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# Statelessness in the European Union

## *The Case of Cuban Migrants*

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### Abstract

Statelessness affects 12 million people around the world, including within the European Union. On the international level, the 1954 United Nations Convention relating to the Status of Stateless Persons and the 1961 United Nations Convention on the Reduction of Statelessness only apply to those who are *de jure* stateless persons. Within the framework of the European Union no specific regulation on statelessness exists. Consequently, the way on which statelessness is recognized differs between the EU Member States. This article examines the situation of Cuban migrants that stay abroad for more than 11 months (Cuban *emigrados*). The analysis of the Italian case-law shows that the majority of Italian judges recognize stateless status to Cuban *emigrados*. By illustrating the 'Cuban case', this article focuses on a concrete and current example of statelessness within the EU. It stresses the consequences of the lack of uniform recognition of statelessness within the EU Member States.

### Keywords

statelessness – *de facto* – recognition – European Union – Cuban migrants – nationality

## 1 Introduction

Statelessness is a global problem,<sup>1</sup> which means it also occurs within the Member States of the European Union (*hereinafter*: EU). A huge number of stateless people that live in the EU are former citizens of dissolved states. These former citizens have failed to obtain the nationality of one of the successor states and thus have become stateless.<sup>2</sup> Statelessness in the EU, however, can also be explained for other reasons, for instance stateless people that have migrated from third countries to one of the EU Member States.<sup>3</sup>

On the international level, two important Conventions deal with statelessness: the 1954 United Nations Convention relating to the Status of Stateless Persons<sup>4</sup> and the 1961 United Nations Convention on the Reduction of Statelessness.<sup>5</sup> Within the framework of the EU a specific instrument on statelessness does not yet exist.<sup>6</sup> As a result, only few EU Member States have a specific legislation on statelessness determination procedure (Italy, France, Latvia, Spain, Hungary, and United Kingdom).<sup>7</sup> Consequently, the way in which statelessness is recognized differs between the EU Member States, even among those that have adopted a determination procedure.

This article examines the ‘Cuban migrants’ case’ through a study of the Italian case-law. Following a period of more than 11 months absence from

1 Based on UN High Commissioner for Refugees statistics, there are up to 12 million of stateless persons in the world. See UNHCR, ‘Searching for Citizenship’ <<http://www.unhcr.org/pages/49c3646c155.html>> accessed 26 September 2013.

2 In the European context, the dissolved States are: the Union of Soviet Socialist Republics, Czechoslovakia, and the Socialist Federal Republic of Yugoslavia. For more information about statelessness related to dissolved states see Paul Lagarde, ‘Successions d’États, apatrie et nationalité: développements récents’ in Patrick Courbe (ed), *Le monde du droit: écrits rédigés en l’honneur de Jacques Foyer* (Economica 2008).

3 See UNHCR, ‘Statelessness Determination Procedures and the Status of Stateless Persons (“Geneva Conclusions”)’ (2010) <<http://www.refworld.org/docid/4d9022762.html>> accessed 27 September 2013. The ‘Geneva Conclusions’ point out the difference between two different contexts. The first consisting of countries – many industrialized – that host stateless persons who are predominantly migrants and the second consisting of countries that have *in situ* stateless population.

4 Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

5 Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

6 See para 3.

7 See: Gábor Gyulai ‘Statelessness in the EU Framework for International Protection’ (2012) 14 European Journal of Migration and Law 287.

Cuban territory, Cuban migrants are not allowed to return to Cuba.<sup>8</sup> The majority of Italian judges have declared these Cuban migrants stateless, even if Cuban authorities continue to consider them as national.

This article is aimed to reflect upon the usefulness of a wide concept of statelessness and of its recognition within the EU Member States.

## 2 The Definition of Statelessness

Article 1 of the 1954 Convention defines a stateless person as: ‘a person who is not considered as a national by any State under the operation of its law’. People who fall within the scope of Article 1 are commonly referred to as *de jure* stateless persons.<sup>9</sup> On the contrary, an agreed international definition of *de facto* statelessness does not exist.<sup>10</sup> During the Expert Meeting of Prato, the United Nations High Commissioner for Refugees (hereinafter: UNHCR) suggested the following definition for *de facto* stateless persons:

[they] are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality.<sup>11</sup>

Nevertheless, the concept of *de facto* statelessness and the usefulness of this term remain widely debated.<sup>12</sup>

8 On January 2013, a new Cuban regulation extended the permission to stay outside the country to 24 months.

9 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’ (2012) HCR/GS/12/01.

10 UNHCR, ‘Expert Meeting - The Concept of Stateless Persons under International Law (“Prato Conclusions”)’ (2010) <<http://www.refworld.org/docid/4ca1ae02.html>> accessed 27 September 2013.

11 Ibid.

12 UNHCR, ‘Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person’ (2012) HCR/GS/12/02. As regards the use of the term ‘*de facto* statelessness’ see: Laura van Waas, *Nationality Matters. Statelessness under International Law* (Intersentia 2008) 27. In particular, the author points out that ‘the continued use of the term “*de facto* statelessness” (...) may be counterproductive since it has

It is interesting to notice that another conclusion of the Expert Meeting at which the concept of stateless persons was discussed is that ‘persons who are unable to return to the country of their nationality will (...) always be *de facto* stateless even if they are otherwise able in part or in full to avail themselves of protection of their country of nationality while in the host country.’<sup>13</sup> *De facto* statelessness related to the impossibility to return to the country of nationality is a topical and complex issue within the EU also because not all EU Member States recognize the stateless status to these persons.<sup>14</sup>

Moreover, the *de facto* stateless persons are not covered by any international treaties and the 2 United Nations Conventions on statelessness only apply to *de jure* stateless persons.<sup>15</sup>

However, Article 1 of the Final Act of the 1954 Convention refers implicitly to *de facto* stateless people (in particular, to persons who have, for valid reasons, renounced the protection of the State of which they are a national). The Final Act, which is not binding,<sup>16</sup> recommends States to extend the protection offered by the Convention also to *de facto* stateless persons. On the other hand, the Final Act of the 1961 Convention explicitly refers to *de facto* stateless persons and recommends that States treat the *de facto* stateless as *de jure* stateless, in order to enable them to acquire an effective nationality.<sup>17</sup>

### 3 The Recognition of Statelessness within the EU

Within the Framework of the EU, a specific regulation about statelessness does not exist. Stateless people, however, can fall under secondary EU legislation. This is the case, for instance, when they are simultaneously an asylum seeker or a person who is for other reasons in need of international protection.<sup>18</sup>

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no legal significance. Moreover, ongoing disagreement on the scope of the term “statelessness” can have a highly disruptive impact on the implementation of the relevant international standards’. For a broad approach of the *de facto* statelessness, see: Brad K. Blitz and Caroline Sawyer (eds), *Statelessness in the European Union, Displaced, Undocumented, Unwanted*, (Cambridge University Press 2011).

13 UNHCR, ‘Expert Meeting - The Concept of Stateless Persons under International Law’ (n 10).

14 See para 3.

15 UNHCR, ‘Expert Meeting - The Concept of Stateless Persons under International Law’ (n 10).

16 UNHCR, ‘Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person’ (n 12).

17 Convention on the Reduction of Statelessness, Final Act.

18 See, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugee or as

Furthermore, stateless people enjoy several rights as resident workers in the territory of Member States (e.g. rights related to social security).<sup>19</sup> The definition of statelessness used in the Regulation on the coordination of social security systems is the one that is applied in the 1954 Convention.<sup>20</sup> Nevertheless, referring to the rules concerning the right to travel within the EU, the statelessness definition seems to be wider. In fact, according to the Council Regulation No 1932/2006, amending Regulation No 539/2001, '(...) recognized refugees and stateless persons and other persons who do not hold the nationality of any country who reside in a Member State and are holders of a travel document issued by that Member State shall be exempt from the visa requirement'.<sup>21</sup> As stressed by Tamás Molnár, 'this is the first time in EU legislation where a *larger personal scope* (including eventually the *de facto* stateless as well) *applies* than that defined in the 1954 New York Convention'.<sup>22</sup>

In absence of a EU regulation regarding statelessness, only a few EU Member States have a specific legislation on the statelessness determination procedure.<sup>23</sup> Moreover, their procedures differ from each other regarding, for example, the authority in charge of the statelessness determination (asylum authority, immigration authority or civil courts).<sup>24</sup> It is to note that, also among

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persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12. See also 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 L122/12.

- 19 Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.
- 20 The Art. 1, lit (h) of the Regulation (EC) 883/2004 provides "stateless person' shall have the meaning assigned to it in Article 1 of the Convention relating to the Status of Stateless Persons, signed in New York on 28 September 1954".
- 21 Council Regulation (EC) 1932/2006 of 21 December 2006 amending Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2006] OJ L405/23, Art. 1 lit (b).
- 22 Tamás Molnár 'Remembering the Forgotten: Legal Status of Stateless Persons under International Law and EU Law' in Cristina Gortázar (ed), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 149.
- 23 See UNHCR, 'Statelessness Determination Procedures and the Status of Stateless Persons' (n 3). Regarding the United Kingdom, a statelessness determination procedure came into effect on 6 April 2013.
- 24 Gábor Gyulai 'Statelessness in the EU Framework for International Protection' (2012) 14 *European Journal of Migration and Law* 287.

the EU countries having adopted a specific determination procedure, differences on the recognition of statelessness are patent.

Some EU Member States use a recognition process limited to *de jure* stateless persons as defined in Article 1 of the 1954 Convention (e.g. France, Hungary and the United Kingdom). On the contrary, the Italian judiciary recognizes a wider concept of statelessness.

Italy has ratified the 1954 Convention.<sup>25</sup> Nevertheless, the Italian procedural regulation on statelessness does not refer to the Convention definition of Article 1 and it does not even provide a definition of statelessness.<sup>26</sup> In absence of a definition included in this regulation, the majority of the Italian judges, while ruling in procedures for statelessness determination, considered statelessness in a broader sense, including a non-effective nationality.

In France, a non-effective nationality does not allow recognition of the stateless status.<sup>27</sup> The French Office for the Protection of Refugees and Stateless Persons<sup>28</sup> and the French judges focus on a concept of 'national' that reflects a formal link between the individual and a particular State. Consequently, they only recognize a person to be stateless if this person has definitively lost his/her nationality.<sup>29</sup>

Hungary legislation related to statelessness determination procedure follows, word by word, the definition of statelessness contained in Article 1 of the 1954 Convention.<sup>30</sup> The recognition of statelessness in Hungary is thus limited to *de jure* stateless persons.<sup>31</sup>

Similarly, the United Kingdom Immigration Rules establish that, for the purpose of the recognition of statelessness, a stateless person is a person who 'satisfies the requirements of Article 1(1) of the 1954 United Nations Convention relating to the Status of Stateless Persons, as a person who is not considered as a national by any State under the operation of its law'.<sup>32</sup> Asylum Aid

25 Law n. 306/1962.

26 D.P.R. 572/1993, Art. 17.

27 See Catherine-Amélie Chassin, 'Panorama du droit français de l'apatridie' (2003) RFDA 327.

28 The OFPRA (Office français de protection des réfugiés et apatrides) is the French authority in charge of the recognition of the stateless status. The OFPRA's negative decision can be appealed before administrative courts.

29 See, for instance, Cour administrative d'Appel de Paris 25 octobre 2012 *B.*, Inédit au Recueil Lebon, Conseil d'État 20 mars 2000 *Haque*, req. 190036, Inédit, Tribunal administratif de Paris, 13 décembre 1995, *Haque*, Rec. CRR 1996, p. 136.

30 Act No II of 2007 on the Entry and Stay of Third Country Nationals, Art. 2 lit (b).

31 Tamás Molnár, 'Statelessness Determination procedure in Hungary' (2013) 5/6 *Asiel&Migrantenrecht* 273.

32 Immigration Rules, Art. 401.

commented on this recent adoption of the UK statelessness determination procedure and pointed out that '[t]he new procedure is not intended for undocumented migrants *per se*, including those sometimes labeled '*de facto*' stateless persons and for whom there is no universally accepted definition under international law'.<sup>33</sup>

#### 4 A Controversial Case of Statelessness: Cuban Migrants

Differences on the recognition of statelessness within the Member States of the EU lead to practical difficulties. The analysis of a concrete and current example of statelessness within the EU shows these difficulties.

The situation of Cuban migrants who stay abroad for more than 11 months is a good illustration of the use of a wide concept of statelessness.

Until January 2013, the Cuban law on migration only granted Cuban nationals permission to leave the country if they possessed a passport and an exit-permit issued by the national authorities.<sup>34</sup> This permit was valid for 11 months.<sup>35</sup> Those Cubans who did not go back to Cuba within this timeframe were considered *emigrados* and they needed a special authorization (*permiso de entrada*) to return to Cuba. This permission had to be granted by the Cuban authorities in the country of residence.<sup>36</sup>

Italian judges, while ruling in procedures for statelessness determination concerning Cuba migrants, focused on the drawbacks related to the authorization to return to Cuba.<sup>37</sup> Firstly, this authorization was only allowed when the

33 Asylum Aid, 'Asylum Aid Briefing Note on the Introduction of a UK Stateless Determination Procedure effective from 6 April 2013' (2013) <[http://www.asylumaid.org.uk/data/files/publications/214/STATELESSNESS\\_BRIEF.pdf](http://www.asylumaid.org.uk/data/files/publications/214/STATELESSNESS_BRIEF.pdf)>, accessed 27 September 2013.

34 Former Art. 1, Law No 1312 of 20 September 1976, Law on Migration (*Ley No. 1312 de 20 de septiembre de 1976, Ley de Migración*). Former chapter III, Decree No 26 of 31 July 1976, Regulation of the Law on Migration (*Decreto No. 26 de 31 de julio de 1976, Reglamento de la Ley de Migración*).

35 In January 2013 a new legislation entered into force. The exit-permit to leave Cuba is no longer required and the permission to stay outside the country is extended to 24 months. The impact of this legislation will be examined later in this paragraph.

36 Former chapter II, Decree No 26 of 31 July 1976, Regulation of the Law on Migration, (*Decreto No. 26 de 31 de julio de 1976, Reglamento de la "Ley de Migración"*). Former Art. 1, Law No 989 of 5 December 1961, (*Ley No. 989 de 5 de diciembre de 1961*).

37 See, for instance, Tribunale di Lecce, decision of 5 March 2010, Tribunale di Brindisi, judgment of 15 July 2009, Tribunale di Milano, judgment n. 4324 of 31 March 2009, <<http://dejure.giuffre.it.>> accessed 16 May 2013.

person involved had a regular residence permit in the country of residence.<sup>38</sup> Secondly, the authorization was a discretionary act of the Cuban authorities.<sup>39</sup> Furthermore, the authorization only permitted a temporary return to Cuba and it did not allow the *emigrados* the right to a reestablished residence in Cuba.<sup>40</sup> Besides this, Cuban laws entail other negative repercussions for Cuban migrants who stay abroad for more than 11 months, such as the seizure of all their goods, the loss of civil and political rights, the deprivation of parental authority and the loss of inheritance rights.<sup>41</sup> According to the majority of Italian judges, these provisions reveal the lack of a real and effective link between a State and its nationals.<sup>42</sup> In particular, judges stress that the impossibility to freely return to Cuba and the need for a special authorization *de facto* make the Cuban *emigrados* equal to an alien.<sup>43</sup> In fact an alien normally needs a permit to enter the territory of a country. The possibility to leave and to return without any restrictions to one's country of nationality is one of the basic civil rights of a national.<sup>44</sup> Therefore, the majority of Italian judges

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38 See for instance the documents produced by the General Cuban Consulate during a statelessness determination procedure and quoted by the Tribunal of Milan, Tribunale di Milano, judgment n. 4324 of 31 March 2009, <<http://dejure.giuffre.it>> accessed 16 May 2013.

39 Communication of the Cuban embassy in Rome of 15 April 1996. The Communication is quoted by Carlo Vitiello, in Carlo Vitiello 'L'accertamento dello status di apolidia' (1997) 2 Giur. merito 247.

40 See, especially, the analysis on Cuban regulation, done by the Tribunal of Milan. Tribunale di Milano, judgment n. 4324 of 31 March 2009, <<http://dejure.giuffre.it>> accessed 16 May.

41 Former Law No 989 of 5 December 1961 (*Ley No. 989 de 5 de diciembre de 1961*).

42 See, for example, Tribunale di Firenze, decision of 29 April 1995, Tribunale di Prato, decision of 14 January 1997, Tribunale di Milano, decision of 5 March 2003, Tribunale di Milano, judgment n. 4324 of 31 March 2009, Tribunale di Brindisi, judgment of 15 July 2009, Tribunale di Lecce, decision of 5 March 2010, The decisions are available online at <<http://dejure.giuffre.it>> accessed 16 May. See also Tribunale di Brescia, judgment n. 2245 of 3 July 2012 <<http://www.guidellegali.it/Sentenze-in-immigrazione-ingresso-e-soggiorno-in-italia/riconoscimento-dello-status-di-apolide-del-cittadino-cubano-emigrante-5192.aspx>> accessed 27 May 2013.

43 See, for example, Tribunale di Milano, judgment n. 4324 of 31 March 2009, Tribunale di Brescia, judgement n. 2245 of 3 July 2012.

44 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) Art. 13, para 2; International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Art. 12, para 4; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention

declared these Cuban migrants stateless, even in the absence of a formal act of revocation of nationality.<sup>45</sup> In their decisions, the Italian judges refer to the definition of Article 1 of the 1954 Convention and they do not explicitly refer neither to *de jure* statelessness, nor to *facto* statelessness. They base their decisions on the acknowledgement of the lack of an effective link between Cuba and the *emigrados* because these migrants cannot benefit from the principal rights that are related to nationality.

According to the definition of *de facto* statelessness suggested by the UNHCR,<sup>46</sup> Cuban *emigrados* could be considered as *de facto* stateless persons. Cuban laws envisage different categories of nationals with different associated rights. Thus, formally, the *emigrados* have a nationality. The fact that Cuba considers the *emigrados* as nationals is confirmed by passports issued by Cuban authorities and by documents, which will have been produced by the Cuban embassy in Italy during some Italian judiciary procedures for statelessness determination.<sup>47</sup> Even if Cuban *emigrados* need permission to re-enter Cuba, Cuba continues to renew their passports. The possession of a passport establishes the presumption that the holder is a national of the country of issue.<sup>48</sup> A passport is 'a formal document or certification issued by a national government identifying a traveler as a citizen or national with a right to protection while abroad and a right to return to the country of citizenship'.<sup>49</sup> In the

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and in the first Protocol thereto as amended by Protocol No. 11 (adopted 16 September 1963, entered into force 2 Mai 1968) 46 (ETS) Art. 3, para 2.

45 See n 42. For an analysis of 'Cuban case' and of Italian case-law on statelessness, see Carlo Vitiello, 'L'accertamento dello status di apolidia' (1997) 2 Giur. merito 247. See also Emmanuela Bertucci, Claudia Moretti 'Il riconoscimento dello status di apolide per i cittadini cubani' (2008) <[http://immigrazione.aduc.it/articolo/riconoscimento+dello+status+apolide+cittadini\\_14651.php](http://immigrazione.aduc.it/articolo/riconoscimento+dello+status+apolide+cittadini_14651.php)> accessed 18 October 2013.

46 See para 2.

47 Tribunale di Firenze decision of 27/30 June 2001 <<http://dejure.giuffre.it.>> accessed 16 May 24 June 2013.

48 See UNHCR, 'Statelessness Determination Procedures and the Status of Stateless Persons' (n 3).

49 *Encyclopædia Britannica. Encyclopædia Britannica Online Academic Edition.* (Encyclopædia Britannica Inc 2013) <<http://www.britannica.com/EBchecked/topic/445907/passport>> accessed 26 September 2013.

The Regulation on the Cuban Law on Migration provides the following definition of passport: 'El pasaporte es un certificado de identidad y ciudadanía que expide, según sea el caso, el Ministerio de Relaciones Exteriores o el Ministerio del Interior, para surtir efectos sólo en cuanto a la admisión y estancia de su titular en el extranjero como ciudadano cubano'. Art. 1 of the Decree No 26 of 31 July 1976, Regulation of the Law on Migration (*Decreto No. 26 de 31 de julio de 1976, Reglamento de la Ley de Migración*).

documents produced by the Cuban embassy, it states that: 'a Cuban citizen is considered as such if he does not formally renounce at the consulate of the country in which he resides',<sup>50</sup>

The case of the Cuban migrants, as well as *de facto* statelessness in general, illustrates a patent problem on the international level. This problem is deeply related to the issue where a State recognizes a person stateless eventhough (s) he is considered a national by the country of origin. This clearly infringes upon the principle of State sovereignty in international law.<sup>51</sup> Nevertheless, referring to the specific case of Cuban migrants, Cuba does not comply with the international Law in ignoring the right of entry for its nationals. As regards the Cuban migrants, Cuba violates, in particular, Human Rights Law. As regards other States, Cuba also breaches the sovereignty of other States by refusing to receive its nationals.

A solution to the 'Cuban case' can possibly be created in the near future if Cuba will respect international law and will change its attitude towards its own nationals. Restrictions on the right to leave Cuba and to freely return to the country are only some of the effects of the Cuban authoritarian regime.<sup>52</sup> Some changes have already been made. For instance, in October 2012, the Decree Law No 302 amended the Cuban Law on Migration.<sup>53</sup> The new regulation to some extent diminished negative consequences for Cuban migrants provided in the former Law on Migration and in the 'Law on Seizure'. The exit-permit to leave the Cuban territory is no longer required and several limitations regarding the seizure of goods have been established.<sup>54</sup> The Decree Law

50 See, especially, Tribunale di Firenze, decision of 27/30 June 2001 <<http://dejure.giuffre.it>> accessed 13 May 2013.

51 The principle that 'Each State shall determine under its own law who are its nationals' is confirmed by International Treaties. See, for example, Convention on Certain Questions Relating to the Conflict of Nationality Laws (adopted 13 April 1930, entered into force 1 July 1937) 179 LNTS 89 Art. 1. See also European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) 166 ETS Art. 3.

52 The Reports of Human Rights Watch and Amnesty International point out the fact that Cuban authorities continue to severely restrict the freedom of expression, association, movement and assembly (Human Rights Watch, 'World Report 2013' (HRW 2013) <[https://www.hrw.org/sites/default/files/wr2013\\_web.pdf](https://www.hrw.org/sites/default/files/wr2013_web.pdf)> accessed 26 September 2013). Moreover, the political conformity is enforced using 'short-term detentions, beatings, public acts of repudiation, travel restrictions, and forced exile' (Human Rights Watch (n 33) 222).

53 Decree-Law No 302 of 16 October 2012 amending the Law No 1312, Law on Migration (*Decreto-Ley No. 302 de 16 de octubre de 2012, Modificativo de la Ley No. 1312, "Ley de Migración"*).

54 Art. 1 of the Law No 1312 of 20 September 1976, Law on Migration (*Ley No. 1312 de 20 de septiembre de 1976, Ley de Migración*). Recitals and Final Regulation of the Decree-Law No

has also extended the permission to stay outside the country to 24 months. Thus, Cubans who leave the country can stay abroad for 24 months; during this period they can freely return to Cuba.<sup>55</sup> This new legislation entered into force on 14 January 2013. Consequently, Italian judges will be confronted with different 'groups' of Cubans:

- Cuban migrants that leave Cuba after the entry into force of the decree (they can stay abroad for 24 months);
- Cuban migrants that have left the Cuban territory before the entry into force of the legislative amendments.

With regards to this second group, it is necessary to understand if these Cuban migrants can stay abroad for 11 months (they emigrated during the former regulation) or for 24 months (they are still abroad when the new regulation entered into force). The Decree Law No 302 states that Cuban *emigrados* that stay abroad at the moment when the regulation enters into force will remain within their immigration status.<sup>56</sup> As a result, the Italian judiciary may continue to consider Cubans, who have left Cuba before 14 January 2013, as stateless after a period of 11 months since their departure from Cuban territory.

The recognition of the stateless status of Cuban *emigrados* is not shared by other EU Member States because of the exclusion of a wide definition of statelessness. Cubans are treated differently and have different status depending on the State where they apply for the recognition of their statelessness. When a EU Member State recognizes a person as being stateless, it normally provides such person with a residence permit and this person has the right to move freely in the Schengen Area.<sup>57</sup> This person also has the rights specified in the 1954 Convention. Thus, a Cuban *emigrado* enjoys the Convention benefits in

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302 of 16 October 2012 amending the Law No 1312, Law on Migration (*Decreto-Ley No. 302 de 16 de octubre de 2012, Modificativo de la Ley No. 1312, "Ley de Migración"*).

55 Art. 9.1, para 2, of the Law No 1312 of 20 September 1976, Law on Migration (*Ley No. 1312 de 20 de septiembre de 1976, Ley de Migración*).

56 Special Regulation (*Disposición Especial*) of the Decree-Law No 302 of 16 October 2012 amending the Law No 1312, Law on Migration (*Decreto-Ley No. 302 de 16 de octubre de 2012, Modificativo de la Ley No. 1312, "Ley de Migración"*).

57 Today, the Schengen Area encompasses most EU States, except for Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom. However, Bulgaria and Romania are currently in the process of joining the Schengen Area. Of non-EU States, Iceland, Norway, Switzerland and Liechtenstein have joined the Schengen Area <<http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/>> accessed 10 September 2013.

Italy because of his/her statelessness, but (s)he does not enjoy these benefits in other EU Member States.

## 5 Conclusions

The situation of Cuban migrants deserves attention because it raises several questions and it entails important challenges. Through the use of a wide concept of statelessness, the Italian judiciary shows a possible solution to the situation of persons lacking in an effective link with their State of origin. The situation of Cuban migrants also highlights the need to encourage countries to refrain from procedures erasing or limiting the basic rights related to nationality. Regarding the EU level, the 'Cuban case' is a starting point to reflect upon the differences between the Member States in the way they recognize statelessness and upon the consequences related to this. A harmonization on a EU level is needed to prevent stateless people (in the broadest meaning of the word) from being treated differently depending on the EU Member State where they apply for recognition of their statelessness.

The EU Treaties do not empower the EU institutions to adopt legal acts focusing only on statelessness. Nevertheless, the increase of EU interest towards immigration, asylum field and nationality can be acknowledged in the jurisprudence of the Court of Justice of the European Union.<sup>58</sup> Thus, a future intervention of the EU concerning statelessness is not to be ruled out.

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58 See, for instance, Case C-135/08 *Rottmann* [2010] European Court Reports I-01449 and Case C-61/11 *El Dridi* [2011] European Court Reports I-03015.