

# PERSISTENT GAPS IN PROTECTION: STATELESS AND FORCIBLY DISPLACED IN UKRAINE AND ABROAD

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*Since the Russian invasion of Ukraine, beginning in February 2022, millions of Ukrainians have fled their homes. Among the forcibly displaced are stateless persons who lived in Ukraine prior to the war, who are particularly vulnerable because they do not possess any nationality. Unable to prove their identity, stateless internally displaced persons and refugees experience numerous challenges along their flight routes. The measures adopted by European countries to support Ukrainian refugees have been successful in many ways, but insufficiently consider the situation of stateless persons. This article explores the protection gaps in the laws of Ukraine and neighbouring countries, as well as at the European level, and critically evaluates those gaps in light of the relevant international protection regimes, ie, international statelessness law, international refugee law, international and European human rights law and international humanitarian law. From the analysis, it can be concluded that possession of identity documentation and legal status remain crucial conditions for crossing borders and accessing protection.*

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## I INTRODUCTION

Since the invasion of Ukraine by the Russian Federation on 24 February 2022 and the escalation of the armed conflict in eastern Ukraine, large-scale human suffering has forced millions of Ukrainians to flee their homes. While some have become internally displaced within Ukraine, others have crossed the borders in search of protection. The United Nations High Commissioner for Refugees ('UNHCR') estimates that the global number of refugees from Ukraine has risen to more than 6 and a half million persons, of which more than 6 million reside in

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Europe.<sup>1</sup> Among the displaced, stateless persons, persons at risk of becoming stateless and undocumented persons are particularly vulnerable, as they are confronted with additional obstacles in crossing borders and accessing protection.<sup>2</sup> In spite of waves of solidarity and efforts by European countries to accommodate Ukrainian refugees, the protection needs of stateless refugees and internally displaced persons ('IDPs') are often insufficiently taken into account.

From a human rights law perspective, the article explores the different challenges faced by stateless persons fleeing from the hostilities in Ukraine by mapping out the protection gaps in the legal framework of Ukraine and other relevant European states. The article shows that the possession of identity documentation, which stateless persons often lack, remains a crucial condition to cross checkpoints and borders, and to benefit from established protection regimes. The insufficient consideration of the challenges that stateless and undocumented persons face frequently results in the violation of rights guaranteed under international and European human rights law, and international humanitarian law.

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<sup>1</sup> On 15 July 2024, the United Nations High Commissioner for Refugees ('UNHCR') registered 6,579,700 refugees from Ukraine globally, of whom 6,021,400 resided in Europe: UNHCR, 'Ukraine Refugee Situation', *Operational Data Portal* (Web Page, 15 July 2024) <<https://data.unhcr.org/en/situations/ukraine>>, archived at <[perma.cc/5F4B-AV3L](https://perma.cc/5F4B-AV3L)>.

<sup>2</sup> For the clarity of this article, these notions are defined as follows: A 'stateless person' is a person who is not considered as a national by any state under the operation of its laws, as stated in art 1(1) of the *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('1954 Convention'). This definition was labelled as customary international law by the International Law Commission ('ILC'): see *Draft Articles on Diplomatic Protection, with Commentaries* (Report, Yearbook of the International Law Commission, vol II, pt two, 2006) 36, art 8(3). No internationally accepted definition exists of a person at risk of statelessness and more research is necessary to determine who would fall within that category. According to a UNHCR study, a 'person at risk of statelessness' may be described as a person who may have difficulty proving that they meet the conditions prescribed by law to acquire a nationality or whose nationality is generally doubtful, unknown or undetermined: Brian Barbour, *Desk Review on Populations at Risk of Statelessness* (Report, April 2021) 15. For example, children without a birth certificate are often at risk of statelessness, because they may be unable to prove their nationality: Hugh Massey, 'UNHCR and De Facto Statelessness', *Legal and Protection Policy Research Series* (Research Paper, April 2010) 47. As to persons of undetermined nationality, again no internationally accepted definition exists. The Expert Group on Refugee, Internally Displaced Persons and Statelessness Statistics has defined persons of undetermined nationality as

people who lack proof of citizenship but who may possess an entitlement to nationality, and, if so, could be assisted to obtain proof of citizenship by the relevant authorities. Those in the Undetermined Nationality category must lack proof of citizenship and have links to more than one country, that are real or perceived to be real by authorities, because of their place of birth, marriage, habitual residence, or descent from earlier generations who have migrated

: UN Economic and Social Council ('ECOSOC'), *Report of the Expert Group on Refugee, Internally Displaced Persons and Statelessness Statistics on statelessness statistics: Note by the Secretary-General*, UN Doc E/CN.3/2022/10, (8 December 2021) [27(b)]. Note that these notions are not mutually exclusive. The category of persons of undetermined nationality can also include stateless persons whose statelessness has not yet been determined, as well as persons who are at risk of becoming stateless.

## II STATELESSNESS IN UKRAINE

## A Numbers and Causes of Statelessness before 22 February 2024

Ukraine hosts one of the largest stateless populations in Europe, composed of both in situ stateless persons and stateless migrants, yet reliable data regarding the size and characteristics of the stateless population is largely lacking. The Government of Ukraine ('Ukrainian Government') only provides data regarding the number of stateless persons lawfully residing in Ukraine, which amounted to 6,176 persons at the end of 2022, and does not gather any information regarding age, gender or country of origin.<sup>3</sup> According to UNHCR's official statistics, 35,933 stateless persons and persons with undetermined nationality lived in Ukraine in 2021.<sup>4</sup> However, this number is presumably an underestimation. No reliable data exists on the exact size of the stateless population in Ukraine, because the only comprehensive government statistics are the outdated results of the All-Ukrainian Population Census of 2001.<sup>5</sup> In this census, 82,550 individuals self-identified as stateless, while 40,364 persons did not report any nationality.<sup>6</sup> Since 2001, UNHCR has applied a questionable methodology to estimate the total stateless population by reducing the population census figures by the number of persons who have been naturalised since 2001.<sup>7</sup> However, this does not take into account stateless persons in Ukraine who lack awareness regarding their legal status, who may have believed that they did have Ukrainian nationality or the nationality of another former Soviet Republic and as such did not declare themselves stateless.<sup>8</sup> UNHCR's estimation also does not consider any causes of statelessness that may have emerged after 2001, such as irregular migration or lack of birth registration.<sup>9</sup> The consequences of the annexation of Crimea by the Russian Federation and the outbreak of the armed conflict in eastern Ukraine in 2014 are particularly worrisome in that regard. The Ukrainian Government has lost control of Crimea and parts of Donetsk and Luhansk regions.<sup>10</sup> As a result, persons residing in those territories have since encountered difficulties in obtaining civil registration documents issued by the Ukrainian Government. According to the United Nations

<sup>3</sup> 'Stateless Persons', *UNHCR Ukraine* (Web Page, 2024) <<https://www.unhcr.org/ua/en/stateless-persons>>, archived at <[perma.cc/6X67-QFNA](https://perma.cc/6X67-QFNA)> ('Stateless Persons'); UNHCR, *The Problem of Statelessness in Ukraine and the Ways of Addressing It* (Report, 2014) 6–7 ('*The Problem of Statelessness in Ukraine*').

<sup>4</sup> 'Refugee Data Finder', *UNHCR* (Web Page) <<https://www.unhcr.org/refugee-statistics/download>>, archived at <[perma.cc/V9W9-NQZ9](https://perma.cc/V9W9-NQZ9)>.

<sup>5</sup> 'All-Ukrainian Population Census 2001', *State Statistics Committee of Ukraine* (Web Page, 2001) <<http://2001.ukrcensus.gov.ua/eng/results/general/permanent>>, archived at <[perma.cc/YCD3-2K8G](https://perma.cc/YCD3-2K8G)>.

<sup>6</sup> European Network on Statelessness ('ENS'), *Protecting Stateless Persons from Arbitrary Detention in Ukraine* (Report, December 2016) 17; 'The Distribution of the Population by Citizenship and Age' in 'All-Ukrainian Population Census 2001' (n 5).

<sup>7</sup> ENS, *Protecting Stateless Persons from Arbitrary Detention in Ukraine* (n 6) 17.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.* 13, 17; United Nations ('UN') Ukraine, *Briefing Note on Birth Registration* (Briefing Note, January 2020) 1–2.

<sup>10</sup> *Law No 1207-VII of 2014 'On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine* (Ukraine) ('*On Ensuring Civil Rights and Freedoms*'); *Law No 254-VIII 'On Recognition of Certain Regions, Cities, Towns and Villages in Donetsk and Luhansk Regions as Temporarily Occupied Territories* (Ukraine) ('*On Recognition of Certain Districts of Donetsk and Luhansk*').

(‘UN’), only 45% of children born in Donetsk and Luhansk and 12% of children born in Crimea have obtained birth certificates issued by the Ukrainian Government between 2016 and 2019.<sup>11</sup> No data regarding birth registration in the non-government controlled area has been available since the Russian invasion.<sup>12</sup> Birth registration is of fundamental importance to prevent statelessness, particularly in childhood, because a birth certificate is the only legal record of a child’s identity and family relations, and thus, the child’s legal existence. Although an unregistered child is not necessarily stateless, it becomes more difficult to prove the child’s nationality. As such, unregistered children are at a heightened risk of becoming stateless.<sup>13</sup>

Although UNHCR’s data is not precise, it still shows that the stateless population in Ukraine is considerable. There are several reasons that explain the prevalence of statelessness in Ukraine, including exclusion from nationality after the dissolution of the Soviet Union, irregular migration, discrimination against Roma and ethnic minorities, and lack of documentation of persons living in the occupied territories. State succession is considered one of the important causes of statelessness as it often involves a change of nationality. The inhabitants of a territory affected by state succession may lose their nationality when their state ceases to exist. If they are not able to acquire the nationality of (one of) the successor state(s), they are rendered stateless.<sup>14</sup> The dissolution of the Soviet Union was one of the instances of state succession that led to large-scale statelessness in Europe.<sup>15</sup>

When the Soviet Union collapsed and ceased to exist, the former Soviet population had to acquire the nationality of one of the Soviet Union’s successor states. At first glance, the Ukrainian *Law No 1636-XII of 1991 ‘On the Citizenship of Ukraine’* seemed to uphold an inclusive nationality policy, as it granted Ukrainian nationality to all persons residing in the territory of Ukraine at the time of independence, insofar as they did not object to it and had no other nationality.<sup>16</sup> Persons living outside Ukraine could also claim Ukrainian nationality within one year, but only if they were working outside Ukraine on state assignment, performing military service, or studying, and providing that they were born in the territory of Ukraine or had maintained permanent residence in the territory of Ukraine.<sup>17</sup> This limited acceptance of ethnic Ukrainians living abroad resulted in cases of statelessness. Many individuals with ethnic ties to Ukraine were living in other

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<sup>11</sup> UN Ukraine, *Briefing Note on Birth Registration* (n 9).

<sup>12</sup> ‘UNHCR Calls for Improved Access to Birth Registration to Confirm Legal Identity and Prevent Statelessness in Ukraine’, *UNHCR Ukraine* (online, 1 December 2023) <<https://www.unhcr.org/ua/en/65737-unhcr-calls-for-improved-access-to-birth-registration-to-confirm-legal-identity-and-prevent-statelessness-in-ukraine.html>>, archived at <[perma.cc/E3UG-YXBY](https://perma.cc/E3UG-YXBY)>.

<sup>13</sup> UNHCR, *Good Practices Paper — Action 7: Ensuring Birth Registration for the Prevention of Statelessness* (Paper, November 2017) 2–3.

<sup>14</sup> Paul Weis, *Nationality and Statelessness in International Law* (2<sup>nd</sup> edn, Sijthoff & Noordhoff 1979) 135–60. See also Ineta Ziemele, ‘State Succession and Issues of Nationality and Statelessness’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 217.

<sup>15</sup> Michel Iogna-Prat, ‘Nationality and Statelessness Issues in the Newly Independent States’ in Vera Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Brill Nijhoff 1996) 26.

<sup>16</sup> *Law No 1636-XII of 1991 ‘On the Citizenship of Ukraine’*, art 2(1)(Ukraine) (‘*On the Citizenship of Ukraine (1991)*’). See also Oxana Shevel, *Country Report: Ukraine* (Report, April 2013) 5–6.

<sup>17</sup> *On the Citizenship of Ukraine (1991)* (n 16) art 2(2).

Soviet republics at the time of Ukraine's independence in 1991. These individuals or their descendants wished to return to Ukraine and obtain Ukrainian nationality in the years after independence.<sup>18</sup> These individuals were excluded from Ukrainian nationality when they did not meet the limited conditions of working on state assignment, performing military service, or studying abroad, or did not manage to claim nationality within one year. On the other hand, they were also not necessarily eligible for nationality in their country of residence at the time of independence, as these former Soviet republics generally required permanent residence to qualify for nationality.<sup>19</sup> For instance, under *Law No 1948-1 of 1991 'On the Citizenship of the Russian Federation'*, only individuals who were permanently residing in the Russian territory — meaning formally registered in the Soviet internal residence registration system (*'propiska'*) as a permanent resident — were considered Russian nationals.<sup>20</sup> Those who were unregistered or only temporarily residing in the territory were excluded.<sup>21</sup> The largest and most vulnerable group of persons living outside Ukraine were the Muslim Crimean Tatars and other ethnic minorities from Ukraine who had been deported to Siberia on the orders of the Soviet leader Joseph Stalin in a campaign of ethnic cleansing.<sup>22</sup> To illustrate, 248,700 formerly deported persons had returned to Crimea by 1997.<sup>23</sup> However, until 1997, Ukraine's nationality law did not facilitate their access to Ukrainian nationality.<sup>24</sup>

For formerly deported persons and many ethnic Ukrainians living abroad, the only remaining option to obtain Ukrainian nationality after independence was to apply for naturalisation (*'admission to Ukrainian citizenship'*).<sup>25</sup> However, the naturalisation procedure was burdensome and formalistic.<sup>26</sup> By 1997, only 2,091 returnees had applied for nationality through this procedure.<sup>27</sup> Among other

<sup>18</sup> UNHCR, *The Problem of Statelessness in Ukraine* (n 3) 15.

<sup>19</sup> In Moldova, nationality was only granted to persons who resided in Moldova before 28 June 1940 and their descendants: *Law No 596-XII of 1991 'Law on the Citizenship of the Republic of Moldova'*, art 2(1) (Republic of Moldova). In Belarus, nationality was reserved for persons permanently residing in Belarus at the time of independence: *Law No 1181-XII of 1991 'Law of the Republic of Belarus on Citizenship'*, art 2(1) (Republic of Belarus). In a similar vein, Kazakhstan only granted nationality to individuals who permanently resided in Kazakh territory at the time of independence: *Law No 1017-XIII of 1991 'Law of the Republic of Kazakhstan on Citizenship'*, art 3 (Kazakhstan).

<sup>20</sup> *Law No 1948-1 of 1991 'On the Citizenship of the Russian Federation'*, art 13(1) (Russian Federation), cited in Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia: Past, Present and Future as Defined by International Law* (Brill Nijhoff 2005) 178–9. See also Alexander Salenko, *Country Report: Russia* (Report, July 2012) 11.

<sup>21</sup> See, for example, the case of Lavrisa Tatishvili, an ethnic Georgian who resided in the territory of the Russian Federation, but who was excluded from Russian nationality in 1991 as she was not registered as a permanent resident. As a result, she became stateless: *Tatishvili v Russia (Judgment)* (European Court of Human Rights ('ECtHR'), First Chamber, Application No 1509/02, 9 July 2007) [7], [12], [23].

<sup>22</sup> Rustem Ablyatifov, 'Citizenship Reform and Challenges for the Crimean Tatars in Ukraine' in Brad K Blitz and Maureen Lynch (eds), *Statelessness and the Benefits of Citizenship: A Comparative Study* (Oxford Brookes University 2009) 77; J Otto Pohl, 'Stalin's Genocide against the "Repressed Peoples"' (2000) 2(2) *Journal of Genocide Research* 267, 267.

<sup>23</sup> UNHCR, *Report of the United Nations High Commissioner for Refugees*, UN Doc A/53/12 (26 October 1998) [131].

<sup>24</sup> UNHCR, *The Problem of Statelessness in Ukraine* (n 3) 23–4; Ablyatifov (n 22) 77.

<sup>25</sup> *On the Citizenship of Ukraine (1991)* (n 16) arts 2, 17; ENS, *Protecting Stateless Persons from Arbitrary Detention in Ukraine* (n 6) 12.

<sup>26</sup> *ibid.*

<sup>27</sup> UNHCR, *The Problem of Statelessness in Ukraine* (n 3) 24.

conditions, applicants were required to pass a Ukrainian language test and prove regular residence in Ukraine for five years.<sup>28</sup> Registering a place of residence in Ukraine also required burdensome formalities.<sup>29</sup> As a result, many people who returned to Ukraine failed to complete the procedure and were rendered stateless. Yet, significant legislative progress has been made to resolve statelessness among formerly deported persons. In 2001, the nationality law introduced a simplified procedure to acquire Ukrainian nationality by territorial origin which waived the requirements of language proficiency and lawful residence for five years.<sup>30</sup> UNHCR reported in 2014 that 106,000 returned formerly deported persons had successfully acquired Ukrainian nationality through this procedure.<sup>31</sup> Despite the great strides made, UNHCR also acknowledged that many individuals have not acquired nationality as the procedure remains rather complicated and lengthy.<sup>32</sup> As a result, many formerly deported individuals continue to be stateless. Some of them still have an old Soviet passport or birth certificate, but these are no longer recognised as proof of identification and have expired as legal identity documents.<sup>33</sup>

Another group that forms part of the stateless population of Ukraine is irregular migrants living in Ukraine who originate from former Soviet republics. A close nexus exists between migration and statelessness, and irregular migrants are particularly at risk because they may be excluded from the naturalisation procedure in their state of residence due to their irregular status, but at the same time may not be able to return to their state of origin.<sup>34</sup> In Ukraine, many migrants remained unregistered for years due to burdensome formalities required to register their place of residence.<sup>35</sup> As a result, they were often not able to register the birth of their children or renew their own identity documentation, which are consular services that are often restricted to officially registered, permanent residents of Ukraine.<sup>36</sup> Because the procedure to return to their country of origin is also highly formalistic and expensive, many migrants and their children now find themselves undocumented and at risk of statelessness.<sup>37</sup>

Furthermore, the sizeable Roma population living in Ukraine is known to be at a heightened risk of statelessness due to discrimination and lack of documentation.<sup>38</sup> According to the estimations of several international organisations, up to 400,000 Roma live in Ukraine.<sup>39</sup> Discrimination against Roma is pervasive in Ukrainian society. According to a non-governmental organisation ('NGO') report, 93% of Roma families with young children face discrimination when accessing public

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<sup>28</sup> *On the Citizenship of Ukraine (1991)* (n 16) art 17.

<sup>29</sup> ENS, *Protecting Stateless Persons from Arbitrary Detention in Ukraine* (n 6) 12.

<sup>30</sup> *Law No 2743-VIII of 2019 'Law on Citizenship of Ukraine'*, art 8 (Ukraine).

<sup>31</sup> UNHCR, *The Problem of Statelessness in Ukraine* (n 3) 24.

<sup>32</sup> *ibid.*

<sup>33</sup> ENS, *Protecting Stateless Persons from Arbitrary Detention in Ukraine* (n 6) 12.

<sup>34</sup> Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 267–8.

<sup>35</sup> ENS, *Protecting Stateless Persons from Arbitrary Detention in Ukraine* (n 6) 13.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> European Roma Rights Centre ('ERRC'), *Roma Belong — Statelessness, Discrimination and Marginalisation of Roma in Ukraine* (Report, March 2018) 10–11 ('*Roma Belong*').

<sup>39</sup> Organisation for Security and Co-operation in Europe ('OSCE'), *Situation Assessment Report on Roma in Ukraine and the Impact of the Current Crisis* (Report, August 2014) 11; European Commission against Racism and Intolerance, *Report on Ukraine (Fifth Monitoring Cycle)* (Report, 19 September 2017) 21.

services or premises.<sup>40</sup> Many Roma are also undocumented and do not have passports or documents proving other legal facts, such as birth certificates and residence registration. Although no accurate data exists on how many Roma are stateless or do not have any personal documents, the lack of documentation has been labelled as one of the most pressing human rights dilemmas that Roma are experiencing in Ukraine.<sup>41</sup> The interrelation between discrimination, documentation and statelessness is complex and mutually reinforcing. Discrimination is often both a cause and a consequence of the lack of documentation.<sup>42</sup> While many Ukrainians became undocumented after the dissolution of the Soviet Union, the Roma's vulnerability to such a lack of documentation was exacerbated by a lack of awareness of civil registration procedures, marginalisation, fear of applying to State authorities and residence in remote and rural areas, in combination with bureaucratic challenges and institutional barriers.<sup>43</sup> The risk of becoming stateless is perpetuated over generations, since in Ukraine undocumented parents are not allowed to register the births of their children.<sup>44</sup> Children of undocumented parents can only be registered by a third party, but, in that case, the legal relationship between the child and the parents remains undetermined.<sup>45</sup> In general, parents are also required to present a medical certificate confirming the child's birth.<sup>46</sup> However, Romani women often give birth at home out of fear of discriminatory treatment in the hospital and are hence not able to present such a certificate.<sup>47</sup> In that case, a court decision confirming the child's birth is an alternative, but such a procedure is burdensome.<sup>48</sup> As a result, many Romani children are ultimately not registered at birth. Multiple human rights treaty bodies have repeatedly recommended that Ukraine facilitate the acquisition of personal documentation by Roma communities.<sup>49</sup>

<sup>40</sup> Romani Early Years Network, *Young Roma Children Status in Ukraine* (Report, 2022) 1.

<sup>41</sup> Rita Izsak, *Report of the Special Rapporteur on Minority Issues*, UN Doc A/HRC/28/64/Add.1 (27 January 2015) [63]; OSCE, Office for Democratic Institutions and Human Rights, *Access to Personal Documents for Roma in Ukraine: More Efforts Needed* (Report, June 2018) 15.

<sup>42</sup> Amal de Chickera and Joanna Whiteman, 'Addressing Statelessness through the Rights to Equality and Non-discrimination' in Laura van Waas and Melanie J Khanna (eds), *Solving Statelessness* (Wolf Legal Publishers 2017) 99, 104–5.

<sup>43</sup> ERRC, *Roma Belong* (n 38) 14, 23, 37–8.

<sup>44</sup> *ibid* 37.

<sup>45</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (Report, 2022) 30.

<sup>46</sup> *Law No 2398-VI 'On State Registration of Civil Status Acts'*, art 13(4) (Ukraine) ('*On State Registration of Civil Status Acts* (Ukraine)').

<sup>47</sup> ERRC, *Roma Belong* (n 38) 37–8.

<sup>48</sup> *On State Registration of Civil Status Acts* (Ukraine) (n 46) art 13(4).

<sup>49</sup> UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention*, UN Doc CRC/C/UKR/CO/3-4 (21 April 2011) [35]–[36]. See also UN Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention*, UN Doc CERD/C/UKR/CO/19-21 (14 September 2011) [15]; UN Human Rights Committee ('CCPR'), *Concluding Observations on the Seventh Periodic Report of Ukraine*, UN Doc CCPR/C/UKR/CO/7 (22 August 2013) [12]; UN Committee on Economic, Social and Cultural Rights ('CESCR'), *Concluding Observations on the Sixth Periodic Report of Ukraine*, UN Doc E/C.12/UKR/CO/6 (13 June 2014) [8(b)]; CESCR, *Concluding Observations on the Seventh Periodic Report of Ukraine*, UN Doc E/C.12/UKR/CO/7 (2 April 2020) [15(d)]; UN Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Ukraine*, UN Doc CRC/C/UKR/CO/5-6 (27 October 2022) [20(c)].

Finally, the annexation of Crimea and the outbreak of the armed conflict in eastern Ukraine in 2014 led to an increase of Ukraine's stateless population. The Russian Federation annexed Crimea in March 2014, and parts of Luhansk and Donetsk regions proclaimed independence as the Luhansk People's Republic and the Donetsk People's Republic on 12 May 2014, as a result of which Ukraine lost control over a part of its territory.<sup>50</sup> Ukrainians living in the non-government controlled area have encountered significant obstacles in applying to Ukrainian state institutions for the issuing or renewal of personal documents. Children born in the occupied territories face difficulties in obtaining a birth certificate issued by the Ukrainian Government, as the latter no longer controls the administrative services in those regions.<sup>51</sup> To remedy that obstacle, a special court procedure was introduced in 2016 to establish the facts of a birth in the occupied territories.<sup>52</sup> However, the procedure is again burdensome and expensive as it requires applicants to travel to a non-occupied Ukrainian territory.<sup>53</sup> The Office of the United Nations High Commissioner for Human Rights ('OHCHR') also found that the procedure was unevenly applied in practice and the courts sometimes required a formal refusal of the administrative authorities in Crimea to register the birth.<sup>54</sup> Procedures for the issuing or renewal of passports were also burdensome due to required travel, evidentiary requirements, lost archives, long waiting periods and fines for failure to renew documents in time.<sup>55</sup> OHCHR also reported arbitrariness and bias against Crimean residents applying for personal documents. For instance, a Crimean woman was denied a renewal of her passport by the State Migration Service ('SMS') as she could be 'a separatist'.<sup>56</sup>

## B *Impacts of the Russian Invasion*

On 24 February 2022, Vladimir Putin, President of the Russian Federation, announced a 'special military operation' in Ukraine and subsequently invaded the Ukrainian territory with Russia's military forces. The invasion resulted in large-scale international armed conflict, which is still ongoing. Since the invasion, the Russian Federation has occupied parts of the Kherson and Zaporizhzhia regions, in addition to Crimea, Luhansk and Donetsk, which have been occupied since 2014.<sup>57</sup> Three days before the invasion, the Russian Federation unlawfully

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<sup>50</sup> 'Ukraine Separatists Declare Independence', *Al Jazeera* (online, 12 May 2014) <<https://www.aljazeera.com/news/2014/5/12/ukraine-separatists-declare-independence>>, archived at <[perma.cc/2FFX-KDTV](https://perma.cc/2FFX-KDTV)>. For more information about Luhansk and Donetsk, see Roman Petrov, 'The Legal Systems of the Donetsk/Lugansk People's Republics: International and European Considerations' in Benedikt C Harzl and Roman Petrov (eds), *Unrecognized Entities* (Brill Nijhoff 2021) 209.

<sup>51</sup> UN Ukraine, *Briefing Note on Birth Registration* (n 9) 1.

<sup>52</sup> *Law No 990-VIII of 2016 'On Amendments to the Civil Procedure Code of Ukraine regarding the Establishment of the Fact of Birth or Death of a Person in the Temporarily Occupied Territory of Ukraine'* (Ukraine).

<sup>53</sup> UN Ukraine, *Briefing Note on Birth Registration* (n 9) 1.

<sup>54</sup> UN Human Rights Council, *Report on the Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine: 13 September 2017 to 30 June 2018*, UN Doc A/HRC/39/CRP.4 (21 September 2018) [81].

<sup>55</sup> *ibid* 17 [83].

<sup>56</sup> *ibid*.

<sup>57</sup> George Barros et al, 'Interactive Map: Russia's Invasion of Ukraine', *Institute for the Study of War* (Web Page, 2 August 2024) <<https://storymaps.arcgis.com/stories/36a7f6a6f5a9448496de641cf64bd375>>, archived at <[perma.cc/F8YY-9MT6](https://perma.cc/F8YY-9MT6)>.



recognised the Luhansk People's Republic and the Donetsk People's Republic as independent, sovereign states.<sup>58</sup> In September 2022, the Russian Federation organised unlawful referendums regarding the status of Luhansk, Donetsk, Kherson and Zaporizhzhia and subsequently annexed these territories.<sup>59</sup> These referendums and the subsequent annexation were condemned by the UN General Assembly as a violation of the territorial integrity and sovereignty of Ukraine.<sup>60</sup>

These events will likely cause a significant growth in the stateless population of Ukraine. The annexation of Crimea and the outbreak of the armed conflict in Luhansk and Donetsk in 2014 already demonstrated that the issuing and renewal of passports, as well as the obtainment of birth certificates in the non-government controlled area is problematic, leaving undocumented individuals and unregistered children at an increased risk of becoming stateless. Hence, a similar development is to be expected in the newly occupied territories. In November 2022, the UN Committee on the Elimination of Discrimination against Women noted the difficulties that women in the non-government controlled area experienced in registering the births of their children and called upon Ukraine to facilitate birth registration for these women.<sup>61</sup> It is difficult to estimate how many individuals living in the non-government controlled area are undocumented and how many have been issued personal documentation by the Russian authorities, such as birth, marriage and death certificates. Even though the Russian occupation of the territory is unlawful, these documents should be considered valid to the extent that they benefit the inhabitants of the non-government controlled area.<sup>62</sup>

Regarding the issuance of passports, the Russian Federation has taken far-reaching actions to forcibly naturalise Ukrainians living in the occupied territories to expand the Russian polity, in violation of international law.<sup>63</sup> When it annexed Crimea, all Ukrainian citizens and stateless persons permanently residing in

<sup>58</sup> See Julia Miklasová, 'Russia's Recognition of the DPR and LPR as Illegal Acts under International Law', *Völkerrechtsblog* (Blog Post, 24 February 2022) <<https://voelkerrechtsblog.org/russias-recognition-of-the-dpr-and-lpr-as-illegal-acts-under-international-law>>, archived at <[perma.cc/E5XY-5AQE](https://perma.cc/E5XY-5AQE)>.

<sup>59</sup> 'Russia/Ukraine: Illegitimate Results of Sham "Referenda" Must Not Enable Illegal Annexation of Occupied Areas', *Amnesty International* (online, 28 September 2022) <<https://www.amnesty.org/en/latest/news/2022/09/russia-ukraine-illegitimate-results-of-sham-referenda-must-not-enable-illegal-annexation-of-occupied-areas>>, archived at <[perma.cc/WKT9-QWG7](https://perma.cc/WKT9-QWG7)>.

<sup>60</sup> UN General Assembly ('UNGA'), *Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations*, UN Doc A/RES/ES-11/4 (12 October 2022) [2].

<sup>61</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Ninth Periodic Report of Ukraine*, UN Doc CEDAW/C/UKR/CO/9 (November 2022) [35(a)], [36(a)].

<sup>62</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 56 [125]; *Loizidou v Turkey* (1998) Eur Court HR 1807; OSCE, *Enhanced Understanding on Freedom of Movement in all Phases of the Conflict Cycle* (Report, 7 November 2023) 27.

<sup>63</sup> This practice was already widely condemned after the annexation of Crimea by the UN General Assembly, the Parliament of the European Union ('EU') and the Parliamentary Assembly of the Council of Europe ('CoE'): European Parliament Resolution of 18 September 2014 on the Situation in Ukraine and State of Play of EU-Russia Relations (2014/2841(RSP)) [2016] OJ C 234/14 (18 September 2014) [4]; UNGA, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, UN Doc A/RES/72/190 (19 January 2018); Parliamentary Assembly, CoE, *Humanitarian Consequences of the War in Ukraine*, Res 2198(2018) (23 January 2018) [10](9).

Crimea were automatically granted Russian nationality.<sup>64</sup> By May 2015, only 4% of Crimea's residents were estimated not to possess Russian nationality.<sup>65</sup> On 25 May 2022, the Russian President issued a decree that simplified the procedure to obtain Russian nationality for Ukrainians who are permanently residing in Crimea, Luhansk, Donetsk, Zaporizhzhia or Kherson.<sup>66</sup> For Ukrainian citizens living in Luhansk and Donetsk, that simplified procedure has been in place since 2019.<sup>67</sup> The procedure allows permanent residents to apply for naturalisation without fulfilling the regular requirements, including five years of residence in Russia, proof of a source of livelihood and knowledge of the Russian language.<sup>68</sup> Stateless persons are explicitly mentioned, but the simplified procedure only extends to stateless persons with a permanent residence permit.<sup>69</sup> While the procedure seems voluntary at first glance, the presidential decree of 27 April 2023 stipulates that if residents do not accept Russian nationality, they are considered as foreign citizens and stateless persons from 30 September 2022.<sup>70</sup> From 1 July 2024 onwards, they may be subjected to detention or deportation.<sup>71</sup> Moreover, humanitarian aid and basic services are reserved for Russian nationals within the non-government controlled area, leaving Ukrainians with little choice but to accept Russian nationality and to relinquish their own.<sup>72</sup>

In addition to these 'passportisation' efforts of the Russian Federation, a number of recent legal reforms present clear risks of statelessness for the Ukrainians living in the occupied territories. On 18 March 2023, a new Russian law introduced a procedure for Ukrainians who received a Russian passport to renounce their Ukrainian nationality.<sup>73</sup> Four months later, a decree was issued that could result in the loss of Russian nationality for individuals who have unilaterally

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<sup>64</sup> Law No 36-FZ 'On Ratification of the Treaty between the Russian Federation and the Republic of Crimea on the Admission of the Republic of Crimea to the Russian Federation and the Formation of New subjects within the Russian Federation' (Russian Federation).

<sup>65</sup> UN Human Rights Council, *Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol* (Ukraine), UN Doc A/HRC/36/CRP.3 (25 September 2017) [56].

<sup>66</sup> Decree of the President of the Russian Federation No 304 of 25 May 2022, 'On Amendments to Decree of the President of the Russian Federation No 183 of 24 April 2019' (Russian Federation).

<sup>67</sup> Decree of the President of the Russian Federation No 183 of 24 April 2019, 'On the Definition for Humanitarian Purposes of the Categories of Persons Entitled to Apply for Admission to the Citizenship of the Russian Federation in a Simplified Manner' (Russian Federation).

<sup>68</sup> *ibid* art 1; Yale School of Public Health Humanitarian Research Lab ('Yale School'), *Forced Passportization in Russia-Occupied Areas of Ukraine* (Report, 2 August 2023) 9.

<sup>69</sup> Decree of the President of the Russian Federation No 307 of 27 April 2023, 'On the Features of the Legal Status of Certain Categories of Foreign Citizens and Stateless Persons in the Russian Federation' (Russian Federation) art 1 ('On the Features of the Legal Status of Certain Categories of Foreign Citizens and Stateless Persons (Russian Federation)').

<sup>70</sup> *ibid*; Yale School, *Forced Passportization in Russia-Occupied Areas of Ukraine* (n 68) 9.

<sup>71</sup> *On the Features of the Legal Status of Certain Categories of Foreign Citizens and Stateless Persons in the Russian Federation* (Russian Federation) (n 69) art 2; Yale School, *Forced Passportization in Russia-Occupied Areas of Ukraine* (n 68) 9.

<sup>72</sup> *ibid* 5. See also Iryna Romaliyska, 'Kherson Clampdown: Russian Authorities Going Door-To-Door, Mandating Russian Passports, Official Says', *Radio Free Europe — Radio Liberty* (online, 15 August 2022) <<https://www.rferl.org/a/kherson-clampdown-russia-passports-ukraine/31989546.html>>, archived at <[perma.cc/9CEC-V3T3](https://perma.cc/9CEC-V3T3)>.

<sup>73</sup> Law No 62-FZ of 2023 'On the Features of the Legal Status of Citizens of the Russian Federation with Citizenship of Ukraine' art 1 (Russian Federation) ('On the Features of the Legal Status of Russian Citizens with Ukrainian Citizenship (Russian Federation)').

renounced their Ukrainian nationality if they continue to employ their Ukrainian nationality, for instance by using Ukrainian identity documents.<sup>74</sup> Since April 2023, nationality deprivation can be imposed as a punishment for certain acts, such as desertion and spreading fake news about the army and riots, as well as acts that could threaten national security.<sup>75</sup> A report published by the University of Yale observed that:

Given the subjective nature of these acts, the amendment leaves all recipients of Russian citizenship in a permanent state of probation, in which anyone considered insufficiently enthusiastic for the war can have their citizenship revoked. In combination with existing laws and requirements for renouncing Ukrainian citizenship, this last amendment puts individuals at constant risk for statelessness.<sup>76</sup>

The practical consequence of these Russian laws is that Ukrainians are not only coerced into trading their nationality for Russian nationality, they in turn risk being deprived of that Russian nationality at the wide discretion of the Russian authorities.<sup>77</sup> As a result, they will be considered neither Russian nor Ukrainian by the Russian Federation within the non-government controlled area. Even though Ukraine does not recognise any unilateral renunciations of Ukrainian nationality following the Russian legislation and continues to consider these individuals as its own nationals, the Ukrainian nationality of those individuals is not effective in practice. The Russian Federation will consider them as stateless and treat them as such.<sup>78</sup> Moreover, it is likely that many Ukrainians from the non-government controlled area will no longer be able to prove their Ukrainian nationality in the future, because they were compelled to exchange their Ukrainian identity documents for Russian ones, or because their documents were destroyed by military action.<sup>79</sup> Hence, they risk becoming stateless.

Finally, it is not only the Russian Federation's campaign to force its nationality on Ukrainians in the non-government controlled area that creates a statelessness risk, but also the ongoing hostilities. The armed conflict has resulted in a mass displacement of Ukrainians aiming to flee the atrocities of the war. The most recent statistics (as of July 2024) recorded more than 6 and a half million Ukrainian refugees and more than 3 and a half million Ukrainian IDPs (as of

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<sup>74</sup> *Decree of the President of the Russian Federation No 495 of 6 July 2023, 'On Certain Issues Related to the Features of the Legal Status of Citizens of the Russian Federation Having Citizenship of Ukraine'* (Russian Federation) art 1; Yale School, *Forced Passportization in Russia-Occupied areas of Ukraine* (n 68) 10.

<sup>75</sup> *On the Features of the Legal Status of Russian Citizens with Ukrainian Citizenship* (Russian Federation) (n 73) art 22.

<sup>76</sup> Yale School, *Forced Passportization in Russia-Occupied areas of Ukraine* (n 68) 10.

<sup>77</sup> *ibid.*

<sup>78</sup> Ministry of Foreign Affairs of Ukraine, 'Comment of the MFA of Ukraine regarding the Entry into Force in Russia of a Regulatory Act that Violates the Legal Rights of Citizens of Ukraine' (Media Release, 10 July 2023) <<https://mfa.gov.ua/en/news/komentar-mzs-ukrayini-shchodo-nabuttya-v-rf-chinnosti-normativno-pravovogo-akta-yakij-porushuye-zakonni-prava-gromadyan-ukrayini>>, archived at <[perma.cc/EED5-9SFH](https://perma.cc/EED5-9SFH)>. See also Yale School, *Forced Passportization in Russia-Occupied Areas of Ukraine* (n 68) 10.

<sup>79</sup> Evan Harary, 'In Ukraine, Russian Passportization Generates Effective Denationalization', *Opinio Juris* (Blog Post, 4 January 2024) <<https://opiniojuris.org/2024/01/04/in-ukraine-russian-passportization-generates-effective-denationalization>>, archived at <[perma.cc/G3JK-ES4R](https://perma.cc/G3JK-ES4R)>.

December 2023).<sup>80</sup> Refugees and IDPs are more vulnerable to becoming stateless due to the close nexus between forced displacement and lack of personal documentation. Forcibly displaced persons may not have been able to collect their personal documents because they had to flee abruptly, or they may have lost them on dangerous flight routes.<sup>81</sup> It is also possible that their documentation was confiscated or destroyed by border guards or soldiers.<sup>82</sup> Such destruction and confiscation practices by Russian armed forces have already been reported in the occupied territories.<sup>83</sup>

### III PROTECTION GAPS FOR STATELESS PERSONS IN UKRAINE IN GENERAL

Over the last decade, Ukraine has undertaken several efforts to protect stateless persons and persons at risk of statelessness. In 2013, Ukraine acceded to the *1954 Convention relating to the Status of Stateless Persons* ('1954 Convention') and the *1961 Convention on the Reduction of Statelessness* ('1961 Convention') (collectively, the '*Statelessness Conventions*');<sup>84</sup> the primary international legal framework addressing statelessness.<sup>85</sup> The *1954 Convention* aims to protect individuals who find themselves in a situation of statelessness by granting them a set of civil and socio-economic rights, such as the rights to religion, property, association, access to courts, employment, housing, education and social security.<sup>86</sup> Some of these rights address the specific protection needs of stateless persons, such as the right to identity papers and travel documents, freedom of movement, protection against expulsion and naturalisation.<sup>87</sup> The *1954 Convention* has a similar structure as the *Convention relating to the Status of*

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<sup>80</sup> UNHCR, 'Ukraine Refugee Situation' (n 1); International Organisation for Migration, *Ukraine Returns Report (General Population Survey Round 15)* (Report, December 2023) 2.

<sup>81</sup> Zahra Albarazi and Laura van Waas, *Statelessness and Displacement* (Report, 15 April 2016); Bronwen Manby, *Identification in the Context of Forced Displacement* (Report, June 2016) 12.

<sup>82</sup> Manby, *Identification in the Context of Forced Displacement* (n 81) 12.

<sup>83</sup> Olha Hlushchenko, 'Russians Confiscate Ukrainian Passports from Citizens in Temporarily Occupied Territories', *Ukrainska Pravda* (online, 21 February 2023) <<https://www.pravda.com.ua/eng/news/2023/02/21/7390232>>, archived at <[perma.cc/29Q9-8V9A](https://perma.cc/29Q9-8V9A)>; 'Russian Forces Destroy Passports of Ukrainians in Kherson Region', *Espresso* (online, 12 May 2023) <<https://global.espresso.tv/russian-forces-destroy-passports-of-ukrainians-in-kherson-region>>, archived at <[perma.cc/P5TF-A2CJ](https://perma.cc/P5TF-A2CJ)>.

<sup>84</sup> *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('1961 Convention'). The *1961 Convention* aims to prevent and reduce statelessness in the future by incorporating safeguards against a number of causes of statelessness, including safeguards to protect children (orphans, foundlings and those born on the territory who would otherwise be stateless if not granted nationality) (arts 1–5), conflicts of laws, deprivation, loss and renunciation of nationality (arts 5–9), and state succession (art 10).

<sup>85</sup> *Law No 22-VII of 2013 'Law on the Accession of Ukraine to the Convention on the Reduction of Statelessness'* (Ukraine); *Law No 23-VII, 'Law on the Accession of Ukraine to the Convention Relating to the Status of Stateless Persons'* (Ukraine).

<sup>86</sup> *1954 Convention* (n 2) arts 4, 13, 15–19, 21–2, 24.

<sup>87</sup> *ibid* arts 26–8, 31–2.

*Refugees* (*Refugee Convention*),<sup>88</sup> but omits a few safeguards, such as protection from penalties for unlawful entry or presence and protection from *refoulement*.<sup>89</sup>

#### A A Newly Established Statelessness Determination Procedure

On 16 June 2020, the Ukrainian Parliament adopted the law *On Amending Certain Legislative Acts of Ukraine regarding Recognition as a Stateless Person* in order to implement Ukraine's obligations under the *1954 Convention*.<sup>90</sup> The Ukrainian law defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law' in line with the definition prescribed by art 1(1) of the *1954 Convention*.<sup>91</sup> The law also introduced a statelessness determination procedure ('SDP'); a mechanism through which stateless persons can be identified and subsequently granted a legal status.<sup>92</sup> The resolution required for the implementation of the SDP was adopted on 24 March 2021.<sup>93</sup> By introducing an SDP, Ukraine joined a small group of states responding to UNHCR's recommendations related to the identification and protection of stateless persons under international law.<sup>94</sup> While UNHCR initially only had a mandate for refugees — including stateless refugees — the UN General Assembly

<sup>88</sup> This similarity is explained by the common drafting history of both conventions. In 1949, ECOSOC appointed the Ad Hoc Committee on Statelessness and Related Problems to consider the desirability of a new convention related to refugees and stateless persons, and, in the case of the affirmative, to draft that convention. The Committee recommended the adoption of a convention relating to the status of refugees, accompanied by a protocol relating to the status of stateless persons. Eventually, at the Conference of Plenipotentiaries in 1951, only the *Convention relating to the Status of Refugees* was adopted while the protocol was referred back to the UN for further study: opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (*Refugee Convention*). In 1954, the protocol was used as a basis to draft and adopt the *1954 Convention*: ECOSOC, *The Study of Statelessness*, UN Doc E/RES/248(IX)B (6 August 1949); ECOSOC, *Report of the Ad Hoc Committee on Statelessness and Related Problems*, UN Doc E/1618 and E/AC.32/5 (17 February 1950) [19]; UN General Assembly, *Draft Convention relating to the Status of Refugees*, UN Doc A/RES/429(V) (14 December 1950) [1]; *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, UN Doc A/CONF.2/108/Rev.1 (25 July 1951) Resolution III.

<sup>89</sup> *Refugee Convention* (n 88) arts 31, 33(1).

<sup>90</sup> *Law No 693-IX of 2020 'On Amending Certain Legislative Acts of Ukraine regarding Recognition as a Stateless Person'* (Ukraine).

<sup>91</sup> *Law 3773-VI of 2012 'On the Legal Status of Foreigners and Stateless Persons'* (Ukraine) (*'On the Legal Status of Foreigners and Stateless Persons'* (Ukraine)). This definition also constitutes customary international law: see ILC, 'Draft Articles on Diplomatic Protection, with Commentaries' (n 2) art 8(3).

<sup>92</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) art 6.

<sup>93</sup> *Law 317-2021-n of 2021 'Some Issues of Recognition as a Stateless Person'* (Ukraine).

<sup>94</sup> Other states that have implemented a Statelessness Determination Procedure ('SDP') in their national law include France, Hungary, Mexico, Moldova, Paraguay, Italy, Latvia, Spain, Georgia, the Philippines, Costa Rica, Brazil, Uruguay, the United Kingdom, Kosovo, Turkey, Bulgaria, Ecuador, Montenegro, Panama and Argentina: UNHCR, *'Good Practices Paper — Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons'* (Paper, July 2020) 5 (*'Good Practices Paper — Action 6'*). Furthermore, at the High-Level Segment on Statelessness organised by UNHCR in 2019, various states pledged to introduce an SDP in their national laws in the future, including Albania, Belize, Bosnia and Herzegovina, Burkina Faso, Chad, Guinea, Mali, Nigeria, Senegal, Sierra Leone and Zimbabwe: UNHCR, *High-Level Segment on Statelessness: Results and Highlights* (May 2020) 47, 50–52, 54, 59, 63, 66, 70, 75 (*'High-Level Segment on Statelessness'*).

gradually expanded UNHCR's mandate to include stateless persons.<sup>95</sup> Since 1995, UNHCR has been mandated to take measures for the reduction and prevention of statelessness, as well as for the protection of stateless persons, while identification of stateless groups and individuals was added to the list in 2006.<sup>96</sup> Since its establishment, UNHCR has been vested with a supervisory responsibility in the context of its international protection mandate.<sup>97</sup> While the legal basis of UNHCR's supervisory role for international instruments related to statelessness is not as explicit as it is for international refugee law — the *United Nations High Commissioner of Refugees Statute* only mentions the supervision of refugee instruments and the *Statelessness Conventions* do not attribute any supervisory tasks to UNHCR — UNHCR has interpreted its competence broadly and has assumed a supervisory function in practice.<sup>98</sup> Among other activities, through its

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<sup>95</sup> UNHCR's initial mandate was laid down in the *UNHCR Statute*, as adopted by the UN General Assembly: *Statute of the Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/428(V) (14 December 1950) ('*UNHCR Statute*'). In later decades, UNHCR's mandate was expanded to stateless persons through a series of Executive Committee ('ExCom') conclusions and UN General Assembly resolutions. See *inter alia* UNGA, *Question of the Establishment, in Accordance with the Convention on the Reduction of Statelessness, of a Body to Which Persons Claiming the Benefit of the Convention May Apply*, UN Doc A/RES/3274(XXIX) (10 December 1974); UNGA, *Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/49/169 (23 December 1994) [20]; ExCom, *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, No 78(XLVI) (20 October 1995) ('*Prevention and Reduction of Statelessness*, No 78(XLVI)'); UNGA, *Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/50/152 (21 December 1995) [15] ('*Office of the UNHCR*, UN Doc A/RES/50/152'); ExCom, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, No 106(LVII) (6 October 2006) ('*Conclusion on Identification, Prevention and Reduction of Statelessness*, No 106(LVII)'); UNGA, *Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/61/137 (19 December 2006) [1] ('*Office of the UNHCR*, UN Doc A/RES/61/137').

<sup>96</sup> *Prevention and Reduction of Statelessness*, No 78(XLVI) (n 95); *Office of the UNHCR*, UN Doc A/RES/50/152 (n 95) [15]; *Conclusion on Identification, Prevention and Reduction of Statelessness*, No 106(LVII) (n 95); *Office of the UNHCR*, UN Doc A/RES/61/137 (n 95) [1]. According to Manly, the resolution adopted by the UN General Assembly in 1995 'established a truly global mandate for UNHCR on statelessness': Mark Manly, 'UNHCR's Mandate and Activities to Address Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 89.

<sup>97</sup> For a more elaborate discussion of UNHCR's supervisory responsibility, see, eg, Walter Kälin, 'Supervising the 1951 *Convention Relating to the Status of Refugees*: Article 35 and beyond' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 613; Volker Türk, 'UNHCR's Supervisory Responsibility' (2001) 14 *Revue Québécoise de Droit International* 135; Volker Türk, 'The UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (1<sup>st</sup> edn, Cambridge University Press 2013) ('UNHCR's Role in Supervising International Protection Standards').

<sup>98</sup> See *UNHCR Statute* (n 95) [8(a)]. However, the *UNHCR Statute* is not the sole legal basis of UNHCR's supervisory responsibility. It must be considered *in juncto* with the subsequent Executive Committee conclusions and UN General Assembly resolutions expanding UNHCR's mandate, which have indirectly provided UNHCR with a supervisory role. For instance, the Executive Committee requested UNHCR 'to provide technical advice to States Parties on the implementation of the 1954 *Convention* so as to ensure consistent implementation of its provisions': *Conclusion on Identification, Prevention and Reduction of Statelessness*, No 106(LVII) (n 95) [X]; Türk, 'UNHCR's Role in Supervising International Protection Standards' (n 97) 42.

established practice of publishing guidelines,<sup>99</sup> UNHCR has provided extensive treaty interpretation and policy guidance to interested states and other stakeholders regarding international standards on statelessness.<sup>100</sup> Although UNHCR's guidelines are not legally binding in the traditional sense, they are considered to possess significant legal authority.<sup>101</sup> Yet, it can be observed that while many states have pledged to implement some of the recommendations made by UNHCR, the actual implementation in states' national laws and practices often remains scant.<sup>102</sup>

The use of an SDP is not prescribed anywhere in the *1954 Convention* and cannot be considered a stringent obligation under international law. In principle, states are thus free to choose how they identify stateless persons on their territory.<sup>103</sup> Yet, states must enable stateless persons to regularise their stay one way or another, as the European Court of Human Rights ('ECtHR') held in *Hoti v Croatia* and *Sudita Keita v Hungary* that the lack of any effective and accessible procedure or a combination of procedures enabling stateless persons to have their stay and status determined can violate the private life interests under art 8 of the *European Convention of Human Rights* ('ECHR').<sup>104</sup> Nevertheless, the

<sup>99</sup> Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner for (UNHCR)' (2013) *Max Planck Encyclopedia of Public International Law*, 81, 82; Türk, 'UNHCR's Role in Supervising International Protection Standards' (n 97) 52–3.

<sup>100</sup> See 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*, UN Doc HCR/GS/12/01 (20 February 2012); UNHCR, *Guidelines on Statelessness No 2: Procedures for Determining whether an Individual is a Stateless Person*, UN Doc HCR/GS/12/02 (5 April 2012); UNHCR, *Guidelines on Statelessness No 3: The Status of Stateless Persons at the National Level*, UN Doc HCR/GS/12/03 (17 July 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*, UN Doc HCR/GS/12/04 (21 December 2012); UNHCR, *Guidelines on Statelessness No 5: Loss and Deprivation of Nationality under Articles 5–9 of the 1961 Convention on the Reduction of Statelessness*, UN Doc HCR/GS/20/05 (May 2020).

<sup>101</sup> Satvinder Singh Juss, 'The UNHCR Handbook and the Interface between "Soft Law" and "Hard Law" in International Refugee Law' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing 2013) 61–6; Volker Türk, 'Introductory Note to UNHCR Guidelines on International Protection' (2003) 15 *International Journal of Refugee Law* 303, 304; Türk, 'UNHCR's Role in Supervising International Protection Standards' (n 97) 52–3; Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (1<sup>st</sup> edn, Cambridge University Press 2014) 80.

<sup>102</sup> For an overview of all the pledges made at the High-Level Segment on Statelessness, see 'Results of the High-Level Segment on Statelessness', *UNHCR* (Web Page, 6 February 2020) <<https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness>>, archived at <[perma.cc/R9FS-LL76](https://perma.cc/R9FS-LL76)>.

<sup>103</sup> Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018) 112–3 ('*Protecting Stateless Persons*').

<sup>104</sup> *Hoti v Croatia* (ECtHR, First Section, Application No 63311/14, 26 July 2018) [141], [143] ('*Hoti*'); *Sudita Keita v Hungary* (ECtHR, Grand Chamber, Application No 42321/15, 12 May 2020) [41]–[42]. For commentaries on these two cases, see Patrícia Cabral, 'Sudita Keita v Hungary' (2020) 2(2) *Statelessness & Citizenship Review* 324; Tamas Molnar, 'The Sudita Keita Versus Hungary Ruling of the ECtHR and the Right to Private Life of Stateless Persons: A Long Saga Comes to an End' (2021) 9 *Hungarian Yearbook of International Law and European Law* 279; Barbara von Rütte, 'Social Identity and the Right to Belong — The ECtHR's Judgment in *Hoti v Croatia*' (2019) 24(2) *Tilburg Law Review* 147.

establishment of an SDP has been consistently recommended by UNHCR.<sup>105</sup> In its *Handbook on Protection of Stateless Persons* ('*Handbook*'), UNHCR states that the *1954 Convention* implicitly requires the implementation of an SDP in national law to ensure that stateless persons can enjoy their rights under the Convention.<sup>106</sup> Although an SDP seems an appropriate and efficient means of identification, UNHCR should shed some light on how it arrived at this interpretation, as this interpretation does not inherently follow from the ordinary meaning of the text.<sup>107</sup> Furthermore, in the *Handbook*, UNHCR asserts that an SPD is only an appropriate mechanism to identify stateless persons in a migratory context, not individuals who are stateless in situ, due to their long established ties with their country of residence.<sup>108</sup> For the latter category, UNHCR recommends that the state should rather undertake targeted nationality campaigns or nationality verification efforts.<sup>109</sup> However, it is again unclear why the use of an SDP would not be an appropriate means of identification for in situ stateless persons. If an SDP only provides a pathway to facilitated naturalisation, the procedure would indeed not be appropriate for stateless persons who have long-established ties with their country of residence.<sup>110</sup> Yet, if an SDP is solely a means of identifying stateless persons and allows the relevant authorities to establish that the applicant should have the country's nationality under the law, in situ stateless persons should not be excluded from the procedure. Ukraine provides a good example in that regard.<sup>111</sup> The SDP in Ukraine does not distinguish between the two categories of stateless persons, but if there are indications during the procedure that the applicant is eligible for Ukrainian nationality, the procedure is suspended until the applicant's nationality status is verified.<sup>112</sup>

To be recognised as stateless in Ukraine under the SDP applicants are required to apply to the SMS and to submit a number of documents. If the applicant does not have any, the SMS will conduct interviews with relatives, neighbours or other persons to confirm the facts of the application.<sup>113</sup> Lawful residence in Ukraine before the application is not a requirement.<sup>114</sup> During the application review period, the applicant is considered to be lawfully temporarily staying in Ukraine.<sup>115</sup> The SMS decides on the recognition of the applicant as stateless within a time period of six months, which can be extended to 12 months.<sup>116</sup> If the applicant receives a negative decision, they can appeal the decision to the

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<sup>105</sup> See, eg, UNHCR, *Statelessness Determination Procedures: Identifying and Protecting Stateless Persons* (Report, August 2014) 1; UNHCR, *Global Action Plan to End Statelessness: 2014–2024* (Report, November 2014) 20; UNHCR, *Good Practices Paper — Action 6* (n 94) 3.

<sup>106</sup> UNHCR, *Handbook on Protection of Stateless Persons* (Handbook, 30 June 2014).

<sup>107</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

<sup>108</sup> UNHCR, *Handbook on Protection of Stateless Persons* (n 106) 25 [58].

<sup>109</sup> *ibid.*

<sup>110</sup> Paola Pelletier Quiñones, 'Breaking the Presumption That Applicants of Statelessness Determination Procedures Are Foreign' (2021) 3(1) *Statelessness & Citizenship Review* 59, 85.

<sup>111</sup> *ibid.* 82–3.

<sup>112</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) art 6(2).

<sup>113</sup> *ibid.* art 6(1).

<sup>114</sup> *ibid.* art 4(22).

<sup>115</sup> *ibid.* art 6(2).

<sup>116</sup> *ibid.*



administrative court within 20 working days after notification of the decision.<sup>117</sup> As such, the procedural safeguards provided reasonably follow UNHCR's recommendations.<sup>118</sup>

The introduction of the SDP in Ukraine was undoubtedly a welcome development, but the number of recognitions remains low. The SDP only became operational quite recently — on 7 May 2021<sup>119</sup> — and thus has not yet received many applications. As of 30 September 2023, the SMS has received applications from 1,253 individuals, of which 883 applicants were recognised as stateless, 61 applicants were rejected because they possessed the nationality of another state, 11 applicants were found to be Ukrainian nationals, 32 applicants received a negative decision and the remaining applicants were still awaiting their decision.<sup>120</sup> Moreover, various accessibility problems persist. Stateless Roma generally suffer from a low level of literacy and education, and often experience difficulties in accessing administrative procedures.<sup>121</sup> Efforts should be made to make the procedure more accessible as various obstacles remain, such as the lack of detailed instructions about the SDP from the Government and the requirement that the application be submitted in Ukrainian.<sup>122</sup> Furthermore, government services, including the SDP, have been overburdened due to the armed conflict.<sup>123</sup> After the Russian invasion, the procedure was suspended during March and April 2022, and has at times been hindered by blackouts as a result of missile and drone attacks by the Russian Federation.<sup>124</sup> Since May 2022, the procedure has again become accessible in lesser affected regions.<sup>125</sup> Hence, stateless persons living in the non-government-controlled area have very limited access to the SDP, since they are required to travel outside the non-government-controlled area and risk being stopped at the border for lack of travel or identity documentation.<sup>126</sup> When stateless persons flee to neighbouring countries, they are also no longer able to access the procedure.<sup>127</sup>

### B *The Enjoyment of Human Rights by Stateless Persons*

Recognised stateless persons enjoy some rights in Ukraine, but the implementation of relevant international standards remains generally uneven. Moreover, some of the gaps in the Ukrainian protection framework echo the protection gaps at the international level. One of the greatest weaknesses of the *1954 Convention* is the lack of an obligation for states to grant any right of residence to stateless persons while at the same time limiting certain rights to stateless persons with a legal

<sup>117</sup> *ibid* art 6(4).

<sup>118</sup> UNHCR, *Handbook on Protection of Stateless Persons* (n 106) [71]–[77].

<sup>119</sup> The first procedure started on 7 May 2021: UNHCR, 'Stateless Persons' (n 3).

<sup>120</sup> *ibid*.

<sup>121</sup> ERRC, *Roma Belong* (n 38) 37.

<sup>122</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 12.

<sup>123</sup> Aleksejs Ivashuk, Sofiia Kordonets and Jyothi Kanics, 'The Forgotten Victims of War: Ukraine's Stateless' (2023) 72 *Forced Migration Review* 37, 38.

<sup>124</sup> UNHCR, 'Stateless Persons' (n 3).

<sup>125</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 11–12.

<sup>126</sup> Ivashuk, Kordonets and Kanics (n 123) 38; Emma Batha, 'Ukraine's Stateless Trapped in Warzone with No Proof They Exist', *Reuters* (online, 5 April 2022) <<https://www.reuters.com/article/ukraine-crisis-statelessness/ukraines-stateless-trapped-in-war-zone-with-no-proof-they-exist-idUKL5N2VW4KZ>>, archived at <[perma.cc/X4D4-Z4AU](https://perma.cc/X4D4-Z4AU)>.

<sup>127</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 11–12.

status.<sup>128</sup> This concern was shared by the ECtHR, which held in *Hoti v Croatia* that ‘stateless individuals, such as the applicant, are required to fulfil requirements which by the virtue of their status they are unable to fulfil’.<sup>129</sup> To fill that gap, UNHCR recommends that states provide a residency right, as it would fulfil the object and purpose of the treaty.<sup>130</sup> Without a regular status, stateless persons would be prevented from enjoying other rights under the *1954 Convention* and human rights law.<sup>131</sup> This reasoning holds true. In principle, states could comply with their obligations by merely refraining from expelling stateless persons from state territory and providing stateless individuals with a tolerated status, provided that states grant stateless individuals all the rights ensured under the *1954 Convention*. However, state practice shows that these types of tolerated statuses generally give rise to limited rights and do not allow for facilitated naturalisation.<sup>132</sup> As such, some form of residence permit seems to be a *conditio sine qua non* (a necessary condition) for the enjoyment of most rights under the *1954 Convention*. Otherwise, states could simply avoid their obligations by expelling stateless persons from their territory, as art 31 only protects stateless persons from expulsion if they are lawfully present in the territory. Since the Convention does not ensure any way for stateless persons to regularise their presence, protection would be rendered virtually non-existent without access to a residence permit.

In Ukraine, recognised stateless persons have the right to apply for a residence permit. After the SMS provides a positive decision, the applicant must apply within 10 days for a temporary residence permit with a renewable duration of one year.<sup>133</sup> Hence, the regularisation of the stateless person’s stay is not automatic and is time sensitive. The permit may still be refused if a court decision ordering deportation was previously issued.<sup>134</sup> After two years of stay with a temporary residence permit, the stateless person becomes eligible for a permanent residence permit.<sup>135</sup> Stateless persons are considered an out of quota category, so no maximum number of applications for permanent residence permits per year applies.<sup>136</sup> Ukraine does not (yet) provide a simplified naturalisation procedure for stateless persons. In December 2021, the requirement of five years of continuous lawful residence in Ukraine was lowered to three years for recognised stateless

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<sup>128</sup> The *1954 Convention* (n 2) differentiates between rights based on the level of attachment of the stateless person to the state. These levels of attachment are: being subject to the state’s jurisdiction, physical presence, lawful presence, lawful stay and habitual or durable residence. See also Bianchini, *Protecting Stateless Persons* (n 103) 97; van Waas *Nationality Matters* (n 34) 229–30.

<sup>129</sup> *Hoti* (n 104) [137].

<sup>130</sup> UNHCR, *Handbook on Protection of Stateless Persons* (n 106) [147].

<sup>131</sup> *ibid.*

<sup>132</sup> See, for example, Germany and the Czech Republic in above Part V. See also Inês Máximo Pestana, “‘Tolerated Stay’: What Protection Does It Give?” (2012) 40 *Forced Migration Review* 38, 38–9.

<sup>133</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) art 5(19).

<sup>134</sup> Sofiia Kordonets and Anastasiia Koval, ‘Legal Obstacles to Obtaining a Temporary Residence Permit for Stateless People Recognised in Ukraine’, *ENS* (Blog Post, 12 January 2023) <<https://www.statelessness.eu/updates/blog/legal-obstacles-obtaining-temporary-residence-permit-stateless-people-recognised>>, archived at <[perma.cc/CLM5-9GVL](https://perma.cc/CLM5-9GVL)>.

<sup>135</sup> *Law No 2491-III of 2001 ‘Law on Immigration’*, art 4(6) (Ukraine).

<sup>136</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 18.

persons, but this provision has not yet entered into force.<sup>137</sup> Furthermore, the general, stringent conditions for naturalisation continue to apply, including the conditions of language proficiency and the existence of legal livelihood.<sup>138</sup> Nevertheless, international law itself does not impose any strong obligations on states to naturalise stateless persons.<sup>139</sup> The only treaty provisions addressing naturalisation are art 32 of the *1954 Convention* and art 6(4)(g) of the *European Convention on Nationality*<sup>140</sup> — to which Ukraine is not a party — which only require the ‘facilitation’ of naturalisation. The only standard that such facilitation imposes is that the application conditions must be more favourable for stateless persons than for others.<sup>141</sup> While some scholars have argued that a customary duty exists to reduce statelessness, including to prevent childhood statelessness at birth,<sup>142</sup> current state practice seems to indicate that this duty does not extend to reducing statelessness through naturalisation.<sup>143</sup>

As to the enjoyment of rights, a few positive elements can be observed in the context of Ukraine. All recognised stateless persons have the right to work without the requirement of an employment permit.<sup>144</sup> Furthermore, they have the right to free education, extending to both primary and secondary education, in line with the *1954 Convention* and human rights law.<sup>145</sup> Recognised stateless persons also have the right to apply for a travel document.<sup>146</sup> While the law grants this right to

<sup>137</sup> *On the Citizenship of Ukraine (1991)* (n 16) art 9(3), amended by *Law No 2996-IX of 2023 ‘On Amendments to the Law of Ukraine “On Citizenship of Ukraine” regarding the Simplified Acquisition of Ukrainian Citizenship by Certain Categories of Persons’* (Ukraine); ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 26.

<sup>138</sup> *Law No 2743-VIII of 2019 ‘Law on Citizenship of Ukraine’* (n 30) arts 9(5)–(6) (Ukraine).

<sup>139</sup> For a more elaborate analysis of the duty to facilitate naturalisation for stateless persons, see Eva Mrekajová, ‘Facilitated Naturalization of Stateless Persons’ (2014) 19(1–2) *Tilburg Law Review* 203.

<sup>140</sup> *European Convention on Nationality*, opened for signature 7 November 1997, ETS 166 (entered into force 1 March 2000).

<sup>141</sup> Council of Europe (‘CoE’), *Explanatory Report to the European Convention on Nationality* (Report, 6 November 1997) [52]; Council of Europe Committee of Ministers, *Recommendation No R (99) 18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness* (Recommendation, 15 September 1999) [I(d)]; UNHCR, *Good Practices Paper — Action 6* (n 94) 20–1.

<sup>142</sup> Alice Edwards, ‘The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects’ in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (1<sup>st</sup> edn, Cambridge University Press 2014) 27–9; Lisa Pilgram, *International Law and European Nationality Laws* (Report, March 2011) 2; William Thomas Worster, ‘Customary International Law Requiring States to Grant Nationality to Stateless Children Born in Their Territory’ (2022) 4(1) *Statelessness & Citizenship Review* 113.

<sup>143</sup> Only a handful of states facilitate the conditions for the naturalisation of stateless persons, such as Belgium, Bulgaria, Montenegro and Argentina: *Law No 1984900065 of 1984 ‘Belgian Nationality Code’*, art 19(2) (Belgium); *Law No SG 136 of 1998 ‘Law for the Bulgarian Citizenship’*, art 14 (Bulgaria); CoE, Committee of Experts on Nationality, *Report on Conditions for the Acquisition and Loss of Nationality* (Report, 14 January 2003) [43]; *Good Practices Paper — Action 6* (n 94) 21. At the High-Level Segment on Statelessness, only 15 states pledged to reform their nationality laws in order to facilitate naturalisation for stateless persons: UNHCR, *High-Level Segment on Statelessness* (n 94) 30.

<sup>144</sup> *Law No 3302-IX of 2023 ‘Law on Employment of the Population’*, art 42(6)(4) (Ukraine).

<sup>145</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 28(1)(a)–(b) (‘CRC’); *1954 Convention* (n 2) art 22; *Law No 1369-IX of 2021 ‘Law on Education’*, art 4(2) (Ukraine).

<sup>146</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) art 19(1).

stateless persons with a temporary or permanent residence permit, the SMS limits the application procedure to permanent residence permit holders on its website.<sup>147</sup> It is unclear how this is enforced in practice. Moreover, the application for a travel document is rather expensive. Hence, although Ukrainian law may formally meet the requirement of art 28 of the *1954 Convention*, the procedure to obtain a travel document is little accessible.<sup>148</sup>

At times, Ukrainian law makes an arbitrary distinction between stateless persons with a temporary residence permit and those with a permanent residence permit. Having only a temporary residence permit, stateless persons are excluded from the state funded healthcare program and thus do not have access to free healthcare. The state pays only for their emergency healthcare, which they are required to reimburse afterwards.<sup>149</sup> This exclusion runs counter to UNHCR's recommendation that recognised stateless persons must have access to healthcare.<sup>150</sup> Moreover, art 12 of the *International Covenant on Economic, Social and Cultural Rights* guarantees the right of everyone to enjoy the highest attainable standard of health.<sup>151</sup> Any discrimination in access to healthcare on the grounds of civil, political, social or other status is prohibited, and states even have a special obligation to provide the necessary health insurance and healthcare facilities to those who do not have sufficient means.<sup>152</sup> Certain types of social assistance depend on the individual's residence permit, resulting in barriers for stateless persons with a temporary residence permit.<sup>153</sup> Under the *1954 Convention*, access to healthcare and social assistance are only subject to the condition of 'lawful stay', which covers all stateless persons with a residence permit, regardless of whether this permit is temporary or permanent.<sup>154</sup> Hence, Ukraine should extend these rights to all recognised stateless persons.

Furthermore, only stateless persons with a permanent residence permit have a right to family reunification.<sup>155</sup> In its *Handbook*, UNHCR acknowledges that the *1954 Convention* does not address family unity but encourages states to facilitate the reunion of stateless persons with their family members.<sup>156</sup> However, the *1954 Convention* is not the relevant framework to consider. For refugees, the right to family reunification has always been addressed under human rights law. The *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention*

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<sup>147</sup> 'Issuance of ID Documents to Stateless Persons for Traveling Abroad', *State Migration Service of Ukraine* (Web Page) <<https://dmsu.gov.ua/en-home/services/documenting-foreigners/issuance-of-id-documents-to-stateless-persons-for-traveling-abroad.html>>, archived at <[perma.cc/6GB9-3FW9](https://perma.cc/6GB9-3FW9)>.

<sup>148</sup> The current fee for a travel document is UAH5337 (approximately EUR119 as of August 2024): *ibid*.

<sup>149</sup> *Law No 5081-VI of 2013 'On Emergency Medical Care'*, art 3(1) (Ukraine) ('*On Emergency Medical Care*'); *Law No 2168-VIII of 2018 'On State Financial Guarantees of Medical Care for the Population'*, art 4(2) (Ukraine).

<sup>150</sup> UNHCR, *Handbook on Protection of Stateless Persons* (n 106) [150].

<sup>151</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

<sup>152</sup> CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)*, UN Doc E/C.12/2000/4 (11 August 2000) [18]–[19].

<sup>153</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 19.

<sup>154</sup> *1954 Convention* (n 2) arts 23–4; UNHCR, *Handbook on Protection of Stateless Persons* (n 106) [136]–[137].

<sup>155</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) art 4(14), (15).

<sup>156</sup> UNHCR, *Handbook on Protection of Stateless Persons* (n 106) [151].

on the Rights of the Child ('CRC') and the ECHR, to which Ukraine is a party, ensure the right to family life.<sup>157</sup> In particular situations the right has been found to protect family reunification. While the entry and residence of aliens remains a prerogative of the state, the Human Rights Committee has recognised that in certain circumstances aliens may enjoy the protection of the ICCPR in relation to entry or residence when considerations of family life arise.<sup>158</sup> In *El Dernawi v Libya* and *Gonzalez v Guyana*, the Human Rights Committee found that refusing family reunification violated the right to family life if the family could not be reunited elsewhere.<sup>159</sup> For children, the level of protection is higher; they can only be separated from their parents if it is in the best interest of the child.<sup>160</sup> The ECtHR follows a similar standard, as it has found that the refusal of family reunification violated the right to family life if that family life could not be enjoyed elsewhere and the best interests of minor children were involved.<sup>161</sup> No case law exists regarding the right of stateless persons to reunite with their family members, but they should be granted the same level of protection if they cannot return to another country. While Ukrainian law extends the right to family reunification to all foreigners with a permanent residence permit,<sup>162</sup> it should provide additional protection for refugees and stateless persons who cannot enjoy their family life elsewhere.

Individuals who have applied to the SDP, but who are awaiting their decision, are lawfully present in Ukraine, but have more limited rights than recognised stateless persons. In terms of healthcare, all individuals present in Ukraine have the right to free, accessible, timely and high quality emergency healthcare regardless of their legal status, but stateless persons who have not yet been formally recognised must bear the expenses of such care themselves.<sup>163</sup> As to education, applicants to the SDP have the same rights as recognised stateless persons, as all lawful residents of Ukraine have the right to complete general secondary education free of charge.<sup>164</sup> With respect to employment, their rights are again more limited, as they can only work under the condition that the employer receives a permit to lawfully employ the stateless person.<sup>165</sup>

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<sup>157</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 005 (entered into force 3 September 1953) art 8 ('ECHR'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17(1), 23(1) ('ICCPR'); CRC (n 145) arts 9, 10, 16.

<sup>158</sup> UN Human Rights Committee ('HRC'), *General Comment No 15: The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.1 (1986) [5].

<sup>159</sup> HRC, *Views: Communication No 1143/2002*, UN Doc CCPR/C/90/D/1143/2002 (31 August 2007) [6.3] ('*Farag El Dernawi v Libya*'); HRC, *Views: Communication No 1246/2004*, Patricia, UN Doc CCPR/C/98/D/1246/2004 (21 May 2010) [14.3] ('*Angela Gonzales v Republic of Guyana*').

<sup>160</sup> Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, UN Doc CRC/GC/2005/6 (2005) [81].

<sup>161</sup> *Tuquabo-Tekle and others v The Netherlands* (ECtHR, Third Section, Application No 60665/00, 1 March 2006) [47], [52]; *Jeunesse v The Netherlands* (ECtHR, Grand Chamber, Application No 12738/10, 3 October 2014) [117]–[118], [122].

<sup>162</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) arts 4(14)–(15).

<sup>163</sup> *On Emergency Medical Care* (n 149) art 3(1).

<sup>164</sup> *Law on Education* (Ukraine) (n 145) art 4(3).

<sup>165</sup> *Law on Employment of the Population* (Ukraine) (n 144) arts 42(1), 42(1)(4).

The vast majority of stateless persons remain unrecognised and find themselves in a highly precarious situation as their human rights are violated in various ways. Like applicants to the SDP, they do not have access to free healthcare. They are not allowed to work, not even with a permit.<sup>166</sup> As to education, the *Law On Education* stipulates that the fundamental right to education is guaranteed regardless of nationality, but yet unrecognised stateless persons are excluded from free education.<sup>167</sup> This exclusion constitutes a clear violation of art 28(1)(a) of the *CRC*, according to which states are under the obligation to make primary education compulsory and available free to all.

### C *The Risk of Arbitrary Detention*

Stateless persons face a significant risk of detention, which is a common practice in Ukraine.<sup>168</sup> Various UN bodies, including the UN General Assembly and UNHCR, have called upon states to only use detention of irregular migrants as a measure of last resort and to explore alternative measures.<sup>169</sup> Yet, in Ukraine, detention is generally used as a routine measure for irregular migrants, including stateless persons without a residence permit.<sup>170</sup> The lack of stateless persons' protection from detention is especially problematic as stateless persons may be detained before they can apply to the SDP, and, once detained, they are no longer allowed to lodge an application to the SDP.<sup>171</sup> Detention may be at odds with the right to freedom of movement, to which stateless persons are entitled under art 26 of the *1954 Convention*. However, said article conditions this freedom upon lawful stay within the territory. Although the interpretation of the notion of 'lawful stay' is contested, stateless migrants who entered a state's territory unlawfully definitely do not fall under its protective scope.<sup>172</sup> Yet, for in situ stateless persons the

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<sup>166</sup> *ibid* arts 42, 42(1).

<sup>167</sup> *Law on Education* (Ukraine) (n 145) arts 3(2), 4(2).

<sup>168</sup> *On the Legal Status of Foreigners and Stateless Persons* (n 91) arts 1(27), 30; ENS, *Protecting Stateless Persons from Arbitrary Detention in Ukraine* (n 6).

<sup>169</sup> UNHCR Executive Committee, 'Conclusions on Detention of Refugees and Asylum-Seekers', No 44 (XXXVII) (13 October 1986) Conclusion (b) in *Addendum to the Report of the UNHCR: Report of the ExCom of the Programme of the UNHCR on the Work of Its 37<sup>th</sup> Session*, Supp No 12A, UN Doc A/41/12/Add.1 (13 January 1987); *Protection of Migrants*, GA Res 63/184 (18 December 2008) in *Resolution Adopted by the General Assembly on 18 December 2008*, UN Doc A/RES/63/184 (17 March 2009) [9]; François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, UN Doc A/HRC/20/24 (2 April 2012) [68]; UNHCR, *Handbook on Protection of Stateless Persons* (n 106) [113].

<sup>170</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 20, 22; ENS, *Protecting Stateless Persons from Arbitrary Detention* (n 6) 17–18.

<sup>171</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 18, 21.

<sup>172</sup> Bianchini, *Protecting Stateless Persons* (n 103) 98. In its *Handbook*, UNHCR interprets the requirement as a greater duration of presence in a territory, which covers individuals with residence permits, those with a temporary permission to stay for longer than a few months and those recognised as stateless but who do not have a residence permit: *Handbook on Protection of Stateless persons* (n 106) [137]. In the context of the *Refugee Convention*, the notion of 'lawful stay' has also been interpreted divergently. UNHCR stated that 'lawful stay' covers both permanent and temporary residence, but not situations where refugees are in transit or temporarily visiting a country for a special reason and a specific period of time: UNHCR, '*Lawfully Staying*' — *A Note on Interpretation* (Working Document, 2 May 1988) [7]. According to Hathaway, the term 'lawful stay' covers all situations of officially sanctioned, ongoing presence, regardless of refugee status, permanent residence or domicile: James C Hathaway, *The Rights of Refugees under International Law* (2<sup>nd</sup> edn, Cambridge University 2021) 216.

reasoning should be different. Some scholars hold the view that stateless persons should be considered lawfully staying if they are habitually resident on the territory.<sup>173</sup> Following the *1954 Convention*'s logic, habitual residence provides a greater level of attachment and includes stateless persons without a residence permit who are settled in a country long-term.<sup>174</sup>

In any case, detention of disproportionate length and indefinite detention are considered arbitrary under human rights law.<sup>175</sup> Stateless persons are particularly vulnerable to arbitrary detention because when they are detained with the eventual aim of removal and no other state is obliged to admit them, they may end up in detention for a prolonged period of time or even indefinitely.<sup>176</sup> According to the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, a higher due diligence standard applies when detaining individuals in vulnerable situations, including stateless persons. Interestingly, the Committee linked the duty to protect stateless persons from arbitrary detention to the need for the implementation of SDPs.<sup>177</sup> Although Ukraine is not party to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*,<sup>178</sup> it is still bound by the right to liberty under the *ICCPR*, the *CRC* and the *ECHR*.<sup>179</sup> In that regard, the Human Rights Committee has stated that indefinite detention cannot be justified where the detainee is stateless and cannot be expelled.<sup>180</sup>

A considerable body of case law has also been developed by the ECtHR regarding this matter. In *Auad v Bulgaria*, detention with the purpose of deportation but without any clarity regarding the destination country was considered arbitrary.<sup>181</sup> In *Kim v Russia*, the Court held that detention is only lawful if the length does not exceed what is reasonably required for the purpose pursued.<sup>182</sup> The Court took into account that the individual concerned was stateless and thus particularly vulnerable, as he did not have access to consular assistance.<sup>183</sup> As such, statelessness is a factor that impacts the allowed duration

<sup>173</sup> Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants', *Legal and Protection Policy Research Series* (Research Paper, April 2011) 17.

<sup>174</sup> UNHCR, *Handbook on Protection of Stateless Persons* (n 106) [139].

<sup>175</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Guidelines, 2012) Guideline 6.

<sup>176</sup> Katherine Perks and Jariath Clifford, 'The Legal Limbo of Detention' (2009) 32 *Forced Migration Review* 42, 42.

<sup>177</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and their Connection with other Human Rights*, UN Doc CMW/C/GC/5 (21 July 2022) [46].

<sup>178</sup> Ukraine was recommended to ratify the Convention during the Universal Periodic Review process in 2008 but has not yet done so. HRC, *Report of the Working Group on the Universal Periodic Review: Ukraine*, UN Doc A/HRC/8/45 (3 June 2008) [58](1).

<sup>179</sup> *ECHR* (n 157) art 5; *ICCPR* (n 157) art 9; *CRC* (n 145) art 37.

<sup>180</sup> HRC, *Views Adopted by the Committee at its 108<sup>th</sup> Session (8–26 July 2013)*, Communication No 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) [9.3] ('*FKAG et al v Australia*'); HRC, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [18].

<sup>181</sup> *Auad v Bulgaria* (ECtHR, Fourth Section, Application No 46390/10, 11 January 2012) 133, 135.

<sup>182</sup> *Kim v Russia* (ECtHR, Second Section, Application No 44260/14, 17 July 2014) [49].

<sup>183</sup> *ibid* [54].

and arbitrariness of detention.<sup>184</sup> Similarly, in *Mainov v Russia*, the two years spent in detention by a stateless person with the view of removal to Tajikistan was found to be arbitrary.<sup>185</sup> The Court held that the procedure followed by the Russian authorities was ‘in blatant disregard for the fact that the applicant was not a national of that State and that Tajikistan had no legal obligation to admit him’.<sup>186</sup> The purpose of the detention could not have been the applicant’s removal, as it was not a realistic prospect.<sup>187</sup>

In Ukraine, no specific safeguards for stateless persons in detention are in place. No country of removal must be identified before detention, which is clearly not in line with the aforementioned case law of the ECtHR.<sup>188</sup> Moreover, the authorities are only required to release a detainee after the maximum detention period of 18 months in the case of impossibility of removal.<sup>189</sup> In those cases detainees are generally only released when the maximum period has passed.<sup>190</sup> While a maximum duration of detention is an important safeguard,<sup>191</sup> a worrying trend can be observed in Ukraine as law reforms have regularly extended the maximum duration. Before June 2016, the maximum duration was 12 months, whereas before May 2011 individuals could not be detained longer than six months.<sup>192</sup> In *Shoygo v Ukraine*, the ECtHR already condemned Ukraine for the prolonged detention of a person without identity documents.<sup>193</sup>

After the outbreak of the armed conflict, NGOs and news outlets, including Human Rights Watch, expressed their concerns about the continued detention of

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<sup>184</sup> Adrian Berry, ‘*Kim v Russia* — The Unlawful Detention of Stateless Persons in Immigration Proceedings’, *ENS* (Blog Post, 30 October 2014) <<https://www.statelessness.eu/updates/blog/kim-v-russia-unlawful-detention-stateless-persons-immigration-proceedings>>, archived at <[perma.cc/P842-8JJQ](https://perma.cc/P842-8JJQ)>.

<sup>185</sup> *Mainov v Russia* (ECtHR, Third Section, Application No 11556/17, 15 May 2018) [24], [26]–[27].

<sup>186</sup> *ibid* [24].

<sup>187</sup> *ibid*.

<sup>188</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 21.

<sup>189</sup> *Code of Administrative Procedure of Ukraine* (2005), as amended by *Law No 1379-VIII of 2016 ‘On the Introduction of Amendments to Some Legislative Acts of Ukraine regarding the Improvement of the Provisions of Judicial Protection of Foreigners and Stateless Persons and the Settlement of Certain Issues related to the Fight against Illegal Migration’*, art 183(7); ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 21.

<sup>190</sup> ENS, *Statelessness Index Survey 2022: Ukraine* (n 45) 21.

<sup>191</sup> HRC, *Report of the Working Group on Arbitrary Detention*, UN Doc A/HRC/13/30 (18 January 2010) 18 [61].

<sup>192</sup> Desyate Kvitnya et al, *Joint Submission to the Human Rights Council at the 28th Session of the Universal Periodic Review (Third Cycle, 6–17 November 2017): Ukraine* (30 March 2017) [31].

<sup>193</sup> *Shoygo v Ukraine (Judgment)* (ECtHR, Fifth Chamber, Application No 29662/13, 30 September 2021) [23]–[25].



irregular migrants, who were not allowed to leave the country.<sup>194</sup> This continued detention is a violation of art 35 of the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* ('*Fourth Geneva Convention*'), which states that all protected persons may leave the territory of a state party to an international armed conflict.<sup>195</sup> This right extends to stateless persons as they meet the general definition of 'protected persons', ie, persons who find themselves in the hands of a state of which they are not nationals and which is also party to the conflict.<sup>196</sup> Subsequently, a petition for interim measures was made to the ECtHR on the basis of the right to liberty and the right to life, as a result of which the Court ordered Ukraine to move the detained individuals to a safer place in Ukraine and to take measures to protect their lives.<sup>197</sup> In response to the decision, the Ukrainian Government decided to move the detainees to a detention centre in a safer region within Ukraine.<sup>198</sup>

#### IV PROTECTION GAPS FOR STATELESS IDPS FROM UKRAINE

All recognised stateless persons fleeing from the hostilities in Ukraine can freely move within the country to safer regions by means of their residence permit, which certifies their identity.<sup>199</sup> Unrecognised stateless persons and undocumented Ukrainians, on the other hand, may face obstacles in passing checkpoints within Ukraine. Since they often do not have any personal documentation, they may be denied entry at checkpoints, and if they are able to pass, they may not be able to return. A stateless woman in Ukraine testified to the Thomson Reuters Foundation:

<sup>194</sup> Katy Fallon, 'Fear Grows for Migrants Held in Ukraine's Detention Centre', *Al Jazeera* (online, 4 April 2022) <<https://www.aljazeera.com/news/2022/4/4/fear-grows-for-migrants-held-in-ukraines-detention-centre>>, archived at <[perma.cc/5VVM-YBKS](https://perma.cc/5VVM-YBKS)>; 'Migrants, Asylum Seekers Locked Up in Ukraine: Free Detainees; Allow Them to Seek Refuge', *Human Rights Watch* (online, 4 April 2022) <<https://www.hrw.org/news/2022/04/04/migrants-asylum-seekers-locked-ukraine>>, archived at <[perma.cc/T6TZ-TXP6](https://perma.cc/T6TZ-TXP6)>; Global Detention Project, *Immigration Detention amidst War: The Case of Ukraine's Volyn Detention Centre* (Report, 29 April 2022) <<https://www.globaldetentionproject.org/immigration-detention-amidst-war-the-case-of-ukraines-volyn-detention-centre>>, archived at <[perma.cc/QU43-HTSJ](https://perma.cc/QU43-HTSJ)>; 'Ukraine: Migrants Locked Up Near Front Lines: Free Migration Detainees; Allow Them to Leave Country for Safety', *Human Rights Watch* (online, 6 May 2022) <<https://www.hrw.org/news/2022/05/06/ukraine-migrants-locked-near-front-lines>>, archived at <[perma.cc/4SRB-5FFH](https://perma.cc/4SRB-5FFH)>.

<sup>195</sup> *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 35 ('*Fourth Geneva Convention*').

<sup>196</sup> *ibid* art 4; International Committee of the Red Cross ('ICRC'), *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (Commentary, 1987).

<sup>197</sup> 'How the Rule 39 Initiative Saved the Lives of Migrants Held on the Edges of Conflict in Ukraine', *Open Migration* (online, 25 August 2022) <<https://openmigration.org/en/analyses/how-the-rule-39-initiative-saved-the-lives-of-migrants-held-on-the-edges-of-conflict-in-ukraine>>, archived at <[perma.cc/CL9L-LKP2](https://perma.cc/CL9L-LKP2)>.

<sup>198</sup> *ibid*.

<sup>199</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) arts 1(17)–(18).

I'm afraid that if I decided to leave, I wouldn't be able to cross checkpoints or borders because I don't have documents. I'm also very scared they'd separate me from my children because I have no proof that I'm their mother.<sup>200</sup>

While freedom of movement within a state's territory may be restricted to lawful residents under human rights law and the *1954 Convention*, all protected persons must be able to leave the occupied territory following the *Fourth Geneva Convention*.<sup>201</sup>

After the annexation of Crimea in 2014, a procedure was established that allowed IDPs to register and receive a certificate in the government-controlled area.<sup>202</sup> On 3 August 2022, the procedure was extended to persons coming from all territories occupied by the Russian Federation.<sup>203</sup> The certificate confirms the IDPs' new (temporary) place of residence and gives access to a set of rights, such as employment, education, social services, family reunification, administrative assistance, information about the location of missing relatives, safe and appropriate living conditions, information about threats in their abandoned place of residence, the possibility of free residence for six months, medical assistance, civil registration and humanitarian aid.<sup>204</sup> Ukrainian law has thus implemented many of the non-binding *Guiding Principles on Internal Displacement*, which aim to address the specific needs of IDPs by identifying rights and safeguards relevant to their protection.<sup>205</sup> However, the procedure is only accessible to IDPs with a permanent residence permit and applicants must enclose an identity document proving their Ukrainian nationality or special status.<sup>206</sup> As such, recognised stateless persons with a temporary residence permit, applicants to the SDP, unrecognised stateless persons and undocumented persons are excluded from this protection regime.

## V PROTECTION GAPS FOR STATELESS REFUGEES FROM UKRAINE

If they have applied for and obtained a travel document, recognised stateless persons can also travel outside Ukraine as well as return to it in the future.<sup>207</sup> For unrecognised stateless persons and undocumented persons, international travel is

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<sup>200</sup> Batha, 'Ukraine's Stateless Trapped in Warzone with No Proof They Exist' (n 126).

<sup>201</sup> *Fourth Geneva Convention* (n 195) art 35; *1954 Convention* (n 2) art 26; *ICCPR* (n 157) art 12(1); *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already included in the Convention and in the First Protocol thereto*, opened for signature 16 September 1963, ETS 046 (entered into force 2 May 1968) art 2(1).

<sup>202</sup> *Law No 1706-VII of 2015 'On Ensuring the Rights and Freedoms of Internally Displaced Persons'* (Ukraine) arts 1(1), 4(1) ('*On Ensuring the Rights and Freedoms of Internally Displaced Persons* (Ukraine)').

<sup>203</sup> *Law No 2417-IX of 2022 'On Amendments to the Law of Ukraine "On Ensuring the Rights and Freedoms of Internally Displaced Persons"'* (Ukraine).

<sup>204</sup> *On Ensuring the Rights and Freedoms of Internally Displaced Persons* (Ukraine) (n 202) arts 5(1), 7, 9(1).

<sup>205</sup> UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr Francis M Deng, Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) [9].

<sup>206</sup> *On Ensuring the Rights and Freedoms of Internally Displaced Persons* (Ukraine) (n 202) art 4(7).

<sup>207</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) art 15.

again uncertain.<sup>208</sup> Those who have applied to the SDP but have not yet received a decision receive a certificate confirming that they have submitted an application to the SDP,<sup>209</sup> but it is unclear whether the certificate allows them to re-enter Ukraine.<sup>210</sup> For entry into and exit from Ukraine, Ukrainian law explicitly requires that stateless persons possess a document that allows them to travel abroad.<sup>211</sup> Hence, the certificate that is granted to applicants to the SDP seems to be insufficient. As such, the majority of stateless persons are not allowed to cross international borders, and if they manage to do so, they may not be able to re-enter Ukraine in the future. While the right to leave under human rights law may be subject to limitations, the right to leave under international humanitarian law prevails in a situation of armed conflict because of the *lex specialis* principle.<sup>212</sup> Under art 35 of the *Fourth Geneva Convention*, the right of aliens to leave a territory is absolute, unless their departure would run against the state's national interests. This limited exception envisions, for example, situations where men of an age to carry arms are required to stay for reasons of national defence;<sup>213</sup> it does not envision the situation of stateless persons seeking safety. Moreover, under customary international humanitarian law, displaced persons have the right to voluntarily return in safety to their place of habitual residence.<sup>214</sup> These rights should be upheld for stateless persons.

Stateless persons attempting to flee are also confronted with discrimination on a large scale. Discrimination and differential treatment have been reported both at border crossings and in neighbouring host countries. After the invasion, Hungary, Slovakia, Poland, Romania and Moldova declared that they were willing to admit anyone fleeing the armed conflict in Ukraine<sup>215</sup> — including stateless persons and undocumented persons — and by June 2022, most European states allowed entry to persons fleeing from Ukraine, regardless of their documentation or legal

<sup>208</sup> For country-specific information about the situation at the borders and entry requirements, see ENS, *Poland: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (Briefing Note, 6 April 2022); ENS, *Hungary: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (Briefing Note, 18 May 2022); ENS, *Slovakia: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (Briefing Note, 11 May 2022).

<sup>209</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) art 6(2).

<sup>210</sup> 'Who Are Stateless Persons Who Fled Ukraine after the Russian Invasion on 24 of February, 2022', *Right to Protection* (Article, 26 April 2022) <<https://r2p.org.ua/en/page/stateless-persons-fled-ukraine-after-2022>>, archived at <[perma.cc/35QL-5JLX](https://perma.cc/35QL-5JLX)>.

<sup>211</sup> *On the Legal Status of Foreigners and Stateless Persons* (Ukraine) (n 91) art 15(1).

<sup>212</sup> Following the adage *lex specialis derogate legi generali*; a special rule prevails over a general rule in case of a conflict between norms. International humanitarian law is considered as the *lex specialis* to human rights law: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 131 [106]; Malcolm N Shaw, *International Law* (6<sup>th</sup> edn, Cambridge University Press 2008) 124, 1180–1. For more about the interrelationship between human rights law and international humanitarian law see Roberta Arnold and Noëlle Quéniwet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill Nijhoff 2008).

<sup>213</sup> ICRC, *Commentary to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Commentary, 1958) 235–6.

<sup>214</sup> ICRC, 'Rule 132: Return of Displaced Persons', *International Humanitarian Law Databases* (Web Page) <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule132>>, archived at <[perma.cc/9JJG-R83W](https://perma.cc/9JJG-R83W)>.

<sup>215</sup> ENS, *Stateless People and People at Risk of Statelessness Forcibly Displaced from Ukraine* (Briefing Note No 1, 10 March 2022) 3 ('Briefing Note No 1').

status.<sup>216</sup> Nevertheless, discriminatory practices based on documentation have been reported at several border crossings, such as racial profiling and additional secondary screening procedures for non-Ukrainians.<sup>217</sup> In Poland and Bulgaria, undocumented persons risk not only refusal of entry, but also detention.<sup>218</sup> Due to strengthened border control measures, from January 2023, undocumented and stateless persons have faced difficulties in entering Hungary.<sup>219</sup> However, Member States of the EU have an obligation to admit all forcibly displaced persons fleeing from armed conflict, per the right to seek asylum and the *non-refoulement* principle.<sup>220</sup> This principle stipulates that refugees should not be returned to any country where they are likely to face persecution, torture or any other form of ill-treatment.<sup>221</sup> Furthermore, Roma seem to be disproportionately affected by discriminatory practices. For example, in Moldova, Romania and Hungary, widespread discrimination and segregation of Roma was reported in May 2022.<sup>222</sup>

If stateless or undocumented persons manage to flee to a neighbouring country, the protection that they can apply for again varies according to their status. On 4 March 2022, the Council of the EU adopted *Implementing Decision 2022/382*, thereby activating the *Temporary Protection Directive* ('*TPD*') to apply to the displaced persons fleeing Ukraine until 4 March 2023.<sup>223</sup> Since then, the Council has extended the application of the *TPD* twice, which is now in force until 4 March 2025.<sup>224</sup> The objective of the 4 March 2022 decision was to introduce temporary protection for persons residing in Ukraine who had been displaced on or after 24 February 2022 as a result of the military invasion by Russian armed forces.<sup>225</sup>

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<sup>216</sup> ENS, *Protection Gaps for Stateless Refugees from Ukraine* (Briefing Note No 3, 23 June 2022) 1.

<sup>217</sup> ENS, 'Briefing Note No 1' (n 216) 3.

<sup>218</sup> ENS, *Update on Access to Protection in Europe for Stateless People Fleeing Ukraine* (Briefing Note No 4, February 2024) 2 ('Briefing Note No 4').

<sup>219</sup> *ibid.*

<sup>220</sup> *Refugee Convention* (n 89) art 33; *Charter of Fundamental Rights of the European Union*, opened for signature 2 October 2000, 2000/C 364/01 (entered into force 7 December 2000) arts 18–19; *Consolidated Version of the Treaty on the Functioning of the European Union*, opened for signature 13 December 2007, OJ C 115/01 (entered into force 1 December 2009) art 78(1); Roberto Mungianu, *Frontex and Non-refoulement: The International Responsibility of the EU* (Cambridge University Press 2016) 89–91.

<sup>221</sup> *Refugee Convention* (n 89) art 33; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) 201.

<sup>222</sup> European Union Agency for Fundamental Rights, *The War in Ukraine — Fundamental Rights Implications within the EU* (Bulletin No 1, 19 May 2022) 18–19; 'Moldova: Romani Refugees from Ukraine Face Segregation: Ensure Equal Treatment for All', *Human Rights Watch* (online, 25 May 2022) <<https://www.hrw.org/news/2022/05/25/moldova-romani-refugees-ukraine-face-segregation>>, archived at <[perma.cc/7QM9-L6QJ](https://perma.cc/7QM9-L6QJ)>.

<sup>223</sup> *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in The Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof* [2001] OJ L 212/12, art 4(1) ('*Temporary Protection Directive*'); *Council Implementing Decision (EU) 2022/382 of 4 March 2022 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection* [2022] OJ L 71/1, [10]–[11] ('*Council Implementing Decision 2022/382*').

<sup>224</sup> Council of the EU, 'Ukrainian Refugees: EU Member States Agree to Extend Temporary Protection', *Consilium* (Press Release, 28 September 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/09/28/ukrainian-refugees-eu-member-states-agree-to-extend-temporary-protection>>, archived at <[perma.cc/6XLT-TF8H](https://perma.cc/6XLT-TF8H)>.

<sup>225</sup> *Council Implementing Decision 2022/382* (n 223) [11].

Member States have the obligation to provide these persons with temporary protection or adequate protection under their national law, complementary to any national protection schemes.<sup>226</sup> Temporary protection is defined as:

a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.<sup>227</sup>

Beneficiaries of temporary protection have the right to a residence permit, employment, housing, medical care, education and family reunification.<sup>228</sup> After having been granted temporary protection, beneficiaries may apply for asylum.<sup>229</sup> However, depending on the Member State, an asylum application may lead the applicant to be treated as an asylum seeker, meaning they will no longer benefit from temporary protection.<sup>230</sup> The temporary protection scheme does not only apply to Ukrainian nationals, but also to recognised stateless persons who have benefited from international protection, or who had a permanent residence permit before 24 February 2022 and are unable to return to safe and durable conditions to their country or region of origin.<sup>231</sup> As for the latter category, Member States can choose whether they apply the directive or whether the stateless individual has adequate protection under national law.<sup>232</sup> For stateless persons with a temporary residence permit, Member States do not have an obligation to grant temporary protection but have the option to do so.<sup>233</sup> In general, states have the option to extend temporary protection to other categories of displaced persons if the latter are displaced for the same reasons and from the same country or region of origin.<sup>234</sup> The implementation of the *TPD* with respect to stateless persons is highly uneven across the EU. For instance, while Bulgaria and Spain apply the *TPD* to stateless persons with either a permanent or temporary residence permit, most Member States, including Italy, Slovakia and the Czech Republic, limit the protection to stateless persons with a permanent residence permit.<sup>235</sup> Belgium, Croatia, the Czech Republic, France, Hungary and Spain also apply the *TPD* to stateless persons who are recognised by Ukraine's SDP.<sup>236</sup> Many non-EU countries have implemented a national protection scheme similar to the *TPD* and

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<sup>226</sup> *ibid* [17].

<sup>227</sup> *Temporary Protection Directive* (n 223) art 2(a).

<sup>228</sup> *ibid* arts 8, 12–15.

<sup>229</sup> *ibid* art 17(1).

<sup>230</sup> *ibid* art 19(1).

<sup>231</sup> *Council Implementing Decision 2022/382* (n 223) arts 2(1)(b), 2(2).

<sup>232</sup> *ibid* art 2(2).

<sup>233</sup> *ibid* art 2(3).

<sup>234</sup> *Temporary Protection Directive* (n 223) art 7(1).

<sup>235</sup> ENS, *Bulgaria: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (Briefing Note, 15 February 2024) 2; ENS, *Czechia: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (Briefing Note, 15 February 2024) 3; *Slovakia: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (n 208) 2; ENS, *Spain: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (Briefing Note, 21 February 2024) 2; ENS, *Italy: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (Briefing Note, 22 February 2024) 2.

<sup>236</sup> ENS, 'Briefing Note No 4' (n 218) 2.

uphold the same limitations for stateless persons.<sup>237</sup> Hence, applicants to the SDP, unrecognised stateless persons and undocumented persons can generally not rely on the *TPD* or similar forms of temporary protection.

Applying for international protection on the basis of refugee status remains a possible avenue, regardless of a stateless person's eligibility for temporary protection. To qualify for refugee status, stateless persons must meet the refugee definition of art 1(A)(1) of the *Refugee Convention*, ie, they must be unwilling or unable to return to their country of habitual residence due to a well-founded fear of being persecuted for reasons relating to race, religion, nationality, membership of a particular social group or political opinion.<sup>238</sup> Whether persons fleeing from Ukraine meet the refugee definition depends on individual assessment.<sup>239</sup> While the mere exposure to an armed conflict is not sufficient to be considered persecution, severe human rights violations and violations of international humanitarian law may present a persecutory risk.<sup>240</sup> Various reports indicate that such human rights violations and war crimes are being committed in the occupied territories, including attacks against civilians on the move, unlawful transfers and deportations, torture and sexual and gender-based violence.<sup>241</sup> Yet, the requirement of a protected persecutory ground may present additional challenges for stateless persons from Ukraine. Ukrainians may be eligible for refugee protection due to persecution on the ground of nationality, as President Putin has argued that Ukraine is not a genuine state with its own nationals and has initiated a passportisation campaign.<sup>242</sup> Stateless persons from Ukraine cannot argue persecution on the ground of being Ukrainian nationals, as they are not. Yet, the ground of political opinion may present another possible avenue.<sup>243</sup> Furthermore, it also seems unlikely that forcibly displaced persons can easily return to Ukraine. In that regard, UNHCR stated that: 'In view of the volatility of the situation in the entire territory of Ukraine, UNHCR does not consider it appropriate to deny international protection to Ukrainians and former habitual residents of Ukraine on

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<sup>237</sup> *ibid.* See, eg, the temporary protection provided by Moldova: ENS, *Moldova: Information for Stateless People and Those at Risk of Statelessness Fleeing Ukraine* (Briefing Note, ENS 18 January 2023) 2.

<sup>238</sup> *Refugee Convention* (n 89).

<sup>239</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV.4 (April 2019) [44] ('*Handbook on Procedures and Criteria for Determining Refugee Status*').

<sup>240</sup> UNHCR, *Guidelines on International Protection No 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions*, UN Doc HCR/GIP/16/12 (2 December 2016) [11]; Hugo Story, 'Are Those Fleeing Ukraine Refugees?' in Sergio Carrera and Meltem Ineli Ciger (eds), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (European University Institute 2023) 107–10.

<sup>241</sup> HRC, *Report of the Independent International Commission of Inquiry on Ukraine*, UN Doc A/HRC/52/62 (15 March 2023) [57]–[59], [68]–[85]; Office of the High Commissioner for Human Rights ('OHCHR'), *Report on the Human Rights Situation in Ukraine* (Report, 24 March 2023) [57]–[61], [63]–[70].

<sup>242</sup> OHCHR, *Report on the Human Rights Situation in Ukraine* (n 241) [113]–[115].

<sup>243</sup> See Story (n 240) 113–5.

the basis of an internal flight or relocation alternative.<sup>244</sup> However, a real-life assessment of whether persons who have fled Ukraine qualify for refugee protection would depend on accurate, up-to-date information about the current situation in Ukraine.<sup>245</sup> Given the context of mass displacement, individual refugee determination may not be feasible due to urgency and for practical reasons.<sup>246</sup> Authorities may instead take a *prima facie* approach, which allows for group refugee determination on the basis of readily apparent and objective circumstances.<sup>247</sup> Such an assessment would again depend on reliable information about the situation in Ukraine at the time of application.<sup>248</sup>

While refugee protection is thus a viable option for stateless persons from Ukraine, asylum procedures remain difficult to access. If stateless persons do not have any identity documentation, they risk being denied entry at state borders.<sup>249</sup> Although those who are not eligible for protection under the *TPD* have the right to apply for asylum at the border,<sup>250</sup> unlawful pushbacks have been reported in Poland, Hungary and Bulgaria.<sup>251</sup> With that risk also comes the risk of arbitrary detention. For instance, in Poland, 49 people with undetermined nationality have been placed in detention since October 2023.<sup>252</sup> Such detention practices are unlawful following the case law of both the ECtHR and the Court of Justice of the EU ('CJEU'). Following the ECtHR's reasoning in *Mainov v Russia*, detention is only lawful if expulsion is a realistic prospect.<sup>253</sup> Similarly, for EU Member States, the CJEU held in *Kadzoev v Bulgaria* that detention is unlawful if there is no reasonable prospect of successful expulsion.<sup>254</sup> In the case of stateless persons from Ukraine, there is no prospect of expulsion whatsoever, as Ukraine has no

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<sup>244</sup> UNHCR, *UNHCR Position on Returns to Ukraine* (March 2022) [8]; UNHCR, *UNHCR Position on Voluntary Return to Ukraine* (June 2023) [4]; UNHCR, *Voluntary Return to Ukraine of Refugee Children without Parental Care, including Unaccompanied Children and Children Evacuated from Care Institutions in Ukraine* (Position Paper, July 2023) 1.

<sup>245</sup> Story (n 240) 103.

<sup>246</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (n 240) [44].

<sup>247</sup> *ibid.* UNHCR, *Guidelines on International Protection No 11: Prima Facie Recognition of Refugee Status*, UN Doc HCR/GIP/15/11 (24 June 2015) [1]–[2] ('*Guidelines on International Protection No 11*').

<sup>248</sup> UNHCR, *Guidelines on International Protection No 11* (n 247) [17].

<sup>249</sup> Hebrew Immigrant Aid Society, *Protection Risks Facing Non-Ukrainian Asylum Seekers and Refugees Fleeing Ukraine to the EU* (Report, 26 January 2023) 5–6; Halina Niec Legal Aid Centre, *Stateless Persons from Ukraine Seeking Protection in Poland* (Report, 16 October 2023) 13–14.

<sup>250</sup> The European Commission has also explicitly recommended that the Member States admit persons not eligible for temporary protection, even when the latter do not meet the entry conditions under the Schengen Borders Code: *Communication from the Commission on Operational Guidelines for the Implementation of Council Implementing Decision 2022/382 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection* [2022] C 126I/1 (21 March 2022).

<sup>251</sup> ENS, 'Briefing Note No 4' (n 216) 2.

<sup>252</sup> Halina Niec Legal Aid Centre, *Stateless Persons from Ukraine Seeking Protection in Poland* (n 249) 13.

<sup>253</sup> *Mainov v Russia (Judgment)* (ECtHR, Third Chamber, Application No 11556/17, 15 May 2018) [24], [26]–[27].

<sup>254</sup> *Kadzoev v Bulgaria (Judgment)* (Court of Justice of the EU, Grand Chamber, Application No C-357/09 PPU) [65]–[66].

obligation to admit stateless persons and the expulsion of forcibly displaced individuals would be a clear violation of the *non-refoulement* principle.<sup>255</sup>

A final possibility for unrecognised stateless persons is to apply for recognition as stateless in the host country in which they have sought refuge. Yet, many European states have not properly implemented the international standards regarding the protection of stateless persons. For instance, the majority of Ukrainian refugees have fled to Poland, Germany and the Czech Republic,<sup>256</sup> where no proper SDPs are in place and no adequate protection statuses are offered.<sup>257</sup> Poland is not a party to the *1954 Convention*, nor to the *1961 Convention*, and no definition of a stateless person exists in Polish law.<sup>258</sup> Statelessness could be a legally relevant fact in other procedures, such as asylum procedures or return proceedings, but such a determination does not give rise to a residence permit or any other rights.<sup>259</sup> A stateless person can only regularise their stay in Poland on two grounds. If it is established during return proceedings that return to the country of origin is unenforceable for reasons that cannot be attributed either to the authorities or to the stateless person concerned, a permit for tolerated stay can be granted.<sup>260</sup> In limited circumstances, a residence permit on humanitarian grounds is another possibility.<sup>261</sup>

Germany defines a stateless person in its legislation by reference to art 1(1) of the *1954 Convention*, which it has signed and ratified.<sup>262</sup> However, no SDP exists in Germany and statelessness is not a recognised ground of protection.<sup>263</sup> Although an SDP is not a requirement under the *1954 Convention*, the situation of stateless persons in Germany illustrates why a mechanism to identify stateless persons and qualify them as such is paramount. Due to the absence of an SDP, statelessness is only incidentally addressed through other procedures, such as an asylum procedure, and many stateless persons are wrongly categorised under

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<sup>255</sup> HRC, *General Comment 15: Positions of Aliens under the Covenant*, UN Doc CCPR/A/41/40 (1986) [5]; Sophie Nonnenmacher and Ryszard Cholewinski, 'The Nexus between Statelessness and Migration' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 247, 251–4.

<sup>256</sup> On 15 March 2024, UNHCR estimated that 956,635 Ukrainian refugees resided in Poland, 1,139,690 in Germany and 381,400 in the Czech Republic: UNHCR, 'Ukraine Refugee Situation' (n 1).

<sup>257</sup> For an overview of SDPs throughout Europe, see ENS, *Statelessness Index* (Web Page) <<https://index.statelessness.eu>>, archived at <[perma.cc/7Q5Z-9QYE](https://perma.cc/7Q5Z-9QYE)>.

<sup>258</sup> UNHCR, *Mapping Statelessness in Poland* (Report, September 2019) 16–7; ENS, *Statelessness Index Survey 2022: Poland* (Report, 2022) 10. For more information about the protection of stateless persons in Poland, see Gabor Gyulai, Hungarian Helsinki Committee, *Forgotten Without Reason: Protection of Non-Refugee Stateless Persons in Central Europe* (Research Paper, 2007).

<sup>259</sup> UNHCR, *Mapping Statelessness in Poland* (n 258) 28–32.

<sup>260</sup> *Law No 1650 of 2013 'Act on Foreigners'*, art 351(2) (Poland) ('*Act on Foreigners (Poland)*').

<sup>261</sup> *ibid* art 348.

<sup>262</sup> *Law No Z1998A of 1976 'Law on the Convention of 28 September 1954 relating to the Status of Stateless Persons'*, Federal Law Gazette II, No 22 of 1976, 473 (Germany); *Law No Z1997A of 1977 'Implementing Act to the Convention of 30 August 1961 for the Reduction of Statelessness and to the Convention of 13 September 1973 for the Reduction of Cases of Statelessness'*, Federal Law Gazette I, No 40 of 1977, 1101, art 1 (Germany) ('*Act for the Reduction of Statelessness*').

<sup>263</sup> ENS, *Statelessness Index Survey 2022: Germany* (Report, 2022) 15, 20–1.



‘undetermined nationality’.<sup>264</sup> Stateless persons can thus only be protected on grounds other than their statelessness. A tolerated status (*duldung*) may be granted if the deportation of an individual is impossible on legal or factual grounds.<sup>265</sup> However, the tolerated status only involves a temporary suspension of deportation and does not provide for an actual right of residence.<sup>266</sup> This is an extremely precarious status, which does not confer any rights, and the time spent in this status is not considered for naturalisation.<sup>267</sup> In 2022, a right to residence was introduced for persons who have a tolerated status (on or before 31 October 2022) and have been living in Germany for more than five years.<sup>268</sup> Another possibility is to apply for a temporary residence permit, which can be granted when the departure of an individual is impossible in fact or in law and the obstacle to deportation is unlikely to disappear in the near future.<sup>269</sup>

The Czech Republic is party to both the *1954 Convention* and the *1961 Convention*. The definition of a stateless person in the *1954 Convention* has direct effect on the Czech legal order.<sup>270</sup> However, the *1954 Convention* is not properly implemented in Czech legislation, as stateless persons have limited rights.<sup>271</sup> The Ministry of the Interior has the power to decide whether an individual meets the definition of a stateless person, but there are no procedural safeguards in place.<sup>272</sup> After the Ministry of the Interior determines that an individual meets the conditions of statelessness, in principle, it must issue a binding opinion on the impossibility to leave the Czech Republic.<sup>273</sup> On the basis of that opinion, the recognised stateless person can obtain a visa for the purpose of a tolerated stay, which is a highly precarious status.<sup>274</sup> It does not provide a right of residence; only

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<sup>264</sup> ENS, *Joint Submission to the Human Rights Council at the 44th Session of the Universal Periodic Review: Germany* (Report, 5 April 2023) [15]; Katia Bianchini, ‘On the Protection of Stateless Persons in Germany’ (2014) 19(1–2) *Tilburg Law Review* 35, 38; Margarida Farinha, ‘Statelessness and the Recognition of the Right to Have Rights in Germany’ (2023) 5(1) *Statelessness & Citizenship Review* 84, 85.

<sup>265</sup> *Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Residence Act)*, Federal Law Gazette I, No 6 of 2008, 162, art 60a(2) (Germany) (‘*Residence Act (Germany)*’).

<sup>266</sup> Jürgen Bast, ‘The Legal Position of Migrants — German Report’ in Eibe Riedel and Rüdiger Wolfrum (eds), *Recent Trends in German and European Constitutional Law* (Springer 2006) 72, 80; Farinha (n 264) 86.

<sup>267</sup> *Joint Submission to the Human Rights Council at the 44th Session of the Universal Periodic Review: Germany* (n 264) [23]–[24]; Bianchini, ‘On the Protection of Stateless Persons in Germany’ (n 264) 43–4.

<sup>268</sup> *Law for the Introduction of an Opportunity for Residency*, Federal Law Gazette I, No 57 of 2022, 2847 (21 December 2022) (Germany).

<sup>269</sup> *Residence Act (Germany)* (n 265) art 25(5).

<sup>270</sup> UNHCR, *Faces of Statelessness in the Czech Republic* (Report, December 2020) 18.

<sup>271</sup> *ibid* 18; ENS, *Statelessness Index Survey 2023: Czechia* (Report, 2023) 16–17.

<sup>272</sup> *Law No 326 of 1999*, as amended by *Law No 173 of 2023*, ‘*On the Residence of Foreigners in the Territory of the Czech Republic and on Amendments to Certain Laws*’ (Czech Republic) art 170d (‘*On the Residence of Foreigners (Czech Republic)*’); UNHCR, *Faces of Statelessness in the Czech Republic* (n 270) 19.

<sup>273</sup> *On the Residence of Foreigners (Czech Republic)* (n 272) arts 170d(4), 170f; UNHCR, *Faces of Statelessness in the Czech Republic* (n 270) 19.

<sup>274</sup> *On the Residence of Foreigners (Czech Republic)* (n 272) art 33(3); UNHCR, *Faces of Statelessness in the Czech Republic* (n 270) 19.

after five years can the individual apply for permanent residence status.<sup>275</sup> As to the enjoyment of rights, the tolerated stay allows individuals to work if they apply for a work permit and to access the public health insurance programme after one year, but they have no right to family reunification and if they travel abroad they do not have the right to return to the Czech Republic.<sup>276</sup> As such, this procedure generally offers only limited protection to recognised stateless persons. On the other hand, naturalisation is facilitated for stateless persons following art 32 of the *1954 Convention*, as the condition of five years of permanent residence and the condition that the applicant must not be a burden on the social security system may be waived at the discretion of the Ministry of the Interior.<sup>277</sup> Yet, other stringent conditions continue to apply, such as a Czech language proficiency test and a citizenship test.<sup>278</sup>

A few countries that host displaced persons from Ukraine have more comprehensive protection frameworks for stateless persons in place. For instance, in Hungary,<sup>279</sup> stateless persons can be recognised through an SDP and receive a humanitarian residence permit upon recognition.<sup>280</sup> By means of this permit, they have access to education, employment (albeit under the condition of a work permit) and public healthcare, and they have the right to apply for a travel document and family reunification.<sup>281</sup> In Moldova,<sup>282</sup> stateless persons can be recognised as stateless by applying to the SDP and once recognised, they are automatically granted statelessness status and a residence permit of an indefinite duration.<sup>283</sup> Based on this statelessness status, recognised stateless persons can

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<sup>275</sup> Organization for Aid to Refugees, ENS and the Institute on Statelessness and Inclusion, *Joint Submission to the Human Rights Council at the 42nd Session of the Universal Periodic Review (Fourth Cycle 23 January — 3 February 2023): Czech Republic* (Submission, 2023) [28].

<sup>276</sup> *ibid* [29]; ENS, *Statelessness Index Survey 2023: Czechia* (n 271) 16–17.

<sup>277</sup> ENS, *Statelessness Index Survey 2023: Czechia* (n 271) 24.

<sup>278</sup> *ibid*.

<sup>279</sup> On 15 March 2024, UNHCR estimated that 66,135 Ukrainian refugees resided in Hungary: UNHCR, ‘Ukraine Refugee Situation’ (n 1).

<sup>280</sup> *Law of 2007 ‘On the Entry and Stay of Third-Country Nationals’*, s 29(2)(a)–(b) (Hungary) (‘*On the Entry and Stay of Third-Country Nationals*’); ENS, *Statelessness Index Survey 2023: Hungary* (Report, 2023) 9, 19. For a more elaborate analysis of Hungary’s legal framework for the protection of stateless persons, see, eg, Gyulai, ‘Forgotten Without Reason: Protection of Non-Refugee Stateless Persons in Central Europe’ (n 250); Gabor Gyulai, Hungarian Helsinki Committee, *Statelessness in Hungary: The Protection of Stateless Persons and the Prevention and Reduction of Statelessness*, (Research Paper, December 2010); Gabor Gyulai, Hungarian Helsinki Committee, *The Black Box of Nationality. The Naturalisation of Refugees and Stateless Persons in Hungary* (Research Paper, 2016); Tamás Molnár, ‘The Constitutional Court’s Decision on the Compatibility of the Hungarian Statelessness Determination Procedure with International Law’ (2015) *Hungarian Yearbook of International Law and European Law* 593.

<sup>281</sup> *On the Entry and Stay of Third-country Nationals* (n 280) ss 19, 83–6; *Law CXC of 2011 ‘On National Public Education’* s 92(1)(c) (Hungary); *Law CLIV of 1997 ‘On Health’*, s 142(2) (Hungary); *Government Decree 445/2013 (XI 28)*, s 3(1)–(3) (Hungary).

<sup>282</sup> On 15 March 2024, UNHCR estimated that 116,855 Ukrainian refugees resided in the Republic of Moldova: UNHCR, ‘Ukraine Refugee Situation’ (n 1).

<sup>283</sup> *Law 200 of 16 July 2010 ‘On Foreigners in the Republic of Moldova’*, arts 72(1)(c), 87(3) (Republic of Moldova) (‘*Law on Foreigners in the Republic of Moldova*’); ENS, *Statelessness Index Survey 2022: Moldova* (Report, 2022) 8, 14–15.

enjoy their rights under the *1954 Convention*, including the right to a travel document, employment, education, healthcare and social security.<sup>284</sup>

## VI CONCLUDING REMARKS

The Russian war in Ukraine serves as a prime illustration of how the challenges related to statelessness are exacerbated by armed conflict. Statelessness forms a part of Ukraine's history and reality. Many among the Roma, former Soviet citizens and irregular migrants in Ukraine do not have any nationality upon which to rely. While stateless persons generally face exclusion and violations of their basic rights, the hardship of having no nationality becomes painfully visible in the context of the war. In Ukraine, the level of protection varies according to the stateless person's legal status; recognised with a permanent residence permit or a temporary residence permit, lawfully present in Ukraine pending the outcome of an SDP application, or unrecognised.

Since the operationalisation of the SDP in May 2021, recognised stateless persons receive some form of protection in Ukraine, as they are granted rights related to employment, education and family reunification. Yet, the granting of a residence permit is not automatic, and in the first two years after recognition, the stateless person is only provided with a temporary residence permit, which offers a more limited set of rights. Applicants to the SDP are considered as lawfully present in Ukraine while they await their decision and receive a certificate in that regard, but again have limited rights. For unrecognised stateless persons who do not have any other legal status, human rights violations are a daily reality. They are excluded from free education, healthcare and employment. Stateless persons who are detained for the purpose of removal, but for whom no country of removal exists, risk prolonged periods of detention, amounting to arbitrary detention. As such, the Ukrainian protection framework does not meet the standards set by the *1954 Convention* and human rights law.

These human rights violations have only worsened after the outbreak of the hostilities and the occupation of eastern Ukraine. While millions of Ukrainians have attempted to flee their homes, stateless and undocumented persons who are not able to present the required personal documentation are not able to pass checkpoints within Ukraine or cross international borders and are often subjected to discriminatory treatment. As a result, their fundamental right to leave is jeopardised. If they do manage to leave, they face exclusion from the established protection regimes in Ukraine.

For the first time in history, the EU has activated the *TPD*, which provides temporary protection for Ukrainian refugees in the context of the mass displacement. Yet, only recognised stateless persons with a permanent residence permit are *ex lege* eligible for protection. For those who are temporarily residing in Ukraine, the application of the protection regime is optional for Member States, while applicants to the Ukrainian SDP and unrecognised stateless persons from Ukraine may be excluded by the Member States all together.

Refugee status determination remains a viable alternative, but the frequent lack of documentation forcibly displaced persons experience makes it again more difficult for stateless and undocumented persons to access asylum procedures, and

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<sup>284</sup> Law 275 of 10 November 1994 'On Legal Status of Foreign Citizens and Stateless Persons', arts 7, 8(1), 9, 12 (Republic of Moldova); Law 200/2010 On Foreigners in the Republic of Moldova (n 283) arts 72(1)(c), 87(3).

again brings the risk of arbitrary detention and expulsion. Once abroad, a final option is to apply for formal recognition as stateless in a neighbouring country. Yet, the lack of ratification by some governments and the weak implementation of the *1954 Convention* throughout Europe is worrisome.

A preliminary study of the three main host countries — Poland, Germany and the Czech Republic — reveals that none of these states have a robust mechanism in place to identify stateless persons and to ensure the enjoyment of the latter's rights under the *1954 Convention*. Other host countries, such as Hungary and Moldova, do provide more comprehensive protection regimes for stateless persons. Among the millions of forcibly displaced Ukrainians, stateless persons and persons at risk of statelessness fleeing the war continue to face legal protection gaps that compromise the exercise of their human rights.