ECtHR does not use the terms ‘indirect’ and ‘direct’ discrimination, and focuses on whether the alleged differential treatment has no objective and reasonable justification, it has been established beyond doubt that Article 14 of the Convention covers indirect discrimination.\(^\text{165}\)

The fourth question concerns the question whether the difference of treatment is capable of objective and reasonable justification. The Court has held that a difference of treatment is discriminatory if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, the state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.\(^\text{164}\) The margin of appreciation will vary depending on the circumstances, the subject matter and its background. Furthermore, both Ovey and White and Gerards note that certain grounds of discrimination are considered as inherently suspect. This means that these will be subject to very careful scrutiny, and they can include discrimination on the grounds of sex, race, nationality, legitimacy, religion, and sexual orientation where there is recognition that discrimination on those grounds is particularly demeaning for those affected.\(^\text{165}\)

#### 6.1.2. Burden of proof

With regard to the burden of proof, it should be noted that the practice is that the applicant has to show that there has been a difference (or similarity) in treatment, the basis thereof, and that he or she is in a relevantly similar or significantly different situation to the group of comparators. If the applicant establishes this, the burden of proof will shift to the state. Then, it is for the state to demonstrate that there is objective and reasonable justification.\(^\text{166}\) The ECtHR adopts the conclusions in a case supported by a free evaluation of all the evidence before it.\(^\text{167}\)

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\(^\text{163}\) Ibid. 559-560. See also the case of *D.H. and Others v Czech Republic* App No 57325/00 (ECtHR 13 November 2007) 175 & 184 on the inclusion of indirect discrimination under Art. 14 ECHR.
\(^\text{164}\) *Burden v the UK* App No 13378/05 (ECtHR 29 April 2008) 60.
6.1.3. Positive obligations

Because of the accessory character of Article 14 of the Convention, positive obligations are somewhat different. The Court has demonstrated when interpreting Article 14 that the justifications for differential treatment must have a legitimate aim and there has to be a reasonable relationship of proportionality between that aim and its realisation. This is not influenced by whether the discrimination is the result of a positive action or of a failure to guarantee non-discrimination.\textsuperscript{168} The positive obligations under Article 14 ECHR furthermore oblige states to take steps to prevent discrimination that can fall within the scope of this Article. According to Ovey and White, this obligation manifests itself in the ECtHR’s conclusion that the right not to be discriminated against as ensured by Article 14 will be violated where states fail to treat persons in different situations differently without any objective and reasonable justification for doing so.\textsuperscript{169} In the case of \textit{Thlimmenos v Greece}, the Court found a violation of Article 14 in conjunction with Article 9 ECHR when the state failed to treat a person differently whose situation was significantly different without any objective and reasonable justification.\textsuperscript{170}

6.2. Discrimination based on (non-)nationality

According to the Court, very weighty reasons would have to be put forward before the ECtHR could regard a difference of treatment based exclusively on the ground of nationality as compatible with the ECHR.\textsuperscript{171} This approach of the Court, however, does not seem to apply to situations that involve the unequal treatment based on nationality when deciding on the entrance or expulsion of aliens, as is evidenced by the case of \textit{Moustaquim v Belgium}. In this case, the ECtHR held that the preferential treatment given to nationals of other EU member states compared to third country nationals was objectively and reasonably justified, because the Belgium belongs, together with the other EU member states, to a special legal order. Therefore, no violation of Article 14 in conjunction with Article 8 of the ECHR was found.\textsuperscript{172}

The case of \textit{Andrejeva v Latvia}\textsuperscript{173} presents another important feature of discrimination based on nationality. This case concerned a stateless applicant, a non-national of Latvia, who did have a permanent resident status as such. Her complaint under Article 14 of the Convention\textsuperscript{174} was directed at the fact that her pension was not calculated the same way as it was for Latvian citizens, which resulted in her receiving a significantly lower pension. Nationality was, according to her, the sole criterion on which the differential treatment was based. The Court agreed with her, finding a violation of Article 14 ECHR (in conjunction with

\textsuperscript{168} Ibid. 547.

\textsuperscript{169} Ibid.

\textsuperscript{170} \textit{Thlimmenos v Greece} App No 34569/97 (ECtHR 6 April 2000).

\textsuperscript{171} Gaygusuz v Austria App No 17371/90 (ECtHR 16 September 1996) 42.

\textsuperscript{172} \textit{Moustaquim v Belgium} App No 12315/86 (ECtHR 18 February 1991) 49.

\textsuperscript{173} \textit{Andrejeva v Latvia} App No 55707/00 (ECtHR 18 February 2009).

\textsuperscript{174} In this case, Art. 14 was invoked in conjunction with Art. 1 of Protocol No. 1 to the ECHR (the protection of property).
Article 1 of Protocol No. 1) as the respondent state could not provide the “very weighty reasons” to justify this difference in treatment based on nationality. It is important to note that the Court took into account here that the applicant was not a national of any state, thus making her situation different from both nationals and non-nationals.175 This demonstrates that, in the field of social security, and possibly beyond, differential treatment of stateless persons requires very weighty reasons. Furthermore, the statelessness of the person is something that seems to affect the ‘very weighty reasons- and proportionality test’. Statelessness, under Article 14 of the Convention, can thus be a relevant factor when deciding on cases involving discrimination based on nationality. In this sense, Article 14 points to an obligation for states to determine statelessness.

6.3. Positive discrimination

In the case of Stec and others v the UK, the Court has held that state authorities are allowed to treat men and women differently for the purposes of positive discrimination, in order to correct factual inequalities between them. The case concerned a difference between men and women in state pensionable age. However, this was justified according to the ECtHR by the fact that women generally spend longer periods out of paid employment than men, for taking care of children, for example. However, the difference is only justified as long as social conditions do not change. This change is a gradual one though. The Court therefore found:

“That the difference in State pensionable age between men and women in the United Kingdom was originally intended to correct the disadvantaged economic position of women. It continued to be reasonably and objectively justified on this ground until such time as social and economic changes removed the need for special treatment for women. The respondent State’s decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field […]. Similarly, the decision to link eligibility for [Reduced Earnings Allowance] to the pension system was reasonably and objectively justified, given that this benefit is intended to compensate for reduced earning capacity during a person’s working life. There has not, therefore, been a violation of Article 14 of the Convention […] in this case.” 176

This shows that positive discrimination, or affirmative action, may be taken for groups who are in a materially different position. States may therefore take measures in order to protect or help vulnerable groups within their territory, who can include stateless persons. The importance of this is also noted in the UNCHR Guidelines on Statelessness where it concerns the status of stateless persons at the national level in relation to international human rights law. The Guidelines encourage states to explore affirmative action measures to help particularly vulnerable groups of stateless persons within their territory.177 However, could all

175 Andrejeva v Latvia App No 55707/00 (ECtHR 18 February 2009) 88.
176 Stec and others v the UK App Nos 65731/01 and 65900/01 (ECtHR 12 April 2006) 66.
177 UNHCR, ‘Guidelines on statelessness no. 3: the status of stateless persons at the national level’ (UNHCR 2012) 21.
this point to an obligation to determine statelessness? An argument can certainly be made for this. In the paragraph on positive obligations\textsuperscript{178} was already mentioned that the Court found a violation of Article 14 of the Convention because the state failed to treat persons differently whose situations are significantly different without justification. Stateless persons are, compared to nationals of a state definitely in a different situation, as nationals of a state enjoy a number of rights that non-nationals do not, including a right to vote for example. Also, compared to other non-nationals in a country, stateless persons can be identified as significantly different because of their lack of nationality and consequent issues such as access to health care, social benefits, education.\textsuperscript{179} In order to identify stateless persons as a group being fundamentally different from another group, the state will have to determine who is stateless in order to treat these people differently and in line with their needs. Interpreted like this, Article 14 of the Convention can oblige states to determine statelessness.

\textbf{6.4. Minorities}

In the case law of the ECtHR regarding minorities and Article 14 ECHR a new development can be seen: treating a problem, that is being embodied by the applicants in the case under consideration, as a collective or systematic issue affecting a certain minority in general.\textsuperscript{180} This was the case in \textit{D.H. and others v Czech Republic}.\textsuperscript{181} The application concerned the adoption of special schools as an answer to the question of the education of Roma children, who, due to these schooling arrangements, were indirectly racially discriminated against. Accordingly, the Court found violation of Article 14 in conjunction with Article 2 of Protocol No. 1 that related to the applicants in general as members of the Roma community. The Court in \textit{Horváth and Kiss v Hungary}\textsuperscript{182} recently decided upon a similar case of two young Roma men that were misdiagnosed with a mental disability, placed in remedial schools and discriminated against. The Court held that the respondent state violated of Article 14 in conjunction with Article 2 of Protocol No. 1 after finding that the schooling arrangements for Roma with an alleged mental disability had not been attended by adequate safeguards that paid attention to their special needs as members of a disadvantaged and vulnerable group. According to the ECtHR, this led to isolation and an education that was likely to compromise the personal development of the applicants. Again, the Court considers the applicants

\textsuperscript{178} Paragraph 5.1.3.

\textsuperscript{179} The right to education is, for example, included in Art. 2 of Protocol No. 1 to the ECHR. This is of importance, because Art. 14 will have to be invoked together with another article of the ECHR. If a stateless person would be unable to access education because the general arrangement thereof does consider not allow a stateless person to begin or finish his or her education, while it does ensure access to education for nationals and other non-nationals, the state may be found of failing to treat persons who are different differently and should have taken affirmative action to guarantee the right to access to education for all persons equally within its jurisdiction.


\textsuperscript{181} \textit{D.H. and others v Czech Republic} App No 57325/00 (ECtHR 15 November 2007).

\textsuperscript{182} \textit{Horváth and Kiss v Hungary} App No 11146/11 (ECtHR 29 January 2013).
as members of the Roma community, thus showing a development of an approach to systematic problems of discrimination that includes indirect discrimination by addressing the issue at hand rather than the individual complaints. Ovey and White believe that this “collective rather than individual approach could have implications for many areas of the Court’s caseload”. 183

If stateless persons could be considered under this line of reasoning of the Court, stateless persons as a group could be better protected. However, it is uncertain whether stateless persons can qualify as a collective that faces a general issue like the ECtHR considers to be present in the Roma case. In assessing this, it should first be noted that many Roma are in fact stateless. 184 This already indicates that (individual) stateless persons can definitely be confronted with the systematic discrimination that minorities face. Furthermore, stateless persons have often been identified as vulnerable, in this piece as well. Stateless persons also have an important feature that distinguishes them, as a group, from any other group: they lack a nationality. As such, it might be possible that they can qualify as a collective that faces systematic discrimination. The form that discrimination might take can depend on the circumstances, but one can again think of discrimination in access to education, discrimination on the basis of lack of a nationality, etcetera. Especially the discrimination on the basis of a nationality can be of a systematic nature, as the lack of a nationality of a stateless person will only disappear when he or she naturalises, and then no longer is a stateless person but a citizen of a state. Stateless persons, when following this line of reasoning, thus might be a collective facing systematic discrimination that are in need of protection against discrimination. It could therefore be concluded that statelessness is a relevant factor in order to ensure the freedom from discrimination for everyone, including that specific group of persons that lack a nationality. That statelessness is a relevant factor that needs to be taken into account again points to the necessity to determine statelessness, however, in a quite general and indirect fashion. It will ultimately depend on what the Court will do when faced with a case involving statelessness under Article 14 of the Convention. In view of the decisions of the ECtHR so far, after applying them to statelessness, it seems likely that it could consider stateless persons as a collective facing the same problems though.

6.5. Statelessness can be a factor of interest in view of Article 14 ECHR

Article 14 is an article of an accessory nature. When recalling the Articles that have already been discussed, especially Articles 3 and 8 of the Convention, it seems that

their link to Article 14 relates mainly to the policy of a state that is, or is not, (indirectly) discriminatory in view of the prohibition of discrimination. When considering the conjunction of Article 14 with Article 8 ECHR, for example, this shows. The case of *Genovese v Malta* demonstrated that the application of nationality policy, including the denial of citizenship, should take place without discrimination. This means that nationality policy may not be discriminatory. However, the real innovation in this case, with regard to statelessness, was that the Court brought issues regarding nationality and nationality policy within the scope of Article 8 ECHR, which could then be linked to discrimination, and, for the purpose of this research, to statelessness determination. Article 14 of the Convention did in this case not play a big role as far as statelessness and the determination thereof is concerned. However, closer examination of Article 14 uncovered that stateless can in fact be a factor of interest in view of this Article as well. The case of *Andrejeva v Latvia* demonstrated that statelessness can affect the balancing exercise involving ‘very weighty reasons’ under this Article, because stateless persons can be distinguished from nationals and non-nationals. Statelessness therefore is a relevant factor under Article 14, which makes the establishment of statelessness necessary. Furthermore, positive discrimination is allowed under Article 14 ECHR for correction of factual inequalities. Due to the vulnerable position of stateless persons, it may be necessary for states to take affirmative action in this regard. However, in order to treat the stateless persons differently from others in the country, the state will have to identify who is stateless. This again shows the need for statelessness determination. Last but not least, it is interesting to note that the Court has taken a bold approach towards Article 14 of the Convention when it concerns minorities. In its interpretations, the ECtHR treats a problem that is being embodied by the applicants in the case under consideration, as a collective or systematic issue affecting a certain minority in general. Due to the special features that stateless persons may share, discrimination of this particular group may be of a systematic nature. Therefore, it is likely that the Court eventually considers stateless persons in this manner as well, thus expanding the protection for stateless persons and showing the need to establish statelessness to ensure that these people can enjoy freedom from discrimination as well.

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185 Such as nationality policy, see also Laura van Waas, ‘Fighting statelessness and discriminatory nationality laws in Europe’ (2012) 14 European Journal of Migration and Law 243-260.
186 *Genovese v Malta* App no 55124/09 (ECtHR 11 October 2011).
7. Conclusion: a European human rights obligation for statelessness determination?

In this research, the determination of statelessness was understood as including any mechanism that determines statelessness, meaning that this may include a (specific) procedure to that end, but that it may also take a completely different form. This was important for the examination of the extent to which an obligation to determine statelessness can be found in the Convention, because the Court shall not oblige states to adopt a (specific) procedure to determine statelessness due to its subsidiary nature. Still, the ECHR may contain an obligation to determine statelessness under the definition that this study uses, even if on top of that is noted that the Convention does not contain a provision regarding statelessness or a right to a nationality. After an analysis of four articles of the Convention, this study is definitely able to shed some light on the question “to what extent does the ECHR oblige European states to determine statelessness?” It should be appreciated though that, due to its limits - both in number of Articles analysed, as well as the time available and the enormous amounts of case law involved, - this research cannot be regarded as exhaustive on the matter.

Article 3 ECHR, which contains an absolute prohibition of torture, demonstrated that statelessness is an issue of importance when assessing cases involving this Article. In view of expulsion, for example, statelessness can function as a marker of circumstances in violation of Article 3 that a person may face when being expelled. It is therefore important for states to take statelessness into account in order to comply with Article 3 of the Convention. To be able to include statelessness properly in their considerations, the state will have to establish the statelessness of a person. Statelessness determination is thus an obligation to be fulfilled under Article 3 ECHR in relation to expulsion. Other concepts that were studied, destitution and prolonged uncertainty, may also raise an issue under Article 3 where it concerns stateless persons. This further reinforces the obligation of statelessness in view of Article 3 of the Convention.

Article 8 ECHR, which guarantees respect to private and family life, is an interesting Article when considering an obligation for states to determine statelessness as well. The analysis of this Article showed that statelessness determination can be read into Article 8, for instance when examining the interpretations of the Court regarding individual circumstances. According to the ECtHR, individual circumstances should be taken into account when deciding upon the removal of persons. The case of Slivenko v Latvia demonstrated that these circumstances could include statelessness. Therefore, a state is obliged to determine statelessness for the purpose of including it in its assessment of removal. Furthermore, other issues that can be raised under Article 8 of the Convention evidenced that an obligation for the determination of statelessness is very likely to be deduced from Article 8 by the Court. These issues included uncertainty, freedom of movement, family life and nationality. The study of them strengthened
the view that there is an obligation for the determination of statelessness under Article 8 ECHR.

Article 13 of the Convention concerns the right to an effective remedy. Even though this Article has to rely on an arguable complain under a substantive article of the ECHR, statelessness seems to be able to influence the nature of the remedy required. This was demonstrated, for example, by the case of Kuric and others v Slovenia. Here, the circumstances of the applicants factually resembled those stateless persons are often confronted with. The Court considered the circumstances in this case to be something that could not be overlooked in relation to an effective remedy. As such, statelessness, or at least the consequences thereof, are to be taken into account for a remedy to be effective. The determination of statelessness, and/or its consequences, can therefore be obliged for states due to its importance to the remedy that needs to be provided at the national level.

A close examination of Article 14 of the Convention, which contains the prohibition of discrimination, revealed that – despite its accessory character – statelessness could be a factor of interest in relation to this Article. In Andrejeva v Latvia statelessness seemed to affect the balancing-exercise involving ‘very weighty reasons’ under Article 14, because stateless persons were identified as distinguishable from nationals and non-nationals. Thus, statelessness can be considered as necessary to be taken into account (where relevant) under Article 14 ECHR, and should therefore be determined. That statelessness is a factor of interest that needs to be determined by the state for compliance with Article 14 can furthermore be deduced from the interpretations of the ECtHR regarding positive discrimination and minorities. In this sense, it is likely that Article 14 of the Convention includes an obligation for statelessness determination.

When looking at the overall picture that these four Articles present, it can be concluded that an obligation to determine statelessness is present in each of the Articles. The analysis demonstrates that statelessness is an issue that is to be taken into account in any of these Articles. However, the extent to which varies. In Article 3 and 8, expulsion and removal are issues that trigger an obligation for statelessness determination in particular. In other circumstances, for example involving Article 13, it may be unlikely that the Court obliges a state to really determine statelessness, because the consequences of statelessness can be taken into account without putting a label of ‘statelessness’ on them.

Can we truly speak of a European obligation for statelessness determination then? The answer on the basis of this study has to be ‘yes’. The analysis of the four Articles shows that statelessness can play a role in considerations involving each of the Articles. This evidences that statelessness, and therefore, the determination thereof, is an issue that states should concern all States Parties to the ECHR in order to fulfil their obligations under – at least – Articles 3, 8, 13 and 14 of the Convention. The likeliness that the Court will truly oblige states to determine statelessness varies depending on the circumstances of the case. In this regard, the innovativeness of the ECtHR in bringing issues that are not explicitly mentioned within the scope of the ECHR by interpreting the Convention in line with its object
and purpose, and as a living instrument, should also be remembered. This activism of the Court combined with the analysis of the Articles set out above convincingly demonstrate an obligation for states to determine statelessness in view of the ECHR. This can definitely help to improve protection of stateless persons, because states will have to take specific action with regard to statelessness. States may therefore be recommended to have some mechanism available to identify a person as being stateless. It was noted in section 2 that statelessness determination can take different forms, as states have a broad discretion in the design and operation of statelessness determination. A specific procedure for statelessness determination would, however, be the best way to identify stateless persons, because this can result in a statelessness-specific protection status. Statelessness is the ground for protection for such statuses, and it therefore includes the specific needs of stateless persons properly. In this way, the state can be sure to have taken to the specific situation of stateless persons into account, and will (usually) be able to fulfil its obligations under the Convention.
Bibliography


Carol A. Batchelor, ‘Transforming international legal principles into national law: the right to a nationality and the avoidance of statelessness’ (2006) 25 *Refugee Survey Quarterly* 3, 8-25

Carol A. Batchelor, ‘Developments in international law: the avoidance of statelessness through positive application of the right to a nationality’, in *1st European conference on nationality. Trends and developments in national and international law on nationality*, Strasbourg, 18 and 19 October 1999, Proceedings, 49-62


Brad K. Blitz, ‘Statelessness, protection and equality’, *Forced Migration policy briefing* No. 5, Refugee Studies Centre University of Oxford, September 2009


Matthew J. Gibney, ‘Statelessness and the right to citizenship’ (2009) 32 *Forced Migration Review* 50-51

Gabor Gyulai, *Statelessness in Hungary: the protection of stateless persons and the prevention and reduction of statelessness* (Hungarian Helsinki Committee 2010)

Lord Hoffmann, *The universality of human rights* (Judicial Studies Board Annual Lecture 2009)


Daniel Thym, ‘Respect for private and family life under Article 8 ECHR in immigration cases: a human right to regularize illegal stay?’ (2008) 57 *International and Comparative Law Quarterly* 1, 87-112


Reports by UN (United Nations) agencies and civil society organisations

Equal Rights Trust, Burning homes, sinking lives: a situation report on violence against stateless Rohingya in Myanmar and their refoulement from Bangladesh (Equal Rights Trust 2012)

Maureen Lynch, Latvia: the perilous state of nationality rights, field report (Refugees International 2011)

Sarnata Reynolds & Kirsten Cordell, Kuwait: Bidoun nationality demands can’t be silenced (Refugees International Field Report 2012)

UNHCR, Geneva Conclusions (Expert Meeting on Stateless Determination Procedures and the Status of Stateless Persons, Geneva, Switzerland, 6-7 December 2010)

UNHCR, ‘Guidelines on statelessness no. 1: the definition of “stateless person” in Article 1 (1) of the 1954 Convention relating to the Status of Stateless Persons’ (UNHCR 2012)

UNHCR, ‘Guidelines on statelessness no. 2: procedures for determining whether an individual is a stateless person’ (UNHCR 2012)

UNHCR, ‘Guidelines on statelessness no. 3: the status of stateless persons at the national level’ (UNHCR 2012)

UNHCR, ‘Guidelines on statelessness no. 4: ensuring every child’s right to acquire a nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness’ (UNHCR 2012)

UNHCR, Mapping Statelessness in Belgium (UNHCR 2012)
UNHCR, *Mapping Statelessness in the Netherlands* (UNHCR 2011)

UNHCR, *Mapping Statelessness in The United Kingdom* (UNHCR 2011)

UNHCR, *Nationality and statelessness: a handbook for Parliamentarians* (UNHCR 2008 - updated)


UNHCR, *Statelessness: An analytical framework for prevention, reduction and protection* (UNHCR 2008)

**International and European Conventions and related documents**

- 1954 UN Convention relating to the Status of Stateless Persons
  <http://www.unhcr.org/3bb25729.html>

- 1961 UN Convention on the Reduction of Statelessness
  <http://www.unhcr.org/3bb286d8.html>

- Council of Europe (CoE) Convention on the Avoidance of Statelessness in Relation to State Succession

  <http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer>


- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9
Case law

European Court of Human Rights (ECtHR):

- A. v The Netherlands App No 4900/06 (ECtHR 20 July 2010)
- A. v the UK App No 25599/94 (ECtHR 23 September 1998)
- A. and others v the UK App No 3455/05 (ECtHR 19 February 2009)
- Al-Nasib and others v Bulgaria App No 50963/99 (ECtHR 20 June 2002)
- Andréjeva v Latvia App No 55707/00 (ECtHR 18 February 2009)
- Awad v Bulgaria App No 46390/10 (ECtHR 11 October 2011)
- Burden v the UK App No 13378/05 (ECtHR 29 April 2008)
- Case “relating to certain aspects of the laws on the use languages in education in Belgium” v Belgium App Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR 23 July 1968)
- Cruz Varas and others v Sweden App No 15576/89 (ECtHR 20 March 1991)
- D.H. and others v Czech Republic App No 57325/00 (ECtHR 13 November 2007)
- Gaygusuz v Austria App No 17371/90 (ECtHR 16 September 1996)
- Golder v UK App No 4451/70 (ECtHR 21 February 1975)
- Genovese v Malta App no 53124/09 (ECtHR 11 October 2011)
- Horváth and Kiss v Hungary App No 11146/11 (ECtHR 29 January 2013)
- H.P. v Denmark App no 55607/09 (lodged on 1 October 2009)
- Iatriðósi v Greece App No 31107/96 (ECtHR 25 March 1999)
- İletmiş v Turkey App No 29871/96 (ECtHR 6 December 2005)
- Ireland v the UK App No 5310/71 (ECtHR 18 January 1978)
- Jabari v Turkey App No 40055/98 (ECtHR 11 July 2000)
- Andrei Karassev and family v Finland App no 31414/96 (ECtHR 12 January 1999)
- Kjeldsen, Bukk Madøen and Pedersen v Denmark App Nos 5095/71, 5920/72 and 5926/72 (ECtHR 7 December 1976)
- Klause and others v Germany App No 5029/71 (ECtHR 6 September 1978)
- Kudła v Poland App No 30210/96 (ECtHR 26 October 2010)
- Kuric and others v Slovenia App No 26828/06 (ECtHR 26 June 2012)
- Kuric and others v Slovenia App No 26828/06 (ECtHR 13 July 2010)
- Kurt v Turkey App No 24276/94 (ECtHR 25 May 1998)
- Markx v Belgium App No 6835/74 (ECtHR 15 June 1979)
- Moustaghioun v Belgium App No 12313/86 (ECtHR 18 February 1991)
- Niemietz v Germany App No 13710/88 (ECtHR 16 December 1992)
- Saadi v Italy App No 37201/06 (ECtHR 28 February 2008)
- Said v The Netherlands App No 2345/02 (ECtHR 5 July 2005)
• Selmouni v France App No 25803/94 (ECtHR 28 July 1999)
• Silver and others v The UK App Nos 5947/72; 6205/75; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECtHR 25 March 1983)
• Slivenko v Latvia App No 48321/03 (ECtHR 9 October 2003)
• Soering v the UK App No 14038/88 (ECtHR 7 July 1989)
• Stec and others v the UK App Nos 65751/01 and 65900/01 (ECtHR 12 April 2006)
• Thlimmenos v Greece App No 34369/97 (ECtHR 6 April 2000)
• Tyrer v UK App No 5856/72 (ECtHR 25 April 1978)
• Vilvarajah and others v. The UK App Nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR 30 October 1991)
• Z. and others v the UK App No 29392/95 (ECtHR 10 May 2001)

European Court of Justice (ECJ):
• Case C-135/08 Janko Rottman v Freistaat Bayern [2010] ECR I-01449

Internet sources

Significant Internet sources:
• Council of Europe (CoE) <http://hub.coe.int/>
• EUDO Observatory on Citizenship <http://eudo-citizenship.eu/>
• European Court of Human Rights (ECtHR) <http://www.echr.coe.int/Pages/home.aspx?p=home>
• European Network on Statelessness (ESN) <http://www.statelessness.eu/>
• HUDOC (case law database of the ECtHR) <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#> 
• International Observatory on Statelessness <http://www.nationalityforall.org/>
• Open Society Foundations <http://www.opensocietyfoundations.org/>
• Refugees International <http://www.refugeesinternational.org/>
• Refworld documents related to statelessness (all UNHCR guidelines, documents and reports can be found here) <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=statelessness>
• Statelessness Programme Blog <http://statelessnessprog.blogspot.nl/>
• Statelessness Programme Tilburg Law School <http://www.tilburguniversity.edu/research/institutes-and-research-groups/statelessness/>
• United National High Commissioner for Refugees (UNHCR) <http://www.unhcr.org/>

Specific Internet sources:
• Adrian Berry, ‘Proving statelessness: evidential issues for refused asylum seekers’ (Blog European Network on Statelessness 14 June 2013) <http://www.statelessness.eu/blog/proving-statelessness-evidential-issues-refused-asylum-seekers>

• CoE objectives <http://www.coe.int/aboutcoe/index.asp?page=nosObjectifs>

• EUDO Observatory on Citizenship, ‘Mode S01: born stateless’ (Protection against statelessness database 2013) <http://eudo-citizenship.eu/databases/protection-against-statelessness?p=&application=modesProtectionStatelessness&search=1&modexideby=idmode&idmode=S01>


• Thomas Hammarberg, ‘Many Roma in Europe are stateless and live outside social protection’, Viewpoint by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 6 July 2009 <http://www.coe.int/t/commissioner/viewpoints/090706_en.asp>


• UNHCR estimates on statelessness <http://www.unhcr.org/pages/49c3646c15e.html>


• United Kingdom (UK) Border Agency information on statelessness determination procedure in the UK <http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/stateless/>

• Caia Vlieks, ‘Statelessness – any attention at the national level?’ (Weblog Statelessness Programme 27 August 2012) <http://statelessprog.blogspot.nl/2012/08/guest-post-statelessness-any-attention.html>
• Laura van Waas, ‘Rottmann and Genovese: How will Europe’s nationality laws stand up to the scrutiny of its regional courts?’ (Weblog Statelessness Programme 12 March 2012) <http://statelessprog.blogspot.nl/2012/03/rottmann-and-genovese-how-will-europes.html>