

The World's Stateless

CHILDREN



Institute on Statelessness and Inclusion

January 2017



The Institute on Statelessness and Inclusion is an independent non-profit organisation dedicated to promoting an integrated, human rights based response to the injustice of statelessness and exclusion. Established in August 2014, it is the first and only global centre committed to promoting the human rights of stateless persons and ending statelessness. Its work combines research, education, human rights advocacy, field and network building, and awareness raising. The Institute is incorporated in the Netherlands, where it has Public Benefit Organisation (PBO) status.

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The photograph was taken a day before Yunus – a stateless Rohingya refugee - left his nine-month pregnant wife Begum (name changed) in Bangladesh along with their son and allowed himself to be trafficked to Malaysia. A week later, she received the news that his boat had capsized in the rough sea and everybody on board had died. Soon after, Begum gave birth to their second stateless son.

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*To all the children in our lives,
very specially to Lexi, Ayaana, Dylan and Uti*

TABLE OF CONTENTS

Foreword	1
Acknowledgements	3
Chapter 1: Introduction	9
State of the World's Stateless <i>by Melanie Khanna</i>	11
Global Campaign for Equal Nationality Rights <i>by Catherine Harrington</i>	18
Chapter 2: Africa	21
1. Stateless persons in Africa	21
2. Regional standards	23
3. Identification for Development (ID4D) and regional passports	26
4. Breaking ground in West Africa: the Abidjan Declaration	27
5. Country profiles: Côte d'Ivoire, Kenya, Madagascar, South Africa	29
6. The Citizenship Rights in Africa Initiative (CRAI) <i>by Liesl Muller</i>	39
Chapter 3: Americas	41
1. Stateless persons in the Americas	41
2. Regional standards	42
3. The Brazil Plan of Action	44
4. Indigenous and border populations	47
5. Country updates: the Bahamas, Canada, Colombia, The Dominican Republic, the United States	48
6. Americas Network on Statelessness and Nationality <i>by Ivonne Garza</i>	54
Chapter 4: Asia and the Pacific	57
1. Stateless persons in Asia and the Pacific	57
2. Regional standards	59
3. Civil Registration	61
4. Country updates: Kyrgyzstan, Malaysia, Myanmar, Nepal, Thailand	63
5. Civil society networks in the Asia-Pacific region: The Central Asian Network on Statelessness <i>by Azizbek Ashurov</i> and The Statelessness Network Asia Pacific <i>by Davina Wadley</i>	70
Chapter 5: Europe	73
1. Stateless persons in Europe	73
2. Regional standards	75
3. Europe's 'refugee crisis'	79

4. Growing engagement by the European Union	83
5. Country profiles: Bulgaria, Estonia, Italy, The United Kingdom	85
6. The European Network on Statelessness (ENS) <i>by Chris Nash</i>	92
Chapter 6: Middle East and North Africa (MENA)	95
1. Stateless persons in the MENA	95
2. Regional and international standards	98
3. Displacement and statelessness	99
4. Arbitrary deprivation of nationality in the Gulf region	100
5. Gender discrimination in nationality laws	101
6. Country updates: Iraq, Kuwait, Lebanon	102
7. Increased momentum on the issue	105
Chapter 7: Introduction	109
The importance of nationality for children <i>by Jacqueline Bhabha</i>	112
We see you <i>by Greg Constantine</i>	120
Chapter 8: The right of every child to a nationality	123
Introduction	125
An interview with Benyam Dawit Mezmur, Chairperson of the United Nations Committee on the Rights of the Child <i>by Maria Jose Recalde Vela</i>	130
Using the CRC to help protect children from statelessness in Serbia <i>by Praxis Serbia</i>	140
Erduan – an interview <i>by Praxis Serbia</i>	143
Advancing children’s right to a nationality through the UN Committee on the Rights of the Child <i>by Francesco Cecon</i>	146
Activating the CRC - tools for civil society engagement	157
Human rights and stateless children <i>by Hernan Vales</i>	163
The boy <i>by Amal de Chickera</i>	167
Discrimination and childhood statelessness in the work of the UN human rights treaty bodies <i>by Peggy Brett</i>	169
Gender and birth status discrimination and childhood statelessness <i>by Betsy L. Fisher</i>	185
Axin – an interview <i>by Thomas McGee</i>	189
Using the UN System to advocate for nationality law reform in Lebanon <i>by Bernadette Habib</i>	191
Using the Inter-American regional framework to help stateless children in the Dominican Republic <i>by Francisco Quintana</i>	195
Using the African regional framework to realise children’s right to nationality in Kenya <i>by Mustafa Mahmoud Yousif</i>	198
Sultan – an interview <i>by Mustafa Mahmoud Yousif</i>	201

Chapter 9: Migration, displacement and childhood statelessness	203
Introduction	205
Migration, forced displacement, and childhood statelessness <i>by Jyothi Kanics</i>	209
The stateless Rohingya <i>by Helen Brunt</i>	223
Accessing documents, preventing statelessness <i>by Monica Sanchez Bermudez</i>	226
Syria's displacement crisis, statelessness and children <i>by Zahra Albarazi</i>	233
Stateless refugee children of Syria - interviews <i>by Thomas McGee</i>	239
The long-overlooked mystery of refugee children's nationality <i>by Gábor Gyulai</i>	242
The open sky or a brick-and-mortar School? Statelessness, education and nomadic children <i>by Heather Alexander</i>	248
Preventing statelessness of migrant children <i>by Alice Sironi and Michela Macchiavello</i>	256
Birth registration problems in complex migration contexts – case studies from the Netherlands <i>by Laura Bosch</i>	265
Risks of statelessness for children of undocumented parents in Europe <i>by Lilana Keith</i>	267
 Chapter 10: The Sustainable Development Agenda and childhood statelessness	 275
Introduction	277
Statelessness, human rights and the Sustainable Development Agenda	281
Stateless at sea <i>by Helen Brunt</i>	290
The SDGs: An opportunity to leave no stateless child behind <i>by Betsy Apple and Laura Bingham</i>	295
The SDGs and childhood statelessness <i>by Tendayi Bloom</i>	304
“Legal identity for all” and childhood statelessness <i>by Bronwen Manby</i>	313
Every child counts <i>by Anne-Sophie Lois</i>	327
Meet the children assisted <i>by Plan International</i>	331
Churches advocating for birth registration <i>by Semegnish Asfaw</i>	333
 Chapter 11: Safeguards against childhood statelessness	 337
Introduction	339
International and regional safeguards to protect children from statelessness <i>by Laura van Waas</i>	342
A nationality for Denny	356
Safeguards against childhood statelessness under the African human rights system <i>by Ayalew Getachew Assefa</i>	359
Mapping safeguards in Europe	368

Foundlings in Côte d'Ivoire <i>by Laura Parker</i>	369
Reflecting on the lost children of Côte d'Ivoire	371
International surrogacy arrangements and statelessness <i>by Sanoj Rajan</i>	374
Preventing childhood statelessness of children of prisoners <i>by Laurel Townhead</i>	385
Do jus soli regimes always protect children from statelessness? Some reflection from the Americas <i>by Juliana Vengoechea Barrios</i>	393
Making safeguards work: A perspective from South African legal practice <i>by Liesl Muller</i>	401
Stateless and invisible <i>by Tini Zainudin</i>	407

Chapter 12: Litigation and legal assistance to address childhood statelessness **409**

Introduction	411
Strategic litigation to address childhood statelessness <i>by Adam Weiss</i>	416
An Italian recipe for reducing childhood statelessness <i>by Nicole Garbin and Adam Weiss</i>	424
Out of limbo: Promoting the right of undocumented and stateless Roma people to a legal status in Italy through community-based paralegals <i>by Elena Rozzi</i>	427
Landmark case notes from Africa and Europe	430
The perpetuation of childhood statelessness in the Dominican Republic <i>by David Baluarte</i>	434
Stateless children of the Dominican Republic <i>by Allison Petrozziello</i>	447
The role of Legal Clinics and local communities in securing the right to a nationality in Chile <i>by Delfina Lawson and Macarena Rodriguez</i>	452
Estela visits the Legal Clinic <i>by Delfina Lawson and Macarena Rodriguez</i>	455
Mobile legal services and litigation in Kyrgyzstan <i>by Ferghana Lawyers</i>	457
Legal action to address childhood statelessness in Malaysia <i>by DHRRA Malaysia</i>	460
The struggle for documentation: A family story <i>by DHRRA Malaysia</i>	465

Chapter 13: Mobilising to address childhood statelessness **469**

Introduction	471
Mobilising to address childhood statelessness: The experience of the European Network on Statelessness through its #StatelessKids campaign <i>by Chris Nash</i>	474
Schools outreach in Poland <i>by Katarzyna Przybyslawska</i>	490
Excerpts from the ENS Schools Outreach Toolkit	492
Campaigning for gender equality in nationality laws <i>by Catherine Harrington</i>	495
Mobilising to address childhood statelessness in Nepal <i>by Subin Mulmi</i>	508

Interview with a child in Nepal who is stateless due to gender discrimination in the nationality law	515
The mobilisation of Bidoon youth <i>by Marie Brokstad Lund-Johansen</i>	518
Being accountable to stateless children and youth: The 2016 UNHCR NGO Consultations session on statelessness <i>by Amal de Chickera</i>	521
Introducing statelessness to Model United Nations conferences <i>by Aleksandra Semeriak Gavrilénok</i>	527
Researching childhood statelessness <i>by Charlie Rumsby</i>	531
Street theatre to address statelessness in the Dominican Republic <i>by Laura Quintana Soms</i>	539
List of Abbreviations	543
List of contributions	547

FOREWORD

“How long will I have to wait to have equal rights to other people?
I have been fighting for it my whole life.”

21 year old stateless Phra from Thailand

To say that we live in difficult times is neither exaggeration nor melodrama. Human rights, freedom, tolerance, inclusion – all are under enormous strain. Conflict, displacement, violence and xenophobia seem to be shaping our world, delivering new challenges and further entrenching existing ones. The field of statelessness is not immune to this. We are also finding ourselves confronted with new and growing problems, such as the heightened persecution and displacement of some stateless minorities, the renewed instrumentalisation of citizenship policy (and statelessness) as a means to punish and exclude people who are “different” or “undesirable” from society and the growing perception of nationality as a privilege that can be taken away rather than a right that must be protected. In the midst of this, we cannot to lose sight of the fact that for most stateless persons, like Phra (cited above¹), statelessness is a deeply personal problem, constricting and negatively shaping many aspects of their lives. They have already been waiting too long. Their situation is no less real or urgent, just because other problems are cropping up across the globe.

Happily, all around the world, people continue to work tirelessly to advance human rights and bring relief to human suffering. The community of persons and organisations committed to addressing statelessness is actually expanding, as more civil society, academic, UN and government actors take up the issue. Now, more than ever, it is important to recognise, share, celebrate and take courage from the efforts that are being made to promote the human rights of stateless persons and foster their inclusion. In our own work on statelessness, we draw great inspiration and motivation from our collaboration with local, national, regional and international partners.

¹ See further *Being accountable to stateless children and youth: the 2016 UNHCR NGO Consultations session on statelessness* by Amal de Chickera in Chapter 13.

With this edition of *The World's Stateless*, we wanted to reaffirm the necessity of maintaining and strengthening engagement on statelessness with renewed vigour in this difficult global environment. The focus on children was, in part, prompted by this. A child who is forced to grow up stateless will not get a second chance at a fair start in life. Even if we must acknowledge that real change will likely be slow in coming for many stateless populations, we cannot be deterred in fighting for every child's enjoyment – today – of the right to a nationality.

It is our intention that the World's Stateless reports will, over the years, serve as reference points, both of the situation of statelessness in the world, and of critical and cutting edge thinking, analysis, information and discourse on relevant themes.² With this object in mind, it is important to us that this publication reflects not only the Institute's thinking, but also that of others from around the world. We are delighted that this second volume really does bring together the collective expertise of the field, with over 50 external contributions from our global partners from different sectors.

That the field of statelessness is one that remains relatively charged with optimism is, we believe, in large part thanks to the spirit, energy and creativity of those who are working tirelessly to identify or create windows of opportunity for change. We feel deeply privileged to work in this field and profoundly grateful to everyone who contributed content to this report. We hope that this report, and its accompanying interactive website (which contains additional resources and further reading) will be useful resources to all those already working on statelessness and will help those working in related fields – human rights, development, migration, etc. – to understand how their engagement may also contribute to helping stateless persons.

Laura van Waas & Amal de Chickera
Co-editors
January 2017

² The First World's Stateless Report, with a thematic focus on 'counting the stateless' was published in December 2014, and in many ways, marked the launch of the Institute. See <http://www.institutesi.org/worldsstateless.pdf>

ACKNOWLEDGEMENTS

This publication is a product of the generosity, goodwill and creativity of a multitude of people from all over the world and all walks of life, who have contributed their time, expertise, skills, resources, stories, outputs and intellectual property towards it. Over a year ago, when we first started thinking about this report – its thematic focus, our approach of inviting external contributions - we decided to be ambitious and to put together an extensive list of potential topics and people ask to contribute content. This was both because the issue of childhood statelessness is so rich and cross-cutting that it was difficult to think small, and because we were anticipating that many of those invited would not be able to devote the time to contribute to a publication for which they would receive no remuneration. The size of the report, the number of contributions and their rich and diverse content shows that we were, in reality, confronted with a “problem” of plenty. Almost everyone we approached was happy to contribute to the report. They were in fact, as excited and enthusiastic as we were about the idea of the report as a model of collaboration and joined up expertise. The joint ownership of this report lies with all of its contributors – stateless children and their parents, those working for NGOs and UN agencies, academics, lawyers, UN treaty body members, artists and photographers. To all of the over 50 contributors, who we will not name again individually here – they are all acknowledged in the table of contents, in each separate contribution and on the dedicated website - we are immensely grateful for your generosity, expertise, collaborative spirit and time.

The report’s editorial team was made up of Institute staff and volunteers, many of whom contributed their time in kind. Laura van Waas and Amal de Chickera served as co-editors, conceptualising the report and its content, reviewing and editing both external and internal contributions and drafting the various introductory texts. Special thanks to María José Recalde Vela – our wonderful assistant editor – who on a volunteer basis coordinated all external contributions to Part Two of the report, edited and reviewed draft essays and communicated with all contributors (to name just a few of her tasks). We are also grateful to our interns Jade Knight and Deborah Ribeiro for helping review first drafts of external contributions, putting together further reading lists and preliminary drafts of the regional updates in Part One.

ACKNOWLEDGEMENTS

Thanks also to Caia Vlieks, for drafting case notes to be included in the publication, as well as ISI fellows Peggy Brett and Juliana Vengoechea Barrios and ISI staff Zahra Albarazi, Sangita Jaghai and Ileen Verbeek who each worked on the regional chapters. Our thanks also to those who reviewed some of the regional chapters – Chris Nash (Europe), Helen Brunt (Asia and the Pacific) and Ivonne Garza (the Americas). While all Institute staff were involved in content, Mark van Waas ensured we did not lose sight of other commitments and deadlines, and also helped with fundraising for the publication.

Editing, proof reading and cross referencing a publication of this size, and with so many contributors, is an immense task. We are extremely grateful to the pro-bono team at Ashurst for proof reading Part Two of the report. Special thanks to Claire Fourel for organising this, and to Kay Auld, Alice Dawson, Rachel Gaughan, Sinead Tulley, Ibrahim Khan, Heather Adams and Karina Clarke for doing such a wonderful job, to a very tight deadline, with the proof reading.

As always, we are extremely grateful to Willem-Jan van der Wolf and his team at Wolf Legal Publishers, for the design, layout and publication of this report. The collaboration we have developed with Willem-Jan and his team and their help with all our publications has given us the confidence to undertake new publications, safe in the knowledge that they can be turned around to a high quality in a short timeframe. Similarly, our partnership with Rogier Bakx and his team at Robiz, has enabled us to think more expansively and creatively, to develop an interactive and dynamic website to accompany the printed report. We are extremely grateful to them all.

While so many of those who contributed to this report have done so for free or at reduced rates, we still would not have been able to publish this report without the generous contributions of our donors. We are particularly grateful to the Sigrid Rausing Trust, for its support of the Institute and the issue, and to Janivo Stichting for its donation towards this report.

Any undertaking of this nature has a way of taking over and demanding more of your time, including time that would otherwise be spent with family and loved ones. We all thank our families for their patience, encouragement and support throughout this process. We would also like to thank the Institute's Trustees, for all their support and advice.

Finally, this report – like so many other tools and resources – ultimately exists for one primary reason: to enable us to collectively do better at combatting statelessness and enhancing the quality of life and inclusion of stateless persons. This report is dedicated to the stateless of the world and to all persons who can, have and will continue to work on their behalf. As this report shows, our strength is in our collaboration.

Part 1

STATELESSNESS AROUND THE WORLD

CHAPTER 1: INTRODUCTION

This is the second edition of the Institute on Statelessness and Inclusion's flagship report on *The World's Stateless* – the second time we have zoomed out from our day-to-day involvement with different aspects of the issue of statelessness in different places, to take stock of the overall state of the phenomenon globally. The first edition was published at the end of 2014, shortly after the launch by the Office of the United Nations High Commissioner for Refugees (UNHCR) of the #Ibelong campaign to end statelessness by 2024.¹ In it, we focused largely on the question of statistical reporting on statelessness, “with a hope to contribute to a better sense of the task ahead by providing an insight into the scope of statelessness around the world”.² At the time, the report helped to reflect on and serve as a complement to the growing international discourse on what the ‘problem’ of statelessness actually looks like and why it is of importance to tackle it.³

Since 2014, the global discourse on statelessness has undergone a striking transformation. The #Ibelong campaign launch marked the culmination of a process of (re)discovery of the issue, in which interested stakeholders were grappling to get to grips with what statelessness entails and it was still vying for a place on the international agenda.⁴ In

¹ UN High Commissioner for Refugees (UNHCR), *Global Action Plan to End Statelessness* (4 November 2014), available at: <http://www.refworld.org/docid/545b47d64.html>. See further www.unhcr.org/ibelong.

² Institute on Statelessness and Inclusion, *The World's Stateless* (2014) available at <http://www.institutesi.org/worldsstateless.pdf>, at page 14.

³ In September 2014, for instance, 300 representatives of governments, academia, civil society, the UN and other stakeholders met in The Hague for the First Global Forum on Statelessness to discuss research findings and policy challenges. See <https://www.tilburguniversity.edu/research/institutes-and-research-groups/statelessness/forum.htm>. For more on the imperative of tackling statelessness, see also section 1(IV) of *The World's Stateless* (2014).

⁴ Consider, for instance, the UNHCR Expert Meetings of 2010-2013 (held in Prato, Geneva, Dakar and Tunis) which sought to interpret long-neglected international treaty standards on statelessness, including the definition of a stateless person as contained in the 1954 Convention relating to the Status of Stateless Persons; and the UNHCR Ministerial Intergovernmental Event on Refugees and Stateless Persons in 2011 which led to concrete pledges by many governments to tackle statelessness. Resources relating to these and other such initiatives can be accessed via <http://www.refworld.org/statelessness.html>.

this new era, the emphasis of the statelessness discourse has shifted from questions of what or why, to when and how. As embodied by the #Ibelong campaign itself, the necessity and even the urgency of countering statelessness is now widely recognised and discussion increasingly centres on how to effectuate international obligations and leverage relevant international frameworks to achieve real and meaningful change. The time for talk has, as it were, made way for the time for action.

Today, as we again take stock of the challenges and opportunities that confront the global community concerned with statelessness, it is important to acknowledge this evolution in the discourse and the ambition with respect to engagement. There are new benchmarks and milestones against which to gauge progress – quite literally, in the case of the #Ibelong campaign, which outlines a first set of milestones for 2017, for each of the ten ‘actions’ of the Global Action Plan to End Statelessness. With this in mind, the focus of this edition of *The World’s Stateless* report has also evolved from a largely descriptive critique of the state of statelessness to an exploration of entry points, tools, frameworks, and strategies for improving the lives of stateless persons and reducing the incidence of statelessness.

In Part Two of this report, we will turn our attention to the situation of stateless children and what can be learned from efforts around the world to more effectively promote the right of every child to a nationality. Before that, this first part of the report offers a more general overview of developments in the field of statelessness. In this opening chapter, Melanie Khanna, Chief of the Statelessness Section of UNHCR, reflects on the state of statelessness globally and highlights areas of progress in relation to the #Ibelong campaign. A short synopsis of developments in respect of the Global Campaign for Equal Nationality Rights, aimed at eliminating gender discrimination in nationality law, is then provided by the Campaign’s manager, Catherine Harrington. A broader stock-taking and analysis of developments since 2014, compiled by the Institute in consultation with civil society partners around the world, is presented in the subsequent chapters of Part One. As in the previous report, we have grouped this material according to the five regions into which UNHCR organises its work and statistical reporting: Africa (Chapter 2), the Americas (Chapter 3), Asia and the Pacific (Chapter 4), Europe (Chapter 5) and the Middle East and North Africa (Chapter 6).

STATE OF THE WORLD'S STATELESS

*Melanie Khanna**

As the rich and varied contributions in this volume amply demonstrate, there have been momentous developments with respect to statelessness since the 2014 edition of this publication. Most notably, in November 2014 the #IBelong Campaign to End Statelessness was launched by UNHCR and partners with the ambition of ending statelessness in ten years. In the two years since then, the Campaign has helped to raise global awareness of statelessness and galvanise the political will to address it. Regional initiatives such as the Abidjan Declaration on the Eradication of Statelessness and the Brazil Declaration and Plan of Action provided important early momentum in this regard; partly as a result of these helpful regional initiatives, a number of States have developed or begun to develop National Action Plans that envision the reforms necessary to prevent and resolve statelessness. In addition, some States have made positive legislative and policy changes since 2014 even without National Action Plans, as discussed below. With respect to solutions to existing situations, governments worldwide have granted or confirmed nationality for tens of thousands of stateless persons in each of the last two years. In most countries where reductions are happening progress is steady, albeit not as fast as one would hope.¹ Over the last two years adherence to the

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¹ Notwithstanding continued reductions over the last two years in many countries, the overall number of stateless persons counted in UNHCR's statistical reporting has gone slightly up during this period, largely because of improved data. This trend could continue for some time to come if advances in data about stateless populations continue to help close the gap between the number of stateless persons reported by UNHCR in its statistical reporting (approximately 3.7 million at the end of 2015) and UNHCR's global estimate that there are more than ten million stateless persons worldwide. UNHCR, 'Global Trends: Forced Displacement in 2015' (20 June 2016), available

statelessness conventions has grown notably stronger: as of the end of September 2016, ten governments have acceded to one or both of the UN Statelessness Conventions since the Campaign was launched, bringing the total number of Parties to the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness to 89 and 68, respectively.

The developments highlighted above would not have been possible without the championship of many actors. UNHCR's strategy for achieving the Campaign's goals relies on enhanced diplomacy, stronger civil society coordination, and more robust engagement by other international organisations, and there have been important strides in all of these areas. The 'Friends of the Campaign' group, launched in October 2015, now meets quarterly in Geneva to exchange information about upcoming opportunities to advocate for the realisation of the right to nationality. The States in this group and others have been active bilaterally, regionally, and globally. At the global level, a resolution on the Right to Nationality was adopted by the Human Rights Council in June with over one hundred co-sponsors.² The follow up work called for in the resolution will provide an important platform for cooperation among UNHCR, OHCHR, States, and civil society to disseminate good practices, particularly with respect to the elimination of gender discrimination from nationality laws. At the regional level, the African Commission on Human and Peoples' Rights adopted a draft Protocol on the Right to Nationality that will go to AU Member States for review in 2017. A regional conference on statelessness in Central Asia was hosted by Turkmenistan in September 2016, and in October 2016 the League of Arab States, together with UNHCR, held an expert meeting on the theme of legal identity and belonging with a view to adoption of a Declaration at a subsequent stage. In Asia, work is ongoing under the Bali process to produce a toolkit to support the commitment made by all states in the region to universal civil registration. In Europe, following the adoption in 2015 of the first ever EU Council Conclusions on Statelessness, UNHCR is working closely with EU institutions to

at: <http://www.refworld.org/docid/57678f3d4.html>. For persons under UNHCR's Statelessness Mandate please see table 7 of the annex: <http://www.unhcr.org/globaltrends/2015-GlobalTrends-annex-tables.zip>.

² UN Human Rights Council (UN HRC), 'the right to a nationality: women's equal nationality rights in law and in practice: resolution/adopted by the Human Rights Council' (18 July 2016), A/HRC/RES/32/7, available at <http://www.refworld.org/docid/57e910044.html>.

encourage engagement with governments, civil society and others to end statelessness within the Union and beyond. And finally, in the Americas, the Organisation of American States General Assembly passed a resolution in 2016 welcoming the #IBelong Campaign and urging action to prevent and resolve statelessness.

Civil society has also ramped up its advocacy efforts. In June 2016 several dozen NGOs, including international human rights organisations attended a global statelessness retreat organized by UNHCR. That retreat resulted in agreement on a number of shared strategic objectives for the year ahead, including cooperation to make more effective use of the human rights mechanisms of the United Nations, to produce practical guidance on paralegal assistance projects to address statelessness, and to launch a Coalition on Every Child's Right to Nationality. New regional civil society networks have sprung up in the last twenty-four months, complementing those already in place in Europe and the Americas. A number of NGOs have led initiatives that have been highly complementary to UNHCR's effort to call attention to childhood statelessness in particular. For example, the European Network on Statelessness launched an innovative #Statelesskids Campaign in 2015; in 2016 the Institute on Statelessness and Inclusion (ISI) produced a comprehensive toolkit to support various stakeholders' ability to engage with the Committee of the Rights of the Child on the right to nationality ("Addressing the Right to a Nationality through the Convention on the Rights of the Child: A Toolkit on Civil Society"); and the Lawyers for Human Rights and ISI collaborated on a solutions-oriented publication on childhood statelessness in South Africa.

Other international organisations are also becoming more active in the fight against statelessness. UNHCR recently launched an effort to reinvigorate cooperation and shared ownership of this issue in relation to the rule of law, human rights, and development mandates of other agencies. A one-day inter-agency dialogue on statelessness held in New York in June of 2016 attracted strong participation from UN organisations and the World Bank. It resulted in agreement on a collective effort to strengthen the capacity of UN Country Teams to address statelessness. In addition, UNICEF has committed to partner with UNHCR on the new Coalition to ensure Every Child's Right to Nationality, and UNHCR and the World Bank are working to find synergies between the Campaign and the Bank's new 'ID4D Initiative'.

which aims to ensure that every person on the planet has ID by 2030, consistent with Sustainable Development Goal 16.9. The Sustainable Development Goals generally provide important opportunities for partnerships with development actors to address the root causes of statelessness and advocate for inclusion of stateless persons in development planning. At the same time, the global push to ensure full ID coverage runs the risk of leaving stateless populations more vulnerable if they're left behind. It will therefore be important for all stakeholders to strengthen advocacy efforts with governments and development actors in favour of the principle of universality with respect to basic ID, including birth registration.

At the end of 2015 UNHCR and the Inter-Parliamentary Union co-organized, with the Parliament of South Africa, a Conference on Ensuring Everyone's Right to Nationality that attracted some hundred Parliamentarians worldwide and that continued the strong partnership that UNHCR already enjoys with the IPU on this issue. Parliamentarians are of course key actors in the fight to end statelessness, as they are instrumental in the achievement of meaningful law reform.

The first anniversary of the #IBelong Campaign attracted significant press attention to the issue, particularly with respect to the risk of statelessness among the forcibly displaced. This remains a serious issue, especially for those displaced persons who come from countries where gender discrimination in the nationality law makes it difficult or even impossible for mothers to transmit nationality to their children. Syria and Iraq, for example, are two countries of origin with gender discrimination in their nationality laws. Birth registration can mitigate the risk of statelessness among refugee children but it cannot eliminate the risk entirely. UNHCR called attention to the plight of stateless children in its first Campaign anniversary publication 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' and offered four concrete recommendations to States to prevent and reduce childhood statelessness.³ The first hand testimonies in that report have helped UNHCR and others to convey the human impact of statelessness to a wider public audience.

³ UN High Commissioner for Refugees (UNHCR), *I Am Here, I Belong: The Urgent Need to End Childhood Statelessness*, (3 November 2015), available at <http://www.refworld.org/docid/563368b34.html>.

At the country level, there have been many notable achievements in relation to various Actions in UNHCR's Global Action Plan⁴, including Action 1 (Resolve Existing Major Situations of Statelessness); Action 2 (Ensure That No Child Is Born Stateless); Action 6 (Grant Protection Status to Stateless Migrants and Facilitate Their Naturalisation); Actions 7 and 8 (relating to birth registration and nationality documentation); Action 9 (Accede to the UN Statelessness Conventions) and Action 10 (Improve Quantitative and Qualitative Data on Stateless Persons).

With respect to Action 1, some important developments include the following: UNHCR's partnership with the Ministry of Justice in Cote d'Ivoire supported approximately 5,000 stateless people to acquire Ivorian nationality as of June 2016. In Central Asia, UNHCR's work with government and NGO partners has promoted the identification and resolution of the cases of tens of thousands of statelessness people since 2014. In Thailand, close cooperation with the Royal Thai Government and NGO partners working with stateless communities has resulted in the granting of nationality to more than 23,000 stateless individuals over the past three and a half years, bringing the total registered population down to 438,821 as of September 2016.

With respect to Action 2, a number of States have amended their citizenship laws in positive ways since 2014. Estonia's amendments to its Citizenship Act make it automatic for children born to parents with 'undetermined citizenship' to acquire citizenship at birth by naturalisation. They also ease naturalisation requirements for persons over 65 years of age. Latvia's amendments to its law make it easier for children of non-citizen parents to acquire Latvian nationality. And Armenia's reforms ensure that all children born on Armenian territory who would otherwise be stateless acquire Armenian nationality.

With respect to Action 6, in 2016, the Government of Bolivia adopted a resolution to facilitate the naturalisation of stateless persons and refugees. In the same year, Costa Rica adopted a statelessness determination procedure. Recent law reforms in Greece pave the way for a Presidential Decree establishing a statelessness determination procedure. In 2015, the Ministry of Internal Affairs in Kosovo adopted

⁴ UN High Commissioner for Refugees (UNHCR), *Global Action Plan to End Statelessness*, (4 November 2014), available at <http://www.refworld.org/docid/545b47d64.html>.

an instruction establishing a statelessness determination procedure and granting protection status to stateless individuals and a decision by the Hungarian Constitutional Court on 23 February 2015 removed the requirement that only lawfully staying persons could initiate a statelessness determination procedure in Hungary. Additional examples can be found in UNHCR's recently published 'Good Practices Paper on Establishing Statelessness Determination Procedures to Protect Stateless Persons'.⁵

Improvements that support Action 7 on birth registration are taking place globally, and it can be expected that these will be further reinforced by SDG 16.9 and the creation of a new Global Working Group on CRVS, as well as by regional initiatives such as the 2014 Ministerial Declaration on CRVS in Asia and the Pacific. One of the most important achievements has been the significant increase in birth registration rates among refugees in the Middle East and North Africa region in the last two years, thanks to collective efforts to mitigate the risk of statelessness among the forcibly displaced. At the same time, efforts to ensure that all those entitled to nationality documentation are issued with it (Action 8) are seeing results in Costa Rica, Kyrgyzstan, Malaysia, Tajikistan, and elsewhere. It can be hoped that additional progress in this area will be made soon in Nepal and the Dominican Republic, among other places.

The achievements with respect to Action 9 (accession to the statelessness conventions) have already been detailed above. With respect to Action 10, important country-level mapping studies have been carried out either locally or country-wide in Iceland, Finland, Norway, Kenya, and Serbia, among other places. Additional surveys are underway or in the works in a number of countries, including in Benin, the Gambia, Mali, Ghana, and Zimbabwe.

One disappointment in terms of progress in the last two years relates to Action 3, 'The Removal of Gender Discrimination from Nationality Laws'. While there have been substantial advocacy efforts by UNHCR, the Global Campaign on Equal Nationality Rights, and others—

⁵ UN High Commissioner for Refugees (UNHCR), 'Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons' (11 July 2016), available at <http://www.refworld.org/docid/57836cff4.html>.

and although a number of States have pledged to eliminate gender discrimination from nationality laws as part of regional initiatives or during the course of their Universal Periodic Reviews—as of September 2016 the number of States with gender discrimination in their nationality laws remains the same as it was in 2014. Given the pledges made to eliminate this discrimination, however, and given law reform processes in progress in Liberia, Madagascar, and Somalia, among other places, it can be hoped that there will be some meaningful progress over the next two years.

The year 2017 will be an important one, as it is a ‘Milestone Year’ for UNHCR’s #IBelong Campaign, when progress will be measured against the specific targets set out in the Global Action Plan. The numerical targets are ambitious ones and in many areas progress is likely to fall short of the Campaign’s goals. UNHCR and other stakeholders will thus need to redouble their efforts as the Campaign approaches its mid-way point and capitalise on higher levels of greater global awareness and political will. The inclusion of statelessness in the 2016 New York Declaration may present opportunities in this regard.⁶ The challenges will be significant, however, as the global displacement crisis has not only heightened the risk of new statelessness situations but has also made national debates about belonging and nationality more contentious in some parts of the world. Deprivation of nationality linked to counterterrorism efforts has also become a topic of debate in many countries. In the years ahead it will be important for the international community to counter xenophobia and fear-mongering with concrete evidence about the benefits of social inclusion and the risks of marginalisation. Moreover, coordinated diplomacy to promote the right to nationality should be matched with development assistance to improve the rule of law and Civil Registration and Vital Statistics systems worldwide. In sum, there are rather remarkable opportunities today to advance the cause of ending statelessness; at the same time, there are new risks that must be carefully navigated.

⁶ See paragraph 72 of the New York Declaration, available at <https://refugeesmigrants.un.org/declaration>

Global Campaign for Equal Nationality Rights

*Catherine Harrington**

Since its launch in 2014, the Global Campaign has exposed the costs of gender-discriminatory nationality and is mobilising action to realise needed reforms amongst international and national policy makers and civil society. At the international level, the Global Campaign increased attention to this issue, through: informing parliamentarians from 50+ countries of the impact of gender discriminatory nationality laws at a conference on statelessness organized by the Inter-Parliamentary Union and UNHCR; engagement in target countries' UPR, CEDAW, and CRC reviews; and a June 2016 UN Human Rights Council (HRC) Side Event, organized by the Global Campaign and cosponsored by fifteen Member States, three UN agencies, and ISI, which raised awareness of the new HRC resolution 32/7, "The Right to a Nationality: Women's Equal Nationality Rights in Law and Practice".¹ Co-sponsored by 107 Member States, the new resolution calls for the reform of all gender-discriminatory provisions in nationality laws. The need for gender equal nationality rights was also highlighted around both the 2015 and 2016 UN Open Debates on Women, Peace, and Security (WPS), including in the 2016 NGO Working Group on Women, Peace, and Security's Open Letter,² signed by the Global Campaign and 253 NGOs from 55 countries.

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¹ Available at <http://equalnationalityrights.org/images/zdocs/HRC-Resolution-The-Right-to-a-Nationality---Womens-Equal-Nationality-Rights-in-Law-and-Practice.pdf>.

² Available at <http://equalnationalityrights.org/images/zdocs/pdf-CSO-OpenLetter-WPS-OpenDebate-Oct2016.pdf>.

At the national level, activities undertaken by the Global Campaign increased momentum for reform in several countries. The Global Campaign's February 2016 Gulf regional conference on women's nationality rights,³ co-organized by Bahrain Women Union, helped to revitalise the national campaign for reform, according to a leading Bahraini activist – a movement stifled since the 2011 uprisings. Following an October 2015 Madagascar workshop on nationality rights,⁴ co-organized with Focus Development, UNHCR, and Equal Rights Trust, the President of the National Assembly and thirty parliamentarians committed to reforms. A new citizenship law enshrining women's right to confer nationality on children is now under consideration and expected to be passed by parliament. Global Campaign members led by Equality Now filed an amicus brief, with other human rights organisations, to the US Supreme Court regarding the *Lynch v. Morales Santana* case challenging discrimination against single fathers in US nationality law. Oral arguments took place in Washington, D.C. on November 9, 2016. During the February 2015, ECOWAS Members committed to advancing gender equal nationality rights, in the Abidjan Declaration of ECOWAS Ministers,⁵ with explicit commitments made by Liberia and Sierra Leone to enact reforms. In 2016, Somalia's Ministry of Justice engaged in public consultations regarding proposed changes to the nationality law, which would advance women's nationality rights.

³ See further <http://equalnationalityrights.org/news/62-bahrain-civil-society-government-discuss-achieving-women-s-nationality-rights-at-global-campaign-conference?highlight=WYjiYWhyYWluliwiYmFocmFpbidzIl0=>.

⁴ See further <http://equalnationalityrights.org/news/45-madagascar-poised-to-remove-gender-discrimination-from-nationality-laws?highlight=WYltYWRhZ2FzY2FyIiwibWFkYWdhc2NhcidzIl0=>.

⁵ Available at <http://www.refworld.org/docid/54f588df4.html>.

CHAPTER 2: AFRICA

1. Stateless persons in Africa

Statelessness remains a significant but poorly documented problem in Africa. The stateless population overlaps with a larger undocumented population whose nationality status is unclear until put to the test through efforts to acquire documentation. There are, however, important signs of progress: a number of States have taken important steps towards resolving cases of statelessness; the African Human Rights system has developed its positions and guidance on the right to nationality; and the Abidjan declaration by the Heads of State of the Economic Community of West African States (ECOWAS) has shown that there is political will to eradicate statelessness.

Statelessness in Africa has a number of causes. Of the 27 States which still discriminate against women in their ability to transmit nationality to their children, nine are in sub-Saharan Africa¹ and many African States do not have safeguards guaranteeing nationality to children born in their territory who would otherwise be stateless,² with the result that children continue to be born stateless across Africa. Racial, religious, and ethnic discrimination are present in the nationality laws of around ten African States³ and result in individuals being unable to acquire nationality. Nomadic and cross-border populations continue to face practical and political challenges as nationality laws are not designed to accommodate them and settled populations remain suspicious of their loyalties.⁴ Displaced persons, including refugees, run the risk of losing their connection with their country of origin as well as facing difficulties acquiring documentation, which may result in statelessness, particular in subsequent generations.⁵ State succession,

¹ Burundi, Liberia, Madagascar, Mauritania, Sierra Leone, Somalia, Sudan, Swaziland and Togo. See, UNHCR 'Background Note on Gender Equality, Nationality Laws and Statelessness 2016' (2016).

² B. Manby, *Citizenship Law in Africa: A Comparative Study* (Open Society Foundations, 2016), 49-52.

³ Ibid, 60-62.

⁴ Ibid, 1-2.

⁵ This is related to limited access to naturalisation as well as problems maintaining contact with the country of origin. Ibid, 2 and 128-133;

both the legacy of decolonisation and more recent succession situations, and the resulting redefinitions of national belonging are also a cause of statelessness in Africa.⁶ Finally, statelessness can result from the lack of due process and the broad discretion granted to State officials responsible for the issuing of birth certificates and identity cards, which in practice may determine an individual's access to nationality.⁷

Table 1: Countries in Africa with over 10,000 stateless persons⁸

Cote d'Ivoire	700,000
Zimbabwe	300,000
Kenya	20,000
Democratic Republic of Congo	*
Eritrea	*
Ethiopia	*
Madagascar	*
South Africa	*

At the end of 2015 UNHCR recorded 1,021,418 persons under its statelessness mandate in Africa,⁹ but the real figure is probably much higher as this is based on the estimated populations in only six countries. Five further countries are marked with an asterisk in UNHCR's figures, indicating that they have significant, but uncounted stateless populations. An estimate of the stateless population of Zimbabwe was included in UNHCR's statistics for the first time in 2015, but represents the only change in the figures since 2014.¹⁰

Norwegian Refugee Council (NRC) and Tilburg University, 'Statelessness and Displacement: Scoping Paper' (2016); L. Hovil, 'Ensuring that today's refugees are not tomorrow's stateless: solutions in a refugee context' in L. van Waas and M. Khanna (eds), *Solving Statelessness* (Wolf Legal Publishers, 2016).

⁶ B. Manby, *Citizenship Law in Africa: A Comparative Study* (Open Society Foundations 2016), 2.

⁷ Ibid, 2, 116.

⁸ UN High Commissioner for Refugees (UNHCR), 'Global Trends: Forced Displacement in 2015' (2016), annex 2. Available at <http://www.unhcr.org/576408cd7.pdf>

⁹ UN High Commissioner for Refugees (UNHCR), 'Global Trends 2015' (2016), Annex Table 1.

¹⁰ Ibid, Annex Table 7.

2. Regional standards

Article 6(3) of the African Charter on the Rights and Welfare of the Child provides that “Every child has the right to acquire a nationality” and 6(4) requires States Parties to grant nationality to an otherwise stateless child born in their territory.¹¹ These rights have been explored in detail in a General Comment of the African Committee of Experts on the Rights and Welfare of the child, adopted in April 2014.¹² The General Comment recognises the “profoundly negative impact on respect for and fulfilment of other human rights” of statelessness and the need not only for nationality but also proof of nationality in order to be able to access rights. It highlights the importance of access to nationality in the State with which an individual has a connection and the extent to which recognition of such connections benefits both the State and the individual. Following its jurisprudence in *The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian Descent in Kenya) v. Kenya* the ACERWC adopts a purposive reading of Article 6(3) stressing that the best interests of the child requires that children should acquire a nationality from birth and must not be made to wait until they turn 18. The ACERWC encouraged States to adopt the ‘double *jus soli*’ approach whereby a child born in the State one of whose parents was also born in the State acquires nationality at birth and to allow children not born in the State but who have lived there for much of their childhood to acquire nationality as well as facilitating naturalisation for children born in the State. It also highlighted as a matter of good practice the granting of nationality from birth to children born in the territory whose parents are lawfully and habitually resident there.¹³

The African Charter on Human and Peoples’ Rights does not contain a right to a nationality. However the African Commission on Human and Peoples Rights which oversees the implementation of the Charter has found that Article 5 (which provides that “[e]very individual shall have the right to the respect of the dignity inherent in a human being and to

¹¹ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49, arts 6(3) and 6(4).

¹² African Committee of Experts on the Rights and Welfare of the Child, ‘General Comment No. 2 on Article 6 of the ACRWC: “The Right to a Name, Registration at Birth, and to Acquire a Nationality”’ (2014), ACERWC/GC/02.

¹³ See also *Safeguards against childhood statelessness under the African human rights system* by Ayalew Getachew Assefa in Chapter 11.

the recognition of his legal status”) includes the right to a nationality. In 2013 a resolution of the African Commission on Human and Peoples’ Rights (ACommHPR) reaffirmed this position (originally established in the ACommHPR’s case law) in general terms.¹⁴ The African Commission has since undertaken a study of nationality in Africa¹⁵ and produced a draft protocol to the African Charter on the Right to Nationality. This draft protocol was adopted by the African Commission in July 2015 and in July 2016 was approved by the Executive Committee of the African Union beginning the process of its adoption as a legal standard.¹⁶

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa is more limited in its promotion of women’s equal right to acquire, retain and transmit nationality than the international standards, providing only that “a woman shall have the right to retain her nationality or to acquire the nationality of her husband” and “a woman and a man shall have equal rights with respect to the nationality of their children *except where this is contrary to a provision in national legislation or is contrary to national security interests*”.¹⁷ This clause permitting national law to override the principle of gender equality is unfortunate and runs counter to the general provisions on gender equality in this protocol.¹⁸

¹⁴ African Commission on Human and Peoples’ Rights (ACommHPR), Resolution 234 on the Right to Nationality, 23 April 2013. This position had already been taken in, *Modise v Botswana*, Communication 97/93, ACommHPR (6 November 2000), para 91 and *Amnesty International v Zambia*, Communication No. 212/98, ACommHPR (5 May 1999), para 58.

¹⁵ ACommHPR, ‘The Right to Nationality in Africa’ (2014).

¹⁶ AU Executive Council of Ministers, ‘Decision on the Activity Report of the African Commission on Human and Peoples’ Rights’ (15 July 2016), AU Doc. EX.CL/968 (XXIX).

¹⁷ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (adopted 7 November 2003, entered into force 25 November 2003), art 6 (emphasis added).

¹⁸ To date no cases have tested the interpretation of this provision.

African states at the Universal Periodic Review

Just over half of sub-Saharan African States reviewed in the second cycle of the Universal Periodic Review received at least one recommendation on statelessness or the right to nationality: 23 out of 45 states. There have, however, been some significant gaps – of the eight States with known or suspected stateless populations of more than 10,000 persons five did not receive any relevant recommendations. Côte d'Ivoire, for example, with the highest reported stateless population, while receiving four recommendations relating to this issue in the first UPR cycle, received none in the second. Moreover, of the nine States which discriminate against women in the ability to transmit nationality to their children, only five received recommendations on this subject. Yet, several of these states received numerous recommendations on the issue, including from other African countries, urging them to reform the nationality law. Swaziland received as many as 7 recommendations to amend its gender discriminatory nationality law during the second UPR cycle, including from Botswana, Djibouti, and Sierra Leone (which also restricts women's nationality rights). A number of the recommendations which were directed towards this issue explicitly raised concerns about statelessness, such as this one made to Madagascar by the United States: "reform its nationality law to ensure that all citizens have equal right to confer nationality to their children and the children born to citizen mothers are no longer at risk of statelessness". Of the other recommendations made to African states during the second UPR cycle which are relevant to statelessness and nationality issues, most addressed accession to one or both of the UN statelessness conventions. A few also touched on other issues – for instance, Kenya made the recommendations to Namibia that it "align the provisions of the nationality law with international human rights standards so as to enable children born in the territory of Namibia whose parents are unknown to acquire nationality of Namibia".

3. Identification for Development (ID4D) and regional passports

Across the region, many people face severe obstacles in accessing *proof* of nationality. Indeed, it has been suggested that “in practice, individual Africans far more often face the practical impossibility of obtaining official documentation than an explicit legal denial of nationality”.¹⁹ Where individuals or groups face systematic exclusion from birth registration, identity documents or passports, this can expose them to the risk of statelessness, especially where multiple generations are effected. As new policies or programmes relating to documentation of identity (and nationality) are rolled out in Africa, these can therefore also have implications for the issue of statelessness in the region.

In 2014 the African Union (AU) announced the launch of an African Union passport, with the aim of issuing these biometric passports to all Africans by 2018²⁰ and, in 2016, the first AU passports were issued to Heads of State.²¹ These passports are intended to promote the free movement of people as part of the 2063 Agenda objective of strengthening African unity and integration and optimising “the use of Africa’s resources for the benefits of all Africans”. Also in 2014, the World Bank launched its Identification for Development (ID4D) initiative to support efforts to provide documentation to the estimated 1.5 billion undocumented people worldwide.²² This initiative links to Sustainable Development Goal 16.9 “providing legal identity for all, including birth registration, by 2030” and recognises the connection between proof of identity and access to rights and services.

These documentation initiatives present both opportunities and risks for addressing statelessness in Africa. Increased documentation should improve the availability of data, which has been particularly sparse in Africa not least because of the difficulty of distinguishing between those who are undocumented citizens and those who are undocumented because they are stateless. However, this creates the risk that some

¹⁹ B. Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* (2015), p 183.

²⁰ African Union, ‘Agenda 2063: The Africa We Want’ (2014), para 67(k).

²¹ African Union, ‘African Union Passport Launched during Opening of 27th AU Summit in Kigali’ Press Release (17 July 2016) <http://www.au.int/en/pressreleases/31182/african-union-passport-launched-during-opening-27th-au-summit-kigali>

²² World Bank, ‘Identification for Development’, available at <http://www.worldbank.org/en/programs/id4d>

individuals who have been treated as citizens will in effect become stateless as a result of being refused documentation (or because they are unable to produce the additional information and evidence required for the issue of these new forms of identification). Increased documentation also runs the risk of increasing the vulnerability of those without documentation, including those who cannot access documentation because they are stateless, both by limiting access to services for those without IDs and by increasing the tendency to see documentation as synonymous with proof of citizenship.²³

4. Breaking ground in West Africa: the Abidjan Declaration

On 25 February 2015, the Economic Community of West African States (ECOWAS) Member States adopted the Abidjan Declaration on the eradication of statelessness in West Africa.²⁴ This ground-breaking declaration includes 25 commitments covering prevention of statelessness, identification and protection of stateless persons, the resolution of existing situations of statelessness, and strategies and partnerships for fighting statelessness. The declaration makes a particular commitment to ensuring that all children acquire nationality at birth and recognises the impact of gender discrimination in nationality laws. It also addressed the need to improve civil registration systems and to tackle migration as a factor in creating statelessness.

In February 2016 the first anniversary of the Abidjan Declaration provided an opportunity to assess the progress made towards its implementation²⁵ and in April a draft action plan on implementation was developed with ECOWAS States also indicating an interest in moving towards a binding treaty to replace the Declaration.²⁶ By

²³ See, for instance, A Gelb and B. Manby, 'Has Development Converged with Human Rights? Implications for the Legal Identity SDG' (2016), available at <http://www.cgdev.org/blog/has-development-converged-human-rights-implications-legal-identity-sdg>.

²⁴ Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness, (25 February 2015).

²⁵ See generally, UN High Commissioner for Refugees (UNHCR), 'First anniversary of the Abidjan Declaration on the eradication of statelessness, Press Release' (25 February 2016), available at <http://www.unhcr.org/56ceda796.html>; UN High Commissioner for Refugees (UNHCR), '#IBelong Campaign Update April 2016', (April 2016).

²⁶ UN High Commissioner for Refugees (UNHCR), '#IBelong Campaign Update July 2016', (2016).

February 2016, nine of the fifteen ECOWAS States had begun developing action plans for the eradication of statelessness with two (Benin and Gambia) having been approved at the Ministerial level. Benin and Mali have implemented programmes to deliver birth certificates to unregistered children²⁷ and four States (Guinea, Burkina Faso, Liberia and Togo) have announced revisions of their nationality laws while Senegal is preparing a Children's Act which would protect against statelessness at birth.²⁸ In terms of accessions to the UN Statelessness Conventions, Guinea-Bissau, Mali and Sierra Leone have ratified both Conventions, Burkina Faso has acceded to the 1961 Convention, and Ghana and Togo are taking steps towards accession.²⁹ Finally, Benin, Gambia, Ghana Mali and Nigeria have begun mapping studies which should contribute to a better understanding of the number and profile of stateless persons in these regions.³⁰

²⁷ UN High Commissioner for Refugees (UNHCR), '#IBelong Campaign Update April 2016' (2016).

²⁸ UN High Commissioner for Refugees (UNHCR), 'First anniversary of the Abidjan Declaration on the eradication of statelessness, Press Release' (25 February 2016), available at <http://www.unhcr.org/56ceda796.html>

²⁹ List of States Parties available at, United Nations Treaty Collection, 'Convention relating to the Status of Stateless Persons', available at https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=en; United Nations Treaty Collection, 'Convention on the Reduction of Statelessness', available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=en. Burkina Faso's accession to the 1961 Convention was announced on 20 October 2016, but is not yet included in the list of States Parties by the United Nations Treaty Collection. UN High Commissioner for Refugees (UNHCR), 'Burkina Faso accedes to the 1961 Convention on the Reduction of Statelessness' (20 October 2016), available at <http://kora.unhcr.org/burkina-faso-accedes-1961-convention-reduction-statelessness/>. For Ghana and Togo's commitments see, UN High Commissioner for Refugees (UNHCR), 'First anniversary of the Abidjan Declaration on the eradication of statelessness, Press Release' (25 February 2016), available at <http://www.unhcr.org/56ceda796.html>; UNHCR 'Statelessness in West Africa: Newsletter 10: July-September 2016'. This means that of the 15 ECOWAS States 12 are now parties to both Conventions and only Cape Verde has made no moves towards accession.

³⁰ UN High Commissioner for Refugees (UNHCR), '#IBelong Campaign Update July 2016', (July 2016); UNHCR 'Statelessness in West Africa: Newsletter 10: July-September 2016'.

Other sub-regional initiatives

West Africa is not the only sub-region in which there have been discussions on a coordinated response to statelessness. As reported in the December 2016 #ibelong campaign update issued by UNHCR, both the East African Community (EAC) and the Southern African Development Community (SADC) have tabled this issue.³¹ The annual Zinduka festival, held in Uganda on 29 November 2016 drew civil society organisations from across the EAC and included a thematic ‘convening’ on statelessness at which the establishment of a Coalition on Statelessness was discussed. At the SADC Parliamentary Forum’s 40th plenary session, held in Zimbabwe on 13 November 2016, a resolution “On the Prevention of Statelessness and the Protection of Stateless Persons in the SADC Region” was passed – addressing the questions of law reform and accession to the statelessness conventions.³²

5. Country profiles

The 2014 edition of the Institute on Statelessness and Inclusion’s World’s Stateless Report noted that “a dearth of information on the scope of statelessness in Africa is a protracted problem”.³³ Across the region, however, a number of research and mapping initiatives are gradually helping to establish a clearer picture of the situation of stateless populations and the factors which are driving nationality problems. The publication by Bronwen Manby of a doctoral dissertation which provides an in depth comparative examination of nationality law and practice in Africa in late 2015 – a culmination of many years of research on these questions—is one important piece in this puzzle.³⁴ She has also authored a study for UNHCR and IOM

³¹ UN High Commissioner for Refugees (UNHCR), ‘#IBelong Campaign Update December 2016’, (December 2016), available at <http://www.refworld.org/docid/585bd6564.html>

³² See also NewsDay, ‘Sadc countries urged to domesticate laws on statelessness’ (12 November 2016), available at <https://www.newsday.co.zw/2016/11/12/sadc-countries-urged-domesticate-laws-statelessness/>.

³³ Institute on Statelessness and Inclusion, *The World’s Stateless* (2014), available at <http://www.institutesi.org/worldsstateless.pdf>.

³⁴ B. Manby, *Citizenship and Statelessness in Africa: The law and politics of*

looking specifically at the West Africa region.³⁵ At the national level, mapping efforts are underway in a number of countries, with UNHCR for example publishing a comprehensive study of the situation in Côte d'Ivoire in late 2016.³⁶ Thematic studies have also helped to elucidate the challenges faced in specific countries in Africa, such as on the issue of gender discrimination in nationality laws in the 2015 report published by the Equal Rights Trust which covers Madagascar and Kenya (alongside Nepal and Indonesia).³⁷ The new 'Citizenship Rights in Africa' website, re-launched in the second half of 2016, offers an impressive database of news articles, reports, legislation and jurisprudence about nationality law, identification and statelessness in Africa. It is searchable by country, theme, and type of media, serving as a key resource for activists working for the eradication of statelessness and the realisation of the right to a nationality in Africa.³⁸

The following paragraphs offer a snapshot of recent developments in four countries in Africa – Côte d'Ivoire, Kenya, Madagascar, and South Africa – where statelessness is known to be a significant problem but where new research and other initiatives are now helping to drive progress.

Côte d'Ivoire

The main cause of statelessness in Côte d'Ivoire is the nationality law which grants citizenship purely on the basis of descent and does not include safeguards against statelessness.³⁹ As a result, hundreds of thousands of persons who have been categorised as 'foreigners'—in

belonging (2015). Relatedly, in 2016, Manby published an updated, 3rd edition of the report 'Citizenship Law in Africa: A Comparative Study' (Open Society Foundations, 2016), available at <http://www.refworld.org/docid/56a77ffe4.html>.

³⁵ B. Manby, 'Nationality, Migration and Statelessness in West Africa. A study for UNHCR and IOM' (UNHCR & IOM, 2015), available at <http://www.refworld.org/docid/55b886154.html>.

³⁶ M Adjami, 'Statelessness and Nationality in Côte d'Ivoire - A Study for UNHCR' (UNHCR, December 2016), available at <http://www.refworld.org/docid/58594d114.html>.

³⁷ Equal Rights Trust, 'My children's future. Ending gender discrimination in nationality laws' (2015), available at <http://www.equalrightstrust.org/ertdocumentbank/My%20Children%27s%20Future%20Ending%20Gender%20Discrimination%20in%20Nationality%20Laws.pdf>.

³⁸ See <http://citizenshiprightsfrance.org/>. See also section 6 below.

³⁹ See also *Foundlings in Côte d'Ivoire* by Laura Parker in Chapter 11.

some cases despite living in Côte d'Ivoire for generations—are unable to obtain Ivoirian nationality, leading to the highest reported figure of statelessness on the African continent.⁴⁰ There has, however, been some progress towards reducing the number of stateless persons. Amendments to the law in 2013 introduced gender neutral provisions on access to nationality through marriage and enabled persons who should have been entitled to nationality under the law in force before 1972 (which provided that a child born in Cote d'Ivoire could opt for nationality at majority) to acquire nationality by declaration. By August 2016, 10,219 persons had acquired nationality certificates through this process with more than 123,000 people having submitted applications.⁴¹ Others had benefited from late birth registration, an important step towards acquiring nationality.⁴² Both governmental and civil society initiatives have also been created to provide legal aid to those seeking nationality through this procedure and to those whose claims for nationality have been dismissed or whose cases have been closed.⁴³

Other noteworthy developments include the African Commission on Human and Peoples' Rights decision of 27 May 2016 in the case of *Open Society Justice Initiative v Cote d'Ivoire* which reaffirmed the position that the right to a nationality is protected under Article 5 of the African Charter on Human and Peoples' Rights. In its decision the Court calls on Cote d'Ivoire to amend its nationality law and improve access to birth registration.⁴⁴ In a referendum held on 30 October 2016, public support was given to a proposed Constitutional reform which included the removal of the concept of 'Ivory', which has fuelled ethnic and religious discrimination in access to nationality, from the Constitution.⁴⁵ In December 2016, an inter-ministerial initiative

⁴⁰ For a summary of Côte d'Ivoire's nationality law since independence see, B. Manby, 'Nationality, Migration and Statelessness in West Africa. A study for UNHCR and IOM' (UNHCR & IOM, 2015), available at <http://www.refworld.org/docid/55b886154.html>; Box 5 and Citizenship Rights in Africa, 'Côte d'Ivoire', available at <http://citizenshiprightsafrika.org/region/cote-divoire>.

⁴¹ UN High Commissioner for Refugees (UNHCR), 'Statelessness in West Africa: Newsletter 10: July-September 2016' (2016).

⁴² Ibid.

⁴³ UN High Commissioner for Refugees (UNHCR), '#IBelong Campaign Update July 2016', (July 2016).

⁴⁴ *Open Society Justice Initiative v Cote d'Ivoire*, Communication 318/06, ACommHPR (27 May 2016), para 207.

⁴⁵ L. Konkobo, 'Will new constitution bring peace to Ivory Coast?' (BBC

culminated in the adoption of a National Plan of Action under which Côte d'Ivoire has committed to the eradication of statelessness in the country by 2024.⁴⁶ Commitments were also made at the end of 2016 to redress the gap in birth registration coverage in the country, with the government announcing a programme to deliver birth certificates to three million undocumented children.⁴⁷ An important tool that will inform this work moving forward is the detailed study produced for UNHCR titled 'Nationality and Statelessness in Côte d'Ivoire' that was published at the close of 2016.⁴⁸ This report sheds light on the ways statelessness can arise through the cracks in Côte d'Ivoire's nationality system [and] concludes with a number of recommendations on necessary steps – such as nationality law reform, better identification of those who are stateless or at risk of statelessness, strengthening of the civil status system, and the transparent and uniform identification of nationals and foreigners – to resolve statelessness and ensure respect for the right to nationality.⁴⁹

Kenya

The stateless population in Kenya is largely composed of ethnic minorities, particularly those who live near the borders or are considered 'un-Kenyan' because of their origin in other States. Although they may in fact be eligible for Kenyan nationality under the law, members of the Nubian, Somalis, Maasai, Swahili, Teso, Borana, and Makonde communities face difficulties in acquiring identity cards, which serve in practice as proof of nationality.⁵⁰ This includes 'vetting' procedures

Africa, 28 October 2016), available at <http://www.bbc.com/news/world-africa-37693120>. Note that although over 90% of those who voted approved the proposed Constitutional reform, the referendum was not uncontroversial. See Aljazeera, 'Ivory Coast voters back new Constitution' (1 November 2016), available at <http://www.aljazeera.com/news/2016/11/ivory-coast-voters-constitution-161101205411361.html>.

⁴⁶ Koaki, 'Côte d'Ivoire: Les autorités ivoiriennes s'engagent à éradiquer l'apatride avant fin 2024' (8 December 2016), available at <http://linkis.com/koaci.com/X8XgP>.

⁴⁷ Citizenship Rights in Africa Initiative, 'Ivory Coast to register 3 million undocumented children' (9 December 2016), available at <http://citizenshiprights-africa.org/ivory-coast-to-register-3-million-undocumented-children/>.

⁴⁸ M Adjami, 'Statelessness and Nationality in Côte d'Ivoire - A Study for UNHCR' UNHCR (December 2016), available at <http://www.refworld.org/docid/58594d114.html>.

⁴⁹ Ibid, page 4.

⁵⁰ Citizenship Rights in Africa Initiative, 'Kenya', available at <http://>

which require the individual to prove their connection to Kenya before they are issued with an identity card and requirements to produce additional documentation such as their grand-parents birth certificates.

Five years after the African Committee of Experts on the Rights and Welfare of the Child found that Kenya had violated the rights of Nubian children in Kenya to access nationality there is no evidence that this decision nor those of the African Commission on Human and Peoples' Rights on access to nationality for Kenyan Nubians have been fully implemented.⁵¹ There have, however, been some positive steps. In October 2016, the Kenyan president issued a directive that eligible Makonde were to be recognised as citizens and issued identity cards by December.⁵² The deadline for registration under a temporary procedure allowing stateless persons whose ancestors had lived in

citizenshiprightsafrika.org/region/kenya accessed 28 October 2016; UN High Commissioner for Refugees (UNHCR), 'UNHCR and the Kenya Human Rights Commission: Kenya Dialogue on Gender Equality, Nationality and Statelessness' (23 March 2015) noting in particular that there remain difficulty for the children of Kenyan mothers and stateless, non-national or unregistered fathers in accessing nationality despite the reform of the nationality to allow women to transmit nationality to their children and spouses on an equal basis with men. On the situation of the Makonde see UNHCR with Haki Centre, Kenya Human Rights Commission, Haki Africa and Open Society Initiative for Eastern Africa, 'Integrated, but Undocumented: A study into the nationality status of the Makonde community in Kenya' (2015).

⁵¹ In March 2016, the UN Committee on the Rights of the Child included in its recommendations to Kenya "Fully implement the decision of the African Committee of Experts on the Rights and Welfare of the Child in the case entitled 'Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of children of Nubian descent in *Kenya v the Government of Kenya*' (decision No.002/Com/002/2009)", UN Committee on the Rights of the Child 'Concluding observations on the combined third to fifth periodic reports of Kenya' (21 March 2016) UN Doc CRC/C/KEN/CO/3-5, para 30(3). See also *Using the African regional framework to realise children's nationality rights in Kenya* by Mustafa Mahmoud Yousif in Chapter 8.

⁵² C Omondi and PSCU, 'Stateless Makonde people to get Kenyan citizenship' (The East African, 13 October 2016), available at <http://www.theeastafrican.co.ke/news/Stateless-Makonde-people-to-get-Kenyan-citizenship/2558-3415802-it93aqz/index.html> accessed 28 October 2016; E Jacob, '2,950 stateless Makonde registered, IDs out in December' (The Star, 25 October 2016), available at http://www.the-star.co.ke/news/2016/10/25/2950-stateless-makonde-registered-ids-out-in-december_c1443802. See also the box on 'Trekking against statelessness' below.

Kenya since independence to acquire nationality has been extended⁵³ and in July 2016 a pilot survey on stateless persons in Kwale and Malindi counties was launched to test questions on nationality and statelessness for inclusion in the next national census in 2019.⁵⁴ This may help to ensure that more reliable data on the stateless population in Kenya is available in future.

Trekking against statelessness

On Monday 10 October 2016, over 300 members of the Makonde community set off on a 500km march from their homes in Kwale (near Mombasa), to State House in Kenya's capital of Nairobi. The journey, dubbed 'trekking against statelessness' was led by the Kenya Human Rights Commission (KHRC). Its purpose was to draw attention to the barriers the community faced in accessing Kenyan citizenship and call on the president to intervene: "the trek was to be a symbolic journey showing the daily struggle that the Makonde go through in not accessing what would be seen as ordinary. It was a journey to lay a mark in the eyes heart and mind of every Kenyan of the degrading nature of statelessness".⁵⁵ While the trekkers met with some setbacks on the way, President Uhuru Kenyatta met with the group following their arrival in Nairobi and offered an apology that their statelessness issue had not yet been addressed. He ordered that the Makonde be recognised as Kenyan citizens and issued with national identity documents accordingly by the end of 2016.

⁵³ G. Kegoro, 'Makonde issue shows different people care for Kenya and are concerned for common interest' (Daily Nation, 16 October 2016), available at <http://www.nation.co.ke/oped/Opinion/makonde-issue-shows-people-care-for-kenya/440808-3418162-yxrrbx/index.html>.

⁵⁴ UN High Commissioner for Refugees (UNHCR), '#IBelong Campaign Update July 2016', (July 2016).

⁵⁵ Kenya Human Rights Commission, 'The arduous journey of the Makonde to Kenyan citizenship' (2016), available at <http://citizenshiprightsafrika.org/wp-content/uploads/2016/11/The-Arduous-journey-of-the-Makonde-to-Kenyan-Citizenship.pdf>.

Madagascar

There are various problems in Madagascar leading to statelessness, the main ones being racial discrimination and nationality laws which limit the ability of mothers to transmit nationality to their children,⁵⁶ despite the constitution of Madagascar prohibiting such discrimination. Although the law contains provisions which should enable mothers to transmit nationality to their children when the father is stateless in practice this remains a problem.⁵⁷ The racial dimension of statelessness particularly affects the Karana (a minority of Indo-Pakistani origin who have been resident in Madagascar since before independence), individuals of Comorian origin and others who are not perceived as ethnically Malagasy. These groups are unable to access naturalisation⁵⁸ and even those who are theoretically eligible for nationality face difficulties in acquiring documentation and proof of citizenship as a result of discriminatory administrative practices.

Some positive developments are now underway in the country, as increasing attention is being drawn to the need to address the causes of statelessness. UNHCR, with local partner Focus Development Association (FDA), began the initiative 'Prevention and reduction of statelessness in Madagascar' which aims to ensure that the Malagasy nationality law is brought into compliance with international principles of human rights. Components of the project include raising public awareness of the issue of statelessness, as well as building jurisprudence regarding confirmation and acquisition of nationality for stateless persons.⁵⁹ In November 2015 a group of twenty MPs pledged to move towards reform of the gender discrimination in Madagascar's nationality law through the introduction of a proposition *de loi* in parliament.⁶⁰ This came after a technical workshop on statelessness

⁵⁶ See Equality Now, 'The State We're In: Ending Sexism in Nationality Laws' (2015), p.67 for the precise provisions in Malagasy law which discriminate against women.

⁵⁷ Equal Rights Trust, 'My Children's Future: Ending Gender Discrimination in Nationality' Laws (2015), 11ff.

⁵⁸ Ibid, 12-13, 48; C. McNerney, 'Accessing Malagasy Citizenship: The Nationality Code and Its Impact on the Karana' (2014) 19 TiLR.

⁵⁹ Interview with FDA, ISI Monthly Bulletin (March 2016), available at http://www.institutesi.org/stateless_bulletin_2016-03.pdf

⁶⁰ Equal Rights Trust 'Madagascar moves closer to reforming gender discriminatory nationality law' (3 November 2015), available at <http://www.equalrightstrust.org/news/madagascar-moves-closer-reforming-gender-discriminatory-nationality-law>.

targeting parliamentarians – organised by FDA, the Global Campaign for Equal Nationality Rights, Equal Rights Trust and UNHCR – encouraged them to sign a pledge to that effect. Such an amendment would be in line with the recommendations made by the UN Committee on the Elimination of All Forms of Discrimination against Women in 2015.⁶¹ In the summer of 2016, during the 32nd session of the UN Human Rights Council, a side event was convened on ‘Women’s Equal Nationality Rights in Law and Practice’ at which the Malagasy representative reasserted the country’s commitment to achieving law reform.⁶² At the time this publication went to print, there were unconfirmed reports that MPs voted to pass a law reform bill at the end of December 2016. If the change to the law comes into effect, it will remove gender discrimination in the transmission of nationality from parent to child. Although a very encouraging step, the issue of statelessness remains intractable and politically sensitive. The Karana are commonly viewed with hostility, with widespread public belief that granting them nationality will result in this minority gaining undue influence.⁶³ A new population census was due to be held in 2016 and may result in a better estimate of the stateless population, although problems with estimating statelessness through self-reporting will remain.

South Africa

Statelessness is understood to be a substantial problem in South Africa, although to date no comprehensive statistics exist.⁶⁴ Studies have revealed that the population affected by statelessness is not homogenous, but rather that different groups are vulnerable to nationality problems, for different reasons. These include migrants, asylum seekers and refugees from elsewhere in Southern Africa—including, most significantly, Zimbabwe⁶⁵—or from further afield, who do not enjoy the nationality of

⁶¹ UN Committee on the Elimination of All Forms of Discrimination against Women (UN CEDAW), ‘Concluding observations on the combined sixth and seventh periodic reports of Madagascar’ (24 November 2015) UN Doc CEDAW/C/MDG/CO/6-7, paras 26-27.

⁶² See Global Campaign for Equal Nationality Rights, 107 Governments Sponsor UN Resolution Calling for Women’s Equal Nationality Rights (2016) <http://www.equalnationalityrights.org/news/69-111-governments-sponsor-un-resolution-calling-for-women-s-equal-nationality-rights>.

⁶³ Equal Rights Trust, ‘My Children’s Future: Ending Gender Discrimination in Nationality’ Laws (2015), 48.

⁶⁴ See table 1 above where South Africa is marked with an asterisk (*).

⁶⁵ B. Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* (2015), section 8.3.

their country of origin or now face the risk of statelessness as a result of a protracted problem of lack of documentation of their link to any country.⁶⁶ Abandoned and orphaned children have also been found to encounter problems, in some cases, in accessing a nationality and can be at risk of statelessness in South Africa.⁶⁷ The so-called 'blocking' of identity documents has also created ambiguity in respect of the enjoyment of South African nationality for some of those affected and may be exposing people to statelessness.⁶⁸ A serious impediment to better understanding the situation of stateless persons in South Africa is the lack of accurate identification. Indeed civil society has reported that "one of the biggest challenges in the context of assisting stateless persons is that South Africa does not formally recognise nor protect stateless persons who do not qualify for refugee status", which has also left stateless individuals vulnerable to arbitrary and lengthy immigration detention.⁶⁹

Although the country is not a party to either of the statelessness convention, the right to a nationality is enshrined in the South African Constitution, according to which, no one shall be deprived of their nationality and "every child has a right to a name and a nationality from birth".⁷⁰ Certain protections against statelessness are also included within the South African Citizenship Act,⁷¹ however the implementation of these provisions and their interaction with the Birth and Deaths Registration Act and its regulations has posed difficulties.⁷² Important progress was made in September 2016, when the Supreme Court of Appeal handed down a judgement affirming the

⁶⁶ B. Manby, 'Statelessness in Southern Africa' (2011); J George, 'Statelessness and nationality in South Africa' (Lawyers for Human Rights, 2013).

⁶⁷ Lawyers for Human Rights and Institute on Statelessness and Inclusion (ISI), 'Childhood statelessness in South Africa' (2016), available at http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf.

⁶⁸ Lawyers for Human Rights and Institute on Statelessness and Inclusion (ISI), 'Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review' (2016), available at <http://www.institutesi.org/SouthAfricaUPR2016.pdf>.

⁶⁹ Ibid, paras. 40-42.

⁷⁰ The Constitution of the Republic of South Africa, 1996, Section 20 and 28(1a).

⁷¹ In particular, section 2(2) of the South African Citizenship Act 88 of 1995, providing for acquisition of nationality by a stateless child born in the territory. See also J. George and R. Elphick, 'Promoting citizenship and preventing statelessness in South Africa: A practitioner's guide' (Lawyers for Human Rights, 2014), section 3.2.

⁷² Lawyers for Human Rights and Institute on Statelessness and Inclusion (ISI), 'Childhood statelessness in South Africa' (2016).

right of a stateless child born in South Africa to acquire nationality⁷³ and ordering the Minister of Home Affairs to put in place regulations to ensure the implementation of this provision of the Citizenship Act.⁷⁴ The following month, the UN Committee on the Rights of the Child issued its concluding observations on the second periodic report of South Africa, in which it made a number of recommendations relating to how the country deals with cases of statelessness, including that it proceed to “put in place regulations to grant nationality to all children under the jurisdiction of the State party who are stateless or are at risk of being stateless”.⁷⁵

South Africa host of global IPU conference on statelessness

For some time, the Inter-Parliamentary Union (IPU) has taken an interest in the issue of statelessness, publishing a ‘Handbook for Parliamentarians’ on the subject - in collaboration with UNHCR – in 2005 (updated in 2014).⁷⁶ In November 2015, the IPU and UNHCR co-organised a global conference on ‘Ensuring Everyone’s Right to Nationality: The Role of Parliaments in Preventing and Ending Statelessness’. The conference was co-hosted by the Parliament of South Africa at the Old South African Assembly Chamber in Cape Town and drew almost 100 parliamentarians from 39 different countries. Following two days of discussion, South African MP Ms. Boroto who was acting as rapporteur for the meeting, issued a conclusions document. In this, seven agreed ‘actions’ for parliamentarians to advocate for were outlined, alongside a call for “all international, regional and sub-regional parliaments and parliamentary assemblies to accelerate efforts to achieve these goals and to support the creation of alliances to advance them”.⁷⁷

⁷³ South Africa Supreme Court of Appeal, *DGLR and Another v Minister of Home Affairs and Others* (6 September 2016).

⁷⁴ See further <http://www.statelessness.eu/blog/south-african-courts-confirm-right-nationality-stateless-child-20-year-old-legal-principle>. See also *Making safeguards work: A perspective from South African legal practice* by Liesl Muller in Chapter 11.

⁷⁵ UN Committee on the Rights of the Child (UN CRC), *Concluding Observations: South Africa*, CRC/C/ZAF/CO/2 (27 October 2016), Section D.

⁷⁶ Inter-Parliamentary Union (IPU) and UN High Commissioner for Refugees (UNHCR), ‘Nationality and Statelessness. Handbook for Parliamentarians No. 22’ (2014), available at http://www.ipu.org/PDF/publications/statelessness_en.pdf.

⁷⁷ Conclusions of the Conference on Ensuring Everyone’s Right to Nationality: The

6. The Citizenship Rights in Africa Initiative (CRAI) – from Liesl Muller⁷⁸

The Citizenship Rights in Africa Initiative (CRAI) is a coalition of African NGOs that are working, individually and collectively, to promote the right of all people on the continent to effective recognition of a nationality. Over the last year, the most striking development was the decision by the African Union's Executive Council at the AU Summit in July 2016 to support the African Commission on Human and Peoples' Rights (ACHPR) to draft a new protocol on nationality rights.⁷⁹ This provides an opportunity for regional civil society to collaborate with the ACHPR to ensure adoption of a strong protocol that will strengthen existing international norms and protections regarding statelessness and adapt them to some of the most prevalent regional dynamics in Africa.

To support the ACHPR in this, the coalition organized a number of events at its 59th Ordinary Session in October. A panel discussion highlighted the need to address the right to a nationality as a vital factor affecting human dignity. Speakers described difficulties faced by persons who are stateless or whose nationality is not recognized, such inability to get ID, denial of the right to free movement, educational and work opportunities. These difficulties were humanised in reflections on the life of a colleague Adam Hussein Adam, a Kenyan activist who and victim of contested nationality who went on not only to resolve his own situation, but to become a champion of the cause.⁸⁰ A photo exhibition entitled 'Out of the Shadows' was also launched.

At the national level, the Kenya Human Rights Commission (KHRC) campaigned the on behalf of the Makonde people. The Makonde migrated to Kenya in the 1940s from present day Mozambique. At independence, they were not recognized as citizens and have been left effectively stateless ever since. In October 2016, the KHRC supported the Makonde to march to Nairobi. There they were received by the

Role of Parliaments in Preventing and Ending Statelessness (26-27 November 2015), available at <http://www.ipu.org/splz-e/captown15/outcome.pdf>.

⁷⁸ Liesl Muller acts as the focal point for the Southern Africa branch of Citizenship Rights in Africa Initiative (CRAI) network on statelessness. See also by Liesl Muller in this publication, *Making safeguards work: A perspective from South African legal practice* in chapter 11.

⁷⁹ See <http://citizenshiprightsafrika.org/wp-content/uploads/2016/08/EXCL-Decision-ACHPR-Nationality-Protocol-July2016.pdf>.

⁸⁰ See <http://citizenshiprightsafrika.org/remembering-adam-hussein-adam/>.

president, who promised to address their situation by the end of the year.

In Southern Africa, under the leadership of Lawyers for Human Rights (LHR),⁸¹ NGOs from across Southern Africa met in July and agreed to work together to fight statelessness. In August, LHR addressed the Civil Society Forum of the Southern African Development Community (SADC) convincing the forum to include issue of statelessness in their action plan and to engage governments in the region to support the fight against statelessness.⁸²

⁸¹ See <http://www.lhr.org.za/programme/rmrp-statelessness-project-accessing-citizenship-and-nationality>.

⁸² For information on these initiatives and to access a resource database of laws, policies, reports, academic articles and news articles others visit the CRAI website <http://citizenshiprightsafrika.org>.

CHAPTER 3: AMERICAS

1. Stateless persons in the Americas

The Americas is the region which promises to lead the way in the eradication of statelessness.¹ Such optimism is largely attributed to the nationality law frameworks in the region, which provide a combination of *jus solis* and *jus sanguinis* provisions,² the statelessness safeguard in regional legal standards, and emerging good practices.³ These factors should combine to ensure that any case of statelessness should at most, last no more than one generation. However, obstacles to the eradication of statelessness in the region stem from a lack of prioritisation, mapping, and awareness in relation to this issue, but also due to discrimination on different grounds.

Table 2: Countries in the Americas with more than 10,000 stateless persons

Dominican Republic	133,770
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¹ UN High Commissioner for Refugees (UNHCR), Remarks by Commissioner António Guterres, ‘Out of the Shadows: Ending Statelessness in the Americas Event’ (18 November 2014), available at <http://unhcrwashington.org/resources/video-gallery/out-shadows-ending-statelessness-americas-event>

² AmericasNetworkonNationalityandStatelessness:AnnualReport(2015),available at <http://static1.squarespace.com/static/55eb3459e4b021abebfec2bd/t/570dc6aa04426215739ab87c/146052063710/Red+ANA+Annual+Report+2015>

³ For example: Brazil’s draft legislation to grant nationality to people not considered nationals of any other state, in compliance with the 1954 Convention and Suriname’s 2014 amendment of Law 1975 on Nationality and Residence removing gender inequality and giving equal rights to women to pass on nationality to their children and spouses. See also, UN High Commissioner for Refugees (UNHCR), ‘Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report - Universal Periodic Review: Brazil’ (November 2011), p. 2. available at <http://www.refworld.org/docid/4ed361722.html>; UN High Commissioner for Refugees (UNHCR), ‘UNHCR applauds Suriname for ensuring gender equality in nationality laws’ (2014), available at www.unhcr.org/53d20b756.html

The Americas is the region with the lowest number of stateless persons—according to UNHCR statistics—with 136,585 stateless persons reported.⁴ Almost this entire population—133,770 of the 136,585 reported—live in the Dominican Republic (DR). According to the statistics, the rest live in Costa Rica (1,806), Haiti (977), Brazil (4), Colombia (12), and Mexico (13). It must be noted though, that these numbers are incomplete and lack precision for various reasons, such as the absence of stateless determination procedures in many countries, the lack of accurate data due to countries not including statelessness within their statistics, and non-standardised birth registration processes in remote areas.⁵

In the Institute's 2014 World's Stateless report, the stateless population in the Americas was reported at 210,032. This data was based on the UNHCR Global Trends report of 2013, which reported 210,000 stateless persons in the Dominican Republic alone; with the remaining being reported from México (13), Brazil (2), Colombia (12), Nicaragua (1), Panamá (2), Honduras (1), and Aruba (1).⁶

The main reason for the shift in numbers between 2013 and 2015 is the change in the reported numbers of stateless persons in the DR from 210,000 to 133,770. This is partly due to the measures implemented by the government to address, even if only in part, the situation of Dominicans of Haitian descent (see more below). There was an increase however, in the numbers reported in other countries across the region, from 32 in 2013 to 2,815 in 2015. This increase is likely to be due to awareness raising efforts that are having an impact on state reporting. At the same time, statistical reporting remains a challenge in most countries in the region.

⁴ UN High Commissioner for Refugees (UNHCR), 'Global Trends: Forced Displacement in 2015' (2015), available at <http://www.unhcr.org/576408cd7.pdf>

⁵ For a detailed analysis and critique of the challenges and gaps in statistical reporting on statelessness, see Institute on Statelessness and Inclusion, *The World's Stateless Report* (2014), available at <http://www.institutesi.org/worldsstateless.pdf>

⁶ Chile, for example, reports no stateless persons. See 'UNHCR Statistical Yearbook' (2015). Available at: <http://www.unhcr.org/protection/statelessness/546e01319/statistics-stateless-persons.html>

2. Regional standards

In the Americas, the established regional human rights system (the Inter-American system) is composed of two bodies: the Inter-American Commission on Human Rights (IACommHR) and the Inter-American Court of Human Rights (IACtHR), created under the auspices of the Organisation of American States (OAS).

Article 20 of the American Convention on Human Rights protects the right to a nationality.⁷ This provision, the accompanying case law of the Inter-American Court and the work of the Inter-American Commission, provide a robust legal framework for the protection of the right to a nationality. Cases brought before the Inter-American Court of Human Rights, even if few,⁸ have reinforced guarantees against statelessness which establish limits to State discretion in this regard.⁹ Furthermore, a recent report by the by the Inter-American Commission on Human Rights—through its Special Rapporteurship on the Rights of Migrants—provides a detailed overview of regional standards for the protection of vulnerable groups in the Americas, including stateless persons.¹⁰

⁷ Article 20 ACHR reads: “1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it. See also F Lapova, ‘Comentario al Artículo 20 de la Convención Americana’ in E Alonso Regueira (ed), *La Convención Americana de Derechos Humanos y su proyección en el Derecho Argentino* (2013) p 333-353 available at: <http://www.derecho.uba.ar/publicaciones/libros/pdf/la-cadh-y-su-proyeccion-en-el-derecho-argentino/020-lavopa-nacionalidad-la-cadh-y-su-proyeccion-en-el-da.pdf> and MJ Recalde Vela, ‘How far has the protection of the right to nationality under international human rights law progressed from 1923 until the present day? An analysis of this progress against the backdrop of the 5 elements of Article 20 of the American Convention on Human Rights’ (2014) LLM thesis, Tilburg University, available at <http://arno.uvt.nl/show.cgi?fid=136225>

⁸ Inter-American Court of Human Rights, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N° 2: Migrantes* (2015) pp 12-14, available at <http://www.corteidh.or.cr/sitios/libros/todos/docs/migrantes4.pdf>

⁹ See also *The perpetuation of childhood statelessness in the Dominican Republic* by David Baluarte in Chapter 12.

¹⁰ See Inter-American Commission on Human Rights’ Special Rapporteurship on the Rights of Migrants, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System (Human Mobility, Norms and Standards)* (2016) OEA/Ser.L/V/II Doc. 46/15, available at <http://www.oas.org/en/lr/doc/2016-046>

The Americas' states at the Universal Periodic Review

The issue of statelessness in countries in the Americas rarely comes up within the framework of the Universal Periodic Review (UPR), with the majority of recommendations relating to accession to the Statelessness Conventions.¹¹ Chile and the Dominican Republic have received concrete recommendations to address statelessness. During Chile's 2014 UPR review, the need for a comprehensive immigration policy and modification of current legislation to guarantee the right to nationality of children of migrants, was highlighted by multiple states.¹² The DR received 15 recommendations when undergoing the UPR in 2014, directly related to the issue of statelessness.¹³

3. The Brazil Plan of Action

In the framework of the 30-year anniversary of the 1984 Cartagena Declaration on Refugees—a landmark regional refugee law instrument that broadened the refugee definition and proposed new approaches to the humanitarian needs of refugees and internally displaced persons—the representatives of the Governments of Latin America and the Caribbean met in Brasilia, in December 2014.¹⁴ During this gathering the region updated and revisited its commitments under the Cartagena Declaration adopting the Brazil Declaration and Plan

oas.org/en/iachr/reports/pdfs/HumanMobility.pdf

¹¹ Countries which have received this recommendation are: Argentina, Bahamas, Barbados, Dominican Republic, Ecuador, Haiti, Jamaica, Solomon Islands, St. Lucia, St Vincent & the Grenadines, Suriname, and Venezuela.

¹² UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review : Chile' (2 April 2014), A/HRC/26/5, para 121, available at <http://www.refworld.org/docid/53917ded4.html>

¹³ See further: UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Dominican Republic' (4 April 2014) A/HRC/26/15, paras 20,52,56,65,68,70,80,84,92,94,98, available at <http://www.refworld.org/docid/5399947c4.html>

¹⁴ Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Cayman Islands, Chile, Colombia, Costa Rica, Cuba, Curaçao, El Salvador, Ecuador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Suriname, Trinidad and Tobago, Turks and Caicos Islands, Uruguay and Venezuela.

of Action. The Brazil Declaration was an extensive, government-led process, developed through several consultations. Among other developments, it provides a detailed framework and concrete regional commitments to uphold the right to nationality and identify, reduce and prevent statelessness in the region.

This instrument included for the first time, specific measures to address statelessness in the region, and Chapter 6 of the Plan of Action specifically enumerates commitments and actions to address statelessness, upholding the importance of the right to nationality as a fundamental human right, and setting up the goal that within ten years the countries of Latin America and the Caribbean will eradicate statelessness.¹⁵

Some of the proposed activities under the Plan of Action include: promote the harmonisation of internal legislation and practice on nationality with international standards, facilitate processes such as birth registration and the issuance of documentation, implement late birth registration as a measure to confirm nationality, promote the establishment of effective statelessness status determination procedures, and adopt legal protection frameworks that guarantee the rights of stateless persons.

¹⁵ Brazil Declaration, 'A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (December 4 2014), available at <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2014/9865>

Treaty Accessions and Statelessness Determination Procedures

The most recent accessions to the statelessness conventions by states from the region have been Belize (1961 Convention, 14 August 2015), El Salvador (1954 Convention, 9 February 2015), Peru (1954 Convention, 23 January 2014 and 1961 Convention, 18 December 2014), Argentina (1961 Convention, 13 November 2014), Colombia (1961 Convention, 15 August 2014) and Paraguay (1954 Convention, 1 July 2014 and 1961 Convention, 6 June 2012).¹⁶ Out “of the 65 states currently party to the 1961 Convention, 16 are American countries”.¹⁷ The American countries (as of 2016) that have neither signed nor ratified either convention on statelessness are the Bahamas, Chile, Cuba, Dominican Republic, the United States of America, Granada, Guyana, Haiti, Saint Kitts and Nevis, Saint Lucia, Suriname and Venezuela.¹⁸

The adoption of statelessness determination procedures (SDPs) remains to be a challenge worldwide. In the Americas, states are starting to adopt legislation to address this gap. Currently Mexico¹⁹ and Costa Rica²⁰ are the only two countries in the region with statelessness determination procedures. Uruguay, Brazil and Peru have made pledges to adopt SDPs.²¹

¹⁶ UN High Commissioner for Refugees (UNHCR), ‘Good Practices Paper – Action 9: Acceding to the UN Statelessness Conventions’ (28 April 2015), available at <http://www.refworld.org/docid/553f617f4.html>

¹⁷ UN High Commissioner for Refugees (UNHCR), States Party to the Statelessness Conventions - As at 1st June 2016, 1 June 2016, available at <http://www.refworld.org/docid/54576a754.html>; UN High Commissioner for Refugees (UNHCR), ‘Good Practices Paper – Action 9: Acceding to the UN Statelessness Conventions’ (28 April 2015), available at <http://www.refworld.org/docid/553f617f4.html>

¹⁸ Americas Network on Statelessness: Ratifications of Conventions, available at www.americasns.org/ratifications-of-conventions

¹⁹ México: UN High Commissioner for Refugees (UNHCR), ‘Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons’ (11 July 2016), p.1 3, available at <http://www.refworld.org/docid/57836cff4.html>

²⁰ ‘Costa Rica: Decreto ejecutivo n. 39620 de 2016, Reglamento para la declaratoria de la Condición de Persona Apátrida’ (8 April 2016), available at: <http://www.refworld.org/docid/5714e0f14.html>

²¹ Uruguay: Cámara de Senadores, República del Uruguay, XLVII Legislatura, Quinto Periodo, Carpeta 1600/2014; Brazil: UN High Commissioner for

4. Indigenous and border populations

In a region where nationality is predominantly granted by birth on the territory, registering and documenting births before the authorities is extremely important to secure state recognition as a national. The indigenous and afro-descendant communities that reside on ancestral territories, border regions or are nomadic, are more likely to have their nationality questioned and are particularly vulnerable to being unable to access registration and documentation to prove nationality.²² It is often difficult, if not impossible, to register births in these often hard to reach territories, with few to no state authorities.²³ Intergenerational lack of documentation—where grandparents and parents lack documents or have never been registered—affects the registration of new births. Likewise, cultural and linguistic barriers and the absence of special policies to tend to these vulnerable populations can result in disincentives to registration. In the face of heightened border control and the securitisation of political boundaries,²⁴ these communities are likely find it increasingly necessary to prove their identity and demonstrate their nationality. This is a challenging area where there are tangible risks of statelessness.

Countries in the region such as Brazil,²⁵ Colombia,²⁶ and with great success Costa Rica²⁷, sometimes working in in partnership with UNHCR

Refugees (UNHCR), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Brazil' (November 2011), p. 2, available at <http://www.refworld.org/docid/4ed361722.html>

²² See more: Inter-American Development Bank, 'Civil Registration and Identity Management in Latin America and the Caribbean' (2014) Available at http://iadb.libguides.com/ld.php?content_id=7521581; For country to country birth registration resource page see http://iadb.libguides.com/registros/registros_paises

²³ JC Murillo, 'Apatridia y nacionalidad en América Latina, Aportes Andinos' (2011), Universidad Andina Simón Bolívar, 2.

²⁴ Ibid., 3.

²⁵ Ministério da Justiça, FUNAI, Secretaria de Direitos Humanos, 'Cartilha "Registro Civil de Nascimento para os Povos Indígenas do Brasil"' (2014), available at http://pib.socioambiental.org/anexos/28172_20140808_123412.pdf

²⁶ Colombian Civil Registry: <http://www.registraduria.gov.co/Informacion/udapv.htm> and UNICEF, Colombia country profile and statistics website, available at http://www.unicef.org/infobycountry/colombia_statistics.html

²⁷ UN High Commissioner for Refugees (UNHCR), 'ACNUR ayuda a indígenas en

and UNICEF, have established mobile registration units, which are an effective way to reach these communities. More bilateral policies of cooperation are needed across the region to fully ensure these populations can access means to prove their nationality, and register the births of their children.

5. Country updates

The following country profiles exemplify some of the challenges faced by countries in the region, as well as legislative reform, advances in jurisprudence, and some emerging good practices.

The Bahamas

The law of the Bahamas does not allow Bahamian women to confer nationality to their foreign-born children, whereas the same does not apply to Bahamian men.²⁸ Gender-based discrimination in the nationality laws of the Bahamas²⁹ is likely to remain unaltered in the foreseeable future, despite the consistent international call for change. A referendum which took place on 7 June 2016 on whether to amend the discriminatory nationality provisions (among other questions) resulted in a ‘no’ vote. The negative outcome to the referendum is believed to have been the result of insufficient efforts to properly inform the general public of the extent, content and effects of the discriminatory laws, and the urgent need for reform. Limited resources and advocacy capacity by human rights defenders, civil society groups, and government leaders promoting the gender-equality reform in nationality law in the face of an opposition campaign, together with inaccurate and inflammatory rhetoric regarding the intent of the referendum, led to the outcome.³⁰ The Bahamas remains one of only twenty-seven countries worldwide— one of two in the Western

riesgo de apatridia en Costa Rica’ (07May 2015), available at <http://www.acnur.org/noticias/noticia/acnur-ayuda-a-indigenas-en-riesgo-de-apatridia-en-costa-rica/>

²⁸ UN High Commissioner for Refugees (UNHCR), ‘Background Note on Gender Equality, Nationality Laws and Statelessness 2016’ (8 March 2016), available at <http://www.refworld.org/docid/56de83ca4.html>

²⁹ Global Campaign for Equal Nationality Rights, ‘A Loss for Gender Equality and Equal Nationality Rights in The Bahamas’, available at <http://equalnationalityrights.org/news/68-gender-equality-nationality-rights-bahamas-2>

³⁰ Ibid.

Hemisphere— that denies mothers the right to confer nationality to their children on an equal basis with men.³¹

Canada

Following the worrying global trend to expand grounds for deprivation of nationality based on national security criteria and to create further restrictions to citizenship conferral, Bill C-24 was proposed in Canada in February 2014.³² This Bill created two changes in Canadian nationality provisions, a restriction on the generational passing of Canadian nationality to children born abroad,³³ and an expansion on the grounds on which dual nationals can have their citizenship stripped, to include suspicion of crimes such as terrorism and high treason in Canada or abroad. This Bill's constitutionality was challenged by measures such as the lawsuit filed by the BC Civil Liberties Association (BCCLA) and the Canadian Association of Refugee Lawyers (CARL).³⁴ In 2016, the Bill was reconsidered³⁵ through the introduction of the Act to Amend the Citizenship Act³⁶ repealing the extension of the deprivation powers to permit denationalisation of Canadian dual citizens born abroad for acts against "the national interests of Canada."³⁷ More recently there has been a push to amend the new Bill, upon second hearing, to include the issue of revocation of nationality on grounds of misrepresentation.³⁸

³¹ See more: Institute on Statelessness and Inclusion (ISI), 'Gender Equality, Nationality and statelessness', available at <http://www.institutesi.org/ourwork/genderequality.php>; See also *Campaigning for gender equality in nationality laws* by Catherine Harrington in Chapter 13.

³² Parliament of Canada, Bill C-24 (Historical) Strengthening Canadian Citizenship Act: An Act to amend the Citizenship Act and to make consequential amendments to other Acts, available at <https://openparliament.ca/bills/41-2/C-24/>

³³ Canadian Bar Association, 'Immigration Law Section Comments on Bill C-24, Strengthening Canadian Citizenship Act' (April 2014).

³⁴ Canadian Citizenship (Bill C-24) Information factsheet, available at <http://voices-voix.ca/en/facts/profile/canadian-citizenship-bill-c-24>

³⁵ Government of Canada, 'An overview of proposed changes to the Citizenship Act' (2016), available at <http://news.gc.ca/web/article-en.do?nid=1036069>

³⁶ Bill C-6 Sept. 27, 2016 An Act to amend the Citizenship Act and to make consequential amendments to another Act, available at <https://openparliament.ca/bills/42-1/C-6/>

³⁷ Don Davies, NDP MP for Vancouver Kingsway (B.C.), during Citizenship Act Government Orders (June 3rd, 2016), available at <https://openparliament.ca/bills/42-1/C-6/>

³⁸ See also <http://globalnews.ca/news/2967829/senate-looking-to-change-controversial-citizenship-law>

Colombia

Colombia, due to its geographic location, is a strategic route for migrants travelling from South America to Central and North America. Currently, as its laws and practice stand, births occurring in the territory may result in statelessness due to human mobility.³⁹ Unlike most countries in the region, acquisition of nationality by birth on the territory is not automatically available for all children born in Colombia. In order to be automatically granted Colombian nationality by birth in the territory, the child must have either a Colombian parent, or a parent domiciled in Colombia at the time of birth.⁴⁰ Under Colombian law, domicile is understood as physical presence in the territory with the real or presumptive intention to permanently reside in the country.⁴¹ This has been restrictively interpreted by the Courts, and in the past the only valid proof of domicile was a resident visa.⁴² Under this interpretation, anyone born in the territory of Colombia would only be considered Colombian if at least one of his parents was a national of Colombia or a legally authorised resident, at the time of birth.

In 2014 the Ministry of Foreign Affairs,⁴³ the authority in charge of nationality matters, extended the means of proof to demonstrate domicile to include other non-resident visas, such as student refugee visas and temporary work visas.⁴⁴ This change in policy though promising and positive, falls short to fully covering the contexts

³⁹ See *Do jus soli regimes always protect children from statelessness? Some reflection from the Americas* by Juliana Vengoechea Barrios in Chapter 11.

⁴⁰ O. Vonk, *Nationality law in the western hemisphere: a study on grounds for acquisition and loss of citizenship in the Americas and the Caribbean* (2014) p 161.

⁴¹ Civil Code of the Republic of Colombia, Law 57 of 1887, Article 76. "El domicilio consiste en la residencia acompañada, real o presuntivamente del ánimo de permanecer en ella."

⁴² Consejo de Estado, 'Decision No. 1653' (30 June 2005) available at <http://www.refworld.org/pdfid/532bf85d4.pdf>

⁴³ The National Civil Registry is an autonomous organ but its competences are limited to collecting, storing and certifying the information related to vital statistics and identity of citizens and persons born in the Colombian territory. However, the competent authority for all nationality matters is the Ministry of Foreign Affairs. Accordingly, the National Civil Registry must follow the interpretation of the Ministry of Affairs in relation to which documents serve as proof of domicile in the Colombian territory for the purposes of recording and certifying information of nationality in birth certificates.

⁴⁴ Ministerio de Relaciones Exteriores de Colombia, 'concepto número S-GNC 15-016796' (24 February 2015).

under which children born in the territory could be placed at a risk of statelessness. A case that remains unaddressed is that of births that occur prior to one of the parents obtaining a visa that serves as proof of domicile. Children born in Colombia might be protected under the statelessness safeguard if they can prove they have no claim to another nationality and would otherwise be stateless. In such cases, they are eligible to naturalise as Colombians. But children who do not fall under the statelessness safeguard, and with no parent who has a visa that serves as proof of nationality, are at a heightened risk of becoming stateless if they are unable to access and secure the nationality of any other state.

*The Dominican Republic*⁴⁵

The statelessness of Dominicans of Haitian descent in the DR remains to be the gravest problem in the region. Despite some advances in rectifying the nationality of a number of Dominicans of Haitian descent, the country continues to have the largest stateless population in the Americas. It has yet to fully address the unprecedented stripping of nationality of tens of thousands, as it struggles to come to terms with a troubling history of racial discrimination towards this group and rectify past injustices.

The 2013 judgment of the Constitutional Court of the DR⁴⁶ and subsequent legal reforms marked a critical turning point in the arbitrary denationalisation of Dominicans of Haitian descent.⁴⁷ Responding to international pressure and outcry over this mass denationalisation, the Government enacted Law 169 of 2014 which establishes two distinct procedures, one of rectification and one of naturalisation. The implementation of Law 169 procedures have led to strong criticism. In particular, the restrictive timeline for registration (90 days) and the

⁴⁵ For further analysis of various dimensions of the situation in the Dominican Republic, see *The perpetuation of childhood statelessness in the Dominican Republic* by David Baluarte; *Stateless children of the Dominican Republic* by Allison Petrozziello in Chapter 12; *Using the Inter-American regional framework to help stateless children in the Dominican Republic* by Francisco Quintana in Chapter 8; and *Street theatre to address statelessness in the Dominican Republic* by Laura Quintana Soms in Chapter 13.

⁴⁶ Dominican Republic Constitutional Court, *Ruling TC/0168/13* (2013), available at <https://www.tribunalconstitucional.gob.do/node/1764>

⁴⁷ Inter-American Commission on Human Rights, *Report on the situation of human rights in the Dominican Republic* (2015) OEA/Ser.L/V/II, p. 22, available at <http://www.oas.org/en/iachr/reports/pdfs/dominicanrepublic-2015.pdf>

limited availability of offices to register, are of significant concern.⁴⁸ These procedures divide the affected population in two different groups:

- Children of foreign parents in an irregular migratory situation born in the Dominican territory who had been registered.
- Those who had not been registered.

They offer specific administrative nationality procedures for each. These documentary regularisation and naturalisation procedures have been considered contrary to the American Convention on Human Rights,⁴⁹ as directing persons to a naturalisation process is treating Dominican nationals as foreigners, in violation of their right to nationality. Furthermore, Law 169 is contrary to the rights to judicial personality, name and nationality. According to information provided by the Dominican government to the Inter-American Commission of Human Rights, in late May 2015, 53,000 persons have had their birth registration validated, and in consequence their nationality and

⁴⁸ There are several recent publications on the situation of Dominican-Haitians in the Dominican Republic. The short film *Needed but Unwanted: Haitians in the Dominican Republic* by Emmy-award winning journalist S Farkas discusses how Dominicans from Haitian descent are excluded from nationality and deported from the territory. The Inter-American Commission has furthermore issued its report *Situación de derechos humanos en República Dominicana* on the situation in the DR (in Spanish). Related to this and the continent at large is the ENS blog on the 'state of statelessness' in the Americas. The blog, written by A McAnarney, discusses the continents status in relation to UNHCR's Action Plan to eradicate statelessness. The paper 'Stateless: Dominican-born Grandchildren of Haitian Undocumented Immigrants in the Dominican Republic' by K Shipley addresses the history leading up to the Constitutional Tribunal's ruling that excludes Dominicans with Haitian descent from Dominican nationality. It goes on to discuss international and human rights implications and to suggest policy and implementation changes for the Dominican government, available at www.institutesi.org/stateless_bulletin_2016-02.pdf. Further resources on 'Denationalisation and Statelessness in the Dominican Republic' can be found in the virtual platform developed by the Inter-American Commission on the Situation of human rights in the Dominican Republic, available at www.oas.org/en/iachr/multimedia/2016/DominicanRepublic/dominican-republic.html. See also A Martín Pérez, 'La paradoja de no poder votar por convertirte en apátrida en República Dominicana' (2016, May 13) Europa Press, available at www.europapress.es/internacional/noticia-paradoja-no-poder-votar-convertirte-apatrida-republica-dominicana-20160513104631.html

⁴⁹ *Case of Expelled Dominicans and Haitians v the Dominican Republic* (IACtHR, 28 August 2014), available at <http://www.refworld.org/docid/546db31f4.html>

documents of identity will be restored.⁵⁰

The Inter-American Commission has recognised the partial outcomes of the implementation of Law 169, but remains deeply concerned about the situation in the DR; where many cases remain to be unaddressed, and thousands of Dominicans of Haitian descent remain in a legal limbo, amidst continuous reports of widespread discrimination and attacks towards this population.⁵¹

The United States

The United States is a country with a liberal citizenship tradition under which the conferral of citizenship by birth in the territory has remained unaltered in the law. However, this has been affected in practice by administrative restrictions in the conferral of birth certificates. In 2015 a case was brought in the State of Texas against the State Department of Health Services⁵² in an effort to put a halt into the administration's practice to deny the issuance birth certificates to children born in the U.S. to undocumented immigrants, on the basis of restrictive policies on the type of documents of identity that were acceptable for migrant parents to prove their identity. The case was settled by the State, in which it agreed to expand the types of documents parents can present, allowing those without legal immigration status to obtain birth certificates for their children. Under the settlement, parents from three Central American countries — El Salvador, Guatemala and Honduras — will be able to present documents certified by their consulates. Texas has also set up a review process for parents whose applications were rejected, as well as training for more than 450 county officials who issue birth certificates.⁵³

A second case, related to conferral of U.S citizenship to foreign born children on grounds of descent, will be heard by the Supreme Court

⁵⁰ Inter-American Commission on Human Rights, *Report on the situation of human rights in the Dominican Republic* (2015) OEA/Ser.L/V/II, para 15, available at <http://www.oas.org/en/iachr/reports/pdfs/dominicanrepublic-2015.pdf>

⁵¹ *ibid.*, pp 193-203.

⁵² *Perales Serna et al v Texas Department of State Health Services, Vital Statistics Unit et al*, available at <https://www.documentcloud.org/documents/2178327-texas-birth-certificate-complaint.html>

⁵³ See www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2016/07/25/texas-settles-birth-certificate-lawsuit.aspx#sthash.dTSpcJvb.dpuf

of the United States.⁵⁴ The case is an appeal over the grant of U.S. citizenship to a man born in the Dominican Republic to an unwed U.S. citizen father and noncitizen mother. The case exemplifies gender discrimination in U.S. law. Under the current legalisation it is more difficult for citizen fathers to confer citizenship, than it is for citizen mothers.

6. Americas Network on Statelessness and Nationality – from Ivonne Garza⁵⁵

The Americas Network on Nationality and Statelessness⁵⁶ was launched in November 2014 together with the UNHCR's #IBelong Campaign and the Global Action Plan to End Statelessness by 2024. Since then, Red ANA—the Network's acronym in Spanish—has united a number of organisations in the Americas and engaged in activities towards the prevention of statelessness in the region and the promotion of the #IBelong Campaign's goals.

In 2015, the Network consolidated its membership and began its activities. Approximately 70 civil society organisations that work on nationality and human rights issues joined the Network. During a meeting held in Costa Rica, the Network established its Steering Committee and Work Plan. The year continued by hosting four thematic and country-specific webinars related to statelessness. By December 2015, Red ANA hosted its first Annual Conference at the Inter-American Commission on Human Rights. The Conference held a panel composed of representatives of the governments of Brazil and Chile, the Inter-American Commissioner on Migrants and a representative of Red ANA.

During 2016 Red ANA held a regional workshop in Chile and national workshops in Costa Rica and Peru. It also strengthened its capacity and expanded its activities by focusing on strategic objectives. Red ANA has worked to engage the Ombudsman institutions in priority countries to collaborate in training workshops and research efforts towards the goal of mapping statelessness in the Americas. Red ANA has also

⁵⁴ U.S. Supreme Court, *E. Lynch, Attorney General v Luis Ramon Morales-Santana*, No. 15-1191.

⁵⁵ Ivonne Garza is a Fellow at the Americas Network on Nationality and Statelessness.

⁵⁶ See further <http://www.americasns.org/>

positioned itself as an important statelessness actor, by collaborating closely with UNHCR and working with countries in their legislation efforts to adopt statelessness determination procedures. The network continued to offer webinars covering a wide variety of topics and concentrated on the delivery of two research projects.

As we advance in our work in the Americas, many challenges remain in the years to come: the complete mapping of statelessness, the regionalisation of the two Statelessness Conventions, and the adoption of domestic legislation to protect stateless persons, to name a few. Red ANA firmly believes in the potential the Americas has to become the first region to eradicate statelessness around the globe, and it will continue to work towards the achievement of this goal.

CHAPTER 4: ASIA AND THE PACIFIC

1. Stateless persons in Asia and the Pacific

According to UNHCR statistics 40% of the identified stateless population of the world live in Asia and the Pacific.¹ Many factors contribute to statelessness across the region, with some being particular to certain sub-regions. In South East Asia and South Asia, discriminatory laws, policies and practices on the basis of gender, race and religion have significantly contributed to statelessness.

The stateless Rohingya

The Rohingya have sought refuge in countries across the Asia Pacific region to escape the violence, marginalisation and persecution they face in Myanmar. The Rohingya are widely regarded as one of the most persecuted peoples in the world. It is estimated that between 1 million and 1.5 million Rohingya live in Myanmar, with the majority living in northern Rakhine State, which shares a border with Bangladesh. In 1982, Myanmar changed its nationality legislation to guarantee nationality by birth to members of 135 listed ethnic groups. This act entrenched the statelessness of the Rohingya and some other ethnic minorities living in the country.²

The Rohingya is one example of a stateless and persecuted group being displaced and forced to seek refuge in multiple countries. At the same time, forced migration can also cause statelessness. For instance, since being forcibly displaced during the Khmer Rouge regime in the 1970s, many ethnic Cambodians have lived in Vietnam for generations. Many of these ethnic Cambodians have lost their documentation or any proof of having lived in Cambodia. This has resulted in their loss

¹ UN High Commissioner for Refugees (UNHCR), 'Thousands of stateless people given nationality in Thailand (December 2015)', available at <http://www.unhcr.org/news/latest/2015/12/565db8939/thousands-stateless-people-given-nationality-thailand.html>.

² See also *The stateless Rohingya* by Helen Brunt in Chapter 9.

of lawful residence and nationality. While some have since regained Cambodian citizenship, others remain stateless. Groups whose traditional lifestyles are based on travel across the contemporary borders of states are also vulnerable to statelessness. The Sama Dilaut, a migratory maritime people of Southeast Asia, are one such group who face acute discrimination and risk of statelessness.³

Gender discrimination in nationality laws also cause statelessness in the region. While many countries have reformed their gender discriminatory nationality laws in the past 15 years, Nepal, Brunei Darussalam, and Malaysia continue to discriminate against women in their ability to confer nationality on their children or spouses. These are three of the 27 countries worldwide where mothers are unable to confer their nationality on equal grounds with men.⁴

Across Central Asia, statelessness is mainly a consequence of ethnic-based discrimination in the aftermath of state succession. After the dissolution of the Soviet Union in 1991, large numbers of people were left stateless in successor states across Central Asia (and Europe). A total of 280 million people had lost their citizenship, including a total of 60 million in Kazakhstan, Turkmenistan, Uzbekistan, Tajikistan and Kyrgyzstan.⁵ Since then, the vast majority of these people have received a nationality, but statelessness is still a significant problem, with Uzbekistan, Tajikistan and Kyrgyzstan reportedly having large stateless populations.

As with other regions in the world, the issue of statelessness in Central Asia is not comprehensively mapped. In South East Asia, with the growing Rohingya refugee crisis, it becomes difficult to provide accurate statistics on statelessness in Myanmar and host countries to which they have fled. There is also a significant statistical gap, with very little information available on statelessness in large countries such as India and China. In recent years, more accurate baseline figures of stateless persons have been arrived at through mapping studies (e.g. in Tajikistan and parts

³ See also *Stateless at sea* by Helen Brunt in Chapter 10.

⁴ UN High Commissioner for Refugees (UNHCR), 'Background Note on Gender Equality, Nationality Laws and Statelessness 2016' (8 March 2016). See also *Campaigning for gender equality in nationality laws* by Catherine Harrington in Chapter 13.

⁵ M. Farquharson, 'Statelessness in Central Asia' (UNHCR, 2011), available at <http://www.unhcr.org/4dfb592e9.pdf>

of Malaysia). Below is an overview of countries, which according to available UNHCR statistics, have large stateless populations.

Table 3: Countries in the Asia Pacific with over 10,000 stateless persons⁶

Country	2015
Myanmar ⁷	938,000
Thailand	443,862
Uzbekistan ⁸	86,703
Brunei Darussalam	20,524
Tajikistan ⁹	19,469
Malaysia	11,689 ¹⁰
Vietnam	11,000
Kyrgyzstan	9,118

2. Regional standards

Unlike Africa, the Americas and Europe, the Asia and Pacific region does not have a regional human rights framework, with its own treaty, court and commission (or equivalent bodies). This lacuna means that there is a dearth of regional norms and jurisprudence which set out the rights of all persons including the stateless. In the absence of such a regional framework, the importance of the international UN framework is greater.

At sub-regional level the Association of South East Asian Nations (ASEAN) adopted its own non-binding Human Rights Declaration in

⁶ UNHCR, 'Global Trends: Forced Displacement in 2015' (2016), annex 2. Available at <http://www.unhcr.org/576408cd7.pdf>.

⁷ Figure of Stateless persons was estimated from the 2014 census. It does not include an estimated 151,921 stateless IDPs.

⁸ Figure of stateless persons refers to those with permanent residence reported in 2010 by the Government. Information on other categories of stateless persons is not available.

⁹ The figure on stateless persons increased as a result of a national pilot project set up by the Government and UNHCR in 2014. Two years after, it was reported that 21, 623 persons, including former USSR citizens and other persons with undetermined nationality were identified and registered. For more information, see <http://www.unhcr.kz/eng/news-of-the-region/news/2586/>

¹⁰ This is the UNHCR estimate of potentially stateless people in Peninsular Malaysia and does not include those in Sabah or stateless refugees.

2012, which largely mirrors the Universal Declaration of Human Rights. Article 18 of the ASEAN Human Rights Declaration affirms that “Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.”¹¹ Although there is no entity within ASEAN that specifically looks into nationality and statelessness matters, the mandates of two of its Commissions are relevant to statelessness. The ASEAN Intergovernmental Commission on Human Rights (AICHR) and ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) focus their work on developing strategies for the promotion and protection of human rights. ACWC is, for instance, mandated to propose and support appropriate measures relating to the elimination of all forms of violation of the rights of women and children. The ACWC can propose a wide variety of measures to end childhood statelessness, including through resolving gender discrimination in nationality legislation, and permitting all otherwise stateless children to have the right to a nationality and identity documents. However, with small budgets and non-binding force, there are significant limitations as to what can be achieved.

Next to ASEAN, the ‘Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime’ is a forum for states and international organisations to interact in policy dialogue, information sharing and practical cooperation to address challenges in the region.¹² A total of 48 members – a combination of states and international organisations such as IOM and UNHCR – work together to address a variety of related issues. The nexus between (irregular) migration and the risk of statelessness is gaining more recognition in the region and beyond. In March 2016 during the Sixth Bali Process Ministerial Conference, ministers and delegates of member states and organisations endorsed the ‘Bali Process Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime’. This declaration confirms the core objectives and priorities of the Bali Process, including “measures to prevent and reduce statelessness, consistent with relevant international instruments” in the context of complex irregular migration.¹³

¹¹ ASEAN, ASEAN Human Rights Declaration (2012), available at http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

¹² For more information on the Bali Process, see <http://www.baliprocess.net/>

¹³ Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime, The Sixth Ministerial Conference of the Bali Process on

Asia & Pacific states at the Universal Period Review

Between 2014 and 2016, Brunei Darussalam, Nepal, and Myanmar, which all underwent review under the UPR, received the largest number of statelessness related recommendations.¹⁴ Fifteen recommendations were issued to Myanmar in relation to amending its nationality legislation to avoid discriminatory provisions that prohibit ethnic minorities from acquiring a nationality. In addition, one recommendation was made to it on the prohibition of the deprivation of identity documents that leave people living in irregular situations and unable to register new-born children. Recommendations to Nepal and Brunei Darussalam mainly focused on gender equality of men and women in the context of conferring nationality onto their children.¹⁵

3. Civil Registration

An estimated 135 million children under five years old across Asia and the Pacific have not had their births registered.¹⁶ Not being registered at birth is not synonymous to being stateless, however such registration is often a prerequisite in establishing a child's legal identity. It usually includes key information, such as the identity of the child's parents and the date and place of birth which establish if the child has a right to nationality under the law of the State where he or she is born or under the law of other States to which the child has a relevant link.¹⁷ Particularly in the context of migration and displacement, the lack of documentation can undermine nationality rights, whereas birth registration can help realise the child's right to

People Smuggling (23 March 2016).

¹⁴ P. Brett and M. Khanna, 'Making Effective Use of UN Human Rights Mechanisms to Solve Statelessness', in L. van Waas and M. Khanna (eds) *Solving Statelessness* (Wolf Legal Publishers, 2017).

¹⁵ For more information see: UPR-info Database of Recommendations, available at <https://www.upr-info.org/database/>

¹⁶ UN High Commissioner on Refugees (UNHCR), 'UNHCR welcomes declaration of civil registration for all by Asia-Pacific countries' (November 2014), available at <http://www.unhcr.org/news/briefing/2014/11/54787a056/unhcr-welcomes-declaration-civil-registration-asia-pacific-countries.html>

¹⁷ See also *Legal identity for all and childhood statelessness* by Bronwen Manby and *Every child counts* by Anne-Sophie Lois in Chapter 10.

a nationality and the prevention and reduction of statelessness. Other forms of civil registration such as marriage registration can also help prevent statelessness among children. In some countries, a child can only acquire its parent's nationality if he or she is born in wedlock. In order to prove this, parents have to provide relevant authorities with a marriage certificate, making administrative registration of marriage of crucial importance. In this context, it is of great importance that in 2014 the Asia-Pacific Ministerial Declaration proclaiming a shared vision of civil registration for all by 2024 (i.e. the recording of all vital events of people in the region including births, deaths, and marriages). This also applies to refugees, asylum-seekers and stateless people.¹⁸

Registering and possessing documents (e.g. birth certificate, identity documents) are often key to proving one's identity in order to acquire a nationality.¹⁹ However, these processes can also be used as a tool to discriminate against people. For instance, the identity documentation system in Myanmar is colour-coded and contains information on the holder's ethnicity and religion. Consequently, minority communities are easy to identify and target. It is therefore important to continue to emphasise the importance of international law principles such as non-discrimination and best interests of the child, in the context of civil registration.

The importance of civil registration has also been acknowledged within the context of the Bali Process. The Asia Regional Support Office is working with experts to develop a civil registration toolkit.²⁰

¹⁸ UN High Commissioner on Refugees (UNHCR), 'UNHCR welcomes declaration of civil registration for all by Asia-Pacific countries' (November 2014), available at <http://www.unhcr.org/news/briefing/2014/11/54787a056/unhcr-welcomes-declaration-civil-registration-asia-pacific-countries.html>

¹⁹ Please note that not in all countries is civil registration a prerequisite to acquire a nationality. In most countries a nationality is automatically acquired through the parent(s) and birth registration is a separate administrative procedure. However in other countries, birth registration and a birth certificate are needed in order for a child to acquire a nationality.

²⁰ Bali Process, 'Concept Note: Bali Process Civil Registration Assessment Toolkit' (February 2016), available at <http://www.baliprocess.net/news/concept-note-bali-process-civil-registration-assessment-toolkit/>

4. Country updates

Kyrgyzstan

Kyrgyzstan has a large, yet decreasing stateless population, a legacy of the collapse of the Soviet Union. The number of recorded stateless persons in the country reduced by 3,000 between 2013 and 2015 and now stands at 9,118.²¹ This reduction has been achieved through changes in law and policy over the years including, adopting an increasingly flexible approach in relation to establishing proof of residence for those applying to be naturalised.

Kyrgyzstan's first post-independence nationality legislation of 1993 linked citizenship to proof of residency in the territory, but failed to provide safeguards against statelessness in the context of state succession. For various reasons, many wishing to acquire Kyrgyz nationality could not prove their link to the country, i.e. through a *propiska* (residence stamp) in a USSR passport indicating residence in Kyrgyzstan or a birth certificate. Some migrated during or after independence leaving them unable to acquire Kyrgyz nationality as they often obtained a *propiska* from another Republic. Others had lost their USSR identity documents, missed registration deadlines or were simply unable to travel to registration offices due to distance, travel costs and other reasons.²²

As a first step to resolving this problem, the 2007 Citizenship Law of the Kyrgyz Republic implemented a facilitated naturalisation procedure for former USSR citizens who are now stateless. Automatic acquisition of nationality became possible for those who had lived in the country for five years and had not applied for citizenship of another country.²³ Though this process resolved a large number of cases of statelessness, many could not meet evidentiary conditions,²⁴ pay the registration fees

²¹ See also *Mobile legal services and litigation in Kyrgyzstan* by Ferghana Lawyers in Chapter 12.

²² J. Tucker, 'statelessness in Central Asia: From state succession to Solutions', in L. van Waas and M. Khanna (eds) *Solving Statelessness* (Wolf Legal Publishers, 2017).

²³ Law of the Kyrgyz Republic on Citizenship of the Kyrgyz Republic 2007, Article 5(2).

²⁴ Amongst others, their USSR passport or notification of loss of their USSR passport, and documentation to prove permanent residency in the country. For more information see: Presidential Decree of the Kyrgyz Republic 473,

or travel to the registration centres. As a response, the 2013 Citizenship Regulation accepts a wider variety of documents as proof of residence (e.g. military service booklets, school diplomas, and testimonies from people fulfilling a certain capacity) and practical barriers are being resolved through the use of mobile registration centres.²⁵

Malaysia

The recorded stateless population in Malaysia at the end of 2015 was 11,689. This is a considerable decrease of about 30,000 in the past two years. However, this does not necessarily relate to a large number of persons accessing nationality, but rather, the adjustment of the estimated stateless population. The previous figure of 40,000 was an estimated figure that UNHCR reported covering West Malaysia only (mainly referring to the ethnic Tamil population of Indian origin).²⁶ As a result of the work on statelessness carried out by Development of Human Resources in Rural Areas (DHRRA), UNHCR was able to report a figure of 11,641, which serves as a baseline figure.²⁷

DHRRA has been involved in resolving statelessness in the country through addressing “birth registration and other legal identity documentation issues among the Indian community [mostly of Tamil descent] in Malaysia.”²⁸ By July 2016, 700 out of 12,341 stateless persons who had been registered with DHRRA in the latest phase of their project acquired Malaysian nationality documentation, close to 8,000 nationality applications had been submitted to the authorities and 3,723 applications were pending submission.²⁹ DHRRA has also started looking at statelessness among indigenous groups in central Peninsular (West) Malaysia.

Regulation on Procedures to Consider Issues of Kyrgyz Republic Citizenship, 25 October 2007.

²⁵ Regulation on the Procedure for Considering Issues of Citizenship of the Kyrgyz Republic, Resolution Number 174, 10 August 2013.

²⁶ UN High Commissioner for Refugees (UNHCR), ‘Global Trends: Forced Displacement’ (2015 and 2014).

²⁷ N Oakeshott, ‘Solutions to statelessness in Southeast Asia’, in L. van Waas and M. Khanna (eds) *Solving Statelessness* (Wolf Legal Publishers, 2017).

²⁸ See also *Legal action to address childhood statelessness in Malaysia* by DHRAA Malaysia in Chapter 12 and <http://dhrramalaysia.org.my/>.

²⁹ UN High Commissioner for Refugees (UNHCR), Campaign Update (July 2016)

Significantly, the present statistics for the known stateless population in Malaysia only refers to West Malaysia and does not include the communities in Sabah or Sarawak, including the Sama Dilaut, who may be at a high risk of statelessness.³⁰ Irregular migrants who are stateless or at risk of statelessness as well as stateless refugees in the country, including the Rohingya, are also not included.

Myanmar

The Rohingya have suffered discrimination, exclusion, and persecution for many decades. While the nationality status of many Rohingya was unclear due to discriminatory practices, Myanmar's 1982 Citizenship law and subsequent state practice confirmed and entrenched their statelessness through arbitrarily depriving them of their nationality and systematically denying them access to nationality. According to UNHCR statistics, an estimated 938,000 Rohingya were stateless at the end of 2015, and the latest Human Rights Council report on Myanmar (2016) provides an estimate of over one million stateless Rohingya in Rakhine State alone.³¹ The majority of Rohingya in Myanmar have lived in northern Rakhine State for decades, in remote locations and under marginalised circumstances.³²

In the latter part of 2016 violence against the Rohingya in Myanmar escalated, following attacks on three border posts in Myanmar's northern Rakhine State on 9 October, during which nine Myanmar border police officers were killed.³³ The state mounted a sustained, indiscriminate and disproportionate programme of collective punishment of Rohingya in northern Rakhine State. Allegations of a range of gross human rights violations carried out by the Myanmar army, including arbitrary arrests and torture, the displacement of over 50,000 persons, indiscriminate killings and rapes of women and

³⁰ See also *Stateless at sea* by Helen Brunt in Chapter 10.

³¹ A/HRC/32/18.

³² In reality, the number of stateless people in Myanmar is likely to be much higher. The figure provided by UNHCR for the end of 2015 is estimated from a 2014 census. This number does not include an estimated 151,921 stateless Internally Displaced Persons (IDPs) and persons in an IDP-like situation who are also of concern under UNHCR's statelessness mandate. They are instead included separately within the figures on IDPs. It is stated that in Rakhine State it is estimated to be approximately one million.

³³ For more information, see Institute on Statelessness and Inclusion, *Monthly Bulletin: November 2016*, available at http://www.institutesi.org/stateless_bulletin_2016-11.pdf

the destruction by fire of entire villages, were met by denial from the Myanmar government. The state blocked access to humanitarian aid (including existing programmes) – an act which severely put at risk the lives of over 140,000 people who are dependent on aid, and barred independent human rights monitors and reporters from entering the area. As a result of this latest wave of persecution, as of 6 December 2016 over 21,000 Rohingya had fled across the border to Bangladesh.³⁴ The situation in Myanmar has been described as amounting to genocide by the International State Crime Initiative of Queen Mary University of London.³⁵

Looking at the statistics, it is unclear how many non-Rohingya persons in Myanmar were also rendered stateless by the 1982 citizenship law (e.g. those with Chinese, Indian, and Nepali ancestry). Particularly after the previous government announced the expiry of temporary identity certificates (TICs) in February 2015. The TIC was the primary document held by stateless people in Rakhine State to prove their legal residence in the country. Approximately 700,000 stateless people across the country possessed this document, including Rohingya, Chinese and other minority groups. In June 2015, a new ‘identity card for nationality verification’ was announced. However, it was widely viewed with suspicion.

Nepal

The number of stateless people in Nepal is unknown, yet the risk of statelessness is high. Nepal is one of 27 countries that maintains sex discriminatory nationality laws which prevent women from conferring their nationality on their children on the same basis as men. Despite significant national and international advocacy over many years,³⁶ the

³⁴ A Withnall, ‘Burma: 21,000 Rohingya Muslims flee to Bangladesh amid ‘attempted genocide’ (The Independent, 6 December 2016), available at <http://www.independent.co.uk/news/world/asia/burma-21000-rohingya-muslims-flee-bangladesh-attempted-genocide-a7458091.html>

³⁵ International State Crime Initiative, ‘Genocide of Rohingya in Myanmar may be entering a new and deadly phase’ (17 October 2016), available at <http://www.qmul.ac.uk/media/news/items/hss/187983.html>

³⁶ See for instance, Nepal Civil Society Network of Citizenship Rights, the Global Campaign for Equal Nationality Rights and the Institute on Statelessness and Inclusion (ISI), <http://equalnationalityrights.org/images/NepalUPRprinting.pdf>; S Nowack, ‘Gender Discrimination in Nepal and How Statelessness Hampers Identity Formation’ (2015), available at http://www.institutesi.org/WP2015_02.pdf.

adoption of a new Constitution in 2015 has not resulted in the removal of gender discrimination from the country's nationality laws.³⁷ Though the letter of the law states that a child can acquire Nepali nationality if either the father or the mother is a national, the risk of statelessness amongst children born in Nepal to a Nepali mother still arises if the father's identity is unknown, if he is deceased or has deserted the family, is a foreigner who cannot pass on his own nationality or refuses to acknowledge his paternity.³⁸

Gender discrimination also exists with regard to the conferral of nationality to foreign spouses. While the Constitution explicitly mentions the possibility for foreign women who have married Nepali men to acquire naturalised citizenship, such a provision does not exist for foreign men married to Nepali women.³⁹ This could lead to statelessness if the foreign man loses his nationality, for instance, through marriage or residence abroad. Significantly, intersectionality and multiple-discrimination is an important factor, with the gender discrimination in Nepal's nationality law disproportionately impacting members of the Dalit community and those living in the Terai region.

The risk of childhood statelessness in the context of International Commercial Surrogacy (ICS) has reduced since this practice was completely banned in Nepal since September 2015. This ban results from a petition handed over the Supreme Court of Nepal stating that surrogacy exploited the bodies of poor females.⁴⁰ Prior to this, ICS was allowed as long as it did not involve Nepali citizens (i.e. as surrogate mothers, donators of gametes, or as providers of any surrogacy service). This increased risks of statelessness as Nepal applies the *jus sanguinis* principle preventing conferral of nationality in this context. If the commissioning parent's State of nationality or the surrogate

³⁷ Constitution of the Kingdom of Nepal 2015, Section 11, Part 2.

³⁸ A. De Chickera and J. Whiteman, 'Addressing statelessness through the rights to equality and non-discrimination, Resolving Statelessness' in L. van Waas and M. Khanna (eds) *Solving Statelessness* (Wolf Legal Publishers, 2017).

³⁹ Constitution of the Kingdom of Nepal 2015, Section 11, Part 6: "A foreign woman who has a matrimonial relationship with a citizen of Nepal may, if she so wishes, acquire the naturalized citizenship of Nepal as provided for in the Federal law."

⁴⁰ See: <http://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html> and <http://www.marilynstowe.co.uk/2015/10/01/foreign-parents-face-surrogacy-uncertainty-in-nepal/>.

mother's State of nationality would not recognise the child, he or she will be stateless.⁴¹

Thailand

In 2014, when the first edition of World's Stateless report was launched, Thailand had a stateless population of half a million persons, and was third on the list of countries with the largest known stateless populations in the world. Hill Tribe communities are the largest stateless group in the country, and some undocumented migrant workers are also at heightened risk of statelessness. While there are a few thousand Rohingya refugees in the country, they are not included in UNHCR's statelessness statistical reporting. Through various initiatives, the government of Thailand has reduced the size of the known stateless population in the country to 443,862 by the end of 2015. Though a lot of work remains to be done to further reduce statelessness in the country, below are some updates of what has been done to date.

In recognition of the large numbers of irregular migrant workers, Thailand introduced a 'Nationality Verification Registration' scheme in 2006 as a way to regulate the status of migrants from Cambodia, Lao PDR and Myanmar.⁴² This was also designed as a tool to prevent statelessness among irregular migrant workers and their children. Irregular migrants who complete the Nationality Verification Registration receive identity documents which allow them to obtain temporary legal resident status in Thailand (which in turn makes them eligible to obtain a work permit). Having a regularised status is also the first step for children born to irregular migrants to obtain a legal status.⁴³ However, according to several organisations working with stateless persons in these countries, this process can be a lengthy one and its efficiency or effectiveness has been difficult to assess. For

⁴¹ See also *International surrogacy arrangements and statelessness* by Sanoj Rajan in Chapter 11.

⁴² The Government of Thailand in 1996 applied the Immigration Act 1979, Article 17 which enables irregular migrant workers from these three countries to receive a work permit on a yearly basis. The Government of Thailand has no direct policies that aim to grant permanent residency or to integrate migrant workers into the Thai State.

⁴³ International Organisation for Migration (IOM), *Thailand Migration Report 2011, Migration for Development in Thailand: Overview and Tools for Policymakers, Integration of minorities in Thailand* (2011), p. 139, http://publications.iom.int/system/files/pdf/tmr_2011.pdf.

example, many undocumented migrants in Thailand are unable to complete the nationality verification process due to practical barriers such as acquiring documents from their own countries (e.g. many migrant workers from Myanmar face challenges accessing documents from their own country).⁴⁴ Also, stateless people still remain cautious and/or unwilling to participate in the nationality verification process due to fears of having to return to their country of origin.

Stateless people from the Hill Tribe communities have long not been recognised as Thai nationals, though they have been living in Thailand for generations.⁴⁵ Thailand's nationality law reforms in 2008 determined that those affected by the 1972 Declaration, i.e. anyone whose nationality was revoked by this or could not acquire nationality while this Declaration was in force (1972-1992), could acquire Thai nationality if they provide evidence of their birth, subsequent domicile status in Thailand and demonstrate good behaviour.⁴⁶

Other efforts to further reduce statelessness include the directive from Thailand's Department of Provincial Administration to identify and issue legal status to eligible stateless students in Thailand who are recorded in the government's database. The realisation of this directive may benefit up to 65,000 students.⁴⁷

⁴⁴ See, for instance, International Labour Rights Forum with support from Alliance to End Slavery & Trafficking (ATEST), 'Comments concerning the Rankings of Thailand by the United States Department of State in the 2016 Trafficking in Persons Report' (February 2016), International Labour Rights Forum, available at <http://www.laborrights.org/publications/comments-concerning-rankings-thailand-united-states-department-state-2016-trafficking>.

⁴⁵ Both the Revolutionary Party No. 337 of 1972 and the second edition of the Nationality Act (1992) caused legal status problems for many minorities and their children residing in Thailand.

⁴⁶ For more information on the situation of statelessness among the Hill Tribe communities in Thailand, see C Rijken, L. van Waas, M Gramatikov, and D. Brennan, *the nexus between statelessness and human trafficking in Thailand* (Wolf Legal Publishers, 2015), p. 13, <http://www.institutesi.org/StatelessTraffickingThailand.pdf>.

⁴⁷ UN High Commissioner for Refugees (UNHCR), 'UNHCR commends steps taken to grant citizenship to stateless students in Thailand' (March 2016), available at https://www.unhcr.org/th/en/news/stateless_news.

5. Civil society networks in the Asia-Pacific region

*The Central Asian Network on Statelessness – from Azizbek Ashurov*⁴⁸

The Central Asian Network on Statelessness (CANS) was launched in June 2016 with a membership of 11 NGOs and activists from Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.⁴⁹ CANS was established to:

- Enable direct and robust dialogue for the exchange of information and experience in the prevention and reduction of statelessness, and the development of nationality-focused institutions in the region; monitor and review statelessness in Central Asia, and draw out recommendations, strategies and joint actions to scale down statelessness and eliminate its causes in the future.
- Contribute to the reduction of statelessness in the region's countries, i.e. through inter-regional collaboration as well as legal aid, expertise, advice and other assistance in promoting individual cases of stateless persons in the course of their legalisation and naturalisation.
- Engage the region's authorities, NGOs, media, business community, academia, educational facilities and other stakeholders in discussions to put statelessness high on the agenda, ensure support and consolidate efforts to address statelessness.
- Deliver awareness, education and research campaigns aiming at eradicating statelessness in the region.
- Enhance capacities of the network members and other parties in the area of statelessness.
- Develop cooperation with other networks and organisations pursuing similar objectives.

⁴⁸ Azizbek Ashurov is Director of Ferghana Lawyers in Kyrgyzstan and was actively involved in the process of establishment of the Central Asia Network for the Reduction of Statelessness. See also *Mobile legal services and litigation in Kyrgyzstan* by Ferghana Lawyers in Chapter 12.

⁴⁹ NGOs from Kyrgyzstan: Legal Clinic 'Adilet', Ferghana Valley lawyers without borders, WESA Association; NGOs from Kazakhstan: Kazakhstan International bureau for Human Rights and Rule of Law, Legal Centre of Women Initiatives 'Sezim'; NGOs from Tajikistan: Chashma, Initiatives Consortium, Law and prosperity; NGOs from Turkmenistan: Keik Okara, The National Red Crescent Society of Turkmenistan; Activist from Uzbekistan: Mr. Ganiev Sh.

*The Statelessness Network Asia Pacific – from Davina Wadley*⁵⁰

At the Conference on Addressing Statelessness in Asia and the Pacific ('the Conference'), which was held from 24 to 26 November 2016, representatives from over 40 civil society organisations from across Asia and the Pacific and from UNHCR met in Kuala Lumpur, Malaysia, with the aim of building and strengthening cooperation among civil society actors and participants' collective capacities to address statelessness.⁵¹

A key outcome of the Conference was the launch the Statelessness Network Asia Pacific (SNAP).⁵² The goal of SNAP is to prevent and resolve statelessness in Asia and the Pacific.

Civil society actors are in a unique position to respond to the challenge of statelessness in Asia and the Pacific through existing direct engagement with stateless populations and decision makers. However, currently, there is limited collaboration and information sharing between civil society actors on activities focused on preventing and resolving statelessness. SNAP aims to bridge this gap. Collaboration and exchange between civil society actors will enhance individual actors' impact and create opportunities for collective action. SNAP will work on statelessness through strategic partnerships on three, key long term objectives:

Objective 1: To strengthen and support, and build solidarity and cooperation between stateless communities, civil society actors and other stakeholders working on nationality, statelessness and related issues

⁵⁰ Davina Wadley is co-chair of the core-group to establish the Statelessness Network Asia Pacific.

⁵¹ Over 18 months, SNAP's Organising Committee on a voluntary basis developed a terms of reference for SNAP, based on extensive consultations with key stakeholders, and secured funding for SNAP's launch. For further background on the development of SNAP, see Outcome Document, Civil Society Retreat on Resolving Statelessness in Asia and the Pacific (June 2015), http://aprrn.info/wp-content/uploads/2015/06/final_outcome-document_civil-society-retreat-on-resolving-statelessness-in-asia-and-the-pacific_june20151.pdf.

⁵² See <http://www.statelessnessnetworkasiapacific.org/>.

Objective 2: To increase knowledge, visibility and understanding on the right to nationality and the issue of statelessness amongst civil society actors and other stakeholders

Objective 3: To develop and support initiatives that promote practical solutions to statelessness at national and regional levels

SNAP's potential future activities and initiatives, as developed by Conference participants are detailed in the Summary Report for the Conference.⁵³

SNAP's Organising Committee has engaged a Coordinator to facilitate the development and implementation of SNAP's Work Plan. A Governance Board and Advisory Group has also been appointed to provide support and guidance to the Coordinator. The Coordinator can be contacted via snap@statelessnessnetworkasiapacific.org.

⁵³ The Summary Report is available here: <http://nebula.wsimg.com/dfd8ff56161676dfb625401a4191da81?AccessKeyId=54F266038F6B472A10EE&disposition=0&alloworigin=1>

CHAPTER 5: EUROPE

1. Stateless persons in Europe

Statelessness affects around 600,000 people in Europe today. Most can trace their situation back to the political upheaval of the 1990s, in particular the dissolution of the Union of Soviet Socialist Republics (USSR), but also the breakup of Yugoslavia. Indeed, over 80% of the total reported stateless population in Europe live in just four countries, all successor states of the Soviet Union: Latvia, the Russian Federation, Estonia and Ukraine. The numbers affected in each of these countries continue to decline.¹ Nevertheless, a quarter of a century after state succession took place, nearly half a million people remain stateless in these four states. In the six states to emerge from the Socialist Federal Republic of Yugoslavia, a total of almost 10,000 stateless persons are reported² and others remain at risk of statelessness due to lack of key forms of documentation.³

Across Europe, the other main context in which statelessness arises is migration. In some cases, people who were already stateless in their country of origin arrive in Europe within the mixed migration flows, as migrants, trafficking victims or refugees. In other cases, people may experience citizenship problems and become stateless following their arrival, due to the loss or deprivation of nationality while they are away from their country. With the mass influx in 2015 of migrants and refugees into Europe, the number of stateless persons in some receiving states has grown significantly. For instance, in Sweden, the reported

¹ The total figure in these four countries dropped from 570,341 at the end of 2013, to 474,537 at the end of 2015. Compare the UNHCR Global Trends report published in mid-2014 and the UNHCR Global Trends report published in mid-2016.

² UN High Commissioner for Refugees (UNHCR), 'Global Trends: Forced Displacement in 2015' (2016), annex 2. Available at <http://www.unhcr.org/576408cd7.pdf>. Note that no figure is reported for the Former Yugoslav Republic of Macedonia.

³ See for instance UN High Commissioner for Refugees (UNHCR), *Persons at risk of statelessness in Serbia: Progress Report 2010-2015* (June 2016), Available at <http://www.refworld.org/docid/57bd436b4.html>. See also *Using the CRC to help protect children from statelessness in Serbia* by Praxis Serbia in Chapter 8.

figure for stateless persons in the country climbed from 20,450 at the end of 2013 to 31,062 at the end of 2015.⁴ Moreover, children born in Europe to migrant or refugee parents can sometimes be exposed to statelessness as a result of discriminatory nationality laws of the country of origin or a conflict of nationality laws. The nationality laws of many European states have been found to fail to adequately protect children born on their territory from statelessness. In September 2015, the report 'No Child Should be Stateless' demonstrated that more than half of European parties to relevant international conventions have not properly implemented their obligations to ensure that all stateless children born in the country acquire a nationality.⁵ The same report also highlighted how other factors, such as child abandonment, international surrogacy or cross-border adoption, and systemic birth registration obstacles for particular groups are also producing statelessness in Europe.

Statelessness in Europe is more comprehensively mapped than in any other region: UNHCR has statistical data on statelessness for 42 out of the 50 countries that fall within the scope of their European regional bureau.⁶ The total figure reported by UNHCR for persons under its statelessness mandate in Europe as part of its statistical reporting at the end of 2015 is 592,151 persons. Latvia and the Russian Federation have stateless populations of over 100,000 persons within their territory. Stateless populations in Estonia, Ukraine, Sweden, Germany and Poland all exceed 10,000 individuals.

⁴ See further section 3 of this chapter.

⁵ European Network on Statelessness (ENS), *No Child Should be Stateless* (September 2015), Available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf. See also *An Italian recipe to address childhood statelessness* by Nicole Garbin and Adam Weiss, and *Out of limbo: Promoting the right of undocumented and stateless Roma people to a legal status in Italy through community-based paralegals* by Elena Rozzi in Chapter 12.

⁶ UN High Commissioner for Refugees (UNHCR), 'Global Trends: Forced Displacement in 2015 (2016), annex 2. Available at <http://www.unhcr.org/576408cd7.pdf>.

Table 4: Countries in Europe with over 10.000 stateless persons⁷

Latvia ⁵	252.195
Russian Federation	101.813
Estonia ⁶	85.301
Ukraine	35.228
Sweden	31.062
Germany	12.569
Poland	10.852

2. Regional standards

At the core of the regional human rights system in Europe are the Council of Europe (CoE) and the European Convention on Human Rights (ECHR), adopted in 1950. The CoE has 47 member states, all of which are parties to the ECHR. The ECHR enshrines basic human rights and fundamental freedoms of everyone within the jurisdiction of any member state and offers protection of these rights to everyone within the territory of Europe, including stateless persons, before the European Court of Human Rights (ECtHR) in Strasbourg, France. There are numerous cases in which stateless persons have succeeded in appealing to the Court to address a human rights violation suffered.¹⁰

While the right to a nationality is not contained as a provision in the ECHR, the Court has discussed citizenship on several occasions when the circumstances for or consequences of the denial of nationality violated a separate provision under the ECHR. The Court has

⁷ Ibid.

⁸ The figure is for the total number of stateless persons reported by UNHCR in Latvia. UNHCR separates the figure in two different groups – 252.017 ‘non-citizens of Latvia or any other State’ and 178 other stateless persons. Non-citizens get a set of rights and obligations that generally go beyond the minimum rights prescribed by the 1954 Convention relating to the Status of Stateless Persons.

⁹ Almost all people recorded as being stateless in Estonia have permanent residence and generally enjoy other and more rights than foreseen in the 1954 Convention relating to the Status of Stateless Persons. For more information on statelessness in Estonia please see section 5 of this chapter.

¹⁰ These include, for example, *Andrejeva v Latvia* [2009] Application no. 55707/00 (ECtHR); *Kim v Russia* [2014] Application no. 44260/13 (ECtHR).

recognised nationality as an element of the social identity of a person, which forms part of private life as protected by Article 8 of the ECHR.¹¹ This is a developing area of jurisprudence by the Court, with cases delivered to date focusing on the application of the principles of non-discrimination¹² and of the best interests of the child¹³ in access to nationality.¹⁴

In 1997, the CoE adopted the European Convention on Nationality, consolidating in a single, regional document a variety of international legal norms on nationality. This instrument contains several important safeguards directed towards the avoidance of statelessness, along similar lines to the 1961 Convention on the Reduction of Statelessness. It attracted sixteen states parties within the first decade after its adoption, but by the end of 2016, this number had only climbed by a further four ratifications.¹⁵ A separate CoE Convention relevant to statelessness is the Convention on the Avoidance of Statelessness in relation to State Succession. This relatively young regional Convention (from 2006) regulates the prevention of statelessness in the specific context of state succession, but has yet to attract many states parties.¹⁶ The Committee of Ministers of the CoE has also adopted numerous Recommendations outlining further normative guidance on issues relating to nationality and the prevention of statelessness.¹⁷ Although there have been no new standard-setting initiatives in recent years, the CoE continues to maintain an interest in nationality questions. In March 2016, the Parliamentary Assembly of the Council of Europe adopted a Resolution on the need to eradicate statelessness of children.¹⁸

¹¹ See most prominently *Genovese v Malta* [2012] Application no. 53124/09 (ECtHR).

¹² Ibid.

¹³ *Mennesson v France* [2014] Application no. 65192/11 (ECtHR) [French].

¹⁴ See also *Strategic litigation to address childhood statelessness* by Adam Weiss in Chapter 12.

¹⁵ This Convention had 20 states parties as of 15 December 2016. See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/signatures?p_auth=1l9CHog9.

¹⁶ This Convention had 6 states parties as of 15 December 2016. See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/200/signatures?p_auth=1l9CHog9.

¹⁷ For instance, Recommendation (99) 18 of the Committee of Ministers on the Avoidance and Reduction of Statelessness and Recommendation (2009) 13 of the Committee of Ministers on the Nationality of Children.

¹⁸ PACE Resolution 2099 (2016), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22556&lang=en>.

The Council of Europe Commissioner for Human Rights, Nils Muižnieks, has been a strong advocate for addressing statelessness in Europe. Muižnieks has, in fact, made this one of the priorities of his work since taking up his post in 2012. He has spoken passionately about the need to protect children, in particular, from statelessness, participating in numerous conferences and meetings to lend his voice to the cause. Moreover, he has also devoted attention to reviewing domestic laws and practices relating to statelessness when making country visits. For instance, following his visits in 2016, he recommended to Latvia that the law be reformed to allow stateless children born in the country to automatically acquire nationality and to Croatia that it redouble its efforts to ensure access to documentation and address the risk of statelessness for members of the Roma community.¹⁹

Besides the CoE, there is the European Union (EU), which currently has 28 member states. The EU has its own human rights document: the Charter of Fundamental Rights of the European Union. The Charter does not contain a provision guaranteeing the right to a nationality, but does provide a set of rights which are attached to EU citizenship, the special supra-national legal status enjoyed by everyone who is a national of an EU member state.²⁰ EU member states maintain competence in the field of nationality law and can set their own rules for acquisition and loss of nationality.²¹ Due to the connection between nationality of a member state and EU citizenship, however, the Court of Justice of the European Union (based in Luxembourg), has affirmed that in relation to the loss of EU citizenship and even when setting the conditions for acquisition of nationality, “Member States must, when exercising their powers in the sphere of nationality, have due regard to European

¹⁹ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Latvia, from 5 to 9 September 2016, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2954116&SecMode=1&DocId=2392328&Usage=2>; Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Croatia, from 25 to 29 April 2016, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2951929&SecMode=1&DocId=2392316&Usage=2>.

²⁰ Article 20(1), Treaty on the Functioning of the European Union (TFEU), 26 October 2012.

²¹ Declaration No. 2 on Nationality of a Member State, annexed to the Treaty on European Union (1992).

Union law”.²² While further jurisprudence has yet to be developed in this area, EU law may therefore have some influence on the nationality policy and practice of EU member states, including in respect of the avoidance of statelessness. The EU could potentially also play a part in ensuring adequate protection for stateless persons on the territory of its member states through the establishment of common standards for statelessness status determination or the regulation of a residence status for stateless persons.²³ To date, concrete measures have yet to be taken in this regard, but interest in the issue of statelessness at the level of the EU has been growing.²⁴

European states at the Universal Periodic Review

Within the framework of the Universal Periodic Review (UPR) statelessness does not frequently come up in relation to European countries. Latvia and Estonia received the most recommendations on this issue: 17 and 12 recommendations respectively during the second UPR cycle. The recommendations to Latvia dealt with four issues: access to nationality for stateless children, improving the enjoyment of rights by stateless persons, resolving existing cases of statelessness, and judicial review of naturalisation applications which are denied.²⁵ Estonia received recommendations on facilitating the resolution of existing cases of statelessness, strengthening the safeguards against statelessness for children and more generally improving the nationality law.²⁶ Several other countries also received specific recommendations on strengthening the protection of the right to nationality and addressing statelessness.

²² Court of Justice of the European Union, *Rottmann v Freistaat Bayern*, Case C-135/08 (2 March 2010), paras 32 and 56.

²³ K Swider, G Bittoni, and L. van Waas ‘The evolving role of the European Union in addressing statelessness’ in L. van Waas and M. Khanna (eds) *Solving Statelessness* (Wolf Legal Publishers, 2017).

²⁴ See further section 4 below.

²⁵ Institute on Statelessness and Inclusion, ‘UPR 24th Session & Statelessness: overview and analysis (2016), Available at http://www.institutesi.org/UPR24_stateless.pdf.

²⁶ Ibid. For more on Estonia, see section 5 of this chapter.

For instance, Austria received the recommendation that it address the limitations in access to nationality for children born out of wedlock and Georgia received the recommendation that it strengthen the safeguards to allow stateless children born in the territory to acquire a nationality.²⁷ Many of the other recommendations made to European states during the second cycle concerned accession to the statelessness conventions.²⁸

3. Europe's 'refugee crisis'

More people are forcibly displaced in the world today than at any other time since World War II.²⁹ A record number of 1.2 million forcibly displaced persons reached Europe during 2015 and the first months of 2016.³⁰ This situation came to be labelled as a 'refugee crisis' and it has been the focus of fervent public and political debate. An issue that has attracted some attention on the margins of this debate has been the implications of this 'refugee crisis' for the picture of statelessness in Europe. In late 2015, for instance, the media warned that the region may be confronted with a 'stateless generation' of children born in exile.³¹ Several short publications have since considered this question.³²

²⁷ Institute on Statelessness and Inclusion, 'UPR 23rd Session & Statelessness: brief overview of outcomes' (2015), Available at http://www.institutesi.org/UPR23_stateless.pdf.

²⁸ This information can all be found in the UPR-info Database of Recommendations, available at <https://www.upr-info.org/database/>

²⁹ UN High Commissioner for Refugees (UNHCR), 'Global Trends: Forced Displacement in 2015' (2016), 5. Available at <http://www.unhcr.org/576408cd7.pdf>

³⁰ UN High Commissioner for Refugees (UNHCR), 'Refugees/Migrants Emergency Response - Mediterranean' (2016) Available at http://data.unhcr.org/mediterranean/regional.php#_ga=1.176929509.1974026488.1468322593. Last accessed 27-10-2016.

³¹ For instance, 'Refugee crisis creates 'stateless generation' of children in limbo (27 December 2015), The Guardian, available at, <http://www.theguardian.com/world/2015/dec/27/refugee-crisis-creating-stateless-generation-children-experts-warn>.

³² These include I. Sturkenboom and L. van Waas, 'How Real Is the Risk of a 'Stateless Generation' in Europe?: Reflections on How to Fulfil the Right to a Nationality for Children Born to Refugee and Migrant Parents in the European Union', in O. Vonk et al, *Grootboek* (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2877368; and K Berenyi, 'Statelessness and the

Looking at the numbers, it appears that approximately 3% of asylum applicants in the EU in 2015 faced nationality problems. According to Eurostat data, 19,605 were recorded as being stateless and a further 22,140 were of “unknown citizenship”.³³ Stateless persons, including Palestinians and stateless Kurds from Syria are among the recent arrivals in Europe. At the same time, 12 of the other 28 largest countries of origin of asylum applicants³⁴ are either known to have a significant, existing stateless population³⁵ or a gender discriminatory nationality law,³⁶ or both. As such, statelessness may be a more significant problem in Europe’s ‘refugee crisis’ than the Eurostat figures show, especially as displacement can also cause statelessness, in particular for the next generation.

The risk of statelessness for children born in Europe to Syrian refugee mothers is a clear example of this problem. Currently, roughly half of all refugees in Europe originate from Syria.³⁷ While the nationality laws of all European states allow women to confer nationality to their children on equal terms with men, under the Syrian nationality law only fathers to transmit nationality to children born outside Syria. Due to the conflict in Syria, many children born in Europe may never get to see their fathers because the family has become separated or the father has been killed. Documentation of identity and of family relationships is also often lost when homes are destroyed or as people flee. Children born in Europe who cannot prove their descent from a Syrian father—or, indeed, whose father is unknown, for instance in the context of

refugee crisis in Europe’ in (2016) FMR, available at <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/community-protection/berenyi.pdf>. See also on the relationship between refugees and migration, including several essays exploring the European context, Chapter 10 on *Migration, displacement and childhood statelessness*.

³³ See <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>.

³⁴ See Annex 1.

³⁵ See <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>. Stateless persons may be among those who flee these countries and seek asylum in Europe.

³⁶ See <http://www.institutesi.org/ourwork/genderequality.php>. A child born to a female refugee from one of these countries may have difficulties securing a nationality, in particular if the father is stateless, unknown or unable to pass on his nationality.

³⁷ UN High Commissioner for Refugees (UNHCR), <http://www.unhcr.org/europe-emergency.html>.

gender-based violence—face a significant risk of statelessness.³⁸ While it receives less attention, the same scenario would also play out for a child born to a refugee who holds the nationality of another country which restricts women's rights to confer nationality to their children.

An obvious implication of this interaction between statelessness and the 'refugee crisis' in Europe is that organisations engaged in statelessness work in the region are confronted with new cases, issues and questions. At the same time, organisations engaged in refugee and migrant assistance may find that nationality and statelessness issues are affecting the individuals and families who they are helping. Governments are also asking new questions about the implications of statelessness for their asylum and migration system, with statelessness now demanding a place in law and policy debate, including at the EU level – as discussed in the next section.

Strengthening national protection frameworks

Protecting stateless persons in a migration context requires a dedicated law and policy framework. Statelessness determination procedures (SDPs), in particular, serve to identify statelessness and are thus essential in ensuring stateless persons enjoy the rights to which they are entitled until they acquire a nationality. Without their statelessness identified there is no route by which stateless migrants who do not qualify for asylum or another form of international protection can regularise their status. This leaves them at risk of a range of rights violations and can expose stateless migrants to long term destitution and/or immigration detention.³⁹

³⁸ See further Institute on Statelessness and Inclusion and Norwegian Refugee Council, 'Understanding Statelessness in Syria Refugee Context' (November 2016), available at www.syrianationality.org.

³⁹ See European Network on Statelessness (ENS), *Still Stateless, Still Suffering* (2014), available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Still_Stateless_Still_Suffering_online%20version_2.pdf.

At present, countries in Europe take varying approaches to the identification of statelessness,⁴⁰ but there is a clear trend towards the adoption of dedicated frameworks and the strengthening of national protection systems. France, has the oldest identification mechanism and has been recognising and protecting stateless persons since the 1950s. Later, Italy, Hungary, Latvia, and Spain all created statelessness determination mechanisms.⁴¹ More recently, Moldova (2011), Georgia (2012), the United Kingdom (2013)⁴², Kosovo (2015), Turkey (2016) and Bulgaria (2016) have all established SDPs. At the time of writing, legislation was in the pipelines in the Netherlands.⁴³ Civil society advocacy and litigation efforts are also ongoing, with a view to strengthening the effectiveness of these national frameworks. An important achievement in this regard was a Constitutional Court ruling in Hungary in February 2015 which struck down the requirement in the Hungarian SDP framework that an applicant for recognition as a stateless person must already be lawfully staying in the country.⁴⁴

⁴⁰ See, for instance, European Migration Network, *EMN Inform: Statelessness in the EU* (2016), available at <http://www.emnluxembourg.lu/wp-content/uploads/2016/11/EMN-Inform-Statelessness-in-the-EU.pdf>.

⁴¹ See G. Gyulai, 'Statelessness Determination and the Protection Status of Stateless Persons' (European Network on Statelessness, 2013), 15. Available at <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/Statelessness%20determination%20and%20the%20protection%20status%20of%20stateless%20persons%20ENG.pdf>

⁴² See further section 5 of this chapter.

⁴³ In the Netherlands, a legislative proposal was made available for public consultation in September 2016. See <https://www.internetconsultatie.nl/staatloosheid>. However, the draft law received significant criticism from civil society organisations, lawyers, UNHCR and the Netherlands Institute for Human Rights, all of which have suggested substantial changes be made before the bill proceeds to parliament for consideration. See, for instance, the joint submission made by ASKV / Refugee Support and the European Network on Statelessness, and the submission by the Institute on Statelessness and Inclusion, available at <https://www.internetconsultatie.nl/staatloosheid/reacties>.

⁴⁴ See G. Gyulai, 'Hungarian Constitutional Court declares that lawful stay requirement in statelessness determination breaches international law' (ENS blog, 2015), available at <http://www.statelessness.eu/blog/hungarian-constitutional-court-declares-lawful-stay-requirement-statelessness-determination>.

4. Growing engagement by the European Union

The role of the European Union (EU) in the protection of stateless persons and the prevention of statelessness has, to date, been relatively limited. As mentioned in section 2 of this chapter, there is no clear mandate for the EU to legislate on statelessness as such, with the regulation of nationality a competence that rests with member states. Nevertheless, there are numerous entry points for EU engagement on statelessness and over the past few years, the issue has started to gain a foothold on the agenda of key EU institutions.

In late 2014, the European Parliament published a study, commissioned by the Directorate-General for External Policies of the Union, titled 'Addressing the human rights impact of statelessness in the EU's external action'.⁴⁵ The study demonstrated that there is a strong nexus between statelessness and several of the EU's current human rights priorities and identified a variety of ways in which the EU has already contributed to addressing statelessness in its external action. This has included, among others, the initiation of or support for children's rights programmes with stateless beneficiaries, awareness-raising on citizenship rights to help the avoidance of statelessness, promoting universal access to birth registration, research and dialogue on statelessness, in particular specific populations or geographies.⁴⁶ The EU has since developed a framework for raising awareness about statelessness among third countries and in 2015, the global call for proposals issued by the European Instrument for Democracy and Human Rights explicitly included the possibility of support for projects with stateless persons as beneficiaries.⁴⁷ External engagement on statelessness should continue in accordance with the EU's Action plan on human rights and democracy for the period 2015-2020, which includes as a focus "preventing the emergence of stateless populations as a result of conflict, displacement and the break-up of states".⁴⁸

In November 2015, the European Parliament released another study, this

⁴⁵ Available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534983/IPOL_STU\(2014\)534983_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534983/IPOL_STU(2014)534983_EN.pdf).

⁴⁶ Ibid, section 4.2.

⁴⁷ Lot 4, see http://odb-office.eu/ann/_global-call-proposal-2015-under-eidhr-announced.

⁴⁸ See https://eeas.europa.eu/human_rights/docs/eu_action_plan_on_human_rights_and_democracy_en.pdf.

time commissioned by the Policy Department for Citizen's Rights and Constitutional Affairs, at the request of the LIBE Committee.⁴⁹ The study captured the state of play with respect to "Practices and approaches in EU Member States to prevent and end statelessness", presenting an assessment of national practices in light of the relevant international and European standards.⁵⁰ While focused on prevention and reduction of statelessness, the study also recognised that "proper mechanisms to identify stateless populations are lacking in a majority of Member States" and therefore looked more closely at the procedures used in determining statelessness where these exist.⁵¹ The study concluded that there are many holes in EU member states' response to statelessness and pointed to both the need for and the different legal bases that exist to achieve coordinated EU regulation on the identification and protection of stateless persons in particular.⁵² A month after the publication of this study, in December 2015, the Council of the EU adopted its first Conclusions on Statelessness under the Luxembourg Presidency.⁵³ In the Conclusions, the Council invites member states to exchange good practices and information relating to statelessness, specifically relating to reliable data on stateless persons and statelessness determination procedures using the European Migration Network (EMN) as a platform for exchange.

During 2016, EMN carried out a series of activities in response to the Council Conclusions. Two Ad Hoc Query were launched by the Luxembourg EMN National Contact Point to gather information on existing practices and generate the baseline data required for a more targeted discussion on the possibility of further coordinating action on statelessness. EMN also hosted several events, including a Conference discussing experiences and good practices regarding tackling statelessness organised in Luxembourg in April,⁵⁴ a seminar on statelessness determination procedures, sharing

⁴⁹ This is the European Parliament Committee focusing on Civil Liberties, Justice and Home Affairs.

⁵⁰ See [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU\(2015\)536476_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU(2015)536476_EN.pdf).

⁵¹ Ibid, page 9.

⁵² Ibid, from page 60.

⁵³ Conclusions of the Council and the Representatives of the Government of the Member States on Statelessness (4 December 2015) available at <http://www.consilium.europa.eu/en/press/press-releases/2015/12/04-council-adopts-conclusions-on-statelessness/>

⁵⁴ See <http://www.statelessness.eu/blog/eu-response-statelessness-where-next-after-luxembourg>. This conference resulted in the publication of a 'Policy Brief', available at <http://www.emnluxembourg.lu/wp-content/>

experiences in establishing and operating such procedures in countries throughout Europe held in Ireland in May,⁵⁵ and a meeting to discuss different examples for managing and identifying statelessness held in Hungary in September.⁵⁶ Towards the end of 2016, EMN published the synthesis report of the findings from its Ad Hoc Queries and further discussions: “EMN Inform: Statelessness in the EU”.⁵⁷

EU engagement on statelessness: what’s next?

Looking ahead, further debate on the role of the EU in addressing statelessness is on the cards in 2017. In January 2017, EMN will convene another conference, in collaboration with the European Network on Statelessness⁵⁸ and UNHCR, to “take stock on collective efforts to address statelessness in the EU as well as identify what further action is required”.⁵⁹ MEPs have announced that a debate on statelessness will also be held at the European Parliament in 2017, as a joint initiative of the LIBE Committee and the Petitions Committee.⁶⁰

5. Country profiles

As mentioned in section 1 of this chapter, there is greater statistical coverage on statelessness in Europe than in any other part of the world. In recent years, there has also been an increase of research and mapping initiatives on statelessness in the region. UNHCR has published

[uploads/2016/03/Policy-Brief-conclusions-Statelessness-conference.pdf](#).

⁵⁵ See <http://emn.ie/index.jsp?p=100&n=105&a=2440>.

⁵⁶ See <http://www.statelessness.eu/news-events/news/european-migration-network-xvii-national-conference-different-examples-managing-and>.

⁵⁷ See <http://www.emnluxembourg.lu/wp-content/uploads/2016/11/EMN-Inform-Statelessness-in-the-EU.pdf>.

⁵⁸ See further section 6 of this chapter.

⁵⁹ See <http://www.statelessness.eu/news-events/news/emn-unhcr-and-ens-conference-addressing-statelessness-european-union-one-year>.

⁶⁰ See <http://www.statelessness.eu/blog/working-together-end-childhood-statelessness-europe>. The European Parliament’s Petitions Committee has now received two petitions initiated by the European Network on Statelessness: the first calling for better protection of stateless persons in Europe (<http://www.statelessness.eu/act-now-on-statelessness>) and the second for action to be taken to end childhood statelessness in Europe (<http://statelesskids.eu/>).

mapping studies and scoping papers of the situation of stateless persons and the law and policy framework in place in a multitude of countries, including in 2014-2016 in Ireland, Malta, Iceland, Finland, Norway, Lithuania, and Sweden.⁶¹ In the same period, the European Network on Statelessness has also been the driving force behind a wealth of research, with a particular focus on childhood statelessness (8 country studies and two regional reports) and the detention of stateless persons (6 country studies and a regional toolkit).⁶² Within academia there has also been a growing interest in research relating to statelessness in Europe, including under the Involuntary Loss of European Citizenship project which ran from 2013-2015⁶³ and through the EUDO Citizenship Observatory.⁶⁴

This rapidly growing body of analysis on statelessness in Europe provides a powerful resource for understanding the problems and opportunities faced. The following paragraphs take a closer look at selected challenges, legislative reform and advances in jurisprudence that have occurred in the region in the past few years.

Bulgaria

Not much is known about statelessness in Bulgaria as no comprehensive mapping study has been undertaken yet. The UNHCR-reported figure for the number of stateless persons in Bulgaria stands at 67 persons. The issue has nevertheless now come onto the domestic agenda and steps are underway which may lead to a better picture of the state of statelessness in the country. Specifically, as 2016 was drawing to a close, the Bulgarian Parliament adopted a law that introduces a statelessness determination procedure, published in the State Gazette on 6 December.⁶⁵ While the introduction of such a procedure is very

⁶¹ These studies and others launched earlier by UNHCR can all be found under the Europe section here: <http://www.refworld.org/statelessness.html>.

⁶² All publications by the European Network on Statelessness are available here: <http://www.statelessness.eu/resources/ens-working-papers>. Note that the Institution of Statelessness and Inclusion acted as an expert partner on both the childhood statelessness and detention projects for ENS in 2015-2016.

⁶³ See <http://www.ilecproject.eu/>.

⁶⁴ See <http://eudo-citizenship.eu/>.

⁶⁵ This concerns the Law amending the Aliens Act, introducing a new Chapter on “Granting the status of stateless person in Bulgaria under the Law on Ratification of the Convention on the Status of Stateless Persons, adopted by the United Nations Organisation in New York on 28 September 28 1954”. See European Network on Statelessness, ‘Bulgaria introduces a statelessness determination procedure

much welcomed, the law comes with some difficulties that threaten its utility for *all* stateless persons. The law allows the authorities to decide to refuse statelessness status to applicants who entered the country or attempted to pass through it not through the established entry border points or using false or forged documents; reside unlawfully on Bulgarian territory; or have resided legally and continuously in Bulgaria for less than five years. Without a determination procedure that is open to everyone on Bulgarian territory (not just those who are there legally) the law fails not only to adequately identify statelessness but also to put in place an effective protection regime.⁶⁶ The systematic identification of stateless persons is needed to protect people from arbitrary and protracted detention, as without it stateless persons may be put in detention without any or only little prospect for removal.⁶⁷

Estonia

There are just over 85,000 stateless persons in Estonia, almost 6% of the total population.⁶⁸ This makes Estonia home to one of the largest stateless populations in Europe. With the restoration of independence of Estonia in 1991, many former citizens of the Soviet Union lost that citizenship and were unable to acquire Estonian nationality. Estonia's new nationality law pursued a strict *jus sanguinis* based approach, restoring citizenship to those who were Estonian prior to the country's incorporation into the Soviet Union and their descendants. Others could apply for naturalisation, but the process was cumbersome. In Estonia, those left stateless in the wake of state succession are known as 'persons with undetermined citizenship' and hold a special status under domestic law. A strong package of rights accompanies this status,

into national law' (15 December 2016), available at http://www.statelessness.eu/news-events/news/bulgaria-introduces-statelessness-determination-procedure-national-law?mc_cid=43d079c28e&mc_eid=f5a69993cc.

⁶⁶ Additional problems with the law are discussed in an ENS blogpost. See V Ilareva, 'Bulgaria is introducing a statelessness determination procedure. Or is it?' (ENS blog, 2016). Available at <http://www.statelessness.eu/blog/bulgaria-introducing-statelessness-determination-procedure-or-it>

⁶⁷ Please see the recently published ENS report, *Protecting Stateless Persons from Arbitrary Detention in Bulgaria* for more information on the arbitrary detention of stateless persons in Bulgaria. For this report and a summary report (the latter also available in Bulgarian), please visit <http://www.statelessness.eu/resources/protecting-stateless-persons-arbitrary-detention-bulgaria>

⁶⁸ UN High Commissioner for Refugees (UNHCR), 'Global Trends: Forced Displacement in 2015' (2016), annex 1. Available at <http://www.unhcr.org/576408cd7.pdf>.

but not all of the rights and entitlements that Estonian nationals hold are extended to this population.⁶⁹

Many children born to ‘persons with undetermined citizenship’ in Estonia faced statelessness themselves, even if born in the country, due to the way the nationality law was constructed. Over the years, the law did make access to nationality for such children steadily easier, but it was still conditional on the parents’ having resided for at least 5 years in the country and then taking action on behalf of their child for the granting of nationality.⁷⁰ According to the Estonian Ministry of Interior, some 300 children were still being born stateless in Estonia each year.⁷¹ In January 2015, Estonia passed a new amendment to its Citizenship Act that further improved access to nationality for these children. Any child born after the amendment entered into force at the start of 2016, children would automatically acquire nationality if the parents are stateless and meet the residence criteria. The amendment also made provision for retroactively granting citizenship to stateless children who were still under the age of 15 when the law entered into force. It also took positive steps in terms of facilitating access to naturalisation for some people who continued to find this a challenge. People over 65 can now take an oral language exam instead of a written exam, highly improving their chances of fulfilling the required language conditions.⁷² Nevertheless, concerns remain about both the content of the law and its implementation.⁷³

⁶⁹ For instance, in 2016, the question of European voting rights of stateless persons in Estonia (and Latvia) received attention at the European Parliament. For more on this please see: Y Toom, ‘The Fight for Voting Rights of Stateless Persons in Estonia and Latvia’ (ENS Blog, 2016). Available at <http://www.statelessness.eu/blog/fight-voting-rights-stateless-persons-estonia-and-latvia>

⁷⁰ European Network on Statelessness and the Legal Information Centre for Human Rights, ‘Ending childhood statelessness: A study on Estonia’ (2015) Working Paper 04/15, available at http://www.statelessness.eu/sites/www.statelessness.eu/files/Estonia_2.pdf.

⁷¹ Explanation note to the amendment to the Citizenship Act (nr737), available at <http://www.riigikogu.ee/download/ab5f780c-3b11-4bb3-8f5b-d819ec8deaa4/ab5f780c-3b11-4bb3-8f5bd819ec8deaa4>

⁷² See E Eestis, ‘Riigikogu Simplifies Granting Estonian Citizenship to Children and Elderly’ (2015) Estonian World Review, available at <http://www.eesti.ca/riigikogu-simplifies-granting-estonian-citizenship-to-children-and-elderly/article44181>

⁷³ See, among others, Institute on Statelessness and Inclusion and European Network on Statelessness, *Submission to the Committee on the Rights of the*

Italy

Statelessness in Italy primarily concerns Roma children: around 15.000 such children reportedly live at risk of statelessness.⁷⁴ While nationality legislation provides positive routes through which to reduce and prevent childhood statelessness,⁷⁵ difficulties remain regarding the practical application of the law. Over the course of the last two years several court rulings have achieved positive progress for the prevention and reduction of statelessness.

On 22 January 2016, the Civil Court of Rome held that held that Italian authorities were too strict in interpreting the 'legal residence' as contingent on a person meeting two conditions: uninterrupted registered residence and the continuous possession of a residence permit.⁷⁶ On 17 March 2016, the same court overturned a negative decision on an application for citizenship that had been based on a woman's parents' failure to complete all registration formalities for her when she was a child.⁷⁷ Both cases dealt with difficulties that are common barriers to acquiring nationality among young Roma living in Italy. Uprooted by war in the former Yugoslavia, many Roma came to Italy several decades ago but still cannot meet all administrative formalities for access to nationality—including for their children, even if statelessness threatens—due to their precarious situation before and

Child on the Right of Every Child to Acquire a Nationality: Estonia (October 2015), available at http://www.institutesi.org/CRC_Estonia_2015.pdf; and Human Rights Watch, *Submission to the Committee on the Rights of the Child on Estonia* (November 2016), available at https://www.hrw.org/sites/default/files/supporting_resources/hrw_submission_on_estonia_to_the_committee_on_the_rights_of_the_child.pdf.

⁷⁴ The figure of 15.000 Roma children who are stateless or at risk of statelessness comes from a blog written by N Garbin and A Weiss, 'An Italian Recipe for Reducing Childhood Statelessness' (ENS Blog, 2016), available at <http://www.statelessness.eu/blog/italian-recipe-reducing-childhood-statelessness>

⁷⁵ See European Network on Statelessness and Italian Council for Refugees (CIR), 'Ending childhood statelessness: A study on Italy' (2015) Working Paper 07/15, available at http://www.statelessness.eu/sites/www.statelessness.eu/files/Italy_0.pdf.

⁷⁶ See for example N Garbin and A Weiss, 'An Italian Recipe for Reducing Childhood Statelessness' (ENS Blog, 2016), available at <http://www.statelessness.eu/blog/italian-recipe-reducing-childhood-statelessness>

⁷⁷ See for example S Simándi, 'Italian Court decision brings Europe one step closer to ending Romani statelessness' (European Roma Rights Centre, 17 March 2016), available at <http://www.errc.org/article/italian-court-decision-brings-europe-one-step-closer-to-ending-romani-statelessness/4466>

after relocating to Italy. These court rulings promise to help prevent these problems from becoming a recurring obstacle for such families. There has also been progress in respect of the protection of stateless persons in Italy. The implementation of the framework for statelessness status determination in Italy is not without its challenges.⁷⁸ Italy saw an important judgement on 3 March 2015. The Italian Court of Cassation ruled on a case relating to the Italian determination procedure, effectively lowering the burden of proof for applicants in proving their statelessness and relocating part of this burden to a bigger role for Italian judges in searching evidence in statelessness determination procedures.⁷⁹

United Kingdom

In November 2011, UNHCR published a mapping study of Statelessness in the United Kingdom (UK).⁸⁰ The report concluded that the UK lacked “specific law, policy and procedures to address many of the challenges confronting stateless persons”.⁸¹ A central problem in the country, as elsewhere in Europe, was the absence of a specific statelessness determination and protection framework. The adoption, in April 2013, of a procedure for granting statelessness leave under Part 14 of the Immigration Rules was therefore a much-welcomed development.⁸² Stateless persons can now seek recognition of their stateless status and acquire a residence permit based on that recognition. The exact procedure for granting statelessness leave was elaborated upon further by the government in a related policy instruction, which was updated and published by the government in February 2016.⁸³ While the determination procedure is designed to offer a pathway to protection for stateless persons, in practice problems remain. Between the introduction of the procedure and April 2016, almost

⁷⁸ See, for instance, G Bittoni, ‘Statelessness determination procedure in Italy: who bears the burden of proof?’ (ENS Blog, 2015), available at <http://www.statelessness.eu/blog/statelessness-determination-procedure-italy-who-bears-burden-proof>.

⁷⁹ Ibid.

⁸⁰ See <http://www.refworld.org/docid/4ecb6a192.html>.

⁸¹ Ibid, page 7.

⁸² See for instance <http://www.unhcr.org/news/briefing/2013/4/5163f0ba9/uks-new-determination-procedure-end-legal-limbo-stateless.html>.

⁸³ UK Home Office, ‘Asylum Policy Instruction: Statelessness and applications for leave to remain’ (18 February 2016, version 2.0), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501509/Statelessness_AI_v2.0_EXT_.pdf.

1600 persons had submitted application under the Immigration Rules in relation to statelessness. Only 5.2% of decisions (39 decisions) were positive, and 715 applications were refused.⁸⁴ More than half of all applications remain pending.⁸⁵ There are problems particularly with the practical implementation of the criteria to grant stateless people lawful permission to stay including lack of legal aid, legal errors by UK Home Office staff, slow decision-making by the Home Office, and the lack of right of appeal in case an application gets refused. The reality continues to be that being stateless in the UK often means hardship, with high vulnerability to destitution, depression, exploitation and homelessness.⁸⁶ It even may lead to repeated and/or extended periods of detention. Recent research shows that at least 108 stateless persons were detained at the end of 2015.⁸⁷ Without their stateless status properly determined, stateless persons remain in migration detention for extended periods, without the prospect of removal.

Civil society in the UK continues to undertake efforts to secure better protection for stateless persons in the country. For instance, on 2 November 2016, the Immigration Law Practitioner's Association and Liverpool Law Clinic jointly published a tool for legal practitioners to help with offering the highest qualitative legal representation by pressing for the best possible implementation of the statelessness determination procedure.⁸⁸

⁸⁴ Asylum Aid, *Key Successes*. Available at <http://www.asylumaid.org.uk/statelessness/>

⁸⁵ K Bianchini, *Statelessness Detention in the UK* (2016), 14, available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Reports_UK.pdf

⁸⁶ C. Orchard, 'The UK's Approach to Statelessness: Need for Fair and Timely Decisions' (Asylum Aid, September 2016), 1, available at <http://d2t68d2r9artlv.cloudfront.net/wp-content/uploads/2016/09/Policy-briefing-statelessness-22-September-final.pdf>

⁸⁷ This is more than twice as many stateless detainees in migrant detention facilities as compared to 2012. See European Network on Statelessness, *Statelessness Detention in the UK* (2016), 15 available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Reports_UK.pdf

⁸⁸ Sarah Woodhouse and Judith Carter, *Statelessness and Applications for Leave to Remain: A Best Practice Guide* (2016), available at <http://www.ilpa.org.uk/resource/32620/statelessness-and-applications-for-leave-to-remain-a-best-practice-guide-dr-sarah-woodhouse-and-judi>

Brexit and the Scottish independence referendum

When the (first) referendum for Scottish independence took place in 2014, questions were raised as to the potential nationality implications of an independent Scotland.⁸⁹ When the vote was 'no', the discussion of options for regulating nationality post-succession remained a theoretical one. However, following the 'yes' vote for the withdrawal of the United Kingdom from the European Union (Brexit), not only may a second Scottish independence referendum be on the cards, but Brexit itself raises questions on the enjoyment of EU citizenship and its benefits. That nationals of the UK may lose their status of EU citizen once the withdrawal from the EU happens will not create an issue of statelessness (they will still hold British citizenship). However, the ongoing debate about their post-Brexit status raises broader questions about the relationship between nationality of a member state and EU citizenship that are potentially relevant to the status of long-term stateless residents in the EU. Could they, too, make a claim to EU citizenship that bypasses nationality of an EU member state?

6. The European Network on Statelessness (ENS) - from Chris Nash⁹⁰

The European Network on Statelessness (ENS) is a civil society alliance committed to addressing statelessness in Europe.⁹¹ It was launched in 2012 and now has members in 39 countries. The period 2015-16 has proved pivotal both for the development of the ENS and the external environment in which we work. We have consolidated our Network after transitioning from being a project of our founding members to become an independent charity with a growing membership

⁸⁹ See, for instance, J. Shaw, 'Citizenship in an independent Scotland: legal status and political implications' (2013), CITSEE Working Paper 2013/24, available at http://www.citsee.ed.ac.uk/working_papers/files/CITSEE_WORKING_PAPER_2013-34.pdf.

⁹⁰ Chris Nash is the Director and a co-founder of the European Network on Statelessness. See also by Chris Nash in this publication, *Mobilising to address childhood statelessness: The experience of the European Network on Statelessness through its #StatelessKids campaign* in Chapter 13.

⁹¹ See www.statelessness.eu.

now covering 39 countries. During this period, we have published two comparative research reports, conducted 14 country studies, organised four regional conferences/roundtables, facilitated three regional training workshops, supported over 20 national trainings, and started to implement a pan-regional litigation strategy. This has only been possible due to committed engagement of our members across Europe, as well as support from donors and other partners willing to back what was initially a fledgling initiative.

Over the last two years, a major focus for us has been our #StatelessKids campaign (described in more detail in a separate essay in this report) which promotes the right of every child to acquire a nationality. This aligns with our strategy of seeking new 'entry points' to tackle statelessness, and has enabled us to engage an array of new supporters. As well as child rights actors, these include a dynamic force of youth ambassadors who attended the first ever Youth Congress on statelessness which we organised in Brussels in July 2016.

Other current thematic priorities include our project to address Roma statelessness as well as our project to protect stateless persons from arbitrary detention⁹². Both of these initiatives will be increasingly visible during 2017 as we believe that continued awareness-raising is critical to maintain the scale and speed with which the issue of statelessness has emerged in recent years. We have attracted increasing subscribers to our weekly blog as well as seen our campaign mailing list grow to over 20,000 supporters. As well as our capacity-building programmes within Europe, we have also sought to share our learning with other nascent regional statelessness networks to help foster a growing global civil society coalition.

Nowhere is the ambition of eradicating statelessness more achievable than in Europe. The debate now is on 'how', rather than 'what is' or 'why' should we address the problem. In 2017 and beyond we aim to build on our campaigning work to date, as well as utilise other markers of progress such as the first ever Conclusions on statelessness adopted by the European Council in December 2015. By targeting advocacy at the national level we hope to secure increased law and policy reform across Europe.

⁹² See <http://www.statelessness.eu/protecting-stateless-persons-from-detention>

CHAPTER 6: MIDDLE EAST AND NORTH AFRICA (MENA)

1. Stateless persons in the MENA

Statelessness continues to affect hundreds of thousands of families across the MENA region. UNHCR's 2015 statistics indicate that there are 374,237 recorded stateless persons in the region, which is a decrease of just under 70,000 from previous years.¹ However, these figures present a significantly lower estimate, to what is likely to be the actual size of the stateless population in the region. Stateless Palestinians, who fall under UNRWA's mandate, have not been included in this data.² Moreover, stateless refugees are also not included in this figure.³ The impact this can have on statistics is significant, as conflict and instability have spread across the region over the last few years, displacing millions of persons and creating new risks for the emergence of statelessness.

Various historical factors have contributed to the prevalence of statelessness in the region today. Many stateless persons can trace their statelessness back to the formation of States, which mostly occurred with the end of colonisation. When borders were drawn up by the colonial powers, new states were faced with the immediate task of defining who their citizens were. In Kuwait for example—which has a reported stateless population of 93,000 persons—the genesis of statelessness was the failure to comprehensively identify and register all persons who should have been recognised as citizens during the post-colonial period of state formation.⁴ Similarly in Lebanon, a census

¹ UN High Commissioner for Refugees (UNHCR), 'Global Trends, Forced Displacement in 2015' (2015), available at <http://www.unhcr.org/576408dc7.pdf>. In 2013 the number was above 444,000.

² UNHCR Statistical online population database, general notes, 2013, available at www.unhcr.org/uk/statistics/unhcrstats/4a01417d6/unhcr-statistical-online-population-database-general-notes.html

³ For a detailed analysis of the challenges and gaps related to statistical reporting on statelessness in the world, see Institute on Statelessness and Inclusion, *The World's Stateless* (2014), available at <http://www.institutesi.org/worldsstateless.pdf>

⁴ For more information on this population see Human Rights Watch, 'Prisoners of the Past, Kuwaiti Bidoon and the Burden of Statelessness' (2011).

that took place in the 1930s after the establishment of the state 'locked in' those who were entitled to nationality (and the delicate religious balance of the state), and left others out. This has resulted in the great grandchildren of those who were initially left out of the citizenship identification process continuing to remain without nationality.

Flawed and discriminatory nationality laws also create new cases of statelessness and prolong protracted ones across the region. For example, 12 out of the 27 countries worldwide that discriminate against mothers in their right to transfer their nationality to their children on an equal basis as fathers are in the MENA region.⁵ Discrimination based on religion, race, and disability is also prevalent in the nationality legislation of various countries across the region. For example, under Yemeni nationality law, non-Arabs or Muslims are prohibited from access to naturalisation.⁶ Children born out of wedlock are often not legally recognised, and in most countries in the region valid marriage certificates are required to register the births of children. Even countries such as Lebanon and Syria, which have safeguards to protect children from being born stateless on their territories, rarely implement these safeguards.⁷

The region has also witnessed many cases of arbitrary deprivation of nationality by states. Mauritania, Iraq, and Syria are three countries in the region that in recent history have arbitrarily deprived tens of thousands of persons of their nationality due to race and ethnicity.⁸ More recently, there has been a rise in the deprivation of nationality of individuals in the Gulf region, where nationality is being used as a tool to exclude persons from membership.⁹ Furthermore, in the majority

⁵ See UN High Commissioner for Refugees (UNHCR), 'Background Note on Gender Equality, Nationality Laws and Statelessness' (2016). See also *Campaigning for gender equality in nationality laws* by Catherine Harrington in Chapter 13.

⁶ See Article 4, Law no. 6 of 1990 Yemeni Nationality Law.

⁷ See also *International and regional safeguards to protect children from statelessness* by Laura van Waas in Chapter 11.

⁸ Z. Albarazi, 'Stateless Syrians' (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269700; Open Society Foundations, 'We Are Mauritians' (2009), available at <https://www.opensocietyfoundations.org/multimedia/we-are-mauritians>; Refugees International, 'The Failli Kurds of Iraq' (2010), available at <http://reliefweb.int/report/iraq/faili-kurds-iraq-thirty-years-without-nationality>

⁹ For discussion on using the political usage of citizenship in the region see Z. Albarazi and J. Tucker, 'Citizenship as a Political Tool: the recent turmoil in the MENA and the creation and resolution of statelessness' (2014).

of countries across the region, nationality disputes are not considered to fall under the jurisdiction of national courts, and therefore any arbitrary denial or deprivation cannot be legally challenged.

Lastly, forced migration has been and remains a fundamental cause of statelessness in the region. Historically, due to the upheaval of hundreds of thousands of Palestinians in the wake of the establishment of Israel, millions of Palestinians remain stateless today. Neighbouring countries do not grant citizenship to Palestinians, and therefore many live in an intergenerational and protracted state of statelessness. Additionally, recent conflict of the most severe nature in the region has meant that there are new factors that are putting families—particularly new-born children—at risk of statelessness.

Statelessness in the MENA is poorly mapped. No figures are available for the stateless populations in the majority of countries in the MENA, even though it is well known that many of these states have significant stateless populations. The following table provides the known statistics for the four countries which have reported stateless populations above 10,000:

Table 5: Countries in the MENA with over 10.000 stateless persons:¹⁰

Syria	160,000
Kuwait	93,000
Saudi Arabia	70,000
Iraq	50,000

The figures for Iraq and Syria have decreased over the past few years. In Iraq, some stateless persons have been able to obtain nationality on the basis of a new nationality law that was adopted in 2006.¹¹ In Syria in 2011 legislative Decree No. 49—which was a concessionary measure to reduce anti-government protesting at the start of the Syrian revolutionary protests—resulted in tens of thousands of stateless Ajanib Kurds receiving nationality. However, this decree does not apply to all stateless Kurds – the Maktoum are excluded.¹²

¹⁰ UN High Commissioner for Refugees (UNHCR), 'Global Trends, Forced Displacement in 2015' (2015), available at <http://www.unhcr.org/576408dc7.pdf>.

¹¹ Article 17, law no 26 of 2006, 7 March 2006.

¹² For more discussion on this decree see T. McGee, 'Statelessness Displaced:

2. Regional and international standards

There are only two countries in the region that have acceded to both the 1954 and the 1961 Statelessness Conventions: Libya and Tunisia. In addition, Algeria is party to the 1954 Convention. The level of accessions in the region has not changed for many years and with the majority of the States not having ratified the 1951 Refugee convention either, there has been little push or expectation to encourage more accessions.

It is important to note that, despite slight variations from State to State, in general, the rights of stateless persons are rarely protected in the region. There is not a single country in the region that has a statelessness determination procedure, nor a specific protection status for stateless persons. In most countries, a stateless person will remain legally invisible, which means they will be unable to access a host of various rights. Despite this, the countries in the region have a reasonably high accession rate to human rights conventions, all for example are parties to the CRC, the ICCPR and CEDAW.¹³

MENA states at the Universal Periodic Review

Within the framework of the Universal Periodic Review (UPR) statelessness regularly comes up in relation to MENA countries. The majority of recommendations relate to the removal of gender discrimination from nationality law, in particular granting women equal rights to transmit nationality to their children and removing reservations to article 9 of CEDAW. During the second cycle of the UPR, recommendations of this nature were made to Bahrain, Jordan, Kuwait, Lebanon, Mauritania, Oman, Qatar, Saudi Arabia, Syria and the United Arab Emirates. Recommendations have also addressed discrimination in nationality rights more broadly, as well as access to human rights of specific stateless communities, and in relation to access to birth registration. For example, Paragraph 86 of the 23rd session on Lebanon specifically discussed the problems of access to birth registration, particularly for children of refugee families and of *Maktoum* (unregistered) fathers, which was one of the causes of statelessness in the country. Lebanon received a recommendation to ensure access to birth registration for everyone.

Update on Syria's Stateless Kurds' (2016) Institute on Statelessness and Inclusion Working Paper Series No 2016/02, available at http://www.institutesi.org/WP2016_02.pdf

¹³ However, many states have put in reservations to various articles in these conventions, specifically Article 9 of the CEDAW prohibiting discrimination against women in nationality law.

The UPR of Kuwait in 2015 resulted in eight recommendations being made regarding the stateless Bidoons, ranging from granting them citizenship to ensuring the protection of their human rights, and two recommendations being made on Kuwaiti accession to the statelessness conventions.¹⁴

Additionally, there is a weak regional human rights framework in the region. Both the Arab Charter on Human Rights and the Convention on the Rights of the Child in Islam protect the right to nationality.¹⁵ However, these are not binding frameworks and there is no human rights mechanism or regional court to monitor implementation or hear individual complaints under these treaties. The Arab League has recently shown some interest in statelessness-related issues, hosting a 2016 conference on access to civil registration procedures in the region, but to-date there has been no take-up of the issue more substantially.

3. Displacement and statelessness

Civil war broke out in Syria in 2011, causing hundreds of thousands of civilians to be killed, millions to be displaced, and significant areas of the country to have fallen under the control of armed non-State actors. In Iraq, ongoing turmoil has also led to destruction and the displacement for hundreds and thousands of families.¹⁶ Yemen has millions of internally displaced persons and hundreds and thousands of refugees that are escaping the crisis and conflict that has afflicted this country.¹⁷ These worsening crises have caused a massive humanitarian disaster in the region, impacting countries far beyond those in which conflict is taking place.

The overwhelming majority of these refugees and internally displaced persons hold the nationality of their country of origin and face no

¹⁴ UN General Assembly (UNGA), A/HRC/29/17 29th session (April 2015).

¹⁵ Article 24 of the Arab Charter on Human Rights, adopted in Cairo 15 September 1994, and Article 24 of the Covenant Rights of the Child in Islam 2004.

¹⁶ See UNHCR's Iraq Global Focus page, available at http://reporting.unhcr.org/node/2547#_ga=1.99285276.341780641.1482348053

¹⁷ See UNHCR's Yemen Global Focus page at <http://reporting.unhcr.org/node/2647>.

immediate risk of statelessness. However, due to a number of factors—mainly the gender discriminatory nature of the law in all three of these countries and complex civil registry procedures in host countries—the risk of statelessness in the region has increased significantly with the rise of conflicts. Children born to Iraqi and Yemeni mothers outside their country do not automatically obtain nationality, but have to apply for it.¹⁸ Furthermore according to Syrian nationality law, those born outside of Syria to a Syrian mother can never obtain her nationality.¹⁹ In times of conflict there are varying scenarios in which a father may not be present or known, or may not be legally linked to the child, increasing the risk of statelessness and related vulnerabilities.²⁰ Statelessness is a driver of insecurity and injustice, particularly in situations of conflict and displacement. Being left both displaced and stateless is not only an impediment to accessing a variety of rights, but also may affect a family's opportunity of returning to their country in the future.

4. Arbitrary deprivation of nationality in the Gulf region

The Gulf region has historically been home to a substantial number of stateless persons, most notably the stateless Bidoon.²¹ However more recently we have witnessed a sharp rise in the trend of stripping individuals of their nationality. Across this region, nationality legislations prohibits dual nationality, therefore, when an individual is stripped of their nationality it is likely that they will be rendered stateless. It is widely believed that these measures are being taken to punish and exclude human rights advocates and political opponents.²²

¹⁸ See Article 4 of Iraqi Nationality Law, Law 26 of 2006, 7 March 2006, and Article 3 of Law No. 6 of 1990 on Yemeni Nationality.

¹⁹ Article 3 Legislative Decree 276 – Syrian Nationality Law, 1969.

²⁰ For more information on the risks of statelessness in the Syria context, see Institute on Statelessness and Inclusion (ISI) and Norwegian Refugee Council (NRC), *Understanding Statelessness in the Syrian Refugee Context* (2016), available at <http://www.syrianationality.org/pdf/report.pdf>. See also, Chapter 9 of this report on *Migration, displacement and childhood statelessness*.

²¹ UN High Commissioner for Refugees (UNHCR), 'The situation of stateless persons in the Middle East and North Africa' (2010), available at <http://www.refworld.org/pdfid/4cea28072.pdf>.

²² See for example the Islamic Human Rights Commission, *Stripping Nationality as a Weapon of Political Suppression* (2014), available at <http://www.ihrc.org.uk/publications/reports/11230-stripping-of-nationality-as-a-weapon-of-political-suppression-the-cases-of-bahrain-united-kingdom-united-arab-emirates-and-kuwait>.

The practices in Bahrain and the United Arab Emirates in particular, are of significant concern.

In Bahrain in 2013, the King issued a decree that, among other things, enabled the courts to revoke the citizenship of any citizen convicted of a terrorist offense: an offense that is defined very broadly under Bahraini law.²³ Since then, more than 330 persons have been stripped of their Bahraini nationality.²⁴ All of those who have had their nationality stripped were male and, as women are not able to transfer their nationality to their children under Bahraini nationality law, any children born to these men is at risk of statelessness if their parents hold no other nationality.²⁵ Although there are no available figures, the Emirati government has also been carrying out similar methods of using citizenship as a political tool. This practice started in 2011 with the emergence of the then viewed 'Arab Spring'²⁶ and has continued, with individuals regularly being stripped of their Emirati nationality. State practice has even extended to the deprivation of nationality of family members of individuals who have been jailed as political dissidents. Such deprivation is rarely carried out before a court of law. Instead, individuals are informed by the migration department that they are no longer citizens.²⁷

5. Gender discrimination in nationality laws

To varying degrees, Qatar, Oman, Kuwait, Saudi Arabia, Bahrain, Syria, Lebanon, Jordan, Mauritania, Iraq, Libya, Sudan and the UAE still discriminate against women in the transferral of nationality.²⁸ Gender

²³ Decree on 31 July 2013 available on the State News Agency at <http://www.bna.bh/portal/news/573609>.

²⁴ These figures are derived from a database maintained by American for Democracy and Human Rights in Bahrain and its partners.

²⁵ For more information on arbitrary deprivation of nationality in Bahrain see the submission to the UPR by the Americans for Democracy and Human Rights in Bahrain and Institute on Statelessness and Inclusion (ISI): 'Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review' (2016).

²⁶ See for example Aljazeera, 'UAE strips six of citizenship' (2011), available at <http://www.aljazeera.com/news/middleeast/2011/12/20111222154624388439.html>.

²⁷ Middle East Eye, 'UAE Strips Citizenship from Family of Political Prisoner' (March 2016), available at <http://www.middleeasteye.net/news/uae-revokes-citizenship-3-children-jailed-political-prisoner-1813994043>

²⁸ See UN High Commissioner for Refugees (UNHCR), 'Background Note on Gender Equality, Nationality Laws and Statelessness' (2016). See also, www.equalnationalityrights.org

discrimination can also be found in civil registration procedures that can also contribute to risks of statelessness.²⁹ Over the past two decades, countries across North Africa enacted gender equal nationality laws. However, since then, there has been little change in legislation in the region. There has, however, been significant momentum from civil society and international actors calling for reform.³⁰ In Bahrain for example, activists and women rights organisations have been advocating for an amendment of the law for many years. In 2014 the Bahraini cabinet referred the issue to the legislature.³¹ At the outset of 2016 civil society in Bahrain discussed achieving equal nationality rights with the government at a conference organised by the Global Campaign for Equal Nationality Rights,³² which followed a submission to the 26th UPR session by a civil society coalition.

6. Country updates

As highlighted in the previous sections of this chapter, statelessness remains a challenge throughout the MENA region, with conflict and displacement putting new groups at risk. This section concentrates on some of the most recent statelessness related developments in three selected countries: Lebanon, Kuwait, and Iraq.

Iraq

Iraq had seen one of the largest reductions of statelessness globally, due to reforms in nationality law and the introduction of policies allowing groups that had been denaturalised during Saddam Hussein's regime to re-acquire Iraqi nationality.³³ However, the country still faces significant challenges. Iraq's civil registration system is complex, and differs across

²⁹ For more discussion on how discrimination in civil status and registration procedures can contribute to statelessness see B Fisher, 'Statelessness in the GCC: Gender Discrimination beyond Nationality Law' (2015) Institute on Statelessness Working Paper Series no. 2015/01, available at http://www.institutesi.org/WP2015_01.pdf

³⁰ See also *Campaigning for gender equality in nationality laws* by Catherine Harrington in Chapter 13.

³¹ The New Arab, 'A Glimmer of hope for thousands of Bahrain's children' (2014), available at <https://www.alaraby.co.uk/english/features/2014/10/9/a-glimmer-of-hope-for-thousands-of-bahrains-children>

³² See Global Campaign for Equal Nationality Rights.

³³ See K. Hendriks, 'An unexpected frontrunner – tackling statelessness in Iraq' (ENS Blog, 2013), available at <http://www.statelessness.eu/blog/unexpected-frontrunner-tackling-statelessness-iraq>, www.equalnationalityrights.org.

different local governorates. This means that an individual who needs to register a vital event in a region not the governorate in which they are registered in, may face significant obstacles. This is particularly concerning given the large number of IDPs who have been displaced, often several times. Additionally, some regions are falling in and out of control of various non-state actors, specifically the so-called Islamic State. This has led to children being born outside of regime-controlled areas as well as a rise in children born of sexual slavery, to foreign fighters and from forced marriages. These challenges combined with discriminatory laws and procedures in the country may be putting many children at risk of statelessness.³⁴ Additionally, Iraq—specifically the Kurdistan region—hosts a large number of stateless Kurd refugees from Syria.³⁵ Many have—even before the Syrian conflict—sought refuge in the Kurdistan region of Iraq due to cultural and linguistic affinity. The country therefore now has to address the challenge of a new stateless population on its territory.

Kuwait

In Kuwait there is a reported stateless population of 93,000 persons, although civil society estimates are higher.³⁶ The state had not comprehensively identified and registered all persons who should have been recognised as citizens during the post-colonial period of state formation.³⁷ The unregistered population and their descendants are called the 'Bidoon' – which literally translates to 'without' as they are without nationality. Over the several decades since independence, their human rights situation became increasingly worse. In response to this in 2011, the Bidoon made headlines when many Bidoon took to the streets to demand access to rights, including the right to nationality. The government reacted—at times harshly—to these protests, including by establishing a government institute responsible for them.³⁸ There have been some developments since, for example allowing members

³⁴ See S Lees, 'Born of the Islamic State: Addressing Discrimination in Nationality Provision through a Rule of Law Framework' (2016) Institute on Statelessness and Inclusion Working Paper Series, no 2016/08, available at http://www.institutesi.org/WP2016_08.pdf

³⁵ For more information on this group see Z. Albarazi, 'Stateless Syrians' (2013)

³⁶ Human Rights Watch, 'Prisoners of the Past, Kuwaiti Bidun and the Burden of Statelessness' (June 2011), available at <http://www.refworld.org/docid/4df7191b2.html>

³⁷ Ibid.

³⁸ Officially known as the Central system to Resolve Illegal Residents Status.

of this population to access health care and education (although implementation of these initiatives have been contested³⁹), but there has been no move towards offering them Kuwaiti citizenship. There has however, been the worrying development that thousands of Bidoon would be offered 'economic citizenship' of the Comoros Islands.⁴⁰ What exactly this would mean for the Bidoon is unclear as this proposal has yet to be implemented, but precedents in the neighbouring UAE show that granting stateless persons the citizenship of a third country has allowed for them to be subsequently deported.⁴¹

Lebanon

Lebanon hosts tens of thousands of individuals who have historically been left stateless. The state also has gender discriminatory nationality laws and a complex and burdensome birth registration system.⁴² In addition to this, the sheer number of Syrian refugees has put a strain on Lebanon's civil registration infrastructure, highlighting the problems that refugees, and also many Lebanese, face in accessing the birth registration system. However, there have been steps in the right direction to address some of these challenges. A statelessness working group now exists in Lebanon made up of key stakeholders.⁴³ There have also been various initiatives to both raise awareness of the procedures —such as videos and brochures that can be disseminated among expecting families⁴⁴—and to engage with the government on facilitating some of the procedures.⁴⁵

³⁹ Human Rights Watch, *World Report* (2013), available <https://www.hrw.org/world-report/2013/country-chapters/kuwait?page=1>

⁴⁰ Washington Post, 'The controversial plan to give Kuwait's stateless people citizenship of a tiny, poor African Island' (2016) available at https://www.washingtonpost.com/news/worldviews/wp/2016/05/17/the-controversial-plan-to-give-kuwait-stateless-people-citizenship-of-a-tiny-poor-african-island/?utm_term=.c20d7e473934

⁴¹ Human Rights Watch, *World Report* (2013), available <https://www.hrw.org/world-report/2013/country-chapters/kuwait?page=1>

⁴² See also *Using the UN system to advocate for nationality law reform in Lebanon* by Bernadette Habib in Chapter 8.

⁴³ These include relevant government authorities, UNHCR, Frontiers, and LOST

⁴⁴ See for example <https://www.youtube.com/watch?v=39ape83HiZE> video on registering the births and this Q+A page provided by the government <http://bit.ly/2j77Nv3>.

⁴⁵ See UN High Commissioner for Refugees (UNHCR), 'Statelessness update' (2014), available at www.unhcr.org/StatelessnessUNHCRMonthlyUpdate-August2014.pdf

7. Increased momentum on the issue

Nationality is a very sensitive issue in the region. The reasons behind this sensitivity vary—in the Gulf for example the citizens are often a minority of the total population—so States aim to maintain exclusivity in access to their nationality. In the Levant, the large Palestinian populations cause concern that naturalisation will influence and change demographics. In part due to this and in part due to ongoing and increasing turmoil in recent years, there have been too few research or mapping initiatives on statelessness carried out in the region. However, there have been several notable initiatives and publications that are pushing awareness and the agenda forward. The EUDO Citizenship Observatory now provides analysis of nationality laws of countries in the MENA,⁴⁶ and in 2016, UNHCR published a report on addressing statelessness in the Middle East and North Africa.⁴⁷ This publication details efforts to address the risks of statelessness in the Syrian refugee crisis. Also in relation to the Syrian refugee crisis, the Institute on Statelessness and Inclusion and the Norwegian Refugee Council published a toolkit which provides tools and information to humanitarian actors working in the region with refugees who are stateless or at risk of statelessness from Syria.⁴⁸

Various civil society and human rights organisations have also shown increased interest in the issue. Legal Agenda published a statelessness series that looked at issues such as discrimination in Syrian nationality law and policy and the Mauritanian statelessness problem.⁴⁹ In 2016 Amnesty International and other NGOs hosted a conference on the arbitrary deprivation of nationality, with a focus on the Gulf, which brought to light some of the hidden issues related to this problem. There is a growing need though, for more sustained civil society collaboration to address statelessness in the region.

⁴⁶ See <http://eudo-citizenship.eu/>.

⁴⁷ UN High Commissioner for Refugees (UNHCR), 'In Search of Solutions: Addressing Statelessness in the Middle East and North Africa' (2016), available at <http://www.refworld.org/docid/57dbdaba4.html>

⁴⁸ To access this toolkit in both Arabic and English see www.syrianationality.org

⁴⁹ See Legal Agenda, 'Statelessness in Mauritania' (2016), available at <http://legal-agenda.com/en/article.php?id=3118> and Legal Agenda, 'Syrians Women's Rights to Pass on Citizenship to Children: An Appraisal' (2016), available at <http://legal-agenda.com/en/article.php?id=742&folder=articles&lang=en>

Part 2

CHILDREN

CHAPTER 7: INTRODUCTION

The Institute on Statelessness and Inclusion was founded in late 2014 to fill what we saw to be a worrying gap in the global civil society landscape: no other NGO was dedicated to the task of helping to address situations of statelessness worldwide. Our vision is of a world in which statelessness and disenfranchisement are ended through the promotion of human rights, participation and inclusion. It is this vision, shared by all members of our team, which motivates us and drives everything we do as an organisation. We take our commitment to any and all aspects of this issue very seriously. One of the challenges which has perhaps most captured our imagination and our hearts since the Institute's establishment is that of tackling childhood statelessness. The decision to focus this edition of our flagship report on the world's stateless *children* was readily made.

There are a plethora of reasons why the situation of stateless children is so compelling, not least the innocent and brief, yet formative, nature of childhood itself. No child chooses, or ever deserves, to be left without the protection of a nationality. If this is not remedied quickly and decisively, statelessness may leave a profound and potentially indelible mark on a child's life. As Jacqueline Bhabha, Professor of the Practice of Health and Human Rights at the Harvard T.H. Chan School of Public Health, discusses in her essay in this introductory chapter: to be stateless as a child can stunt opportunity, erode ambition and destroy the sense of self-worth. That we, the adults who set the rules for inclusion and exclusion, allow this to occur is – in the words of Benyam Dawit Mezmur, Chairperson of the Committee on the Rights of the Child, interviewed in Chapter 8 – “shameful”. Childhood statelessness need never happen, it can be avoided. Yet it has been estimated that a child is born stateless every 10 minutes.¹

As the multitude of essays gathered in Part Two of this report testify, the fight to realise every child's right to a nationality is one which people have taken up all across the globe – and in a wide array of

¹ UNHCR, *Global Action Plan to End Statelessness: 2014-2024*, 2014, available at <http://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>

contexts. A child may be left stateless due to the failure to tackle inter-generational exclusion, as a result of gender discrimination in nationality laws, because his or her mother was incarcerated at the time of the birth, as a consequence of the failure to regulate the complex questions which international commercial surrogacy throws up with respect to legal parentage, in the context of conflict and displacement which interrupts access to civil registration, as an unintended by-product of the lack of harmonisation of nationality rules and practices globally – or indeed in many other circumstances. That the root of the problem can be so different and that childhood statelessness is often a result of indifference rather than malevolence, makes it a truly fascinating and confronting phenomenon. At the same time, there is a captivating universality to this problem which is evident in listening to the questions or testimonies of stateless children: wherever they are in the world and whatever the cause of their plight, there is a common experience of loss and frustration.² As documentary photographer Greg Constantine reflects in his contribution to this introductory chapter, the world’s stateless children represent “a wealth of amazing contributions to society denied”.

The incentive for focusing efforts on promoting children’s right to a nationality is also a pragmatic one. The disconnect between the recognition of nationality as a fundamental child right and the reality of childhood statelessness presents a massive challenge, but it equally opens up a wealth of opportunities. Childhood statelessness should be entirely preventable. It is never a child’s “fault” if they are left without nationality, nor is it ever in a child’s best interests to be stateless. By focusing on children, we can try to move towards desensitising the issue of nationality, focusing on the future (i.e. on including a new generation, leaving historical animosities in the past) and halting the spread of statelessness. Not only does this allow us to protect children who are born today from marginalisation and from a life in limbo, it also helps to lay the groundwork for more comprehensive solutions in the longer term.

² See, for instance, *Being accountable to stateless children and youth: The 2016 UNHCR NGO Consultations session on statelessness* by Amal de Chickera in Chapter 13. See also United Nations High Commissioner for Refugees (UNHCR), *I am Here, I Belong: the Urgent Need to End Childhood Statelessness* (2015), available at http://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf

Ultimately, the Institute's profound sense of responsibility towards promoting inclusion for the world's stateless *children* in particular is also a product of who makes up our team. In the relatively short time that has elapsed since the Institute was founded, we have celebrated two marriages and the birth of two new babies within our midst. Through the involvement of interns and trainees in our work, we are also happily surrounded by students and recent graduates: young adults who are seizing the opportunity to further their education, dip their foot in the labour market and pursue their ambitions. Moreover, our team is truly multinational and were it not for our nationalities – our passports – it is doubtful whether we would have had the opportunity to work together or indeed to travel and collaborate with others in our efforts to promote solutions to statelessness around the world. In such an environment, it isn't difficult to imagine how profoundly different each of our lives would be if we had been denied nationality. For those of us who are watching our young children grow and their characters develop, it isn't difficult to empathise with the parents of stateless children who want nothing more than to give them a fair start in life but are so often powerless to do anything about their situation.

We hope that the ideas, knowledge and experiences gathered in Part Two of this report will help to inspire and inform further efforts to improve the lives of stateless children and realise the right of every child to a nationality.

The importance of nationality for children

*Jacqueline Bhabha**

1. Introduction

In a world where the principle of non discrimination¹ was fully realised, nationality would not matter. Nationality would not affect access to basic services such as health care and education, or to place related activities such as crossing an international border, or moving freely within a state. This is not the world we live in. Despite three quarters of a century of global human rights norms and two decades of near universal child rights principles, nationality matters.² And it matters for children as much as it matters for adults. The importance of nationality for children overlaps but is not co-extensive with the importance of nationality for adults. The following discussion addresses key issues relevant to this subject.

2. Nationality, children and individual rights

Nationality is the legal confirmation of a reciprocal bond between person and state, a bond that connotes obligations and privileges. Many of these obligations and privileges are not applicable to nationals under 18 years of age: children cannot vote, they cannot stand for public office, they cannot serve on juries, and, as a matter of international law, they cannot be compelled to participate in active combat. But these exclusions do not negate the importance of nationality for children.

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¹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. art. 2(1).

² For a full discussion of the relevance of nationality for children, see ed. Jacqueline Bhabha, *Children without a State*, (Cambridge, MA. MIT Press. 2014)

Among a plethora of examples, consider the following. First, even a very young child, like an adult, will need proof of nationality to qualify for safe and legal border crossing. Second, more age specifically, though primary education is supposed to be free and universally available to all children irrespective of nationality,³ comparable international mandates do not apply to other, equally critical, educational opportunities, a deficit with consequential implications. Compared to their non-national peers, children who are citizens generally have privileged access to early childhood development and preschool opportunities, as well as to post primary education, college scholarships and other educational facilities⁴. The same enhanced access for citizen children also applies to health care, to social welfare protections and to other critical economic and social rights facilities.⁵

3. Nationality, children and relational benefits

It is not just individual rights and benefits that are at stake for children when questions of nationality are at issue. Relational benefits, and in particular the right to respect for family and private life, are also implicated, benefits that constitute a peculiarly important set of ties

³ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, art. 28. (hereafter CRC). But note that even this universal children's right may be denied to stateless children, many of whom are regularly denied access to free primary education. See Brad Blitz, "Neither Seen nor Heard: Compound Deprivation among Stateless Children", in ed. Jacqueline Bhabha, *Children without a State* (Cambridge, MA: MIT Press. 2014). pp. 43-66. Similarly Syrian refugee children exiled in countries neighbouring their war torn homeland and lacking evidence of their nationality continue to encounter obstacles to educational enrolment. See UNICEF, "Access to Education for Syrian Refugee Children and Youth in Jordan Host Communities" (2016), available at http://www.unicef.org/jordan/Joint_Education_Needs_Assessment_2014_E-copy2.pdf, and UNHCR, "Barriers to Education for Syrian Refugee Children in Lebanon" (November 2014), available at <http://reliefweb.int/report/lebanon/barriers-education-syrian-refugee-children-lebanon-november-2014>

⁴ UNESCO Institute for Statistics (UIS) and UNICEF, "Fixing the Broken Promise of Education for All: Findings from the Global Initiative on Out-of-School Children" (2015), available at <http://dx.doi.org/10.15220/978-92-9189-161-0-en>

⁵ UNHCR, "I am Here, I Belong: The Urgent Need to End Childhood Statelessness" (2015), available at http://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG15-web.pdf

in childhood, given its characteristics of dependence, vulnerability and rapid developmental growth. A child's early environment, physical but also emotional and affective, has lifelong potential impacts on his or her wellbeing and functioning as an adult⁶. More particularly, as widely recognised, the family constitutes "the fundamental group of society and the natural environment for the growth and wellbeing of all its members *and particularly children*"⁷. Access to family life, to the predictability and security that guaranteed continuity of contact to parents or other caregivers, is critical for healthy development. Children separated from their parents have higher mortality and morbidity, and are at far greater risk of abuse and violence.⁸ It is for this reason that the Convention on the Rights of the Child reserves its strongest language for states' obligations to avoid the separation of parent and child:

*States Parties **shall** ensure that a child **shall not** be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is **necessary** for the best interests of the child.*⁹

The ability to enjoy and depend on family life may be critically tied up with questions of nationality. A stateless child or a child who cannot prove his or her nationality may have difficulty asserting a claim to enter or to remain in the country where key family members live, with life shattering implications.

Consider the following cases, separated by over a century, each based on one of the two central principles for nationality acquisition, *jus soli* (birthright citizenship) and *jus sanguinis* (citizenship by descent). The first case illustrates the importance of nationality for securing entry

⁶ See Jack Shonkoff et al., "An Integrated Scientific Framework for Child Survival and Early Childhood Development", *Pediatrics* 129, no.2 (2012), pp. 460-472, and The Center for the Developing Child, Harvard University: <http://developingchild.harvard.edu>.

⁷ Preamble to the CRC. Italics added.

⁸ UNICEF, "Protecting Children on the Move" (2015), available at http://www.unicef.org/emergencies/files/Refugee_and_Migrant_Crisis_Advocacy_Web_12_11_15.pdf

⁹ C art. 9(1). Emphasis added.

to a place where a child's family resides, to ensure reunification. In 1897, Leong Quai Ho attempted to return to San Francisco, her city of birth, after a stay in China. But the San Francisco immigration inspectors challenged her *jus soli* claim to US nationality.¹⁰ They asked: "In what part of China were you born." "I was not born in China," Leong explained for the second time, "I was born in California." "Well go on," frustrated inspectors prodded, "give us the rest of your story, let's have it." Though a citizen, she did not look like one. Eventually, but only after protracted and costly litigation, was Leong Quai Ho finally admitted to the US and allowed to reunify with family.¹¹ Because of questions about her nationality, Ho's whole future was plunged into uncertainty.

The second case concerns the other element in the right to respect for a child's family life, the prevention of separation from family. In 2001, the U.S. Supreme Court considered another East Asian case where a child's entitlement to US nationality was at issue. Tuan Anh Nguyen was born to an American father and a Vietnamese mother in Vietnam. The parents never married and the mother left the family shortly after Nguyen's birth. When the boy was six, he moved to the US with his father and lived there with him throughout his childhood. His early biography only became salient when he was convicted of a felony and, as is mandatory for aliens convicted of serious criminal offences, served with a deportation order as his term of imprisonment came to an end.¹²

For Nguyen in his early twenties to be deported to Vietnam, a foreign country to which he had no ties - linguistic, cultural or personal - would be devastating. But avoiding this depended on proof of his US nationality. Had his parents married, or his mother rather than his father been a US national, Nguyen would have had little difficulty in

¹⁰ The United States followed English common law in accepting the principle of birth right citizenship, and the courts clarified that it applied to all children born in the United States, irrespective of the legality of their parents' status, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). The principle continues to govern US transmission of nationality, despite frequent and vigorous challenges. See Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (Princeton: Princeton University Press. 2014). pp. 60-95.

¹¹ Martha Gardner, *The Qualities of a Citizen* (Princeton: Princeton University Press. 2005). pp.159-160.

¹² *Tuan Anh Nguyen vs. Immigration and Naturalization Service*, 533 U.S. 53 (2001).

asserting his US nationality by descent (or *jus sanguinis*), subject to certain residence and procedural requirements.¹³ But because neither of those circumstances obtained, Nguyen failed in his claim for US nationality and the guarantees of continued family and private life that this would have enabled. Again a child's nationality could hardly have had more dramatic personal consequences.

4. Nationality, children and a sense of belonging

A key, perhaps the most important, attribute of nationality is non deportability, or the lifelong guarantee of a right to entry and to indefinite residence in the country of one's nationality irrespective of criminal conviction, prolonged foreign absence or any other personal behaviour. It is through this entitlement that the enduring bonds of national identification are protected. Whether a child (or any individual) identifies affectively with a particular nationality, with the cultural, linguistic or religious environment of the nation in question, is incidental to the legal protection it affords. To be sure, many nationals feel a profound sense of loyalty and comfort from the sensation of community belonging that comes with national membership – the pride in a flag, a glorious history, a sporting victory or a political leader. But the protection afforded by nationality is more fundamental. By blocking and nullifying the threat of deportation, national membership protects the building blocks fundamental to life. It prevents the separation of a child from his or her immediately supportive environment, not only parents and nuclear family members, but the private life that he or she has built, including the school friends, the cultural traditions, the familiar spaces, as well as the climate, language and foods that constitute the fabric of quotidian rootedness.

5. Nationality, children and public policy

At a time in global history when nationalism and xenophobia are particularly resurgent and when the significance of national borders is

¹³ For a detailed account of this case see Linda K. Kerber, "Birthright Citizenship – The Vulnerability and Resilience of an American Constitutional Principle", in ed. Jacqueline Bhabha, *Children without a State* (Cambridge, MA: MIT Press. 2014). pp. 255-276.

being reasserted, even in regions where these concerns had diminished, nationality and the ability to prove it are increasingly salient. As noted, they impinge on access to an extensive set of entitlements and opportunities, and their absence, statelessness, has momentous consequences. “[Nationality] defines the framework in which the balance between self interest and public concern is negotiated, both by the individual citizen and by the polity, because citizens’ interests are central to the assessment of what is a public good”.¹⁴ The interests of non citizens or stateless persons, by contrast, are of subsidiary political concern.

Whether they are short term visitors or long term residents, non citizens lack a vote and thus, as a community, have compromised an at best derivative political leverage vis à vis politicians. The Swedish government’s abrupt decision in 2016 to reverse its long-standing policy of generous reception of unaccompanied refugee children by restricting access and impeding family reunification, is a case in point.¹⁵ Toleration of increasing levels of Islamophobic rhetoric in mainstream public discourse, as in the case of the 2016 US Presidential campaign and much pro-Brexit propaganda, is another.¹⁶

Non citizens are also particularly vulnerable to the hostility of nationals, convenient targets for marginalisation, scapegoating and stigma at times of national crisis, whether economic, social or both. These detriments also apply to children, despite the fact that, according to binding and very widely ratified international law, states have an obligation to consider the best interests of children, irrespective of their nationality, in all matters affecting them,¹⁷ an obligation that does not apply to adults. This obligation exists for matters of divorce, adoption or access to social welfare services just as much as it does for decisions within the domain of immigration law – permission to access

¹⁴ Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age*, (Princeton: Princeton University Press. 2014). pp. 66.

¹⁵ Dan Bilefsky, “Sweden Toughens Rules for Refugees Seeking Asylum”, *The New York Times*, June 21, 2016.

¹⁶ See news coverage such as Julia Preston, “For Trump, an America That is Not a Nation of Nations”, *The New York Times*, July 22, 2016, and Tom Peck, “Nigel Farage Speech: ‘The Eurosceptic Genie is Out of the Bottle,’ Ukip Leader Tells Supporters”, *The Independent*, June 23, 2016.

¹⁷ CRC, art. 3.

or remain on the territory.¹⁸ Because of their peculiar dependence on state provision – in respect of schooling, primary health care, social protection for example – children stand to lose critical benefits where their interests are neglected. What is more, because of the distinctive vulnerability that comes with early childhood, the risks of irreversible harm from rights violations and deprivations are most severe.¹⁹

6. Conclusion

Though nationality does not, on its own, guarantee wellbeing or enjoyment of the constituent elements of a safe and rights endowed life, its absence is strongly correlated with serious rights violations and profound human suffering. One of the clearest illustrations of the devastating impact of statelessness on the life chances of children is the situation of the Rohingya Muslim minority in Rakhine state, a western province of Myanmar.

Despite centuries of residence in and identification with the region, the Rohingya have been denied nationality by the Myanmar government. Rohingya children, as a result, are denied access to Burmese schools, their births are unregistered, their need for all forms of health care, including primary health care, is severely neglected and they lack the proof of identity that would facilitate international travel and access to refugee protection.²⁰

Myanmar, like all states that have ratified the CRC, is obliged by law to consider the impact on every child of public policies or state practice that impinge on that child, whether or not the child or the child's parents are stateless. Its continuing failure to do so, including after a

¹⁸ For an interesting discussion of the way in which matters of nationality and immigration status impinge on family court decision making see David Thronson, "Clashing Values and Cross Purposes: Immigration Law's Marginalization of Children and Families", in ed. Jacqueline Bhabha, *Children without a State* (Cambridge, MA: MIT Press. 2014). pp. 237-254.

¹⁹ Jack Shonkoff et al., "The Lifelong Effects of Early Childhood Adversity and Toxic Stress", *Pediatrics* 129, no.1, (2012), pp. 232-246.

²⁰ See Fortify Rights, "Policies of Persecution: Ending Abusive State Policies against Rohingya Muslims in Myanmar" (February 5, 2014), available at http://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf

momentous political transformation that has introduced democratic principles and installed as a leader a Nobel Peace prize laureate with an illustrious human rights record,²¹ is a powerful reminder of the critical importance of nationality for children worldwide.

²¹ Richard Cockett, "Aung San Suu Kyi Is in Power. So Why Is She Ignoring her Country's Most Vulnerable People?" *Foreign Policy*, June 9, 2016, available at <http://foreignpolicy.com/2016/06/09/aung-san-suu-kyi-is-in-power-so-why-is-she-ignoring-her-countrys-most-vulnerable-people-burma-rohingya/>

We see you

*Greg Constantine**

I remember travelling to the Ivory Coast; it was early 2010. I travelled all around that amazing country, meeting with stateless people who struggled every day. Most were born in the Ivory Coast, but were not recognised as citizens. And with that, they were denied documents, which paralysed them, preventing them from being able to move forward with their lives, find jobs, education and a sense of belonging to this country they called home. Toward the end of my time in the Ivory Coast, I visited an orphanage in the capitol of Abidjan. The orphanage was home to many children who had been given away at birth, some because they had a disability, or orphaned because their parents had passed away. At the time, the laws in the Ivory Coast did not provide nationality to children who were 'foundlings': children who could not provide evidence to establish who their parents were. As a result, the child would travel through life stateless.

One of these children was eleven years old. He had lived in the orphanage all his life. I remember talking briefly with him and when I took his photograph, he said something to me in French. I don't speak or understand French. I assumed he said something about me taking his photograph. But the translator told me the young boy had said, "You see me."

It was an incredibly powerful moment. One that I will never forget. In so many ways, children are the most silent and invisible victims of statelessness. And without a doubt, children have the most to lose by statelessness as well. They represent futures denied. Potential denied. A wealth of amazing contributions to society denied.

* Greg Constantine is a documentary photographer from the United States. For the past 10 years, he has worked on the long-term photography project, Nowhere People. The project documents the impact statelessness has on individuals and communities in eighteen countries around the world. Since 2006, work from Nowhere People has been exhibited in over forty cities. He is the author of three books, most recently the acclaimed books: *Exiled To Nowhere: Burma's Rohingya* (2012) and *Nowhere People* (2015).



Children in an orphanage in Abidjan

© Greg Constantine

Stateless children must rely on others for their voice, and this includes other children. Other children who know what it is like to go to school, enjoy their studies and discover the excitement that comes from learning and having an education. Other children who also have dreams but live day to day with the opportunity to make those dreams come true. Other children, regardless of where they are in the world, who believe it is important to say “All children deserve a birth certificate. All children deserve the right to citizenship.”

Adults have a crucial role to play too. Adults who recognise the importance of children receiving every opportunity life can give them, so they may do better than we have.

All children deserve a future.

“We see you!”

CHAPTER 8: THE RIGHT OF EVERY CHILD TO A NATIONALITY



Foundlings' artwork on the theme of nationality and statelessness

© UNHCR Côte d'Ivoire / SOS Villages Aboisso'

In this Chapter:

An interview with Benyam Dawit Mezmur, Chairperson of the UN Committee on the Rights of the Child	Maria Jose Recalde Vela
Using the CRC to help protect children from statelessness in Serbia	Praxis Serbia
Erduan – <i>an interview</i>	
Advancing children's right to a nationality through the UN Committee on the Rights of the Child	Francesco Cecon
Activating the CRC – tools for civil society engagement	
Human rights and stateless children	Hernan Vales
The boy	Amal de Chickera
Discrimination and childhood statelessness in the work of the UN human rights treaty bodies	Peggy Brett
Gender and birth status discrimination and childhood statelessness	Betsy Fisher
Axin – <i>an interview</i>	
Using the UN system to advocate for nationality law reform in Lebanon	Bernadette Habib
Using the Inter-American regional framework to help stateless children in the Dominican Republic	Francisco Quintana
Council of Europe efforts in the area of childhood statelessness	
Using the African regional framework to realise children's nationality rights in Kenya	Mustafa Mahmoud Yousif
Sultan – <i>an interview</i>	

Introduction

After enumerating the reasons why nationality is important for children, Professor Bhabha of Harvard Law School concludes that “though nationality does not, on its own, guarantee well-being or enjoyment of the constituent elements of a safe and rights endowed life, its absence is strongly correlated with serious rights violations and profound human suffering”.¹ This, she demonstrates, is the case not only for adults who are affected by statelessness, but also – and perhaps even more so – for children who are forced to grow up without a nationality. It is not a surprising conclusion by any means. Rather, it is a truth so foundational, that those who are working to address childhood statelessness consider so evident, that it is often assumed to be universally known and understood. Yet the public perception of nationality, and of children’s enjoyment of nationality, often betrays a certain disregard for the reality of childhood statelessness as a feature of today’s world. Successfully asserting the right of every child to a nationality – the central focus of this chapter – requires us to challenge the prevailing misconceptions of children’s experience of nationality.

Firstly, while the vast majority of children do acquire a nationality immediately, automatically and without difficulty at birth, it is a false assumption that this is the case for all children. The office of the United Nations High Commissioner for Refugees (UNHCR) reports that over 70,000 children are born into statelessness each year.² That their situation is often overlooked is testament to the fact that statelessness can have the effect of rendering a person invisible,³ but this does not make their predicament any less real. Secondly, as Bhabha’s essay shows, having a nationality is not something that only starts to be meaningful upon the attainment of adulthood when, for instance, the participatory rights of citizenship may kick in. Nationality matters right from the start, for a child’s enjoyment of other rights, for family life, for stability and security,

¹ See also *The importance of nationality for children* by Jacqueline Bhabha in Chapter 7.

² UNHCR, *Global Action Plan to End Statelessness: 2014-2024* at 9, 2014, available at <http://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>.

³ See also *I see you* by Greg Constantine in Chapter 7.

for identity, for education, for a sense of belonging and much more. Thirdly and relatedly, childhood statelessness should not be misconstrued as a transient problem that is easy for a person to resolve, for instance, once they reach majority. To the contrary, statelessness and the disadvantage that it creates have the worrying tendency of becoming entrenched. At and soon after birth, evidence of relevant facts and links is most fresh, witnesses likely available and procedures relatively straightforward. Without help early on, a stateless child will readily grow up to be a stateless adult, who may live their entire life without ever acquiring a nationality. This underlines the importance of taking early, ideally even preventative action, to stay ahead of statelessness and negate its impact. A final and central message that must be made to resonate more strongly is that the right of every child to a nationality is just that: a right. Taking the necessary measures to grant nationality to a child who would otherwise be stateless is not an act of privilege or charity, it is the fulfilment of a fundamental child right, protected – as this chapter shows – under human rights law.

The contributions featured in this chapter centre the discussion of childhood statelessness in a rights-based discourse, which recognises nationality as an integral aspect of a child's identity and acknowledges its function as a gateway right, enabling the enjoyment of other child rights. The common thread is how the right of every child to a nationality has gained a strong foothold in international and regional human rights frameworks alike, with different essays exploring different dimensions of the right and how it has been interpreted. Broader human rights and child rights principles, such as non-discrimination and best interests of the child, have clearly played an important part in the latter and helped to shape the review of states' performance by United Nations (UN) human rights bodies as well as the content of human rights jurisprudence on the child's right to a nationality. Despite the tremendous progress that has been achieved in clarifying states' obligations in respect of this right at a doctrinal level, in response to specific country situations or individual complaints, real change on the ground has proven harder to deliver. As contributors who have engaged with different human rights mechanisms in support of their advocacy on behalf of stateless children attest, securing improvement to law, policy and practice requires a long term mindset and the deployment of a range of strategies.⁴ Bringing the

⁴ This is a lesson that also emerges in the essays contributed to other chapters of this report, including those on litigating and mobilising against childhood statelessness.

issue of childhood statelessness before human rights bodies is recognised to be an important avenue for combating the invisibility of this problem, generating international guidance to and pressure on states to improve their response, and sustaining a rights-based approach to the issue. The contributors to this chapter provide helpful information and inspiration that can serve to strengthen this area of engagement.

This chapter opens with a series of contributions relating to the Convention on the Rights of the Child (CRC), the most universally ratified human rights treaty in the world, in which the right of every child to a nationality is enshrined in Article 7. As Benyam Dawit Mezmur, Chairperson of the Committee which supervises the implementation of the CRC explains in his interview piece, “nationality is fundamental in part because it is crosscutting; if we look at the 41 provisions within the CRC, there is almost no provision which does not have at least some level of interaction or implication in relation to the right to nationality”. Praxis Serbia, a Non-Governmental Organisation (NGO) that assists children who face the risk of statelessness, shares its motivation for working within the CRC framework as a means to promote the right to a nationality in the Serbian national context. Praxis’ contribution demystifies the process of submitting information to and participating in discussion with the Committee. It is accompanied by the first of several short interviews with families affected by statelessness – in this case 10-year old stateless Erduan and his father – helping to illuminate their lives, hopes and struggles. The next essay, by Francesco Cecon, offers some strategic reflections from his experience of working as a Programme Officer with Child Rights Connect on two possible avenues for consolidating and strengthening the guidance of the Committee on the Rights of the Child on the child’s right to a nationality or childhood statelessness more broadly. He explores the potential added value of a General Comment or a Day of General Discussion on Article 7 CRC, laying out the groundwork that should be put in place for such an initiative to succeed. This essay is followed by a brief summary of the Institute on Statelessness and Inclusion’s (ISI) ‘CRC Toolkit’⁵ – a resource designed to encourage and inform civil society engagement with the Committee as it engages in dialogue with states to monitor the implementation of state obligations under the CRC. The CRC Toolkit builds on and makes available the analysis conducted by ISI of the Committee’s guidance to states on the interpretation and implementation of this right to date, as

⁵ See <http://www.statelessnessandhumanrights.org/>

well as providing ready-to-use instruments for engagement such as a checklist for identifying relevant issues and template for reporting to the Committee.

The next set of contributions in the chapter zoom out from the CRC to look at the broader UN framework, demonstrating that the right of every child to a nationality is not ‘merely’ a child rights issue, it is a human rights issue. The essay by Hernan Vales, Human Rights Officer in the Rule of Law and Democracy Section of the UN Office of the High Commissioner for Human Rights (OHCHR), draws from General Assembly and Human Rights Council Resolutions as well as Secretary-General Reports, to elucidate the impact of arbitrary deprivation and denial of nationality for children affected. This is followed by a poem, authored by Amal de Chickera, Co-Director of the ISI, which expresses in a different yet powerful way how children fall victim to statelessness, often not as a simple bureaucratic oversight but rather as part of a long-standing policy of exclusion which spills over to affect new generations. Such situations which often arise out of deeper societal failures are also the theme at the centre of the next essay by Peggy Brett, an ISI 2016 Fellow. She discusses how “discrimination, in one form or another, underlies almost all cases of childhood statelessness” and through a systematic canvassing of the UN’s work in this area, demonstrates that, in response, “the UN human rights treaty bodies have used discrimination as an important framework in addressing the right to a nationality and particularly the right of the child to a nationality”.

Digging deeper into the dilemmas encountered at the national level, Betsy Fisher, an attorney in the United States who represents and advocates for vulnerable refugees in the Middle East, confirms that discrimination can be at the root of nationality problems because it manifests in not just nationality law, but also in other areas of law which can impact on access to nationality. Drawing from examples in the Gulf Cooperation Council states, she shows how gender discrimination in civil registration law, family law and even criminal law can conspire to put children at risk of statelessness. The complex interaction of different areas of law and processes of exclusion comes to the fore also in the second short interview with an affected family – this time with Axin, a Syrian mother whose seven children are stateless as a result of multiple forms of discrimination, gender and ethnicity. “I have never had peace of mind about my children”, she reflects, serving as a reminder that when statelessness affects even a single member of a family, it affects them all. The essay by Bernadette Habib of Frontiers Rights (Ruwad Houkoul), a national human rights

NGO specialising in refugee rights and statelessness in Lebanon, brings the focus back to the question of where opportunities lie within the UN human rights framework. Habib explains how the systematic use of UN human rights reporting mechanisms – including both treaty bodies and the Universal Periodic Review (UPR) – to raise awareness of the issues affecting the populations they work with in Lebanon is part-and-parcel of their overall engagement strategy. While this has yet to lead to a reform of the country's gender discriminatory nationality law, Habib says that the visibility that such advocacy brings to the issue carries real value and using these UN systems is nevertheless an important means to strengthen national advocacy efforts for law and policy change.

The chapter closes by looking at how the right of every child to a nationality has been constructed within regional human rights frameworks. Francisco Quintana, a Program Director at the Center for Justice and International Law (CEJIL), introduces the Inter-American system, touching on the background to a truly landmark ruling – *Yean and Bosico v. Dominican Republic* – in which a regional human rights body in an individual complaint declared for the first time that a state had violated the right of a child to a nationality.⁶ After a concise summary of Council of Europe (CoE) efforts in the field of childhood statelessness is presented, the last essay of this chapter is offered by Mustafa Mahmoud Yousif, who dives into the African human rights system. His contribution looks at the Nubian Rights Forum's experience in Kenya, where a case was also brought before a regional body. In its ruling, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) also affirmed the child's right to a nationality to be a justiciable right, finding the state in violation.⁷ The third and final interview gives a sense of the context of this decision and brings the chapter full circle to the right to a nationality as a fundamental child right, the realisation of which impacts a child's enjoyment of other rights. Sultan, a Nubian boy who is battling discriminatory procedures to acquire a birth certificate, has already missed a year of schooling and faces an uncertain future unless he can secure recognition of his status as a Kenyan national.

⁶ This case is discussed at greater length in *The perpetuation of childhood statelessness in the Dominican Republic* by David Baluarte in Chapter 12.

⁷ This case is summarised in *Landmark case notes from Africa and Europe*, in Chapter 12.



An interview with Benyam Dawit Mezmur, Chairperson of the United Nations Committee on the Rights of the Child

*Conducted in December 2016, by Maria Jose Recalde Vela**

Dr. Benyam Dawit Mezmur

Chairperson of the UN Committee on the Rights of the Child

Chairperson of the African Committee of Experts on the Rights and Welfare of the Child

Associate Professor of Law, Dullah Omar Institute for Constitutional Law, Governance, and Human Rights at the University of the Western Cape, Cape Town, South Africa

1. What makes the right to a nationality so fundamental for children?

I think one can argue this from a moral, a legal, a political point of view – even an economic argument can be made as to why it is so fundamental. I want to start maybe with some of the words that are often used to describe stateless persons. ‘Invisible’, as the UN High Commissioner for Refugees has mentioned on a few occasions. Or illegal, non-belonging, Bidoon, unwelcome, unwanted... These are already indications of the extent to which, when a child/person is without a nationality, they can be vulnerable to the violations of many of the rights which are provided by the Convention on the Rights of the Child (CRC). I think that when stateless persons are adults you can often say they are invisible, they are in the shadows, but when they are children they actually become the ‘invisible of the invisible’, which increases the vulnerability further.

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Personally, I usually introduce myself by saying 'Benyam Dawit Mezmur is my name, and I am Ethiopian'. I do not say my nationality as a side-line issue; I say it with the heavyweight importance of highlighting the effect it had and still has on me as a human being. The fact that many people are not able to experience this is obviously shameful. In fact, in a world full of states — more than 190 states globally — to talk about 10 million stateless persons, I think, is a clear indication of our collective failure as a society, legally and morally. Nationality is a right; this is why it was included — long before the adoption of the Convention on the Rights of the Child (CRC) — in the Universal Declaration of Human Rights (UDHR). There is also a reason why it has been identified as being closely linked with the right to birth registration, which is a right we have from the very beginning of our lives. I think it is not an exaggeration to say that the right to nationality is also supposed to be a right from the start, because the longer time lapses with someone not having a nationality, usually the worse the consequences become.

We also say nationality is fundamental in part because it is cross-cutting; if we look at the 41 provisions within the CRC, there is almost no provision which does not have at least some level of interaction or implication in relation to the right to nationality. One cannot really label nationality as being a civil and political right, or as being a social, economic, and cultural right; it is an 'enabling right'. Nationality — to a certain extent — can be compared to the right to education, because when people have education, this 'enables' people to do things and has a positive effect on other rights. When people do not have an education, this impacts on the enjoyment of other rights. It is therefore not an exaggeration to say that nationality is a fundamental right because, similarly to the right to education, it can be labelled as an 'enabling right'.

Even though in human rights law we hardly use numbers as a justification, to be able to urge action and address violations, here we are talking about 10 million people. This is extremely large, which makes statelessness a real cause of concern and is another reason why we need to acknowledge nationality as a fundamental right. It is also important to realize that we constantly have to strive to create a world for all. The more this group of children (and their families) are disenfranchised, the worse off are the socio-economic, health, and security prospects of countries with stateless populations. For many children, statelessness is also like poverty, in the sense that it follows a cycle: if the parents are living in poverty, then there is a very high chance that their children will also live in poverty, and that

their descendants for many generations will too. In a sense, it is the same in the context of statelessness: in the instances where the parents are stateless, the chances that the children will be stateless will be higher, and so on and so forth. The trans-generational transmission of statelessness means we are not just talking about the current generation of stateless persons, but we are also talking about the future generations.

2. Can you tell us about how you became interested in children's right to a nationality and what drives you to champion this issue?

The link between the right to birth registration and the right to acquire nationality is something I became familiar with as a consequence of my initial interest in birth registration, which is a particularly critical issue, especially in the African continent. I was 17 years old when I started working on children's rights, volunteering at an orphanage in Ethiopia-called Medical Missionaries of Mary. At that point, I already became acquainted with the importance of the right to birth registration, and the subsequent violations that are further facilitated in its absence. That issue came up again in my first job after completing university, when I joined the African Child Policy Forum (ACPF) as a junior legal officer.

I became directly involved in the issue of nationality when the communication against the government of Kenya was brought to the African Committee of Experts on the Rights and Welfare of the Child in 2010. We went through the submission made by the Institute for Human Rights and Development in Africa (IHRDA) together with Open Society Justice Initiative (OSJI). At that stage, the communication alleged a number of violations, including the right to acquire a nationality in relation to children of Nubian descent.¹ Through the research process in the consideration of that individual complaint, statelessness became a major interest of mine. I was directly involved in writing the decision of the Committee, which held violations of various rights of these Nubian children living in Kenya. After that, I had the opportunity to take part in meetings, lectures, trainings, workshops, etc., and as they say, the rest is history. I should mention that I am very interested in a number of other (children's) rights, including children and armed conflict, alternative care, inter-country adoption which was the area of my PhD research. But the

¹ See also *Using the African regional framework to realise children's right to nationality in Kenya*, Mustafa Mahmoud Yousif, in this Chapter.

issue of children's right to a nationality continues to be one of the top issues that I believe I can contribute to, but also still have a lot to learn about and I definitely see myself continuing to be involved in the issue in the future. In other words, I consider that childhood statelessness is an area that can certainly benefit from people joining the circle, and I am very happy to be part of that circle and contribute in any way I can.

3. What has been the Committee on the Rights of the Child's approach to protecting and promoting every child's right to a nationality?

There was a very interesting recent publication by the Institute on Statelessness and Inclusion which gave us very a detailed insight into some of the ways in which the CRC has dealt with the issue of statelessness.² One of the conclusions that actually came out from that report is the fact that over the course of about 22 years —it explored the first Committee recommendations issued in 1993, until some of the most recent recommendations of 2015 — is that we have made close to 120 recommendations. The recommendations have dealt with nine different issues or themes related to children's right to nationality. Gender equality is one of them, birth registration, foundlings, and non-discrimination, among others. Furthermore, the Committee has also flagged issues related to international adoption and the issues of remedies. Our recommendations in relation to loss and deprivation of nationality also related to article 8 of the CRC, which specifically addresses the right of the child to preserve his/her identity. These are all areas in which we have tried to engage states.

In terms of substance, the Committee has, for instance, called for the ratification of the two Statelessness Conventions. These continue to be critical instruments and we systematically recommend ratification. We have also called for the withdrawal of reservations that states have made in relation to article 7 of the CRC and article 9 of the CEDAW. In fact, because the CEDAW Committee often gives recommendations to states to withdraw reservations to article 9, we have often reinforced those recommendations and we have often used those recommendations from the CEDAW Committee to make the argument that they should not only withdraw reservations to article 7 CRC, but, where applicable, also to article 9 CEDAW. One of the other issues that I think we have tried to engage states on is the prevention of statelessness among children born

² See www.statelessnessandhumanright.org.

on their territory. In this regard, we have often recognised that states could not accept an obligation to grant nationality to every child born on their territory, regardless of the circumstances. This is one of the reasons why during discussions on the nationality provision in the ICCPR, states said ‘we cannot give the right to nationality; we actually have to say the right to acquire a nationality’. However, we have to understand that in circumstances where the child would otherwise be stateless, I think that the prevention of childhood statelessness becomes a very critical issue. We are not prescribing universal *jus soli*, but we are actually saying that in instances where a child would otherwise be stateless, there must be a safeguard in place within legislation and practice.

Our engagement with the issue of children’s right to nationality has not only increased in terms of numbers over the years, but I think that the quality of the engagement has also improved. A whole range of stakeholders — from members of the secretariat of the UN High Commissioner for Human Rights, the members of the Committee, civil society organisations, UN Agencies particularly UNHCR, and other stakeholders including children themselves — can take credit, not only for the number of recommendations but also for the quality of recommendations and the extent to which the Committee continues to cover the various important themes that I mentioned earlier. I also recall occasions during the child participation process when civil society organizations brought children with them to the pre-sessions and issues of nationality were raised by some of the children, which I think is very useful. With the advancement of technology, for instance in-vitro fertilization and the use of surrogate mothers, I believe there are few more emerging themes within the issue of nationality that will naturally grow in the conversations with stakeholders and within the Committee.

At this juncture I want to point out a couple of methodology issues related to our engagement. We usually say that as the Committee, our engagement with states is as good as the information base that we have in front of us. You have to remember that during the constructive dialogue with a state time is very limited: a maximum of six hours of dialogue with a state party. The questions that are raised range from article 1 to article 41. Therefore, the issue of children’s right to nationality has to contend with a whole range of other issues that will also be important. This means that the more precise, the more nuanced, and the more up-to-date the information the Committee has in relation to the right to nationality, the better the engagement with the state. I found it especially useful when

there are specific court decisions that have covered legislation or practice on nationality, to be provided with this information so we can have a nuanced conversation with the state. I also personally found it very useful when the relevant provision(s) of a state's law are actually provided word by word, so that the engagement with the state is more informed. Therefore, there are instances where issues of nationality are actually very important, but as a Committee, we have been unable to engage with the state party with the necessary vigour and depth. In part, this is because we do not have adequate information before we engage with the state-party. In those instances where we might try to engage with the state party without the necessary details, we might run the risk of appearing to be out of our depth. So a detailed information base on the situation of nationality in a state is crucial for a nuanced dialogue with a state as well as to draft focussed, and precise recommendations.

I also want to mention the importance of 'making the circle of stakeholders bigger'. When alternative reports are submitted to the Committee—which are often submitted by coalitions of civil society organisations—it is important to ensure that the issue of statelessness is given the attention it deserves in the report. We continue to benefit from the submission of separate reports focusing on nationality, and I am aware that the Institute on Statelessness and Inclusion has been doing this for more than a year; and a number of other organisations—including the confidential submissions by UN Agencies, in particular UNHCR—highlight the issue of statelessness. One cannot over-emphasise the importance of these submissions; they allow the Committee to engage with the state party in a more informed and nuanced manner. One of the areas where I believe there needs to be better engagement is the extent to which National Human Rights Institutions engage with the Committee, but also the extent to which various civil society organizations working on the issue of statelessness engage with NHRIs. The issue of statelessness should become an issue that the NHRIs deal with in their alternative submissions, in their engagement with the government, and in their engagement with various stakeholders.

Finally, I think that we need to be aware that in a number of countries we have engaged with, we have come across instances where the administrative system in place for the acquisition of nationality creates so many unnecessary obstacles for parents and children. They must appear before a special committee, and an overseeing committee, and another committee, and in a number of instances, these special committees

distribute rights in an arbitrary manner. They are not always just and not always legal, and are sometimes biased or based on individual connections, and there is uncertainty within these processes. In a number of instances, we have also found these processes to be inaccessible. They are often not accessible and understandable to adults let alone children. The more inaccessible and the less understandable these processes are, the more prone they are to corrupt practices. I think that, moving forward, this is one of the areas where we can improve engagement, not only the Committee but also those who provide information to the Committee, so that the administrative processes that states have are scrutinised closely from a variety of child rights angles.

4. Has the right of every child to a nationality received the attention it deserves? What are some of the challenges?

It depends on what time frame we are looking at. From five years ago – when I started to engage with the subject-matter – until now, i.e. the end of 2016, I think there has been significant progress. There has been significant progress in terms of increasing the number of stakeholders involved in the process and in terms of increasing the attention that this issue is getting from UNHCR. I will be a bit critical here: in 2011, when UNHCR was celebrating the 50th anniversary of the 1961 Convention, I was in Geneva for its Executive Committee meeting. Even though UNHCR made great efforts to give the Convention the attention it deserves, I think it could have given it additional attention, particularly given the fact that it was the 50th anniversary of the Convention. Still, one of the positive things that came out of that exercise was that there were a number of pledges that were made in 2011, which actually led to better awareness raising and ratification of the two Statelessness Conventions. So, it depends on the time-frame we are looking at, and compared to what other child rights issue. However, generally speaking, I feel that the right of every child to a nationality still has a long way to go to be able to conclude that it has received the attention that it deserves.

I would like to clarify a bit more; when we say ‘it is getting the attention it deserves’, we are talking about the attention that it deserves for instance in terms of ratification of the two Statelessness Conventions and the ratification of human rights instruments that some states have not yet ratified but that promote children’s right to nationality and the removal of reservations. We are also talking about the granting of nationality to stateless persons within a country; about research; about efforts

undertaken to raise awareness; about the number of organizations that are working on the issue; about the funding environment and how funding is being channelled and made available to address the issues affecting stateless persons; and we are talking about undergraduate, graduate and post-graduate teaching. A whole range of things come into the mix before we can say it is getting — or not getting — the attention it deserves. We can probably categorically say — and I am sorry about this reality — it is not getting the necessary attention in the political agenda of states that it actually deserves. It is simply not. If it was getting the necessary political attention, then we would have been able to make significant progress on eradicating statelessness around the world. We would also be making significant progress in preventing statelessness. Also identifying and undertaking advanced work to reduce or prevent statelessness, particularly among those who are at risk of statelessness is an issue that should be within the radar of many states.

To sum up, I think we have made progress as compared to 10 years ago, and 5 years ago on giving the issue of right of every child to a nationality. But whether it is now getting the necessary attention it deserves? I do not think so. Particularly, it still is not on the political agenda of a number of states. And even when it features and gets attention, the right to a nationality is not being seen through a human/child rights lens; it is often being seen from a political lens, a financial lens, and lenses.

5. What is the most positive development that you have seen in your work addressing childhood statelessness?

The issue of statelessness is a self-inflicted challenge. It is different, for instance, from children who are affected by flooding, or children who die from water-borne diseases, or children who die from malaria. Statelessness is self-inflicted, and it is actually man-made. Therefore, if it is man-made, the solutions are also man-made; they can actually be achieved. However, I would like to emphasize — a point I emphasized a few weeks back in Geneva for the UNHCR High Commissioner's Protection Dialogue — that even if we were to succeed in generating 10 million dollars or 100 million dollars tomorrow and would throw it at the issue of statelessness, I do not think we would be able to solve it. I do not think that the issue of statelessness can be addressed simply by throwing money at it, because of deep-seated stereotyping, because of discrimination, because of deep-seated pigeon-holing of those "individuals who belong" and "those who do not belong". I agree that the notion that says that more

money must be raised to eradicate statelessness is to some extent true; to raise awareness, conduct training, collect and analyse data, manage information etc. Funds are always necessary. Resources are also necessary to cater to the needs of stateless children who are currently living at the margins of society. However, unless the political discourse changes, unless political commitment is there, we are definitely not going to make much progress in terms of eradicating childhood statelessness.

Now, in terms of positive developments, I do believe the #ibelong campaign — which was launched in 2014 — is very useful. It is very ambitious, since its main target is to wipe out statelessness by 2024. But the fact of expressing the ambition to eradicate statelessness within the next 10 years has helped to drive significant progress. For instance, we have had close to 10 new states that have ratified the statelessness conventions. The number of countries—Thailand, Ivory Coast, Malaysia, etc—that have managed to make progress in reducing the number of stateless persons in their territories is very impressive. The government of Kenya has managed to make progress in relation to giving nationality to one of its minority groups. That is also progress. Also in relation to children of Nubian descent, they have now been identified as an ethnic group and have been included in the national census. These are some positive developments. Additionally, the number of countries that have entered reservations to CEDAW and the CRC has also been reduced. There was a report written by UNHCR, which highlighted progresses made in the MENA region regarding reduction of statelessness. Such progress should be commended and further consolidated. But I think the challenge that we face, and the road we have to travel, not just to address the 10 million and the part of that population that are children, but also the efforts we have to undertake to prevent statelessness is a very serious challenge we need to invest on intellectually, financially, and through political commitment.

6. Where do you see the issue going and what is your hope for the future?

In an ideal world, the issue would be addressed now and we would not even have to wait until 2024. If the political commitment is there, the issue can be addressed within a few years. One of the issues that I am concerned about in going forward is the fact that conflicts — particularly armed conflicts — will continue to increase the challenges that we are facing in efforts to address statelessness as a result of the destruction of documents, but even more directly, because of the number of children being born in

exile due to war. I think the Syrian conflict is a classic example of this: hundreds of thousands of children are being born in exile and are at risk of statelessness. Therefore, the risk that armed conflict, and the challenge that it imposes on the goals we want to achieve is something we should pay very close attention to.

The second point that I want to emphasize is how I personally see the issue going forward. I do not think that working to address statelessness and working on the prevention of statelessness are mutually exclusive efforts. I think that there is a tendency to look at the situation of eradicating statelessness as a priority, which is OK, but in the meantime states have to exert much more energy and be proactive with a view to also prevent statelessness. They need to undertake efforts through legislation, through policy, through identification of populations that are at risk of becoming stateless. Efforts towards prevention of statelessness will need to be increased even more so we can make some gains in moving forward.

In terms of the various partners that are involved in the field, I think there needs to be more concerted and sustained energy and intellectual investment from various UN Agencies, not only UNHCR but also from IOM, UNICEF, OHCHR, both among their staff and also within their partners that often work at the grassroots level. I think for the future, in moving forward, this needs to happen in a more systemic way. I think one of the positive things that have happened in the last few years is the fact that the number of organisations, particularly civil society organisations that are working on the issue has increased. The stakeholders—in this case the children—are invisible, and if the organisations that are also working on the subject-matter are also invisible, then we might be losing the battle. So, visibility in terms of numbers is very important, and as I said earlier, it is not just the numbers of civil society organisations working on the subject-matter at the international level, but also the engagement at the national level with the NHRIs, which I believe are very critical. Another positive development is in the area of research and training—as, for instance, more courses are taking place; for instance, UNHCR just held a course in Ghana, which was being provided to a number of academics in the African continent. This, I believe, is part of the strategy that needs to be consolidated moving forward. The more lawyers get to know about it, the more lecturers know about it and are qualified to teach about it, the more national measures in terms of law drafting, in terms of policy, in terms of litigation in court, and so forth, then the process can benefit from the expertise that the new breed of professionals will bring to the table.

Using the CRC to help protect children from statelessness in Serbia

*Praxis Serbia**

Several categories of children are at risk of statelessness in the Republic of Serbia. These include children who have not been registered in birth registries, children of undetermined citizenship and those who were registered in registry books that were lost or remain unavailable to the authorities of Serbia. The great majority of these children belong to the Roma community, which lives in deep poverty and social exclusion, exposed to discriminatory treatment in almost every area of life. Statelessness and the risk of statelessness is an issue that the Republic of Serbia has made efforts to address.

Legislative changes¹ and better practices have helped to both prevent new cases of statelessness and find solutions for persons who have been living without citizenship or proof of citizenship for many years. However, some gaps still remain, which must be addressed to fully resolve statelessness in Serbia. In particular, in order to prevent childhood statelessness and to fulfil obligations stemming from Serbia's international obligations and its constitution, it is still necessary to ensure that every child is registered at birth without discrimination and regardless of the status of his/her parents.

In 2016, Praxis, the Institute on Statelessness and Inclusion (ISI) and the European Network on Statelessness (ENS) made a submission to the Committee on the Rights of the Child regarding Serbia's compliance with Article 7 of the Convention on the Rights of the Child (CRC), which states that every child has the right to acquire a nationality².

* Praxis is a national non-governmental organization established in 2004 in Belgrade that protects human rights by providing legal protection and advocating for elimination of systemic obstacles in access to rights. Praxis acts in the area of status and socioeconomic rights, antidiscrimination, gender equality, migration and child rights.

¹ Especially those related to the adoption of the Law on Amendments to the Law on Non-Contentious Procedure

² The report is available via following link: <http://praxis.org.rs/index.php/en/reports-documents/praxis-reports/item/1105-civil-society-submission-on->

The report submitted by the state to the Committee did not address comments by Praxis related to still unresolved issues and the need for further improvements in exercising the right to birth registration and nationality, even though Praxis was asked to submit them by relevant state bodies³. Hence, this submission was necessary in order to provide the Committee with further information to complement and fill out the gaps in the state report.

The Praxis, ISI and ENS submission highlighted challenges related to the exercise of the right of every child to acquire a nationality and the avoidance of childhood statelessness in Serbia as a result of discrimination, poor implementation of the law and challenges related to birth registration, as well as equal access to socio-economic rights and services.

Representatives of Praxis and ISI presented the submission before the Committee at the 74th Pre-Sessional Working Group, held in June 2016 in Geneva, Switzerland. Since all the relevant information was received in advance and on time, the submission and presentation process was conducted smoothly and efficiently. In addition, the assistance provided by Child Rights Connect⁴ through the participant registration process, briefing before the Pre-Sessional Working Group, and debriefing afterwards, was immensely useful. During the Pre-Sessional Working Group, Praxis and ISI provided responses to questions raised by the Committee on statelessness and related issues. The Committee members appeared to be aware of these issues in Serbia and were well prepared for the Working Group.

In light of the Committee's previous recommendations to Serbia on the issue, state recommendations issued to Serbia during

[the-right-of-every-child-to-acquire-a-nationality-under-article-7-crc](#)

³ Specifically, Praxis, together with Centre for Children's Rights, was invited in 2012 by the Office for Human and Minorities Rights, which coordinated the preparation of the State report, to take part in the drafting process. In December 2012, Praxis sent comments and information about its experience, as well as about various unresolved issues in relation to Articles 2 and 7 CRC. Feedback from the Office for Human and Minority Rights was received one and a half years later, and a new meeting was held in July 2014. Praxis again sent in comments in relation to gaps and issues in accessing the rights guaranteed under Article 7 CRC. However, these comments were not included in the state report.

⁴ <http://www.childrightsconnect.org/>

the second UPR cycle and the importance of the eradication of statelessness, Praxis engaged in this process in the hope that the Committee will raise the issue of the right of every child to acquire a nationality in its List of Issues for Serbia and subsequently address recommendations to the government of Serbia to further prevent and solve the problem of childhood statelessness in the country. The Committee's recommendations contribute to keeping the issue of child statelessness high on the state's agenda and, at the same time, they will be a strong advocacy tool for legal changes and improvement in protection framework. Praxis hopes that the state will take measures in accordance with relevant recommendations and hence, ensure prevention of statelessness at birth and full access to nationality related rights for everyone.

Even though CRC engagement is important, it also must be something which complements wider work on the issue, in order for it to be effective. There must be follow up on implementation, to ensure the state is making effective progress and implementing sustainable solutions. This entire process has been of extraordinary significance and the CRC is a very effective instrument with a far-reaching effect for any CSO aspiring to openly confront all issues connected to the problems children face in their respective countries.



This stateless woman from the Roma community in Serbia was unable to register her four children. She is now pregnant and it is unlikely she will be able to register her newborn. As a result her children are legally invisible. © Greg Constantine

Erduan – an interview

Ten-year old stateless boy in Serbia*

Erduan was born in Belgrade. At the time of his birth, his mother did not have any personal documents and therefore she used her sister's identification document in the maternity hospital. Consequently, this sister was registered as his mother in the birth registry book. The procedure for challenging the maternity is ongoing and for now, Erduan does not have a nationality. Only when (and if) the maternity of his real mother is legally established, will he be able to be recognised as a Serbian citizen.

Erduan

Q. Where are you from? Where are your parents from?

A. *I am from Belgrade, and my parents are from Kosovo.*

Q. Do you go to school? What is your favourite thing about school, and what is your least favourite thing about school?

A. *I don't go to school. I went to school only for a few months.*

Q. Do you like any extra-curricular activities, sports, clubs, theatre etc.?

A. *I like playing football the most. I play football whenever I can. Otherwise, I work with my dad. He collects cardboards on the streets.*

Q. What do you want to be when you grow up?

A. *I would like to play football or to collect cardboards.*

Q. Would you like to go to school? Do you think it would help you in life? What would you like to learn at school?

A. *Maybe I would ... I know that at school you learn how to read and write, and how to calculate.*

¹ Interview conducted by Praxis Serbia in 2016. The name has been changed to protect the interviewee's identity.

Q. Have you ever had to work? Why? What job did you do? Was it difficult to get a job?

A. *Yes, I have been working with my dad for long. We collect cardboards together.*

Q. What does 'home' mean to you – can you describe it?

A. *It is my place. My mum, dad, brother and sisters are there.*

Q. Do you have documentation? Do you need documentation?

A. *I don't have documents. I haven't needed them so far.*

Q. Do you know what the documents are for and what they mean to people?

A. *When you have documents, you can "do a job", go to a doctor. When you don't have documents, you cannot do anything.*

Q. What makes you most happy?

A. *I am happy when my dad gives me some money and then I can buy ice-cream or something else for myself.*

Erduan's father

When our child was born, neither my wife nor I had personal documents. My wife didn't have a health booklet or any other

personal document, so we were afraid that without it she wouldn't be taken in the maternity hospital and she would have to pay enormous hospital expenses, so she took her sister's identification card. Therefore, my wife's sister was registered as the mother of our son. Since my wife's sister did not have a citizenship, my son could not acquire it either. In addition, our son could not have his name determined. Only now that my wife and I have ID cards, have we initiated the procedure for challenging the maternity before the court and we hope that once we are registered as the parents of our son, he will be able to finally acquire his citizenship.

"I am afraid that my kids cannot be treated if they fall ill"

Until a few years ago, didn't have any personal documents either. The birth registries where I was registered were destroyed during the conflict in Kosovo, and my parents did not save my old birth and citizenship certificates. Therefore I couldn't re-register in a simple way and thus

lived without documents for years. However, after a lengthy procedure, I am again registered in birth registries, I obtained birth and citizenship certificates and then an ID card as well.

Our son is 10. He is a good child, he obeys, but mainly if everything is as he wants. Just like other kids, he is not satisfied when he is asked to do something he doesn't like or he is not good at. He likes playing football the most. He also likes being with me when I go to work.

Actually, the first time we realised how important it is that children have documents, was when our other son got sick. Since he did not have any documents then (he still doesn't have any), they did not want to take him into the hospital, although he felt very bad. We were forced to wait the whole night in the hospital and finally they took him in. My wife and I have five kids and only the youngest one has personal documents and citizenship. If all our kids had personal documents, we would receive social welfare assistance, which would mean a lot to us. I am the only one who earns in the family, and I can earn just for food and the basic needs. I am afraid that my kids cannot be treated if they fall ill.

I hope he will obtain the documents and go to doctors without any problem, and one day to find a job, because without documents he will not be able to do it. I hope one day we will all have documents and finally be free people.

Advancing children's right to a nationality through the UN Committee on the Rights of the Child

*Francesco Cecon**

1. The added value for civil society in engaging with the Committee on the Rights of the Child

Article 45 of the United Nations Convention on the Rights of the Child (CRC)¹ sees civil society as an active actor for the implementation of the CRC.² The advocacy strategies of Non-Governmental Organisations (NGOs) carried out in the framework of the Committee's activities have resulted in real change on the ground in many cases.³ Article 7⁴ of the CRC stands as a

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¹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

² See article 45 of UN CRC: "In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention: (a) [...] The Committee may invite the specialized agencies, the United Nations Children's Fund **and other competent bodies** as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. [...]; (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund **and other competent bodies**, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications. [...]"

³ Child Rights Connect has collected case studies of best practices implemented by NGOs in the follow-up to the Committee's Concluding Observations, available at http://www.childrightsconnect.org/wp-content/uploads/2013/10/CRC_CaseStudies_All_Final_english.pdf

⁴ See Article 7 of UN CRC: "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality

central provision in the Convention: the Committee asks each state party about their efforts to ensure universal birth registration and children's right to a nationality, and systematically includes recommendations related to Article 7 in its Concluding Observations.⁵

The Committee's Concluding Observations, which are the main outcome of its reporting cycle, constitute a strong tool for NGOs' advocacy strategies at national and international levels. They also serve as a basis for civil society's engagement with other United Nations (UN) treaty bodies, the Human Rights Council (HRC), and its Universal Periodic Review (UPR). As children's rights are cross-cutting, the exercise of cross-referencing UN recommendations can be extremely valuable in terms of pressure exercised on states. In this sense, the strategic cross-referencing of recommendations issued by independent bodies⁶, such as the Committee on the Rights of the Child, and political ones, such as the UPR, can exert pressure on states.⁷ In the case of Article 7, using the interpretation of the Article's provisions carried out by the Committee and the recommendations made to states, can serve as a strong basis for the engagement of NGOs with other UN human rights mechanisms.

As mentioned previously, the CRC and the working methods of the Committee on the Rights of the Child⁸ envisage a strong civil society engagement, on which the Committee is highly dependent, both for its dialogue with state parties and for its Concluding Observations.⁹ NGOs

and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

⁵ Institute on Statelessness and Inclusion, 'An Analytical Database of the Concluding Observations of the Committee on the Rights of the Child which relate to children's right to a nationality' (2016), available at <http://www.institutesi.org/ourwork/children.php>

⁶ For instance, using the Concluding Observations of the Committee on the Rights of the Child as the basis for a submission to another Treaty Body or to the Universal Periodic Review.

⁷ For more information on how to engage with the Universal Periodic Review, please see <http://www.childrightsconnect.org/connect-with-the-un-2/universal-periodic-review/>

⁸ Committee on the Rights of the Child, 'Working methods of the Committee on the Rights of the Child', available at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx>

⁹ Please see Child Rights Connect's mini-site, explaining all the phases of the

can invoke Article 7 and obtain country specific recommendations on it. However, given the lack of a comprehensive, established interpretation of the provision by the Committee, this can lead to different recommendations depending on the state. This essay therefore aims to provide a short overview of how NGOs could jointly call for a General Comment and/or a Day on General Discussion (DGD) on Article 7 and how these instruments could advance their advocacy and campaigns.

2. Advancing the interpretation of the rights of children to a nationality: the General Comments

Advancing the interpretation of the provisions of the Convention is not only one of the outcomes of the Committee's reporting cycle and of the dialogue between governments and the Committee, but it also constitutes a major area of the Committee's work. In this respect, the General Comments¹⁰ issued by the Committee, "provide an authoritative interpretation of the rights contained in the articles and provisions of the Convention on the Rights of the Child".¹¹ These instruments can have a significant impact as they do not only provide guidance to States on how to best implement specific provisions, they can also be used for advocacy and jurisprudential purposes with relevant stakeholders. In this sense, reference to the Committee's General Comments is a widespread practice among national courts¹² and can influence the development of new laws, policies and programmes. In the case of the right of a child to a nationality, General Comments can also be a good basis for the mainstreaming of the issue as "the Committee generally shares draft general comments

Committee's reporting cycle and entry points for civil society organisations, available at <http://csrcreporting.childrightsconnect.org/>

¹⁰ The Committee produces General Comments to explain the rights contained in the CRC, the OPSC and OPAC and provide guidance with respect to particular issues. This helps States improve both the way they write their reports and the way they implement the CRC and its Optional Protocols. Please see the list of previous General Comments: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

¹¹ Please see <http://www.childrightsconnect.org/connect-with-the-un-2/committee-on-the-rights-of-the-child/general-comments/>

¹² Y Iwasawa, 'The Domestic Impact of International Human Rights Standards: the Japanese Experience' in P Alston & J Crawford (eds.), *The future of UN human rights treaty monitoring* (Cambridge University Press 2000).

with selected experts, including those from the other treaty bodies, for comments”.¹³

To date, no General Comment on Article 7 has been formulated; however, existing General Comments do make reference to issues related to statelessness.¹⁴ Having a General Comment on the provisions of the Article would provide better guidance to states on how to put these into practice. The themes of each General Comment are not chosen in a systematic manner, but they can be the result of proposal by individual Committee members, UN agencies and/or NGOs.¹⁵ In addition, the Committee has also formulated joint General Comments with other Treaty Bodies.¹⁶ Civil

¹³ Ibid, note 7.

¹⁴ See the following General Comments: UN Committee on the Rights of the Child, ‘General Comment No. 3’ (17 March 2003) UN Doc CRC/GC/2003/3, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f3&Lang=en; UN Committee on the Rights of the Child, ‘General Comment No. 6’ (01 September 2005) UN Doc CRC/GC/2005/6, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2005%2f6&Lang=en; UN Committee on the Rights of the Child, ‘General Comment No. 7’ (20 September 2006) UN Doc CRC/C/GC/200/7/Rev.1, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f7%2fRev.1&Lang=en; UN Committee on the Rights of the Child, ‘General Comment No. 9’ (27 February 2007) UN Doc CRC/C/GC/9, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f9%2fCorr.1&Lang=en; UN Committee on the Rights of the Child, ‘General Comment No. 10’ (25 April 2007) UN Doc CRC/C/GC10, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f10&Lang=en; UN Committee on the Rights of the Child ‘General Comment No. 11’ (12 February 2009) UN Doc CRC/C/GC/11, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f11&Lang=en; UN Committee on the Rights of the Child ‘General Comment No. 12’ (20 July 2009) UN Doc CRC/C/GC/12, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f12&Lang=en; UN Committee on the Rights of the Child ‘General Comment No. 14’ (29 May 2013) UN Doc CRC/C/GC/14, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f14_&Lang=en; and UN Committee on the Rights of the Child ‘Draft General Comment No. 20’ (22 April 2016) UN Doc CRC/C/GC/20: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f19&Lang=en

¹⁵ Civil society organisations can also offer funding to the Committee for the preparation of the General Comment.

¹⁶ The Committee has already worked with the Committee on the Elimination of Discrimination against Women on the ‘Joint General Recommendation/

society organisations can therefore choose to propose a theme to the Committee alone or together with other committees. Proposing a theme to more Committees would help in mainstreaming the issues related to the implementation of Article 7. This consideration is particularly relevant in this case, as the issues are cross-cutting through different UN Conventions. In practice, NGOs have to explain, in writing, the reasons why a General Comment on the issue of statelessness is necessary.

However, some considerations need to be made before discussing this process. First of all, the Committee does not have a standardised decision making process¹⁷ for the selection of themes of General Comments. The process varies according to a series of factors. The weight that NGOs could exercise in the selection process would depend, *inter alia*, on the relationship that NGOs have with Committee members, the strength of the proposal and also the relevance or urgency in addressing a specific issue at that time¹⁸. It would be therefore important to be strategic in demonstrating the relevance of the issue of statelessness at the specific time. The first step, in this direction, would be to identify gaps in the understanding of the issue in existing General Comments. NGOs can also suggest a list of elements that can be taken into account and included in the Comment. Statelessness being a cross-cutting issue, the possibility of suggesting a list of elements to be included can be a beneficial resource for NGOs working on the theme. During the preparation process and the review of the draft, some UN agencies, experts and NGOs can provide further inputs and comments.¹⁹ In general, the timeframe for the adoption

Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices'. And, the Committee is currently working with the Committee on the Rights of Migrant Workers and their Families on the 'Joint General Comment on the Human Rights of Children in the Context of International Migration'.

¹⁷ The Committee is currently in the process of discussing a possible review of its working methods.

¹⁸ This essay will not make reference to a specific case studies as there is no standardised process and the NGOs involvement in it might vary from one case to the other. However, you can refer to the recent involvement of a group of NGOs (Working group of Investment of Child Rights Connect) in the development of the Committee's General Comment No.19 for a general overview of how NGOs can be involved in the process: <http://www.childrightsconnect.org/child-rights-issues/investmentinchildren/>

¹⁹ For more information on all the steps of adoption of a General Comment by the Committee and how NGOs can contribute, please see <http://www.childrightsconnect.org/connect-with-the-un-2/committee-on-the-rights-of-the-child/general-comments/>

of a General Comment theme lasts 18 months. NGOs need to keep this in mind when proposing a theme. Besides, NGOs can also participate and provide input into the drafting of other General Comments in the areas where they have expertise. It is therefore important to be aware of the themes discussed in the General Comments of the Committee to be able to explore possibilities for the integration of considerations related to Article 7 in these instruments. In particular, the Committee, while drafting, encourages NGOs working on thematic issues locally to provide feedback on the text of the General Comment and on how to tailor it to address questions of implementation on the ground.

3. Days of General Discussion

General Comments can also sometimes be the direct result of a Day of General Discussion (DGD) of the Committee on the Rights of the Child.²⁰ The DGD is a one-day event taking place in Geneva every other year. The discussion focuses on a specific child rights theme related to one or several articles of the CRC. The purpose of the DGD is to “foster a deeper understanding of the contents and implications of the Convention as they relate to specific articles or topics.”²¹ As with General Comments, DGDs are also decided by Committee members, but proposals can also come from UN agencies and NGOs.²² Interestingly, the discussions held at previous DGDs²³ led to important outcomes in addition to the traditional recommendations to state parties to the Convention. The UN Study on Children in Armed Conflict²⁴ and on Violence against Children²⁵ also stand

²⁰ Previous Days of General Discussion (DGD) led to the formulation of the Committee’s General Comments on ‘implementing child rights in early childhood’, ‘HIV/AIDS and the rights of the child’, and the one on the ‘rights of children with disabilities’.

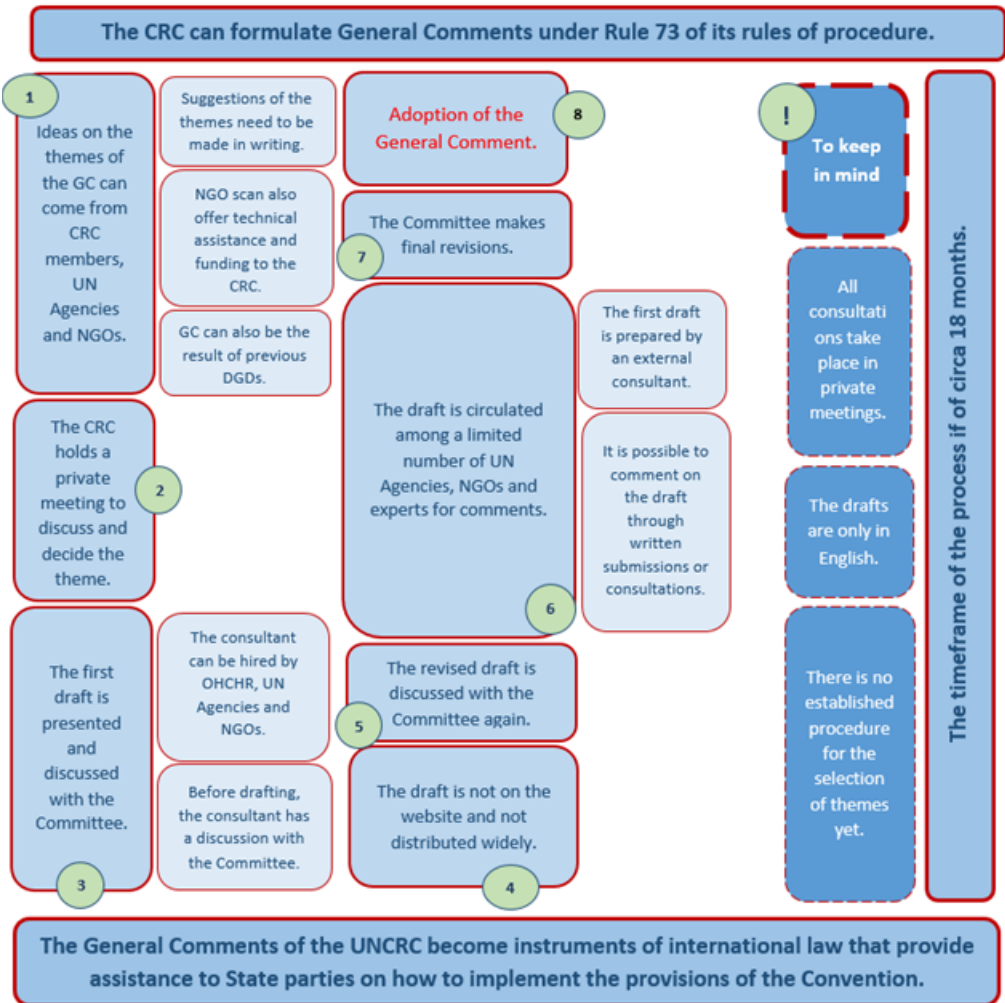
²¹ For more information on the scope of the Committee’s Days of General Discussion, please see <http://www.childrightsconnect.org/connect-with-the-un-2/committee-on-the-rights-of-the-child/days-of-general-discussion/>

²² For detailed information on how to request a DGD on a theme or on how to contribute to other DGDs with submissions, please see *ibid* 22.

²³ Please see the list of previous DGDs, available at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx>

²⁴ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, ‘The Machel Study – UN Study on Children in Armed Conflict’ (1996), available at <https://childrenandarmedconflict.un.org/mandate/the-machel-reports/>

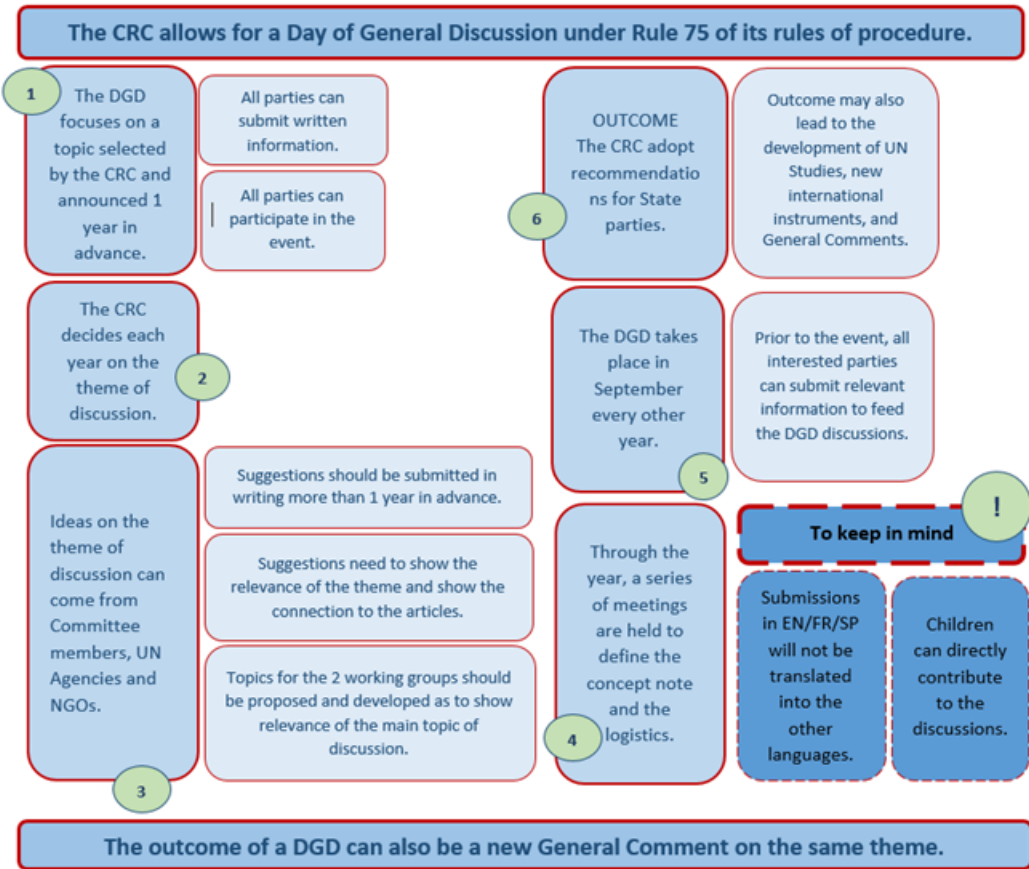
²⁵ Independent Expert for the Secretary-General Study on Violence against



as a result of former DGDs. NGOs who are willing to suggest a theme for a DGD have to demonstrate the importance of the proposed theme and establish links with the Articles of the CRC. During the event, working groups will take place around different aspects of the issue and NGOs should also be able to propose and develop the concepts around the specific themes being discussed on these occasions²⁶.

Children, 'The UN Study on Violence against Children' (2006) available at <http://www.ohchr.org/EN/HRBodies/CRC/Study/Pages/StudyViolenceChildren.aspx>

²⁶ Ibid, 22.



As is the case with General Comments, NGOs willing to propose an issue as a theme for discussion should be very strategic in demonstrating the reasons why having a DGD on Article 7 is essential. This is an important preliminary consideration to make as the Committee often decides to opt for the theme in which there is a current lack of expertise and where therefore there is a need for further recommendations to be made to state parties²⁷. NGOs working on issues related to the implementation of Article 7 should work collectively to demonstrate the implications, the challenges but also the best practices that could be shared on such an occasion.

²⁷ This has in fact been the case for the 2016 DGD on 'Children's Rights and the Environment', where the Committee seeks at further improving its understanding and knowledge on the issue. For more information on the 2016 DGD, please visit: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2016.aspx>

The emphasis should be placed on the challenges that states face in the implementation process. In this regard, an analysis of the Committee's dialogues, recommendations and jurisprudence on the issue should be the first step. For instance, several of the dialogues between Committee members and government representatives focus on the difficulties that states face in the collection of data and the subsequent reporting to the Committee. Establishing links on the importance of having a deeper understanding of the implications related to Article 7 to assist States in addressing the issue is thus paramount.

Furthermore, the interpretations and recommendations issued by the Committee can assist other relevant stakeholders. With this in mind, suggestions on the theme of discussion should also demonstrate how the recommendations made by the Committee could improve the national frameworks of action on children's rights to a nationality. This means that NGOs could reinforce their proposal on a DGD by demonstrating how the recommendations made to States could also assist other actors or institutions working at the national level on the implementation of the provisions listed by Article 7.

4. Mainstreaming Article 7 across Treaty Bodies: the call for a joint General Comment

The effective implementation of Article 7 and the full realisation of children's right to a nationality have an impact on several other rights protected by the CRC. The Committee has demonstrated an understanding of this inter-relation of rights and the importance of making strong recommendations to states in this regard. However, because of the very nature of childhood statelessness, receiving further guidance on how to consider all aspects related to the issue could be particularly beneficial for states, and for civil society. In this sense, viewing the CRC as part of a bigger system is fundamental. Indeed, Concluding Observations should not constitute the only basis for the mainstreaming of the issue across human rights mechanisms. As General Comments and DGDs provide for a more solid understanding of issues, they can serve as valuable tools for the further engagement with other mechanisms.

In the case of children's right to a nationality, cross-referencing becomes even more effective. Approaching additional Committees to call for a Joint General Comment could bring about significant benefits in terms of both

understanding childhood statelessness' implications and mainstreaming the question. If guidance provided to states takes into account most of the aspects related to the issue and if recommendations are formulated on the basis of the expertise of members from different Treaty Bodies, the impact on the development of legal and policy frameworks at national level will be stronger. In addition, two or more Committees will start making reference to a joint General Comment in their dialogues with states, and this would most likely be reflected in the Committee's recommendations to states. On the same line, the engagement in the reporting cycle of civil society to the Committee and other Treaty Bodies would also benefit from such an instrument. Passing clear and comprehensive messages regarding children's right to a nationality would allow for stronger advocacy in the framework of the Committees' work.

All the areas of work of the Committee are inter-related and, although recommendations formulated in General Comments are made to state parties, the interpretation of the CRC provisions represent a powerful tool for NGOs in their work. The submission of information on the implementation of Article 7 by states, which is in line with the Committee's understanding of the question, would make the overall engagement of NGOs through the Committee's reporting cycle even more effective, coherent and impactful. This would, in turn, strengthen recommendations to states on how to implement Article 7 and ensure that every child has his/her right to nationality fully realised.

Similarly to the process of selection, the impact of such instruments on the ground can differ. It goes without saying that the political will of governments is fundamental. However, the level of pressure exercised by NGOs can make a difference. Before asking for a DGD or a General Comment on statelessness, NGOs should first make sure they have a clear follow-up plan in mind. This includes making sure that NGOs have the necessary resources to support such a plan. In this sense, it would be important to have strong coordination between NGOs advocating a specific theme, facilitating the sharing of resources and responsibilities throughout the process. Obtaining a General Comment or a DGD on Article 7 would not be enough in itself. The capacity of NGOs to engage in a series of raising awareness and advocacy activities for the implementation of such instruments needs to be an element of consideration from the outset.

Why is a General Comment on Article 7 necessary? What are the elements that should be addressed? Do we have the capacity to follow-up and

advocate for the implementation of the outcomes by states? These are only some of the questions that need to be asked before engaging in this process. The selection of the theme, the relevance of the instrument chosen and its impact not only depend on NGO pressure and capacity but also on the answer to one question: are we ready?

Activating the CRC - tools for civil society engagement

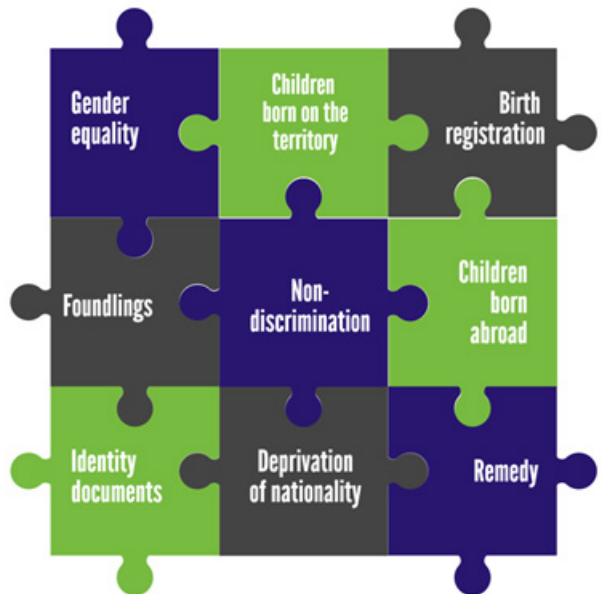


In June 2016, the Institute on Statelessness and Inclusion (ISI) launched a Toolkit to assist civil society in its endeavours to effectively engage the Committee on the Rights of the Child to ensure that states fulfil their obligations under Article 7 of the Convention on the Rights of the Child to promote, respect and fulfil every child's right to acquire a nationality, and to ensure that no child is stateless.

The CRC Toolkit is free to download (as a whole or in individual sections) and can also be navigated online at www.statelessnessandhumanrights.org.

The CRC Toolkit comprises **ten sections which can be read together or individually**, depending on the reader's existing level of knowledge and interest. Each section serves a specific purpose, while also being part of a collection of Tools which provide civil society actors, including Non - Governmental Organisations (NGOs), national human right institutions and Ombudspersons with a wide range of information and advice.

After an introduction (1) which sets out the purpose and aims of the CRC Toolkit and explains how it can be used, two substantive sections outline the scope and content of every child's right to a nationality (2), followed by a closer look at the Committee on the Rights of the Child,



its mandate and its work to date to ensure that the right of every child to a nationality is realised (3). This part includes a summary of the recommendations the Committee has made on the content / substance of the right (see graphic for the topics the Committee has dealt with), as well as on general measures of implementation.

The next two sections of the CRC Toolkit help civil society actors to identify opportunities for engagement with the Committee. An overview is given of the CRC reporting cycle – its different stages and the opportunities these each present for civil society engagement, the role that civil society actors can play in this process and relevant considerations for civil society actors in this regard (4). After that, a checklist for identifying issues relating to the child’s right to a nationality offers concrete questions to guide civil society stakeholders in the assessment of issues, legal gaps, and conditions in which statelessness may arise in countries being reviewed (5). A condensed version of this checklist is included later in this piece.

If an opportunity for engagement with the Committee on the Rights of the Child has been identified, the CRC Toolkit can also help to facilitate that engagement. It provides a template for civil society submissions on the child’s right to a nationality (6). Instructions are also given on how to use the **CRC Concluding Observations Database on the child’s right to a nationality** which accompanies the CRC Toolkit and which

Advocacy using the CRC Toolkit: the example of Norway

In October 2016, the Norwegian Ministry of Justice and Public Security issued an instruction which greatly improved access to nationality for stateless children born in the country. The problematic requirement of lawful residence was abolished and now, a stateless person born in Norway has the right to acquire Norwegian citizenship after a period of factual, stable residence of three years. This important step came following advocacy efforts made by the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Norwegian Organization for Asylum Seekers (NOAS), with support provided by the European Network on Statelessness (ENS) – including through its #StatelessKids campaign – and using the tools developed by ISI. In particular, the toolkit helped NOAS to quickly identify relevant points of concern that had already been raised by the CRC in its Concluding Observations on other State party reports and use this in its advocacy with the Norway, which will soon be coming up for review again before the Committee on the Rights of the Child.

contains information on the content of the recommendations made by the Committee (7). The instructions outline how different sorts of queries can be made and gives examples of how to look up information in the database. Finally, the CRC Toolkit also contains relevant excerpts of other treaties, Treaty Bodies and Special Procedures (8); an overview of other resources and further reading (9); and a list of all abbreviations with a glossary of key terms used in the Toolkit (10).

Checklist for identifying issues relating to the child's right to a nationality

The CRC Toolkit offers a **10-point checklist** to guide civil society stakeholders in the assessment of issues, legal gaps and conditions in which statelessness may arise and manifest in countries under review, in order to determine if and how they would engage with the CRC Process. For each of the issues on the checklist, the Toolkit gives a brief description/guiding questions to help identify relevant problems, as well as some examples of relevant recommendations previously issued by the Committee. A much condensed overview of this checklist is reproduced here.

Scale of the problem and related data/statistics

1. Is there a large habitually resident stateless population in the country?

20 countries have known non-refugee stateless populations of over 10,000. In many other countries, there are large but unquantified stateless populations.

2. Does the country host to a large refugee or irregular migrant population that is stateless or at risk of statelessness?

Forced migration can cause statelessness, and stateless refugees face added vulnerability. Particularly in countries without adequate safeguards against statelessness, statelessness in migration can be inherited by new generations.

3. Does the state maintain systematic and disaggregated data on children's acquisition of nationality, birth registration, statelessness and as relevant, the questions highlighted above?

The legal framework

4. Does the country's legal framework contain discriminatory provisions which arbitrarily deprive nationality or deny access to nationality?

27 countries discriminate against women in their ability to confer nationality to their children. Many countries discriminate in access to nationality on grounds of race, religion, disability etc. The discriminatory implementation of the law can also cause statelessness.

5. Does the country's legal framework have adequate safeguards to protect all children born in the territory (including foundlings) from statelessness?

Some countries have no safeguards to protect against childhood statelessness. Others have partial safeguards, conditional on the fulfilment of unreasonable criteria. Even in countries with full safeguards, implementation can be discriminatory and/or ineffective.

6. Are there other legal gaps affecting children's access to nationality?

In some countries, children born abroad to nationals do not have access to nationality. The law may also not protect against statelessness in the context of adoption or surrogacy, or allow for the deprivation or loss of nationality of children (including as a result of deprivation or loss of their parent's nationality)

7. Is the State party to the most relevant treaties and has it removed any reservations that it made to these treaties?

The 1954 and 1961 Conventions and other core human rights treaties with statelessness relevant provisions including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights and Persons with Disabilities (CRPD) and the International Covenant on Civil and Political Rights (ICCPR), are all relevant. States may be party to these treaties but have declared reservations on provisions which relate to the right to a nationality and statelessness.

State practice

8. Is there universal birth registration, which is free and accessible for all?

The majority of countries have not achieved universal birth registration. Minority, rural, poor, migrant and refugee communities

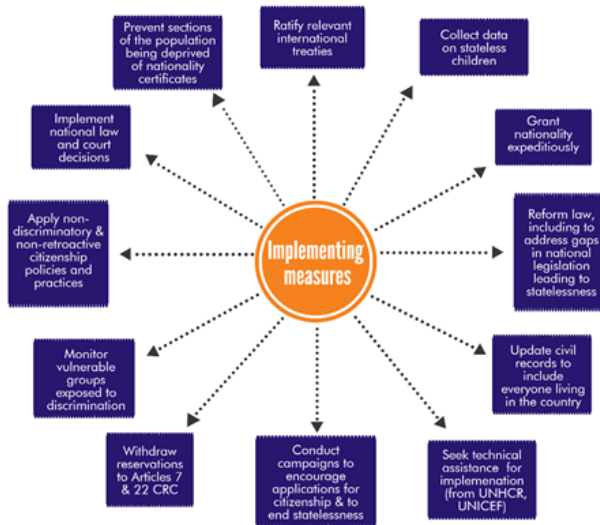
are disproportionately impacted. The lack of birth registration and documentation is not the same as statelessness, but it heightens the risk of statelessness, in particular in a context of forced displacement or where a population's belonging is challenged.

9. Is there access to justice and a right to a remedy?

Statelessness can serve as a barrier to accessing justice, with stateless children being denied legal recourse and a fair remedy for rights violations including the violation of their right to a nationality.

10. Do stateless children in the country benefit from the protection and enjoyment of other human rights enshrined in the CRC?

Statelessness can result in denial of (or disadvantage in) accessing a multitude of other fundamental rights including the rights to an identity, education, health, family life, adequate standard of living, freedom of movement and protection from economic exploitation.



Committee engagement on childhood statelessness

In the 23 years of Committee reviews of state party reports (until mid-2016), the Committee issued 126 recommendations on the content of children's right to acquire a nationality. A further 226 recommendations on measures of implementation that states should take in order to improve the protection of children's right to acquire a nationality have been made. In total, 89 different states have received relevant recommendations from the Committee.

The Committee has paid the greatest attention in its substantive recommendations to addressing the obligation of states to grant nationality to children who are born stateless in their territory, to ensuring that access to nationality is non-discriminatory and to promoting universal birth registration as a means to help prevent childhood statelessness. The most common implementing measure recommended has been the ratification and application of other relevant international standards, including the two UN statelessness conventions. The Committee has also made recommendations regarding the treatment and rights of stateless children.

Civil Society Submissions to the Committee on the Rights of the Child

The Institute on statelessness and Inclusion, in collaboration with thematic, regional and national partner organisations, makes regular submissions to the Committee on the Rights of the Child, on the child's right to acquire a nationality in different countries around the world (see: www.institutesi.org/children). Our joint submissions at various stages of the process and our oral representations to the Committee have contributed towards positive recommendations on the child's right to a nationality and protection against childhood statelessness being made by the Committee to many of these states.

If the country you work in is coming up before the Committee for review and you are interested in making a joint submission, please contact us via email: info@institutesi.org

Human rights and stateless children

*Hernan Vales**

1. Introduction

Every year, more than 70,000 children in the world are born into statelessness.¹ These children are subject not only to a violation of the right to nationality, but also to violations of other fundamental human rights deriving from it. The right to a nationality is protected under international law and recognized in key international human rights instruments.² The Convention on the Rights of the Child (CRC) is particularly important when it comes to the protection of children's right to nationality, because it explicitly obligates States to implement this right, in accordance with the principles of non-discrimination and the child's best interests.³ The United Nations (UN) General Assembly, the Human Rights Council and the UN Secretary General have all addressed the right to a nationality and the avoidance of statelessness in

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¹ United Nations High Commissioner for Refugees (UNHCR), *I am Here, I Belong: the Urgent Need to End Childhood Statelessness* (2015), at 8, available at <http://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport-ENG16.pdf>

² See, for instance, the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Nationality of Married Women, the Convention on the Reduction of Statelessness, the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

³ Convention on the Rights of the Child, 20 November 1989, Article 7.

several resolutions and reports dealing with the arbitrary deprivation of nationality, including its impact on children, and discrimination against women regarding nationality-related matters.⁴

2. Impact of statelessness and arbitrary deprivation of nationality on children's rights

The arbitrary deprivation of nationality for children not only constitutes in itself a human rights violation, but it also exacerbates the difficulties encountered by these children, particularly when deprivation of nationality leads to statelessness. There is no legal basis upon which states can justify the denial of human rights to a child on grounds of statelessness.

Indeed, with the exception of certain specific rights, such as the right to vote, entitlement to human rights is not premised on the nationality of the individual, but rather on human dignity. Nevertheless, various human rights have been practically compromised *vis-à-vis* to people without a nationality.

2.1 Right to an identity

As stated in the report of the Secretary-General on the impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children (A/HRC/31/29), arbitrary deprivation of nationality undermines the right to identity, closely related to the right to a nationality. Deprivation of nationality places children in a situation of extreme vulnerability and also threatens the enjoyment of other rights linked to children's identity, as the right to juridical personality, the right to a name and the right to equal protection.⁵ Birth registration is one of the means through which the right to an identity is preserved. Unfortunately, stateless children are more likely to face barriers in their access to birth registration.⁶

⁴ See HRC Resolution 7/10 (2008); Resolution 10/13 (2009); Resolution 13/2 (2010); Resolution 20/4 on the Right to a Nationality: Women and Children (2012); Resolution 20/5 (2012); Resolution 26/14 (2014); Resolution 32/5 (2016); Report of the Secretary-General on human rights and arbitrary deprivation of nationality A/HRC/10/34; A/HRC/13/34; A/HRC/19/43; A/HRC/23/23; A/HRC/25/28 and A/HRC/31/29.

⁵ Case of the *Yean and Bosico Children v The Dominican Republic*, Inter-American Court of Human Rights, Judgment of 8 September 2005.

⁶ See A/HRC/31/29, para. 31.

2.2 Right to education

Although statelessness should have no stand on the enjoyment of the right to education, it does limit children's access to education opportunities. As they grow into adulthood, this consequently limits children's opportunities in the job market and exposes them to dangerous and exploitative work.⁷

2.3 Right to health

The International Covenant on Economic, Social and Cultural Rights prohibits discrimination in access to healthcare. In spite of this prohibition, stateless children face discrimination in their enjoyment of the right to health, usually due to lack of documentation.⁸ Frequently, in order to treat children, even for vaccination, health facilities need to be provided with documentation proving the nationality of the patient. Other impediments also hinder children's right to health, such as higher medical costs for non-nationals and travel restrictions for undocumented patients.

2.4 Other human rights

Children who are stateless and/or deprived of their nationality also encounter obstacles in the enjoyment of their right to private and family life, to freedom of movement and to an adequate standard of living, because their right to enter a State and reside in its territory is limited.⁹ Children who have been arbitrarily deprived of their nationality are also more vulnerable to human trafficking, sexual exploitation and military recruitment. In the context of migration or forced displacement, stateless children are exposed to arbitrary and lengthy immigration detention procedures, which often destabilise their psychological and physical well-being, compromise their cognitive development and might also constitute cruel, inhuman or degrading treatment.¹⁰

⁷ *Ibid.*, para. 34 and 39.

⁸ *Ibid.*, para. 35.

⁹ *Ibid.*, para. 36-38.

¹⁰ *Ibid.*, para. 40-41.

3. Safeguards against childhood statelessness

Gaps in domestic laws, in particular substantive and procedural conditions required to benefit from safeguards as well as discrimination on different grounds are among the most widespread barriers to access to nationality for children who would otherwise be stateless. For this reason, states should ensure that comprehensive safeguards to prevent statelessness are incorporated in their nationality laws and implemented in practice, without being subject to unreasonable conditions.

4. Conclusions

International human rights law guarantees the right of every child to acquire a nationality and prohibits arbitrary deprivation of nationality. While states may exercise discretion in determining the rules of access to nationality, such rules must comply with principles of international human rights law, in particular the best interests of the child and non-discrimination.

Arbitrary deprivation of nationality places children in a situation of increased vulnerability to human rights violations. Where children have been, in contravention of international law, arbitrarily deprived of their nationality and rendered stateless, states must ensure that effective and appropriate remedies are available, including reinstatement of nationality. States should become party to the 1954 and 1961 Conventions, and fully implement relevant international human rights instruments, such as the CRC.

Furthermore, as required by Target 16.9 of the Sustainable Development Goals, States should ensure legal identity for all, meaning that the birth of every child within their national borders should be registered immediately, especially if lack of registration may lead to statelessness. Statelessness and the different human rights violations caused thereby are a man-made problem. With the concerted effort of the international community, statelessness can be prevented so that millions of children and adults can live a full and dignified life.

The boy

*Amal de Chickera**

The boy does not know his place.
He does not know he is different. Inferior.
He thinks he is equal.
He thinks he can dream.

We can't really blame the boy. Well... not fully.
He is just 10.
His needs are simple. His dreams, fantastical.
It is the parents.
They have not taught him well.

This boy will be trouble.
He has no fear. He will fight for his rights.
And he is likeable.
This boy who is inferior, will rise above.
He connects at the human level.
This is dangerous.

We must regroup, strategise, hit back.
When he dreams, we must crush his spirit.
When he connects, we must put up barriers.
When he is happy, we must make him sad.
When he doubts, we must swoop in for the kill.

We need a label. We must show he is different.
Inferior.



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* Amal de Chickera is a founder and Co-Director of the Institute on Statelessness and Inclusion. A human rights lawyer, he has written, spoken, trained and served as an expert on statelessness and related issues for the UN, NGOs and academia since 2008. Amal holds an LLB from the University of Colombo and LLM from University College London. He also co-founded the European Network on Statelessness and Stages, a Sri Lankan theatre group. This poem was first published on the Blog of the European Network on Statelessness in May 2016. It can be accessed online here: <http://www.statelessness.eu/blog/boy>.

We need to show him. We need to show us.
Rohingya. Haitian. Kurd. Palestinian. Russian.
Any of the above would do.

We need a status. We must show he does not belong. He has no claim.
We need to show him. We need to show us.
Migrant. Illegal. Refugee. Stateless. Displaced. Criminal.
Any combination would do.

We need a motivation. We must justify our decisions.
We need to show him. We need to show us.
His mother is unequal. His ancestors are not from here. He will steal
our jobs.
Any one would do.

We need consequences. We must attach a cost to inferiority. To not
belonging.
We need to show him. We need to show us.
Some education, but poor.
Some healthcare that keeps him alive, but malnourished.
Some movement, but not across borders.
Some documentation, but not the right kind.
Some hope, that flickers and fades.

We are not inhuman after all.

Discrimination and childhood statelessness in the work of the UN human rights treaty bodies

*Peggy Brett**

1. Introduction

Each United Nations (UN) human rights treaty is overseen by a Treaty Body: an independent committee of experts mandated to review the implementation by states parties of the rights set out in the treaty, to interpret the text of the treaty and to hear individual and group complaints brought before them. Through these roles, Treaty Bodies can play an important role in addressing childhood statelessness through human rights law. Firstly, they can draw attention to particular issues by asking questions of and making recommendations to individual states in their regular reviews of the implementation of treaties. Secondly, through their interpretation of the treaties they can help to develop the understanding of childhood statelessness as a violation of the child's rights and therefore as a matter which states have an obligation to address.

The latter is particularly important in light of the extent to which the question of who is a national of a state falls within the domain of state sovereignty and as such is left to the discretion of each state, without interference from other states or the international community. One way in which international law and particularly international human rights law attempts to balance this respect for state sovereignty with the right of the individual to a nationality is by setting out general principles that states should respect in their laws and practice on granting and refusing nationality, rather than dictating to states which individuals they should consider nationals. Non-discrimination is one

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such principle, enshrined in Article 2 of the Universal Declaration of Human Rights (UDHR) and reiterated in every subsequent human rights treaty. One of the roles the treaty bodies can play is therefore to help define, both in general and in relation to specific situations, how this principle applies to the right to a nationality and what the acceptable parameters of state discretion are in this respect.

Discrimination is understood as:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹

The Convention on the Rights of the Child (CRC) further specifies that protecting children against discrimination includes prohibiting discrimination based on the status or origin of their parents or legal guardian.²

The importance of non-discrimination as a means of balancing the demands of State sovereignty with the right of each individual to a nationality are reflected in the wording of the right to a nationality in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³ and the Convention on the Rights of Persons with Disabilities (CRPD).⁴ These treaties emphasise that women and

¹ UN Human Rights Committee 'General Comment No. 18: Non-Discrimination' (10 November 1989) UN Doc CCPR/C/GC/18, para 7.

² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS vol.1577, p.3, art 2(1) and 2(2).

³ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 December 1981) UNTS vol.1249, p.13, art 9 "1. States Parties shall grant women **equal rights with men** to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall **grant women equal rights with men** with respect to the nationality of their children." (emphasis added).

⁴ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), UNTS vol.2515, p. 3, art. 18 "1. States

persons with disabilities, respectively, should not be discriminated against in the matter of nationality rather than providing a positive right to a nationality.⁵ Where a positive right to a nationality is asserted in human rights treaties it is ascribed to children; the International Covenant on Civil and Political Rights⁶ (ICCPR) includes the right to a nationality under Article 24 (Rights of the Child) rather than as a separate right guaranteed to all persons. In interpreting this right, the Human Rights Committee has stressed the importance of non-discrimination:

[N]o discrimination with regards to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.⁷

It is therefore unsurprising that the UN human rights Treaty Bodies have used discrimination as an important framework in addressing the right to a nationality and particularly the right of the child to a nationality. The discrimination framework has also allowed Treaty Bodies to address access to rights by stateless children.

2. Discrimination in Access to Nationality

Discrimination in access to nationality may take the form of provisions of national law that directly exclude some individuals from nationality or limit the circumstances in which individuals can acquire nationality in a discriminatory manner. However, it can also occur where apparently neutral provisions are interpreted or implemented in a discriminatory way or where the situation of particular groups makes it more difficult

Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, **on an equal basis with others**, including by ensuring that persons with disabilities: (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;[...]" (emphasis added).

⁵ The Convention on the Elimination of Racial Discrimination is an exception in that Article 5(iii)(d) includes the right to a nationality without the same emphasis on equality.

⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNTS vol.999 p.171.

⁷ Human Rights Committee, 'General comment No. 17: Article 24 (Rights of the child)' (29 September 1989), para 8.

for them to fulfil certain conditions for access to nationality. The non-discrimination aspects of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁸ CEDAW and CRPD have meant that the relevant treaty bodies consistently address access to nationality as a discrimination matter. However, the broad reach and importance of non-discrimination provisions have meant that other Treaty Bodies (including those whose treaties do not contain the right to a nationality) have also raised concerns about direct or indirect discrimination in access to nationality.⁹ While the Committee on the Rights of the Child, more than any other Treaty Body, has considered access to nationality and the prevention of statelessness as positive rights, it has also regularly highlighted discriminatory factors affecting this right.

2.1 Discrimination on grounds of race or religion

A small number of states maintain clearly discriminatory laws that restrict nationality to individuals of a particular race or religion. The Committee on the Rights of the Child has criticised such laws as a violation of the right to nationality read in conjunction with the prohibition of discrimination.¹⁰ On the other hand, the Human Rights Committee's recommendation to the Maldives on revising the constitutional bar on non-Muslims being citizens makes no mention of the right to nationality, but addresses this as a question of freedom of religion combined with the prohibition of discrimination.¹¹ This reflects the way that the prohibition of discrimination can be invoked

⁸ Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) UNTS vol.660, p.195.

⁹ See, for instance, Committee on Economic, Social and Cultural Rights (CESCR), 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Madagascar' (16 December 2009) UN Doc E/C.12/MDG/CO/2, para 14 "The Committee urges the State party to adopt revised legislation, so as to guarantee Malagasy nationality to children born to a mother of Malagasy nationality and a father of foreign nationality, on an equal footing to children born to a Malagasy father and a mother of foreign origin"; Committee Against Torture (CAT), 'Concluding observations of the Committee against Torture: Czech Republic' (13 July 2012) UN Doc CAT/C/CZE/CO/4-5, para 19.

¹⁰ Committee on the Rights of the Child (CRC), 'Concluding observations on the combined second to fourth periodic reports of Liberia, adopted by the Committee at its sixty-first session (17 September-5 October 2012)' (13 December 2012) UN Doc CRC/C/LBR/CO/2-4, paras 41-42.

¹¹ Human Rights Committee, 'Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012: Maldives' (31 August 2012) UN Doc CCPR/C/MDV/CO/1, para 9.

to support access to nationality even in the absence of an explicit right to nationality.

In other states, instead of defining who is eligible for nationality, the law (or the interpretation of the law), serves to exclude certain groups or individuals. Such exclusionary measures are recognised, for instance, in the Committee on the Elimination of All Forms of Racial Discrimination's (CERD) recommendation that States "ensure that legislation regarding citizenship and naturalisation does not discriminate against members of Roma communities".¹² Other Treaty Bodies have made recommendations to particular States where they have identified problems, such as the Committee on the Rights of the Child's criticism of Israeli legislation preventing the children of Israeli citizens and individuals from the Occupied Palestinian Territories from acquiring Israeli nationality.¹³

2.2 Discriminatory application of laws

Sometimes the law itself is neutrally worded, but its interaction with other laws creates discrimination. In such cases, Treaty Bodies may ask states to take special measures with regard to access to nationality. For instance, the CERD did not explicitly recommend that Italy revise its national laws to give children born in Italy of foreign parents the right to Italian nationality, but did recommend "that the state party take measures to facilitate access to citizenship for stateless Roma, Sinti and non-citizens who have lived in Italy for many years, and to pay due attention to and remove existing barriers".¹⁴ In making this recommendation it recognised the particular discrimination faced by Roma and Sinti as well as the importance of distinguishing between foreign nationals - whose children should be able to acquire their parents' nationality - and stateless persons.

Not all distinctions are discriminatory. In addition to special measures to address existing inequalities, states are permitted to make

¹² Committee on the Elimination of Racial Discrimination (CERD), 'General recommendation XXVII on discrimination against Roma' (16 August 2000), para 4.

¹³ CRC, 'Concluding observations on the second to fourth periodic reports of Israel, adopted by the Committee at its sixty-third session (27 May – 14 June 2013)' (4 July 2013) UN Doc CRC/C/ISR/CO/2-4, paras 29-30.

¹⁴ CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Italy' (4 April 2012) UN Doc CERD/C/ITA/CO/16-18, para 24.

distinctions based on reasonable and objective criteria provided that the aim of the measures is legitimate.¹⁵ In particular, given the extent to which decisions on nationality are protected by state sovereignty, states have a significant degree of freedom in deciding what constitutes a sufficiently close connection to the state to enable an individual to claim nationality. As a consequence, laws that provide an exception to the right to nationality for children born in the territory to those 'in transit' are not, *per se*, discriminatory. The fact of being in transit rather than resident in the state is an objective criterion and the exclusion of such persons from nationality is not unreasonable. However, the Treaty Bodies have raised concerns about cases where the implementation of these provisions has, in practice, resulted in discrimination. In particular, they have criticised the application of such provisions to migrants in an irregular situation whatever the duration of their residence in the state.¹⁶ Where a particular group (for instance persons of Haitian descent in the Dominican Republic) is targeted by these measures there is an obvious element of discrimination.¹⁷ However, even if applied to all national groups, these measures introduce discrimination into the national law, since they discriminate against certain children based on their parents' migratory status.¹⁸

¹⁵ UN Human Rights Committee 'General Comment No. 18: Non-Discrimination' (n 1), para 13.

¹⁶ CERD, 'Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee at its eighty-third session (12–30 August 2013)' (23 September 2013), UN Doc CERD/C/CHL/CO/19-21, para 18; Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), 'Concluding observations on the fifth and sixth periodic reports of Chile, adopted by the Committee at its fifty-third session (1–19 October 2012)' (12 November 2012) UN Doc CEDAW/C/CHL/CO/5-6, paras 26-27; Committee on the Protection of All Migrant Workers and Members of their Families, 'Concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Chile' (19 October 2011) UN Doc CMW/C/CHL/CO/1, para 32.

¹⁷ See, for instance, CEDAW, 'Concluding observations on the combined sixth and seventh periodic reports of the Dominican Republic' (30 July 2013) UN Doc CEDAW/C/DOM/CO/6-7, paras 30-31 which stresses the discriminatory aspect of the application of the Dominican Republic's law.

¹⁸ The Committee on the Rights of the Child's recommendations are particularly clear on this aspect. See, CRC, 'Concluding observations on the combined fourth and fifth periodic reports of Chile' (30 October 2015) UN Doc CRC/C/CHL/CO/4-5, paras 32-33.

2.3 Discrimination related to acquisition of nationality from parents

Discrimination against women in their ability to transmit nationality to their children is one of the most consistently addressed issues relating to access to nationality. The CEDAW has regularly addressed this issue in its concluding observations and stressed that making reservations to Article 9 of CEDAW cannot absolve states of their responsibilities in this respect.¹⁹ In its General Recommendation on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW explains how such laws can render children stateless if the father is unable to transmit nationality to the child or is unable or unwilling to take the necessary steps to ensure that the child inherits his nationality.²⁰

Other treaty bodies have made similar recommendations, stressing the gender-based discrimination inherent in such laws and, in some cases, echoing the concern that they increase the risk of statelessness.²¹ Such recommendations have, however, rarely considered the extent to which these laws discriminate against the child on the basis of the nationality of their father, as well as against the parent who is unable to transmit nationality. This is particularly striking in the work of the CERD since the question of discrimination on grounds of the parent's nationality would seem to fit naturally into its mandate.²²

¹⁹ See, for instance, CEDAW, 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Bahamas' (6 August 2012) UN Doc CEDAW/C/BHS/CO/1-5, paras 29-30; CEDAW, 'Concluding observations on the combined initial and second periodic reports of Swaziland' (24 July 2014) UN Doc CEDAW/C/SWZ/CO/1-2, paras 28-29; CEDAW 'Concluding observations on the initial report of Qatar' (10 March 2014) UN Doc CEDAW/C/QAT/CO/1, paras 31-32.

²⁰ CEDAW, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women (14 November 2014) UN Doc CEDAW/C/GC/32, para 61.

²¹ See, for instance, Human Rights Committee, 'Concluding observations on the initial report of Mauritania' (21 November 2013) UN Doc CCPR/C/MRT/CO/1, para 9; CESCR, 'Concluding observations: Madagascar' (n 9), para 14.

²² For an example of recommendations highlighting precisely this racial discrimination aspect, see, CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Mauritania' (10 December 2004) UN Doc CERD/C/65/CO/5, para 18. Recent recommendations refer to gender based discrimination such as CERD, 'Concluding observations on the combined second to fifth periodic reports of Oman' (6 June 2016) UN Doc CERD/C/OMN/CO/2-5, paras 25-26 or simply to discrimination CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination:

Similarly, the Committee on the Rights of the Child has framed its recommendations on gender-based discrimination in nationality laws as a matter of prevention of statelessness and discrimination against women. When addressing a woman's ability to transmit nationality to her children, this omission is not significant, but articulating the ways in which such laws also discriminate against the child could help to draw out why other provisions of nationality laws may be problematic from the perspective of the child's right to a nationality. For instance, this approach provides a framework to talk about provisions which discriminate against fathers in the transmission of nationality to their children, or where there is no gendered aspect to the laws, but distinctions are made between citizens from birth and naturalised citizens.²³

Discrimination on grounds of their birth out of wedlock particularly affects children. Often the impact on the right to nationality is linked to gender-based discrimination that prevents women transmitting their nationality to children and recommendations by the Committee on the Rights of the Child and CEDAW have been made on this basis.²⁴ However, in some cases the issue has been addressed as a matter of discrimination against the child on the basis of the status of their parents. For example, the Human Rights Committee recommended that Japan "remove any provisions discriminating against children born out of wedlock from

Jordan' (9 March 2012) UN Doc CERD/C/JOR/CO/13-17, para 11.

²³ For instance the Human Rights Committee criticised San Marino's law which prevented children of a couple one of whom was a naturalised citizen and the other a foreign national from acquiring nationality at birth (as children of a couple both of whom were naturalised or one of whose parents was a citizen by birth could). Human Rights Committee, 'Concluding observations of the Human Rights Committee: Republic of San Marino' (31 July 2008) UN Doc CCPR/C/SMR/CO/2, para 9.

²⁴ See, for instance, CRC, 'Concluding observations: Madagascar' (8 March 2012) UN Doc CRC/C/MDG/CO/3-4, paras 31-32; CRC, 'Concluding Observations: Togo' (31 March 2005) UN Doc CRC/C/15/Add 255, paras 34-37; CEDAW, 'Concluding observations on the combined fourth and fifth periodic reports of the Gambia' (28 July 2015) UN Doc CEDAW/C/GMB/CO/4-5, paras 30-31; CEDAW, 'Concluding observations on the combined fourth and fifth periodic reports of Maldives' (11 March 2015) UN Doc CEDAW/C/MDV/CO/4-5, paras 30-31. CAT, 'Concluding observations: Czech Republic' (n 9), para 19 "In order to avoid discrimination among different categories of stateless persons, the State party should review the provisions in the draft Citizenship Act relating to acquisition of nationality by children who would otherwise be stateless or who are born out of wedlock to foreign stateless mothers" is also interesting to consider in this context.

its legislation”.²⁵ Similarly the Committee on the Rights of the Child has made recommendations relating to the ability of parents to transmit nationality to their children born out of wedlock on an equal basis with those born within marriage, such as the recommendation to the UK on the ability of fathers to transmit nationality:

*While welcoming the adoption of the Race Relations (NI) Order 1997 and the State party's commitment to end discrimination in its nationality law between children born in and out of wedlock, the Committee is concerned that the principle of non-discrimination is not fully implemented for all children in all parts of the State party [...]. The Committee recommends that the State party: [...] (d) Amend the nationality law to allow transmission of nationality through unmarried as well as married fathers.*²⁶

2.4 Administrative and Practical Barriers to Nationality

Discrimination in access to nationality often arises where particular groups or individuals are already marginalised or subject to discrimination. For instance, low levels of birth registration among certain sections of the population can affect their access to nationality by leaving children without proof of their place of birth and parentage (and therefore their eligibility for nationality). On this basis, Treaty Bodies have recommended special measures to promote birth registration among marginalised groups.²⁷

Recommendations have also been made on removing administrative and practical measures preventing access to nationality for certain individuals or groups. In its General Comment on People of African Descent, the CERD highlights the need to address both discriminatory

²⁵ Human Rights Committee, 'Concluding observations of the Human Rights Committee: Japan' (18 December 2008, UN Doc CCPR/C/JPN/CO/5, para 28.

²⁶ CRC, 'Concluding observations: United Kingdom of Great Britain and Northern Ireland' (9 October 2002), UN Doc CRC/C/15/Add.188, paras 22-23.

²⁷ See for instance, Human Rights Committee, 'Concluding observations of the Human Rights Committee: Thailand' (8 July 2005) UN Doc CCPR/CO/84/THA, para 22; CEDAW, 'Concluding observations on the combined fourth and fifth periodic reports of India' (24 July 2014) UN Doc CEDAW/C/IND/CO/4-5, paras 34-35; CRC, 'Concluding observations: Australia' (28 August 2012) UN Doc CRC/C/AUS/CO/4, paras 35-36; Committee on the Rights of Persons with Disabilities (CRPD), 'Concluding observations on the initial report of Paraguay, adopted by the Committee at its ninth session, 15-19 April 2013' (15 May 2013), UN Doc CRPD/C/PRY/CO/1, paras 45-46.

laws and other barriers to people of African descent accessing nationality.²⁸ The Committee on the Rights of the Child has also recommended that Croatia:

*undertake measures to ensure that [...] the Act on Croatian Citizenship [...] is implemented in a non-discriminatory manner, including through reducing administrative obstacles associated with the acquisition of Croatian citizenship that mainly affect children from minority groups, in particular Roma children.*²⁹

Naturalisation laws that impose unreasonable requirements, such as a high level of knowledge of the language of the state, have been criticised by the CERD.³⁰ The CRPD has also highlighted the discriminatory aspect of naturalisation laws that exclude persons with disabilities.³¹ Such provisions may be particularly problematic, since children with disabilities are sometimes discriminated against in nationality laws³² and are less likely to be registered at birth, increasing their risk of statelessness³³ and, therefore, the need to apply for naturalisation.

Treaty Bodies have also addressed the intergenerational impact of statelessness arising from historic exclusion and marginalisation. In this context, they have made recommendations stressing the need for special measures to promote access to nationality for persons, particularly children, from these stateless populations.³⁴

²⁸ CERD, 'General recommendation No. 34: Racial discrimination against people of African descent' (3 October 2011) UN Doc CERD/C/GC/34, para 47.

²⁹ CRC, 'Concluding observations on the combined third and fourth periodic reports of Croatia' (13 October 2014) UN Doc CRC/C/HRV/CO/3-4, paras 26-27. See also, for instance, CERD, 'Concluding observations on the combined thirteenth to fifteenth periodic reports of Suriname' (25 September 2015) UN Doc CERD/C/SUR/CO/13-15, paras 19-20.

³⁰ CERD, 'Concluding observations on the combined seventh to ninth periodic reports of Switzerland' (13 March 2014), UN Doc CERD/C/CHE/CO/7-9, para 13; CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway' (8 April 2011) UN Doc CERD/C/NOR/CO/19-20, para 11.

³¹ CRPD, 'Concluding observations on the initial report of Ecuador' (27 October 2014) UN Doc CRPD/C/ECU/CO/1, paras 32-33.

³² The Committee on the Rights of the Child addressed this point specifically in CRC, 'Concluding observations on the fourth periodic report of Yemen' (25 February 2014) UN Doc CRC/C/YEM/CO/4, paras 39-40.

³³ CRPD, 'General comment No. 1 (2014): Article 12: Equal recognition before the law' (19 May 2014) UN Doc CRPD/C/GC/1, para 43.

³⁴ See, for instance, CRC, 'Concluding observations on the combined second to

3. Deprivation or Loss of Nationality

As with access to nationality, states have a degree of freedom to define the conditions under which an individual may lose their nationality and the reasons for which the state may deprive them of their nationality. However, human rights law prohibits arbitrary deprivation of nationality. In order to not be arbitrary, a deprivation of nationality must be in accordance with national law, not for reasons incompatible with international human rights law, reasonable, and with an impact on the individual that is proportionate to the outcome the state expects from the deprivation of nationality.³⁵ The CERD has highlighted that deprivation of nationality on discriminatory grounds “is a breach of States parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality”.³⁶ Such deprivation would also be arbitrary, since a discriminatory measure would not be for a purpose permissible under international human rights law.

Proportionality is a particularly important consideration where deprivation of nationality affects children or will result in statelessness, since the wide-ranging and severe effects of statelessness make it particularly hard to justify such measures as proportionate.³⁷ Furthermore, the Committee on the Rights of the Child has taken the position that children should never be deprived of their nationality,

fourth periodic reports of Iraq’ (3 March 2015) UN Doc CRC/C/IRQ/CO/2-4, paras 31-32; CRC, ‘Concluding observations on the second periodic report of the United Arab Emirates’ (30 October 2015) UN Doc CRC/C/ARE/CO/2, paras 35-36; Human Rights Committee, ‘Concluding observations of the Human Rights Committee: Mongolia’ (2 May 2011) UN Doc CCPR/C/MNG/CO/5, para 26; CERD, ‘Concluding observations on the combined tenth and eleventh periodic reports of Estonia’ (22 September 2014) UN Doc CERD/C/EST/CO/10-11, para 11; CEDAW, ‘Concluding observations on the combined third and fourth periodic reports of Kazakhstan’ (10 March 2014) UN Doc CEDAW/C/KAZ/CO/3-4, paras 24-25.

³⁵ For a detailed discussion of what constitutes arbitrary deprivation of nationality and the relevance of non-discrimination in this context see Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’ (14 December 2009) UN Doc A/HRC/13/34, paras 23-28.

³⁶ CERD, ‘General recommendation XXX on discrimination against non-citizens’ (19 August 2004). See also CERD, ‘General recommendation No. 34: Racial discrimination against people of African descent’ (n 28).

³⁷ Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’ (n 35), para 27.

due to the profound effect this can have on their identity and access to other rights.³⁸ This is the case whether the child is the subject of the deprivation of nationality or would lose nationality due to a parent's deprivation of nationality. The treaty bodies have not often dealt with situations in which children are directly deprived of their nationality. An exception is the Dominican Republic, where the effective deprivation of nationality from Dominicans of Haitian descent has been condemned by a number of Treaty Bodies, not least because of the element of racial discrimination. Recommendations have included the reform of the relevant laws and the restoration of nationality to those affected.³⁹

In other cases, children may not be the direct subjects of laws depriving individuals of nationality on discriminatory grounds, but may be affected when a parent is deprived of nationality and this is automatically extended to his or her children. While the Treaty Bodies have expressed concern about these issues, they have tended to focus on the reasons for deprivation of nationality from the adults, including highlighting discrimination in such deprivation, without addressing it as a matter of discrimination against the child.⁴⁰ In addressing this issue, even the Committee on the Rights of the Child has emphasised the prevention of childhood statelessness and the right to a nationality, rather than focusing on the discriminatory aspects of such deprivation.⁴¹ Where the reasons for the parent's loss or deprivation of nationality are discriminatory (or arbitrary) it is clear that the child's loss of nationality as a result will also be prohibited on the grounds

³⁸ CRC, 'Concluding observations: Australia' (n 27), paras 37-38; CRC, 'Concluding observations on the fourth periodic report of the Netherlands' (8 June 2015) UN Doc CRC/C/NDL/CO/4, paras 32-33.

³⁹ Human Rights Committee, 'Concluding observations of the Human Rights Committee: Dominican Republic' (19 April 2012) UN Doc CCPR/C/DOM/CO/5, paras 22-23; CERD, 'Concluding observations on the thirteenth and fourteenth periodic reports of the Dominican Republic, adopted by the Committee at its eighty-second session (11 February–1 March 2012)' (19 April 2013) UN Doc CERD/C/DOM/CO/13-14, paras 18-20; CEDAW, 'Concluding observations: Dominican Republic' (n 17), paras 30-31; CRC, 'Concluding observations on the combined third to fifth periodic reports of the Dominican Republic' (6 March 2015) UN Doc CRC/C/DOM/CO/3-5, paras 27-28.

⁴⁰ Human Rights Committee, 'Concluding observations: Dominican Republic' (n 39), paras 22-23; CERD, 'Concluding observations: Jordan' (n 22), para 12.

⁴¹ CRC, 'Concluding observations: Australia' (n 27), paras 35-36; CRC, 'Concluding observations on the combined fourth and fifth periodic reports of Jordan' (8 July 2014) UN Doc CRC/C/JOR/CO/4-5, paras 25-26.

that it too is discriminatory or arbitrary. It is where the parent's loss of nationality is permissible under international law that the importance of the child's right to nationality and not to be discriminated against because of the status of a parent could be significant. This may be the implication of the Committee on the Rights of the Child's recommendation to Australia to "ensure that no child is deprived of citizenship on any ground regardless of the status of his/her parents".⁴²

4. Access to Rights for Stateless Children

Human rights treaties generally guarantee rights to all those within the territory or jurisdiction of the State.⁴³ That stateless persons are included within the scope of human rights treaties and protected from discrimination in access to rights is beyond doubt, and has been laid out in the General Comments of Treaty Bodies. For example, the Committee on Economic Social and Cultural Rights' General Comment on non-discrimination specifically mentions children born of stateless parents among those who are protected from discrimination based on birth and includes stateless children in the list of non-nationals to whom the rights set out in the Covenant also apply "regardless of legal status and documentation".⁴⁴

In their concluding observations Treaty Bodies have highlighted in particular the need to avoid discrimination in access to education and health care for stateless children. For instance, the Committee on Economic, Social and Cultural Rights recommended that Vietnam "recognise and register children [...] who are currently stateless, and ensure that they receive the necessary education, health care and other social services".⁴⁵ Other recommendations have referred to the

⁴² CRC, 'Concluding observations: Australia' (n 27), para 36.

⁴³ There are a very few exceptions, notably the right to vote and stand for election (ICCPR art 25) which can be limited to citizens. For provisions defining the scope of application of treaties, see, for instance, CRC, Article 2(1), ICCPR Article 2(1).

⁴⁴ CESCR, 'General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20, para 30. Similarly, Human Rights Committee, 'General comment No. 15: The position of aliens under the Covenant' (30 September 1986) also explicitly mentions stateless persons as a group covered by the ICCPR.

⁴⁵ CESCR, 'Concluding observations on the second to fourth periodic reports of

obligation to ensure all rights,⁴⁶ or made specific reference to rights such as freedom of movement.⁴⁷

In addition to discrimination because of their status as stateless persons, children whose statelessness is the result of discrimination may face problems in accessing rights because of that discrimination. Such discrimination would be linked to, but not necessarily the result of, their statelessness. However, in some instances it may be hard to distinguish whether discrimination arises from the fact of statelessness, or the underlying discrimination that caused the statelessness.⁴⁸ Equally, stateless children may officially be in the same position as other non-nationals, but face greater difficulties in accessing rights due to their marginalisation. In particular, treaty bodies have recognised that lack of documentation may be a major barrier to accessing rights. For instance, the CERD recommended that Georgia “solve the documentation issues of stateless persons so that they can be registered, including through mobile registration centres, and have access to public services”.⁴⁹

Viet Nam’ (15 December 2014), UN Doc E/C.12/VNM/CO/2-4, para 26. For similar recommendations from other Committees see, for instance, CERD, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada’ (25 May 2007), UN Doc CERD/C/CAN/CO/18, para 23; CRC, ‘Concluding observations on the fourth periodic report of Kazakhstan’ (30 October 2015), UN Doc CRC/C/KAZ/CO/4, paras 54-55.

⁴⁶ Human Rights Committee, ‘Concluding observations on the second periodic report of Cambodia’ (27 April 2015), UN Doc CCPR/C/KHM/CO/2, para 27; CRC, ‘Concluding observations on the second periodic report of Kuwait, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013)’ (29 October 2013) UN Doc CRC/C/KWT/CO/2, paras 27-28; CERD, ‘Concluding observations on the sixth to eighth periodic report of Tajikistan, adopted by the Committee on the Elimination of Racial Discrimination at its eighty-first session (6–31 August 2012)’ (24 October 2012) UN Doc CERD/C/TJK/CO/6-8, para 16.

⁴⁷ CERD, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Kuwait’ (4 April 2012), UN Doc CERD/C/KWT/CO/15-20, para 17.

⁴⁸ Such situations are reflected in recommendations which address access to a range of rights, including nationality, for marginalized populations. One example would be CERD, ‘Concluding observations on the combined nineteenth to twenty-first periodic reports of the Netherlands’ (24 September 2015) UN Doc CERD/C/NLD/CO/19-21, paras 19-20.

⁴⁹ CERD, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia’ (20 September 2011) UN Doc CERD/C/GEO/CO/4-5, para 21. See also, CERD, ‘Concluding observations on the combined sixth and

While emphasising the importance of guaranteeing stateless children's access to rights, the Treaty Bodies have made it clear that this does not abrogate the state's obligations with regard to the right to nationality. For instance, in its General Recommendation on the rights of non-citizens the CERD asks states to:

*take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles.*⁵⁰

5. Conclusion

Discrimination, in one form or another, underlies almost all cases of childhood statelessness: from children unable to inherit nationality from their mother, to disabled children whose births are unregistered and who therefore have no proof of their nationality, to those from marginalised ethnic groups. UN human rights Treaty Bodies have recognised the link between discrimination and statelessness in a wide range of situations relating to access to nationality, loss or deprivation of nationality and access to rights for stateless children. They have called on states to amend discriminatory laws and take special measures to ensure access to nationality for children who are likely to be marginalised. While stressing that stateless children should have access to all the rights guaranteed under international law, they have recognised both the importance of nationality as a right and an aspect of identity and the extent to which statelessness renders children vulnerable to violations of their other rights. In this context, they have consistently stressed the need to find solutions involving access to nationality for all stateless children, rather than only a better implementation of their other rights. However, there remain some situations in which the discriminatory aspect of nationality laws have

seventh periodic reports of Kazakhstan' (14 March 2014), UN Doc CERD/C/KAZ/CO/6-7, para 19; CEDAW, 'Concluding observations: Kazakhstan' (n 34), paras 24-25.

⁵⁰ CERD, 'General recommendation XXX on discrimination against non-citizens' (n 36), para 15. The CRC has similarly stressed the importance of access to nationality to ensure full access to rights, for instance in CRC, 'Concluding observations on the combined third and fourth periodic reports of India' (7 July 2014) UN Doc CRC/C/IND/CO/3-4, paras 43-44.

not been explored, for example, deprivation of nationality because of a parent's loss or deprivation of nationality.

While the link between discrimination and statelessness helps clarify and crystallise state's obligations to protect the right to nationality, it raises problems in finding lasting solutions since these must address or at least circumvent the underlying discrimination. However, it is also true that solutions which resolve the statelessness of children without tackling the discrimination that caused their statelessness are likely to be incomplete in that they resolve one part of the problem without ensuring that the children can benefit from the full range of human rights. Unfortunately addressing discrimination is a complex problem which requires long term efforts to bring about societal change and build tolerant and inclusive societies as well as the introduction and reform of laws and policies. A key element in such changes is the involvement of both the marginalised and dominant communities to bring about solutions that work in the particular context and respond to the history, culture and needs of the population while being held to account by human rights standards.

Gender and birth status discrimination and childhood statelessness

*Betsy L. Fisher**

1. Introduction

In most countries, nationality is conveyed through lineage rather than by birth in territory. When women are unable to convey nationality to their children in these countries, children will likely be stateless in any situation where the father cannot or will not convey nationality and there is no safeguard against statelessness. For this reason, much attention has been given to reforming gender-discriminatory nationality law.¹

Under international law, discrimination is “any distinction, exclusion, restriction or preference or other differential treatment”² on prohibited grounds that limits an individual’s access to a human right, such as the right to acquire a nationality³ or to have one’s birth registered.⁴ Thus, if an individual faces additional obstacles in obtaining nationality or birth registration because of their gender or ethnicity or birth status,

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¹ See U.N. Human Rights Council, Resolution: “The Right to a Nationality: Women’s Equal Nationality Rights in Law and in Practice,” 30 June 2016, A/HRC/RES/32/7; Global Campaign for Equal Nationality Rights, <http://equalnationalityrights.org/>. See also *Campaigning to end gender discrimination and its impacts on children* by Catherine Harrington in Chapter 13.

² U.N. Committee on Economic, Social, and Cultural Rights, General Comment No. 20, “Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2),” para. 7, June 10, 2009, E/C.12/GC/20.

³ Universal Declaration of Human Rights, art. 15.

⁴ Convention on the Rights of the Child, art. 7.

this is unlawful discrimination. This essay summarises a longer article⁵ to highlight how, in countries of the Gulf Cooperation Council (GCC), gender and birth status discrimination in birth registration, family, and criminal law can create new cases of statelessness.

2. Discrimination in civil registration law

Birth registration is crucial to ensure that children who are entitled to a nationality are recognised as nationals, because birth certificates record crucial information which demonstrates the child's right to nationality through their parents or through their birth in a country's territory.⁶ Many states' civil registration laws or practices limit mothers' ability to register their children's births or limit the parents' ability to register non-marital children, thus discriminating on the basis of the parents' gender or marital status.⁷ Because birth registration is so crucial to preventing statelessness, states should eliminate all obstacles to and discrimination in birth registration including legal or practical limitations on mothers registering births or limitations on parents registering births out of wedlock.

3. Discrimination in family law

Discrimination in family law can also create a risk of statelessness. Many countries do not have adequate means for non-marital children to legally establish their relationship to their father. When nationality can only be derived from the father, children who cannot verify their paternity – especially non-marital children – may be left stateless.⁸

⁵ Betsy L. Fisher, 'Gender Discrimination and Statelessness in the Gulf Cooperation Council States' (2016) 23 Michigan Journal of Gender and Law (forthcoming).

⁶ Laura van Waas, Nationality Matters 155 (Interstentia 2008). In many countries, birth registration rates are lowest in rural areas and low-income individuals, suggesting discrimination on the basis of socioeconomic status. UNICEF, Every Child's Birth Right: Inequities and Trends in Birth Registration, 24 (Dec. 2013).

⁷ See, e.g., Kuwaiti Law No. 36 of 1969, art. 3 (listing individuals responsible for registering a child's birth, which does not include the child's mother); Bahraini Law No. 6 of 1970, art. 1 (outlining that, in cases of unestablished paternity, a child treated in the same manner as a foundling, the child of unknown parents).

⁸ See L. Welchman, 'Bahrain, Qatar, UAE: First time Family Law Codifications

Other states limit their nationals' ability to marry foreigners, and children who are born to such prohibited unions will be considered non-marital children.⁹ As seen above, this may mean that fathers cannot establish the relationship to their children to convey nationality or that parents cannot register their children's births. Then, children who are or who are considered to be non-marital children may not receive nationality, which is discrimination on the basis of birth status. Every attempt should be made to ensure that all children, regardless of their parents' nationality or birth status, are registered at birth and receive a nationality, as required in Article 7 of the Convention on the Rights of the Child.

4. Discrimination in criminal law

Finally, criminal prohibitions of adultery create risks of statelessness and pit access to one human right directly against another. Officials in countries that criminalise adultery report that parents may abandon children rather than face criminal penalties. Abandoned children receive nationality as foundlings, or children whose parents cannot be identified, rather than from their parents.¹⁰ In other words, the child who receives nationality, does so at a cost of the right to family life.

5. Conclusion

Some discriminatory policies create the greatest risk of statelessness when paired with gender-discriminatory nationality laws. For example,

in Three Gulf States' in International Survey of Family Law at 12-13 (Jordan Publishing 2010) (describing means by which putative fathers can disclaim paternity in Bahraini, Qatari, and Emirati law).

⁹ Al-Arabiya, 'Tougher rules for Saudis marrying foreign women' (Makkah, 5 August 2014), <http://english.alarabiya.net/en/perspective/features/2014/08/05/Tougher-rules-for-Saudi-men-marrying-foreign-women.html> accessed 25 September 2016 (describing extensive regulations on marriages between Saudi men and foreign women).

¹⁰ See, e.g., Joseph George, 'Sharjah's abandoned babies – 4 in 3 months' (Dubai, 14 March 2012), <http://www.emirates247.com/crime/local/sharjah-s-abandoned-babies-4-in-3-months-2012-03-14-1.448315> accessed 25 September 2016; Gulf Digital News, 'Saudi Arabia: Newborn Baby Found Abandoned in Field' (Jazan, 26 August 2015) <http://www.gdnonline.com/Details/20595/Saudi-Arabia-Newborn-baby-found-abandoned-in-field> accessed 25 September 2016.

if mothers can convey nationality, then establishing paternity is less critical in preventing statelessness. In each case, though, discrimination on the basis of gender and birth status violates international law and leaves children vulnerable to statelessness.

Axin – an interview

Syrian mother of seven stateless children*

All seven of Axin's children are stateless. She is a Syrian citizen herself, but under Syrian law, nationality is transmitted through the father and not the mother. Her husband, the children's father, is stateless. He

"As a mother, there is nothing more difficult than facing such prejudice and seeing your children without a future"

belongs to a group of Kurds known as the *Ajnab* whose statelessness resulted from an arbitrary one-day census, conducted in a single area of Syria, in 1962. Those Kurds who participate in the census but could not provide sufficient documentation to prove their connection with Syria were registered as *Ajnabi* (foreigner) and this status has been inherited from father to children across the generations born since. Axin's children missed out on a nationality as a consequence of multiple discrimination, on the grounds of both gender and ethnicity. Here, she reflects back on the challenges faced by her now-adult children, growing up stateless in Syria:

I first realised when registering my children in the civil registry. We were unable to receive the food rations for our children that are allocated to all citizens at a subsidised price.

My children always suffered psychologically from the discrimination by all governmental bodies and education agencies ... in the state directorates and schools. They were deprived from participating in most activities such as festivities, competitions, trips, sports teams, which contributed some additional marks towards the final class grades. This really affected their personalities a lot, and they always felt they were discriminated against as a result of race and nationality. During

* Interview conducted by Thomas McGee in 2016. Thomas McGee is a researcher and humanitarian practitioner specialising in the Middle East. Speaking Arabic and Kurdish, he has conducted extensive field research with Syrian/Kurdish communities since 2009. Thomas graduated from Cambridge University and holds MA in Kurdish Studies from Exeter, writing his thesis on stateless identity for Syria's Kurds. He has published on Kurdish statelessness in *Tilburg Law Review* and contributed to the MENA Nationality and Statelessness Research Project. The name has been changed to protect the interviewee's identity.

their later studies, I was shocked that they were deprived of certificates demonstrating their successes at the key educational milestones (the Brévet certificate in ninth grade and Baccalaureate in twelfth grade). My eldest daughter was affected the most out of my children. She is very ambitious. She was a top student at school. She likes music and plays the piano. She was prevented from pursuing university education even though she had passed the school leaving exams. For the rest of my children, their big sister was a role model and the deprivation she faced really affected their ability to have a normal childhood too. Society did not have mercy on them either; instead adding further pressure by confronting them and telling them it is not feasible to continue their academic achievements. My younger children would always ask me if they would face the same fate as their elder sister. As a mother, there is nothing more difficult than facing such prejudice and seeing your children without a future.

I have never had peace of mind about my children. I always had a feeling of fear, despair and anxiety about their future: fearing that they would not be entitled to pursue university education or legally travel outside the country or own property or have the opportunity to get married properly. Since getting married with an Ajnabi means that the children of that marriage will be deprived of the same rights, this leads to social isolation and sometimes rejection within the community, even at an early age. I feel proud of their successes in the face of all of this.

Using the UN System to advocate for nationality law reform in Lebanon

Bernadette Habib*

Lebanon is party to neither the 1954 Convention, nor to the 1961 Convention. However, Lebanon is party to six of the core human rights instruments that guarantee the basic and fundamental rights of stateless persons.¹ According to Article 2 of the Lebanese Code of Civil Procedures, international treaties prevail over all national legal texts.² Furthermore, human rights conventions have been integrated in the Preamble of the Constitution, and as such have acquired the force of constitutional norms.³ A number of these conventions guarantee the right to nationality and the right to identity.⁴ The Lebanese Constitution also stipulates the country's compliance with international human rights standards and principles, and clearly guarantees the equality of all before the law—a principle embedded in all human rights instruments Lebanon is party to.

Nevertheless, Lebanese laws on nationality and personal status do not fully comply with general international standards, especially regarding

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¹ ICCPR, ICESCR, CRC, CEDAW, CERD and CAT.

² Article 2 of the code of civil procedures states that “when there is contradiction between the provisions of the international conventions and the regular laws, the first prevail in application over the second”.

³ Para (b) of the Lebanese Constitution states that Lebanon is “Arab in its identity and in its association. It is a founding and active member of the League of Arab States and abides by its pacts and covenants. Lebanon is also a founding and active member of the United Nations Organisation and abides by its covenants and by the Universal Declaration of Human Rights. The Government shall embody these principles in all fields and areas without exception.” Lebanese Constitution, issued on 23 May 1926, and all amendments, available at <http://www.lp.gov.lb/doustour/default.htm>; See also Constitutional Council, Decision 2/2001, dated 10 May 2001, considering that the Constitution's preamble has the same force as the whole Constitution. Available in Arabic at <http://www.conseil-constitutionnel.gov.lb/ar/arabic/arrets.htm>

⁴ These include the ICCPR, CRC, in addition to the UDHR which became binding on Lebanon as per the Preamble of the Lebanese Constitution.

the respect for the principle of non-discrimination. Most pertinent to the problem of childhood statelessness is the fact that Lebanese nationality and personal status laws are patriarchal and discriminate against women in terms of family rights and in terms of women's right to pass nationality on to their children (and spouse). Frontiers Rights (FR) raised these issues in a shadow report to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).⁵ FR's unpublished survey on stateless persons in Lebanon in 2012 showed that 73% of stateless persons in Lebanon are born to Lebanese mothers, and 52% of the stateless males surveyed are married to Lebanese women. These results highlight the significant impact a legal reform aiming at removing gender discrimination from the nationality law might have in reducing statelessness in the country.

Lebanon adopts a dual legislative system in 'personal status' matters, whereby the legitimacy of marriages and kinship is regulated by religious laws, while their civil effects and registration are governed by civil law. This dual system entails discrimination between citizens according to their religious affiliations. This may lead and has led to conflicting situations between the two legislative bodies, aggravating the risk of statelessness in many cases. For example, some marriages might be considered religiously legitimate and valid, but are not registered with the civil authorities and consequently the children may not be able to be registered and can risk becoming stateless. If a married, Christian man converts to Islam and divorces, then remarries but the second marriage is concluded before the declaration of conversion is made to the personal status department, it would be considered void and the new marriage could not be officially registered, even though according to the Islamic courts, it is a valid marriage. In addition, Lebanese civil documentation laws are archaic, the procedures are not computerised and rely completely on the individual's own initiative.

This has also led to cases of non-registration of marriages and births, resulting in statelessness. Furthermore, there is no official institutional infrastructure or policy on statelessness and nationality issues. There are no specific human rights institutions or national bodies concerned with human rights, including statelessness. The National Human Rights Action Plan launched by the Human Rights Parliamentary Committee in 2006

⁵ FR's report to the CEDAW committee is available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fLBN%2f40%2f9475&Lang=en

and adopted in 2012 did not include the issue of statelessness in Lebanon. The issue of statelessness and the right to nationality, except for the right of the Lebanese mother to give her nationality to her family, is not today a priority in the government's agenda or in public opinion. This might be partially linked to the lack of awareness on the existence of the issue on one hand, and concerns over the fragile demographic balance that might be affected by any nationalisation efforts on the other hand.

Frontiers Rights (FR), a human rights organisation specialising in refugee and statelessness issues, systematically uses UN human rights mechanisms to raise awareness of the human rights issues in Lebanon. FR believes that the UN mechanism is a means to strengthen advocacy and push for reform at the law and policy levels. Although Lebanon is late on many Treaty Body reports and submissions, and does not implement the majority of recommendations made by them, it is known that the state cares about its image on the international level. That is why using the international forums might have an impact on the reforms civil society is calling for, although it does not always reach the desired goals. For example, FR submitted shadow reports to various Treaty Bodies, including CERD⁶, CEDAW⁷, and the Universal Periodic Review (UPR)⁸, individually or jointly with other national or international Non-Governmental Organisations (NGOs). It also contributed to the UN Secretary General's report on deprivation of nationality.⁹ Concerns over stateless persons in Lebanon were first submitted by FR to the UPR in 2010 and again in 2015. In 2010, the organisation submitted a report on the rights of migrants and stateless persons, where it highlighted concerns over the lack of legal status of both groups. In 2015, the organisation submitted a specific report on statelessness in Lebanon to the UPR, where it highlighted all the concerns related to the laws, policies and practices concerning nationality, birth registration and statelessness.

⁶ Available at https://www.fidh.org/IMG/article_PDF/article_a907.pdf

⁷ Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fLBN%2f40%2f9475&Lang=en and at http://www.frontiersruwad.org/pdf/FR_Report_CEDAW_EN_2008.pdf

⁸ 2015 submission available at http://www.upr-info.org/sites/default/files/document/lebanon/session_23_-_november_2015/fr_upr23_lbn_e_main.pdf, 2010 submission available at http://www.upr-info.org/sites/default/files/document/lebanon/session_09_-_november_2010/fra_frontiersruwadassociation.pdf

⁹ UN Secretary General, Human rights and arbitrary deprivation of nationality, Report of the Secretary General (2013), A/HRC/25/28, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx>

The first national UPR report submitted by Lebanon in 2010 did not mention statelessness or any related issue, such as the right to identity or civil registration. However, the issue of women's nationality rights was mentioned in the 2010 submission, and was highlighted in the 2015 submission.¹⁰ It should be noted that Lebanon rejected all related recommendations to amend its nationality laws to remove discrimination against women regarding the right to pass nationality on to her family (two in 2010 and three in 2015). This shows that FR's (and other civil society actors) efforts in highlighting these issues with the international bodies obliged the state to take them into consideration as part of its human rights obligations. In all its submissions to the UN, FR recommended that Lebanon should establish a comprehensive rights-based protection framework for stateless persons. It also recommended the amendment of the current nationality laws to eliminate gender discrimination, and the computerisation of the personal status records and related process, to make birth registration adequate and more efficient. Nevertheless, none of the above is on the policymakers' agenda yet.



This woman was born in Lebanon and is a Lebanese national. Because her husband is stateless and because Lebanese citizenship laws discriminate against women and do not permit women to pass on citizenship to their children, her daughter and young son are both stateless even though they were born in Lebanon to a mother who is a Lebanese national. © Greg Constantine.

¹⁰ Lebanese Republic, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1* (2010), para 90. Available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session9/LB/A_HRC_WG.6_9_LBN_1_E_Lebanon-eng.pdf; Lebanese Republic, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Lebanese Republic* (2015) paras 59 to 64. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/197/60/PDF/G1519760.pdf?OpenElement>

Using the Inter-American regional framework to help stateless children in the Dominican Republic

*Francisco Quintana**

In 2016, the Center for Justice and International Law (CEJIL) celebrates its 25th anniversary. As we reflect on more than two decades of work protecting human rights through strategic litigation in the Americas, our efforts to advance the right to nationality stand out. CEJIL's work in the Dominican Republic began almost 20 years ago, as we grew increasingly concerned about the discrimination faced by Dominicans of Haitian descent, particularly regarding their right to nationality. Together with local counterparts, we decided to bring a case before the Inter-American Human Rights system. The American Convention on Human Rights (ACHR) protects the right to nationality, but the Inter-American Court had never analysed this right in a contentious case.

In 1998, CEJIL, along with the Movimiento de Mujeres Dominico-Haitianas (MUDHA), filed a petition on behalf of two Dominican girls of Haitian descent, Violeta and Dilcia, who were denied access to education due to their inability to attain identity documents. Their case represented the situation of thousands in the Dominican Republic who were unable to prove their Dominican nationality. The Inter-American Court ruled on the case in 2005. The Court determined that the deprivation of access to birth certificates on a discriminatory basis constituted a violation of the right to nationality of both girls. Critically, the Court also held that when a child that is born in the country is stateless, governments are required to confer nationality in order to prevent statelessness. This decision represented a landmark moment in the fight against statelessness in the Americas.

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Dayonara is a Dominican of Haitian origin living in the Dominican Republic. In this photograph, she holds up her drawing depicting herself in the present and the future. On the left, she is frowning next to the words “age 12, Dayonara and God”, whereas on the right she is a smiling doctor.

© Allison J. Petrozziello (OBMICA)

Unfortunately, the decision did not result in domestic efforts to improve the living conditions of the affected population in the Dominican Republic. Instead, the situation worsened through the implementation of policies and legislative reforms that further restricted the right to nationality, excluding those born to parents with irregular migration status. The litigation of a second case became inevitable. Again, in partnership with MUDHA, CEJIL undertook the litigation of a second case involving the arbitrary expulsion of Dominican and Haitian citizens from Dominican territory. This second effort, however, was also followed by a negative response from the Dominican government. In September 2013, the Constitutional Court of the Dominican Republic issued a resolution that retroactively changed the constitutional interpretation of the ‘in transit’ clause that limits the acquisition of nationality. This decision resulted in the denationalisation of some 200,000 people. In 2014, the Inter-American Court issued its decision on the Expelled Persons case, which did not focus exclusively on stateless children but reaffirmed that a child’s right to nationality does not depend on the migratory status of their parents.¹

¹ See also *The perpetuation of childhood statelessness in the Dominican Republic* by David Baluarte in Chapter 12.

While Dilcia and Violeta finally have their birth certificates, there are now many others facing the same problems they faced in 1998. CEJIL acknowledges the need to adopt a comprehensive approach that goes beyond litigation. Together with partner organisations, CEJIL launched the Americas Network on Nationality and Statelessness (Red ANA in Spanish). The Network seeks to build upon the legal advances in the Inter-American system by highlighting concrete examples of State efforts to bring their national legal systems into compliance with the legal standards our work helped establish.²

Council of Europe efforts in the area of childhood statelessness

In Europe also, children's right to a nationality has found a place within regional legal frameworks. The work of the Council of Europe (CoE) is particularly relevant. In March 2016, the Parliamentary Assembly of the Council of Europe adopted a *Resolution on the need to eradicate statelessness of children* asking the Member States to take steps to eradicate childhood statelessness, which was preceded by a Report and Opinion on this issue. In this Resolution, the Parliamentary Assembly refers to a number of relevant CoE instruments concerning the avoidance of statelessness, including the European Convention on Nationality (ECN) – a key instrument in this regard – as well as to the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, which could help to address statelessness among children in the specific context of state succession. Efforts relating to childhood statelessness can also be found in the case law of the European Court of Human Rights encompassing significant cases such as that of *Genovese v Malta* (2012) and of *Mennesson v France* (2014). A clear expression of the CoE's commitment to addressing childhood statelessness is the Recommendation of the Committee of Ministers to Member States on the nationality of children, which was adopted in 2009 (CM/Rec(2009)13). 10 out of the 23 principles included in this non-legally binding Recommendation concern reducing statelessness of children specifically. Moreover, childhood statelessness seems to be a continuous concern to the current Commissioner for Human Rights. Efforts to address childhood statelessness at the regional level are thus strongly present in the CoE.

² See also Chapter 3 on *Americas*.

Using the African regional framework to realise children's right to nationality in Kenya

*Mustafa Mahmoud Yousif**

The Nubian community are among the earliest settlers in Kenya. Despite their presence in the country prior to it becoming an independent state - and even their participation in the struggle for independence - Nubians have faced challenges being recognised as Kenyan citizens and are often subjected to severe discriminatory procedures when applying for citizenship documents. These include specific application days, whereby Nubians can only apply on either a Tuesday or Thursday when the vetting elders are available to swear by affidavit that they are Nubians and then book them for “vetting” with the registrar, which may be as much as a three month wait. Vetting is a security process where the applicant appears before a panel that is composed of security agencies like the national intelligence, criminal investigation department and two officials from the registration department. After the process the parent is required to stamp his or her thumb print on the application form. Vetting is only practised in Kibera for Nubians and in North Eastern Kenya for the Kenyan Somali population and it does not have any legal basis. It is a process which increases the waiting period in the application for a document, because an application can only be filled after successfully going through the vetting process. There is then another long wait before obtaining a document. According to the data tracked by the Nubian Rights Forum (NRF), a community based organisation based in the heart of the Nubian settlement in Kibera, the average waiting time ranges between 154- 588 days for a case to be resolved.¹

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¹ NRF tracks its cases on a cloud-based database with real time case updates

In 2009, the Institute of Human Rights and Development and the Open Society Foundation filled a petition on behalf of Nubian children before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The petition was lodged after an unsuccessful appeal to the Kenyan High court on the continued discrimination of the Nubians in 2003. The petition argued that Nubian children faced specific barriers in acquiring nationality at birth, exposing them to statelessness, due to the difficulties experienced by parents in securing a birth certificate because of arduous documentation requirements. In addition, after acquiring the birth certificate, this does not guarantee citizenship, as the document explicitly indicates that it is not a proof of citizenship and thus Nubian children must subsequently prove their citizenship at the age of eighteen through a discriminatory vetting process – not required of other citizens.

In its decision on *Nubian Minors v Kenya*², the ACERWC concluded that Kenya had violated the rights of Kenyan Nubian children by denying them access to a nationality at the time of birth and subjecting them, upon reaching majority, to a complicated, racially discriminatory vetting process. The ACERWC instructed the state to take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, who are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth. Unfortunately, the state did little to implement this judgement.

In 2012, Open Society Justice Initiative (OSJI), Open Society Initiative for East Africa (OSIEA), Nubian Rights Forum and Namati, jointly started a citizenship paralegal project. The project aimed at assisting the Nubian ethnic minority community in applying for documents, while at the same time tracking discriminatory practices that went against the ACERWC ruling on the Nubian minor's decision and collecting valuable data on the status of the implementation of the ruling. In 2014, OSJI, Namati and NRF submitted a report to the ACERWC on the implementation of the judgement by the Kenyan state based on the evidence they collected in their database of the clients of NRF.

and at the time of writing they had handled 2,581 cases which included 1,020 Identity card cases, 1,279 birth certificate cases, 144 death certificate cases and 138 passport cases since 2013.

² For the case file, see <https://www.opensocietyfoundations.org/litigation/nubian-minors-v-kenya>. See also *Safeguards against statelessness under the African human rights system* by Ayalew Gettachew Assefa in Chapter 11.

The report³ indicated that over 60% of birth certificate applications that have been handled by the Nubian Rights Forum paralegals in the Kibera area of Nairobi involve late registration, due to the government's failure in registering children at birth in the Nubian community. In Kenya, for one to sit for examinations both at primary and secondary level, a student is required to produce his or her birth certificate. This is also a prerequisite for joining primary school from 2013, serving as proof of age. Hence, these delays in completing birth registration can deny Nubian children equal access to socio-economic rights, such as right to education, among others. The denial and inordinate delay in the issuance of ID cards further subject the Nubian youth to poverty as they cannot even register a SIM-card, open a bank account or, worst of all, get any gainful employment. The lack of progress in the implementation of the ACERWC decision by the state is therefore a real cause for concern.

³ Report by Open Society Foundations, Namati, and Nubian Rights Forum. This report shows the status of the implementation of the Nubian minors' decision by the state using the data from the NRF database collected from clients they have handled since 2013. The report can be downloaded on the Namati website <https://namati.org/resources/briefing-paper-implementation-of-nubian-minors-v-kenya/>

Sultan – an interview

Nubian child fighting for a birth certificate in Kenya¹

Sultan is one of the clients who the Nubian Rights Forum is assisting to get a birth certificate, which he now urgently needs to continue his education. A birth certificate is required for enrolment in secondary school. His Mother Aisha put in the application, acting on behalf of her son, but Sultan himself has been following up actively on the process. His expectation was that it would be straightforward and he would get the birth certificate after perhaps 3 weeks or a month, but it was six months and counting when this interview was taken and he still has no birth certificate.

"I was emotionally stressed because all my peers were at school while I stayed at home because I didn't have a birth certificate to join school"

Sultan:

Before enrolling in Form 1 [secondary school], I stayed at home for an entire year due to lack of the birth certificate. I was emotionally stressed because all my peers were at school while I stayed at home.

I started the process of applying for a birth certificate in March [2016]. Every moment I used to go to the Nubian Rights Forum paralegal office to follow-up; I was told the birth certificate wasn't ready. I also went to the government office twice, but when I was there I felt fine and confident. Last month when I came to check with the paralegal on the status of the application, I was told to bring the attendance register from the health clinic – the government wanted to ascertain the originality of my clinic card, to verify if it was real. Some people buy fake clinic cards in order to register their children. But I couldn't bring the attendance register because the clinic where I received care as a small child is now closed. Up until now, I have no birth certificate and I have been told it's not possible to register for Form 4 exams without it, and that's giving me stress. Teachers keep telling me that they want the birth certificate.

¹ Interview conducted by Mustafa Mahmoud Yousif in 2016. The name has been changed to protect the interviewee's identity.

If I get my birth certificate, I will be happy. And I will also pursue sponsors for school - because there are options for financial support to continue my studies but they require a birth certificate to enter the process.

Aisha, Sultan's mother:

There is some stigma from neighbours – because they were talking about how my child was not in school. I also feared since he wasn't in school he might start engaging in criminal activities since he was idle at home.

Aisha tried talking to the school officials, and they allowed Sultan to register using the health clinic card, but they told her the clinic card would not actually be sufficient over time, and that she had to provide the birth certificate. She told the school that they were in the process of applying for the birth certificate and that is why they temporarily accepted the clinic card.

CHAPTER 9: MIGRATION, DISPLACEMENT AND CHILDHOOD STATELESSNESS



Foundlings' artwork on the theme of nationality and statelessness
© UNHCR Côte d'Ivoire / SOS Villages Aboisso

In this Chapter:

Migration, forced displacement, and childhood statelessness	Jyothi Kanics
The stateless Rohingya	Helen Brunt
Accessing documents, preventing statelessness	Monica Sanchez Bermudez
Syria's displacement crisis, statelessness and children	Zahra Albarazi
Stateless refugee children of Syria – <i>interviews</i>	
The long-overlooked mystery of refugee children's nationality	Gábor Gyulai
The open sky or a brick-and-mortar school? Statelessness, education and nomadic children	Heather Alexander
Preventing statelessness of migrant children	Alice Sironi and Michela Macchiavello
Birth registration problems in complex migration contexts – case studies from the Netherlands	Laura Bosch
Risks of statelessness for children of undocumented parents in Europe	Lilana Keith

Introduction

Migration to new and different pastures, for a better livelihood, a change of scenery or adventure. Displacement prompted by war, persecution or natural disaster. These are age-old and enduring human phenomena – now made more complicated than they once were by the increased enforcement and securitisation of borders between states. The hitherto unprecedented scale of migration and displacement today also makes this a difficult and often fraught area of law and policy. There are 244 million migrants in the world today, some 15% of them children.¹ More people are forcibly displaced now than at any other time since the Second World War. According to UNHCR, “the rate at which people are fleeing war and persecution has soared from 6 per minute in 2005 to 24 per minute in 2015”² 21.3 million people are refugees, some five million having fled the Syria conflict alone, and almost 100,000 unaccompanied or separated children lodged asylum applications in 2015.³ This creates a seriously complex environment in which to protect children from childhood statelessness.

As the essays in this chapter demonstrate, the acquisition and retention of nationality by migrant and refugee children can pose a real challenge. Children who are born after their parents have migrated or been displaced start their lives in what society commonly perceives as their “host” rather than “home” country, which can have significant implications for their access to a nationality at birth. Children born in this context find that they are more prone to falling victim to a conflict of nationality laws, at greater risk of having their birth go unregistered⁴ and often surprisingly

¹ See also *Preventing statelessness of migrant children* by Alice Sironi and Michela Macchiavello in this Chapter.

² UNHCR, *Global forced displacement hits record high*, 20 June 2016, available at <http://www.unhcr.org/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html>.

³ UNHCR, *Global Trends: Forced displacement in 2015*, June 2016, available at <https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>.

⁴ Lack of birth registration, in particular in a migration or displacement context, can put children at risk of statelessness because it leaves them without evidence of the vital facts of birth which determine their position under the relevant states' nationality laws. See also *Every child counts* by Anne-Sophie Lois in Chapter 10 and also Chapter 10 on The Sustainable Development Agenda and childhood statelessness in general.

beyond reach of the very safeguards designed to protect children in their situation from statelessness. That statelessness can be both a driving force behind and consequence of migration and forced displacement is widely acknowledged, but the essays presented here bring to light a new depth to this relationship. Collectively they constitute essential reading in the present climate when so many questions are being asked about how to ensure a more appropriate, sustainable and effective response to the vulnerabilities experienced by the world's growing migrant and refugee populations.

The chapter opens with an essay by Jyothi Kanics, a Doctoral Fellow at the Faculty of Law of the University of Lucerne, who captures the vulnerable situations children can find themselves in when left stateless in a wide variety of migration contexts. She elaborates on the diversity of circumstances that can put children at risk of statelessness and the impact lack of nationality has for children 'on the move'. This is followed by a series of contributions that look more closely at the relationship between statelessness and forced displacement. Helen Brunt is based in the Secretariat of the Asia Pacific Refugee Rights Network (APRRN), and leads off this topic with a short essay on the stateless Rohingya – one of the world's largest populations to be afflicted by inter-generational statelessness and a group that has undeniably seen statelessness operate as a vector for further rights violations and a root cause for displacement. Her piece is accompanied by a selection of compelling pictures by Saiful Huq Omi, a photographer-activist who has dedicated many years to giving people a sense for the Rohingya's lives and plight through photography.

Next to address the problem of statelessness among (children of) refugees is Monica Sanchez Bermudez, Global Adviser – Information, Counselling and Legal Assistance with the Norwegian Refugee Council (NRC). Her essay canvases the challenges in establishing legal identity and the related risk of statelessness in situations of forced displacement. By explaining the reasoning behind and techniques adopted in NRC's own work on the prevention of statelessness, through promoting access to civil documentation – giving examples of projects in Myanmar and Jordan – she also offers a window into some of the very practical mitigating measures that can be taken by organisations working in displacement contexts. The subsequent essay by Zahra Albarazi, Senior Researcher at the Institute on Statelessness and Inclusion, zooms in again, looking specifically at the interaction between (childhood) statelessness and forced displacement in the context of the Syria crisis. Albarazi presents the highlights of a research

project carried out by ISI and NRC in 2016, looking at the situation of refugees in the countries neighbouring Syria. She also offers a taster of the toolkit that was developed on the basis of the research and consultations conducted, which aims to translate the knowledge gathered into easy-to-digest material and practical tips.

Albarazi's essay is followed with two very different contributions. The first contains short interviews with people for whom statelessness and displacement is a lived reality, provided by Thomas McGee, an expert on the situation of stateless Kurds from Syria. In these interviews, families from Syria whose children are affected by both statelessness and now also displacement open a window into their lives. Thereafter – and last in the set of essays to look at statelessness among children in the refugee context – is a more legal-philosophical contribution by Gábor Gyulai, Refugee Programme Director at the Hungarian Helsinki Committee. Drawing on his experience in responding to refugee situations in Eastern Europe, Gyulai reflects on some deeper questions that go to the heart of the position of children born in exile, to refugee parents. He pinpoints four clear challenges refugee children can face in enjoying their right to a nationality, and becoming (at risk) of statelessness and suggests a number of steps that could be explored in order to better equip actors to deal with the dilemmas that they confront.

The last four contributions in this chapter move away from the forced displacement context to look at other situations in which migration and statelessness interact. Heather Alexander, a Doctoral candidate researching statelessness among nomadic peoples, writes about the nexus between statelessness, education and nomadic children. It is a knowledge-broadening chapter on a topic that is largely untouched, yet presents another worrisome cause of (increased risks of) statelessness. Alexander affirms the importance of the right to a nationality for every child, but stresses the additional importance of a nationality and the meaning of the right to education for nomadic children by touching on some concrete challenges faced by nomadic groups in different parts of the world. The next essay, by Alice Sironi and Michela Machiavello, both migration experts with the International Organisation for Migration (IOM), provides a fresh take on childhood statelessness in the context of international migration. They comment on the specific situations of unaccompanied children and children who became victims of trafficking, before elaborating on some of IOM's programmes that aim to mitigate risks of statelessness in migratory contexts. Providing a concrete sense of how the migration context can

create complex bureaucratic obstacles for people to overcome in order to obtain vital documentation of identity and nationality – and focusing specifically on access to birth registration – Laura Bosch, Legal Advisor at Defence for Children in the Netherlands, briefly presents two cases from their work which exemplify the difficulties. The chapter then closes with an essay by Lilana Keith, Advocacy Officer on Children’s Rights and Labour Rights at the Platform for International Cooperation on Undocumented Migrants (PICUM), looking at why children of undocumented parents can be exposed to statelessness. Scoping the broader European context, Keith shows how undocumented migrant children are often overlooked in migration and public policies, leading to barriers to civil registration and a wide variety of other human rights violations. She explains how discriminatory approaches in civil registration and nationality procedures can lead to further marginalisation of undocumented children in Europe by putting them at risk of statelessness.

Migration, forced displacement, and childhood statelessness

*Jyothi Kanics**

1. Introduction

With the dissolution of the Soviet Union in 1991, many people who had migrated within the territory of the former Soviet Union suddenly found themselves resident in new countries. Millions of people became stateless as a consequence of problems with documentation and acquisition of nationality.¹ Speaking at the 2016 UNHCR NGO Consultations, youth representative Zhirair Chichian explained how his family had migrated within the former Soviet Union when he was a child and how even after returning to his country of birth, he remained stateless and struggled with limited educational opportunities and future prospects. He recounted how he felt like a swallow, who had grown up in a nest with others who would soon fly away, but that he could not fly because he had a broken wing.² With the help of UNHCR, he was able to be officially recognised as stateless, which has changed his life. He continues to fight to receive citizenship and to fulfil his dreams.³

The challenge of preventing statelessness and protecting stateless persons in the context of migration and forced displacement is undiminished today. This Chapter seeks to contextualise childhood statelessness

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¹ IPU and UNHCR, *Nationality and Statelessness: Handbook for Parliamentarians* N° 22, July 2014, available at: <http://www.refworld.org/docid/53d0a0974.html>

² UNHCR, Report of Annual NGO Consultations 2016, page 10 accessed on 13 October 2016 <http://www.unhcr.org/events/conferences/57c3e3d94/report-annual-consultations-non-governmental-organizations-15-17-june-2016.html>

³ Ibid. and <https://www.youtube.com/watch?v=nliM353Tull>

in the migration context by examining both statelessness caused by migration and the increased vulnerability⁴ that statelessness adds to the experiences of ‘children on the move.’⁵ Of particular concern in this regard is the ability and resilience of migrant stateless children to avoid risks that lead to specific child rights violations. Unfortunately, as explained below, statelessness greatly contributes to vulnerability and strips many migrant children and their families of their ability to prevent and to respond to child rights violations.

2. The risks of statelessness for children on the move

The majority of stateless children have never left their country of birth,⁶ but remain stateless due to a variety of reasons, including discrimination and weak child protection systems. Still other factors, such as conflict, human rights violations and collective expulsions, force stateless children to leave their home communities and to migrate abroad.⁷ Statelessness is therefore a cause of social exclusion, persecution and forced migration. Yet, migration may also increase vulnerability and put individuals, particularly children, at risk of statelessness. Indeed, there are several ways that ‘children on the move’ may be threatened by statelessness.

2.1 Reasons for flight or migration

UNICEF estimates that sixty-five million children are ‘on the move’

⁴ The concept of vulnerability captures both the heightened risk of an adverse outcome as well as the options for managing or responding to those risks. D Wenke, *Vulnerable Children in Switzerland: Safeguarding the Rights of Every Child* (2010) available at https://www.unicef.ch/sites/default/files/attachements/vulnerable_kinder_originalfassung.pdf accessed 4 August 2016; J Alwang, PB Siegel & SL Jorgensen, ‘Vulnerability: a view from different disciplines’ (2001) The World Bank Social Protection Discussion Paper Series no. SP 0115, available at <http://documents.worldbank.org/curated/en/636921468765021121/Vulnerability-a-view-from-different-disciplines> accessed 4 August 2016.

⁵ The term ‘children on the move’ is defined in the ‘Report of the Special Rapporteur on the Human Rights of Migrants’ (14 May 2009) A/HRC/11/7, para 52-54, available <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx> accessed on 13 October 2016.

⁶ Institute on Statelessness and Inclusion, *The World’s Stateless* (Wolf Legal Publishers, 2014), p 21, available at <http://www.institutesi.org/worldsstateless.pdf> accessed 4 August 2016.

⁷ Z. Albarazi & L.E. van Waas, ‘Statelessness and Displacement: Scoping Paper’ (2014), available at <https://www.nrc.no/globalassets/pdf/reports/statelessness-and-displacement.pdf> accessed 28 July 2016

around the world fleeing from conflict, poverty and extreme weather.⁸ The conditions and developments in children's community of origin can influence their ability to establish their nationality, especially once they are on the move. Some children may be stateless in their home country, while others may face the risk of statelessness due to lack or loss of documentation as well as separation from family. Children affected by armed conflict often experience the loss of family members and separation from their parents or primary caregivers.⁹ Civil war and state succession may lead to ethnic cleansing and denationalisation of some groups. Children who have fled may not even be aware that they have been stripped of their nationality. Other migrant children may think that they have two nationalities because their parents come from two different countries, yet if those communities or countries are in conflict, neither may recognise the child as a national.¹⁰ Furthermore, when parents possess different nationalities, the child may also face challenges when dual nationality is actively restricted by their parents' home countries. Children born in transit, particularly during sea crossings,¹¹ may face other challenges to documenting their birth and acquiring a nationality while on the move. Migrant children who have been arbitrarily deprived of their nationality and forced to flee persecution are particularly vulnerable to further violations of children's rights.¹²

⁸ UNICEF, 'Children on the Move' (2016), available at <http://www.unicef.org/emergencies/childrenonthemove/> accessed 2 August 2016.

⁹ Save the Children, UNHCR, and UNICEF, *Separated Children in Europe Programme Statement of Good Practice* (2009), available at <http://www.scepnetwork.org/p/1/91/translations-statement-of-good-practice> accessed on 1 August 2016

¹⁰ European Network on Statelessness, 'Sarah – Faces of Statelessness', available at <http://www.statelessness.eu/faces-of-statelessness/sarah> accessed on 1 August 2016; See also the video available at <https://www.youtube.com/watch?v=o1qGwoN61mw>.

¹¹ 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*, (2012), HCR/GS/12/04, available at <http://www.refworld.org/docid/50d460c72.html> accessed 4 August 2016; L.E. van Waas, *No Child should be Stateless* (2015), p 12, available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf accessed 2 August 2016

¹² UN Human Rights Council (UNHRC), 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' (2015) A/HRC/31/29, para 40, available at <http://www.refworld.org/docid/56c42b514.html> accessed 4 August 2016.

2.2 Problems with birth registration

Legal parentage is said to be ‘the gateway through which many of the rights of children, and obligations to children, flow.’¹³ This is one of the reasons why birth registration has been recognised as a ‘critical first step’ in ensuring the rights of children on the move.¹⁴ As the birth certificate given following registration normally includes proof of parentage as well as place of birth, it is often an essential tool in establishing those important links. In this regard, birth registration is “often essential to the reduction and prevention of statelessness.”¹⁵ However, this does not mean that all children without birth certificates are stateless¹⁶ because most children automatically acquire nationality at birth based on their family links according to the *jus sanguinis* rule.¹⁷ However, for certain categories of children – including asylum seekers, refugees, and migrant children – lack of birth registration may result in statelessness,¹⁸ especially when such documentation is required in order to prove family relations or place

¹³ Permanent Bureau of Hague Conference on Private International Law (HCCH), ‘Private International Law Issues Surrounding the Status of Children, including Issues arising from International Surrogacy Arrangements’ (2011) Preliminary Document No 11, 4, available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>; HCCH, ‘A Preliminary Report on the Issues arising from International Surrogacy Arrangements’ (2012) Preliminary Document No 10, 20, available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>

¹⁴ UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration* (2010) A/HRC/15/29, para 59, available at <http://www.refworld.org/docid/51efb9664.html> accessed 28 July 2016.

¹⁵ UNHCR, EXCOM Conclusion No.111 ‘Civil Registration’ (2013) available at <http://www.refworld.org/docid/525f8ba64.html> accessed 4 August 2016.

¹⁶ UN Human Rights Council (HRC), *Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights* (2014), A/HRC/27/22, para 23, available at <http://www.ohchr.org/Documents/Issues/Children/BirthRegistration/ReportBirthRegistration.pdf>

¹⁷ I. Sturkenboom & L.E. van Waas, ‘How Real is the Risk Of a ‘Stateless Generation’ in Europe? Reflections on how to fulfil the right to a nationality for children born to refugee and migrants parents in the European Union’(2016), available at SSRN: <https://ssrn.com/abstract=2877368>.

¹⁸ UN Human Rights Council (HRC), *Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights* (2014), A/HRC/27/22, para 23, available at <http://www.ohchr.org/Documents/Issues/Children/BirthRegistration/ReportBirthRegistration.pdf>

of birth.¹⁹ Worryingly, evidence shows that birth registration rates are generally lower than average for vulnerable and marginalised children, including internally displaced, migrant, and refugee children, as well as children born during or just after wars or natural disasters.²⁰

Many migrant children lack birth registration because of weak civil registration systems in their countries of origin as well as discrimination and barriers to registration. This gap in child protection is still a widespread problem in many countries of origin.²¹ Migrating without proper documentation, in an irregular manner, children may later face real difficulties in trying to establish a link with their home country. In addition, children born outside their parents' home country in an irregular situation may also encounter barriers in trying to acquire the nationality of their parents, as well as accessing birth registration and nationality in the country of their birth.²² This is because some States refuse to register the children of non-nationals or may require a period of legal residence in order to do so, which often excludes not only irregular migrant children, but also asylum seekers and refugees who may not meet the requirements.²³

Furthermore, the attitudes and inaction of local authorities may exclude irregular children from birth registration.²⁴ Irregular migrant parents may also fear repercussions if they approach the authorities to register

¹⁹ I. Sturkenboom & L.E. van Waas, 'How Real is the Risk Of a 'Stateless Generation' in Europe? Reflections on how to fulfil the right to a nationality for children born to refugee and migrants parents in the European Union' (2016), available at SSRN: <https://ssrn.com/abstract=2877368>.

²⁰ UNICEF, *A Passport to Protection: A Guide to Birth Registration Programming* (UNICEF December 2013) p 42, available at <http://www.refworld.org/docid/52b2e2bd4.html> accessed 28 July 2016.

²¹ *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration* (2012) para 31, available at <http://www.refworld.org/docid/51efb6fa4.html>

²² Ibid; Laura van Waas, 'The Children of Irregular Migrants: A Stateless Generation?' (2007) 25 Netherlands Quarterly of Human Rights 437.

²³ UN Human Rights Council, Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights, 17 June 2014, A/HRC/27/22, para 64 <http://www.refworld.org/docid/53ff324e4.html> accessed 28 July 2016.

²⁴ Laura van Waas, 'The Children of Irregular Migrants: A Stateless Generation?' (2007) 25 Netherlands Quarterly of Human Rights 437.

their children.²⁵ Without a birth certificate, such children are likely to lack the evidence that may be necessary if acquisition of nationality is not automatic, and, therefore, are in danger of remaining stateless.²⁶ Finally, in some cases, there may be no barrier to birth registration, but the information provided on the birth certificate, for example only the name of the mother and not that of the father, may be insufficient for the country of origin to recognise the child as one of its nationals. It is crucial that host countries improve birth registration procedures and related documentation so that children do not fall through such gaps.

2.3 Gender discrimination

Gender discrimination in nationality laws in 27 countries currently prevents mothers from passing their nationality on to their children and can render children stateless.²⁷ This inequality affects women from some of the main countries of origin of asylum seekers and refugees such as Iran, Iraq, Somalia, Sudan, and Syria.²⁸ In such cases where the child is unable to acquire the father's nationality because the father is stateless, unknown or absent,²⁹ the child risks remaining stateless if there is no safeguard in place to allow them to acquire the nationality of their country of birth or residence. Furthermore, the child may also be unable to acquire the father's nationality if according to the laws of his country this is not possible when he is unable or unwilling to fulfil the necessary administrative requirements, or if the child is born out of wedlock or born abroad.³⁰ The persistence of gender discrimination in some countries' nationality laws means that for asylum seeking, refugee, and migrant

²⁵ Ibid. and UNGA 'Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante' A/HRC/11/7 (14 May 2009), para 72 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.7.pdf>, para 72.

²⁶ UN Human Rights Council, Birth registration and the right of everyone to recognition everywhere as a person before the law : Report of the Office of the United Nations High Commissioner for Human Rights, 17 June 2014, A/HRC/27/22 <http://www.refworld.org/docid/53ff324e4.html> accessed 28 July 2016.

²⁷ UNHCR, *Background Note on Gender Equality, Nationality Laws and Statelessness* 2016, 8 March 2016, <http://www.refworld.org/docid/56de83ca4.html> accessed 29 July 2016; CEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, <http://www.refworld.org/docid/54620fb54.html> accessed 2 August 2016.

²⁸ Ibid. and EASO July/August 2016 Newsletter.

²⁹ CEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014 CEDAW/C/GC/32, <http://www.refworld.org/docid/54620fb54.html> accessed 2 August 2016

³⁰ Ibid.

children, the loss of their father or separation of their family may leave them stateless.³¹

2.4 Lack of safeguards

In line with international law and best practice, States should adopt safeguards in their legislation in order to grant nationality to children born on their territory who would otherwise be stateless. Ideally, such measures will automatically grant nationality or, alternatively, create a non-discretionary application process as soon as possible after birth.³² Provisions concerning foundlings and orphans are sometimes applied in the case of unaccompanied migrant children found on the territory, especially when the child concerned is an infant or very young. However, several States limit application of this important safeguard to babies under 12 months old.³³ At a minimum, UNHCR advises that such measures should apply to “young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth.”³⁴

It is also necessary to advocate that safeguards be designed and implemented in order to give special consideration to the situation of asylum-seeking and refugee children.³⁵ Some States have deliberate policies not to confer nationality to children born to refugees, especially when a parent is unable to confirm their identity.³⁶ However, when a child

³¹ See for example: Refugees International, *Birth Registration in Turkey: Protecting the Future for Syrian Children*, 2015 at <http://www.refugeesinternational.org/reports/2015/6/13/birth-registration-in-turkey-protecting-the-future-for-syrian-children>; UNHCR, *In Search of Solutions: Addressing Statelessness in the Middle East and North Africa*, September 2016, available at: <http://www.refworld.org/docid/57dbdaba4.html>

³² 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*, 21 December 2012, HCR/GS/12/04 <http://www.refworld.org/docid/50d460c72.html> accessed 4 August 2016; Laura van Waas, *No Child should be Stateless* European Network on Statelessness (2015), page 12, http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf

³³ UNHCR, *Guidelines on Statelessness No. 4*.

³⁴ UNHCR, *Guidelines on Statelessness No. 4*.

³⁵ I. Sturkenboom & L.E. van Waas, 'How Real is the Risk of a 'Stateless Generation' in Europe? Reflections on how to fulfil the right to a nationality for children born to refugee and migrants parents in the European Union' (2016), available at SSRN: <https://ssrn.com/abstract=2877368>.

³⁶ UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR 1994) <http://www.refworld.org/docid/3ae6b3470.html> accessed 2 August 2016.

does not acquire the nationality of his or her parent automatically, the country of refuge should grant them its nationality in line with Article 1 of the 1961 Convention on the Reduction of Statelessness. For example, this would be warranted in cases where the very nature of refugee status precludes parents from contacting their consular authorities.³⁷ With regards to the naturalisation of stateless migrant and refugee children who were not born on the territory, there should be a facilitated naturalisation procedure available. While some States still have strict criteria regarding the proof of identity necessary for naturalisation, other States make special accommodations for refugees.³⁸

2.5 Conflict of nationality laws

When nationality laws of one State conflict with those of another, children may have difficulties acquiring a nationality.³⁹ For ‘children on the move’, the risk of such a conflict of laws is very real because their movement across borders or their birth abroad generally concerns the nationality laws of at least two countries.⁴⁰ A scoping paper on statelessness and displacement provides an overview of scenarios that may affect migrant children such as when: the limits and exceptions in *jus soli* and *jus sanguinis* regimes mean that a child does not acquire a nationality at birth; residence abroad may lead to loss of nationality or the inability to confer nationality on one’s children; protracted refugee situations erode away the rights and identity of those concerned; and when political upheaval or State succession results in denationalisation and discriminatory practices, which increase the risk of certain groups becoming stateless.⁴¹

³⁷ 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*, 21 December 2012, HCR/GS/12/04.

³⁸ See for examples responses at: <http://emn.ee/wp-content/uploads/2016/03/Compilation-FI-Ad-Hoc-Query-on-the-establishment-of-identity-in-connection-with-naturalization-wider-dissemination.pdf>.

³⁹ IPU and UNHCR, *Nationality and Statelessness: Handbook for Parliamentarians* N° 22, July 2014, available at: <http://www.refworld.org/docid/53d0a0974.html>.

⁴⁰ S. Nonnenmacher & R. Cholewinski, ‘The Nexus between Statelessness and Migration’, in A. Edwards & L. van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014).

⁴¹ Z. Albarazi & L.E. van Waas, ‘Statelessness and Displacement: Scoping Paper’ (2014), available at <https://www.nrc.no/globalassets/pdf/reports/statelessness-and-displacement.pdf>

2.6 Return measures

Finally, it is important to consider how forced deportation and expulsion, as well as assisted voluntary return measures, may contribute to violations of migrant children's rights and make it even more difficult for them to prove the necessary link with a country that may enable them to acquire a nationality. Forced deportation and expulsion measures may separate children from their families and place them in a more vulnerable situation. Additionally, in some cases, return procedures have increased vulnerability for children because they were removed without vital documentation, such as their birth certificate, when they had been born abroad outside their parents' country of origin.⁴² If unable to register upon return, these children may be treated as non-citizens in their or their parents' country of origin and can face many barriers in accessing education, healthcare and other services.⁴³

The checklist on implementing returns in line with children's rights contains a good practice indicator to ensure that all necessary documentation including birth certificate, health and education records is acquired pre-departure.⁴⁴ Projects monitoring the effects of return policies on separated and unaccompanied children also identified the possession of a birth certificate to be in the best interests of the child and essential for the child's ability to exercise their rights upon return.⁴⁵ Further attention should be given in future monitoring projects of this kind to ensure that children possess not only a birth certificate upon return, but also that safeguards are in place to identify and to resolve any cases of statelessness.

⁴² UNICEF Germany & UNICEF Office in Kosovo, *A report on the situation of Kosovan Roma, Ashkali and Egyptian children in Germany and after their repatriation to Kosovo* (2010) p 65, available at http://www.unicef.org/kosovoprogramme/RAEstudy_eng_web.pdf

⁴³ UNICEF Germany and UNICEF Office in Kosovo, *No Place to Call Home: Repatriation from Germany to Kosovo as seen and experienced by Roma, Ashkali and Egyptian children*, 2011, page 24. "Without birth certificates issued by the countries where they were born, they cannot be registered in Kosovo." http://www.unicef.org/kosovoprogramme/No_Place_to_Call_Home_English_2011.pdf

⁴⁴ ECRE & Save the Children, 'Comparative Study on Practices in the Field of Return of Minors' (2011).

⁴⁵ HIT Foundation, *Monitoring Returned Minors* (2014), available at <http://hitfoundation.eu/wp-content/uploads/2012/12/1.-Final-report-MRM-model-and-Toolkit.pdf>

3. The impact of statelessness on children on the move

Statelessness has a significant impact on children and on the realisation of all of their rights. The *UN Convention on the Rights of the Child* (CRC), which has been ratified by 196 States,⁴⁶ takes a holistic approach towards children's rights, which are indivisible and interrelated. Equal importance should be attached to each and every right of the child. Yet, when we review the clusters of the CRC, it is very apparent that stateless 'children on the move' are at risk of serious violations in every category outlined below.⁴⁷

3.1 General principles of the Convention on the Rights of the Child

The interpretation and implementation of the CRC should be guided by its four general principles:⁴⁸ the principle of non-discrimination, the best interests of the child, respect for the views of the child, and the right to life, survival and development.⁴⁹ Statelessness undermines all of these principles as stateless children face serious discrimination, often have their best interests neglected, rarely are heard and face restrictions on their livelihoods and potential for development. This is especially the case for stateless migrant children who may face discrimination and language barriers as well as fewer resources in times of austerity.

3.2 Civil rights and freedoms: birth registration, identity, nationality and family relations

All children should be registered immediately after birth and have the right to acquire a nationality,⁵⁰ but many stateless migrant children encounter obstacles with birth registration, as noted above. This means

⁴⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS vol. 1577 p 3, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en

⁴⁷ Committee on the Rights of the Child, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (2015) CRC/C/58/Rev.3, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/58/REV.3&Lang=en

⁴⁸ Committee on the Rights of the Child, 'General Comment No 12' para 17 <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

⁴⁹ Committee on the Rights of the Child, General Comment No 5, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en accessed 4 August 2016

⁵⁰ CRC article 7

that the child's right to identity, which encompasses name, nationality and family relations, is compromised.⁵¹ Without the sense of belonging that identity creates, children and youth grow up socially excluded and often living in poverty. Living in such conditions on the margins of society can influence some stateless youth to decide against founding a family and having children of their own.⁵²

3.3 Violence against Children

Stateless migrant children are often at risk of abuse and exploitation. In particular, girls may be forced into early marriage⁵³ including as a means of escaping poverty or attempting to secure a nationality through marriage. Additionally, those who are irregular and stateless are more vulnerable to arbitrary and lengthy immigration detention especially because their lack of nationality creates a barrier to removal procedures.⁵⁴ Immigration detention is never in the best interests of the child and should be avoided.⁵⁵ As emphasised by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: "Even very short periods of detention can undermine a child's psychological and physical well-being and compromise cognitive development."⁵⁶ Detention results

⁵¹ CRC article 8.

⁵² UN Human Rights Council (HRC), 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' (2015) A/HRC/31/29, para 31, available at <http://www.refworld.org/docid/56c42b514.html>

⁵³ UN Human Rights Council (HRC), 'Resolution on the right to a nationality: women's equal nationality rights in law and in practice' (2016) A/HRC/32/L.12, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/L.12

⁵⁴ UN Human Rights Council (HRC), 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' (2015) A/HRC/31/29, para 41, available at <http://www.refworld.org/docid/56c42b514.html>

⁵⁵ UN Committee on the Rights of the Child (CRC), Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, November 2012, para 32; Inter-American Court of Human Rights, Advisory Opinion OC-21/14 of August 19, 2014 on Rights and Guarantees of Children in the Context of Migration, para. 154.

⁵⁶ UNGA Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, JE Méndez (2015) A/HRC/28/68, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>

in mental health problems and higher rates of suicide and self-harm.⁵⁷ Moreover, despite a lack of documentation, some stateless children will be removed in violation of the principle of *non-refoulement* and, therefore, risk facing persecution, exploitation and abuse.

3.4 Family environment and alternative care

'Children on the move', particularly those fleeing conflict and persecution, may become separated from their families. In this context, refugees and stateless persons may not be able to obtain the necessary documentary evidence for the family reunification process.⁵⁸ Stateless children often face unsurmountable barriers to family reunification especially when they lack documents to prove their family links and to allow them to travel freely or even to return to their country of birth. At the same time, separated and unaccompanied stateless children are often denied alternative care or placed in care arrangements that are not equitable and that do not meet the standards offered to children who are nationals.⁵⁹

3.5 Freedom of movement

Stateless migrant children may face severe limitations on their ability to travel and to choose a place of residence.⁶⁰ This further limits their opportunities for education, work and leisure. As noted above, it can also infringe on their right to private life and their ability to enjoy their family life.

3.6 Basic health and welfare

Another obvious violation of the rights of stateless migrant children is the barrier that many face when trying to access healthcare services. Many States require documentation to provide medical treatment and some do not even provide vaccination to stateless children.⁶¹ Additionally, higher

⁵⁷ Ibid.

⁵⁸ EU Red Cross Office and ECRE, *Disrupted Flight: The Realities of Separated Refugee Families in the EU*, November 2014, accessed on 13 October at: http://www.redcross.eu/en/upload/documents/pdf/2014/Asylum_Migration/RCEU%20ECRE%20-%20Family_Reunification%20Report%20Final_HR.pdf.

⁵⁹ EU FRA *Separated, asylum-seeking children in EU Member States*, 2011 http://fra.europa.eu/sites/default/files/fra_uploads/1692-SEPAC-comparative-report_EN.pdf

⁶⁰ UN Human Rights Council (HRC), 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' (2015) A/HRC/31/29, para 37, available at <http://www.refworld.org/docid/56c42b514.html>

⁶¹ Ibid, para 35.

medical costs for non-nationals and discrimination prevent stateless children from exercising their right to health.⁶² Irregular status or non-national status also often means exclusion from social welfare and child benefits. Stateless migrant children generally have a lower standard of living and most live in poverty on the margins of society.⁶³ The denial of property rights may further contribute to living in precarious conditions and to intergenerational poverty.

3.7 Education, leisure and cultural activities

All children have the right to education,⁶⁴ play, leisure, and cultural activities.⁶⁵ However, problems in accessing and continuing education are one of the most frequently reported effects of statelessness.⁶⁶ In particular, such obstacles severely limit the opportunity of stateless adolescents to pursue higher education or to benefit from vocational training opportunities. Furthermore, stateless migrant children belonging to ethnic and linguistic minorities may not be able to exercise their cultural rights⁶⁷ and, for example, to study in their native language. Lack of educational opportunities diminish their chances of securing decent job prospects in the future.⁶⁸ Stateless youth express frustration with such circumstances, which prevent them from applying their skills and realising their full potential.⁶⁹

3.8 Special protection measures

There is evidence that shows that both children without birth certificates

⁶² Ibid.

⁶³ Ibid. para 38.

⁶⁴ CRC article 28.

⁶⁵ CRC article 31

⁶⁶ UN Human Rights Council (HRC), 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' (2015) A/HRC/31/29, para 40, available at <http://www.refworld.org/docid/56c42b514.html>; UNHCR, *I Am Here, I Belong: The Urgent Need to End Childhood Statelessness*, (2015) available at <http://www.refworld.org/docid/563368b34.html>

⁶⁷ CRC, article 30.

⁶⁸ UN Human Rights Council (HRC), 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' (2015) A/HRC/31/29, para 40, available at <http://www.refworld.org/docid/56c42b514.html>

⁶⁹ UNHCR, *I Am Here, I Belong: The Urgent Need to End Childhood Statelessness* (2015), available at <http://www.refworld.org/docid/563368b34.html>

and stateless children are more vulnerable to sexual exploitation, trafficking, and recruitment into armed forces.⁷⁰ Without documentation, stateless children are often denied access to education and livelihood options. Due to social deprivation, they may end up living and working in street situations and face further protection risks.⁷¹ Their marginalisation and lack of prospects to earn a living make them vulnerable to being exploited in the worst forms of child labour.⁷² Stateless children rarely receive the protection and support that they deserve including measures that may be necessary for their physical and psychological recovery as well as social reintegration.

4. Conclusion

While statelessness and unsafe migration both increase children's risk of being exposed to child rights violations, better responses can help to minimise vulnerability and to protect children on the move who are stateless. In some countries, "integrated child protection systems"⁷³ are being developed, which could have a key role to play in identifying stateless migrant children and in referring them to protection and assisting them to secure durable solutions in line with their best interests including the acquisition of a nationality. In many countries, such mechanisms are targeting mainly unaccompanied and separated children, but there is a need to improve such assessments and services for children migrating with their families as well. In particular, there is a need for more research and better interventions while children and families are on their journey in first countries of reception or transit countries. Additionally, repatriation measures should include safeguards to identify and to resolve cases of child statelessness.

⁷⁰ UN Human Rights Council (HRC), 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' (2015) A/HRC/31/29, para 40, available at <http://www.refworld.org/docid/56c42b514.html>

⁷¹ OHCHR, *Protection and promotion of the rights of children working and/or living on the street* <http://www.ohchr.org/Documents/Issues/Children/Study/OHCHRBrochureStreetChildren.pdf>

⁷² Ibid, para 39.

⁷³ European Commission, Reflection Paper, 9th European Forum on the rights of the child cooperation in integrated child protection systems, 20 April 2015 http://ec.europa.eu/justice/fundamental-rights/files/2015_forum_roc_background_en.pdf

The stateless Rohingya

*Helen Brunt**

The Rohingya are an ethno-religious Muslim minority group originating from the Rakhine region¹ which today is encompassed within the western part Myanmar (also known as Burma) and is adjacent to Bangladesh. There is an estimated population of between one and 1.5 million Rohingya in Rakhine State, with the majority living in camps as internally displaced people (IDPs). With at least 1.5 million people in the diaspora following waves of



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forced migration dating back to the 1970s, today more Rohingya live in exile outside of Myanmar than within its borders.

In 1982 the Rohingya were arbitrarily stripped of their Burmese citizenship through the passing of a Citizenship Law and children born subsequently to Rohingya parents are also deprived of their right to a nationality. Ever since, the Rohingya population in Myanmar has been continuously subjected to systematic, targeted persecution and discriminatory restrictions on their fundamental human rights including livelihoods, movement, education and healthcare. In recent

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¹ Also known as Arakan.

years, over a million Rohingya men, women and children have fled from Myanmar to neighbouring Bangladesh and then onwards to India, Indonesia, Malaysia, Thailand and beyond. No country recognises the Rohingya as their citizens, rendering the vast majority as stateless and most Rohingya outside of Myanmar as stateless refugees. As displaced stateless people, they experience heightened vulnerability, greater difficulty in exercising their basic human rights, and have particular protection needs, in contrast to other non-stateless refugees or internally displaced people. Countless Rohingya are seeking asylum in countries which have not acceded to the 1951 Refugee Convention. Consequently, these 'host' countries have very weak or non-existent protection frameworks which results in the Rohingya being further deprived of their rights and freedoms.

The Rohingya are a clear example of a protracted and inter-generational statelessness situation with the vast majority of Rohingya without a recognised legal nationality status and, as such, unable to pass on a nationality to their children. There is a serious risk of further inter-generational statelessness for Rohingya children born in host countries where there is an absent or ineffective safeguard against statelessness for children born to stateless Rohingya refugees. Stateless Rohingya face both administrative and physical challenges accessing civil registration and documentation, such as registering births, marriages and deaths. Although not necessarily a prerequisite for acquisition of nationality, a birth certificate can provide the first legal identification of a person existing, and can be critical for the recognition by a country of a person's tie to that country, and right to citizenship. Even when Rohingya children do have a birth certificate, they are frequently denied access to public education, with literacy and numeracy challenges compounding the Rohingya's marginalisation from mainstream societies.

Rohingya are habitually deprived of their liberty and freedom to move inside Myanmar, and are highly vulnerable to arbitrary arrest in countries of asylum (particularly Indonesia, Malaysia and Thailand). Further, detention of Rohingya can be for an indefinite period: their statelessness means that it is very difficult for authorities to return Rohingya to their country of origin, since Myanmar does not recognise them as citizens.

Affordable healthcare and social welfare is often unavailable for Rohingya in both Myanmar and most countries of asylum, due to their stateless condition. For example, Rohingya in Malaysia who are not recognised as refugees by UNHCR and do not hold any form of legal documentation, are sometimes denied vital diagnostic medical treatment as hospitals require all patients to have an identity number which must be entered into a registration system. Medical staff have been known to reject patients who lack documentation and therefore cannot fulfil this criteria, highlighting the nexus between statelessness/lack of legal identity and increased barriers to protection.



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In the face of abject human rights violations, the Rohingya are immensely resilient. Across the world, displaced Rohingya communities have mobilised to ensure that their children can receive informal education in the Rohingya language and culture, keeping alive their hope for a brighter future.

Accessing documents, preventing statelessness

*Monica Sanchez Bermudez**

1. The importance of civil registration and legal identity during displacement

In displacement, accessing civil registration and documentation can be vital for people to be able to prove who they are and where they come from. It is also often required to access lifesaving humanitarian assistance as well as other essential services; and to be afforded the full protection of the law. However this can prove challenging for those who have fled their homes, as previous documents may have been lost or destroyed or people may never have had them in the first place. In conflict-affected countries, civil registries may no longer be accessible or functioning, or may have been damaged or purposefully destroyed if ethnicity or nationality was a component of the conflict, such as in Côte d'Ivoire or the Central African Republic.

In the long-term access to registration, documentation and identification are important prerequisites for lasting solutions to displacement, such as obtaining permission to stay in countries of exile or to reclaim housing, land and property upon return.

2. Legal identity of children born in displacement

Parents of children born while displaced need to be able to register their birth. This is the first legal acknowledgement of a child's existence: without a proof of identity a child is invisible to the authorities. Having

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a legal identity offers a degree of legal protection and provides access to rights and services such as education and healthcare. Birth registration can help identify unaccompanied children, show their relationship with their parents, and facilitate the acquisition of nationality in order to prevent statelessness.

However, many difficulties can arise in registering birth for families in a foreign land or in a different part of their country. This can be further complicated if the parents do not have documents to prove who they are or where they come from, or if the national law of the country where they are seeking to register the child requires the parents to be legally married for the birth to be registered. In many countries, customary and/or religious marriages are the norm and are not always officially registered in civil registries. Furthermore, documents proving the marriage may have been lost or destroyed during flight or conflict, making it difficult to register the birth.

Without birth registration, children may be denied basic rights and protection. Particularly in times of emergency, children are at heightened risk of being separated from their families and care givers. This can often result in children becoming involved in sexual exploitation, trafficking, recruitment into armed groups and hazardous work.

3. Risk of statelessness

The precarious and unstable circumstances of displacement can, at times, increase the risk of becoming stateless, even for those who had formerly possessed a nationality. One way in which this can happen is when refugees lose their identity documents and struggle to prove the bond with their home country. A lack of documentation does not mean someone is stateless *per se*, however, it makes it more difficult to prove nationality. As displacement continues over time, it becomes harder to maintain legal links with their country of origin, and thus the risk of statelessness rises. Children born in exile can also be at risk of statelessness, for instance when their parents are unable to register their birth or due to conflicts of nationality laws between the host country and the country of origin.

The nexus between statelessness and displacement was explored in a joint scoping paper by NRC and Tilburg University published in

2015.¹ The paper looks at the ways stateless communities are often at risk of forced displacement, as well as how forced displacement itself can increase the risk of statelessness. The report also examines how statelessness increases vulnerability in forced displacement contexts, and the extent to which this poses additional challenges for individuals who may already be in precarious situations. The paper calls on the humanitarian community to understand the potential for statelessness among displaced populations and to be able to identify and assist those most at risk. At a minimum, measures to prevent new cases of statelessness should be incorporated into humanitarian responses. The humanitarian community should also make efforts to identify stateless persons in displacement, enhance their protection and assist them to find lasting solutions.

4. NRC's work on statelessness

The Norwegian Refugee Council (NRC) is an independent, humanitarian, non-governmental organisation, which provides assistance, protection, and contributes to durable solutions for refugees and internally displaced people worldwide. NRC runs Information, Counselling and Legal Assistance (ICLA) programmes which aim at assisting displaced persons to claim their rights through the provision of information and legal support. NRC ICLA programmes are currently being implemented in 20 conflict-affected countries worldwide.²

ICLA programmes include a focus on legal identity³, which involves promoting the right for all to be recognised before the law, the right to universal birth registration, and the right to a nationality. It also involves initiatives to prevent statelessness among those forcibly displaced. NRC works to prevent statelessness by supporting refugees and internally displaced persons (IDPs) to access civil registration procedures, civil documentation (such as

¹ See <https://www.nrc.no/news/2015/may/fleeing-your-home-living-stateless/>

² NRC currently has ICLA programmes in the following countries: Central African Republic, Democratic Republic of Congo, Kenya, Mali, Nigeria, Somalia, South Sudan, Colombia, Panama, Venezuela, Ecuador, Afghanistan, Myanmar, Ukraine, Iran, Iraq, Jordan, Lebanon, Palestine and Syria. For more information see: <https://www.nrc.no/what-we-do/activities-in-the-field/icla/>.

³ See NRC, *Programme Policy* (2012) pp. 16-17, available at <https://www.nrc.no/globalassets/pdf/policy-documents/nrc-programme-policy---english.pdf>

birth, marriage or death certificates), as well as national identity documents.

In practice, this means that NRC provides information on rights, procedures and remedies and legal counselling for displaced persons seeking to register a vital event such as a birth or a marriage. NRC's legal staff may also accompany people in visits to administrative authorities or represent them in court in order to get the documents they need. It also assists authorities to understand and fulfil their obligations towards those affected by displacement through the provision of training to local authorities and other stakeholders on the relevant laws, rights and obligations in relation to civil registration and documentation in the country or area where the displaced live.

Since legal identity and access to civil documentation may also be required to access other humanitarian assistance, ICLA staff work together with NRC's education programmes to assist children to access the documentation necessary to enrol in school or to take exams. ICLA also works with Shelter and Camp Management programmes on security of tenure and land registration, for which identity documents may be a pre-requisite.

5. NRC's ICLA work with Syrian refugees in Jordan⁴

There are particular civil documentation challenges relating to children who were born in Syria but whose families fled to Jordan

⁴ The case study is extracted from NRC's report 'Registering Rights: Syrian Refugees and the Documentation of Births, Marriages and Deaths in Jordan' (October 2015), p 16, available at <https://www.nrc.no/resources/reports/registering-rights/>; For further information on NRC's assistance to Syrian refugees in Lebanon, please see the following NRC reports 'Birth Registration Update: The Challenges of Birth Registration in Lebanon for Refugees from Syria' (January 2015) available at <https://www.nrc.no/resources/reports/the-challenges-of-birth-registration-in-lebanon-for-refugees-from-syria/>; 'Update on Birth Administration for Refugees from Syria' (January 2014) available at <https://www.nrc.no/resources/reports/update-on-birth-registration-for-refugees-from-syria/>; 'Update on Marriage Registration for Refugees from Syria' (July 2016), available at <https://www.nrc.no/resources/reports/update-on-marriage-registration-for-refugees-from-syria-july-2016/>; and 'Update on Marriage Registration for Refugees from Syria' (June 2014) available at <https://www.nrc.no/resources/reports/update-on-marriage-registration-for-refugees-from-syria/>.

before registering their births. Families cannot obtain birth certificates from Jordanian authorities for children born in Syria; their only legal recourse in Jordan is to attempt to register the child's birth at the Syrian Embassy in Amman. Because visiting the Syrian embassy is not a viable option for many Syrian refugees, some families have used alternative ways to register births, such as through relatives who are still in Syria.

Several families NRC works with in Jordan have an unregistered child born in Syria. One father described how his wife gave birth to their son in Homs' main hospital in 2013 as it was being bombed. The family fled the hospital immediately after the birth without receiving a birth notification. The husband said that it would have been too dangerous for him to go the Syrian Civil Status Department to register the child. After the family arrived in Jordan, the mother attempted to register their son at the Jordanian Civil Status Department, but officials accused her of trying to commit fraud and threatened to arrest her. The child, who has asthma, cannot access subsidised public healthcare in Jordan and the parents have resorted to taking him to a pharmacy for medical care. The family has attempted to locate the Syrian doctor who delivered the child to obtain the birth notification, but they do not know where he is or whether he is alive. In another case, a couple received a birth notification from the midwife who delivered their child at home, but left the notification in Syria after their house was bombed. The child's grandfather observed, "In this situation, you're not able to think about bringing a birth notification – you just run."

NRC assists Syrian refugees in Jordan by providing information on the importance of birth registration and on the steps that parents need to take to be able to register a new birth. NRC also supports refugees to acquire other documents such as Ministry of Interior cards, for legal stay in Jordan, and marriage certificates, both pre-requisites for parents to be able to register their new-born child in Jordan.

6. NRC's ICLA work in Myanmar⁵

NRC's Myanmar programme was established in 2008 with the aim

⁵ See full article at: <https://www.nrc.no/news/2016/july/providing-legal-aid-to-vulnerable-communities/>

of assisting the most vulnerable conflict-affected displaced in the Southeast of Myanmar and in Thailand. Known as the “longest running civil war,” internal conflicts led by ethnic groups struggling for power have afflicted Myanmar since the country’s independence in 1948. Hundreds of thousands have been displaced and, despite elections in 2015 ushering in a new era of democratic reforms, there continues to be open armed conflict in Rakhine, Kachin and Northern Shan. In the Southeast of the country, most ethnic armed organisations signed the November 2015 nationwide ceasefire agreement, however more than a hundred thousand refugees remain in Thailand and carefully monitor security and political developments in their country of origin.

In Myanmar the lack of proper identification documents is a problem that affects more than 10 million people. According to the 2014 Union of Myanmar official census, more than 19,000 people in Kayah State (Southeast Myanmar) lacked such documents, the majority in rural areas. The actual number is estimated to be higher, as those living in areas controlled by non-state actors and ethnic armed organisations did not participate in the census. Basic identification papers are often taken for granted, but these documents regulate access to services such as education, social welfare and land registration. They also allow individuals to engage in public life and partake in decision-making. Consequently, those who lack identity documents can be at an increased risk of violence, particularly those in already volatile situations such as women passing through check points or border crossings. In addition, legal identity documents are essential for achieving lasting solutions for returning refugees and displaced persons.

Faced with these challenges, and in cooperation with authorities, NRC has since 2012 helped facilitate the issuing of ID cards, through mobile One Stop Service (OSS) centres in South East Myanmar. Through this initiative, NRC visits hard to reach rural areas to assist the government in providing identification documents, and to offer information and counselling services on the rights of the ID card holders. The project targets conflict affected communities, prioritising the displaced and paying increasing attention to the needs of persons at risk of statelessness. NRC is currently strengthening its advocacy component in order to promote law and policy reforms to the current framework, based on the discriminatory 1982 Citizenship Law, where ethnicity is the primary criteria for acquiring citizenship and different categories

of citizenship lead to unreasonable differences in rights protection (naturalised citizens cannot access higher education in equal terms or stand for political office) which affects displaced persons and refugees. Indeed, a portion of the refugees currently in Thailand do not belong to the recognised 135 ethnic groups and thus would face the risk of discrimination upon return. As a first step, NRC is advocating with the government removing references to ethnicity and religion from ID Cards. In all, since 2012, more than 431,708 beneficiaries have received ID cards as a result of NRC's One Stop Services.

Case study: Daw Ri Sue

Daw Ri Sue is a 56 year old farmer who lives in a conflict affected area in Myanmar, where there has been ongoing displacement for decades. Only two of her nine children are enrolled in school. She wanted to get a valid identity document (ID) so that her younger children could register in school. However, despite having travelled to another town to make an application with the relevant authorities, she was unsuccessful because she did not understand the procedure sufficiently well to bring all the necessary documents. Transportation costs mean that obtaining documentation can be even more challenging for those living in remote areas. Daw Ri Sue then attended an NRC One Stop Service centre in Hoya village, about one hour by foot from her village "Upon arrival, I attended an information session and on the same day, I was able to get an ID card, free of charge", she says. Recently, two of her children have also managed to obtain national identity documents. Daw Ri Sue stresses the importance of having these documents to access basic rights, and will urge the rest of her children to apply.

Syria's displacement crisis, statelessness and children

*Zahra Albarazi**

1. Introduction

Civil war broke out in Syria in 2011 which has led to a humanitarian disaster of immense proportions, both inside Syria and beyond. With the crisis came mass displacement, internally and across international borders. As many as 4.8 million refugees are registered in neighbouring countries and over a million have travelled to Europe. Over 300,000 children have been born to Syrian refugee parents in exile since the start of the conflict.



As a response to this and the increasing awareness as to what this mass displacement may be doing in terms of increasing statelessness, in 2016, a research project was carried out, leading to the report entitled *Understanding Statelessness in the Syria Refugee Context*.¹ This project was a collaboration between the Institute on Statelessness and Inclusion, as statelessness experts, and the Norwegian Refugee Council

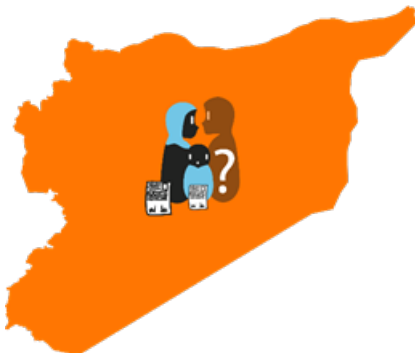
* Zahra Albarazi is a co-founder and senior researcher at the Institute on Statelessness and Inclusion. She holds an LLM in International Law from the University of Leeds, UK and is enrolled as a PhD researcher at Tilburg Law School. Her work has mostly focused on the understanding of statelessness and nationality in the Middle East and Africa region and the interlink between discrimination and statelessness. During 2016, Zahra conducted desk-based and field research to better understand the interaction between statelessness and displacement prompted by the conflict in Syria, for a joint project of the Institute and the Norwegian Refugee Council. This short essay draws from the findings of and tools developed under this project.

¹ See <http://www.syrianationality.org/pdf/report.pdf>.

as displacement experts. Through field research in Jordan, Kurdistan Region of Iraq and Lebanon, and desk research in Egypt and Turkey, the report analysed some of the most significant problems that face displaced persons from Syria in putting them at risk of statelessness, as well as pinpointed some of the obstacles that stateless refugees may face.

The research showed, not surprisingly, that children face the most significant threat of statelessness in the Syrian displacement crisis context. This short essay highlights only some of the issues that children and new-borns in the Syrian displacement crisis are facing with regards to risks of statelessness.²

2. Syria's laws and procedures



There are several issues – including flawed legislation and practice – emerging inside Syria that are contributing to the risk of statelessness among children. These include:

Nationality law: Firstly and most importantly, Syria's nationality law is

predominantly based on paternal *jus sanguinis*, which means that a child will become Syrian only if they have a Syrian father. Birth to a Syrian mother does not automatically confer nationality, and although there are criteria under which a Syrian woman may be able to transmit her nationality – such as when the father is unknown – this is rarely implemented. If born abroad, a child will only be Syrian if his or her father is Syrian. In the situation of displacement, there are many circumstances in which it cannot be established who the father is – such as where there is no marriage registration or if the father is unknown, dead or missing. Therefore discrimination in Syrian nationality law heightens the risk of statelessness among children in this displacement.

² Full details and information sources are available in the research report.

Customary practices: There are customary practices that take place in Syria that have become problematic in the displacement context. One, for example, is the practise of couples marrying according to Islamic tradition and delaying the registration of their marriage with the state authorities until necessary. In Syria, this was not a problematic practise. However, in neighbouring countries there are strict regulations that marriages should be registered immediately or penalties will apply. Therefore, when refugees in neighbouring countries are not aware of this and continue the practise they are used to, they may face problems in getting their marriage recognized. In these same countries, where a marriage certificate is a pre-requirement to registering births, this can make access birth registration and establishment of nationality for new born children difficult.

Hereditary statelessness: Childhood statelessness is not a new phenomenon in Syria. The country already hosted a significant stateless population, which included for example hundreds of thousands of stateless Kurds. When a child is born to a stateless father in Syria, they themselves will be stateless. Therefore, there are many stateless children who have now also become refugees, as well as stateless refugees who are passing on this status to children born in exile.

3. Obstacles to birth registration

When the only route to a Syrian nationality for a child born in exile is through having a Syrian father, registering the birth of your child – which will contain details of who the father is - may be essential to establishing that nationality. However, the conflict has created several obstacles to accessing birth registration:

Birth Registration in Syria: Due to the conflict, there are many children who have been born in Syria in the last five years who have not been able to get their birth registered. This may be for several reasons, including because they live in an area of active conflict making access the authorities hazardous, because the local civil registry has been destroyed, or because they live outside regime controlled areas and there is yet to be a system of birth registration, or the system administered by non-state actors is seen as not legitimate. A particular difficulty when an unregistered child becomes a refugee is that they may then never be able to have their birth registered in Syria, and the refugee-hosting country is not responsible for registering a birth that did not take place on its soil.

Birth Registration in neighbouring host countries: For children who are born in neighbouring countries, there are other obstacles that may be preventing them from having their birth registered. With civil registration systems that differ significantly throughout the region, the parent(s) may not be aware of what the registration process is. This is especially true as the procedure may be particularly complex, sometimes comprising as many as five separate steps. More problematically, a whole array of documents may be required to be able to access the civil registration process. Even when they are aware of the process, refugees may not even be able to access it due to the type of documents that are demanded, which can include for example marriage certificates, ID cards, legal residency documents, etc. Many refugee children are therefore left unregistered. Statistics vary, but, for example all statistics in Lebanon show that more than three quarters of refugee children do not fulfil the birth registration system.

4. Children at heightened risk of statelessness

Due to the vulnerabilities that the crisis has put families in, there are certain families where children are at heightened risk of statelessness because of their displacement:

Female-headed households: UNHCR statistics have stated that a quarter of refugee households are now female headed, where the husband and father is no longer present. If the mother had been pregnant, there may be some of these families who have no legal proof as to who the father was. If there is no legal proof to a marriage and the father is not physically present, this will put serious strain on showing that a child has links to Syria and thereby Syrian nationality.



Children born within early/child marriages: Unfortunately one of the consequences of the crisis is that there has been a sharp rise in the number of Syrian girls who are married before the minimum age – often a coping mechanism adopted by refugee families for a variety of reasons. In many of the neighbouring countries that host significant numbers of refugees, early marriage is prohibited and there may be punitive consequences. Therefore, these marriages are often never registered and remain under the radar. A girl who has a child within an early marriage, will very often not be able to register that child's birth, and there will be no formal recognition as to who the father is.

5. A toolkit for strengthening engagement

To complement and “activate” the knowledge compiled in the research report, an online toolkit was developed. It includes a collection of information and resources that aim to help practitioners in the field to easily find answers to questions about statelessness in the Syria refugee context. It provides easy-to-digest material about relevant concepts, laws and procedures, using infographics to help visualise complex processes, such as this 5-step birth registration procedure in Lebanon:



Wherever possible, the toolkit emphasises practical steps that can be taken to mitigate risks. It is designed to be of use to humanitarian staff who engage in a regular basis with refugees facing challenges to access civil registration and other important procedures for preventing statelessness and alleviating the plight of statelessness refugees. The information and resources offered can also be useful to a wide range of other actors, including government officials responsible for improving civil registration systems, UN staff working on programmes and policies or front-line humanitarian actors providing various forms of direct assistance to refugees. The toolkit is relevant both to practitioners working in the region and to those working with Syrian refugees around the world.

The toolkit can be found at **www.syrianationality.org**. It includes a Resource Library, which contains a selection of project videos and downloads, as well as links to related reading material online.

Stateless refugee children of Syria - *interviews**

Hamid and Hemrin

Stateless refugee siblings from Syria, living in Iraq.

Hamid Mirza Kurd is six years old and his little sister Hemrin is four. They are from Syria, but were displaced by the conflict and now live in the Domiz Camp in the Kurdistan Region of Iraq. They are both stateless because their father is stateless, despite their mother being a Syrian citizen. Hamid and Sima's parents share their family's experience of statelessness:

"We have found ourselves lost, and don't want our children to be lost too"

After our eldest child was born in 2010, we tried to register him and at this stage realized it would not be possible. We had expected that at least we would have been able to register him under his mother's name, but Syrian law does not allow this. We attempted to register him about a hundred times, and resorted to the services of a lawyer to do so and were willing to pay money to get him nationality.

Back in Syria, we had difficulties when visiting the doctors for our elder child. The impact of my own statelessness meant that we registered everything under my wife's name. In Syria, however, inheritance is through the father, so this meant that our children would not be legally permitted to inherit our property. Here in the Kurdistan Region-Iraq, our children should be treated like all other Syrian refugee children (including those with Syrian nationality).

Our biggest concern is that our children will face the same challenges my husband and I have had to deal with. We have found ourselves lost,

* Interviews conducted by Thomas McGee in 2016. Thomas McGee is a researcher and humanitarian practitioner specialising in the Middle East. Speaking Arabic and Kurdish, he has conducted extensive field research with Syrian/Kurdish communities since 2009. Thomas graduated from Cambridge University and holds MA in Kurdish Studies from Exeter, writing his thesis on stateless identity for Syria's Kurds. He has published on Kurdish statelessness in Tilburg Law Review and contributed to the MENA Nationality and Statelessness Research Project. The names has been changed to protect the interviewees' identity.

and don't want our children to be lost too. We want them to have the opportunity to study and work freely. We want them to be recognized and have a nice life.

If we are unable to give them Syrian nationality, we should have found a way to ensure they will receive another nationality as this problem will affect them for the entirety of their lives if not solved. Many other parents have taken their families to Europe in order to try and provide their children with a hopeful future.

Our message is to other parents. I ask mothers to imagine how it feels to know that the child they gave birth to is not registered in their name. Imagine that you always have a sense of insecurity, that somebody could challenge you and take the child away. You try to do everything for your children, and yet somehow you know you are not able to give them everything that other children have. This feels horrible.

Falak

A stateless refugee from Qamishli, Syria, now living in Germany.

"I would love to travel to Syria but I cannot because I do not have residency or any documents proving that we are Syrian"

Falak is 11 years old and is stateless. Her father does not have a nationality, he was born a stateless *Maktoum* ("unregistered") Kurd in Syria. According to Syrian law, children inherit their father's nationality status. So, even though

Falak's mother is a Syrian national, Falak is stateless like her father. So are her two siblings: 12-year old Sherin and 2 year old San.

Falak:

I started school 4 months ago here in Germany. I like my teachers, and their style of teaching and maths... I hate the language difficulties since German is new for me. Acting has been my hobby since I was small. I want to be an actor when I grow up. In 10 years I feel I will be at university and will have achieved some of my ambitions.

I do not miss my home country because I don't feel that I belong to it and I don't remember a lot about it because we moved away (to Iraqi Kurdistan) when I was still quite young. Yes, I used to suffer from the

different treatment I received with respect to my classmates in a private school when they would go on school trips or summer camp and I was not permitted to attend since I was not a citizen and was not entitled to participate in these extra-curriculum activities. Also, the school did not give me my certificates at the end of the year. I would love to travel to Syria but I cannot because I do not have residency or any documents proving that we are Syrian.

Falak's father:

I too was born stateless. It has had catastrophic effects on the psychological health of all of us because we suffered academically, socially and politically. When my daughters started school in Syria I had to get approval from the security services and from the authorities of Hassaka governorate in order for them to enter First Grade. This led to delays of more than a month of missed school. My children love studying and I too was one of the top students nationally. This was the start of the problems for them.

I fear the unknown. Our biggest worry is that our children will be treated unfairly in Europe since we do not possess anything indicating our presence here. My regret is that my children are suffering the same fate as I did.

My regret is that my children are suffering the same fate as I did. The most special thing about my children is their love for life and their constant optimism.

The long-overlooked mystery of refugee children's nationality

*Gábor Gyulai**

1. Introduction

Statelessness and forced migration have a dual relationship, with one both a cause but also a consequence of the other.¹ The potential exposure of refugee children to statelessness is particularly deserving of more attention. Children born to migrant parents can usually be registered with the consular authorities of the parents' country of nationality, and thus – if the *jus sanguinis* rule applies – can both acquire the parents' nationality and a documentary proof thereof. At the same time, refugees and other forced migrants cannot,—as a general rule,—approach the authorities of their country of origin. This would put them at risk of continued persecution, and could even cost them their refugee status, as host countries often see such an act as a proof of an unfounded protection claim. As a consequence, in the absence of a general *jus soli* provision in the host country (therefore nearly everywhere outside of the Americas) refugee children's nationality remains uncertain.

If the law of the country of origin explicitly requires children born to nationals abroad to register with state authorities in order to establish the nationality bond, the situation is clear: since such registration is impossible, the children concerned will not acquire their parents' nationality and will therefore fall under the scope of the

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¹ See also *Migration, forced displacement, and childhood statelessness* by Jyothi Kanics in this Chapter.

legal safeguards for 'otherwise stateless' children (if such safeguards exist in the host country's domestic law) or will become stateless (if the necessary safeguards do not exist or are not applied properly). Similar is the situation of children born to stateless refugee parents, or to a mother who cannot pass on her nationality to her children due to gender discrimination and a stateless or unknown father.²

At the same time, most refugee children fall under a different category. Children born in exile to an Iraqi parent, or a Syrian, Somali or Sudanese father acquire *ipso facto* the parent's/father's nationality. Under the law of these (and many other) important countries of origin, this is a matter of legal automatism that does not require registration or contact with consular authorities. While at first sight the legal situation may seem clear, in reality it poses a number of serious legal dilemmas and practical difficulties, which will be explored below.

2. Four key challenges

Most refugee children will not be able to obtain any proof or official recognition of their automatically acquired nationality for some time, at least. This is the first challenge. If there is a realistic prospect of voluntary return in the near future, this may be a bearable burden, as the child's nationality can be registered already in the country of origin before she/he reaches school age, for instance. But especially in protracted refugee situations this circumstance may result in the child's nationality being reduced to a mere legal fiction, which has little in common with how the International Court of Justice defined nationality ("a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties").³ Can we talk about social attachment or a genuine connection of existence with reciprocal rights in the case of a 12-year-old Somali refugee child living in Europe, who has never been to Somalia, and has neither a chance to be registered as a Somali national by the competent Somali authority, nor a realistic prospective to ever return there to live? This is doubtful.

A second challenge relates to the definition of a stateless person in

² Like in the case of Syria, Lebanon, Somalia or Iran.

³ *Nottebohm case (Liechtenstein v. Guatemala)* (1955) ICJ.

international law, which reads: “a person who is not considered as a national by any State under the operation of its law”.⁴ There are two words in this definition — ‘consider’ and ‘operation’ — which indicate that in order to avoid statelessness, the state in question must take an active approach vis-à-vis the person concerned. ‘Consider’ is a transitive verb here, referring to an action through which a state attributes a certain quality to a person. Also, the UNHCR clearly states in its relevant guidance that “Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State *applies* its nationality laws *in an individual’s case in practice*”.⁵ Can a state ‘consider’ a person in a certain manner, can it apply its law in practice in a way that is adapted to the individual circumstances of the person, if it is not aware of this person’s existence? This points towards some discrepancy between the traditional law-in-the-books approach towards nationality and the more ‘practice and protection’ oriented interpretation of the 1954 Statelessness Convention and UNHCR guidance. There are at least considerable grounds for the positive application of the latter two in case of refugee children who have no realistic chance to be registered with their country of origin in the long term prospect, but further development in doctrine, jurisprudence and literature seems indispensable to properly clarify this issue, such as by creating concrete benchmarks and indicators. For instance, specific guarantees should be in place for refugee children whose nationality could not be clearly established and registered by a certain age.

The third challenge is the fact that the link between birth registration and the determination of a new-born child’s nationality may also increase confusion. In some states (like Romania or Italy), state authorities automatically attribute the parents’ nationality—(or the nationality indicated by the parents)—to the baby on birth certificates. As the birth certificate often serves as a key source of data for other official documents issued later, this practice may give the false impression that the nationality status of the refugee child is properly determined and that statelessness was effectively avoided. In other countries (like Hungary), children of foreign nationals are automatically registered as having an unknown nationality until such time as they can provide

⁴ 1954 Convention relating to the Status of Stateless Persons, Article 1 (1).

⁵ UNHCR, *Handbook on Protection of Stateless Persons* (2014), Para. 23, available at <http://www.refworld.org/docid/53b676aa4.html>

proof of acquisition of a nationality. In some instances, this may be the correct conclusion at the time of the birth, but it can easily become a source of hardship, legal limbo and human rights violations if it persists for several years.⁶ Yet in other states (like France, the United Kingdom or the Czech Republic) no information concerning nationality is entered on the birth certificate. What often lacks, under the various scenarios, is the proper and timely determination of the child's *real* nationality, which also allows for a conclusion of statelessness,—and thus the application of the safeguards applicable for “otherwise stateless” children,—if the conditions are met.

Finally, the fourth challenge concerning ensuring refugee children's right to nationality is the application of the best interest of the child principle in connection with all children's right to acquire a nationality, as foreseen by the UN Convention on the Rights of the Child.⁷ The avoidance of statelessness—as a matter of principle—is always in the child's best interest. But in case the refugee child's nationality is unclear (see the previous dilemmas and examples), her/his best interest would be served in the acquisition of *which* nationality? Should a host state pursue the widest possible application of the legal safeguards applicable to ‘otherwise stateless’ children and thus integrate as many refugee children as possible into its own community of nationals? Or should refugee children primarily be encouraged and helped to obtain a documentary proof of having inherited their parents' nationality (where this happens *ipso facto*)? This is a complex dilemma, for which solutions will largely depend on the individual circumstances of each case. The dilemma gets even more complex if the country of origin does not allow for multiple nationality, which means that obtaining the host country's nationality after birth will exclude the child from regulating and registering her/his nationality status with the country of origin at a later time in life. UNHCR guidance also advises against the mere automatic grant of the host country's nationality in such cases and suggest that “refugee children and their parents be given the possibility to decide for themselves, whether or not these children acquire the nationality of the State of birth, taking

⁶ The UNHCR suggests that no child should live with an undetermined nationality for more than five years – 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* (2012), Para. 22, available at <http://www.refworld.org/docid/50d460c72.html>

⁷ 1989 Convention on the Rights of the Child, Articles 3 and 7.

into account any plans they may have for future durable solutions (e.g. voluntary repatriation to the State of origin).”⁸

3. Some ways forward

These few ideas already indicate the complexity of the issue and the numerous gaps in knowledge, awareness and doctrine. Millions of refugee children may be affected by problems and human rights violations emanating from an improper determination of their nationality, and—consequently—the insufficient application of legal safeguards aiming at the avoidance of statelessness, with due consideration to the child’s best interest. In order to remedy this situation, the following steps should be taken, as a starting point:

1. We know very little about the actual practices related to refugee children’s nationality, as hardly any focused research has been carried out on this topic. States, the UNHCR, civil society and academia should make efforts to obtain first-hand information about how, when and by whom refugee children’s nationality is determined; how and where this nationality is registered; whether there are any later reviews of the ‘validity’ of this nationality status; whether categories such as unknown nationality are unduly overused; how all these issues affect refugee children’s human rights; and whether (and how) their best interest is properly considered. Such mapping exercises will no doubt discover a variety of state practices with serious gaps, but it may also bring to the light exemplary state practices that can be promoted elsewhere.
2. An international expert meeting could be convened to discuss the above-presented dilemmas could be discussed, and recommendations could be formulated. This could be initiated by UNHCR, as with earlier expert meetings to explore areas of international statelessness law, perhaps in collaboration with relevant civil society actors and networks, and drawing in governmental, academic and other expertise. The expert

⁸ UNHCR suggests that no child should live with an undetermined nationality for more than five years – 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* (2012), Para. 28, available at <http://www.refworld.org/docid/50d460c72.html>

conclusions of the meeting should provide standard guidance to states as to when, how and by whom refugee children's nationality should be determined to respect, to the most extent, these children's best interest. The guidance should contain recommendations about the scenario to follow in cases where refugee children's *ipso facto* inherited nationality seems no more than a legal fiction, including concrete benchmarks and indicators concerning the applicability of 'otherwise stateless' safeguards and the consideration of the children's and the parents' will. The expert meeting should also address the dilemmas related to the often confusing link between birth registration (birth certificates) and nationality determination, in order to promote a more harmonised and more correct legal approach.

3. Based on the expert conclusions, international organisations with a relevant mandate, such as the UNHCR, the UN Committee on the Rights of the Child or the Council of Europe, should adopt recommendations to states and encourage them to implement these rules and follow previously identified good practices.
4. Finally, states should put standard mechanisms in place that ensure that all refugee children's real nationality is properly determined in a timely manner after birth. States should appoint an authority responsible for this process, which has both a clear mandate and the necessary knowledge and means. The mechanism should in all cases avoid that refugee children are registered under a false (wrongly attributed) nationality or that they are registered as having an unknown or undetermined nationality for more than the necessary minimum time. The authority in charge should be trained to recognise where a refugee child's *ipso facto* inherited nationality can be considered as, or after certain time turns out to be a mere legal fiction, allowing for the application of the 'otherwise stateless' safeguards in international law, considering the best interest of the child, and following international guidance.

With international forced displacement reaching unprecedented levels and especially the ever-worsening crisis in the Middle East, hundreds of thousands of refugee babies are at risk of never acquiring a real nationality. There has never been a more important time to take action.

The open sky or a brick-and-mortar School? Statelessness, education and nomadic children

*Heather Alexander**

1. Introduction

In May 2016, the Indian newspaper Business Standard carried an article on the education of nomadic children in India. Lamenting the difficulties in providing a formal education to the children of “denotified, nomadic and semi- nomadic tribes”, the employee of a local NGO said; “the itinerant lifestyle isn’t suited for sending children to school...”

¹ Nomadic children in India used to grow up immersed in the skills of nomadism: snake charming, juggling, ayurvedic healing, herding, hunting, storytelling and crafts.² Today, nomadism is dying out, yet the children of ‘denotified tribes’ often cannot attend government schools to learn the skills they need to survive in a settled, urban environment because they lack birth certificates. As a result, many nomadic children in India find themselves without an education of any kind.

Nomads face a long history of discrimination in India. Previously labelled as “criminal tribes” by the government, today nomads have been ‘denotified’ as criminals, but often lack identification documents

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¹ Geetanjali Krishna, ‘A Voice for Nomads’ Business Standard (21 May 2016) at <http://www.business-standard.com/article/beyond-business/a-voice-for-nomads-1160520014221.html> accessed 7 June 2016.

² Nomadic tribes in India have often been the subject of fascination for non-nomads, though today all forms of nomadism in India, which include peripatetic nomadism, pastoralism and hunting, are under threat. See for example John Lancaster, “India’s Nomads” February 2010 at <http://ngm.nationalgeographic.com/2010/02/nomads/lancaster-text>.

and cannot access their rights, including the right to an education. In many cases, this lack of documentation stretches back over multiple generations to before colonial independence. Many nomads and former nomads are ineligible for Caste Certificates which would enable them to access many forms of government assistance. Many lack any identity documents at all, including birth certificates. As a result, many children of 'denotified tribes' are unable to register for school.³

Their plight is similar to that of nomad children all over the world, who find nomadism increasingly unsustainable as a way of life, but are shut out of formal, government education. This is often because they are shut out of formal systems more generally, excluded from population registration exercises, left without documentation of their identity or proof of their nationality and even exposed to multi-generational statelessness. While the extent of statelessness among nomadic peoples is unknown, UNHCR has highlighted the link between nomadism and statelessness in its Global Action Plan.⁴ In my research, I have found evidence that many nomadic groups are either stateless or at risk of statelessness. This essay offers some reflections based on this work into the relationship between statelessness and education among nomadic communities.

2. Statelessness, assimilation, and education

All over the world, stateless children are unable to attend school because lack of documents prevents them from enrolling, but for nomad children, statelessness violates their right to an education in

³ Ashraya Initiative for Children, Denotified Tribes, 2016 at <http://www.ashrayainitiative.org/what-we-do/context/denotified-tribes/>. The Hindu, "PIL seeks birth certificates for kids of nomads" 9 December 2015 at <http://www.thehindu.com/news/cities/Madurai/pil-seeks-birth-certificates-for-kids-of-nomads/article7963699.ece>. See also William Conklin "Statelessness: The Enigma of the International Community" (Bloomsbury 2014) 122. More research is needed on the status of their denotified tribes in India.

⁴ UNHCR, 'Global Action Plan to End Statelessness 2014-2024' Division of International Protection 2014 18. In 2010, UNHCR noted that nomads are at "high risk" of statelessness, though more research is needed. UNHCR, 'Action to Address Statelessness: A Strategy Note' (March 2010) 11, para 35 at <http://www.unhcr.org/protection/statelessness/4b960ae99/unhcr-action-address-statelessness-strategy-note.html> accessed 7 June 2016.

other ways.⁵ Without a nationality, nomads lack the ability to advocate for any say over the content and manner of their children's education. In India, many nomadic livelihoods such as hunting, snake charming and street acrobatics are outlawed, meaning that it is illegal for nomad parents to both practice their traditional lifestyles and teach them to their children. Other nomadic livelihoods in India, like herding, are curtailed by grazing restrictions, fines, the introduction of agriculture and even, in some cases, the creation of national parks.⁶ Without a nationality, nomads cannot easily advocate for the decriminalisation and support of their livelihoods or for programs to assist them to pass nomadic skills on to their children.

Not only are nomadic families often unable to pass on nomadic skills to their children, governments often use formal schooling to assimilate nomad children, rather than support their right to culturally appropriate education. Even when states allow nomad children to attend school, statelessness prevents nomad communities from advocating, for example, for the inclusion of nomad languages, skills and culture in the curriculum.⁷ Even the very location and structure of many schools often means that nomad children must be settled to attend school.⁸ Without a nationality, nomad families have little say over the content or quality of the education of their children.

The right to an education is more than simply the right to attend school. Under international human rights law, nomadic children have the right not only to attend school, but to learn nomadic skills and history in

⁵ On the issue of statelessness and school registration more generally, see the European Network on Statelessness, "No Child Should Be Stateless" 2015 at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf.

⁶ See for example Nehal A. Farooquee, "Pastoral nomads in the Indian Himalaya" 1998 Cultural Survival at <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/changes-pastoralism-indian-himalaya>.

⁷ Sarah Gandee, "India's Persecuted Tribes are Marking an Alternative Independence Day" The Wire, 2016 at <http://thewire.in/63312/tribes-mark-alternative-independence/>. See also M. Subba Rao, "Education of Nomad's Children in India" National Campaign for Denotified and Nomadic Tribes Human Rights at <https://www.academia.edu/15512101/EducationofNomadsChildreninIndia>

⁸ International Working Group for Indigenous Affairs, "Indigenous Peoples and Education" at <http://www.iwgia.org/culture-and-identity/indigenous-peoples-and-education>

their traditional languages. Nomadism itself is, arguably, a “traditional economic activity” protected under human rights law. Article 14 of the United Nations Declaration on the Rights of Indigenous Peoples states that indigenous peoples, including indigenous nomads, have the right to “control their educational systems and institutions...in a manner appropriate to their cultural methods of teaching and learning.”⁹ Under Article 20, they have the right to “engage freely in all their traditional and other economic activities.”¹⁰ The right to culturally appropriate education and the right to practice traditional economic activities are linked. Control over schooling is vital for nomads because, as the International Working Group for Indigenous Affairs puts it, “(s)chool terms and daily schedules do not take into consideration indigenous peoples’ livelihood, for example, pastoralism and nomadism.”¹¹ Indigenous rights place a duty on states to conform education policy to fit nomadism, and not the other way around.

But how are nomadic children and parents to exercise their educational and economic rights, including the right to learn nomadism, if they are stateless? The right to a nationality is vital because it provides nomads with the tools to promote nomadism and nomadic-friendly education. Not only is nationality a prerequisite in many countries for nomad children to register and attend school, it is vital for nomad parents to advocate on the content and manner of schooling by, for example, giving nomad families the power to vote, advocate with the government and, when necessary, sue in court. In Sweden, for example, the Sami people, long recognised as Swedish nationals, have their own Parliament which has pushed for the official recognition of the Sami language and a parallel system of schools.¹² The Sami were able to take their issues with Swedish education to the Council of Europe,

⁹ United Nations Declaration on the Rights of Indigenous Peoples, Article 14. While some nomads are not indigenous, it is frequently argued that the framework of indigenous rights, as well as minority rights such as highlighted by the Framework Convention on the Protection of National Minorities, should be extended to all nomads to the extent possible. See for example Jeremie Gilbert, “Nomadic Territories: A Human Rights Approach to Nomadic Peoples’ Land Rights” 7 Human Rights L. R. 681, 714 (2007).

¹⁰ Declaration, article 20.

¹¹ International Working Group for Indigenous Affairs, ‘Indigenous Peoples and Education’ at <http://www.iwgia.org/culture-and-identity/indigenous-peoples-and-education>.

¹² Sami Parliament at <https://www.sametinget.se/english>.

pushing for better legislation.¹³ For nomads, statelessness does more than simply violate the individual right of children to an education, it also prevents nomads from advocating for culturally appropriate schooling, for the ability to pass on vital skills, and for government support of their way of life more generally. Keeping nomadism alive in countries like Sweden requires constant citizen activism in the face of government hostility, activism that can only be undertaken by Swedish nationals with full access to their rights.¹⁴

As Mark Manly and Laura van Waas have put it, statelessness impacts “the integrity of the modern nation-state system”,¹⁵ but it is also a product of that system and its assumptions and biases. Governments have usually been more occupied with the elimination of nomadism than with the enfranchisement and protection of nomads. This has been particularly true when it came to the ‘education’ of nomad children. In many countries, governments took nomadic children away from their parents and sent them to majority schools in order to promote settlement and assimilation. Statelessness, forced and coercive schooling, and the elimination of nomadism often went hand in hand, a legacy that has not been forgotten by many nomads.

3. Nomads, registration and ‘education’: a fraught history

In the past, the ‘right to an education’ for many nomad children meant being forcibly placed in schools and being kept from traditional activities like hunting. The trope of the illiterate beggar child justified the forced schooling of nomads in many countries, meaning that a generation grew up without any knowledge of nomadism. In Ireland in the 1970s, the “poverty and illiteracy” of traveller children was labelled a national disgrace and travellers were registered by the government, placed in

¹³ Dominik Zimmermann, “Better Protection of National Minorities and Minority Languages in Sweden?” *International Law Observer* February 2010 at <http://www.internationallawobserver.eu/2010/02/16/better-protection-of-national-minorities-and-minority-languages-in-sweden/>

¹⁴ David Crouch “Sweden’s indigenous Sami people win rights battle against state” *The Guardian* 3 February 2016 at <https://www.theguardian.com/world/2016/feb/03/sweden-indigenous-sami-people-win-rights-battle-against-state>

¹⁵ Mark Manly and Laura van Waas, ‘The State of Statelessness Research’ 19 *Tilburg Law Review* 3 (2014) 6.

housing projects and their children were sent to school, in part to be taught to live a settled life.¹⁶ The illiteracy of nomad children was often a driving force behind such programs, which were bitterly resisted by many nomads as unwanted assimilation. In Australia, Aboriginal children were forced to attend settlement schools, giving rise to the "Stolen Generations".¹⁷ Years of forced schooling by the Swedish government devastated Sami culture, a process Sami filmmaker Amanda Kernell calls "the colonization of the mind."¹⁸ Today, many nomads continue to have mixed feelings about government schooling. As a previously nomadic man in China recently explained to the US National Public Radio, "...he moved into town so that his children could get an education. Now, he says he's moving out, in a sense, to continue their education."¹⁹

Today, with the devastation of nomadism as a way of life, many nomad families see settlement and formal education as the only possibility left open to them. As one Moroccan Berber put it, "I'd feel bad about settling in a village, but I'd get over it. I'm more scared of working in this life until I'm old."²⁰ Giving their children access to government schools is often an important factor in a nomadic family's decision to settle. As a Moken father told The Guardian newspaper, "I wanted my

¹⁶ Sharon Bohn Gmelch and George Gmelch, 'Nomads No More' (Natural History 2014) at <http://www.naturalhistorymag.com/features/282779/nomads-no-more>

¹⁷ The Stolen Generations, "Training for half-castes at Moore River" at http://www.stolengenerations.info/index.php?option=com_content&view=article&id=141:training-for-half-castes-at-moore-river&catid=17:chapter-eight&Itemid=124.

¹⁸ Julien Gignac, "Sami Blood addresses the assimilation of indigenous children in Scandinavia" The Globe and Mail 14 September 2016 at <http://www.theglobeandmail.com/arts/awards-and-festivals/tiff/sami-blood-shines-spotlight-on-assimilation-of-indigenous-children-in-scandinavia/article31892290/>

¹⁹ See for example, Anthony Kuhn, 'China's Nomads Have A Foot In Two Very Different Worlds' National Public Radio Morning Edition (14 Oct 2014), <http://www.npr.org/sections/parallels/2014/10/14/356012331/chinas-nomads-are-caught-between-two-worlds>

²⁰ Hazel Southam, "Morocco's last Berbers on their 4,000-year-old annual migration: a tradition that is now under threat" (Independent 20 August 2012) at <http://www.independent.co.uk/news/world/africa/moroccos-last-berbers-on-their-4000-year-old-annual-migration-a-tradition-that-is-now-under-threat-8063327.html>

children to go to school and have options.”²¹ Yet without a nationality, many nomads like the Moken lack the ability to advocate with their governments for culturally appropriate education, which means that sending their children to school often means abandoning nomadism. Even in Thailand, where education is guaranteed for all children, there is only one school where Moken culture is taught, and this school has not been recognised by the government.²² Statelessness prevents Moken communities from advocating with the government for more Moken schools, as well as for official recognition, meaning that Moken families must make a terrible choice between school and their way of life, a violation of the very principle of the right to an education.

4. Conclusion

Nationality is one of the most powerful tools nomads have to protect their way of life. It provides nomads with the power to not only access an education, but influence the content and manner of that education, helping nomads pass their culture and traditions to the next generation both in formal and informal settings. The vital benefits of nationality, including education and schooling, can and should be used to support an education for nomad children that promotes their way of life. Yet in the past, governments have used the education of nomad children as a tool of assimilation. The Sami people struggled for years to keep their traditions alive while their children attended state-run boarding schools designed, in part, to stamp out nomadism.²³ Today, despite immense challenges, the Sami are using their political clout as nationals to reform Sami schooling, transforming it into a tool of cultural preservation. In Mongolia, nomads, local officials and UNICEF have successfully advocated for mobile schools to bring education to

²¹ Kate Hodal, ‘Moken nomads leave behind their ‘sea gypsy’ life for a modern existence’ (Koh Lao, The Guardian, 13 September 2012) at <https://www.theguardian.com/world/2012/sep/13/moken-nomads-leave-sea-gypsy-life> (accessed 8 June 2016).

²² Human Rights Watch, “Stateless at Sea: the Moken of Burma and Thailand” June 2015 at <https://www.hrw.org/report/2015/06/25/stateless-sea/moken-burma-and-thailand>.

²³ Inga (Rebecca Partida), ‘Suffering Through the Education System: The Sami Boarding Schools’ (University of Texas) at <https://www.laits.utexas.edu/sami/dieda/hist/suffer-edu.htm> accessed 7 June 2016.

nomad children, instead of the other way around.²⁴ Yet the historical link between education and assimilation means that many nomads view government schools with suspicion. As Narumon Hinshiranan from Chulalongkorn University in Thailand put it, “I don’t see education as an ‘option’ (for nomads), I see it as integration into Thai society – so that they are essentially cut off from their roots.”²⁵

The education of nomadic children should never be used as a tool of assimilation, as this is a violation of human rights law and the very concept of the right to an education. The best practices demonstrated by Sweden and Mongolia have shown that education can be one of the most powerful tools to protecting and promoting the nomadic way of life, reinforcing and transmitting nomadic culture while also giving nomad children the opportunity to learn other skills if they choose. But culturally appropriate education for nomads will happen only if nomads have a say over curriculum and school policies, a level of empowerment that can only come with nationality. Without a nationality, many nomads will continue to struggle to control their destinies, including the education of their children, in a world where education for nomads is too often not a right, but is at best a handout, and at worse, a Trojan Horse.

²⁴ Andy Brown, ‘Mobile kindergarten for nomadic Mongolian children’ (UNICEF 17 July 2013) at https://www.unicef.org/education/mongolia_69868.html accessed 7 June 2016.

²⁵ Quoted in Hodal, ‘Moken Nomads’.

Preventing statelessness of migrant children

*Alice Sironi and Michela Macchiavello**

1. Introduction: impact of migration on childhood statelessness

Throughout the migration cycle, a number of situations may have an impact on a child's nationality. Some of these situations may give rise to uncertainty about what nationality the child has and, in more extreme cases, may leave him or her stateless. In the various stages of the migration process, the causes of statelessness or risk of statelessness may lie in the law and in its application or in situations of exclusion, invisibility or particular vulnerability in which children may find themselves. In other cases, a child's nationality becomes difficult to prove due to lack of an identity card or other document to certify his or her birth or filiation.

The introductory essay of this chapter already discussed the impact that situations of migration or forced displacement can have on children's access to nationality. This essay re-introduces the challenges by looking at some of the lesser-known factors that can influence a migrant

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child's acquisition and retention of nationality. Thereafter, it discusses how, even in the absence of a specific mandate on statelessness, some of the International Organization for Migration (IOM)'s programmes contribute to preventing situations of statelessness or risk of statelessness for children who have migrated from their country of origin alone or with their parents, as well as for children who are born outside their parents' country of nationality.

2. Causes of statelessness among migrant children

15% of the 244 million people migrating today are aged below 18, translating to a total number of migrant children of around 36.6 million globally.¹ Although most stateless children are not migrants, migration can have the effect of hindering a child's access to a nationality or render it particularly difficult for a child to prove his or her nationality. This can occur due to conflicts of laws, inadequate civil registries or consular services and barriers posed by the status of migrant children or of their parents.² Migrant children then may be left in *limbo* for protracted periods of time, with all the consequences that the lack of a recognised nationality can have on children's access to basic rights. The following paragraphs look at three generally lesser-known situations in which nationality problems can arise for child migrants.

2.1 Unaccompanied children

The number of children sent by their families to look for employment opportunities abroad and travelling alone is significant.³ These

¹ UNDESA, 'International Migration: highlights' (2015), p. 12. It should be noted that this figure only includes foreign-born children; therefore, if children born abroad from migrant parents had also to be included, the percentage would be much higher.

² These contexts are dealt with in detail in *Migration, forced displacement, and childhood statelessness* by Jyothi Kanics in this Chapter.

³ According to UNHCR, 98,400 unaccompanied children lodged an asylum application in 2015 in 78 countries, this figure is the highest since 2006. UNHCR, *Global Trends: Forced displacement in 2015*, June 2016, available at <https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>. According to a joint IOM-UNICEF study they represented 20% of the total of people arriving to Europe in 2015. In 2014, at least 14% of children applying for asylum in Europe were unaccompanied or separated. Since in some countries in Europe, formal registration procedures do not allow for their identification, the number of

children face huge difficulties in proving their nationality, particularly the youngest among them, who may be unable to communicate accurately information pertaining to the identity of their parents or to their place of birth. When a family exists, family tracing can help in establishing nationality and recovering identity documents. The situation is more complex for abandoned children or children who were separated from their family at a young age whose birth may not have been registered. Late registration, which is provided for in the law of many countries, may not be accessible from abroad. In other cases, it can be too cumbersome, financially or for the number of documents that are required as evidence, which may be difficult to retrieve when the child is far from his family. Provisions protecting foundlings from statelessness can help solve their situation. A higher number of States provide nationality to foundlings or to children of unknown parents⁴ compared to the grant of nationality to children, more generally, who would otherwise be stateless. However, for an unaccompanied child of unknown parents proving his or her birth on the territory may often be challenging, particularly if their birth has not been registered.

2.2 *Child victims of trafficking*

Identity is a fundamental right of the child⁵ and one that is too often infringed upon by traffickers. Many child victims of trafficking travel without papers or with forged documents.⁶ In many cases, documents are seized by the traffickers as a means of control. Children are often

unaccompanied or separated children is most likely much higher. IOM and Unicef, 'IOM and UNICEF Data Brief: Migration of children to Europe' (30 November 2015) http://www.iom.int/sites/default/files/press_release/file/IOM-UNICEF-Data-Brief-Refugee-and-Migrant-Crisis-in-Europe-30.11.15.pdf.

⁴ In some States the provisions on unknown parents apply only to new-born infants or to children up to a certain age (Bronwen Manby, 'Citizenship law in Africa', p. 50). However, UNHCR recommends that provisions on foundlings should "apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth". 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' (21 December 2012), HCR/GS/12/04, § 58.

⁵ Article 8 of the Convention on the rights of the child.

⁶ Marie B. Lennartsson, Claire Potaux, 'Identification of children without papers', in IOM, *Resource book for law enforcement officers on good practices in combating child trafficking* (IOM and Austrian Federal Ministry of the Interior 2006), p. 67. IOM, 'Egyptian unaccompanied migrant children', 2016, p. X <https://publications.iom.int/books/egyptian-unaccompanied-migrant-children-case-study-irregular-migration>.

instructed by traffickers to lie about their identity, and sometimes even about their nationality to facilitate admission into the State of destination. Lack of documents, coupled with the fact that especially young children may not be able to provide information about their origin and the location of their family, can render it difficult to ascertain their nationality. Children may also be reluctant to return to their families to avoid failing their migration plan and disappointment with respect to their parents' expectations.⁷ Similarly, families may be reluctant to identify their children, to increase their chance not to be returned and thereby remain abroad.

2.3 Lack of cooperation by States of origin in nationality determination in the context of returns

States of origin are often reluctant to cooperate with States of destination that are in the process of returning migrant children to their country of origin. As a consequence, particularly when the nationality of the child is unclear, this lack of cooperation prevents confirmation of nationality and the child risks remaining in a *limbo* for protracted periods of time. In some extreme cases, it can happen that the State of origin revokes the nationality of those who migrated irregularly, leaving them and their children stateless.⁸

3. IOM's mandate and indirect impact of IOM's programmes on preventing child statelessness

IOM does not have a specific mandate to deal with stateless persons. Nevertheless, its constitution allows the Organization to work with all categories of migrants. IOM defines migrants as any persons who move away from their place of habitual residence either within the State or across international borders, irrespective of the causes of the movement, of its duration and of the person's legal status.⁹ As a consequence of its broad mandate on migration, IOM deals with

⁷ Bronwen Manby, 'Nationality, Migration and Statelessness in West Africa...', p. 78.

⁸ This is the case in Myanmar, see Sophie Nonnemacher 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), p. 247 at 260.

⁹ IOM Definition of "Migrant" (2016) <https://www.iom.int/sites/default/files/about-iom/IOM-definition-of-a-migrant-15March2016.pdf>.

stateless persons who migrate from their original place of residence, including unaccompanied or separated migrant children, and acts to prevent statelessness connected to migration. The activities carried out by the Organization can be critical to prevent statelessness among migrant children. Some of these activities are described below.

3.1 Building the capacities and facilitating contacts with consular authorities

Because of its mandate, IOM acts often as intermediary between migrants and the consular authorities. The Organization assists migrant parents in registering the birth of their children born abroad with the consular authorities of their country of origin or with the local authorities, depending on the system.¹⁰ It also helps parents deal with late birth registration, and go through the cumbersome collection of documents that are generally required.

Ensuring access to documentation can be key for both unaccompanied or separated children and the accompanied ones to be able to prove their nationality. In the context of humanitarian crises, access to documentation is one of the criteria of durable solutions identified by the Inter-Agency Standing Committee (IASC) Framework on durable solutions for internally displaced persons.¹¹ In supporting efforts to progressively resolve displacement situations, IOM applies these criteria to all the Organization's persons of concern, including those who are displaced across borders and other migrants.¹² For cross-border movements, IOM collaborates closely with relevant consular services, where present in the country of evacuation or resettlement, or in countries of nationality, to determine the nationality of migrants and their children, or of unaccompanied or separated children, and facilitate the issuing of civil and travel documentation.¹³ The same type of assistance is also provided in times of peace to migrant children, particularly the ones who are unaccompanied or separated, as well as to other vulnerable migrants.

¹⁰ Bronwen Manby, 'Nationality, Migration and Statelessness in West Africa...', p. 54.

¹¹ IASC, 'Framework on durable solutions for internally displaced persons' (April 2010), p. 38 <http://www.unhcr.org/50f94cd49.pdf>.

¹² IOM, 'IOM contributions to progressively resolve displacement situations – Compendium of activities and good practices' (IOM 2016), p. 13 https://publications.iom.int/system/files/pdf/compendium_of_activities.pdf.

¹³ *Ibid.*, p. 24 https://publications.iom.int/system/files/pdf/compendium_of_activities.pdf.

As a complementary activity, IOM builds the capacity of consular authorities including with regard to good practices in birth registration, nationality determination in uncertain cases and in ascertaining the identity of victims of trafficking, which also includes determining their nationality. Through the development of tailor made manuals and delivery of trainings to consular officers, the Organization contributes to avoiding mistakes or arbitrary decisions when it comes to verifying whether a child is a national of a given country.¹⁴

3.2 Family tracing for unaccompanied migrant children

IOM has been involved in family tracing activities for many years. They are usually inserted into programs which have other specific outcomes, e.g.: response and protection programs for victims of trafficking, return programs, humanitarian evacuations etc. The IOM office in Rome initiated family tracing as a stand-alone programme in 2008. Since then, stand-alone programmes of family tracing have been developed by IOM offices in various other regions.¹⁵ Family tracing activities have the objective of locating the family or other caregivers of the child, while assessing the general socio-economic situation in the country of origin, as well as the child identity and migration history. Family assessments are moreover aimed at facilitating the identification of the most suitable, long-term solution for the child, by the 'best interest of the child' determination process.¹⁶ In the cases in which the nationality of the child is uncertain, family tracing can help establish it. The evidence collected during these assessments can then be used as a proof of nationality with the relevant authorities. The ultimate aim

¹⁴ For example, in 2016, IOM Mission in Azerbaijan has developed a Consular Reference Manual for Azerbaijani consular officers. The Manual includes a session on nationality, specifying also the rules to be applied in cases of uncertain nationality. The publication of the Manual is forthcoming.

¹⁵ See IOM, 'Unaccompanied children on the move', 2011, p. 36 and notably footnote 74 <https://publications.iom.int/books/unaccompanied-children-move>.

¹⁶ International Committee of the Red Cross, 'Inter-Agency Guiding Principles on Unaccompanied and Separated Children' (January 2004), pp. 17, 32, 35. UNHCR, 'Field Handbook for the Implementation of UNHCR BID Guidelines', (UNHCR 2011) <https://www.humanitarianresponse.info/en/system/files/documents/files/BID%20handbook.pdf>. See also Jyothi Kanics, Daniel Senovilla Hernández and Kristina Touzenis, 'Migrating Alone: Unaccompanied and Separated Children's Migration to Europe', (UNESCO 2010), particularly 14-16; Jacqueline Bhabha (ed.), 'Children without a State : A Global Human Rights Challenge', (The MIT Press 2011),

of family tracing is to reunite the child with his or her family, back in the country or origin, or in their country of legal residence if this is in their best interests. Family reunification is normally also accompanied by a financial reintegration package to help the family set up a small income generating activity, deal with the reunification, increase its stability and prevent the possible remigration of family members, including the child. This can help prevent the child having to emigrate again through irregular channels and avert the risk of leaving him or her without a proof of nationality, particularly in the case of prolonged irregular migration.

3.3 Rebuilding the identity of children victims of trafficking

A common, long-lasting consequence of child trafficking is that it deprives children of their identity. This happens both through the physical deprivation of documents (e.g. seizure by traffickers) and the negation of the child's own will and personality. As a consequence, reconstructing all the components of the child's identity, including nationality, can be very challenging. IOM works to identify victims of trafficking and especially those among them who are children and may need specific assistance. Child victims of trafficking represented the largest group of unaccompanied migrant children assisted by the Organization, based on a review conducted in 2009,¹⁷ and 13% of the 7,000 victims assisted by the Organization in 2015.¹⁸ Identification of children may entail the verification of their nationality, especially in case of transnational trafficking. A child's identification, including his/her nationality, is among the preconditions for the best interests determination process to identify the most suitable and sustainable solution for the child.¹⁹ In transnational trafficking cases and when the child has no identity or travel documents, IOM facilitates contact with the consular authorities of the relevant country to verify the nationality, ensure that the child can recover his or her travel or identity documents or be issued some temporary ones. In cases of

¹⁷ *Ibid.*, p. 14.

¹⁸ IOM, 'Counter-trafficking : regional and global statistics at glance' (IOM 2015) https://www.iom.int/sites/default/files/infographic/CT2015_10_June_2016.pdf.

¹⁹ These generally include, amongst others: the reunification with the child's biological family, in case the assessment indicates the suitability of the family, and the return to the child's country of origin; the child's integration in the country where he/she was identified, or resettlement to a safe, third country. The latter is carried out with the support of the UNHCR.

uncertain nationality, the Organization assists the child in going through the process of nationality determination with the respective diplomatic missions. If the child cannot claim any nationality, or in case the claimed nationality is not recognised, the child is usually referred to UNHCR, which has a specific mandate to deal with stateless persons, including children.

3.4 Nationality determination in the context of assisted voluntary return and reintegration

Assisted Voluntary Return and Reintegration (AVRR) is one of the core support activities provided by IOM to migrants and States, often in collaboration with NGOs and diaspora communities. AVRR programmes offer migrants the possibility to return home, if they want to do so, in a humane and dignified manner. AVRR programmes can also assist families with children as well as children who travel unaccompanied or separated.²⁰

In the context of AVRR programmes, when unaccompanied and separated migrant children are involved, according to the Organization's protocols, it is first necessary to confirm the identity of the legal guardians in both the host country and the country of origin, to verify the results of the best interests determination and to confirm that a family tracing and assessment process has been completed. Uncertainty with regards to the nationality of the child may arise in the context of this initial phase, particularly for children who do not carry any identity documents, which is often the case for unaccompanied or separated migrant children.²¹ The pre-departure assistance provided by the Organization also includes assistance with the issuance of travel documents.²² In this context, IOM liaises with the consular authorities of the presumed country of nationality to confirm the nationality of

²⁰ In 2015; 24% of the migrants returnees assisted were children. A stark increase from the 11% of 2012. See IOM, 'Assisted voluntary return and reintegration: 2015 Key highlights' (IOM 2016), chart no. 1, p. 7 http://www.iom.int/sites/default/files/our_work/DMM/AVRR/AVRR_2015_Key_Highlights.pdf.

²¹ IOM, 'Addressing the needs of Unaccompanied Migrant Children in Greece' (IOM 2016), p. 33 https://greece.iom.int/sites/default/files/IOM%20Greece_UAM%20final_0.pdf.

²² See for example the specific assistance provided to unaccompanied migrant children from IOM Norway in IOM, 'Assisted Voluntary Return and Reintegration – 2015 Key Highlights' (IOM 2016), p. 39 https://www.iom.int/sites/default/files/our_work/DMM/AVRR/AVRR_2015_Key_Highlights.pdf.

the child and, when necessary, helps him or her go through nationality determination procedures.

4. Conclusion

In its work with migrant children, IOM has been confronted with a significant number of cases in which the nationality of the child was unclear or difficult to prove because of lack of documentation, often coupled with the limited information children, particularly those of a young age, can provide. This does not necessarily entail that the child is stateless. However, situations of uncertain nationality, if unresolved, may in the long run lead to statelessness. After many years abroad, especially when they are in an irregular situation, it may become impossible for children to prove their nationality or they may risk losing it. Furthermore, due to their irregular situation in a country, in most cases, children will not be able to access naturalisation. As a consequence, their plight, the barriers they face in accessing the most basic services, and their uncertain future are comparable to the ones of stateless children. The aim of IOM's activities in this area is to prevent prolonged situations of uncertainty. To do so, through its various programmes, the Organization helps migrant children ascertain their nationality and secure the documents that are needed to prove it. It thus contributes to averting child statelessness and ensuring children access to their rights.

Birth registration problems in complex migration contexts – case studies from the Netherlands

Laura Bosch*

Defence for Children - ECPAT Netherlands is cooperating with DLA Piper and human rights lawyer Mrs. Cerezo in a project procuring birth certificates for children in the Netherlands. The experience from this project has demonstrated that the reasons for missing out on birth registration and/or a birth certificate are manifold but almost always relate to the migration history of the family. Two examples of cases we are currently working on give some insight into the difficulties faced by children to realise their right to birth registration in complex migration contexts:

Hamsi

Hamsi is a young man of 27 residing in Germany without any identity documentation. He is the son of traveling parents who were passing through the Netherlands at the time of his birth. His parents are undocumented but identify themselves as former Yugoslavian. Hamsi's birth was not registered in the Netherlands. He now wants to marry and start a family but this has become impossible because he lacks a birth certificate. Efforts to obtain a birth certificate in the Netherlands have proven very difficult. Proof of his place of birth cannot be produced due to the illiteracy of his parents and the time that has passed since his birth. While trying to find solutions for the many bureaucratic difficulties we lost touch with Hamsi as he became frustrated and disillusioned about the whole procedure.

Blessing

Destiny, originally from Nigeria, was trafficked to the Netherlands via Spain. During the exploitation that took place in Spain she got pregnant and gave birth to a baby girl named Blessing. She was unaware and unable to register the birth of her child in Spain. She had little knowledge

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about the city or region where she was kept by her trafficker. Destiny and Blessing were trafficked on to the Netherlands where eventually they both escaped. Destiny received protection and a residency permit as a victim of trafficking. However, as Blessing has no birth certificate, they therefore cannot prove the family link and establish Blessing's right to a residence permit as Destiny's daughter. Special provisions for the birth registration of children born in difficult circumstances only apply to children of mothers with asylum status and not mothers who have been kept in a situation of exploitation. Efforts to register Blessing's birth in Spain are complicated since Destiny does not know the location of the birth.

In all of our cases, the two described above among them, we have to work together to overcome both procedural and financial obstacles that are quite difficult to face for families with children without birth registration and who may also be at risk of statelessness as a result.

Risks of statelessness for children of undocumented parents in Europe

Lilana Keith*

1. Introduction

There are a growing number of children born as 'undocumented migrants'¹ in Europe: born to undocumented parents in a region that favours *jus sanguinis*, rather than acquiring citizenship or a residence status based on birth in the country, they will usually inherit their parents' 'undocumented' status. Children born abroad to undocumented parents as well as undocumented children who migrated with their families or by themselves and reside irregularly in Europe can find themselves at risk of statelessness due specifically to the circumstances which surround their undocumented status.² While some of the risks arise from practical challenges associated with an irregular migration or residence status, many are due to systematic discrimination in civil registration and nationality procedures for those who are undocumented across Europe.

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¹ The term 'undocumented migrant' is synonymous with 'irregular migrant', and is used to refer to people who are without a valid residence permit to reside in the country they are in. They may have some form of identification and be known to immigration authorities through previously having a residence or work permit or being in the asylum system, but they are currently without the correct paperwork.

² Undocumented children are a diverse group, who in many cases have been residing regularly but lost their status due, for example, to their application for international protection being refused as a family, their parent(s) losing their work or residence permit due to a personal or employment relationship break down. Most undocumented children are residing with their parent(s) or other caregiver(s), but unaccompanied children may also be undocumented before they come into contact with state services, or if they disengage with them. The term 'undocumented child' refers to the child's residence status, not to a lack of birth registration necessarily.

This discrimination exposes children to further discrimination, poverty and human rights abuses.

2. Discrimination in both migration and public policy spheres

Migrant children are little considered in either migration or public policies. While there is increasing recognition of the need for additional protections for certain categories of migrant children, child rights are not yet adequately visible and integrated into migration law, policy or practice. As a result, children can rarely access protection and justice in migration and asylum procedures; are more likely to become undocumented, or migrate irregularly and unsafely due to lack of alternatives; and are at risk of being subjected to punitive measures that violate their rights, including detention and deportation. At the same time, while migrant children are increasingly targeted in public social policies, undocumented children are usually not considered or are even specifically excluded – facing legal or administrative exclusion from essential services, including health care.

Systematic discrimination against undocumented children is also seen in civil registration, including birth registration, as well as nationality laws, which can lead to increased risk of statelessness. As Kanics and Gyulai set out in detail in their essays, children in a migratory or displacement context face numerous barriers to accessing nationality.³ Undocumented migrant children can face particular risks. They may confront administrative barriers in civil registration and acquiring nationality, and be subject to practical challenges, resulting from living with an irregular residence status. This places them at heightened risk of statelessness.

3. Nationality procedures

3.1 Barriers to acquiring nationality at birth

Children born in a migration context may be unable to get the nationality of parents at birth. This may be because their parents are unable to transmit their nationality, their parents are stateless, or there are additional requirements to *jus sanguinis* transmission that cannot be met. Several

³ See also *Migration, forced displacement, and childhood statelessness* by Jyothi Kanics and *The long-overlooked mystery of refugee children's nationality* by Gábor Gyulai in this Chapter.

countries of origin of undocumented migrants in Europe still maintain discriminatory nationality legislation, e.g. gender discrimination and discrimination against children born out of wedlock.⁴ When acquisition of nationality is non-automatic, imposed conditions can become barriers for undocumented parents to transmit their nationality onto their child.⁵

At the same time, no country in Europe provides for automatic acquisition of citizenship for all children born in the territory. The additional requirements usually include regular residence of the parents, meaning children born to undocumented migrants are explicitly excluded. More troublingly, laws that provide nationality to a child born on the territory who would otherwise be stateless, as a safeguard against statelessness, often also specifically discriminate against children of undocumented migrants, excluding them from the status and protections that this can afford. There are 14 European countries that require regular residence status of the parent and/ or child in the requirements for statelessness recognition under these provisions, in some cases even requiring a permanent residence status.⁶

3.2 Barriers to naturalisation

Undocumented children also face discrimination in naturalisation procedures, as irregular residence is often discounted in naturalisation criteria. When it is counted, the number of years required to qualify can be higher, leaving children undocumented for longer. At the same time, there are few options for children to regularise their residence status in Europe. There are a number of important programmes and mechanisms aimed at

⁴ UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness 2014' (2014), available at <http://www.unhcr.org/4f5886306.pdf>.

⁵ While not only, this is more commonly the case for the acquisition of citizenship by descent from the mother or from the mother or father when born out of wedlock. Countries that require registration procedures for some children to acquire nationality by descent include, for example, Sudan and Mauritania. See, for instance, L. van Waas 'A Comparative Analysis of Nationality Laws in the MENA Region' (9 September 2014), available at SSRN: <http://ssrn.com/abstract=2493718>; B. Manby *Citizenship Law in Africa: A Comparative Study* (Open Society Foundations 2010).

⁶ European Network on Statelessness (ENS) 'No Child Should be Stateless' (2015), available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf. See also *International and regional safeguards to protect children from statelessness* by Laura van Waas in Chapter 4.

resolving the status of undocumented children and their families, but in most of Europe regularisation is either unavailable or inaccessible. This is not to say that children may not have a *right* to reside in their country of residence, due, for example to their right to private and family life, but such rights are not catered for proactively through residence and nationality procedures.

4. Birth registration

4.1 Barriers relating to discriminatory, unclear or contradictory legislation or policy

European countries also face a number of challenges to ensure birth registration for undocumented children in a migratory context. Only a few countries in Europe explicitly protect the right to birth registration for all children by law, regardless of the residence status.⁷ In most countries, it remains unclear whether policies on birth registration also apply if the children and/or parents are undocumented. References to ‘all children’ in policies and legislation may include undocumented children, but this often leads to practical barriers. Barriers can include risks of denunciation, lack of knowledge on the part of both civil servants and undocumented parents about rights and procedures for birth registration, and discretionary and discriminatory refusals.

⁷ The Netherlands is one of the countries with explicit protection of undocumented children’s right to birth registration; it is compulsory for parents to register their new-born child at the local municipality and undocumented migrants are subject to this requirement. The municipality is prohibited from denying the registration of a child, regardless of whether or not the parents are undocumented. However, in practice issues still arise for children born to a mother who cannot provide her ID documents and is therefore declined to register her child’s birth. It is also possible for a third party to submit birth registration papers. However, there remain significant barriers in practice, including difficulties in meeting administrative requirements (ID documents, proof of marital status), lack of awareness, and fear of interaction with state authorities. For more information, please see Platform for International Cooperation on Undocumented Migrants (PICUM), ‘Rights of Accompanied Children in an Irregular Situation’ (Prepared for UNICEF Brussels Office, November 2011), available at <http://fra.europa.eu/fraWebsite/frc2011/docs/rights-accompanied-children-irregular-situation-PICUM.pdf>. See also *Birth registration problems in complex migration contexts – case studies from the Netherlands* by Laura Bosch in this Chapter.

Rates of birth registration generally remain low in many countries of origin.⁸ Nevertheless, even when a child's birth is registered, some countries only issue identity documents when children reach the age of majority.⁹ Also, in the context of irregular migration and/ or irregular residence in a country, even when children have identity documents or are included on their parents' document, these may be lost or expire. Also, in many countries, birth certificates of one or both parents, and marriage certificates, are required. Such administrative requirements can pose challenges for many parents. For irregularly resident families, such paperwork can be particularly difficult to produce because, for example, the paperwork is in their country of origin or has been lost. Further, there may not be an institution able to issue copies in their country of residence (and they are unable to travel), or the costs might be prohibitive. This can lead to increased risks of statelessness among undocumented children.

Furthermore, in countries where irregular residence has been made a criminal, rather than an administrative offence, there is usually a duty on civil servants to report undocumented migrants to the police, effectively negating their access to civil registration, including birth registration procedures. Restrictive policies on access to health care, including maternity services, can also affect birth registration for undocumented children, in countries where medical professionals are involved in the process. This can result, for example, in mothers giving birth at home, or birth registration being denied until the mother has paid for the maternity services provided.

4.2 Administrative barriers

Birth registration procedures also pose several potential barriers. In some countries, the administrative procedures directly discriminate, making it necessary for parents to be registered residents, which is impossible for irregular migrants in most cases. As mentioned earlier, a passport with valid residence permit may also be requested by civil registries even when this is not official policy.¹⁰ Registration fees and fines for late registration

⁸ UNICEF, *Every Child's Birth Right: Inequities and trends in birth registration* (2013), available at https://www.un.org/ruleoflaw/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf

⁹ The age of majority in most countries in Europe is 18 years.

¹⁰ Platform for International Cooperation on Undocumented Migrants (PICUM), 'Rights of Accompanied Children in an Irregular Situation' (Prepared for UNICEF Brussels Office, November 2011), available at <http://fra.europa.eu/fraWebsite/frc2011/docs/rights-accompanied-children-irregular-situation->

also pose financial barriers, alongside indirect costs, such as time off work. For people living and working precariously, such barriers cannot be underestimated.

4.3 Further practical and social obstacles

Even when there is no connection between civil registration procedures and immigration enforcement, irregular migrants fear interacting with any state authority or public service provider, considering it may lead to arrest, detention, deportation and/ or family separation if they are reported. There may also be social-cultural reasons that parents decide not to register their children, or low prioritisation of birth registration compared to meeting immediate needs for family survival, safety and well-being.¹¹

The importance of closely monitoring the implications of any changes in procedural requirements for access to birth registration for undocumented migrants can be demonstrated with the example of Italy, a country that generally has minimal administrative requirements for birth registration.¹² In most parts of the country, a birth can be registered without the parent having to show any identity document, on the basis of declared data, and sometimes testimonies. However, the legal framework in Italy is contradictory and complex. For example, in 2009, a change in the immigration law made it necessary for a residence permit to be shown to register a birth, which would create a real barrier for registration of children of undocumented parents. As a result of advocacy efforts, the Ministry of the Interior issued a circular the day before the law entered into force, removing this requirement and reaffirming that undocumented parents do have the right to register their children.¹³

PICUM.pdf; J. Kanics, 'Realizing the rights of undocumented children in Europe' in J. Bhabha (ed), *Children without a State: a global human rights challenge* (MIT Press, 2011).

¹¹ J Ball, L Butt, H Beazley, & N Fox, 'Advancing Research on "Stateless Children": Family Decision Making and Birth Registration among Transnational Migrants in the Asia-Pacific Region' (2015) CAPI Working Paper 2014-2 University of Victoria Centre for Asia-Pacific Initiatives, available at http://www.uvic.ca/research/centres/capi/assets/docs/working-paper/Butt_etal_Working_Paper_2.pdf

¹² Platform for International Cooperation on Undocumented Migrants (PICUM), 'Rights of Accompanied Children in an Irregular Situation' (Prepared for UNICEF Brussels Office, November 2011), available at <http://fra.europa.eu/fraWebsite/frc2011/docs/rights-accompanied-children-irregular-situation-PICUM.pdf>

¹³ Generally, non-EU citizens are required to present their residence permit for

5. Conclusion and recommendations

There are an increasing number of children and young people who are growing up, spending most if not all of their lives in Europe, but with an irregular status. They can face particular difficulties as a result of their or their parents' irregular residence status, in proving their nationality if they have one, and to acquiring the nationality of their parents or of their country of residence. Efforts to end child statelessness must take into consideration and address the specific risks facing children of undocumented migrants in order to be comprehensive and effective. Many of the challenges arise from systematic discrimination against irregular migrants both in civil registration procedures and in nationality laws, which must be urgently addressed to ensure fulfilment of these rights, as well as the numerous other rights which are violated when children's right to protection by the state is not adequately documented.

To address the risks of statelessness of this growing number of undocumented children in Europe, governments should implement a number of policy reforms. (1) The right to birth registration regardless of the residence status of the child or parents, including a prohibition of refusal, should be explicit in national legislation. There should be minimal administrative requirements (e.g. accepting declared data; possible registration by a third party). Also, equal access to health services, including maternity care, should be provided. (2) There must be a 'firewall': a clear separation of civil registration, services, protection

any authorization or registration, with some exceptions, such as for emergency health care or compulsory schooling (Immigration Law Legislative Decree n. 286/98, art. 6, par. 2). These exceptions included civil registration (including birth registration) until 2009, when Law n. 94/09 cancelled this exception. The ministerial circular reinstates the exception for civil registration. A further complication has been the duty on all public officers to report undocumented migrants to the police, brought about by the criminalisation of unauthorised entry or stay in 2009. Birth registration can be done either at a hospital or at a municipal registry office. While health professionals are prohibited from reporting irregular migrants, this duty technically applies to civil servants in registry offices. Although its application is contested in the case of birth registration because parents cannot be deported within six months of having a baby, and rarely the done in practice, there remains a possibility that registry offices would contact the police or immigration authorities, and that undocumented parents avoid registering their child's birth because they feared being denounced. A decision was made to repeal the law that criminalises irregular entry and stay (i.e. de-criminalise) in 2014, but it technically remains in force.

and justice from immigration enforcement through a prohibition on personal data sharing in law and practice (including through issuing guidelines and providing training). (3) Laws that criminalise irregular entry and residence should be revoked. (4) Nationality laws that restrict transmission and acquisition of nationality should be reformed in view of ensuring every child's right to nationality. In particular, there should be no discrimination in nationality (or statelessness determination) laws due to the irregular residence of the child or parent. (5) Governments should develop and implement accessible permanent mechanisms for children of undocumented migrants to regularise their status, on the basis of human rights and reasonable conditions.

Finally, it is important to underline that as well as the real risks of becoming stateless, undocumented children often reside with similar limitations on rights as those faced by stateless children.¹⁴ Despite all children having equal rights, the states in which undocumented children reside often ignore or specifically restrict their rights in the name of immigration control. In their daily lives, undocumented children in many countries live without – or excluded from – state protection. As a result of the large numbers of migrants and refugees arriving to Europe, the population of undocumented children is likely to increase in the coming months and years, as some of those arriving do not apply for or receive protection, or are provided only with temporary protection, and as new families are formed. It is therefore all the more critical that the policy solutions developed now also pursue long-term solutions that improve the protection and inclusion of all children, regardless of their residence status.

¹⁴ The concept of *de facto* statelessness has been elaborated in J. Bhabha (ed), *Children without a State: a global human rights challenge* (MIT Press, 2011); see in particular the chapters by J. Bhabha, 'From Citizen to Migrant: The Scope of Child Statelessness in the Twenty-First Century' and E Rozzi, 'Undocumented migrant and Roma children in Italy: between rights protection and control' in Jacqueline Bhabha (ed) *Children without a State: a global human rights challenge*, (MIT Press, 2011).

CHAPTER 10: THE SUSTAINABLE DEVELOPMENT AGENDA AND CHILDHOOD STATELESSNESS



Foundlings' artwork on the theme of nationality and statelessness
© UNHCR Côte d'Ivoire / SOS Villages Aboisso

In this Chapter...

Statelessness, human rights and the Sustainable Development Agenda	
Stateless at sea	Helen Brunt
The SDGs: An opportunity to leave no stateless child behind	Betsy Apple and Laura Bingham, OSJI
The SDGs and childhood statelessness	Tendayi Bloom
“Legal identity for all” and childhood statelessness	Bronwen Manby
Every child counts	Anne-Sophie Lois
Meet the children assisted by Plan International	
Churches advocating for birth registration	Semegnish Asfaw

Introduction

Difficulties accessing education and employment; restricted property rights; lack of opportunities to own or register a business; limited access to a bank account or a loan; and, in some cases, the threat of extortion, detention or expulsion; these factors can trap stateless persons in poverty and make it extremely challenging for them to improve their circumstances. Where statelessness affects whole communities over several successive generations – as it often sadly does, such communities can be neglected by development actors and processes. This can result in a significant lag behind others in the country or region in terms of development. Statelessness means a waste, of individual potential, of human capital and of development opportunities.

So, if development matters, statelessness matters.¹

The above quote is from the Institute's 2014 *World's Stateless* Report, when ISI was just beginning to appreciate how the development field could contribute towards addressing statelessness, by including them in development programming, thereby enhancing their lives and future prospects. Since then, the successful negotiation of the Sustainable Development Goals (SDGs) has unlocked far greater potential in this sector, setting an ambitious agenda to be reached by 2030. While statelessness is not explicitly mentioned in the SDGs, the relevance of many of the Goals to statelessness is obvious at first glance. For example, stateless persons are often denied access to quality education and healthcare, whereas SDGs four and three respectively aspire to a world in which everyone – including the stateless – does have access to such fundamental services. Digging a little deeper unearths an exciting level of potential of the SDGs to not only give the stateless access to services, but to also combat statelessness. However, some causes for concern and tricky patches to be negotiated also become apparent upon closer inspection.

¹ Institute on Statelessness and Inclusion, *The World's Stateless*, Wolf Legal Publishers 2014, at 34, available at: <http://www.institutesi.org/worldsstateless.pdf>

Among the potential difficulties, is the relationship between the human rights and development frameworks, which should be complementary, but which do not always operate in that manner. Indeed, one of the concerns of human rights actors is that ‘development’ can pave the way for states to follow a ‘human rights light’ approach, which undermines existing human rights obligations. Development can also provide a distraction from the ongoing exclusion and violation of marginalised and minority groups (including many that are stateless) as a spotlight is shone elsewhere on development gains for the majority. Concerns such as these appear to have been – at least partly – taken on board by the SDGs, which emphasise their embeddedness in human rights, and put forward the mantra that no one should be left behind. This starting point is an important change from the approach followed under the previous Millennium Development Goals (MDGs), which were more concerned with aggregate gains, than with reaching the most disadvantaged. If this approach results in a closer alignment of the two frameworks and a concerted effort by development actors to reach the furthest behind first, the results could be significant – particularly for groups such as the stateless – whose inter-generational disadvantage has left them further behind than most. However, this will not happen automatically, and requires a great transfer and sharing of expertise as well as ongoing collaboration between those working on different issues (human rights, migration, statelessness etc.) and development experts. Now is an extremely important moment to be having this discussion and promoting stronger inter-sectional collaboration. ‘Statelessness actors’ must be among those getting involved in the discourse and influencing the shape of development priorities, programming and implementation.

This chapter brings together a series of essays and other contributions which show how statelessness actors have started getting involved in the development discourse, through the initiative and leadership of various individuals and organisations. Importantly, ISI hopes that the contents of this chapter will serve to inspire more statelessness actors to engage the development sector, as it will introduce development actors to the issues and challenges pertaining to statelessness that can and must be addressed through the Sustainable Development Agenda. The chapter begins with adapted excerpts of the Institute’s Background Paper on “Statelessness, Development and the Human Rights Agenda”. This paper, which informed an Expert Roundtable in early 2017 on this issue, serves as a point of departure for a sustained

discourse between the human rights, development and statelessness sectors. It aims, in particular, to highlight overlaps, grey areas and points of tension between these frameworks in order to promote a human rights based approach to development which is fully inclusive of the stateless. One of the main challenges that statelessness will pose to the development sector, is that it requires states to include within their priorities and plans, the development needs of communities that have historically been disadvantaged and excluded and have had their belonging disputed. The short essay that follows by Helen Brunt introduces us to one such community – the Sama Dilaut – a migratory semi-nomadic group who have for generations inhabited the seas of Southeast Asia. By providing a short overview of the manner in which this group has been disenfranchised by multiple states, and setting this against the human rights and development challenges they face, Brunt's essay provides clear insight into how difficult the task at hand can be.

Having thus set the context, the next two essays look more closely at the SDG Framework and what it has to offer. The first, by Laura Bingham and Betsy Apple of Open Society Justice Initiative, argues that the SDGs provide an opportunity to leave no stateless child behind. It contends that the emphasis given by the SDGs to addressing structural injustices, through SDGs 10 (reducing inequality) and 16 (justice, good governance, and the promotion of peaceful and inclusive societies), “represents a sea change from the last set of global development goals, and provides a crucial platform for advocacy, action, and outreach toward some of the world's most marginalised peoples, including those who are stateless.” The essay proceeds to provide some good examples of national advocacy efforts which have utilised the SDGs to promote the rights of stateless persons, showing how the framework can be effectively used. The next essay, by Tendayi Bloom – lecturer in politics and international studies at the Open University in the UK – takes a more critical approach. She highlights various challenges and points of tension which will have to be addressed if stateless children are to truly benefit from the SDGs, but also sets out ways in which these challenges can be met.

The chapter then moves on to focus on the SDG which is perhaps the most relevant to stateless children: SDG 16.9 which aims to “provide legal identity for all, including birth registration”. As set out elsewhere in this report, birth registration is an important tool to

address statelessness,² and the SDGs are perhaps the most important programme for the achievement of universal birth registration. In an insightful essay, Bronwen Manby - an independent consultant and visiting senior fellow at the London School of Economics Centre for the Study of Human Rights - deconstructs the notion of 'legal identity', arguing that the SDG understanding of this concept is a very limited one. She looks at how this target complements UNHCR's campaign to end statelessness and Action 7 (birth registration) of its 10-point action plan. While acknowledging that universal birth registration in itself is not a solution to statelessness (a stateless person may have had his or her birth registered but this had no bearing on the acquisition of a nationality), Manby argues that registering births can reduce the risk of statelessness faced by many. She does also point to a potential risk of registration - without addressing structural discrimination - leading to more statelessness: an important concern that must be seriously taken on board. Next we have a short reflection by Anne-Sophie Lois of Plan International, which presents the role played by Plan in promoting birth registration around the world, and strengthening international norms on birth registration (including through the SDGs). This is followed by three short profiles of children and their families, who have been positively impacted by the birth registration work of Plan International. Finally, the chapter closes with a contribution from Semegnish Asfaw of the World Council of Churches, which looks at the role that the church (and other religious institutions) can play in the addressing childhood statelessness through registering important life moments such as births and baptisms.

² See for example Chapter 8 on *The right of every child to a nationality* and Chapter 12 on *Litigation and legal assistance to address childhood statelessness*.

Statelessness, human rights and the Sustainable Development Agenda¹

1. Introduction

The Sustainable Development Goals (SDGs) provide a unique opportunity both to further entrench human rights principles within the development framework, and to ensure that the most excluded and vulnerable persons, including stateless persons, have equal access to development. In the lead up to the drafting of the SDGs, former High Commissioner for Human Rights Navi Pillay stated:

*"[T]he Post-2015 Agenda must be built on a human rights-based approach, in both process and substance. This means taking seriously the right of those affected to free, active and meaningful participation. It means ensuring the accountability of duty bearers to rights-holders, especially the most vulnerable, marginalized and excluded. It means a focus on non-discrimination, equality and equity in the distribution of costs and benefits. It means embracing approaches that empower people, both politically and economically. And it means explicitly aligning the new development framework with the international human rights framework – including civil, cultural, economic, political and social rights, as well as the right to development. In essence, it means deliberately directing development efforts to the realization of human rights."*²

Similarly, the outcome document for the UN Summit in September 2015 envisioned:

¹ This text is an adapted extract of Institute on Statelessness and Inclusion, *Statelessness, Human Rights and the Sustainable Development Agenda: A Background Paper*, January 2017, which was drafted in preparation for an Expert Roundtable on this topic in London, 2-3 February 2017. For more details, see www.institutesi.org

² UN High Commissioner for Human Rights Navi Pillay, *Open Letter on Human Rights in the Post 2015 Agenda*, 6 June 2013, Available at: http://www.ohchr.org/Documents/Issues/MDGs/OpenLetterMS_Post2015.pdf.

“[a] world of universal respect for human rights and human dignity; of justice and equality; of respect for race and ethnicity; and of equal opportunity permitting the full realization of human potential while promoting shared prosperity.”³

One of the true tests of whether the SDGs have succeeded both in adopting a rights based approach and in the aim of leaving no one behind, will be the benefit they bring to stateless persons and those at risk of statelessness around the world.

2. Statelessness and different frameworks

Statelessness is centrally relevant to the international human rights regime. On the one hand, statelessness is the most extreme violation of the right to a nationality. On the other, the lack of any nationality closes down opportunities to access other rights and services and increases vulnerability to discrimination, exploitation and the violation of rights. This multiple victimisation – where one rights violation can lead to many repeated violations over a lifetime – combined with the barriers stateless people have accessing justice and claiming their rights, makes statelessness a particularly difficult challenge to the universality and indivisibility of human rights.

Similarly, statelessness is also relevant to the SDGs. In the same way as there is a human right to a nationality, SDG Target 16.9 is to “by 2030, provide legal identity for all, including birth registration”. This can be seen as a parallel to human rights obligations related to nationality, identity and birth registration. Thus, the SDGs have the potential to provide a complementary framework to end statelessness. Similarly, the SDGs must be implemented in a manner that does not leave the stateless behind. In other words, the same way that lack of a nationality should not be a barrier to human rights protection, it should also not be a barrier to accessing development on equal terms.

For actors in the ‘statelessness field’, their work is commonly categorised under the pillars of **identification, prevention, reduction**

³ See, *Transforming our World: the 2030 Agenda for Sustainable Development*, Finalised text for adoption, 1 August 2015. Available at: <https://sustainabledevelopment.un.org/content/documents/7891TRANSFORMING%20OUR%20WORLD.pdf>

(with the ultimate aim of eradication) on the one hand, and **protection** on the other.⁴ The UNHCR led #ibelong campaign to end statelessness⁵ and its Global Action Plan⁶ has ten action points, many of which relate to the human right to a nationality, identity and birth registration and consequently, to SDG 16.9. Similarly, ongoing work on protecting the stateless relates to other human rights principles and SDGs related to education, health, work, equality, poverty etc.

Thus, there is a happy alignment of the different frameworks and discourses, which gives us the opportunity to nimbly move across and between fields, developing arguments that resonate widely and strategising to address statelessness through human rights *and* development mechanisms. For this to be effectively done though, there is an impetus on actors from all of these fields to learn to speak the same language, and to translate vocabularies across different frameworks.

3. Points of divergence

There are significant points of divergence as well. Human rights obligations are justiciable (though the challenges are many), whereas the SDGs are aspirational. As a result, the development framework may have a further reach. However, it is important to guard against situations in which the aspirations of the development agenda fall short of human rights obligations, thereby undermining human rights standards. It is of concern that the draft indicator to SDG 16.9 - "... children **under 5** whose births have been registered ...", is less ambitious than CRC Article 7: "the child shall be registered **immediately** after birth". The other key point of divergence, is that human rights law allows for some differential treatment between nationals and non-nationals (to the disadvantage of the latter), whereas the SDGs take the opposite (and fairer) approach of not discriminating against migrants or non-nationals, but clearly articulating that the most vulnerable should

⁴ See UNHCR ExCom *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, No. 106 (LVII) – 2006, available at: <http://www.unhcr.org/uk/excom/exconc/453497302/conclusion-identification-prevention-reduction-statelessness-protection.html>

⁵ See <http://www.unhcr.org/ibelong/>

⁶ UNHCR, *Global Action Plan to End Statelessness: 2014 – 2024*, available at: <http://www.unhcr.org/uk/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>

be reached first. Thus, when resources are scarce, there is a strong argument to be made for starting with the worst off – even if these are non-nationals.

4. Combatting discrimination and promoting equality through the SDGs

The mutually reinforcing relationship between statelessness and discrimination and inequality, should be taken into account if statelessness is to be systematically addressed through human rights and development frameworks.⁷ The rights to equality and non-discrimination are well entrenched in international, regional and most national laws. Most states also have Constitutional Bills of Rights which are justiciable and which protect the right to equality and non-discrimination.

Development can be ‘simplistically’ viewed as a question of “is there enough for all?” The more difficult but appropriate question may be – “is there willingness to include all?” This is particularly so in the case of statelessness that has arisen out of discrimination on grounds such as race, religion, national origin, etc. When stateless persons are seen as ‘the other’, the socio-political consensus is for their exclusion and not for their inclusion. In such contexts, the ‘development’ of such communities will yield little by way of political gain and may even be a controversial and unpopular act which the state will try to avoid.

The development agenda will only succeed in leaving no one behind if it is complemented by dedicated action to engage and counter entrenched socio-political attitudes and stereotypes. Indeed, a rights based approach to development calls for engagement with populations that are heavily discriminated against and excluded, such as indigenous groups, minorities, migrants, the disabled and the stateless. Importantly, these groups need to find effective ways to work together to promote their collective inclusion.

Ensuring that the stateless are included and not left behind is both

⁷ For a more detailed analysis, see A. de Chickera and J. Whiteman, “Addressing statelessness through the rights to equality and non-discrimination”, in van Waas & Khanna (eds), *Solving Statelessness*, Wolf Legal Publishers, 2016.

logical and necessary for the development project under the SDGs. Equally important and perhaps even more so is engaging with majority populations and state structures that are the source of dominant societal attitudes which justify the discrimination and exclusion of the stateless. Challenging dominant negative stereotypes and prejudices is essential.

5. Intergenerational statelessness and positive action

One of the biggest challenges that statelessness poses to the development agenda (and indeed the human rights framework), is that communities that have been stateless for many generations, have increasingly been 'left further behind' with each new generation. Malnourished and uneducated children grow into unemployed adults, who have less to offer their own children than their parents had to offer them. As the general trend of the world is one of children having access to more and being higher educated than their parents, the trend with intergenerational statelessness can be exactly the reverse. Unless intergenerational statelessness is directly addressed, the gap between the stateless and those with a nationality (including those who live in the same communities as stateless persons) can only widen.⁸

Thus, while it is important to document, to provide healthcare, to educate, this alone is not sufficient. Historical disadvantage can only be redressed through more targeted positive action that takes into account the cumulative impact of intergenerational statelessness and offers the new generation as fair a chance as possible of competing on equal terms.

While the notion of 'positive action' is common parlance in the human rights discourse, this is less familiar territory for the development world. However, the motto 'no one left behind' will only be truly achievable if historical disadvantage is taken into account and substantive equality pursued. Consequently, there is likely to be a steep learning curve for development actors who seeking to pursue the Sustainable Development Agenda in a meaningful manner. It would

⁸ See A. de Chickera and J. Whiteman, "Addressing statelessness through the rights to equality and non-discrimination", in van Waas & Khanna (eds), *Solving Statelessness*, Wolf Legal Publishers, 2016.

be essential that human rights actors weigh in, to help development actors mould and target their activities accordingly, and to ensure that this is the basis for further complementarity and collaboration.

6. Development, socio-economic rights and the stateless

Traditionally, development efforts most obviously overlap with socio-economic rights, which set out the minimum core socio-economic standards that states are obligated to provide to all persons on their territory. The International Covenant on Economic, Social and Cultural Rights is the principle human rights treaty which sets out socio-economic rights, but other treaties (Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, etc.) also contain important socio-economic rights related provisions.

There is often little political incentive (and perhaps even strong disincentive) for states to support the development of stateless persons. The aspiration to leave no one behind and to reach the furthest behind first, requires development actors to find creative and sustainable ways to incentivise states to ensure that stateless persons and other similarly disadvantaged and marginalised groups are included, consulted, reached and empowered to exercise their rights in relation to development. Emphasising the link between development priorities and human rights obligations, can be an important strategy in this regard.

7. Stumbling blocks

There are some common ‘stumbling blocks’, which historically have served as barriers to people – particularly vulnerable and marginalised people – accessing rights and services. In the context of stateless persons, or those at risk of statelessness, the lack of documentation and the lack of a ‘legal status’ are two of the most visible, significant and seemingly insurmountable stumbling blocks. Other stumbling blocks, such as language, race, gender, etc., can have an equally debilitating impact, but often play out in a subtler manner. Discrimination on such grounds that undermines access to socio-economic rights often

manifests through 'proxy reasons' such as the lack of documentation, which can be presented as a more objective, bureaucratic and fair basis on which to deny people access to their rights, than overtly referring to their race or language or gender.

These stumbling blocks do not only serve as barriers to accessing the rights or services being sought by the individual; they can also bring the individual to the attention of the authorities, resulting in the violation of other rights. For example, an undocumented migrant who seeks healthcare, risks being denied the healthcare he or she needs, and being criminally charged for violating immigration law (in some countries, immigration violations are criminal offences), and being detained and subject to removal proceedings. When the individual is stateless and irremovable, this is likely to lead to other human rights violations as well.⁹

A paradigm shift is required in how these stumbling blocks are perceived and approached. Instead of seeing the lack of documentation or legal status as legitimate reasons to deny people their rights and access to development, the emergence of this information in the specific context of them attempting to access another right, should trigger a process which results in their documentation or status also being addressed and resolved. In addition to ensuring that more stateless and similarly disadvantaged persons will benefit from development programmes, this approach will also:

1. Strengthen the rolling out of SDG 16.9¹⁰ and other SDGs which require structural change, by identifying disadvantaged, excluded and discriminated against individuals and groups when they come into interaction with the state for very 'normal' reasons.
2. Minimise the risk of increasing the divide between those who have the 'right' type of documentation, and those who have the 'wrong' type or no documentation at all.
3. Closer align the human rights and development frameworks and contribute to strengthening state observance and compliance with treaty obligations.

⁹ See European Network on Statelessness, *Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners*, 2015, available at: http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Toolkit.pdf

¹⁰ See also "*Legal identity for all*" and childhood statelessness by Bronwen Manby in this Chapter.

8. Achieving structural change related to statelessness

Arguably, the most revolutionary aspect of the SDGs, is that many of them go beyond the 'standard' delivery of development aid, to require the scrutiny and reform of discriminatory and exclusive legal and societal structures.¹¹

While many of the SDG targets across the different goals require (or depend upon) structural change in some form or other, there are three Goals which stand out for what they set out to achieve, and how this in turn relates to statelessness:

- SDG 5: Achieve gender equality and empower all women and girls
- SDG 10: Reduce inequality within and among countries
- SDG 16: Provide peaceful and inclusive societies for sustainable development, access to justice for all and build effective, accountable and inclusive institutions at all levels

All three of these Goals and the targets they contain are strongly aligned with existing human rights obligations. They address some of the root causes of statelessness (in particular, discrimination in all its forms) as well as the key factors which further disadvantage the stateless. Furthermore, they provide important avenues for structural and institutional change, which can create a more conducive environment to confront and effectively address statelessness, and to ensure that stateless people are treated more fairly and equally by society.

One of the challenges that development actors are likely to face in their efforts to implement these SDGs, is resistance from states when raising questions about structural inequality, when they have previously been welcomed by those very same state actors, for example, when offering to construct schools. The relationship that states have historically had with human rights actors has been more fractious and confrontational than the relationship between states and development actors. This is because states see more tangible benefits through the work of development actors, whereas human rights actors are more likely associated with uncomfortable questions and notions of encroachments on state sovereignty. However, in the absence of efforts

¹¹ See also *The SDGs: An opportunity to leave no stateless child behind* by Betsy Apple and Laura Bingham in this Chapter.

to address structural change, the Millennium Development Goals largely failed to address crucial issues of inequality, discrimination and exclusion, ultimately undermining the sustainability of development efforts.¹²

In this context, it is significant that the SDGs also include structural issues. It will require some adjustment in strategy and approach, as development actors begin occupying this more difficult territory, which is likely to bring with it more closed doors and challenges to their mandate and legitimacy. It is of crucial importance that this adjustment is handled properly. The danger if not, is that certain SDGs and targets will get left behind. A fractured approach through which – not the full package, but its component elements – are separately offered to states, will allow states to pick out the development activities which they see as non-threatening and beneficial, while pushing back on those which promote structural change. As development actors are ready to ‘run’ with the activities they have been implementing for decades, but face a steep learning curve with regard to others, this is a very tangible danger.

¹² The Millennium Development Goals (MDGs) are a set of eight measurable development goals preceding the Sustainable Development Goals. The MDGs were set by leaders of 189 countries gathered at the UN headquarters in December 2000 and aimed to be fulfilled by the target date of 2015. For more on the relationship between the MDGs and the SDGs see for example The Sustainable Development Goals Fund, *From MDGs to SDGs*, available at <http://www.sdgfund.org/mdgs-sdgs>

Stateless at sea

*Helen Brunt**



The Sama Dilaut (who are often referred to as Bajau Laut) are a migratory maritime people indigenous to the islands, reefs and coasts that today comprise the area where the territories of eastern Borneo (Indonesia and Malaysia), the west coast of Sulawesi (Indonesia) and the southern Philippines meet. In the lead up to the independence of these

countries, borders were arbitrarily delineated and have subsequently divided ethnic groups. Historically, people living in this area have adapted and responded to trading opportunities leading to a mobile, maritime orientation.¹ Largely undocumented, and at a high risk of statelessness, today they are arguably some of the most discriminated against and marginalised people in Indonesia, Malaysia and the Philippines.

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¹ Sather, C., *The Bajau Laut: Adaptation, History, and Fate in a Maritime Fishing Society of South-eastern Sabah (South East Asian Social Science Monographs)*, (1997) Kuala Lumpur: Oxford University Press.

Many Sama Dilaut in Malaysia are descendants of refugees who fled there following civil unrest and an Islamic insurgency in the southern Philippines in the 1970s. The situation of the Sama Dilaut is a classic example of protracted and intergenerational statelessness and is compounded by ethno-religious discrimination and displacement. Children, the majority of whom were born in Malaysia and have never set foot in another country, are particularly at risk. Such children inherit statelessness from parents and grandparents who were never recognised as nationals of any country, and thus are affected by the impacts of statelessness from the moment they are born.

In Malaysia, the Sama Dilaut children are frequently lumped together with the children of other 'irregular' and vulnerable groups including undocumented migrants, people of refugee descent,² and 'street children', and are often disproportionately targeted during immigration and security operations.³ Without any



Children born into boat-dwelling families may spend their entire lives afloat developing an excellent sense of balance, but with few opportunities to access formal education on land.

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² Malaysia is not a state party to the 1951 UN Refugee Convention, its 1967 Protocol, or either the 1954 or 1961 UN Statelessness Conventions and therefore authorities do not officially recognise any refugees in the country nor grant protection to refugees or stateless persons as required by these Conventions. Refugees and asylum seekers are treated as illegal undocumented migrants under Malaysia's immigration laws. Nevertheless, it is a well-established principle of international law that states are obliged to protect the rights of all individuals within their territory and jurisdiction.

³ Allerton, C., 'Statelessness and the Lives of the Children of Migrants in Sabah,



Even children who are born on land face significant challenges having their births registered and applying for identity documents, rendering them at a high risk of statelessness.

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form of legal identity, the Sama Dilaut are deprived of basic socio-economic rights, denied freedom of movement on land and at sea, and are highly vulnerable to forced eviction, arbitrary and sometimes indefinite detention, and occasionally involuntary deportation by Malaysian authorities to their assumed country of origin – the Philippines.

As a highly mobile people living aboard houseboats and in temporary settlements located in remote and hard to reach places, a significant number of Sama Dilaut children's births are not registered and they are excluded from mainstream society. The Sama Dilaut experience multiple obstacles in registering their children's births, partly because they are often unable to prove that they have connections to the state with which they associate and are considered to be 'non-citizens', even when they are able navigate the administrative and bureaucratic process of birth registration.

Another factor exacerbating the discrimination faced by the Sama Dilaut and acting as an obstacle to obtaining legal identity is their

East Malaysia' (2014), *Tilburg Law Review. Special Issue on Statelessness*, Vol. 19: 26-34.

presence within areas of high conservation and tourism value. As a predominantly maritime people, exclusionary marine conservation initiatives have limited the livelihood options available to the Sama Dilaut and have led to forced evictions and displacement.⁴ In addition, continuing securitisation of national borders has curtailed their maritime movements, which further hinders their ability to pursue other opportunities in accordance with their traditional maritime lifestyle. The regulations imposed on the Sama Dilaut by conservation and tourism initiatives have significant implications for their children within the context of the wider social and political restrictions imposed on them as undocumented non-citizens, such as being deprived of access to primary education and affordable healthcare.⁵

As undocumented non-citizens, the Sama Dilaut do not feature in national statistics and are rendered invisible for external development aid. Such invisibility does not bode well for the likelihood of Sama Dilaut children benefitting from the post-2015 sustainable development agenda, despite the agenda's mandate to address inequality and poverty in the region and globally. Addressing statelessness would also help states assess the size and profile of the stateless population in their territory and thus determine the government services required, as well as strengthening national society making it possible to draw on currently untapped talents and potential.



Very few Sama Dilaut children have the opportunity to receive an education due to their marginalised position, so from an early age most Sama Dilaut children spend their days helping older families members pursue their livelihoods such as fishing or pounding cassava (their staple food).

© Helen Brunt

⁴ Brunt, H., 'Stateless Stakeholders, Seen But Not Heard? The Case of the Sama Dilaut in Sabah Malaysia' (2013), MA Dissertation, Brighton: University of Sussex, available at <https://www.academia.edu/4980363/Stateless_Stakeholders_Seen_But_Not_Heard_The_Case_of_the_Sama_Dilaut_in_Sabah_Malaysia>

⁵ Clifton, J. et al. 'Statelessness and Conservation: Exploring the Implications of an International Governance Agenda' (2014), *Tilburg Law Review. Special Issue on Statelessness*, Vol. 19: 81-89.

To make the pledge of the post-2015 development agenda a reality however, a radical change of approach is needed; one that involves systematically targeting the most impoverished and 'hard to reach', for example through mobile birth registration initiatives, and providing for every child's right to primary education. The first step is greater qualitative and quantitative research, to look more closely at those peoples who continue to be left behind and listen more closely to their voices and views.



Deprived of access to affordable health- and social-care, the Sama Dilaut population in Malaysia are disproportionality affected by a higher than average under-five mortality rate, communicable diseases, and the abuse of solvents (glue-sniffing) and associated behaviours.

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The SDGs: An opportunity to leave no stateless child behind

*Betsy Apple and Laura Bingham**

1. Introduction to the SDGs

In September 2015, the United Nations General Assembly committed to a set of goals that would put—at least theoretically—every country on a common path toward sustainable development for the next fifteen years. Each of the seventeen Sustainable Development Goals (SDGs) contains targets that countries have agreed to work towards by 2030, and each target has an indicator by which progress will be measured. The SDGs address those thematic issues one would expect—social, economic and environmental development—but in addition, and more remarkably, the SDGs include a goal dedicated to justice, good governance, and the promotion of peaceful and inclusive societies. This SDG—Goal 16—represents a sea change from the last set of global development goals (the Millennium Development Goals, or MDGs), and provides a crucial platform for advocacy, action, and outreach toward some of the world's most marginalised peoples, including those who are stateless. The admonition to “leave no one behind” inevitably places the emphasis on those populations whose vulnerability is uncontested, namely, children (and in particular, stateless children). It also creates an imperative for states to recognise that sustainable development cannot be achieved

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without access to justice for all, and access to justice for all cannot be achieved by ignoring stateless persons.

Notably, the SDGs mark the first time that countries have recognised the centrality of justice to sustainable development. The previous attempt to coordinate development across all nations through the MDGs failed to address structural injustice and inequality, thereby ignoring crucial root causes of persistent poverty, instability, and underdevelopment. It is axiomatic now that sustainable development can only be realised when people are able to be agents of their own development, but this is a fairly recent revelation. Fortunately, the recognition that a lack of access to justice erects barriers to sustainable development occurred early in the SDG negotiations, and remained a prominent feature throughout the discussions. Over the several years during which member states convened to debate the priorities for the SDGs (assisted by numerous UN working groups and technical support teams), a major groundswell of support for human—including legal—empowerment emerged. In an effort to build legitimacy and a global constituency for the SDGs, the UN undertook widespread public consultations, during which ordinary people opined that rights, access to justice, and participation are central to their nations' development.¹ This community-based call to action resulted in a set of goals that, for the first time, puts people rather than institutions at the heart of sustainable development and focuses on systemic and underlying causes of poverty and underdevelopment.

2. SDGs and statelessness

While principles of justice and empowerment are integrated throughout the 2030 Agenda, Goal 16 specifically recognises the need to “promote peaceful, inclusive societies for sustainable development, to provide access to justice for all and to build effective, accountable and inclusive institutions at all levels.”² One of Goal 16's targets, 16.9,

¹ The extensive national, thematic, and global consultation process is described briefly at *Summary Note on Post 2015 consultations prepared by UNDP for the OWG (Open Working Group)*, available at <https://sustainabledevelopment.un.org/content/documents/1727undp.pdf> (accessed November 15, 2015).

² Sustainable Development Goal 16, available at <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (accessed November 15, 2016).

calls on states to provide legal identity for all by 2030. Although one of the shortest targets within Goal 16, the call for a legal identity for all met with near unanimous backing from member states. The reason: too many people are denied the benefits of development because they are unrecognised by any national authority. Many are unable to register for school, obtain a mobile phone service contract, find formal employment, or open a bank account, and in many cases, a lack of legal identity creates a downward spiral of insecurity as people are forced to exist outside society's formal structures, in unsafe housing or unregulated workplaces. The SDGs offer an important tool to enable people to obtain legal identity precisely because of the high-level consensus among states that legal identity for all is intrinsically linked to inclusive development.

Notwithstanding the relatively widespread support Goal 16.9 enjoyed throughout and after the negotiations, it does not provide a panacea for the problem of statelessness. It only addresses the issue of legal identity, the absence of which may increase the risk of statelessness, but a focus on legal identity alone does not cure the lack of access to citizenship. Much work remains to be done to make the argument that the eradication of statelessness is a necessary precondition to the achievement of sustainable development.

Nonetheless, those working on statelessness can point to, in addition to Goal 16, many of the other goals, which contain elements that can help promote and support sustainable development for all, including stateless people. For example, target 5.a under Goal 5, which commits to "achieving gender equality and empowering all women and girls," calls for reforms to be undertaken "to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance, and natural resources in accordance with national laws."³ Gender discrimination in the nationality laws of many states prevents women from conferring nationality to their children and spouses, a major cause of statelessness and one which the SDGs provide new momentum to remedy.⁴ Goal 10

³ Sustainable Development Goal 5, available at <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (accessed November 15, 2016).

⁴ Twenty-seven states prevent women from giving their nationality to their children, and nearly fifty prohibit women from conferring nationality on their spouses. See Global Campaign for Equal Nationality Rights, available at

aims to reduce inequality within and among countries, with targets that press states to eliminate discriminatory laws and policies and measure reports of discrimination or harassment on the basis of any ground protected under international human rights law (target 10.3 and 10.3.1). Discrimination against ethnic, linguistic and religious minorities resulting in the denial, loss or deprivation of nationality is also a common cause of statelessness. Stateless people and their advocates, in seeking redress for grievances or protection of their fundamental rights, should utilise the language of Goal 16.3 relating to access to justice to demand resolution of their concerns.

Throughout the SDG negotiations, the call to “leave no one behind” became the slogan for the agenda’s ambition to reach everyone, including the most vulnerable. The 2030 Agenda’s preamble, declaration, and the “means of implementation” section all commit to “leave no one behind” and to “reach the furthest behind first.” These phrases recognise that the needs of the most vulnerable and marginalised are frequently ignored or inadequately addressed by development programmes. They represent a commitment to ensure the universality of the SDGs so that the actions taken directly affect those who need them most. By implication, this dictum means that states will not be able to focus their efforts merely on easily accessible groups, or those who the government believes are most worthy of assistance. This is good news for stateless people, who can and must claim their equal standing in the development agenda. In many parts of the world, this will mean advocating for research to gather basic data on stateless populations and for the establishment of appropriate procedures for identifying stateless people, as the invisibility of the issue is often the first impediment to resolving situations of statelessness and ensuring that those who are stateless have access to rights and opportunities.

Moreover, states have acknowledged that progress towards achieving the SDGs cannot be said to have been made unless results are seen in every population group. The data used to measure the SDGs will be disaggregated by a wide range of demographic characteristics to ensure that sections of the population are not at a comparative disadvantage. For stateless people, this disaggregation of data will provide a window into the viability of government development schemes to show

<http://www.equalnationalityrights.org/countries/global-overview> (accessed November 15, 2016).

whether or not the actions taken are having an impact on all sections of the population. The SDGs are therefore necessarily data-driven, and much will depend on the quality and range of data that can be brought to bear in measuring progress. Civil society groups have a big role to play in this regard, in ensuring that the data used is appropriate to the task.

3. National advocacy on statelessness using the SDGs

In advocating for the rights of stateless persons, all of the tenets of the ambition of the sustainable development agenda should be invoked. While many countries have principles of access to justice, non-discrimination, and equality in their constitutions, or have ratified the human rights instruments that serve as the foundation for a right to “legal identity for all” (the Convention on the Rights of the Child, Articles 7 and 8, for example), many governments have been slow to put actionable policies in place. This failure may be due to limited capacity or financial resources, or lack of political will. The SDGs, however, provide an important opportunity to challenge this status quo through concerted action by a range of stakeholders including national civil society.

The SDGs mean that national governments will be accountable for the progress they make, both at the national and international level. Real accountability and progress in advancing the agenda at the national level in the service of stateless people requires considerable mobilisation. As part of their SDG commitments, governments have agreed to work with a range of actors to establish new plans and frameworks to achieve the goals. This presents an opportunity for civil society to work in partnership with the government to develop laws, policies, and programs that meet the targets and goals of the SDGs. Multi-stakeholder partnerships – with government, private sector and civil society working together – have been touted as a key pillar of SDG implementation. Civil society should seek out this role in devising, implementing and measuring national action plans for the SDGs in their country.

For example: In 2015, the legal empowerment NGO Kituo cha Sheria, the International Commission of Jurists Kenya, and the Law Society of Kenya, began advocating for a National Justice Plan that incorporated

the SDGs' justice targets. The organisations held a two-day meeting that brought together the Kenyan Parliamentary Human Rights Association, the Attorney General, and the Human Rights Commission to discuss justice issues in Kenya. The government representatives supported justice reforms but stressed that a National Justice Plan could take several years to develop. They suggested instead that civil society and government work together to revise existing legislation. The organisations agreed. The National Human Rights Policy was selected as the legislation to tackle first as it would serve as a strong foundation on which to develop other laws and policies. The policy had been in draft form since 2008, but by capitalising on the momentum created by the SDGs, advocates were able to get the policy to the top of the legislative agenda in less than a year. The legislation was passed and led to the development of related policies, including the Legal Aid Bill; the Right to Information Bill, the Community Land Bill, all of which have since been signed into law. Within months of the first advocacy meeting, Kenya passed its first Legal Aid Law.

In 2009, the Government of Indonesia incorporated a National Access to Justice Strategy (NAJS) into its 2010-2014 mid-term development plan. The NAJS was created to embody the Indonesian Constitution and relevant legislation, which recognise that Indonesian people have a right to access to justice. Similar to the SDGs, the mid-term development plan incorporated high-level development goals and targets that were used to measure progress towards achieving these goals. As the government looked to update this plan for its 2015-2019 mid-term development plan, civil society organisations collaborated with the government to ensure that the planning process was organised around the ideal of providing access to justice to all citizens and residents of Indonesia. They pushed for the inclusion of themes related to legal identity, curbing corruption, and access to legal services. This collaboration contributed to the process of building national coalitions and partnerships needed to advance access to justice in Indonesia.

If we are to achieve effective implementation, countries should be encouraged to incorporate commitments under the SDGs into their national development plans, and to tailor such commitments to local priorities. The participation of local stakeholders is critical to this process. The global SDG roadmap is only made real by translating lofty goals into specific and targeted interventions at the national level. Civil society should therefore seize the opportunity of the SDGs to push for

government commitment to specific national priorities in the national development plan, as part of its commitment to the SDGs.

The creation and execution of a national development plan is often led by a working group made up of relevant government actors and civil society representatives. Depending on the situation in each country, this group may become a formal body or remain a more informal coalition of justice reformers. In many countries, the Ministry of Planning (or Planning Commission) will lead this process. Civil society groups are often well placed to offer baseline data which can help governments identify gaps in their current development schemes and progress needed to meet the challenge of the SDGs. Baseline assessments in relation to the numbers of stateless persons on a territory, whether the state has a statelessness status determination process, the availability of a pathway to naturalisation, access to birth registration systems, and other relevant data points will all help to assess whether a government's current efforts satisfy the "legal identity for all" commitments in SDG 16.9. States and other stakeholders should also study the existing legal and policy framework before the introduction of new systems for administering birth registration or issuance of documents that may serve as proof of nationality, to ensure that those who are presently left out due to discriminatory laws or practices are brought within the protection of the law.

Having adopted the SDGs, governments must now focus their efforts on effective implementation in their countries and regional systems. The SDGs allow for a degree of customisation such that governments may implement the goals in ways that are appropriate to their own country's development needs. (However, the SDGs are meant to be a floor, not a ceiling, and must never lead to action in contravention of existing obligations.) Civil society groups should play an active and vital part in helping to identify where those needs lie, and in ensuring that development action plans to meet the SDGs focus on the areas of greatest need, and not merely the areas that will be easiest to achieve. While the SDGs have identified metrics through which progress will be measured at the international level, there should be a great emphasis on developing nationally appropriate measurement indicators as well. This will allow for greater granularity in the data yielded from implementation, so that countries may point to nationally relevant progress and successes rather than simply the broad international yardsticks of progress. Here too civil society should play a role in

developing appropriate measures that will meet national development needs while avoiding any perverse incentives that could risk leaving some groups out of progress. Several platforms have emerged with a mission to gather and showcase the importance of civil society data on progress across the Goals and to provide resources to national groups interested in engaging in implementation. These include the SDG 16 data initiative⁵ and the Transparency Accountability and Participation Network (TAP)⁶.

Finally, progress made under the SDGs must be open, transparent, and subject to review by a range of stakeholders. The international community has agreed to review progress annually on a voluntary basis through the UN's High Level Political Forum. This voluntary process provides a forum for governments to present both progress and challenges toward full implementation of the SDGs at a dedicated forum each July in New York. A list of states engaging in this process can be found on the UN's sustainable development knowledge platform⁷. Governments have wide discretion to showcase the results that they choose and to ignore others. Civil society should work with governments to encourage their voluntary reporting through this forum, and also to encourage reporting on all of the targets including those that have been hardest to achieve.

Moreover, when governments do report progress, it is incumbent upon civil society groups to hold those reports to account and to speak out if they are less than accurate. A number of organisations have proposed publishing shadow reports alongside official statements of progress, to highlight not only discrepancies between official government accounts and on-the-ground data, but also to show where the SDGs are being achieved but are having unintended consequences or not fully meeting the spirit and ambition of the agenda. Because statelessness remains an underserved human rights and development issue, it will be essential for those working in the field to track and call attention to the impact that the SDGs and their implementation may have on stateless populations. Regional and national reporting will also be important, as the SDGs will likely shape and influence much of the discourse on development for the next fifteen years. One year after adoption of the

⁵ Available at <http://www.sdg16.org/>

⁶ Available at <http://tapnetwork2030.org/>

⁷ See <https://sustainabledevelopment.un.org/hlpf>

SDGs, the forums at which reporting will occur—and where feedback and critiques of governments will be most influential—are still emerging. By advocating for particular kinds of reporting, appropriate forums, and useful data, civil society groups can play an active role in holding governments accountable and in promoting ongoing improvements to the implementation and measurement of the SDGs so that they remain relevant, on track and true to the creed of leaving no one behind.

The SDGs and childhood statelessness

*Tendayi Bloom**

1. Introduction

In September 2015, the UN General Assembly adopted a set of Sustainable Development Goals (SDGs). Following on the heels of the Millennium Development Goals (MDGs), they offer a plan for global development for the next fifteen years.¹ It was hoped that the SDGs would fix problems raised with the MDGs. For example, following criticism that the MDGs did not address the needs of the poorest, least enfranchised and most excluded members of the global community,² “leave no one behind” became a theme for the SDGs. This makes the importance of including stateless persons and stateless children in the realisation of the Agenda particularly clear. Other problems raised regarding the MDGs include reporting inconsistencies and accountability difficulties. To ensure that stateless populations are not ‘left behind’, these aspects will be especially important to consider, as data on stateless persons is notoriously scant and their inclusion in development is often politically difficult to achieve. In exploring how to use the SDG framework to include stateless children in development efforts, it will be necessary to acknowledge both its strengths and its limitations.

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¹ UNGA, *Resolution adopted by the General Assembly on 25 September 2015, 70/1. Transforming our world: the 2030 Agenda for Sustainable Development*, (2015) A/RES/70/1, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1; UNGA, *Resolution adopted by the General Assembly on 18 September 2000, 60 (b). United Nations Millennium Declaration* (2000) A/RES/55/2, available at <http://www.un.org/millennium/declaration/ares552e.htm>

² UN, *The Millennium Development Goals Report 2015* (2015) at 8, available at [http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf)

2. Leaving No One Behind: do the SDGs apply to stateless children?

The drafters of the SDGs have made efforts specifically to include groups that had been left out in the implementation of the MDGs. This includes those excluded because of their 'status', or their lack of a recognised 'status' in the country in question (for example, irregular migrants, stateless persons, and those with a temporary residence status). The first paragraphs of the SDG resolution document emphasise that a person should not experience discrimination in access to development based on 'status'. It appears in the list included in that document: 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or *other status*'.³ While many stateless persons are likely to suffer through one or more of the other forms of discrimination listed, it is important to note that the inclusion of 'status' in this list could refer to a lack of recognised status and therefore prohibit discrimination based on statelessness itself.⁴

2.1 The Relevance of Recognised Status and the Importance of Children
Target 10.2 of the SDGs calls for the inclusion and empowerment of individuals irrespective of status and Target 17.18 advocates that data collected should be disaggregated for migration status, among other factors. This recognition of the need for disaggregation by status opens the way to look more broadly at how status and a lack of recognised status affects access to development. Thus, while stateless persons are not addressed explicitly in the SDGs, it is possible to find routes for their inclusion.

Stateless children risk double exclusion, on account also of their age or of non-recognition of their special development needs. The SDGs ask for non-discrimination by age and inclusion of 'children and youth'. Moreover, the specific needs of children in development are also acknowledged, for example, in terms of their vulnerability to disease and malnutrition (Targets 2.2 and 3.2) and their need for education (all of which impact on their longer-term ability to access development), as well as their risk of exploitation (Targets 8.7 and 16.2).⁵ However,

³ From Paragraph 19, emphasis added.

⁴ Note that this section does not address the widely discussed Target 16.9, on access to a legal identity for all, including birth registration, as this is examined separately elsewhere in this report. See also "*Legal identity for all*" and *childhood stateless* by Bronwen Manby in this Chapter.

⁵ For more specifically on children and the SDGs, e.g. see UNICEF, *A Post-2015*

work is needed to ensure that these latter points include children that are stateless.

2.2 Including Stateless Children in Development Strategising

That there is recognition that stateless persons should be considered in work towards the SDGs is clear from the *Reference Guide to UN Country Teams*, published in February 2016.⁶ Throughout, when referring to vulnerable and marginalised communities, the drafters of this document explicitly mention “internally displaced persons, non-nationals such as refugees and *stateless persons*, and minorities”,⁷ in terms both of those who should be made aware of the Agenda’s existence, and those who need to be included in development priorities. Indeed, they even emphasise the importance of including the perspectives of “persons affected by [...] statelessness” in developing national strategies.⁸ This can then provide a useful resource for those seeking to understand and promote the place of stateless children in the Sustainable Development Agenda.

2.3 Disaggregation of Data

The SDGs emphasise the importance of disaggregated data. On the face of it, disaggregated data ensuring that development includes stateless adults and children is positive. However, the way in which this is done will dictate whether disaggregation is beneficial or problematic for stateless children.⁹ As is evident in the debate around Target 16.9 “legal identity for all, including birth registration”, there are risks associated with documenting people in the absence of other inclusion measures.¹⁰ For example, where nationality laws are discriminatory, someone who should have access to citizenship will be documented as stateless. Such documentation could

World Fit for Children: An Agenda for #EveryChild 2015 (2015) available at http://www.unicef.org/agenda2030/files/P2015_issue_brief_set.pdf

⁶ UNDP, *Mainstreaming the 2030 Agenda for Sustainable Development: Reference Guide to UN Country Teams* (2016), available at <https://undg.org/wp-content/uploads/2015/10/UNDG-Mainstreaming-the-2030-Agenda-Reference-Guide-Final-1-February-2016.pdf>

⁷ Ibid., at 16. emphasis added.

⁸ Ibid., at 17; see also at 24

⁹ With regard to vulnerable populations more generally, see OHCHR, ‘SDGs Indicator Framework: A Human Rights Approach to Data Disaggregation to Leave No One Behind’ (2015) Draft background note, available at <http://www.ohchr.org/Documents/Issues/HRIndicators/DataDisaggregation.pdf>

¹⁰ See also “*Legal identity for all*” and *childhood stateless* by Bronwen Manby in this Chapter.

also fix a lack of status, making it difficult to contest. There is also a risk that those who are stateless and able to access resources in an informal manner may be forced to demonstrate their legal identity and so find this informal access more difficult to achieve.

The need to be aware of local contexts can be seen if we consider the Dominican Republic National Development Strategy 2030.¹¹ Articles 2.3.3.5 and 2.3.4.2 are ostensibly supportive of the inclusion of stateless children in development. The former commits to strengthen programmes providing identity documents in order to facilitate better inclusion, while the latter commits to improve the coverage of registration of children, particularly members of excluded groups. And yet a narrowing of the definition of who is eligible for citizenship means that this is likely not to address the principle cause of statelessness in the Dominican Republic, which is the denationalisation of persons considered to be of Haitian heritage.¹²

There are ways to mitigate these risks. For example, work in this area might include firewalls between identification systems and development data, so that the increased use of identification documents does not force individuals to reveal sensitive information (such as that relating to ethnicity, membership of a minority group, or lack of recognised status) to school authorities and healthcare providers.

2.4 Including Stateless Persons from the Start

If stateless children are to be included in the work towards the SDGs, it is particularly important to include them in the indicators as early as possible. At the time of writing, the indicators on the SDGs do not mention stateless persons or stateless children directly. Stateless children are often among the poorest and most disenfranchised. Including them in development reporting, then, where they were not included before, might initially set back reported progress. This means that if their inclusion is left too late into the process on the SDGs, it will become increasingly difficult to do so.

¹¹ Ley Orgánica de la Estrategia Nacional de Desarrollo de la República Dominicana 2030.

¹² E.g. see J. Blake, 'Race-based Statelessness in the Dominican Republic', in T. Bloom, K. Tonkiss & P. Cole (eds) *Understanding Statelessness* (forthcoming 2017), Routledge. See also *The perpetuation of childhood Statelessness in the Dominican Republic* by David Baluarte and *Profiling the stateless children of the Dominican Republic* by Allison Petrozziello in Chapter 12.

3. Making the Most of Aspiration

In the MDGs there were no clear mechanisms for accountability, or ramifications for failing to reach (or make progress towards) the Goals.¹³ While this was cause for criticism of the MDGs, it has been suggested that this lack of accountability could be used advantageously.¹⁴ That is, in the absence of any enforcement mechanism, there is the potential to push for more aspirational goals than would be possible otherwise, and in so doing to provide a complement to human rights frameworks. For example, rather than seeking reductions in the number of persons living in (non-‘extreme’) poverty, the Agenda could aspire to end poverty outright.

The lack of explicit inclusion of stateless children in the SDGs makes clear that this aspirational approach to the SDGs has not yet been adopted. Strategising around the way in which they are implemented could potentially help to address this, for example by explicitly moving beyond the tendency in human rights laws to distinguish between nationals and non-nationals.

3.1 A Lack of Accountability

The lack of accountability could have freed the development agenda to aspire to the development of a world that went beyond basic minimum standards of human rights for all. It could also have provided a vehicle for addressing some of the most difficult and intractable issues, which continue to go unaddressed despite human rights frameworks guaranteeing them. The recognition of status and the granting of nationality is one such issue. While there is a universal right to a nationality, many persons are still unable to make use of this right.

The freedom offered by the reduced accountability found in the SDGs, could have provided an opportunity to set out what an ideal world would be like for currently stateless children and adults. However, in

¹³ E.g. see M. Darrow, ‘The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda’ (2014) 15(1) *Yale Human Rights and Development Journal*, available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1111&context=yhrdlj>

¹⁴ T. Pogge & M. Sengupta, ‘The Sustainable Development Goals As Drafted: Nice Idea, Poor Execution’ (2015) 24(3) *Washington International Law Journal*, available at https://moodle.bbk.ac.uk/pluginfile.php/452432/mod_resource/content/1/Pogge_Sengupta_SDGs_WILJ.pdf

the absence of this aspiration, the lack of accountability risks making the Agenda seem toothless.

Alongside the lack of ramifications for failure, critics have argued that the celebration of success on the MDGs provided a way in which governments could distract attention from failures to protect human rights or to make progress in other areas. This possibility remains in the SDGs and those working in the area will need to ensure that the needs of stateless children are explicitly included in the Agenda. For example, local experts on statelessness and stateless children need to be vigilant to ensure that development strategies produced in line with the Agenda do not airbrush stateless children out of development commitments and take into account local contexts of statelessness.

3.2 Enriching or Devaluing Human Rights?

The importance of the intersection of development and human rights frameworks is set out, for example, in *The Future We Want*, which formalised the plan for drafting the Agenda.¹⁵ However, it has been suggested that this may have been divisive. That is, the aspirational nature of the SDGs in utilising the language of existing human rights commitments –but not going beyond them – risks lessening the power of the human rights agenda, suggesting that human rights obligations are also aspirational, rather than legally required.¹⁶ It will be crucial to address this through the way that the SDGs are taken forward. One suggestion which has been made on how to do this is to use human rights mechanisms including treaty bodies and the Universal Periodic Review in monitoring the implementation of the SDGs.

3.3. An Opportunity to Look Beyond Citizens

The global nature of the SDGs could perhaps have provided an opportunity to look beyond citizens and those whose national identity is formally recognised by States. In its current formation, there is a risk that this opportunity was not taken. However, those working on the Agenda can still look beyond citizens and those included by States in constructing how the SDGs are interpreted and progress is measured.

¹⁵ UNGA, 'The Future We Want, Outcome document of the United Nations Conference on Sustainable Development' (2012) Rio de Janeiro, Brazil 20-22 June 2012, available at <https://sustainabledevelopment.un.org/futurewewant.html>

¹⁶ E.g. A. De Chickera, speaking at 'A4ID Knowledge Group: Statelessness, Sustainable Development and the Law', Wednesday 7 September 2016 at Ashurst LLP, London.

4. An Awareness of the Limitations of Structure

The structure of the SDGs could be considered limiting. While development is complex, multilevel, and multifaceted, the Development Agenda is in the form of a linear series of goals and targets. One concern is that the large number of Goals (17) and Targets (169) weakens their impact, and that the attempt to include so many groups specifically emphasises the exclusion of those left out. The work towards the MDGs was criticised for its focus on States, giving insufficient weight to the role of local and regional actors in development.¹⁷ Related was the criticism that there was a failure to recognise the extent to which global systems of trade, finance, taxation and politics, for example, affect development. While some of these concerns have been addressed in the SDGs, an awareness of their limitations will be useful in strategising.

4.1 A Long List

While the MDGs were presented in a simple (simplistic?¹⁸) list of eight Goals, the SDGs attempted to address much that had been omitted from the MDGs and to satisfy the concerns of many groups. On the one hand, this could risk watering down the existing Goals by providing too many issues to focus on.¹⁹ On the other hand, the attempt to include everyone's concerns in the Goals risks making it seem like anything that was left out of the Agenda is no longer a development priority. Whether either of these turns out to be a problem will be directed by the way in which all actors strategise around the Agenda. The explicit inclusion of the needs and interests of stateless children in strategy documents and discourse will be an important part of demonstrating that the SDGs provide a stepping-off point rather than a limit for setting out priorities.

¹⁷ E.g. D. Satterthwaite, S. Bartlett, Y. Cabannes & D. Brown, 'The Role of Local and Regional Authorities in the UN Development Agenda Post-2015: Paving the Way to Habitat III' (2012) UCLG Position Paper, available at https://www.uclg.org/sites/default/files/Summary_The%20role%20of%20local%20and%20regional%20authorities%20in%20the%20development%20agenda%20post-2015.pdf

¹⁸ E.g. see M. Fehling, B. Nelson & S. Venkatapuram, 'Limitations of the Millennium Development Goals: a literature review' (2013) 8(10) Global Public Health, available at <http://www.ncbi.nlm.nih.gov/pubmed/24266508>

¹⁹ H. Selin, 'The risk of UN's Sustainable Development Goals: too many goals, too little focus' (2015), *The Conversation*, available at <http://theconversation.com/the-risk-of-uns-sustainable-development-goals-too-many-goals-too-little-focus-48083>

4.2 State Development vs Global, Regional and Local Development

While the SDGs emphasise the special development importance of urban (Target 11.2) and rural (Targets 2.a and 11.a) populations and the need to take into account shared stakes in development across global regions, it is true that the focus is still principally on States, and on State-by-State measurement of progress. For stateless children, this carries with it two risks. First, some stateless populations straddle State borders and responsibility for their protection is often denied by both or all States concerned. The State-by-State approach does not provide anything beyond existing mechanisms to address this. Second, stateless persons often engage in different ways and with different levels of political arrangement. For example, in some regions, local and provincial political participation and inclusion in development may be available, even to those not recognised on the State level.²⁰ Conversely, persons granted citizenship or other status may in practice still be excluded locally.²¹

As agencies strategise around the SDGs and the inclusion of stateless children, it will be important to take these different levels into account – and as States, localities, and cities, as well as global and regional groupings strategise, it will be important for them to engage with each other regarding the inclusion of stateless children. Stateless children live all over the world, in countries of all development groups. Though the precise development considerations differ from place to place and the way in which children become stateless or at risk of statelessness also differs, the inclusion of stateless children in development is not something that can be ignored in any region and needs a cooperative global and multi-level approach.

4.3. Strategising

The text of the SDGs has now been fixed and the relevant actors are strategizing on how to work towards them. It is important, then, to ensure that stateless children and their needs are explicitly acknowledged in strategy documents and discourses. This would require the input of experts in the particular needs of stateless

²⁰ E.g. see D. Passarelli, 'Realising the Rights of Stateless Persons: The Doctrine of Fiduciary Duty and the Role of Municipal Government'; and K Swider, 'Why End Statelessness?', both in T. Bloom, K. Tonkiss, & P. Cole (eds), *Theorising Statelessness* (forthcoming 2017), Routledge.

²¹ E.g. see L Kingston, 'Worthy of Rights: Statelessness as a Cause and a Symptom of Marginalisation', in T. Bloom, K. Tonkiss, & P. Cole (eds), *Theorising Statelessness* (forthcoming 2017), Routledge.

persons (not least stateless persons themselves) to be included in the drafting of strategies to ensure that they are genuinely conducive to the inclusion of stateless persons in development, and are accountable to those stateless persons, including stateless children.²²

Consultation and accountability will also help to avoid problematic consequences for stateless persons, including stateless children, of broader development strategising. For example, in Norway's voluntary contribution to the 2016 High Level Political Forum assessing progress on the SDG Agenda, reference was made to Target 10.7 on facilitating migration and mobility in an orderly way. The document proposes to make a commitment to 'prevent and limit irregular migration, while at the same time meeting its obligations under international law to protect persons in need of international protection'.²³ Additional work is needed to ensure that these efforts would not in fact impair the ability of those stateless persons to travel, including stateless children who may lack documents, including the ability to travel in order to escape situations of exploitation, severe vulnerability and persecution.

5. Conclusion

As mentioned above, to ensure that stateless children benefit from the global development agenda, they need to be explicitly included in strategising around the SDGs. This will require a recognition both of the limitations of the Agenda and of its potential strengths. It will also require collaboration between stateless communities and their representatives, human rights communities, and development communities, to ensure that efforts both avoid risking negative consequences for stateless children and positively promote their participation in development. The SDGs could also provide a vehicle for bringing together existing global efforts to address the problems associated with statelessness – and draw attention to the complexities of statelessness within the development community.

²² E.g. see suggestions in UNDP, *Mainstreaming the 2030 Agenda for Sustainable Development: Reference Guide to UN Country Teams* (2016), available at <https://undg.org/wp-content/uploads/2015/10/UNDG-Mainstreaming-the-2030-Agenda-Reference-Guide-Final-1-February-2016.pdf>

²³ 'Norway: Initial Steps Towards the Implementation of the 2030 Agenda: Voluntary National Review Presented at the High-Level Political Forum on Sustainable Development (HLPF)' at 18, UN, New York, July 2016.

“Legal identity for all” and childhood statelessness

*Bronwen Manby**

1. The Sustainable Development Goals and legal identity: Leave no one behind

In September 2015, the UN General Assembly adopted the Sustainable Development Goals (SDGs), an ambitious set of objectives for international development to replace and expand upon the fifteen-year-old Millennium Development Goals (MDGs) adopted in 2000.¹ Goal 16 is one of the broadest: “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. Each Goal has a set of more detailed targets: Target 16.9 requires that states should, by 2030, “provide legal identity for all, including birth registration”.

The achievement of Target 16.9 is relevant for the realisation of many of the other SDGs and their detailed targets, and for the overall ambition to “Leave no one behind”. Without a legal identity, in the form of an official entry in a state register, people are invisible to the state and other agencies that are working to fulfil the different goals and monitor their implementation.² Effective systems to identify individuals in need will be required, amongst other purposes, to implement social protection systems (Target 1.3); for the poor to have control over land and other assets

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¹ See the Sustainable Development knowledge platform at <https://sustainabledevelopment.un.org/sdgs> for further information.

² E. Stuart, E. Samman, W. Avis & T. Berliner, *The data revolution: Finding the missing millions* (2015) Overseas Development Institute, available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9604.pdf>

(Target 1.4); and to measure progress in women's empowerment (many of the targets under Goal 5).³ Civil registration in general is also a priority for public health professionals, since recording cause of deaths provides an important source of information around disease and mortality (several targets under Goal 3).⁴ A document showing legal identity is essential to "facilitate orderly, safe, regular and responsible migration and mobility of people", one of the objectives around reducing inequalities within and between countries (Target 10.7).

In principle, SDG Target 16.9 should provide a significant boost to the achievement of UNHCR's ten-year #IBelong campaign to end statelessness by 2024. The commitment to universal birth registration should particularly assist in the realisation of the ambition to end childhood statelessness. While birth registration in itself does not confer nationality, and is usually not proof of nationality, the official record of the place of birth and parentage of the child provides critical evidence of the facts that enable the child to assert the right to nationality in one or more states.

Yet it is notable that the SDG target endorsed by states is for a less demanding and less specific target—legal identity rather than nationality for all—for which a longer time-frame is also set than the UNHCR campaign. On the one hand, as discussed below, the meaning of "legal identity" is not clear; on the other, a person may have a document that is official proof of identity and yet still be stateless. Moreover, there are concerns that the focus on legal identity may prove to be a distraction from the campaign to eradicate statelessness; in fact, in some contexts it is possible that the SDG may even prove to be damaging, if underlying laws are not reformed before programmes of identification are rolled out. The key problem here is the lack of clarity over the meaning of "legal identity" in the SDGs. How the implementation of the target turns out in practice is yet to be seen: there are opportunities, but also risks.

2. Birth registration in the SDGs and the #IBelong campaign

The SDGs and UNHCR's campaign to end statelessness agree on the

³ M. Dahan & A. Gelb, 'The Role of Identification in the Post-2015 Development Agenda' (2015) Centre for Global Development Essays, available at http://www.cgdev.org/sites/default/files/CGD-Essay-Dahan-Gelb-Role-Identification-Post-2015-ID4D_0.pdf

⁴ The Lancet, 'Counting births and deaths' (series) (2015) *The Lancet*, available at <http://www.thelancet.com/series/counting-births-and-deaths>.

importance of universal birth registration: “the continuous, permanent and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements”.⁵ Universal birth registration is already a long-standing objective of UNICEF and other agencies concerned with child welfare. Birth registration is important not only for statistical purposes of planning and monitoring government policy, but also to assist in child protection.⁶ The requirement for registration and the availability of a birth certificate can help to combat trafficking of children, and provides proof of age for criminal justice, immigration and other government systems.⁷

Birth registration also features as Action 7 in the ten-point action plan for the #IBelong campaign. Birth registration provides evidence of the key pieces of information—where a person was born and who his/her parents are—needed to establish which nationality a child has been attributed at birth or may have the right to acquire later. The concept of birth registration is well understood, and there are extensive international guidelines on its implementation.⁸ The obstacles to universal birth registration are also well understood, as are the steps needed to overcome them. They include both simple failures of administration, and deliberate patterns of discrimination based on factors such as birth out of wedlock, sex or legal status of the parent registering the birth, ethnicity, location of birth, or livelihood of the community from which the child comes. In some countries, rules preventing parents without documents from registering the birth of their children make lack of birth registration a hereditary condition.

⁵ UN Department of Economic and Social Affairs (UNDESA), *Principles and Recommendations for a Vital Statistics System*, Revision 2 (2001) available at <http://unstats.un.org/unsd/demographic/standmeth/principles/M19Rev3en.pdf>

⁶ UN Office of the High Commissioner for Human Rights (UN OHCHR), *Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights* (2014) A/HRC/27/22 available at <http://www.ohchr.org/Documents/Issues/Children/BirthRegistration/ReportBirthRegistration.pdf>

⁷ D Ladner, EG Jensen & SE Saunders, ‘Critical Assessment of Legal Identity: What It Promises and What It Delivers’ (2014) 6 *Hague Journal on the Rule of Law* 47, available at <https://law.stanford.edu/publications/a-critical-assessment-of-legal-identity-what-it-promises-and-what-it-delivers/>

⁸ See, for instance: UNICEF, *A Passport to Protection: A Guide to Birth Registration Programming* (2013) available at http://www.unicef.org/protection/files/UNICEF_Birth_Registration_Handbook.pdf.

The proposed indicator to measure progress towards Target 16.9 is the percentage of children under five whose births have been registered, a statistic already collected in many countries through surveys conducted by UNICEF.⁹ Although there are important criticisms—from those who argue that the indicator should be the percentage of children under one year old, to capture the completeness of current registration levels, and/or the percentage of the entire population, or who emphasise the importance of the issuance of birth certificates as well as the registration of births¹⁰—the under-five registration rate is now the established indicator for SDG 16.9. There is no indicator proposed for other forms of recognition of legal identity beyond birth registration, nor consensus on what success in achieving the broader target would look like.¹¹

3. Legal identity beyond birth registration

‘Legal identity’ is not a term that has any definition in international law. It seems that different agencies and interest groups are interpreting the SDG target on legal identity according to their own priorities, whether they be child protection, national planning, social protection systems, public health, or, indeed, the ending of statelessness. Among the interest groups are the private sector companies involved in the provision of identity documents, especially those with capabilities in the new biometric technologies.

The problem of definition starts from the distinction that can be made between identity and identification: whereas an identity is what a person (or thing) is, in and of itself, identification is the process of establishing that identity and distinguishing the person (or thing) identified from others. A person’s legal identity, the identity they have in law, thus can

⁹ See SDG indicators, available at <http://unstats.un.org/sdgs/>. Birth registration data is also collected through the global Demographic and Health Survey (DHS) program, funded by the US government.

¹⁰ J. van der Straaten, ‘Legal Identity for All by 2030: How will we know?’ (2015) Position Paper, available at <https://www.crc4d.com/downloads/2015-10-legal-identity-for-all-by-2030-how-will-we-know-position-paper.pdf>

¹¹ The indicator can, however, be reviewed and revised as part of the work of the Inter-Agency Expert Group on SDG Indicators (IAEG). The World Bank has compiled a dataset on coverage of different forms of identification (available at <http://data.worldbank.org/data-catalog/id4d-dataset>), that provides some starting points for such a discussion.

(and arguably should in some contexts) be separated from the question of whether they have been formally identified and registered by state authorities and issued a token—such as an identity card—confirming that registration. A range of international human rights standards establish that every person has the right to recognition as a person before the law (enabling that person to assert rights, to enforce contracts, or to defend a case in court): legal identity in this sense is not dependent on existence in any register nor on holding official identification papers; it is already attributed by international law.¹² In the context of statelessness, the rights of a child to a name and nationality are freestanding, and not dependent on the registration of that child's birth, even if birth registration is a closely related right in international treaties, and may be required by national law in order to give effect to the other rights.

Nonetheless, it has for a long time also been clear that without official registration and *proof of* legal identity a person's rights are often significantly curtailed in practice. Rights in international law may indeed be “nonsense upon stilts” if the national legal systems do not support them.¹³ Without official recognition that a person exists, and has rights set out in national law, human rights protections may be worth little. As requirements to produce identity documents grow ever more pervasive, a person without those documents is ever more excluded from the ability to participate in economic activity and in society generally.

International development agencies have thus been considering the question of legal identity since well before the adoption of the SDGs. A 2007 publication of the Asian Development Bank outlines the view that

¹² Article 6, Universal Declaration of Human Rights. See also UN Office of the High Commissioner for Human Rights (UN OHCHR), *Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights* (2014) A/HRC/27/22 available at <http://www.ohchr.org/Documents/Issues/Children/BirthRegistration/ReportBirthRegistration.pdf>, and UN Human Rights Council (UN HRC), *resolution on birth registration and the right of everyone to recognition everywhere as a person before the law* (2015) A/HRC/RES/28/13, available at <http://www.refworld.org/pdfid/558ab29a4.pdf>. Also see Working Group on Enforced or Involuntary Disappearances, ‘General Comment on the right to recognition as a person before the law in the context of enforced disappearances’ (2012) A/HRC/19/58/Rev.1 available at <http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf>

¹³ British philosopher Jeremy Bentham famously stated that: “Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense — nonsense upon stilts”.

legal identity is a matter of legal, rather than physical, personality: a recognised legal identity allows a person to enjoy the protection of the legal system and to enforce rights or demand redress for violations by accessing state institutions. Thus, “Proof of legal identity consists of official, government-issued and recognized identity documents—documents that include basic information attesting to the holder’s identity and age, status, and/or legal relationships.”¹⁴ In 2009, the Inter-American Development Bank (IDB) published a working paper suggesting a somewhat different interpretation: “Legal identity can be understood as a composite condition obtained through birth or civil registration which gives the person an identity (name and nationality) and variables of unique personal identifiers, such as biometrics combined with a unique identity number.”¹⁵

However, it could also be argued that a person may have multiple legal identities, with corresponding entries in official registers and different rights and obligations according to context (as an infant requiring immunisations, a schoolchild, a parent, a pensioner, a permanent resident, a voter, a person entitled to health care or other benefits, a citizen due to perform military service, a migrant worker...). Only in some countries are all such registers linked to a single national system. It is also possible for a person to exist in many different registers, or a single national database, yet still not be recognised as a national of that state—nor of any other.

Thus, as the IDB noted, depending on the context, there may be little distinction in practice between the situation of those people whose births have been registered but who do not possess a legally valid identification document (whether issued by the state of residence or another state) on reaching adulthood and those who have no official identity documents of any kind, including a birth certificate.¹⁶ However, there is no international consensus on the right or obligation to hold official documentation issued later in life. A consequence is that, beyond registration of births, there is still no definition on what enjoyment of legal identity may mean for the

¹⁴ C. Vandenabeele & C.V. Lao (eds.), *Legal Identity for Inclusive Development* (Asian Development Bank 2007), available at <https://openaccess.adb.org/bitstream/handle/11540/227/legal-identity.pdf?sequence=1>

¹⁵ M Harbitz & B Boekle-Giuffrida, *Democratic Governance, Citizenship, and Legal Identity: Linking Theoretical Discussion and Operational Reality* (Inter-American Development Bank 2009), available at <https://publications.iadb.org/bitstream/handle/11319/4300/Democratic%20Governance%2c%20Citizenship%2c%20and%20Legal%20Identity.pdf?sequence=2>

¹⁶ Ibid.

SDG target in each national context or for any particular individual.

4. Legal identity and statelessness

SDG Target 16.9 recognises by its wording that universal birth registration is not a complete solution to the question of legal identity, although it proposes no indicator to measure progress other than the coverage of birth registration among those under five years old. Universal birth registration is equally not a complete solution to the problem of statelessness. Only a few countries provide that a birth certificate is in itself proof of nationality; such a provision in the laws of one country can in any event not bind another state where a child might be entitled to nationality. In some countries, foreign civil registrations have no legal effect even in relation to proof of parentage or marriage. Conflicts of laws mean that some children cannot acquire the nationality of (one of) their parents, even if all details are recorded.

Neither the SDG target nor the #IBelong action plan mention the recording of other life events in a complete civil registration system; although this may also be critical to assert some rights, including the right to the nationality of a particular state.¹⁷ These events include marriage, where birth in or out of wedlock—often defined as a formally registered marriage—creates different rights for children to acquire nationality; adoption, where a child has been adopted from another country; and death, where registration of the death of a parent may be necessary for an orphan to claim rights. The SDG target also does not have any equivalent to Action 8 in the #IBelong campaign, calling on states to issue nationality documentation to those with entitlement to it.

Moreover, although discriminatory practices and administrative blockages hinder universal access to birth registration in many countries, states are often less likely to place obstacles in the way of birth registration than recognition as a national. For those children who do not have at least one parent officially recognised as a national of the country of birth, the risk of statelessness may be high even if the birth of that child is registered. This can be the case even if the parent and the child are both in principle entitled to recognition of nationality of that state under the law. The risk of statelessness is higher in states where the general rate of documentation

¹⁷ The UNHCR ExCom Conclusion on Civil Registration (No. 111 (LXIV) – 2013) does, however, consider civil registration more generally, including as a protection against statelessness.

has historically been low and where new identification systems are being introduced. But even in states where almost everybody exists on one official register or another, this near-universal confirmation of legal identity does not eliminate statelessness. It is very possible for a person to hold proof of legal identity and even of legal immigration status in a country of residence and at the same time to be stateless.

For example, many ethnic Russians in the Baltic states are stateless—they hold the nationality neither of their state of residence nor of the Russian Federation—but the vast majority do not lack a legal identity, since they are legal residents where they live, are issued identification documents indicating that status, and indeed are generally entitled to more rights than other foreigners.¹⁸ Similarly, in Lebanon, there is a longstanding population of stateless persons whose ancestors were not included, or were recorded as foreign, in the population register established in the 1920s following the creation of Lebanon at the break-up of the Ottoman Empire. They are not undocumented—they are, paradoxically, registered and given identification cards as ‘unregistered’ (*maktoum al kayd*) or ‘registration under study’ (*kayd al dars*)—and they are recognised as legal residents. However, people with this status have greatly reduced rights in Lebanon compared to full citizens. Although there were efforts to reduce the number of these stateless persons by providing an exceptional route to naturalisation in the 1990s, the number remains high, and increases because Lebanon provides no access to nationality based on birth and residence in the territory, while a Lebanese woman has no right to transmit her nationality to her child in any circumstances.¹⁹ Similar problems exist in Syria, with serious consequences for those who are now refugees.

By contrast, many millions of people in Asian and African countries lack both birth registration and other proof of legal identity, but only some of them are also stateless. Those who are at risk of statelessness are those who lack documents and in addition fall within a group facing discrimination and exclusion within that society generally: typically, members of certain racial, ethnic or religious groups, children born out of wedlock, orphans,

¹⁸ See the resources available in the country profiles of the EUDO Citizenship Observatory available at <http://eudo-citizenship.eu/country-profiles>.

¹⁹ Lebanon does have a provision recognising nationality of a child born in the territory who is otherwise stateless, but does not respect this rule in practice. See Laura van Waas, ‘A comparative analysis of nationality laws in the MENA region’ (2014) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2493718

trafficked children, refugees and IDPs, and the descendants of people who have migrated from another country—including those who were forcibly transplanted by the colonial powers before independence.

Hence, not everyone lacking proof of legal identity is stateless; while not everyone who is stateless lacks proof of legal identity. This conundrum is recognised by UNHCR's guidance that statelessness is a mixed question of fact and law.²⁰ Determining whether a person is stateless, whatever their existing documentation, may require the exhaustion of all avenues to apply for recognition of nationality by any state to which the person has a connection. The often inaccessible and politicised procedures to resolve these questions have encouraged development agencies wishing to mobilise the power of identification to try to work around official blockages.

5. Digital identity and biometric identification

The World Bank's 2016 *World Development Report* (WDR), focused on the development benefits from digital technologies, recommends that the best way to achieve the SDG legal identity target is "through digital identity systems, central registries storing personal data in digital form and credentials that rely on digital, rather than physical, mechanisms to authenticate the identity of their holder."²¹ The Bank argues that digital forms of official identity can increase access to both public and private services where civil registration is weak; digital identity systems can also help to reduce some forms of corruption, such as double-dipping for entitlements or ghost workers in public employment. The increased availability of affordable technology to capture biometric details provides new ways to authenticate identity and ensure uniqueness, creating much stronger levels of certainty that the person holding a document is the person to whom it was issued, or removing the need for a document altogether. In high-income countries, new digital identification systems are based on long-standing paper systems of civil registration and other

²⁰ UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (UNHCR 2014) available at <http://www.unhcr.org/53b698ab9.pdf>

²¹ World Bank, 'Chapter 3: Delivering Services' (spotlight on digital identity), in *World Development Report 2016: Digital Dividends* (2016), 94-197. Available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2016/01/13/090224b08405ea05/2_0/Rendered/PDF/World0developm0000digital0dividends.pdf

forms of identification. Although the WDR also emphasises the importance of strengthening the “analog foundations of the digital revolution”, it suggests that low-income countries may leapfrog the paper-based stage, and move straight to digital identification.²²

One frequently cited example of such leapfrogging is the Indian Aadhaar (“foundation”) programme, established in 2009, which issues a 12-digit unique identity number to any resident of India, after collecting biometric data and other basic information. As of mid-2016, more than one billion people in India had been issued an Aadhaar number; and there were plans and first steps to issue Aadhaar numbers at the time of registration of birth. The number and linked biometric data are used for the purpose of verifying identity irrespective of nationality or migration status. Indeed, for many situations in which proof of identity is important, legal status is irrelevant: public health and social protection programmes usually aim for complete coverage regardless of the immigration status of the people targeted; while a retailer does not care if the person buying a product is a citizen or not, so long they can be traced to pay the bill. A World Bank paper concludes that the value of Aadhaar as a form of identity “implies that those who were previously marginalized can now be included in a number of welfare programs.”²³ The World Bank also acknowledges risks with the digital identity agenda, including for privacy and data security, but argues that these can be mitigated. In relation to the rights of children, it identifies one key gap in these new digital systems: where they are without a solid foundation in civil registration, children are usually excluded (even if not in the Aadhaar case), and continue to be unregistered.

An Aadhaar-type programme, however, has another critical weakness in relation to securing legal identity: it says nothing about entitlement to citizenship nor about legal status in the country. It can be argued that this is rather a strength: the programme simply sidesteps the complex and controversial questions about legal status and nationality among the many formerly undocumented residents of India, on the basis that proof of

²² Ibid; see also A. Gelb & J. Clark, ‘Identification for Development: The Biometrics Revolution’ (2013) Centre for Global Development Working Paper 315, available at http://cgdev.org.488elwb02.blackmesh.com/sites/default/files/1426862_file_Biometric_ID_for_Development.pdf

²³ S. Banerjee, ‘Aadhar: Digital Inclusion and Public Services in India’ (2015) Background Paper for the *World Development Report 2016: Digital Dividends*, World Bank, available at <http://pubdocs.worldbank.org/en/655801461250682317/WDR16-BP-Aadhaar-Paper-Banerjee.pdf>

identity is useful in itself both for those holding it and for the authorities. However, this sidestep raises the question of whether Aadhaar registration in fact provides a person with a 'legal identity' in the sense understood by the SDGs: although government-issued, it is purely a system of authentication of identity, with no guarantee of ability to enforce rights or access the state system for other purposes. If it is a legal identity, the identity is purely that of 'resident', not even 'legal resident'. In addition, the statistics available on Aadhaar coverage indicate that areas where rates of existing forms of identification are low also have low registration with Aadhaar; there are more new entrants to the system through regular birth registration than there are through the 'introduction system' provided for under Aadhaar.²⁴ Rather than leapfrogging, or creating a new foundation, the system is for the most part built on already existing 'foundations'. On the other hand, its computerised record of identification and authentication could in due course facilitate resolution of the more complex issues.

No other government-backed initiatives for national biometric identification follow the Aadhaar model; they rather focus on upgrading existing systems for national identity cards and passports, the introduction of new national identity cards, or voter registration exercises. In addition, there are function-specific systems, such as for the issue of drivers' licences, collection of pensions or cash transfers, or identification of civil servants. Some of these initiatives are hardly connected to birth registration, especially in countries where civil registration in general or birth registration in particular has historically been neglected. In other cases, however, paper-based civil registers are being digitised and linked to a new or existing central population register of citizens and residents.

There are some overblown claims about the ability of these biometric systems to eliminate doubts over the identification of citizens and

²⁴ With thanks to Jaap van der Straaten for this point. See The Wire Staff, 'Most Aadhar Cards Issued to Those Who Already Have IDs' (2015) *The Wire* (India), available at <http://thewire.in/3108/most-aadhar-cards-issued-to-those-who-already-have-ids/>; for other critiques, see "I am not aware that this has been thought through – Jean Drèze speaks to Pragya Tiwari about the new Aadhaar Act", South Asia @ LSE blog, 28 July 2016, available at <http://blogs.lse.ac.uk/southasia/2016/07/28/even-if-aadhaar-is-deemed-inevitable-there-are-many-ways-of-using-it-some-more-helpful-or-harmful-than-others-jean-dreze/>. For official statistics, see Office of the Registrar General, India Ministry of Home Affairs, *Vital Statistics of India Based on the Civil Registration System 2013* (2015) available at http://www.censusindia.gov.in/2011-Documents/CRS_Report/CRS_Report2013.pdf.

foreigners, in contexts where such uncertainties had nothing to do with authentication of the person holding an identity card, and everything to do with law and politics.²⁵ There is also a risk of creating unnecessary demand for new identification systems, or of rolling out or merging the new systems too quickly, driven by the availability of new technology. Where many databases are linked, but adequate safeguards are not put in place, a person who “existed” on some registers but not others may be excluded from all. The safest approach seems to be to start from the civil registration system, so that digital legal identity starts from facts established at birth in the analogue world.²⁶ At the same time, where long struggles over election rigging have resulted in voter registration being entrusted to an independent electoral commission, there are concerns about relying on national identity systems under the control of the executive for that purpose. Privacy and data protection is a concern for such systems everywhere.

Where new systems are adopted without considering the underlying legal and policy frameworks, there can be a risk of generating new forms of exclusion. Indeed, the creation of new population registers has historically been a danger point for the creation of stateless populations. In Lebanon, Syria, and the Gulf States, the descendants of those who were not included in the population registries created at independence remain stateless today, even though their ancestors should have been entitled to nationality under the law. Similar problems have arisen when new registers were established in the successor states of the former Yugoslavia and Soviet Union. The lobby group *Touche Pas à Ma Nationalité* in Mauritania accuses the government of ‘biometric genocide’ in its implementation of a new identity card system coupled with amendments to the nationality code.²⁷ The new national number and biometric identity card being introduced by Sudan since the secession of South Sudan are also being used to denationalise people who have never considered themselves South Sudanese.²⁸ What is needed is an approach to the legal

²⁵ For example, ‘Côte d’Ivoire: La fin d’un conflit grâce à la biométrie’, Morpho, 2014.

²⁶ See papers presented at the ID4Africa Conference held in Kigali, Rwanda, 24-26 May 2016, available at <http://www.id4africaforum.com/index.php/download-center#toggle-id-4>.

²⁷ Noorinfo, ‘TPMN : Le recensement prend une tournure de génocide biométrique’ (2013) Communiqué, available at http://www.noorinfo.com/TPMN-Le-recensement-prend-une-tournure-de-genocide-biometrique_a9872.html

²⁸ Draft report, *Nationality and Statelessness in Sudan following the Secession of South Sudan* (2016) Human Rights Centre, University of Khartoum, on file with author.

identity target, and principles for the implementation of new biometric and other digital identification systems, that considers and avoids these risks.

6. Legal identity and ending childhood statelessness

The power of birth registration is that it establishes an officially recognised legal identity very shortly after birth. The longer it takes to establish a nationality the more difficult it becomes. Those who are adults before they attempt to prove their origins and nationality may find it impossible to do so; or they may only succeed at great effort and cost. Those vulnerable children who are in situations of difficulty and remain completely undocumented are thus greatly at risk of statelessness. For these children, lack of a nationality may not be their most obvious or urgent problem; but a total lack of documentation means that statelessness is a real risk, and likely to be a more important issue the older they become. Moreover, if “legal identity” beyond birth registration is understood to apply to adults, which is the case for many national identity card systems, children are by definition left excluded.

The focus on birth registration brought by the SDG Target 16.9 is therefore a welcome one. But neither birth registration nor the broader ambition of providing “legal identity for all” fully address the question of statelessness among children—and the adults they become. Even with universal birth registration, many children will be left stateless. Among those who will remain at risk of statelessness even if universal birth registration is fully achieved will be:

- Children of unknown parents
- Children who cannot acquire the nationality of (one of) their parents; for example, because of restrictions on transmission of nationality to those born outside their state(s) of nationality
- Children separated from their parents, including trafficked children, who hold no copy of a birth certificate or any other documentation
- Children of stateless parents
- Children whose parents’ nationality is unknown or undocumented
- Children whose births were registered outside the country of nationality of the parents, where that country does not recognise foreign civil registration documents unless the child was also registered with consular authorities
- Children who cannot acquire a nationality from their parents, and who

only have the right to obtain the nationality of the state of birth on reaching majority

In all cases, ensuring that these children have the right to acquire a nationality, as provided by the universally-ratified (with the exception of the USA) Convention on the Rights of the Child, will require legal reform to establish rights to nationality in the country of birth and residence, at minimum if the child would otherwise be stateless, and administrative procedures to implement that right in practice. Efforts to provide them with another form of legal identity, and a document to match, may be helpful as an interim measure. But history shows that sometimes such interim measures become permanent, serving to identify as outsiders a group of non-citizens who have no meaningful connection to any other country than the one in which they are resident.

The focus brought by SDG Target 16.9 on strengthening identification systems is welcome; increased access to proof of legal identity has great potential to increase social and economic inclusion. However, there are also risks of exacerbating exclusion for those who are already among the most marginalised. As identification requirements reach all residents of a state, people who previously believed themselves to be citizens may find that they do not fulfil the criteria or have the requisite forms of evidence to access the new identity documents. It becomes ever more important that the legal frameworks and systems to determine a person's eligibility for a particular status and issue the appropriate documents are fair, inclusive, and efficient.

The rolling out of digital identity systems and the major push on birth registration can help to address one half of the agenda around the inclusion of the currently undocumented; but there is a risk that the other half will be neglected. If a person cannot obtain recognition of nationality in any country—if he or she is stateless—the reason why this is the case is not only a technical problem of documentation of identity. If you cannot obtain the documents needed to function in a particular country, such as a national ID card, this refusal may be because your birth and those of your parents were not registered, but it may also be because of flaws in the underlying nationality law. Ending statelessness will require attention both to processes of identification and to the rules establishing who has the right to which document. The drive to create legal identity for all must be accompanied by reform of laws on access to nationality if the ambition of the SDGs to “leave no one behind” is to be achieved.

Every child counts

*Anne-Sophie Lois**

Birth registration is the first right of every child.¹ Yet, around the world approximately 230 million children under the age of five have not been registered,² and more than 100 developing countries do not have adequate systems in place to register key life events, such as births, deaths, and marriages. When children are registered and receive identity documentation, they are better protected from early marriage or from being trafficked and forced to work in exploitative conditions. Failure to register births may lead to statelessness and further marginalise already vulnerable groups, including girls and young women. Registering children at birth can therefore, be the first step to reducing statelessness and in securing their recognition before the law, safeguarding their rights, and ensuring that any violation of these rights does not go unnoticed. In simpler terms: birth registration can be the first step towards being able to go to school, get medical treatment, get a job, and more.

Children show off their birth certificates in Bangladesh. This image was taken as part of Plan's 'count every child' campaign. For further information, see: <https://plan-international.org/birth-registration/count-every-child-birth-registration>

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¹ The fundamental importance of the right to birth registration and identity is acknowledged in Articles 7 and 8 of the Convention on the Rights of the Child, as well as in its preamble.

² United Nations Children's Fund, *Every Child's Birth Right: Inequities and trends in birth registration* (2013), available at https://www.un.org/ruleoflaw/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf.

For States, having a section of their population that is not officially registered as citizens can have major and enduring implications. If governments do not have the most accurate, up-to-date data on the people in a country, how can they then effectively respond to those people's needs at the best of times, let alone after there has been a major emergency? How can governments build schools and employ the right number of teachers if they do not know how many children have been born? How can children be vaccinated if nobody knows they exist? And in the post-2015 era, how can governments measure progress towards the Sustainable Development Goals (SDGs) when not all children are counted? How could they reach the most marginalised and furthest behind first, when such groups are invisible to the state?

A strong Civil Registration and Vital Statistics (CRVS) system means a government has the most reliable source of data possible on a population at its fingertips.³ The development of such comprehensive civil registration systems to gather accurate, timely, disaggregated data is vital to inform decision making, programming and planning, and therefore also key to the overall implementation of the newly adopted 2030 Agenda for Sustainable Development⁴. Recognising the fundamental importance of birth registration and the need to strengthen a country's underlying CRVS system to address the root causes of poor registration more comprehensively, Plan International has long promoted universal birth registration as part of a robust and comprehensive CRVS system to make every child visible.

As a result of our 'Count Every Child' initiative, Plan International helped register more than 40 million children around the world with activities in 36 programme countries.⁵ In particular, our work has focused on increasing awareness of the importance of birth registration among the population; protecting vital documents in countries where natural disasters are

³ A well-functioning civil registration and vital statistics system registers all births and deaths, issues birth and death certificates, and compiles and disseminates vital statistics, including cause of death information. It may also record marriages and divorces.

⁴ For more information on CRVS please see: <http://unstats.un.org/unsd/demographic/crvs/globalcrvs.html>; the CRVS Digitisation Guidebook developed by Plan International <http://www.crvs-dgb.org/en/> and [http://unstats.un.org/unsd/demographic/crvs/Global CRVS Docs/news/CRVS and the SDGs 2016.pdf](http://unstats.un.org/unsd/demographic/crvs/Global%20CRVS%20Docs/news/CRVS%20and%20the%20SDGs%202016.pdf)

⁵ Plan International, *Count Every Child: the Right to Birth Registration* (2009) p 15, available at [http://www.planbelgie.be/sites/default/files/user_uploads/count_every_child - the right to birth registration plan international - engelstalig.pdf](http://www.planbelgie.be/sites/default/files/user_uploads/count_every_child_-_the_right_to_birth_registration_plan_international_-_engelstalig.pdf)

frequent; decentralising the civil registration system to prevent it from collapsing during emergencies; and integrating birth registration into social systems, including through training health care professionals to facilitate the registration of new-borns.

In Thailand for example, Plan International has worked in close collaboration with the Ministry of Interior, other NGOs and communities to facilitate the legalisation of the status of stateless children.⁶ We have provided funding for families and children in Chiang Rai to participate in a state-sponsored DNA testing project. The project aims to prove genetic ties between parents who were given Thai citizenship after they gave birth to their children and their children who were not registered at their birth. We also run a legal clinic project for children and youth who were born to Thai parents but do not have birth certificates, teaching them their rights and the government channels they must navigate to apply for citizenship.⁷ Complemented with advocacy to address weak and outdated legal frameworks, Plan International has helped to strengthen legislation on birth registration in ten countries, resulting in access to a free birth certificate for more than 150 million children.⁸ At the international level, Plan International—together with partners—managed to successfully place birth registration at the United Nation's agenda through the adoption of the first Human Rights Council resolution on the importance of birth registration in March 2012,⁹ and one on birth registration within CRVS



Fingerprints being taken from Moken boy at verification event

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⁶ For more information, see: <https://plan-international.org/thailand/child-protection-thailand>

⁷ Apiradee Chappanapong, *How DNA is helping young "stateless" Thais get citizenship*, Thomson Reuters Foundation, 23 August 2011, available at: <http://news.trust.org//item/20110823111500-mi169>

⁸ Plan International, *Count Every Child: the Right to Birth Registration* (2009) at 15, available at http://www.planbelgie.be/sites/default/files/user_uploads/count_every_child_-_the_right_to_birth_registration_plan_international_-_engelstalig.pdf, at 83

⁹ UN Human Rights Council, *Resolution 19/9, Birth registration and the right of everyone to recognition everywhere as a person before the law* (2012) A/HRC/RES/19/9, available at <https://documents-dds-ny.un.org/doc/RESOLUTION/>

systems in 2015.¹⁰ A UNHCR Executive Committee Conclusion on civil registration in humanitarian settings was also adopted in 2013.¹¹ During the negotiations of the post-2015 development agenda, Plan International and others successfully advocated for the inclusion of a target on universal birth registration.¹²

As this new era in development unfolds, Plan International will continue to work to ensure that every child counts. Building upon our earlier success, our Birth Registration Innovation Team is now looking to improve birth registration services using innovation and technology, including the use of digital birth registration systems to reach remote areas and hard-to-reach communities. Additionally, we will continue to promote universal birth registration as part of a comprehensive CRVS system, since we believe it is the foundational step to realise all children's rights, as well as the 2030 Sustainable Development Agenda's promise and aspiration to leave no one behind. After all, well-functioning civil registration systems will be essential to bring about accountability for the implementation of the 2030 Agenda, as they can provide the most reliable basis for monitoring multiple SDG targets. It not only contributes to ensuring governments can accurately plan and budget for the provision of essential services guaranteed through the SDGs, it also helps to ensure that governments are able to meet their commitment to leave no one behind and to reach the furthest behind first.

Girls, for example, are too often hidden from sight—not just in their communities, but also in the statistics that drive government policy. When their births or (early) marriages have not been registered, they are effectively made invisible. Until we can at the very least count them, the chances of transforming the position of girls in society remains vanishingly small. It is for exactly this reason that Plan International will continue to make every girl and every boy visible in the eyes of the law, so that they count and can claim their rights.

[GEN/G12/127/41/PDF/G1212741.pdf?OpenElement](http://www.unhcr.org/refworld/docid/558ab29a4.html)

¹⁰ UN Human Rights Council, *Resolution 28/13, Birth registration and the right of everyone to recognition everywhere as a person before the law* (2015) A/HRC/RES/28/13 available at <http://www.refworld.org/docid/558ab29a4.html>.

¹¹ UNHCR, ExCOM Conclusion on civil registration No. 111 (LXIV) (2013), available at <http://www.unhcr.org/525fdfe9.pdf>

¹² UN General Assembly, *Resolution 70/1, Transforming our world: The 2030 Agenda for Sustainable Development* (2015) A/RES/70/1, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement>

Meet the children assisted by Plan International*

14 year-old A is a stateless girl who lives in Chiang Rai Province in northern Thailand. She doesn't like to work out in the cornfields in the summer since it is very warm. However, she knows that if she doesn't help her father her family won't have enough money to be able to send her to school, which she loves so much. Her family struggles financially because they are stateless; they migrated from Myanmar to Chiang Rai Province seeking a better future.

Plan Thailand launched a programme in 2010 which focuses on setting up legal clinics to teach children about their rights, which includes the right to identity. This would allow A and her little brother to acquire nationality and be able to go to school, so in the future she can have a job she wants and won't have to work in the fields in the warm summer anymore.



Stateless girl in Thailand (A) takes her little brother with her to school while her parents work

© Plan International

L is a young girl from the Salang ethnic group living in Chiang Mai. She has five brothers and sisters, one of whom is her twin sister, S. They are currently Plan sponsored children. L and her family members all received their identity documents with the help of Plan's DNA testing programmes. She said:

"There were so many times I missed the chance to apply for an education scholarship because I couldn't prove that I was a Thai citizen. I was born in Thailand. I speak Thai. I am a student in a Thai school. It was difficult to be seen as an alien in my own country. With my official identity card, I can continue studying and apply for a scholarship," says L.

* These photographs and profiles were shared with the Institute on Statelessness and Inclusion by Plan International.



Plan staff together with L and her family with their new identity cards
© Plan International



Twins M and N, 5, with their birth certificates during a registration event in Upper Manya Krobo district, Ghana
© Plan International

Five-year-old twins M and N were born in a rural community in Ghana's Upper Manya Krobo district, where 149 children now have identity documents and were able to acquire nationality thanks to an event organised by Plan International to register their births.

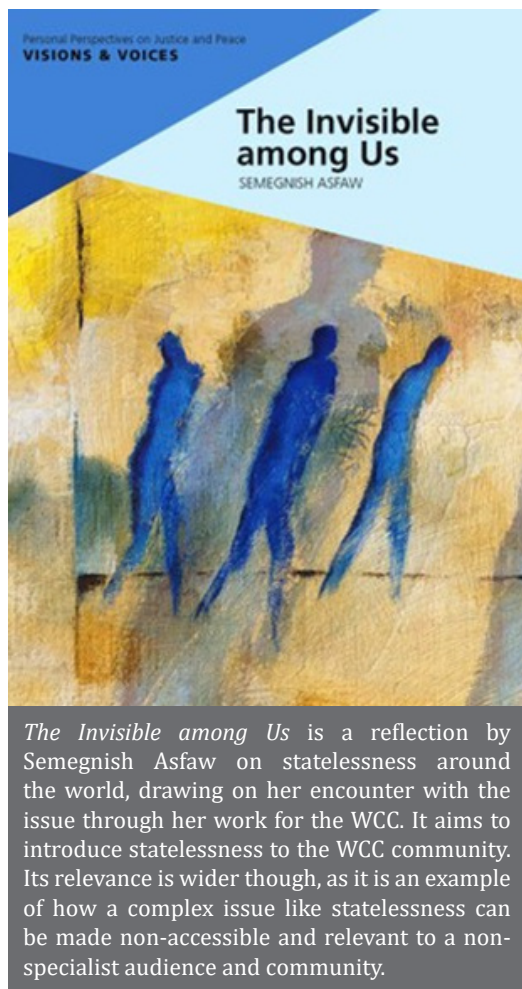
"We know that when our wives give birth in Asesewa they must be registered there, but we didn't take it seriously...Today if my child goes anywhere she can show her certificate and I am very happy about that," says a 38 year old father who registered the birth of his daughter. "I am happy that today my child has a birth certificate because if he

is going to look for job like a police officer or military person he will have access to better employment opportunities because he will have a birth certificate like other children,” says G, a 36 year old mother.

Churches advocating for birth registration

*Semegnish Asfaw**

The World Council of Churches (WCC) has been engaged with advocating for the human rights of stateless people since 2011. A few days prior to the first Global Forum on Statelessness (September 2014) organised by the UNHCR and Tilburg University in The Hague, the WCC organised a global ecumenical conference. Its purpose was to raise awareness among representatives of WCC member churches and ecumenical partners about major cases of statelessness in various parts of the globe and to discuss a possible ecumenical response to statelessness. The participants came up with a set of recommendations, known as the “Den Dolder Recommendations”¹ to Protect the Stateless and End Statelessness. These Recommendations were read out in plenary during the last day of the Global Forum.



The Invisible among Us is a reflection by Semegnish Asfaw on statelessness around the world, drawing on her encounter with the issue through her work for the WCC. It aims to introduce statelessness to the WCC community. Its relevance is wider though, as it is an example of how a complex issue like statelessness can be made non-accessible and relevant to a non-specialist audience and community.

* Asfaw Semegnish is a Programme Executive at the World Council of Churches. She works on statelessness and other issues at the WCC and is the author of “The Invisible among Us”, a reflection on statelessness around the world, which was published in 2016.

¹ WCC, *Den Dolder Recommendations* (2014), available at <http://www.oikoumene.org/en/press-centre/files/DENDOLDERRECOMMENDATIONS.pdf>

In addition to providing a theological grounding to WCC's advocacy work for the human rights of stateless people, the Den Dolder Recommendations provided a number of avenues through which churches and ecumenical partners could act to address statelessness. Birth registration is one of them, with the Den Dolder Recommendations affirming "the role of churches to creatively use their opportunities for registering important life events – such as birth, baptism, confirmation, marriage, and death – in ways that help people to secure documents that help reduce statelessness".

With that in mind, the WCC has been annually organising regional training workshops (training of trainers) on the issue of statelessness, designed for the specificities of the region and the issues at stake. One of these training workshops took place in May 2016 in Addis-Ababa and brought together various leaders of WCC member churches, ecumenical partners and national council of churches to reflect on two major issues: birth registration and gender equality as tools to prevent and address statelessness in the continent. A previous regional training workshop in Lebanon in September 2015 covered the same issues, but with a focus on the refugee crisis that is prevailing in the region.

After the Addis Ababa workshop, many of the participants – upon returning to their own countries – became engaged in advocacy, awareness raising and lobbying activities. Fr. James Oyet, General Secretary of the South Sudan Council of Churches (SSCC) is one of them. Reflecting on his experience, he said:

After the workshop on Statelessness in Addis Ababa, we have realized that there are several children whose birth has not been registered, putting them at risk of being or becoming stateless. The South Sudan Council of Churches (SSCC) has launched a campaign for creating awareness of such status. This campaign through the SSCC Women Department got mobilized and went all around the health centres in the residential areas in Juba calling for the registration of all unregistered children, and also those soon to be born to be registered. The message is simple: to avoid being stateless, you need to be registered. Even for those mothers and fathers who have never been registered due to several circumstances related to war and early instability, to avoid being stateless, everyone must get registered. Today, in Juba, people are getting registered in order to obtain official documents from the government authorities, i.e. the Ministry of Health and Interior.

For the anniversary of the World Day Against Statelessness, which is 4th November 2016, the South Sudan Council of Churches (SSCC) has made an agreement with the South Sudanese telephone company called VIVACELL in order to send messages to mobile phones in order to create awareness of the Status of being Stateless. This is our slogan: "To avoid being Stateless, get registered."

The WCC hopes to continue delivering these training workshops to its constituency in various regions in order to equip its church leaders and ecumenical partners on the importance of birth registration and gender equality as essential tools for preventing and tackling childhood statelessness.

CHAPTER 11: SAFEGUARDS AGAINST CHILDHOOD STATELESSNESS



Foundlings' artwork on the theme of nationality and statelessness
© UNHCR Côte d'Ivoire / SOS Villages Aboisso

In this Chapter...

International and regional safeguards to protect children from statelessness	Laura van Waas
A nationality for Denny	
Safeguards against childhood statelessness under the African human rights system	Ayalew Getachew Assefa
Mapping safeguards in Europe	
Foundlings in Côte d'Ivoire	Laura Parker
Reflecting on the lost children of Côte d'Ivoire	
International surrogacy arrangements and statelessness	Sanoj Rajan
Preventing childhood statelessness of children of prisoners	Laurel Townhead
Do <i>jus soli</i> regimes always protect children from statelessness? Some reflection from the Americas	Juliana Vengoechea Barrios
Making safeguards work: A perspective from South African legal practice	Liesl Muller, Lawyers for Human Rights
Stateless and invisible	Tini Zainudin

Introduction

Every child has the right to acquire a nationality. This principle, enshrined in international and regional human rights instruments alike, is clear and unambiguous.¹ The Convention on the Rights of the Child (CRC) also specifies that states must ensure the implementation of this right “in particular where the child would otherwise be stateless”,² emphasising the particular obligation that states have to identify and remedy situations in which a child would be left without any nationality. This chapter takes a closer look at the mechanics of how this is to be achieved by exploring the theory and use of “safeguards”: specific rules that all countries should have in place and which are designed to kick in when a child faces the prospect of statelessness. Such safeguards form an essential part of the nuts-and-bolts through which every child’s right to a nationality is protected in practice.

Although the topic of legislative safeguards may seem a rather technical one, it would be overstating the complexity to suggest that this is the domain of lawyers and specialists only. In fact, safeguards against childhood statelessness can, and should, be simple and straightforward. The focus must be on the child: has he or she acquired a nationality through the regular operation of the nationality laws of the country or countries with which he or she is connected by birth and parentage? If the answer is no, for whatever reason, the requisite safeguard applies and this is the route through which the child nevertheless secures a nationality.

The notion of safeguards protecting children from statelessness is perhaps most readily illustrated through the example of a foundling, in other words, a child who has been abandoned, perhaps on the steps of a hospital or orphanage, and who is then “found” by someone unconnected to the child. The ordinary rules through which all countries in the world confer nationality to a newborn are based on the connection of birth on the territory (*jus soli*) or to one or more parents who is a national (*jus sanguinis*), or some combination of the two. In the case of a foundling, the parents of the child are unknown and evidence may also be lacking

¹ See also Chapter 8 on *The right of every child to a nationality*.

² Article 7, paragraph 2 of the Convention on the Rights of the Child (CRC).

of exactly where the birth took place. A foundling can therefore appear to satisfy neither the *jus soli* nor the *jus sanguinis* link and so fail to acquire a nationality. To address this and realise the right of every child to acquire a nationality, a safeguard for foundlings should be included within the nationality law, providing specifically for the conferral of nationality to a foundling found on the territory of the state through the presumption that he or she was born there to parents who hold that state's nationality. In this way, responsibility is attributed and a solution is offered for those cases in which the regular rules that apply for acquisition of nationality by a child would otherwise fall short.

As this chapter demonstrates, the idea of establishing safeguards to deal with those cases in which a child would otherwise be stateless is widely accepted, but the implementation is not without its challenges. The first essay, by Laura van Waas, Co-Director of the Institute on Statelessness and Inclusion and Assistant Professor at Tilburg Law School in the Netherlands, explains how a 'safeguards approach' has permeated international and regional legal frameworks dealing with the avoidance of childhood statelessness since the era of the League of Nations. Such a system allows states to retain significant freedom in the establishment of rules relating to nationality, only requiring special measures for the small minority of cases in which a child is 'otherwise stateless'. Despite this, as van Waas discusses, there remain significant gaps in the incorporation, formulation and implementation of safeguards, with states too often allowing other considerations to interfere with the realisation of the fundamental right of every child to a nationality. The short piece 'A nationality for Denny', that immediately follows the opening essay, offers a stark reminder that the best interests of the child must be the central consideration in the implementation of safeguards because the alternative may be a legal limbo that is severely detrimental to a child's well-being – for Denny, six years and counting. Thereafter, the essay by Ayalew Getachew Assefa, legal researcher at the Secretariat of the African Committee of Experts on the Rights and Welfare of the Child, takes a closer look at the evolution of safeguards in the African human rights system and how these have been informed by key rights principles such as the best interests of the child. He also offers a flavour of what may come, with a discussion of the draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Rights to Nationality and the Eradication of Statelessness in Africa.

The next four contributions look at specific contexts in which special

measures to safeguard against childhood statelessness are critical. In the short piece by Laura Parker, Protection Officer (statelessness) with UNHCR in Côte d'Ivoire, the central problem is the lack of any parents to help a child secure a nationality. She talks about the problems which resulted from the lack of a safeguard for foundlings in the nationality law of Côte d'Ivoire, in a context of civil war, mass displacement and family separation, and what efforts are now being made to address them. This piece is complemented by a short reflection on the lost children of Côte d'Ivoire, which looks at the stories of three such children. In the essay by Sanoj Rajan, Professor and Dean at the School of Law of Ansal University in India, the challenge is a potential excess of parents. Where a child is born from a surrogacy arrangement, as many as six different individuals could be identified as a parent, yet the operation of conflicting policies on international commercial surrogacy can leave the child with no access to a nationality. As Rajan discusses, this relatively new phenomenon has yet to be met with effective legal solutions. Laurel Townhead's essay explores the problems that can arise for access to nationality in another relatively uncommon and potentially challenging context: where a baby is born in prison, to a mother who is incarcerated. She reminds us that realising the right of every child to acquire a nationality, without discrimination, demands that no child is overlooked.

Moving away from the discussion of specific circumstances in which statelessness safeguards are necessary, the chapter closes with two contributions which drive home the fact that more attention is needed for implementation issues in safeguarding against childhood statelessness. The essay by Juliana Vengoechea Barrios offers a fresh take on the often-debated question of whether the most straightforward and effective "safeguard" for the avoidance of childhood statelessness could be the conversion of all countries to a *jus soli* system. Focusing on the Americas region, where *jus soli* is prevalent, she scratches beneath the surface to reveal a number of implementation problems that can obstruct access to birth-right citizenship. Liesl Muller presents a series of cases in which children they are assisting in South Africa have confronted seemingly insurmountable obstacles in fulfilling their right to a nationality. The piece demonstrates how even a complex situation can be distilled to a simple problem and, when presented as such, the child rights imperative for solving it becomes clear. The final contribution in this chapter is from Tini Zainudin and offers a personal reflection of one woman's quest to navigate the legal system of Malaysia and secure a nationality for her stateless child.

International and regional safeguards to protect children from statelessness

*Laura van Waas**

1. Introduction

Most newborns take their first breath unassisted. A big, clumsy gulp of air finally inflates the lungs that have been developing in utero for months. This is accompanied by the sound of crying, signalling to the anxious and adrenalin-filled mother that her child has arrived safely. Very occasionally though, things are less straightforward. A baby's breathing will be impaired and someone will need to intervene. Medical staff will take action—suction, ventilation, and intubation—to help kick-start what most of us take for granted. They will step in to protect the child's right to life.

Most newborns acquire their nationality unassisted. By virtue of their very existence—of that first breath, in fact—they simply are British (in my case), or Argentinian, or Ugandan, et cetera. The connection that they have to the country in which they are born (*jus soli*), the country of nationality of their parents (*jus sanguinis*), or both, forms the basis for their acquisition of nationality. It happens automatically, by operation of the law, without anyone having to intervene or take action. Very occasionally though, things are less straightforward. The parents may be stateless and have no nationality to pass on to their child, or there may be a conflict between the terms set out in the nationality laws of the country of birth and country of the parents such that the child

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does not immediately acquire a nationality under either. In such cases, specially constructed safeguards can help to kick-start what most of us take for granted. These safeguards are needed to protect the child's right to acquire a nationality.

This essay explores the system of safeguards set out in international law which guide states, in that minority of cases where extra 'help' is needed, on how to avoid childhood statelessness. It offers an overview of the type of problem that arises and of the content of safeguards which aim to ensure the realisation of the child's right to a nationality in such circumstances. Thereafter, the essay explores a number of common challenges in the interpretation and application of these safeguards. The chapter closes by calling for a back-to-basics approach to safeguarding against childhood statelessness: one that holds true to the object and purpose of the safeguards and is informed by our understanding of the right to acquire a nationality as nothing less than a fundamental right of every child.

2. Preventing childhood statelessness: a 'safeguards approach'

Since the League of Nations era, states have sought to reduce the incidence of statelessness through the promulgation of safeguards in international agreements. The 1930 Hague Convention on certain questions relating to the conflict of nationality laws contains an early set of such provisions, aimed at addressing situations in which a person may be left without a nationality. Thus, while it is up to states to determine the general conditions for acquisition and loss of nationality,¹ they have committed to including certain rules within their domestic legislation which are designed to ensure the avoidance of statelessness. For instance, "a child whose parents are both unknown shall have the nationality of the country of birth" (Article 14 1930 Hague Convention). Such safeguards were needed, the preamble to the convention explained, because states were "convinced that it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality".²

¹ Article 1 of the 1930 Hague Convention: "It is for each State to determine under its own law who are its nationals".

² League of Nations, *Convention on Certain Questions Relating to the*

With the adoption of the Universal Declaration of Human Rights, eighteen years later, the recognition that it is “in the general interest of the international community”³ that everyone hold a nationality paved the way for the recognition of the right to a nationality as a fundamental right of every human being. This and subsequent restatements of the right to a nationality across a wealth of binding international and regional instruments⁴ reinforce the need for states to take action to avoid statelessness not (only) as a matter that is in their own interest but as a legal imperative because every human being enjoys the right to a nationality. Protecting the right of every child to a nationality is a particular focus of these human rights norms.⁵

The Convention on the Rights of the Child (CRC) spells out explicitly that states “shall ensure the implementation of [the child’s right to acquire a nationality] in particular where the child would otherwise be stateless”.⁶ That every child now enjoys the right to a nationality does not mean that states have forfeited their freedom to regulate access to nationality at birth or during childhood, nor that nationality legislation must be harmonised. Rather, a ‘safeguards approach’ continues to inform how states can fulfil their duty to avoid childhood statelessness. Certain rules must be in place and implemented, as the CRC indicates, “where the child would otherwise be stateless”.⁷ These measures must be informed by broader child rights principles of non-discrimination, the best interests of the child, the right to life, survival and development, and respect for the views of the child.⁸ In particular, in situations of childhood statelessness, regardless of the context in

Conflict of Nationality Law (1930), available at <http://www.refworld.org/docid/3ae6b3b00.html>

³ UN General Assembly, *Universal Declaration of Human Rights* (1948), available at <http://www.refworld.org/docid/3ae6b3712c.html>

⁴ Including in Article 5 CERD, Article 24 ICCPR, Article 7 CRC, Article 9 CEDAW, Article 29 CMW, Article 18 CRPD and many regional human rights instruments

⁵ GR de Groot, ‘Children, their right to a nationality and child statelessness’, in A Edwards & L.E. van Waas (eds), *Nationality and statelessness under international law* (Cambridge University Press, 2014)

⁶ Article 7(2) UN General Assembly, *Convention on the Rights of the Child* (1989), available at <http://www.refworld.org/docid/3ae6b38f0.html>

⁷ Ibid.

⁸ See further Institute on Statelessness and Inclusion, *Addressing the right to a nationality through the Convention on the Rights of the Child: A Toolkit for Civil Society* (2016), at 8-10, available at http://www.institutesi.org/CRC_Toolkit_Final.pdf

which this arises, it is the child whose life is “substantially affected” by the failure to access a nationality and “a serious question arises as to the compatibility of that situation with the child’s best interests”.⁹ Effectively implementing safeguards to avoid childhood statelessness is therefore much more than a technical fix to a legal anomaly, but the route through which to realise a fundamental child right and protect the child’s best interests.

The 1961 UN Convention on the Reduction of Statelessness (1961 Convention) remains the most comprehensive international legal instrument to date which informs states as to the situations in which special measures are needed and outlining appropriate safeguards. This under-appreciated instrument is not a human rights treaty but provides detailed guidance on the implementation of the right to a nationality which can be readily transposed into states’ domestic legislation. It offers a common approach to meeting the common interest of avoiding situations of statelessness, firmly embedded in principles of nationality attribution that are already widely recognised by states and without impinging on their overall freedom to legislate on nationality matters. For example, where birth on the territory does not generally lead to the acquisition of nationality in a particular state, Article 1 of the 1961 Convention nevertheless prescribes the adoption of a *jus soli* safeguard in situations where a child would otherwise be stateless. In the same vein, where descent from a parent who holds nationality does not generally lead to the inheritance of that nationality for a child born abroad under the laws of a particular state, the 1961 Convention prescribes a *jus sanguinis* safeguard where a child would otherwise be stateless.¹⁰ Similarly to the 1930 Hague Convention, the 1961 Convention also has a specific provision to facilitate the acquisition of nationality by foundlings, under Article 2, as well as the avoidance of statelessness in a number of other circumstances

⁹ The view of the European Court of Human Rights in the case of *Mennesson v. France*, (ECtHR, 2014) Application No. 65192/11, available at [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-145389\"\]}](http://hudoc.echr.coe.int/eng#{\) in which even though the parents had broken the law in commissioning a child through an international surrogacy arrangement, the French authorities’ legitimate interest of deterring people from such behaviour could not override the child’s right to recognition of the parent-child relationship and thereby access to French nationality.

¹⁰ Article 1(4) and Article 4, UN General Assembly, *Convention on the Reduction of Statelessness* (1961), available at <http://www.refworld.org/docid/3ae6b39620.html>

specifically affecting children, for instance, in the context of adoption or of loss of nationality by a parent, under Articles 5 and 6.¹¹

A ‘safeguards approach’ to fulfilling the right of every child to a nationality is also apparent in a number of regional instruments. The central norm that cuts across these is that nationality shall be conferred by the country of birth *if otherwise the child would be stateless*, echoing the approach of article 1 of the 1961 Convention. This safeguard is prescribed, among others, by the American Convention on Human Rights (Article 20), the African Charter on the Rights and Welfare of the Child (Article 6), and the European Convention on Nationality (Article 6).¹² Tallied together, 107 states worldwide are parties to the 1961 Convention and/or one or more of these three regional instruments.¹³ Moreover, as evident from the authoritative interpretation of the Committee on the Rights of the Child (the Committee) in its Concluding Observations on states’ party reports, the implementation of a safeguard to grant nationality to all children born on the state’s territory who would otherwise be stateless is also an obligation which flows directly from Article 7 of the CRC.¹⁴ The Committee has also directed explicit recommendations to states to introduce or improve other safeguards designed to prevent childhood statelessness, such as in respect of foundlings or in the context of international adoption.¹⁵

The rapid growth in number of parties to the 1961 Convention over the past decade, understood against the background of a broader contemporary framework of regional and international (human rights) standards that affirm the duty of states to safeguard against

¹¹ See further on the content and drafting history of the 1961 Convention: L.E. van Waas, ‘The UN Statelessness Conventions’, in A Edwards & L.E. van Waas (eds), *Nationality and statelessness under international law* (Cambridge University Press, 2014)

¹² This safeguard can also be found in context-specific instruments such as the International Law Commission’s Articles on nationality of natural persons in relation to the succession of states. The Covenant on the Rights of the Child in Islam delineates more generally that states “shall make every effort to resolve the issue of statelessness for any child born on their territories or to any of their citizens outside their territory” (Article 7).

¹³ As at 1 August 2016.

¹⁴ Institute on Statelessness and Inclusion, *Addressing the right to a nationality through the Convention on the Rights of the Child. A Toolkit for Civil Society* (2016), at 38, available at http://www.institutesi.org/CRC_Toolkit_Final.pdf

¹⁵ Ibid, at 38-40. See also Chapter 8 on *The right of every child to a nationality*.

childhood statelessness, is evidence of this responsibility being taken increasingly seriously. A quick scoping of legislative practice confirms that states widely acknowledge that, regardless of the principles that inform their general approach to nationality, they must make special accommodation to deal with cases in which a child would otherwise be stateless. According to analysis undertaken by UNHCR, over 70% of states have made some provision in their nationality law to safeguard the right to a nationality for children born stateless in their territory and for foundlings.¹⁶ Nevertheless, as the saying goes, the devil is in the detail. A closer inspection of the exact formulation of such safeguards, the mechanisms through which they can be invoked and their execution in practice reveals significant challenges.

3. Helping children who are ‘otherwise stateless’: key challenges

In order to protect every child’s right to a nationality, international instruments such as the CRC and the 1961 Convention specify that a special route to nationality must be made available for children who *would otherwise be stateless*. Using such a linguistic construction is perfectly logical, and perhaps unavoidable, but not unproblematic. An exploration of how states have taken up their responsibility for “otherwise stateless” children through domestic legislation and practice uncovers three distinct problems. A common theme across these three areas is a certain fixation on “getting it right”, so as to not unduly privilege any child who may turn out not to have needed the safeguard to help them realise their right to a nationality (and may now as a consequence have two). Yet, as these examples demonstrate, this is actually getting in the way of the effective operation of these safeguards in cases where they are needed.¹⁷

Firstly, some states maintain safeguards that are not fully inclusive. Often, the difficulty is that the safeguard focuses on the situation of the parents rather than that of the child: nationality is granted to a

¹⁶ UNHCR, *Global Action Plan to End Statelessness (2014-2024)* (2014), at 9, available at <http://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>

¹⁷ See also L.E. van Waas, *Am I part of the problem?* (2016) Blog for the European Network on Statelessness, available at <http://www.statelessness.eu/blog/am-i-part-problem>

child born on the territory if, for instance, the parents are stateless¹⁸ or of undetermined citizenship.¹⁹ This approach, once upon a time actually prescribed by the 1930 Hague Convention (Article 15), is clearly intended to prevent cases of statelessness among children, but is based on a false premise about the operation of nationality laws. The reality is that sometimes even when one or both parents hold a nationality themselves, this nationality cannot be passed on.²⁰ In such circumstances, the child will be left stateless but will be unable to benefit from the requisite safeguard.

Moreover, the scope of application may also be restricted in other ways, for instance by requiring the parents to hold a particular form of residence status for the child to qualify. The safeguard contained in Vietnam's legislation is a case in point in respect of both of these limitations, conferring nationality to a child born on the territory "whose parents, at the time of his/her birth are both stateless persons with a permanent residence in Vietnam".²¹ In Europe, research has uncovered a worrying trend of making access to nationality for an otherwise stateless child contingent on either the parents or the child (or both) holding a particular residence status.²² Such criteria have severe implications for the child, whose right to acquire a nationality is undermined as a result of particular choices or actions on the part of the parent. This situation runs counter to the principle of non-discrimination contained in Article 2 CRC, which requires in paragraph 2 that states "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents".²³ Another common example of a statelessness

¹⁸ See, for example, Article 8 of the citizenship law of Tunisia.

¹⁹ See, for example, Article 4(9) of the citizenship law of Indonesia.

²⁰ For instance due to gender discriminatory provisions that restrict the rights of women to transmit nationality to their children – currently the case in 27 countries globally. See further www.equalnationalityrights.org.

²¹ Article 17(1) of the nationality law of Vietnam.

²² 14 out of 45 countries whose legislation was compared with respect to safeguards for "otherwise stateless" children born in the state's territory maintained such conditions. European Network on Statelessness, *No Child Should be Stateless* (2015), at 16, available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf

²³ Such criteria are also incompatible with the best interests of the child where they prevent the child from realising his or her right to a nationality. See further, for example, Committee on the Rights of the Child, *Concluding*

safeguard which is not comprehensive in its coverage is the provision of nationality to a foundling whereby the child in question must be a “newborn”.²⁴ While the question of when a child should be treated as a foundling if he or she is only “found” at a later age is a challenging one, where a safeguard is specifically designed for the avoidance of statelessness, its effectiveness can be readily undermined by an overly restrictive formulation. A child who is no longer a newborn, but is abandoned at a young age and whose parents are unknown will remain stateless.

A second challenge, which arises even where the terminology of a child who is “otherwise stateless” is correctly adhered to in the relevant safeguard in the law, is the operation of the safeguard in practice. Identifying situations in which the safeguard must be applied can be highly problematic, for a number of reasons not least of which is that statelessness as a phenomenon is often poorly understood. Given that it is the norm for children to acquire a nationality at birth through the operation of states’ regular rules and relying on a statelessness safeguard is very much the exception, the need to apply special measures can readily be overlooked. The competent authorities may, for instance, assume that the child acquired a nationality through his or her parents, when in fact that is not the case. The parents may also be ignorant as to the workings of the relevant nationality regulations and thereby the statelessness of their child. In certain contexts, ascertaining whether the child is considered as a national or not under the operation of the law of the country of nationality of the parents is particularly challenging. This may be the case for children born to refugees in exile,²⁵ children born to a prisoner inside a detention facility,²⁶ children whose parent belongs to a minority group which regularly suffers discrimination in access to citizenship or faces problems with intergenerational lack of documentation of identity.²⁷

Observations: The Netherlands (2015) CRC/C/NDL/CO/4, available at http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NLD/INT_CRC_COC_NLD_20805_E.pdf; *Mennesson v. France*, (ECtHR, 2014) Application No. 65192/11, available at <http://hudoc.echr.coe.int/eng#{“itemid”:“001-145389”}”}>

²⁴ See, for example, the citizenship rules of Barbados, Senegal and Ukraine.

²⁵ See also Chapter 9 on *Migration, displacement and childhood statelessness*, and in particular, *The long-overlooked mystery of refugee children’s nationality* by Gábor Gyulai in Chapter 9.

²⁶ See also *Preventing childhood statelessness of children of prisoners* by Laurel Townhead in this Chapter.

²⁷ See also Chapter 8 on *The right of every child to a nationality*.

Generally speaking, statelessness is a largely hidden issue,²⁸ and data on *childhood* statelessness is even more scarce,²⁹ making it difficult to monitor the implementation of safeguards. Yet, the signs are not encouraging. Where research or individual casework has been undertaken, it shows children—or their parents, on their behalf—face an uphill battle in trying to convince the requisite state that they are “otherwise stateless” and should be granted nationality on that basis. In the Netherlands, for example, the decentralised authorities responsible for determining whether a child can opt for Dutch nationality on the basis of being “otherwise stateless” (and born in the territory) very often demand evidence which simply cannot be furnished. In the absence of proof of acquisition of a foreign nationality but also of sufficient proof of statelessness, a child will be labelled as being of ‘unknown nationality’, leaving them ineligible under the statelessness safeguard.³⁰ Even while recognising this outcome to be unsatisfactory, the Dutch courts have been hesitant to intervene and determine a child to be stateless.³¹ Elsewhere, problems have also been encountered where a similarly high threshold is maintained for establishing that a child’s parents are unknown for the purposes of granting nationality through a foundling safeguard. There have been cases where a birth is witnessed (for instance, by medical staff in a hospital), such that the mother is deemed to be ‘known’—even if her identity is not clear or has been falsified and she abandons the baby immediately after the birth.³²

²⁸ Institute on Statelessness and Inclusion, *The World’s Stateless: 2014* (2014), available at <http://www.institutesi.org/worldsstateless.pdf>

²⁹ For instance, while some data on statelessness is reported for most countries in Europe, a 2015 study on childhood statelessness in the region concluded that the lack of disaggregated data is compounding the problem by “reducing its visibility and impairing stakeholders’ ability to take necessary action”. European Network on Statelessness, *No Child Should be Stateless* (2015) at 4, available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf

³⁰ Ibid, at 17. See also Netherlands Advisory Committee on Migration Affairs, *No country of one’s own: an advisory report on treaty protection for stateless persons in The Netherlands* (2013), available at https://acvz.org/wp-content/uploads/2014/09/ACVZ-report_39.pdf

³¹ For instance, Netherlands Council of State, *Case 201302776/1/A3* (2014), available at <https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=79205>. See also *A nationality for Denny* in this Chapter.

³² See, for instance, European Network on Statelessness, *Ending childhood statelessness: A study on Poland* (2015) Working paper 03/15, available at <http://www.statelessness.eu/sites/www.statelessness.eu/files/Poland.pdf>

Finally, where there is an inclusive safeguard which applies to all situations in which a child is “otherwise stateless” and such cases can be effectively identified, the mechanism which is triggered and through which nationality can be conferred may still be problematic. International norms allow states a certain measure of leeway in legislating the details of the requisite safeguards, so long as these comply with general child rights principles such as non-discrimination and the best interests of the child. The 1961 Convention explicitly offers a choice of two pathways to nationality for states to adopt when dealing with children who are otherwise stateless.³³ They may elect to grant nationality in such cases automatically, at birth;³⁴ or they may make nationality available through a non-discretionary application procedure once the child has fulfilled certain conditions.³⁵ The latter route necessitates action being undertaken by or on behalf of the child, which can present a problem where, for instance, the parents or guardians are ignorant of the child’s exposure to statelessness, of the entitlement to nationality via a specialised safeguard, of the procedure through which to invoke that entitlement or of the importance of undertaking the steps to do so.

Where the granting of nationality to otherwise stateless children is made subject to application, a waiting period may also be imposed. According to the terms of the 1961 Convention, the longest someone who is born stateless can be made to wait before being given the chance to apply for nationality is until his or her eighteenth birthday.³⁶ In other words, this instrument appears to tolerate condemning a child to spend their entire childhood without a nationality — yet such

³³ A similar approach can be found in the European Convention on Nationality. Those human rights instruments which protect the child’s right to acquire a nationality – including the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child which explicitly prescribe a *jus soli* safeguard if a child is otherwise stateless – do not specify the mechanism for nationality conferral.

³⁴ Articles 1(1a) and 4(1a) of the 1961 Convention.

³⁵ Articles 1(1b and 2) and 4(1b and 2) of the 1961 Convention. Note that the conditions specified in these articles of the 1961 Convention are limitative – states may not add further requirements. The conditions that may be imposed relate to the timeframe for the lodging of the application, a period of habitual residence prior to application that may be prescribed, that the applicant has not been convicted of particular criminal offences and that he or she has always been stateless.

³⁶ Article 1(2a) of the 1961 Convention.

a policy can be deemed highly problematic in light of subsequent developments in human rights law and contemporary child rights principles.³⁷ Even if the waiting period is shorter, statelessness can have a severely adverse effect on children from a young age and leave a lasting impression on a person's life, even once resolved.³⁸ A child's circumstances may also change between the moment of birth and the moment at which the entitlement to nationality is engaged, such that the safeguard may never be activated, for instance because the family migrates (or is expelled) and the requisite period of residence is never met. Moreover, establishing evidence of the relevant facts, such as place of birth, for the implementation of safeguards can also become a greater challenge as time passes – for instance if the child in question does not have a birth certificate and other forms of proof must be obtained.

In other cases, the mechanism for conferral of nationality to children who are otherwise stateless is straightforward, but the law provides for the subsequent withdrawal of nationality if the child's circumstances change, for instance if the parents of a foundling are later identified.³⁹ If the law does not make such loss conditional upon the child's actual possession of another nationality, he or she may then end up stateless after all. Regardless of whether statelessness will result, withdrawing a child's nationality is an act which states should approach with caution, given the impact that this can have on his or her social identity and on

³⁷ The CRC protects the right of every child to a nationality, affirming that nationality should be acquired during childhood. This has been interpreted as meaning that nationality should be conferred at birth or as soon as possible after birth to a child who would otherwise be stateless. See Committee on the Rights of the Child, *Concluding Observations: Czech Republic* (2011) CRC/C/CZE/CO/3-4, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/CZE/CO/3-4&Lang=Sp; 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*, (2012) HCR/GS/12/04, available at <http://www.refworld.org/docid/50d460c72.html>; African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment on Article 6: Name and Nationality* (2014), available at <http://www.acerwc.org/general-comments/>

³⁸ UNHCR, *I am here, I belong. The urgent need to end childhood statelessness* (2015), available at http://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf

³⁹ For instance, Article 6 of the citizenship act of the Former Yugoslav Republic of Macedonia.

the ability to continue to exercise other rights in respect of the state of which the child had previously been a citizen.⁴⁰

4. Back-to-basics: every child has the right to a nationality

As set out in the introduction of this essay, most children acquire a nationality at birth, immediately and effortlessly. Sometimes though, a little extra help is needed. Rather than divesting states of the freedom to regulate nationality or seeking to harmonise nationality legislation worldwide, international law prescribes the adoption of a number of safeguards which are designed to specifically address cases in which a child *would otherwise be stateless*. The longevity and spread of such safeguards across a multitude of international agreements, the recognition of the right of every child to a nationality as a fundamental human right and the widespread presence of safeguards in one form or another in domestic legislation, are all testament to how strong the consensus is among states that childhood statelessness must be prevented. Although the principle that all children should enjoy a nationality appears to be uncontroversial, a closer look at the integration and implementation of the requisite safeguards in domestic law and practice reveals a tension. Too often, the interpretation and application of safeguards which have been designed for one purpose only (i.e. to realise a child's fundamental right to a nationality) are interpreted not in light of that purpose, but in accordance with various other interests of the state.

One concern which underlies a number of the challenges identified above is avoiding the misapplication of safeguards. For instance, some states place a significant burden of proof on the child (or his or her parents) to establish the absence of nationality or restrict the scope of the safeguard to children of stateless parents or, in the case of foundlings, to newborn babies only. Another factor which evidently

⁴⁰ See on the link between nationality, identity and rights for children, for instance, the cases: *Yean and Bosico v Dominican Republic* (IACtHR, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf; *Children of Nubian descent v Kenya*, (ACERWC, 2011) Comm/002/2009, available at <https://www.opensocietyfoundations.org/sites/default/files/ACERWC-nubian-minors-decision-20110322.pdf>; *Genovese v Malta*, (ECtHR, 2011) Application No. 53124/09, available at [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-106785\"\]}](http://hudoc.echr.coe.int/eng#{\)

affects how states articulate and administer safeguards designed to prevent childhood statelessness is apprehension about the potential that there might be for misuse. For instance, some states are reticent to confer nationality to an otherwise stateless child born on the territory unless the child and/or the child's parents hold a regular residence status. Granting nationality may otherwise be considered to undermine the operation of the state's immigration laws.

States have a legitimate interest in avoiding the misapplication or misuse of safeguards to protect children from statelessness, but it is crucial that these concerns do not serve to undermine children's enjoyment of the right to a nationality. Even in challenging contexts, such as where the parents' own action or inaction has contributed to the difficulty the child is encountering in acquiring a nationality, this does not nullify the right that the child holds. It is unthinkable that a doctor would be within his right to sit back and watch as a newborn struggles to catch his or her first breath because it is apparent that the mother made some very poor choices during her pregnancy, for instance taking illegal drugs which have affected the baby's health. The parent's actions have not and cannot nullify the child's separate and inherent right to life, so why should the child's right to acquire a nationality be any different?⁴¹ As the African Committee of Experts on the Rights and Welfare of the Child has concluded, "being stateless as a child is generally antithesis to the best interests of children."⁴² Furthermore, in the overwhelming majority of cases the parents of a stateless child are powerless to influence their offspring's fate as it is not their (in)action that has caused the lack of nationality but the failure of the state or states concerned to accord nationality (for instance due to discriminatory laws).

As acknowledged in this essay, successfully implementing a 'safeguards approach' to protecting children from childhood statelessness is

⁴¹ Note, in this respect, that the right of every child to a nationality is contained within Article 24 of the International Covenant on Civil and Political Rights which is directed towards "special measures of protection [which belong] to every child because of his status as a minor". See further Human Rights Committee, *General Comment No. 17: Rights of the Child* (1989), available at <http://www.refworld.org/docid/45139b464.html>

⁴² African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment on Article 6: Name and Nationality* (2014), available at <http://www.acerwc.org/general-comments/>

not without its practical challenges. Nevertheless, it is ultimately to the detriment of the state to focus too heavily on the potential risks of misapplication or misuse of safeguards as this leaves children unprotected. States must instead go back-to-basics and recall the object and purpose of these which can accompany these special measures, which are designed to guarantee the enjoyment of the right to a nationality by all children. The interpretation and application of safeguards designed to realise a child's foundational right to nationality must be informed by this object and purpose, as well as by general child rights principles, including that of the best interests of the child.

A nationality for Denny

Six years and counting. That is how long Denny has been stuck in “legal limbo”.¹ Ever since the day he was born, all of his mother’s efforts to secure a nationality for Denny have been futile. So have her subsequent attempts to get Denny recognised as stateless so that he can benefit from the very safeguards that are designed to deal with his situation – i.e. with the exceptional and regrettable case in which the regular operation of nationality rules fails to provide a child with a nationality...

Denny was born in the Netherlands: a country which has made strong international commitments to dealing with situations of statelessness, as a state party to both UN statelessness conventions, a wide array of human rights instruments and the 1997 European Convention on Nationality. The Dutch Nationality Act seeks to protect the right of every child to a nationality through the promulgation of certain safeguards, including a pathway to Dutch nationality for stateless children who are born on the territory of the Netherlands. So, while Denny was unlucky that he could not acquire a nationality from either his mother (a victim of human trafficking, brought from China to the Netherlands when still a minor) or his father (a man who has not recognised paternity, nor stayed in touch), he is surely fortunate to have been born in a place where children’s right to nationality is protected through dedicated safeguards. Yet he remains in legal limbo.

To benefit from a safeguard that operates in contexts where a child would otherwise be left stateless, it must first be apparent that the child in question is just that: stateless. In the Netherlands, the evidentiary burden imposed for establishing statelessness is generally very high – a situation compounded by the absence of a dedicated statelessness status determination authority and procedure. Denny’s mother has been unable to meet that burden on his behalf. Her numerous and documented attempts to have Denny recognised as a national of China all failed and even though this is the only other country with which he has any connection

¹ Open Society Justice Initiative, *Dutch nationality laws leave six-year old in legal limbo*, 29 November 2016, available at <https://www.opensocietyfoundations.org/press-releases/dutch-nationality-laws-leave-six-year-old-legal-limbo>.

(through his mother's origins), this was not considered enough to prove Denny's statelessness. His registration in the Dutch population registry remains as a person of "unknown nationality", but there is no provision in the Dutch nationality act for acquisition of nationality by a child of "unknown nationality" born in the country. Activating the safeguard to solve his statelessness relies entirely on Denny first being recognised as stateless.

Somewhat remarkably, when challenged in the national courts, the ineffectiveness of this bureaucratic quagmire was acknowledged and yet no remedy was offered. The Council of State, the highest court of appeal in the country, concluded that "As long as the statelessness of persons without nationality has not been determined, they cannot invoke protection based on the Statelessness Conventions and the Dutch legislation pursuant to those conventions. However, it goes beyond the lawmaking task of the judiciary to fill in this gap".² Denny's case has now been communicated to the UN Human Rights Committee, with the Netherlands accused of violating the International Covenant on Civil and Political Rights, Article 24(3) *child's right to nationality*, Article 2(2) *obligation to take positive measures to give effect to the rights in the Covenant*, and Article 2(3) *right to an effective remedy*.³

"Denny lives with his mother in a restricted freedom centre for failed asylum seekers and their young children. He has nearly no contact with Dutch society, lives in an atmosphere that is marked by the threat of deportation and surveillance, and his mother is not eligible for any social benefits besides a small weekly allowance. The eight restricted freedom centres throughout the Netherlands are intended to serve as temporary, sober facilities, designed to encourage efforts by residents to facilitate their deportation, but Denny and his family have been there for three years."

Extract from the case of Denny Zhao v. the Netherlands, communicated to the UN Human Rights Committee on 23 November 2016

² X.J. Zhao v. Executive of the Municipality of Utrecht, Council of State (Administrative Law Division), Judgment of 21 May 2014 (with English trans.), at paras. 4.1- 4.4.

³ Communication to the Human Rights Committee, *Denny Zhao v. the Netherlands*, 23 November 2016, available at <http://pilpnjcm.nl/wp-content/uploads/2016/11/ECD-1507-Zhao-5-Communication-As-Sent-SB-11.23.16.pdf>.

As Denny approaches his seventh birthday, his situation remains precarious and the impact of his legal limbo on his wellbeing must be considered a growing cause for concern. Responding to domestic and international criticism for the gaps in its statelessness policy, the Netherlands is in the process of developing a law reform initiative that, if framed appropriately,⁴ could prevent cases such as Denny's from arising in the future. However, the key lesson to take from Denny's story is not about the shortcomings of the Dutch legal framework. Denny is not the only child and the Netherlands is not the only country in which safeguards do not always operate as they should. His case and others like it around the world⁵ demonstrate the importance of legislative safeguards against childhood statelessness being set in a broader framework which is sympathetic to the difficult circumstances in which statelessness can arise and proactively helps children, where necessary, to benefit from the relevant safeguards in practice, fulfilling their individual right to a nationality.

⁴ A Draft Law introducing a statelessness determination procedure in the Netherlands was presented for public consultation on 28 September 2016. According to the analysis and comments offered by legal practitioners, UNHCR, the Netherlands Human Rights Institute and civil society, the Draft Law exhibited numerous problems, including some of a fundamental nature. See further <https://www.internetconsultatie.nl/staatloosheid/reacties>.

⁵ See also *Making safeguards work: A perspective from South African legal practice* by Liesl Muller in this Chapter.

Safeguards against childhood statelessness under the African human rights system

*Ayalew Getachew Assefa**

1. Introduction

There are hundreds of thousands of people living in Africa who are stateless, and many more whose nationality is in doubt or is disputed. Looking at the situation in Africa, at a practical level, we see several obstacles to effectively realise the right to a nationality, one of which is clearly related to the absence of legal and functional safeguards against childhood statelessness in domestic nationality laws. Indeed, “only 13 African countries specifically provide in their nationality laws that children born in their territory who would otherwise be stateless have the right to nationality, while some 17 countries do not have a provision granting nationality to children of unknown parents”.¹

In the absence of such safeguards, it is difficult to ensure that every child in every jurisdiction will obtain a nationality, whether that of his or her parents, or of the State where he or she was born. Focusing on the African Children’s Charter and the Draft Protocol on the Specific Aspects of Nationality and Prevention of Statelessness in Africa, this essay discusses the available principles that protect children from statelessness. It analyses, in particular, the availability of provisions which require State Parties to grant nationality to every child who would otherwise be stateless.

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¹ B. Manby, with A. Getachew and J. Sloth-Nelsen, “The right to a nationality in Africa: New norms and new commitments” in L. van Waas and M. Khanna (eds) *Solving Statelessness*, Wolf Legal Publisher, 2017, p.265. See also *Foundlings in Côte d’Ivoire* by Laura Parker in this Chapter.

2. The African Charter on the Rights and Welfare of the Child

With a view to addressing the challenges of childhood statelessness in Africa, the African Union has established notable normative frameworks. Among these instruments, the African Charter on the Rights and Welfare of the Child (ACRWC) plays the primary role. The ACRWC was adopted in 1990,² shortly after the establishment of the UN Convention on the Rights of the Child (CRC).³ Article 6 of the African Children's Charter recognises three interlinked rights and imposes an obligation on State Parties to take legislative measures to prevent statelessness among children. Article 6(1) establishes the right to a name; Article 6(2) the right to birth registration; and Article 6(3) the right to a nationality. Article 6(4) imposes an obligation on State Parties to ensure that their constitutional legislation recognises the principles according to which a child shall acquire the nationality of the state in the territory of which he/she has been born if, at the time of the child's birth, he/she is not granted nationality by any other state in accordance with its laws. This provision harmonises the Charter with the principle established both by the 1961 Convention on the Reduction of Statelessness (1961 Convention), prescribing that a child who would otherwise be stateless shall have the nationality of the state in which he or she is born, and the Convention on the Rights of the Child (CRC) which obliges State Parties to realise every child's right to acquire a nationality.⁴

Seeking to spell out and explain the obligations of State Parties under Article 6, the African Committee of Experts on the Rights and Welfare

² Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, (1990, entered into force Nov. 29, 1999), CAB/LEG/24.9/49 at <http://pages.au.int/acerwc/documents/african-charter-rights-and-welfare-child-acrwc>

³ See also Chapter 8 on *The right of every child to a nationality*.

⁴ In this regard, it is important to note that both Article 6(1) of the ACRWC and Article 7(1) of the CRC adopted the wording of Article 24(3) ICCPR and not that of Principle 3 of the UN Declaration on the Rights of the Child (1959) which prescribes that 'the child shall be entitled from his birth to a nationality'. However, as it is noted by the UN Human Rights Committee 'states are required to adopt every appropriate measure...to ensure that every child has a nationality when he is born'. See also General Comment No. 17 of the UN Human Rights Committee (1989); Article 24, Rights of the Child, paragraph 8 (HRI/GEN/1/Rev.8 (May 2006)).

of the Child (ACERWC) adopted a General Comment.⁵ Looking at the explanation provided in the first paragraphs of the General Comment, there are two main factors which convinced the Committee to develop the General Comment. The first is related to the observations that the Committee derived from State Party Reports on the status of the implementation of the right to birth registration. The Committee noted that the rights included in Article 6 are among the rights that consistently appear not to be fully implemented by States Parties. Despite the impressive ratification of international and regional instruments on children's rights by AU Member States, implementation of the rights to nationality and birth registration remain major challenges. This can be understood by referring to the Committee's concluding observations and recommendations to State Parties.⁶

The second reason is the gravity of the problem of unregistered births in Africa as recorded by various reports and studies. The Committee noted that millions of children go unregistered every year. A 2013 UNICEF Report revealed that 230 million children under the age of five had not had their birth registered, and the lowest rate of birth registration globally is in South Asia and in Sub-Saharan Africa.⁷ This unfortunate lack of an effective and well-functioning birth registration system leaves children in a precarious position when it comes to claiming nationality, which may also expose them to the risk of becoming stateless. Even though the right to birth registration does not confer nationality in itself, the Committee notes that it could serve as a proof of the nationality of the parents or the place of birth. The Committee, therefore, takes lack of functional and universal birth registration systems as the main obstacle to the effective realisation of the right to a nationality in Africa.

⁵ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment by the ACERWC on Article 6 of the African Charter on the Rights and Welfare of the Child: "right to birth registration, name and nationality"* (2014), available at http://www.acerwc.org/download/general-comment/article_6_name_and_nationality/?wpdmdl=8606.

⁶ Recommendations and Observations to the Governments of Tanzania, Kenya, Burkina Faso, Cameroon, Libya, Mali and Uganda by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child, available at <http://acerwc.org/state-reports/>

⁷ *Every child's birth right: inequalities and trends in birth registration*, UNICEF (2013) at https://www.un.org/ruleoflaw/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf

The Committee's approach to childhood statelessness is in line with the obligation of State Parties as it is envisaged in Article 6(4) of the Charter. In order to give effect to the rights enshrined in Article 6, the Committee prescribes that State Parties have to keep in mind their overall obligation to respect, protect, promote, and fulfil children's rights in accordance with their obligations stemming from Article 1 of the ACERWC, which requires States to "undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter". With a view to addressing childhood statelessness, the Committee specifically requires State Parties which do not have civil registration laws to adopt them, those whose civil registration laws are not implemented to implement them, and those whose laws are deficient or outdated to align them to the required standards through law reform, drawing inspiration from the present General Comment and best practices from other State Parties.⁸ This should be done with an understanding of the principle of interdependence and indivisibility of children's rights in general and the interdependence and indivisibility of the three rights provided for under Article 6 in particular.

The position of the Committee on childhood statelessness could also be inferred from its first decision on the situation of children of Nubian descent in Kenya.⁹ In its decision, the Committee found the Government of Kenya to be in violation of the right to non-discrimination, nationality, health and health services, protection against statelessness, and education of children of Nubian descent living in Kenya. The Committee urged the Government of Kenya to take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent in Kenya—who are otherwise stateless—acquire a Kenyan nationality and the proof of such a nationality at birth. The Committee also held that: "Article 6(3) does

⁸ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment by the ACERWC on Article 6 of the African Charter on the Rights and Welfare of the Child: "right to birth registration, name and nationality"* (2014), para 11.

⁹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Communication 002/2009 IHRDA and OSJI (on behalf of children of Nubian Descents in Kenya) v Kenya*. Available at <https://www.opensocietyfoundations.org/sites/default/files/ACERWC-nubian-minors-decision-20110322.pdf>

not explicitly read, unlike the right to a name in Article 6(1), that ‘every child has the right from his birth to acquire a nationality’”. It only says that ‘every child has the right to acquire a nationality’. Nonetheless, a purposive reading and interpretation of the relevant provision (Article 6(3)) strongly suggests that, as much as possible, children should have a nationality beginning from birth. This interpretation is also in tandem with Article 4 of the African Children’s Charter that requires that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”.¹⁰ The Committee also states that legal and other measures should be adopted to ensure that nationality is acquired by a child at birth not only on the basis of descent from a citizen without restrictions (such as limitation of transmission of nationality to one generation only for children born abroad), but also on the basis of birth in the territory of the State.

As already recommended in the children of Nubian descent case, the Committee prescribed that States should adopt provisions giving children born in their territory the right to acquire nationality after a period of residence that does not require the child to attain majority before nationality can be confirmed. Further, the Committee encourages African States to facilitate the acquisition of nationality by children who were not born in their territory but who arrived there as children and have been resident there for a substantial portion of their childhood.¹¹

¹⁰ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment by the ACERWC on Article 6 of the African Charter on the Rights and Welfare of the Child: “right to birth registration, name and nationality”* (2014), para 90, available at http://www.acerwc.org/download/general_comment_article_6_name_and_nationality/?wpdmdl=8606. See also *Using the African Regional framework to realise children’s nationality rights in Kenya* by Mustafa Mahmoud Yousif in Chapter 8.

¹¹ *Ibid.*, para 92.

3. The draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Rights to Nationality and the Eradication of Statelessness in Africa

The African Charter on Human and Peoples' Rights (the Charter) is a regional instrument which was adopted in 1981 and came into force 1986. The Charter contains no provision which specifically deals with the right to nationality and prevention of statelessness. However, cases involving matters of the right to nationality and statelessness, including the hallmark case of the nationality of the former President of Zambia, Kenneth Kaunda,¹² have been brought before the African Commission on Human and Peoples' Rights.¹³

¹² Legal Resources Foundation v. Zambia, African Commission on Human and Peoples' Rights, Comm. No. 211/98 (2001), available at <http://www.achpr.org/communications/decision/211.98/>.

¹³ See also African Commission on Human and Peoples' Rights (ACHPR), *Communication No. 97/93, John K. Modise v. Botswana*, available at http://www.achpr.org/files/sessions/28th/comunications/97.93_14ar/achpr28_97_93_14ar_eng.pdf; African Commission on Human and Peoples' Rights (ACHPR), *Communication No. 212, Amnesty International v. Zambia*, available at http://www.achpr.org/files/sessions/25th/comunications/212.98/achpr25_212_98_eng.pdf; African Commission on Human and Peoples' Rights (ACHPR), *Communication No. 159/96, Union Interafricaine des Droits de l'Homme and Others v. Angola*, available at http://www.achpr.org/files/sessions/22nd/comunications/159.96/achpr22_159_96_eng.pdf; African Commission on Human and Peoples' Rights (ACHPR), *Communications Nos. 27/89, 49/91 and 99/93, Organisation Mondiale Contre la Torture and Others v. Rwanda*, available at http://www.achpr.org/files/sessions/20th/comunications/27.89-46.91-49.91-99.93/achpr20_27.89_46.91_49.91_99.93_eng.pdf; *Communication No. 71/92, Rencontre Africain pour la Défense des Droits de l'Homme v. Zambia*, available at http://www.achpr.org/files/sessions/20th/comunications/71.92/achpr20_71_92_eng.pdf; African Commission on Human and Peoples' Rights (ACHPR), *Communication 211/98, Legal Resources Foundation v. Zambia*, available at http://www.achpr.org/files/sessions/29th/comunications/211.98/achpr29_211_98_eng.pdf; African Commission on Human and Peoples' Rights (ACHPR), *Communication 292/2004, Institute for Human Rights and Development in Africa v. Angola*, available at http://www.achpr.org/files/sessions/43rd/comunications/292.04/achpr43_292_04_eng.pdf; African Commission on Human and Peoples' Rights (ACHPR), *Communication No. 249/02, Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea*, available at http://www.achpr.org/files/sessions/36th/comunications/249.02/achpr36_249_02_eng.pdf; and African Commission on Human and Peoples' Rights (ACHPR), *Communication No. 246/02, Mouvement ivoirien des droits humains (MIDH) v. Côte d'Ivoire*, available at http://www.achpr.org/files/sessions/5th-eo/comunications/246.02/achpreo5_246_02_eng.pdf.

However, the Commission decided to also develop a Protocol on nationality rights and prevention of statelessness in Africa. Through a collective effort by the African Union, the African Commission, the UN High Commissioner for Refugees, the Open Society Initiative, African civil society organisations, and other partners, a draft on the Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Rights to Nationality and the Eradication of Statelessness in Africa has been produced. The Draft Protocol seeks to provide legal solutions for the resolution of the practical problems linked to the recognition and the exercise of the right to a nationality, to eradicate statelessness, and above all to identify the principles that should govern relations between individuals and States in relation to these issues.

Taking prevention of childhood statelessness as one of its primary areas of focus, the Draft Protocol prescribes a number of provisions which could play a significant role in the eradication of childhood statelessness in Africa. For instance, Article 5 of the Draft Protocol addresses the principle of 'Nationality from Birth'. Nationality from birth in this provision entails that children must be accorded nationality from the moment of birth, or, in some cases, the retrospective recognition of nationality from birth. The Article requires that State Parties automatically confer nationality to the following groups of children from birth: a child with at least one parent who has the nationality of that State at the time of the child's birth; a child born abroad if either of the child's parents has its nationality and was born in its territory; or the child would otherwise be stateless.¹⁴ Moreover, a child born in the territory of the state of one parent also born in the territory of the state and a child born in the territory of the state of parents who are stateless or of unknown nationality shall also be attributed nationality at birth.

Article 5(2) requires states to recognise nationality from birth retroactively for some groups including to a child found in the territory of the State of unknown parents, who shall be considered to have been born within that territory of parents possessing the nationality of that State; to a person born in the territory of the State who has remained

¹⁴ In this regard, Article 5 (1) (a) of Protocol to is in line with the International Covenant on Civil and Political Rights (Article 24(3)), the CRC (Article 7 (1)) and the Convention on the Reduction of Statelessness (1961) (Article1).

habitually resident there during a period of his or her childhood; and to a child adopted by a national. Additional safeguards are also prescribed in Article 6 of the draft Protocol, which provides both for the acquisition of nationality through naturalisation on the basis of long term residence in a State and also for facilitated acquisition of nationality by other categories of person. Particularly, Article 6 requires States to facilitate the acquisition of nationality by different categories of children if they are not entitled to nationality from birth. These categories include: a child of a person who has or who acquires its nationality; a child born in the territory of the State to a non-national parent who is habitually resident there; a person who was habitually resident in its territory as a child and who remains so resident at majority; and a child in the care of a national of the State.

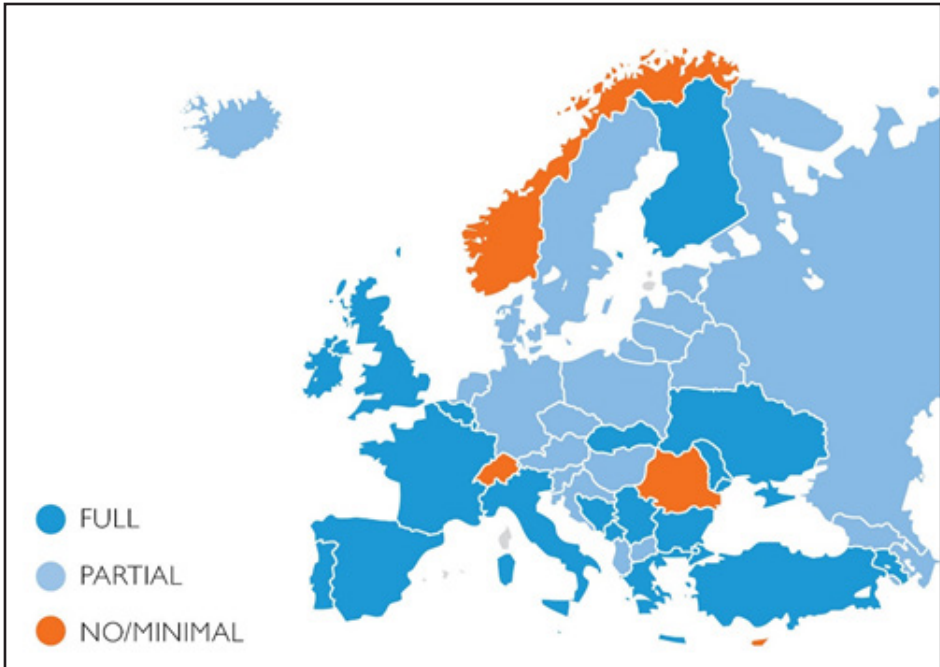
Furthermore, Article 10 of the Draft Protocol provides for more specific safeguards which can play a great role in preventing childhood statelessness. Under the title 'Nationality and Children's Rights', Article 10 prescribes for a State Party to adopt legislative and other measures to ensure that every child is attributed a nationality at birth and is registered immediately after birth. Drawing from the Convention on the Rights of the Child and the African Children's Charter, the Draft Protocol puts conditions on the considerations of the principles on the best interest of the child and consideration of the views of the child in all actions concerning the nationality of a child undertaken by any person or authority.

4. Conclusion

Looking at the provisions included in the African Children's Charter and the initiatives at the ACERWC, one can learn that the African human rights system prescribes safeguards which could prevent childhood statelessness in the continent. Although there is a lack of a clear and specific provision on prevention of childhood statelessness under the African Charter on Human and Peoples' Rights, this can easily be remedied through the detailed provisions under the upcoming Protocol on the specific aspects of nationality rights and prevention of statelessness in Africa. The African Children's Charter and the Protocol, once the latter is ratified by the African Union Policy Organs and the Member States, provide principles which could guide Member States in their endeavours to tackle the problem of childhood

statelessness in their respective jurisdictions. The monitoring organs, particularly the ACERWC and the Commission, therefore, should assume their responsibility in establishing accountability against State Parties while following up the implementation of the provisions. The two organs should also work towards harmonising their jurisprudence on matters related to childhood statelessness with a view of establishing an integrated approach in addressing the plight of childhood statelessness in Africa.

Mapping safeguards in Europe



This map shows the status of legislative safeguards to ensure that children born stateless in Europe acquire a nationality. It was published by the European Network on Statelessness in its report “No Child Should be Stateless” as part of its region-wide #statelesskids campaign in 2015.

“Full” safeguards are those which comply fully with international law; “partial” safeguards retain conditions that are not permitted under international law; and the countries with “no / minimal” safeguards provide no real avenue for stateless children born on the territory to acquire a nationality.

Since the map was published, Norway (featured here in orange) has passed a new instruction introducing a safeguard that is compliant with international law. Using visuals to communicate the extent to which a country’s law falls short of international standards – and how this compares to other states in the region – can be a helpful tool in awareness raising and advocacy for law reform.

Foundlings in Côte d'Ivoire

Laura Parker *

Both *jus soli* and *jus sanguinis* elements were present in the nationality law adopted by Côte d'Ivoire upon independence: those born in the country to migrant parents were able to acquire nationality by declaration, and foundlings were considered nationals. However in 1972, Côte d'Ivoire reformed its foundational 1961 nationality law, removing the statelessness safeguard that had been in place for foundlings. The same reform also curtailed the only other option for acquiring nationality based on birth in the territory, which had been available to minor children born in the country to immigrant parents. Since independence over a decade earlier, only 36 children had acquired nationality under the latter provision, whilst no data exists on the number of foundlings that had been protected by that safeguard until 1972. It is thought that legislators at the time were concerned with restricting access to nationality on account of unaccompanied minors arriving in the country following the Biafran war.¹

To this day, the exclusively *jus sanguinis* nationality regime remains, and Ivorians must provide their birth certificate, and the nationality certificate of a parent, in order to obtain proof of nationality. Since foundlings cannot demonstrate that they have an Ivorian parent, they are consequently stateless.

Reliable statistics on the prevalence of this problem nationally are almost impossible to come by, as foundlings are an invisible population: they generally haven't had their birth registered, and are unable to benefit

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¹ Côte d'Ivoire was one of a handful of countries to have recognised the Republic of Biafra, which broke away from Nigeria between 1967 and 1970. The country received a large number of those fleeing the Biafran war, including around 900 unaccompanied minors, who had been evacuated and were later repatriated. 'Humanitarian issues in the Biafra conflict,' *New Issues in Refugee Research*, Working Paper No. 36, Nathaniel H. Goetz, 2001, available at <http://www.unhcr.org/research/working/3af66b8b4/humanitarian-issues-biafra-conflict-nathaniel-h-goetz.html>.

from the 'late birth certificate' option available in Côte d'Ivoire (issued on the basis of the testimony of two witnesses to account for the place and circumstances of one's birth).² Politico-military crises have resulted in forced displacement both internally and abroad of over a million Ivorians over the last decade and a half. While most of those displaced have now returned, these circumstances resulted in separation of children from their parents, and increased the number of children who grew up with no knowledge or evidentiary proof of their parentage.³

Many foundlings are acutely vulnerable, living in orphanages, or on the streets. With no legal record of their existence, they are at high risk of trafficking and other forms of exploitation. A birth certificate is required to sit for school exams in Côte d'Ivoire, which means that even when foundlings have been taken in by families or 'tutors,' they often have to drop out of education, and cannot develop their full potential.⁴

In 2013, Côte d'Ivoire became a State Party to both statelessness conventions. Nevertheless, despite Article 3 of its nationality law establishing the primacy of international instruments over domestic law in nationality matters, even when contradictory, there have been no reported instances of foundlings acquiring nationality through direct implementation of the 1961 Convention's foundlings safeguard. Judges should be encouraged to assist foundlings in this endeavour, thereby helping Côte d'Ivoire uphold its international human rights obligations.

The domestication of the 1954 and 1961 Conventions is one of the goals of the National Action Plan to eradicate statelessness which was drafted in 2016, and an essential step in ensuring foundlings acquire the protection afforded by nationality. Legal aid is also foreseen in the Plan to assist these and other stateless individuals in accessing the protection they are due.

² Previous estimates are not statistically sound, and it has been concluded that census data cannot lead to estimates of the number of foundlings either.

³ For an overview of the Ivorian conflict, see *Making War in Côte d'Ivoire*, Mike McGovern (London: Hurst), 2011. For displacement trends see 'Côte d'Ivoire IDP Figures Analysis,' Internal Displacement Monitoring Centre, 2015, available at <http://www.internal-displacement.org/sub-saharan-africa/cote-divoire/figures-analysis>.

⁴ See 'The Lost Children of Côte d'Ivoire, UNHCR, 2015, available at <http://www.unhcr.org/ibelong/the-lost-children-of-cote-divoire/>.

Reflecting on the lost children of Côte d'Ivoire¹



Stateless persons in the Ivory Coast are deprived of their most basic human rights. They are unable to go to school, obtain formal employment, open bank accounts, own land, inherit property, move freely within the country and abroad, or participate in political life.

There are two main causes for statelessness in the Ivory Coast. The first is that during colonial times, people were brought into the Ivory Coast from (now) Burkina Faso, Mali and Guinea to work on plantations. However, these persons did not receive Ivorian nationality after Ivory Coast's independence, and so their descendants remained stateless despite having been in the country for generations. The other reason is that there was no provision in the Ivorian nationality law that gives nationality to 'foundlings'.



The impacts on stateless children can be profound and their awareness of their situation can influence their ambitions. One stateless girl wants "to study for a long time and become Minister. After that I will help my mother and all the other people who do not have a nationality". She hopes to one day have a birth certificate, which serves as official recognition of her existence, and nationality.

¹ This short piece is largely based on, and contains extracts from an essay entitled "The lost children of Côte d'Ivoire", published on the Kora UNHCR Website on 6 November 2015, and available at: <http://kora.unhcr.org/lost-children-cote-divoire/>. This essay presents the story of three children who have grown up in Côte d'Ivoire without a nationality because one or both of their parents abandoned them. The pictures accompanying this piece, were drawn by founding children living in the SOS Children's village in Aboisso, and are part of a series of pictures by the children on the theme of nationality and statelessness. We are grateful to UNHCR Côte d'Ivoire and SOS Villages Aboisso for permission to use these images in this report.



This girl's mother is also stateless; she became stateless due to being abandoned at birth. The child's father left shortly after the baby was born, and so the birth was never registered. The mother stated that "I want her to have a better life than I did." She had to leave her daughter in the care of another family, stating that "She is better there. Without papers, I cannot study, I cannot work. I do not have money and cannot give her anything."

Another stateless girl does not know where her parents are since she lost all contact with them when she was very small. She has no documents that prove who she is, where she is from and where she was born. Initially, her grandparents raised her, but after they died, she was looked after by the village chief. After the chief died, the chief's son began to look after her. According to the chief's son, she is approximately 13 years old. She loves going to school, but without nationality and any identification documents, she will most likely not be able to graduate from school and pursue studies at university. "If one day, I can no longer go to school, I would be very unhappy", she says. Furthermore, her freedom of movement is severely restricted. Despite this, she hopes that once she overcomes the barriers of statelessness she will be able to travel, stating that "I would like to explore the capital Abidjan, and discover other countries. I want to become Minister of Finance. I would like to be a powerful woman and help others. That would make me happy."

Then there is a stateless boy who was abandoned when he was very young and has no identity documents, or any way of showing who he is, who his parents are or where he was born. He is approximately 10 years old and cannot prove his nationality. When he was around three years old, he was left in the hands of the Imam of



a mosque in Aboisso. His father told the Imam he would be back in three days, but did not return. The child's only possessions were the clothes he was wearing. He does not get the same treatment as other boys his age; instead of going to school, he looks after the family's sheep, taking them out to pasture, and does household chores. He said "every day I have to do the housework and take care of the animals. I want to go back to school but I cannot without papers". His social worker is concerned that he does too much domestic work and does not go to school: "he does not have a parent to protect him, to say 'no' to the other people in the community who ask him to run errands for them". He says "My dream is to become a football player. But first I need to go to school".



International surrogacy arrangements and statelessness

*Sanoj Rajan**

1. Introduction

Statelessness induced by international surrogacy is a comparatively new phenomenon that has emerged because of advances in Artificial Reproductive Technology (ART). Most births of children conceived through medically assisted reproductive techniques do not cause especial problems in the field of nationality laws.¹ However, in cases of international surrogacy arrangements, there is a real risk of statelessness for children if there is a conflict in the surrogacy regime and the nationality laws of the surrogate mother's country of nationality and that of the commissioning parents. This can mean that nationality cannot be attributed to the child in certain circumstances. Surrogacy, especially international surrogacy is prohibited, highly regulated, or actively discouraged by legal and regulatory bodies in most countries. The objectives of such restrictive laws are to avoid the exploitation of vulnerable women and children, prevent trafficking of women and newborns, and the circumvention of international adoption protocols. However, in some circumstances, these laws and regulations are creating statelessness amongst children born through international surrogacy arrangements.

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¹ G.R. De Groot, 'Children, their right to a Nationality and Child Statelessness' in A Edwards & L.E. van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014), at165.

2. Definition of surrogacy and different types of surrogacies

Surrogacy is the process of one person carrying and delivering a child for another person. Such arrangements are made for various reasons, including medical conditions such as absence or malformation of the womb, recurrent pregnancy loss or repeated in-vitro fertilization implantation failures in the genetic mother.² Sometimes there are non-medical reasons, such as aesthetic or other reasons of convenience, for hiring a surrogate mother.

Surrogacy is classified according to the nature of the contract and relationship between the stakeholders. Traditional surrogacy is the earliest form of surrogacy in which the egg of the surrogate mother and the sperm of either the commissioning father or a donor are used in fertilization; needless to say, in these cases the child is genetically related to the surrogate mother. More recently, as scientific and medical technology has advanced, the role of the surrogate mother has been reduced to that of carrying the embryo in her womb during pregnancy and delivering the child. This type of surrogacy is known as 'gestational surrogacy', and the egg is either procured from the commissioning mother or an egg donor and is fertilized *in vitro* (IVF), and implanted in the surrogate's womb. Hence in gestational surrogacy, the surrogate mother is not genetically related to the baby.

Gestational surrogacy can be further classified on the basis of the money involved in the surrogacy arrangement. In altruistic surrogacy, the surrogate receives no financial reward for her pregnancy except the medical and nutritional expenses incurred during the pregnancy. In commercial surrogacy there is a financial reward paid to the surrogate in addition to the regular expenses.

3. Parenthood of surrogate children

Traditionally, parenthood involves three components: 1) an intention or willingness to have a child; 2) genetic consanguinity; and 3) giving birth to and raising a child. Hence, in ordinary parlance, parenthood involves only two parents. In the case of surrogacy, however, parenthood

² 'Surrogacy' (Wessex Fertility), available at <http://www.wessexfertility.com/surrogacy/>

may involve up to three different mothers and up to three different fathers depending on the facts and national legal regimes involved. In most legal systems, motherhood is assumed only when a person gives birth to the child. Hence the surrogate mother is considered a legal mother in many countries, by operation of law. For instance, a British couple making a commercial surrogacy arrangement abroad would find that British law regards the surrogate and her husband as the legal parents and not the commissioning British couple under the Human Fertilisation and Embryology Act 1990.³

On the other hand, the commissioning parents will become the legal parents, irrespective of their genetic connection to the child, if their country and the surrogate mother's country have legalized surrogacy. For example, if a US citizen from California commissions a surrogate baby in Ukraine: as both countries have legalized surrogacy, the commissioning parents become legitimate parents irrespective of any genetic connection. If there is a genetic relationship between the commissioning parents and child, then, in most of the countries where *jus sanguinis* is followed, the commissioning parents will automatically become legal parents without any surrogacy enabling laws.

Another category of people who may assume parentage in surrogacy arrangements are the 'gamete donors' who are neither the surrogate mother nor the commissioning parents but are the genetic parents who donate sperm and eggs. However, the role of gamete donors as parents comes to light only if they have not donated anonymously and are proved to have a genetic connection with the child. Usually surrogacy arrangements across the world require the donors to be anonymous, thus reducing any possible confusion.

4. Nationality of surrogate children

Usually, children have the same nationality as their parents and this also corresponds to their country of birth. However, just as there are difficulties in determining legal parenthood in cases of international surrogacy, there are also challenges in respect of the determination of

³ See *Re X & Y (Foreign Surrogacy)*, [2008] EWHC (Fam) 3030 (Eng.); See also Mark Henaghan, "International Surrogacy Trends: How Family Law is Coping" (2013) Australian Journal of Adoption Vol. 7 No.3.

nationality because different jurisdictions have different approaches. Hence, determination of nationality also becomes complicated, as nationality is determined by parentage and/or by place of birth. Nationality laws are often interpreted in such a way as to exclude commissioning parents from becoming legal parents of a child born overseas via surrogacy, especially in cases of commercial surrogacy, unless the country has legalized commercial surrogacy.⁴ To analyse this problem in detail, the countries are categorized according to their legal regime on surrogacy.

5. Legal challenges

Statelessness issues arise in international surrogacy arrangements when the commissioning parents are from a country where it is prohibited to commission commercial surrogacy in another country. The laws relating to parentage and nationality usually preclude the commissioning parents from becoming the legal parents of the child born in a foreign country via surrogacy. If the surrogate mother's country also fails to recognise her as the parent because surrogacy is a valid legal act, and if unconditional *jus soli* provisions are not in place, the child will end up stateless. There are also other reasons for surrogacy-related statelessness. Analysis of cases from various jurisdictions reveals that statelessness arising out of surrogacy could arise due to a combination of any two or more of the situations below:

- **Denial of nationality of children by the Commissioning parents' country because of laws prohibiting or restricting surrogacy.**

In this category of cases the commissioning parents from a country, where surrogacy or commercial surrogacy is restricted or prohibited (Categories B and C above respectively), commission a baby in another country. Subsequently, they try to take the baby back to their country but are blocked because of strict anti-surrogacy laws. The surrogate child becomes stateless if the surrogate mother's country also denies the child nationality because the law permits surrogacy there. There are many cases to illustrate this situation, such as *Jan Balaz v Anand*

⁴ Ibid, Henaghan (n 7).

Category A: Commercial surrogacy is legally permitted	Category B: Commercial surrogacy is restricted but altruistic surrogacy is usually allowed	Category C: Surrogacy is entirely prohibited
<i>India⁶, Ukraine, Russia, Panama, Thailand and some states in the USA such as California and Florida.</i>	<i>Canada, UK, Australia, New Zealand, Israel, and the Netherlands.</i>	<i>France, Italy, Germany, China, Japan, Switzerland, Greece, Spain, and Norway.</i>
<p>These countries have adopted laws to enable a surrogate-born child to get citizenship from the commissioning parents. For example, India and Ukraine issue birth certificates in the commissioning parents' names bestowing parentage on the commissioning couple and severing the claims of the surrogate mother and her husband to parentage. In such cases surrogate-born children are not automatically citizens of their country of birth.⁷ However in a considerable number of cases the countries of the receiving commissioning parents, have denied recognizing children born to surrogate mothers outside their borders as citizens; and thus issues of statelessness have arisen for surrogate-born children.⁸</p>	<p>In these countries, altruistic surrogacy is allowed, but commercial surrogacy is prohibited. In Australia, commercial surrogacy is banned except in the Northern Territory.⁹ Britain has substantively similar rules regarding citizenship and illegalizes payment for surrogacy beyond reasonable expenses.¹⁰ Canada and New Zealand both passed laws in 2004 prohibiting commercial surrogacy.¹¹ Israel's Surrogacy Law was passed in 1996 and is highly controlled through a Board of Approval for Surrogacy Agreements. Commercial surrogacy needs to be approved by the Board. Same sex commissioning arrangements are not allowed, and there is no mention of international surrogacy arrangements.¹²</p>	<p>In the case of countries that have passed anti-surrogacy laws to control their nationals on moral and policy grounds, there has been a refusal to grant nationality to surrogate-born children. This is applicable even when the child is the genetic offspring of a national. For example, in France, surrogacy is illegal,¹³ and France refuses to recognize parentage or to give nationality to around 400 children born each year as a result of French nationals entering into surrogacy arrangements with surrogate mothers in the United States, Ukraine or India.¹⁴ However, most of these countries with prohibitive or restrictive surrogacy laws have provided parentage certificates or nationality to surrogate children on an <i>ad hoc</i> basis on the principle that it is in the child's best interest.¹⁵</p>

⁵ The Indian Parliament has passed a national legislation which prohibits commercial surrogacy on August 24, 2016, this is yet to be notified in the official gazette which will make it enforceable. Once it come into effect India will fall under category B, and till that time it is to be read along with the Category A. See the Assisted Reproductive Technology Bill, 2016, India.

⁶ Usha Rengachary Smerdon, "Crossing Borders: International Surrogacy between the United States and India" (2008) 39 Cumb. L. Rev. 15, 42

⁷ See Storrow R F., "Travel into the Future of Reproductive Technology" (2010) 79 UMKC L. Rev. 295, 305.

⁸ Mary Keyes, "Cross-Border Surrogacy Agreements" (2012) Australian Journal of Family Law, Vol. 26, 28-50.

⁹ Surrogacy Arrangements Act, 1985, s 2 criminalize commercial surrogacy. See <<http://www.legislation.gov.uk/ukpga/1985/49>> accessed 18 March 2016.

¹⁰ Section 6 of Canada's Assisted Human Reproduction Act (AHR Act), 2004, see <<http://www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/reprod/surrogacy-substitution-eng.php>> accessed 18 March 2016. Section 14 (3) of New Zealand's Public Act 2004 No 92, see <http://www.legislation.govt.nz/act/public/2004/0092/latest/whole.html>.

¹¹ Law Library of Congress, Israel, *Reproduction and Abortion: Law and Policy* (February 2012) <http://www.loc.gov/law/help/israel_2012-007460_IL_FINAL.pdf> accessed 18 March 2016.

¹² Article 16-7 of the French Civil Code (1804).

¹³ Storrow R. F., "The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy", (2012) 20 Am. U.J. Gender Soc. Pol'y & L. 561, 567 citing Charlotte Rotman.

¹⁴ See Amoros E. F., "Surrogacy Arrangements in a Global World: The Case of Spain" (2013) International Family Law 68 and also Yukari Semba et al., "Surrogacy: Donor Conception Regulation in Japan" (2010) 24 Bioethics 348, 354.

Municipality,¹⁵ *Re: L(A minor) UK*,¹⁶ *the Mennesson Case*,¹⁷ *The Volden Case*,¹⁸ and the *Le Roches case*.¹⁹

– Denial of nationality by the surrogate mother's country, because of acceptance of surrogacy as legal.

In this category, the surrogate mother's country recognizes the surrogate born child as the legitimate child of the commissioning parents and a national of the commissioning parents' country. This assumption arises because of the pro-surrogacy laws in those countries and comes under Category A as discussed above. In such cases, the surrogate child becomes stateless if the child cannot be taken to the commissioning parents' country for various reasons. The *Jan Balaz case*,²⁰ *Baby Manji Case*,²¹ *Re: IJ (A Child) and Re: X&Y (Foreign Surrogacy)*,²² *The Volden Case (India-Norway)*,²³ and *Le Roches case (France-Ukraine)* refer to such situations.²⁴

– Refusal by the commissioning parents to take the child back to their country.

There have been occasions when the commissioning parents, or one of them, have failed to take custody of the surrogate children. The reasons for this vary, including divorce, genetic mix-up, the surrogate child having abnormalities, etc. Examples are *Baby Manji Yamada v*

¹⁵ *Jan Balaz v Anand Municipality* [2009] LPA 2151/2009, High Court of Gujarat, India.

¹⁶ *D v L(Minor)* [2010] EWHC 3146 (Fam).

¹⁷ *Affaire Mennesson v France* App no. 65192/11 (ECHR, 26 June 2014). See also *Affaire Labassee v France* App no. 65941/11 (ECHR, 4 December 2003)

¹⁸ See generally Sumitra Deb Roy, "Stateless Twins Live in Limbo" *The Times of India* (India, 2 February 2011).

¹⁹ See Kateryna Grushenko, "French Couple's Desire for Child Brings Trouble" *Kyiv Post* (15 April 2011).

²⁰ *Jan Balaz v Anand Municipality* [2009] LPA 2151/2009, High Court of Gujarat, India.

²¹ *Baby Manji Yamada v Union of India and Another* [2008] 13 SCC 518. See also Kari Points, "Commercial Surrogacy and Fertility Tourism in India: The Case of *Baby Manji*" <<http://www.readbag.com/duke-web-kenanethics-casestudies-babymanji>> accessed 18 March 2016.

²² *Re X & Y (Foreign Surrogacy)*, [2008] EWHC (Fam) 3030 (Eng).

²³ Sumitra Deb Roy, "Stateless Twins Live in Limbo" *The Times of India* (India, 2 February 2011), n19.

²⁴ Law Library of Congress (n 13).

Union of India,²⁵ *The Canadian Twins Case*,²⁶ and *The case of Gammy*.²⁷ In such contexts, the child will remain in the surrogate mother's country where he or she will likely also remain stateless if that country has surrogacy enabling laws which recognise the commissioning parents, rather than the surrogate mother as the child's legal parents.

– Denial of consent by the surrogate mother, even though there is no genetic relationship.

In some instances, surrogate mothers are reluctant to give consent to hand over the child to the commissioning parents. If the child remains in the country of the surrogate mother, her or she will remain stateless if the country legalizes surrogacy as per Category A discussed above. In *D and L (Minors) (Surrogacy)* (an Indian case) the commissioning parents were not able to get consent from the surrogate mother even six weeks after the birth of the surrogate child.²⁸

– Specific legal prohibitions on surrogacy arrangements for same-sex couples.

The Goldberg Twins was a unique Israeli case where a lower court denied paternity tests of the infants who were born to a gay couple claiming that the court was not authorized to rule on the matter.²⁹ The judge declared that the court could not pass judgment on children who were not in Israel and whose affinity to Israel had not been proven. However, the issue was solved by the involvement of the higher court and Knesset later.

From the above discussions, it is clear that statelessness arising out of international surrogacy arrangements occurs when the commissioning parent(s) from a country that has banned or restricted surrogacy

²⁵ *Baby Manji Yamada v Union of India and Another* [2008] 13 SCC 518.

²⁶ Raveena Aulakh "After Six Years and Fertility Mix-up, Surrogate Twin Can Come Home" *The Star* (online ed, Canada, 5 May 2011) <http://www.thestar.com/news/gta/2011/05/05/after_6_years_and_fertility_mixup_surrogate_twin_can_come_home.html> accessed 17 March 2016.

²⁷ "Baby Gammy Granted Australian Citizenship" *BBC* (Australia, 20 January 2015) <<http://www.bbc.com/news/world-australia-30892258>> accessed 18 March 2016.

²⁸ *D v L (Surrogacy)* [2012] EWHC 2631 (Fam).

²⁹ Harinder Mishra, "Israeli gay couple to take surrogate twins home" *The Indian Express* (Jerusalem, 28 May 2010) <<http://archive.indianexpress.com/news/israeli-gay-couple-to-take-surrogate-twins-home/624650/>> accessed 18 March 2016.

contract with a surrogate mother from a country that has legalized surrogacy. In such cases, the commissioning parents' country can deny the nationality of the surrogate child for the following reasons:

- The country's anti-surrogacy laws expressly prohibit, as a deterrent to discourage surrogacy, recognition of the surrogate parents as the child's parents
- The nationality laws exclude these children because of *jus sanguinis* and *jus soli* principles, i.e. the child was neither born to the commissioning mother nor was born in her country's territory (or the countries in question do not apply *jus soli*). This condition is aggravated when there is no genetic connection between the surrogate child and the commissioning parent(s);
- In very rare cases it may be due to other legal issues such as restrictions on homosexual relationships or the requirements for valid marriages.

The surrogate mother's country might also deny citizenship because:

- The country's legal surrogacy regime assumes and accords the parentage only to the commissioning parents and not to the surrogate mother;
- The surrogate mother's country might not have a nationality law provision for granting citizenship to children abandoned by the commissioning parents or who otherwise get trapped in the surrogate mother's country.

6. International law provisions relevant to surrogacy related Statelessness

There are many provisions in International Human Rights Conventions which deal with nationality, including Article 15 of The Universal Declaration of Human Rights (UDHR),³⁰ Article 24 of the International Covenant on Civil and Political Rights (ICCPR),³¹ Article 1 and 5 of the

³⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

³¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). See also UN Human Rights Committee (HRC), CCPR 'General Comment No. 17: Article 24 (Rights of the Child)' (7 April 1989).

Convention on the Elimination of all forms of Racial Discrimination (CERD),³² Article 9 (2) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),³³ Article 7 and 8 of the Convention on the Rights of the Child (CRC).³⁴

However, these instruments may not immediately provide all the answers with respect to preventing statelessness among children born out of international surrogacy arrangements. For example, Article 24(3) of ICCPR only guarantees a right to acquire a nationality, without any specification by which time this right has to be implemented. Articles 7 and 8 of CRC are very clear about the child's right to acquire a nationality; however, the CRC neither indicates which nationality a child may have a right to, nor does it guarantee that nationality is acquired at birth. Although the Committee on the Rights of the Child has provided significant guidance in this respect,³⁵ it has yet to deal in detail with the obligations of states parties in the context of international surrogacy arrangements. Hence, despite high accession rates, these conventions can fall short in practice.

Further, the provisions of the 1961 Convention,³⁶ are also not fully attuned to preventing statelessness arising out of international surrogacy arrangements. For example:

1. Articles 1(1) and (2) (indirectly) provide for the child's nationality to be from the surrogate mother's state if he or she is born in its territory. However, in reality, if the country where the child is born has recognized surrogacy, then it recognises the commissioning parents as the child's legal parents and may (wrongly, in some cases) assume therefore that a nationality is acquired by the child *jus sanguinis* and fail to apply this safeguard;

³² International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

³³ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

³⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

³⁵ See for more information, <http://www.statelessnessandhumanrights.org/>.

³⁶ Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention).

2. As per Article 1(3) a child who is otherwise stateless and is born in wedlock in the territory of a Contracting State, shall acquire at birth that nationality through the mother. Here, the convention does not clarify to whose wedlock it refers – the surrogate's or the commissioning parents' – thereby causing confusion;
3. Article 1(4) and (5) and Article 4 provides that a Contracting State shall grant nationality to a child, if the nationality of one of his or her parents at the time of the child's birth was that of the Contracting State mentioned above. This supports the child if the surrogate's country rejected the child (for the aforementioned reasons) and the nationality of the commissioning parents could then be conferred. However, in many countries one needs to give birth to the child or have genetic connection to the child born to be defined as the child's parent – which is not always the case in surrogacy. If the commissioning parents' country has prohibited surrogacy, then the possibility of granting nationality could be low because they are not recognised as the legal parents – a problem which the 1961 Convention does not address.

7. Special efforts for international regulations on surrogacy

In April 2010, the Council on General Affairs and Policy of the Hague Conference on Private International Law invited the Permanent Bureau, the Secretariat of the Hague Conference responsible for researching issues undertaken by the Conference, to generate a report on the matter.³⁷ Under this mandate, the Permanent Bureau of the Hague Conference on Private International Law is currently studying the private international law issues arising from the legal parentage or 'filiation' of children, as well as more specific issues in connection with international surrogacy arrangements through its Parentage/Surrogacy Project.³⁸ The project is still not complete and will take more time to come up with concrete solutions for surrogacy-induced statelessness. Some commentators independent to this issue also

³⁷ Council on General Affairs and Policy of the Conference, (Hague Conference on Private Int'l Law, Conclusions and Recommendations) (2010) <http://www.hcch.net/upload/wop/genaff2010concl_e.pdf> accessed 20 March 2016.

³⁸ See "*The Private International Law Issues Surrounding The Status Of Children, Including Issues Arising From International Surrogacy Arrangements*" (HCCH) <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>> accessed 20 March 2016.

suggest that an international convention be modelled on The Hague Adoption Convention.³⁹

8. Conclusion

The International Conventions have been insufficiently effective in preventing statelessness arising out of international surrogacy arrangements and such cases of statelessness continue. However, the reasons for such statelessness can be attributed both to the norms governing the acquisition of nationality in the various countries as well as a lack of clear guidance from international law. There are two solutions for the effective prevention of statelessness arising out of international surrogacy. The first is by regulating international surrogacy arrangements under international law in order to prevent statelessness from arising from international surrogacy. However, this is a long process and requires commitment from states, as it touches upon the states' sovereign right to determine nationality. The second is to proceed with better regulation of international surrogacy arrangements at national level, to prevent statelessness for children born in this context. Some countries like India have taken bold step towards this, by abolishing Commercial Surrogacy involving foreigners completely so as to avoid complications involving statelessness. However, commercial surrogacy options for Indian Citizens and Persons of Indian Origin is retained where such statelessness issues cannot arise as they are entitled to Indian Citizenship by default.⁴⁰

³⁹ Professors Katarina Trimmings and Paul Beaumont advocate for a Convention which aims to establish a framework for international co-operation with emphasis on the need for substantive safeguards and to develop procedures for courts, administrative authorities, and private intermediaries, Katarina Trimmings & Paul Beaumont, *"International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level"* (2011) 7 J. Private Int'l L. 627, 633.

⁴⁰ See Assisted Reproductive Technology Bill, 2016, India.

Preventing childhood statelessness of children of prisoners

*Laurel Townhead**

1. Introduction

All around the world there are pregnant women in prison. Some give birth while they are detained. For their babies, this has a range of negative impacts on their safety and wellbeing¹ and can result in violations of their rights, including their right to nationality. The Quaker United Nations Office was made aware of this nexus between two strands of our work by Heidi Cerneka of the Maryknoll Lay Missionaries.² In the course of her work in Brazil with women in prison she met foreign national women who were pregnant at the time of arrest and received lengthy sentences for drugs offences. As a result, their babies were born in prison and outside their mother's country of nationality, raising a series of questions about acquisition of nationality. What are the risks of childhood statelessness for children born to foreign national women in prison and what causes them? Is this just a problem for foreign nationals? What about the impact of paternal imprisonment? These questions are explored below.

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¹ Oliver Robertson *Collateral Convicts: Children of incarcerated parents: Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion* (Quaker United Nations Office, 2012).

² The Maryknoll Lay Missionaries is a Catholic organization seeking to respond to basic needs by living and working with those affected, this includes work with women prisoners in Brazil. See <http://www.mklm.org/who-we-are/our-people/returned-missioners/returned-missioners-profiles/heidi-cerneka/>

All children have a right to acquire nationality³ and this must be implemented without discrimination, including discrimination based on their parent's status or activities.⁴ International law therefore prohibits limitation of the right to nationality on grounds of parental incarceration. To our knowledge, there is no country that explicitly bars those in prison from transmitting nationality to their child as a result of their status as a prisoner. This does not mean, however, that violations of the right to acquire a nationality resulting from parental incarceration do not take place. The purpose of incarceration is to take people out of society. Unless alternative provision is made it can prevent prisoners from carrying out routine processes such as those required to register a birth.

The compound impact of the social exclusion of those deemed 'criminals' and the intersectional discrimination most of those in prison face hampers access

Deprivation of nationality as a criminal sanction leading to childhood statelessness

The increasing use of deprivation of nationality as a criminal sanction is a worrying trend that can lead to statelessness, not only of the individual who is deprived of nationality, but also of his or her children. In 2011, the United Arab Emirates (UAE) revoked the citizenship of Mohammed Abdul Razzaq al-Siddiq*. In March 2016 the Department of Migration revoked the citizenship of his three children. The Gulf Centre for Human Rights reports that this rendered them stateless. Whilst the children of Al-Siddiq are all adults, the legal rationale applied by the government of UAE, that their citizenship depended on that of their father, could just as easily be applied those who are still children.

³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 24(2), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 7(1), available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 2(2), available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

* Mohammed Abdul Razzaq al-Siddiq is described in the Communications report of Special Procedures as "a human rights defender and online activist who was one of the UAE 94 and is serving a 10-year prison sentence" Communications report of Special Procedures, A/HRC/33/32 of 9 September 2016, at 58, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/201/26/PDF/G1620126.pdf?OpenElement>; Letter from Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders of 10 April 2016, is 1/2016 available at [https://spdb.ohchr.org/hrdb/33rd/public_-_AL_ARE_20.04.16_\(1.2016\).pdf](https://spdb.ohchr.org/hrdb/33rd/public_-_AL_ARE_20.04.16_(1.2016).pdf)

to justice. The stigma faced by prisoners (and by extension their children⁵) make self-advocacy and access to justice even more difficult by presenting additional obstacles to legal processes for remedy and impacting on the political will needed for reform.

2. Transmission of nationality to babies of prisoners

2.1 *Transmission of nationality by incarcerated mothers*

When women give birth in prison and they are not able to transmit their nationality due to inequality in nationality laws,⁶ their babies are at a heightened risk of statelessness. If the father is not in contact with the mother or is not cooperative, the child may become stateless. A significant proportion of imprisoned mothers are single mothers prior to entering prison; for others relationships breakdown once they are incarcerated (not least because of stigma).⁷ It is also worth noting that very high rates of women in prison have experienced prior victimisation, including situations in which the child's father is the perpetrator.⁸ Even where there is a commitment to maintaining family relationships, this can be challenging due the financial, geographical or security barriers to ongoing contact.⁹ These factors could impact on the communication between the mother and the father required to enable and prove transmission of nationality.

2.2 *Transmission of nationality by foreign national incarcerated mothers*

The risks are compounded for babies born to foreign national women in prison. If women are not able to transmit their nationality and the father is not in the country where the birth takes place (or is unknown

⁵ Oliver Robertson *Collateral Convicts: Children of incarcerated parents: Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion* (Quaker United Nations Office, 2012), p.2

⁶ See also *Campaigning for gender equality in nationality laws* by Catherine Harrington in Chapter 13.

⁷ Rachel Taylor *Women in Prison and Children of Imprisoned Mothers: Preliminary Research Paper* (Quaker United Nations Office 2004).

⁸ United Nations Special Rapporteur on violence against women, its causes and consequences *Pathways to, conditions and consequences of incarceration for women* A/68/340 of 21 August 2013, paras. 5-8 available at <http://www.ohchr.org/Documents/Issues/Women/A-68-340.pdf>

⁹ Oliver Robertson *Collateral Convicts: Children of incarcerated parents: Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion* (Quaker United Nations Office, 2012).

or unwilling to be recognised), there is a significant danger that the child could become stateless. This can have ramifications for the child beyond those risks already associated with statelessness, for example, if the child reaches an age at which he or she will be removed from their mother's care in prison. If there is no family support available in the country of incarceration, it may be in the child's best interests to be sent to relatives. If the child has not acquired the nationality of the country in which its family members reside it may not be possible for this to happen, leaving them without family care. In addition, problems may arise if the mother is deported at the end of her sentence but the child has not acquired her nationality and is unable to travel with her or is able to travel with her but then cannot access the same statutory services as nationals once in the mother's country of nationality.

2.3 Other factors presenting barriers to transmission of nationality

In cases where women are incarcerated due to "offences" connected with sexual conduct (for example adultery offences) and are pregnant as a result it is highly unlikely that the father will voluntarily claim paternity. In cases where women have been raped (which in some situations is the reason for their incarceration where it is defined as "adultery"¹⁰) they should not be required to communicate with the perpetrator to ensure a nationality for their child. For stateless women and women whose nationality is in doubt, prison presents an additional barrier to acquisition of nationality and is potentially compounded by perceptions of the likely criminality of the child leading to a reluctance to confer nationality.

3. Birth registration

Given the challenges faced by those without registration to prove the nationality that they acquired in accordance with the relevant legislation, universal birth registration is an important safeguard against statelessness.¹¹ There is a risk of statelessness for those whose birth is not registered.¹² The obligation on States to register every

¹⁰ Penal Reform International *Briefing: Access to Justice: Discrimination of women in criminal justice systems* (Penal Reform International 2012) available at <https://www.penalreform.org/wp-content/uploads/2013/08/BRIEFING-Discrimination-women-criminal-justice.pdf>

¹¹ See also *Every child counts* by Anne-Sophie Lois in Chapter 10.

¹² UN Human Rights Council, Resolution on Birth registration and the right of everyone to recognition everywhere as a person before the law, A/HRC/

child immediately after birth¹³ must also be implemented without discrimination on any grounds.¹⁴ Therefore, States have a duty to register the birth of all children regardless of whether their parent is in prison.

3.1 Barriers to birth registration for babies born to women in prison

Despite the duty to register births, parental imprisonment can present a barrier to accessing birth registration. Analysis of barriers to accessing birth registration examines the impact of various factors coupled with the process in the country in question.¹⁵ Parental imprisonment, much like other factors that have been more fully examined, prevents birth registration where specific provision is not made to facilitate it. The simple fact of deprivation of liberty means that women are not free to go to wherever registration takes place. Birth registration usually requires the presence of at least one parent in a designated location; this will only be possible for women prisoners if provision is made to allow them out of prison to travel there. If this requires a long journey it will be even harder for women prisoners. Practices such as mobile birth registration units are useful means of facilitating birth registration

RES/28/13, 7 April 2015, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/RES/28/13&Lang=E>

¹³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 24(2), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 7(1), available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

¹⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2(1), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 2, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; Human Rights Council (HRC), *Birth registration and the right of everyone to recognition everywhere as a person before the law* (2015) A/HRC/RES/28/13, paragraphs 2 & 6, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/28/L.23

¹⁵ United Nations Children's Fund (UNICEF), *Every Child's Birth Right: Inequities and trends in birth Registration* (2013), https://www.un.org/ruleoflaw/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf; United Nations High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights: Birth registration and the right of everyone to recognition everywhere as a person before the law* (2014) A/HRC/27/22, available at <http://www.ohchr.org/Documents/Issues/Children/BirthRegistration/ReportBirthRegistration.pdf>

where distance would otherwise be prohibitive, however, this will only assist if they go into prisons. Other barriers to birth registration which limit access for the general population, such as access to information and prohibitive costs, are also compounded for imprisoned women.

In States where gender discrimination in nationality laws persists and only the father can register the birth, the barriers to registration are almost insurmountable. If the father is in full contact with the mother and wishes to be recognised as the parent (the likelihood of which is lower for women in prison as explained above), provision would need to be in place to facilitate the registration. For example, the father must be able to have sufficient contact with the mother and with the prison and/or medical facility where the child was born to obtain all the information needed for registration. Similarly, where the father's presence is required in addition to the mother's this must be facilitated and alternative measures developed for the many cases in which the father is unknown or unwilling to be recognised as the parent or the mother does not wish to have contact with the father.

Authorities responsible for birth registration and prison administration should consider the following questions:

- Is information about birth registration made available to women who give birth while imprisoned (and is that information available in relevant languages and formats and provided in a timely way)?
- Do existing procedures allow for the registration of babies born to imprisoned women in practice?
- Is a specific procedure required to enable the registration of babies born to imprisoned women?
- If the father's presence is required for birth registration, how is this facilitated for babies born to women in prison?

One or more of the following processes to facilitate the registration of births in prison should be in place:

- Registrars or mobile registration units visit prisons.
- Women are granted temporary release or escorted to register births at community registration facilities.
- Specified other individuals with whom the mother is in contact can register a birth.¹⁶

¹⁶ For example in the UK if the parents cannot register the birth it can be registered by i) someone who was present at the birth, ii) someone who is responsible for

- Prison staff or health or welfare staff working in prisons are trained and licensed to register births.

3.2 Barriers to nationality registration for babies born to foreign national women in prison

For foreign national women in prison access to registration of nationality for their babies with the country (or countries) of which the mother is a national may be necessary in addition to birth registration. Similar issues to those outlined in relation to birth registration apply. However, in these circumstances the responsibility lies with consular officials. They should ask themselves the questions outlined above and must ensure information is available to their nationals who are in prison about processes for citizenship registration for babies born abroad. They will need to facilitate the registration processes within any time limits that exist in their procedures. Where consular services fail in these duties and the child would be stateless as a result, the responsibility to fulfil the child's right to acquire a nationality falls to State in which the birth took place.

3.3 Barriers to birth registration for babies born with fathers in prison

In States where the father's presence is required for birth registration or where only the father can register the birth and the father is imprisoned, there are similar risk to those described above. Pending the introduction of equal nationality laws and registration procedures, the same questions apply as for imprisoned mothers and similar practices are needed to prevent statelessness. For instance, contact could be enabled between the mother and father and registration in or from the prison could be provided.

4. Conclusion

The UN Human Rights Council has called on all States to work to address barriers to birth registration faced by persons in vulnerable situations.¹⁷ Ensuring that women can transmit nationality and delivering on the obligation to register all births, even those in prison, and providing

the child or iii) a member of the administrative staff at the hospital where the child was born.

¹⁷ Human Rights Council (HRC), *Birth registration and the right of everyone to recognition everywhere as a person before the law* (2015) A/HRC/RES/28/13, paras 4 & 9, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/28/L.23

consular assistance in facilitating citizenship or nationality registration are all safeguards against parental incarceration resulting in childhood statelessness. Such practices should be stopped immediately.

Whether the safeguards to prevent childhood statelessness are not in place because of deliberate action by the State, as the result of oversight or somewhere between the two with discrimination resulting in certain groups being more likely to be overlooked, the result is the same: a violation of the child's right to acquire a nationality as protected in international law. The response must be to close these gaps and ensure this right for each child.

Do *jus soli* regimes always protect children from statelessness? Some reflection from the Americas

*Juliana Vengoechea Barrios**

1. Introduction

It has been held that, in order to ensure that every child has the right to acquire a nationality and thus avoid statelessness, “a key tool in achieving this is to introduce some *jus soli* elements in each state’s nationality law, to address those cases where the child would otherwise be stateless.”¹ By ensuring that every child born in the territory is granted nationality upon birth, statelessness is prevented among future generation by avoiding the inheritance of statelessness from parent to child. This is the situation for most of the countries in the Americas region, where citizenship is granted predominantly by birth on the territory (*jus soli*). As this essay will demonstrate, in order for *jus soli* norms to serve as a guarantee to prevent childhood statelessness, they must be accompanied by state practice that ensures an appropriate interpretation of the norms and full and unrestricted access to birth registration.

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¹ European Network on Statelessness, Preventing Childhood Statelessness in Europe: Issues, Gaps and Good Practices’ (2014), available at <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/Preventing%20childhood%20statelessness%20in%20Europe%20-%20issues%2C%20gaps%20and%20good%20practices.pdf> p 3

2. The *jus soli* tradition in the Americas

The predominance of *jus soli* regimes in the Americas is historically rooted in the post-colonial establishment of independent states, where a state's citizenry was shaped by immigration², facilitated through the predominance of *jus soli* citizenship acquisition rules.³ In fact, "thirty out of thirty five countries in the western hemisphere have automatic *jus soli* acquisition at birth."⁴ Guarantees under international and regional treaties, particularly the American Convention of Human Rights reinforce a solid legal framework for the protection of the right to nationality and the prevention of statelessness. The standard set in the American Convention is a stronger standard of prevention of statelessness than many other human rights treaties. It explicitly provides for children who would otherwise be stateless, to acquire the nationality of the State automatically upon birth.⁵ As such, the Americas has long been considered a region in which statelessness is not prevalent or widespread.⁶

The tradition of *jus soli* provisions in the Americas has been changing, driven by new trends in migration and the fact that certain States in the region have sustained increases in emigration.⁷ Yet, rather than

² O. Vonk, *Nationality law in the western hemisphere: a study on grounds for acquisition and loss of citizenship in the Americas and the Caribbean* (2014) p 9

³ S Aber & M Small, 'Citizen or Subordinate: Permutations of Belonging in the United States and the Dominican Republic' (2013) *Journal on Migration and Human Security* 1, No. 13, at 91, available at <http://jmhs.cmsny.org/index.php/jmhs/article/view/12>

⁴ O. Vonk, *Nationality law in the western hemisphere: a study on grounds for acquisition and loss of citizenship in the Americas and the Caribbean* (2014), p 10.

⁵ Article 20(2) of the American Convention reads: "Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality."

⁶ UN Human Rights Council, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless, 16 December 2015, A/HRC/31/29, para 18, available at: <http://www.refworld.org/docid/56c42b514.html>

⁷ See more: Migration Policy Index, 'On the Other Side of the Fence: Changing Dynamics of Migration in the Americas' (2010), available at <http://www.migrationpolicy.org/article/other-side-fence-changing-dynamics-migration-americas>

limiting *jus soli*, some countries in Latin America have started to include or expand *jus sanguinis* provisions within their nationality framework.⁸ A combination of generous application of both *jus soli* and *jus sanguinis* provisions seems to further demonstrate that the Americas is a global good example in the promotion and protection of the right to nationality. A number of countries in Latin-America (e.g. Argentina, Brazil, Uruguay, Costa Rica, and Mexico) have positioned themselves as international leaders regarding the right to a nationality and the reduction of statelessness.⁹ They are also signatories to international treaties that grant protection to stateless populations, and have established statelessness status determination procedures.¹⁰

The Americas region's apparent good standing with regards to the right to nationality, has led some to believe it will be the first region to achieve an end to statelessness.¹¹ A demonstration of that conviction is seen in the statement by former UNHCR head António Guterres: "At the end of the next ten years, we hope to be in the position to affirm

⁸ O. Vonk, *Nationality law in the western hemisphere : a study on grounds for acquisition and loss of citizenship in the Americas and the Caribbean* (2014) at 9.

⁹ G. Gutnisky & C. Becker, 'América frente a la apatridia (posición internacional de los países de la Organización de Estados Americanos frente a la Apatridia y a la Nacionalidad)' (November 2014) UNHCR.

¹⁰ E.g. México: UN High Commissioner for Refugees (UNHCR), 'Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons' (2016), at 13, available at <http://www.refworld.org/docid/57836cff4.html>; Costa Rica: Costa Rica: Decreto ejecutivo n. 39620 de 2016, Reglamento para la declaratoria de la Condición de Persona Apátrida (2016), available at <http://www.refworld.org/docid/5714e0f14.html>; Uruguay: Cámara de Senadores, República del Uruguay, XLVII Legislatura, Quinto Periodo, Carpeta 1600/2014 (2014); Brazil: UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Brazil* (2011), at 2, available at <http://www.refworld.org/docid/4ed361722.html>

¹¹ See more on regional commitment to eradicate statelessness: Declaration of Brazil, 2014: "Reaffirm our commitment to the eradication of statelessness within the next ten years." (Preamble p 5); Brazil Plan of Action, 2014: "Chapter 6: The sub regional consultations identified challenges and actions required to eradicate statelessness in the region. At the end of the next ten years, we hope to be in the position to affirm that the countries of Latin America and the Caribbean succeeded in eradicating statelessness." P. 17 UNHCR, Remarks by Commissioner António Guterres, 'Out of the Shadows: Ending Statelessness in the Americas Event' (18 November 2014). <http://unhcrwashington.org/resources/video-gallery/out-shadows-ending-statelessness-americas-event>

that the countries of Latin America and the Caribbean succeeded in eradicating statelessness.”

3. Challenges to the implementation of *jus soli*

Despite this generally positive picture, there is no absolute guarantee that the positive normative provisions described above will remain in place or will be interpreted to apply without considerable restrictions (the case of the Dominican Republic is instructive in this matter).¹² Historical ethnic and racial discrimination¹³, and a heightened concern for economic and social security¹⁴, could lead to shifts in legal norms, state practice and political discourse in the region. Furthermore, migratory flows within the region, the global trend to use deprivation of nationality in the national security context¹⁵, and the overall rise in attention to

¹² M. Venanzi, ‘Case of Expelled Dominicans and Haitians v. Dominican Republic’ (2016) 38 *Loyola of Los Angeles International and Comparative Law Review* 14890-1518, available at https://iachr.ils.edu/sites/iachr.ils.edu/files/iachr/Cases/Case_of_Expelled_Dominicans_and_Haitians_v_Dominican_Republic/venanzi_case_of_expelled_dominicans_and_haitians_v_dominican_republic.pdf

¹³ OAS, *La situación de las personas afrodescendientes en las Américas* (2011), OEA/Ser.L/V/II. Doc. 62 paras 1, 6-7, 11-15, 59-80, available at http://www.oas.org/es/cidh/afrodescendientes/docs/pdf/afros_2011_esp.pdf; K Kamienska-Hodge & J Lajzer, ‘Inter-American convention against racism and all forms of discrimination and intolerance, Position Paper 1: the need for a narrow-focused Inter-American Convention against racial discrimination’ (2009) *The University of Texas School of Law Human Rights Clinic and the Observatorio de Discriminación Racial of the University of Los Andes, Colombia*, available at <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2009-HRC-OAS-Paper1-Narrow-focused-convention.pdf>

¹⁴ A. Dobrowolsky, ‘(In)Security and Citizenship: Security, Im/migration and Shrinking Citizenship Regimes’ (2007) 8 *Theoretical Inquiries in Law*, Cegla Center for Interdisciplinary Research of the Law at 629-662.

¹⁵ A. Harvey, ‘Recent developments on deprivation of nationality on grounds of national security and terrorism resulting in statelessness’ (2014) 28(4) *Immigration, Asylum and Nationality Law*, 336, available at <http://sprc.info/wp-content/uploads/2015/02/Harvey-article.pdf>; see also other recent cases: *Pham v Secretary of State for the Home Department* (UKSC, 2013), UKSC 2013/0150, available at <https://www.supremecourt.uk/cases/uksc-2013-0150.html>; and *Home Secretary v Al-Jedda* (UKSC, 2012) UKSC 2012/0129, available at <https://www.supremecourt.uk/cases/uksc-2012-0129.html>; R. Bauböck & V. Paskalev, ‘Citizenship Deprivation: A Normative Analysis’ (2015) CEPS Paper in Liberty and Security in Europe No. 82, available at https://www.ceps.eu/system/files/LSE82_CitizenshipDeprivation.pdf

documentation of identity as a security tool¹⁶, demands closer scrutiny of how states implement their nationality laws. Despite *jus soli* being referred to as a critical solution to statelessness and despite the fact that it guarantees that every child enjoys the right to a nationality when in place, limitations within *jus soli* provisions account for thousands of persons being born in the region without an established nationality.¹⁷

There are also marked differences between the countries in the region, with respect to issues of statelessness and nationality. In each country, the extent of recognition of nationality status may differ according to how legal provisions are implemented, or on the access to means of documenting such right. Factors which play a role in the effective implementation of nationality laws include:

- **Limited availability of offices to carry out procedures in isolated regions.** This was, for instance, a challenge for children of transient foreigners in Chile who have experienced difficulties accessing nationality.¹⁸
- **Delays in procedures with separate and distinct governmental entities.**¹⁹

¹⁶ "Strong identification can be a tool for inclusion and the realization of rights but it can equally formalize and perpetuate exclusion. People may be excluded through greater scrutiny of their national status." A Gelb & A Diofasi, 'Using Identification for Development: Some Guiding Principles' (2016) Centre for Global Development, available at http://www.cgdev.org/publication/using-identification-development-some-guiding-principles?utm_source=160223&utm_medium=cgd_email&utm_campaign=cgd_weekly&utm_&&&; L.E. van Waas, 'The right to a legal identity or the right to a legal ID?' (2016), European Network on Statelessness blog, available at <http://www.statelessness.eu/blog/right-legal-identity-or-right-legal-id>

¹⁷ G. Gutnisky & C. Becker, 'América frente a la apatridia (posición internacional de los países de la Organización de Estados Americanos frente a la Apatridia y a la Nacionalidad)' (November 2014) UNHCR.

¹⁸ C. Bley & D. Pérez, 'Niños sin bandera' (2015) Revista La Segunda, No. 77, at 13, available at <http://impresa.lasegunda.com/2015/11/27/V/fullpage#slider-13>. See also *The role of Legal Clinics and local communities in securing the right to a nationality in Chile* by Delfina Lawson in Chapter 12.

¹⁹ M. Rodríguez Atero & D. Valdés Riesco, 'Nacionalidad en la Jurisprudencia de la Corte Suprema'; Universidad Diego Portales, Centro de Derechos Humanos, *Informe Anual 2014* (2014), p 358-360; D. Lawson, as quoted by C. Bley Cristóbal & D. Perez, in 'Niños sin bandera' (2015), Revista La Segunda, No. 77, at 13, available at <http://impresa.lasegunda.com/2015/11/27/V/fullpage#slider-13>. See also Universidad Diego Portales, Centro de Derechos

- **Discretion held by public officers.** For instance, in Colombia the statelessness safeguards are under the naturalization procedure (article 5(3) of Law 43 of 1993) which requires “a sovereign and discretionary act by the President”.²⁰
- **Arbitrariness in decision making in absence of supervision.** For example, in Brazil, where the Constitution provides for automatic and unconditional *jus soli*, a civil judge in the Guajará-Mirim province, through an ordinance, exercising her authority as civil judge and surveyor of the extrajudicial registries, determined that the child of foreign migrants could only be registered if the parents held regular migratory status at time of birth and instructed registrars that the testimonies of unauthorized migrants would not be accepted.²¹
- **National, ethnic and racial discrimination.**²²
- **Highly onerous evidentiary requirements.** For instance, in Colombia, the statelessness safeguard reads: “The children of foreigners born in the Colombian territory, which no other state recognizes as citizens, can prove their citizenship with a birth certificate without requiring proof of domicile. However, it is necessary that foreign parents *prove through certification of the diplomatic mission of their country of origin* that their country does not grant the nationality of the parents to the child”.²³

A lack of appropriate supervision of the behaviour of public officers and administrative decision makers provide opportunities for improper implementation of nationality laws.²⁴ While lack of birth registration or documentation of identity does not equate to a person being

Humanos, *Informe Anual 2015* (2015) at 298-300

²⁰ Ministry of Foreign Affairs, Booklet on Colombian nationality, Available at: http://www.cancilleria.gov.co/sites/default/files/tramites_servicios/nacionalidadpdf.pdf

²¹ Poder Judiciario, *Comarca de Guajará-Mirim, Portaria No.001/07-VRP, Juiza Silavana Maria de Freitas* (July 05 2007).

²² Poder Judiciario, *Comarca de Guajará-Mirim, Portaria No.001/07-VRP, Juiza Silavana Maria de Freitas* (July 05 2007); G Echeverria, *Report on citizenship law: Chile* (2016) Series/Report no.: EUDO Citizenship Observatory; 2016/02, at 4; R Gaune, *Historia del Racismo y Discriminación en Chile* (UQBAR editores, 2009).

²³ Article 5(3) of Law 43 of 1993. Emphasis added.

²⁴ C. Becker, ‘*Jus soli: A miraculous solution to prevent statelessness?*’ (2015) European Network on Statelessness blog, available at <http://www.statelessness.eu/blog/jus-soli-miraculous-solution-prevent-statelessness>

stateless,²⁵ it does heighten the risk of statelessness; specifically in the context of forced displacement and irregular migration, which occurs across the Americas. Also in spite of the relative predominance of *jus soli* provisions and good practice in the region, birth registration practices are a persistent and serious obstacle to ensure that every child secures nationality at birth.²⁶ McKenzie points out that even though “the longstanding *jus soli* tradition suggests that a nationality is secured for every child at birth, the problem of universal birth registration is serious and persistent in the region.”²⁷

4. Renewed regional commitment to realising the right to a nationality

Underscoring the fact that the region is not problem-free with regards to access to nationality, in December 2014 the topic of statelessness was included for the first time by countries in the region, when revisiting the content of the 1984 Cartagena Declaration on Refugees.²⁸ The Brazil Declaration and Plan of Action²⁹, specifically enumerates commitments

²⁵ Institute on Statelessness and Inclusion, *Addressing the right to a nationality through the Convention on the Rights of the Child. A Toolkit for Civil Society* (2016), at 46 available at <http://www.statelessnessandhumanrights.org/>; see more: R. Brill & W. Hunter, “‘Documents, Please’: Welfare State Extensions and Advances in Birth Certification in the Developing World’ (2014). Available at SSRN <http://ssrn.com/abstract=2468204> or <http://dx.doi.org/10.2139/ssrn.2468204>

²⁶ Y. Mackenzie, ‘*The Campaign for Universal Birth Registration in Latin America: Ensuring All Latin American Children’s Inherent Right to Life and Survival by First Guaranteeing Their Right to a Legal Identity*’ (2009) 37 Georgia Journal of International and Comparative Law 519, available at <http://digitalcommons.law.uga.edu/gjicl/vol37/iss3/3>

²⁷ Ibid.

²⁸ The Cartagena Declaration is a landmark regional refugee law instrument that broadened the refugee definition for Latin America and proposed new approaches to the humanitarian needs of refugees and internally displaced persons within a framework of burden sharing, solidarity and cooperation. See more: <http://www.acnur.org/cartagena30/en/cartagena-declaration-on-refugees/>

²⁹ Revisiting the content of the 1984 Cartagena Declaration on Refugees, within its 30 year anniversary, the representatives of the Governments of Latin America and the Caribbean met in Brasilia, in December 2014. During the Brasilia gathering, the content of the commitments under the Cartagena Declaration were updated. The governments which participated in the meeting adopted the Brazil Declaration and Plan of Action, including for the first time

and measures to address statelessness, upholding the importance of the right to nationality as a fundamental human right, and setting up the goal that within ten years the countries of Latin America and the Caribbean will succeed in eradicating statelessness. It provides that:

...legislation and practice do not create new cases of statelessness (prevention); protect stateless persons arriving in their territories while providing access to definitive solutions such as naturalization (protection); and resolve existing cases of statelessness, promoting the restoration or recovery of nationality through inclusive legislation and policies on nationality (resolution).³⁰

The Brazil Plan of Action includes the following among the proposed measures: 1) promote the harmonization of internal legislation and practice on nationality with international standards, 2) facilitate universal birth registration and the issuance of documentation, and 3) adopt legal protection frameworks that guarantee the rights of stateless persons, in order to regulate issues such as their migratory status, identity and travel documents. The Brazil Declaration demonstrates a step towards furthering regional awareness on the topic and an initial willingness of governments to work to address the underlying issues that might lead to situations of statelessness. The Americas serve as a global reminder that legislation in and of itself is not enough, and that state practice is also highly important. The challenge for the region is to identify existing gaps and to find concrete ways to overcome any obstacles that are impeding the right of children born in the Americas to secure a nationality, and means to prove that right, upon birth.

specific measures to address statelessness in the region. The countries that participated: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Cayman Islands, Chile, Colombia, Costa Rica, Cuba, Curaçao, El Salvador, Ecuador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Suriname, Trinidad and Tobago, Turks and Caicos Islands, Uruguay and Venezuela. See more: <http://www.acnur.org/cartagena30/en/background-and-challenges/>

³⁰ Brazil Declaration, 'A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (2014), available at <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2014/9865>

Making safeguards work: A perspective from South African legal practice

*Liesl Muller, Lawyers for Human Rights**

South Africa is one of those countries where at first glance there seems to be no problem with the law as it stands. It has a progressive Constitution and the South African Citizenship Act contains certain safeguards against statelessness. It takes a closer look and constant monitoring of the interpretation and application of the legislative framework to spot the loopholes and to effectively address the needs of stateless children in South Africa. The following examples of cases in which Lawyers for Human Rights' (LHR) has been working to find solutions offer an insight into some of the challenges faced. LHR is an independent South African human rights organisation committed to social justice activism and strategic public interest litigation. Since 2011, LHR, has been assisting stateless persons, through its Statelessness Project, with the assistance of the United Nations High Commissioner for Refugees (UNHCR). The project assists approximately 80 children annually who are at risk of statelessness in our law clinics in South Africa.

Daniella

Ever since 1994, with the advent of democracy, the South African Citizenship Act has included a very important safeguard against statelessness in a provision (section 2(2)) which states that a person who is born in South Africa, who does not have the citizenship of another country and whose



Daniella, as featured in "Belonging Part Two", a Lawyers for Human Rights advocacy video, available at: <https://www.youtube.com/watch?v=ih5keCYFHyM>

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birth is registered, shall be a South African citizen by birth. This is often referred to as the “otherwise stateless” provision as it gives citizenship to children born on the territory who would otherwise be stateless. In Africa, only 13 countries specifically provide for such a provision in their nationality laws.¹ It is tempting, therefore, to approve of South Africa’s attempts at addressing statelessness and move on to other issues. However, in the 20 years since the provision has been in place, it has never been implemented to protect stateless children born in South Africa.

LHR client, Daniella, was born in Cape Town. Her mother and father thought that she would automatically be Cuban because they are Cuban. However, the Cuban embassy would not recognise Daniella as a citizen, because she was not born in Cuba. A child generally acquires South Africa citizenship when they have a parent who is South African. As Daniella does not, she was born stateless.

“Nobody has to do illegal things. You just have to go to the Minister and the Minister has to sign the certificate. It’s in the law”.

Daniella’s mother

The problem is that it is not possible for stateless children to apply for citizenship using this provision, because there is no regulation to provide a form to fill

out at the local office. There are no guiding principles on determining whether a child is stateless in the Act. Additionally, even though the section was in the law, the Department of Home Affairs had resolved not to implement the section as it was concerned that ‘too many children would apply for citizenship’.

On 6 September 2016, LHR obtained an order in the Supreme Court of Appeal of South Africa, which declares Daniella to be a South Africa citizen by birth and which compels the state to issue her with a South African citizen birth certificate immediately. The court went further than only assisting Daniella. The order compels the Department of Home Affairs to make regulations to facilitate the implementation of section 2(2) by March 2018 so that other stateless children may apply

¹ Bronwen Manby *Citizenship Law in Africa 3rd Ed* (2016) at 49. The countries are Angola, Burkina Faso, Cameroon, Cape Verde, Chad, Guinea-Bissau, Lesotho, Malawi, Namibia, Sao Tome and Principe, South Africa and Togo.

for citizenship. 20 years and a two court orders later, the provision is finally implemented. However, LHR's work is not done yet. We now have to make sure that the court order is implemented and that other stateless children are afforded access to the provision pending the drafting of the regulations. Even after the regulations are in place, LHR will need to monitor the constitutional validity of the regulation and its consistent and correct application to children who are indeed stateless.

Learn more about Daniella in the short film "Belonging, Part 2"
<https://www.youtube.com/watch?v=ih5keCYFHyM>

Manny

Social workers found Manny in the care of a Portuguese speaking woman who was not his mother and who was neglecting him. He was two years old when he was removed from her care by the Department of Social Development. Since then, there has been no sign of the woman who he was found with. He had no documents and was too young to remember any of the details of where he was born or who his parents were. He may or may not have been born in South Africa and/or to South African parents. Manny has been living at a children's home in Cape Town his whole life. He remains unregistered, because the Department of Home Affairs believe he is foreign as he was found with a seemingly foreign woman. Manny is now 17 and will soon be regarded as an adult. Manny only knows South Africa and is terrified at the idea of being considered an illegal foreigner once he turns 18. He may be subject to arrest and deportation to a country where he holds no citizenship. Manny is a bright young boy who wants to study and make a life for himself, but his future is unclear and he cannot make plans to be successful, because he is undocumented and stateless.

Section 12 of South Africa's Births and Deaths Registration Act requires the registration of children who are abandoned or orphaned and have not been registered before. However, it is currently only applied to young babies and it requires the Department of Home Affairs to register children as foreigners when they are "clearly foreign". The Department thinks that Manny is Angolan, because he had a Portuguese speaking caretaker when he was 2 years old. However, there is no proof to that effect and the Angolan embassy has confirmed that he is not considered as such. Manny is therefore stateless.

In order to ensure that foundlings are not exposed to statelessness, the Act should be amended to specifically include foundlings. These are children whose parentage is unknown, regardless of their age. As supported by the Committee and Article 7 CRC, foundlings should be registered and recognised as South African citizens in terms of section 2(2) of the Citizenship Act which gives citizenship to stateless children.

Recently, after LHR made an application the Department of Home Affairs for Manny to have an official status in South Africa. The Department decided to grant Manny permanent residence which finally gives him some stability and gives him a pathway to citizenship (he can apply for citizenship after 5 years of having permanent residence). Even though Manny has received some relief in his situation, it is not ideal to give children like Manny permanent residence only. It is clear from Manny's history that he is stateless and will never be able to claim the citizenship of another country and permanent residence does not resolve Manny's statelessness.

In addition to the need for a change in the law on foundlings in order to prevent statelessness, we will also need to monitor the application of these laws to foundlings in order to ensure that the state's practice evolves in line with international law and human rights. Providing citizenship to children found on the territory is an important safeguard against statelessness.

"The days are coming close for me to write my exams and I do not have a plan or anything I can do to write if I do not have ID".

Caleb, age 20

Caleb

Caleb was born in the DRC. His father fled the DRC as a refugee and settled in South Africa with Caleb, where he claimed refugee status. Before

his father obtained refugee status in South Africa, he passed away, leaving Caleb undocumented and unaccompanied. Caleb was placed in a child and youth care centre where he has been living ever since his father's death. Caleb has no individual refugee claim. He was very young when he came to South Africa with his father. He does not remember the DRC at all. He cannot establish a claim to nationality in the DRC and cannot be returned there, because he has no known

relatives there. The Children's Court has placed him in the care of a South African foster home, but neither the SA Citizenship Act, nor the Immigration Act makes provision for a legal status for someone like him. He is stateless in South Africa.

Caleb's only hope of obtaining legal status and documentation is through section 31(2)(b) of the Immigration Act, under which he relies upon the Minister's discretion. This status is not widely applied and will only give Caleb permanent residence and not citizenship. He may be able to apply for citizenship after 5 years of having permanent residence, but until then he will remain stateless.

In order to protect children like Caleb from statelessness, we need to address the current gap in the law which allows particularly vulnerable children who are stateless or at risk of statelessness, to reach adulthood without having accessed South African nationality. In particular, we need to make provision for an immigration status and an identifying document for unaccompanied or separated migrant children in order to facilitate naturalisation. This is in line with the African Committee of Experts' General Comment No.6 (2005) on the treatment of unaccompanied and separated children outside their country of origin. The Committee recommends that state parties provide birth registration and access to basic rights, such as health and education, to all stateless children and their families, on a state party's territory, irrespective of their legal status. This may be a first step in the possibility to acquire a nationality for children in such circumstances.² In accordance with Article 7, the Committee has urged the States Parties to ensure the implementation of the right of all children to acquire a nationality, as far as possible, in order to prevent statelessness.³

LHR is engaging with government departments on various levels in order to convince the state that there is a need to regularise these children and to create a safeguard in the law which will give these children citizenship when they turn 18 if they are stateless. We are employing several advocacy strategies and may also use strategic litigation if applications for group exemptions for status fail.

² Brunei Darussalam, 2016, CRC/C/BRN/CO/2-3.

³ Belarus, 2011, CRC/C/BLR/CO/3-4.

STATELESSNESS IN SOUTH AFRICA

NKATEKO – AGE 6

Nkateko was born in South Africa. His mother is undocumented but has a claim to South African citizenship. His father is a South African citizen with a valid identity document. Nkateko has a claim to South African citizenship, because of his South African father. However, the Birth and Deaths Registration Act does not allow children to be registered if their mothers are undocumented. It further bars single fathers from registering their children without the mother giving her consent and providing her documents. Nkateko is now 6 years old and has started school, but could only be provisionally registered because he has no birth certificate. If he does not produce a birth certificate soon, he will not be able to return to school. For as long as his South African citizenship remains unrecognised, he is stateless.

PROBLEM:

Regulation 3, 4 and 5 of the BDRA require a child's parents to produce a valid identity document or passport with a valid permit in order to register a child's birth. Regulation 12 of the BDRA allows only mothers to register the births of children born out of wedlock even if the father is documented. This leaves the children of all undocumented mothers undocumented and at risk of statelessness.

SOLUTION:

Regulations 3, 4, 5 and 12 of the BDRA should be amended to allow children of undocumented mothers to be registered and to allow single fathers to register the births of their children where the mother is unavailable, unwilling or undocumented. The Committee requires States Parties to guarantee that all children born in the country are registered at birth regardless of their parents' citizenship status and/or country of origin.⁴ The Committee also stresses the need for states to review discriminatory legislation on birth registration.

"I WANT A BIRTH CERTIFICATE SO I CAN GO TO SCHOOL"

In 2016, Lawyers for Human Rights, in collaboration with the Institute on Statelessness and Inclusion, published a short booklet to share the stories of stateless children in South Africa and explain what law and policy reforms are needed to fulfil their right to acquire a nationality. The publication made the issue so accessible and was suitable for such a wide range of audiences that 20,000 copies were printed for circulation in South Africa within a year after its release. The booklet can be found here: http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf

Stateless and invisible

*Tini Zainudin**

I just tucked both my kids into bed- one Malaysian, one stateless- both abandoned, both the same, in every way except by the law that says they are different!

I cannot fathom my life without either one.

Even though I am a Malaysian citizen, my daughter is still considered stateless. We know nothing of her biological parents and she has no birth certificate or documents of any sort to tell us who and where her parents are from. She is a foundling, a child who had fallen into the hands of people who insisted on selling her. To get her out of their hands, I gave the money they insisted upon. She was then two and half months old. How did we determine this? The lady who sold her to me said she was two and a half months old and the doctor I took her to for a full-checkup said, that was about right, developmentally.

It's been 8 years since that fateful, unexpected day.

Sometimes, when things are terrible and tough and I count the pennies to send her to a non-government school for that term, I wonder- do I give her up to someone who can adopt her and she has a chance at getting a citizenship abroad? Or do I keep her with me and plead? Do I try and pull strings? If I save enough money, Zara can go to private school, but what happens when she turns 18? She cannot be granted a passport or work or school abroad, even if I wanted to. What of her dreams? She'll never attend local university as a citizen. She will never own property or get legally married.

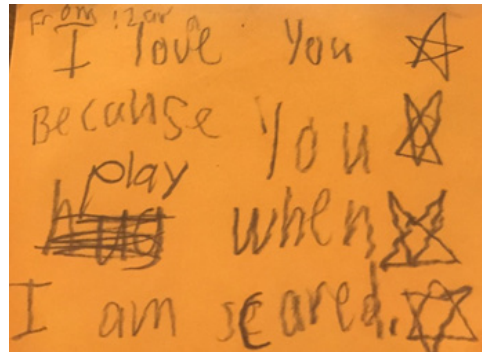
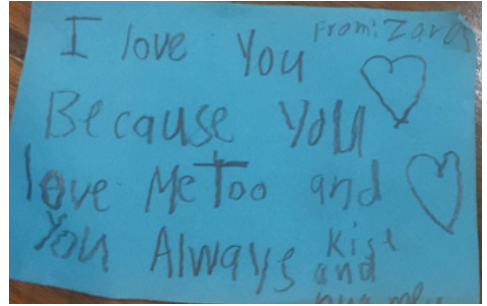
* Tini Zainudin is the cofounder of Yayasan Chow Kit (Chow Kit Foundation) and Voice of the Children, both local NGOs that lobby for the rights and protection of stateless children amongst other Child Rights issues faced by children in Malaysia. She is a child activist and is the mother of a stateless child. She is in the midst of adopting another stateless child so he can have access to education.

I have applied for her citizenship but it has been 3 years of waiting and still there is no answer.

I know I'm not alone and that there are so many of us, Malaysian parents who have adopted foundlings who are stateless, who fight for their lives and their rights- to go to school and get access to free health services and attempt to provide some semblance of a normal life. But the truth of the matter is, that as it stands, these children have no idea when or if ever they'll obtain Malaysian citizenship. They may grow up, their lives hanging in limbo, with no citizenship, no identity and no hope of having rights so many of us take for granted.

The Ministry says, everyone can apply to get citizenship, but I know cases that have taken years and years.

What are the rules of the game and what is the process that allows these individuals to receive citizenship? Receiving citizenship, our government says, is a privilege, not a right and I must prove that Zara is worthy. She's 8 years old. How do I prove she's worthy? She's sassy and smart, colours within the lines and spouts beautiful poetry. She sings our national anthem with pride and loves this country very much. But this country has little regard for her at this point in time.



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CHAPTER 12: LITIGATION AND LEGAL ASSISTANCE TO ADDRESS CHILDHOOD STATELESSNESS



Foundlings' artwork on the theme of nationality and statelessness
© UNHCR Côte d'Ivoire / SOS Villages Aboisso

In this Chapter:

Strategic litigation to address childhood statelessness	Adam Weiss
An Italian recipe to address childhood statelessness	Nicole Garbin & Adam Weiss
Out of limbo: Promoting the right of undocumented and stateless Roma people to a legal status in Italy through community-based paralegals	Elena Rozzi
Landmark case notes from Africa and Europe	
The perpetuation of childhood statelessness in the Dominican Republic	David Baluarte
Stateless children of the Dominican Republic	Allison Petrozziello
The role of Legal Clinics and local communities in securing the right to a nationality in Chile	Delfina Lawson and Macarena Rodriguez
Estela visits the Legal Clinic	Delfina Lawson and Macarena Rodriguez
Mobile legal services and litigation in Kyrgyzstan	Ferghana Lawyers
Legal action to address childhood statelessness in Malaysia	DHRAA Malaysia
The struggle for documentation: A family story	DHRAA Malaysia

Introduction

The existence of statelessness is strong evidence of the denial of human rights, for all stateless persons have had at least one right - their right to a nationality - violated in the most extreme way possible. Statelessness often also serves as the catalyst for the denial of other rights – access to socio-economic rights, freedom of movement and the liberty and security of the person (among others). Discrimination is most often an underlying factor in both the creation/existence of statelessness and the denial of other rights to stateless persons. When those affected are children, the impact is often sharper, more profound and more life-changing. There is no legal justification for such denial, but this is the reality of hundreds of thousands of children around the world. As elaborated in a recent UN Secretary General's Report on the arbitrary deprivation of nationality of children:

*There is no legal basis upon which States that have arbitrarily deprived a child of his or her nationality can justify the denial of other human rights to the child on grounds of his or her resulting statelessness. Repeatedly, however, the invisibility of stateless children to the eyes of society causes the violation of their rights to go unnoticed.*¹

If considering the above factors, a human rights lawyer, would be likely to advise of one main remedy – litigation. However, further complicating this picture is the reality that stateless people, due to the very factors set out above, are more likely to face several barriers to accessing justice, such as costs, standing, lack of awareness, systemic prejudice and lack of implementation.

The role of the law can be crucial to bettering the lot of the stateless who, in many situations, have been pushed outside the law and then

¹ UN Human Rights Council (UN HRC), *Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless*, (16 December 2015) A/HRC/31/29, available at: <http://www.refworld.org/docid/56c42b514.html> para 28.

victimised for occupying this space. However, pursuing justice through litigation and legal action can be a difficult, expensive and time-consuming process. Its capacity to bring real relief to individual victims, and to demand large-scale change of the structures and mechanisms that impact on society and individual alike is undeniable. But this can cut both ways, as evidenced through the dramatic tussle on the right to nationality between the Dominican parliament and Courts on the one hand, and the Inter-American Court of Human Rights (IACtHR) on the other.²

This chapter brings together a range of essays, case notes and interviews from around the world, which collectively provide a wealth of information on both *why* litigation and legal assistance is important, and *how* litigation and legal assistance can be successfully pursued. These contributions also show how this kind of engagement has the capacity to shape the very principles and norms that constitute international, regional and national human rights law. Given the thematic focus of this report on childhood statelessness, many of the contributions relate to legal action aimed at ensuring children's right to a nationality, their access to birth registration and documentation and the triggering of safeguards against statelessness. Hence, this chapter complements the previous chapters in this report on the child's right to a nationality, safeguards against statelessness and the sustainable development framework.

The contributions in the chapter also show how strategic legal action (be it litigation, legal aid or paralegal work) can complement wider advocacy and mobilisation campaigns, which are the focus of chapter 6. To quote from an essay in this chapter:

*the way in which our objective is being pursued, through close collaboration between civil society, local communities and government actors and a combination of strategic litigation, partnership and advocacy is a strong model which may inspire similar action in other parts of the world as well.*³

² See also *The perpetuation of childhood statelessness in the Dominican Republic* by David Baluarte in this Chapter.

³ See *The role of Legal Clinics and local communities in securing the right to a nationality in Chile* by Delfina Lawson and Macarena Rodríguez in this Chapter. And *Legal action to address childhood statelessness in Malaysia* by DHRAA Malaysia also in this Chapter.

These experiences show that adversarial court processes do not necessarily aggravate relationships between civil society and states (as is sometimes feared), but can also serve to demonstrate that it is in everyone's interest to resolve these problems through cooperation.

This chapter begins with an essay by Adam Weiss, the Managing Director of the European Roma Rights Centre (ERRC), on strategic litigation to address childhood statelessness. Weiss' essay challenges us to think outside the box. He argues that strategic litigation, by its very nature, is controversial and unpredictable, though its outcomes in hindsight, almost appear inevitable. The essay guides us through the process (and theory) of finding defendants and litigants, and gives examples of the type of result that can be pursued and achieved through a well thought out case.

The next short contribution – first published on the Blog of the European Network on Statelessness in May 2016 – is also by Weiss and his ERRC colleague, Nicole Garbin. It reflects on the recipe which led to successful litigation to address childhood statelessness in Italy. This is followed by the first of four essays on the provision of legal assistance and paralegal work to address childhood statelessness in various countries around the world. The essay by Elena Rozzi of Association for Legal Studies on Immigration (ASGI) (an Italian NGO), speaks of the importance of working with communities and gaining their trust, in order to deliver effective paralegal work. Rozzi concludes her essay with the words:

The methodology of paralegals, even though quite time-consuming and costly in terms of coordination, training etc., led to the opening up of new perspectives and relationships and sowed the seeds for longer-term strategies to ensure that marginalised stateless or at risk of statelessness persons can exit the limbo of legal invisibility.⁴

This sentiment was shared by the other three essays on legal assistance and paralegal work, which appear later in the chapter.

⁴ See *Out of limbo: Promoting the rights of undocumented and stateless Roma people to a legal status in Italy through community-based paralegals* by Elena Rozzi.

The chapter then shifts focus to some of the landmark judgments on childhood statelessness in the recent past. A short series of case notes, summarises three such judgments: the *Nubian Minors* case, *Genovese v. Malta* and *Mennesson v. France*. This is followed by an insightful analysis by David Baluarte, Associate Clinical Professor of Law and Director, Immigrant Rights Clinic, Washington and Lee University School of Law, on the two landmark IACtHR judgments on the right to nationality: *The Girls Yean and Bosico v Dominican Republic* and *Expelled Dominicans and Haitians v Dominican Republic*. Baluarte appeared as co-counsel in both these cases, and his nuanced reflection goes to the heart of why this jurisprudence is so important, but also why it may have contributed (even if temporarily) to worsening the situation. This is an important insight, which demonstrates that legal action never takes place in a vacuum, but instead plays out in an ever-changing socio-political context. We then have a short piece by Allison Petrozziello of the Observatory on Caribbean Migrants (OBMICA), which introduces us to some of the stateless children in the Dominican Republic, whose lives have been tangibly impacted by the legal drama described in Baluarte's essay. This is followed by our second essay on legal assistance and paralegal work, by Delfina Lawson and Macarena Rodriguez, this time with a focus on the work of their legal clinics in Chile. The problem they encounter and address in their work, is similar (though less politically inflammatory) to the problem in the Dominican Republic – namely the questionable interpretation of the 'in transit' exception to the *jus soli* principle – which in Chile, rendered many thousands of children at risk of statelessness. Immediately following this piece is an interview conducted by the same authors with a child who visited their clinic on behalf of her undocumented sister.

We then travel across the world to Kyrgyzstan, via a short essay by the NGO Ferghana Lawyers, which has been implementing a ground-breaking programme of mobile legal clinics in this Central Asian nation. The outreach, legal assistance and strategic litigation carried out by Ferghana Lawyers has had significant success and shows how litigation can change lives. The final two contributions in this chapter are by the Malaysian NGO DHRRA. The first provides an overview of the highly innovative and successful legal assistance programme carried out by DHRRA to secure documentation and nationality for members of the impoverished and marginalised estate Tamil population of Indian origin in Malaysia. DHRRA's multi-pronged approach of community-based legal aid, evidence-based advocacy and awareness-raising, and

strategic litigation is having a significant impact on individual lives and the system as a whole. This chapter closes by sharing the story of one family that was assisted by DHRRA. This piece shows both the massive cost of statelessness and the profound impact that accessing documentation can have on people's lives.

Strategic litigation to address childhood statelessness

*Adam Weiss**

1. Introduction

Strategic litigation is a poorly-defined concept on which people place a lot of hope for social change. Practising strategic litigation is tricky. The definitions that exist¹ often highlight a perceived tension between the confines of an individual case and the larger social change that those behind the case want to achieve. Our natural tendency to look at famous Court judgments as inevitable – when in fact they were often controversial and unpredictable² – can also blunt the risk-taking attitude³ that lawyers need to have.

The purpose of this short essay is to motivate those committed to combating childhood statelessness to use the Courts to achieve that aim, and give them some starting points for how to do it. The essay

* Adam originally came to the European Roma Rights Centre in 2013 as Legal Director and became the ERRC's Managing Director in January 2016; he still oversees the ERRC's litigation work, including some 100 active cases. His major professional interests are strategic litigation, non-profit management, and professional activism. Adam has been involved in the litigation of a wide range of cases before the European Court of Human Rights, as well as cases before domestic courts and the Court of Justice of the European Union.

¹ See, e.g., Andrea Coomber, 'Strategically litigating equality – reflections on a changing jurisprudence', (2012) *European Anti-Discrimination Law Review* 11. ("Strategic litigation (or 'impact' or 'test' litigation) is a form of public interest litigation where a case is pursued on behalf of an applicant or group of applicants, with a view to achieving a law reform goal beyond the individual case. While legal ethics dictate that the clients' interests are paramount in litigation, strategic litigation seeks an additional social or political impact beyond the remedy sought by the individual").

² See, e.g., *D.H. v Czech Republic* (2008) 47 EHRR 3 (finding segregation of Romani pupils in schools in the Czech Republic overturning a Chamber judgment).

³ Open Society Foundations, 'Strategic Litigation Impacts: Global Narratives About Social Change' (audio recording, 26 October 2015), available at <https://www.opensocietyfoundations.org/events/strategic-litigation-impacts-global-narratives-about-social-change> (Sherrilyn Ifill's comments at the end of the recording).

is split into two parts. The first situates strategic litigation within the larger frame of theories of (social) change, discussing examples of potential defendants whose behaviour we can hope to change by taking them to court, leading to a reduction in childhood statelessness. It would be unusual to use strategic litigation on its own; it should be connected to, and serve, broader advocacy strategies. The second describes the litigants we can select or support and legal theories we can devise to carry through those theories of change in the courts. What follows is heavily influenced by the author's professional context: working in Europe to combat antigypsyism.⁴ That context brings with it certain assumptions and frameworks that may not apply or may apply differently elsewhere, including: multi-level legislation and jurisdiction on statelessness and other issues (national level, European Union level, Council of Europe level); the existence of supranational Courts to adjudicate disputes concerning human rights and other issues; and assumptions about the rule of law and the particular place of Courts as actors capable of achieving (but often reluctant to bring about) social change.

2. Finding defendants and framing theories of change

This essay uses a definition of strategic litigation the author has developed elsewhere:⁵ trying to secure legal judgments that (a) the defendants (and those like them) were previously incapable of imagining, (b) have an enormous impact outside the courtroom (e.g. by forcing someone to pay a lot of money or dismantle an entrenched system that affects many people), and (c) seem explainable and predictable only in retrospect. Given how little has been done to implement human rights protections that should prevent and end childhood statelessness, it is easy to imagine some outcomes of strategic litigation in this area, including judgments that:

⁴ Alliance against Antigypsyism, 'Antigypsyism – reference paper' (July 2016), available at <http://antigypsyism.eu/wp-content/uploads/2016/07/Alliance-against-Antigypsyism-Antigypsyism-a-reference-paper-f.pdf>

⁵ Adam Weiss, 'What is Strategic Litigation' (ERRC Blog, 1 June 2015), available at <http://www.errc.org/blog/what-is-strategic-litigation/62>

- a. Order register offices to register the births of all children born on the territory that falls within their jurisdiction;⁶
- b. Force officials to recognise the citizenship of children born on the territory of a country who would otherwise be stateless;⁷
- c. Condemn practices by officials that leave particular ethnic minorities at risk of statelessness as discriminatory;
- d. Interpret constitutional provisions on the rights of children (e.g. to a legal identity) to force authorities to ensure that no child is stateless.

These hypothetical judgments would all meet the definition of strategic litigation set out above. For example, judgment ‘a’ would target the staff of register offices who, as in Serbia for instance,⁸ are used to turning away parents who have no identity documents, who seek to register their new born children’s births. These bureaucrats must imagine that they are in the right when refusing to enter people who do not produce the usual identity documents; an instinct comforted by conscious or unconscious racism towards the people affected (mostly Roma). A judgment that these bureaucrats have to register such births will blindside them. The impact outside the courtroom will be enormous: children whose families have been legally invisible will have a legal identity and, armed with birth certificates, can test provisions of national law that protect them against statelessness. The judgment will also appear entirely predictable in retrospect. After all, Article 7(1) of the UN Convention on the Rights of the Child⁹ says that “*The child shall be registered immediately after birth*”. The word ‘immediately’ seems obvious.

⁶ This of course would not end childhood statelessness, but there is a close link between birth registration and the prevention of statelessness. United Nations High Commissioner for Refugees (UNHCR), ‘Global Action Plan to End Statelessness’ (November 2014), available at <http://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>.

⁷ Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975), 989 UNTS 175, art 1.

⁸ Ivanka Kostić, ‘The case of Valjbona and her children - lack of birth registration leaves many Roma children in a situation of undetermined nationality for an extended period of time’ (ENS Blog, 15 May 2014), available at <http://www.statelessness.eu/blog/case-valjbona-and-her-children-lack-birth-registration-leaves-many-roma-children-situation>

⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3.

The key to making a case strategic is to build a theory of change¹⁰ rooted in the behaviour changes of our would-be defendants. For example 'b' above, our would-be defendants are the officials responsible for recognising nationality (usually within the Interior Ministry). The required behaviour change is for them to recognise the nationality of children born in the country who are otherwise stateless. This could involve a number of behaviour changes, which we want judges to order, or which must be carried out in order to implement a judgment. For example, these officials might have to implement a procedure for officially recognising that children are otherwise stateless, or, when asked, must acknowledge a child's nationality if they cannot discharge a burden of proof that the child has a nationality.

In relation to example 'c', officials engaged in indirect discrimination based on ethnicity (against Roma, for example) will have to change what appears to be an otherwise neutral policy, such as refusing to issue birth certificates in cases where parents do not have identity documents. For example 'd', depending on the way the legal system in a given country is structured, a constitutional Court might find on examination, that primary legislation is incompatible with its constitution because it allows for children to be born stateless on national territory. Such a finding might lead parliamentarians to amend legislation on nationality to ensure the right of every child to a nationality.

In all of these cases, the defendants are unlikely to see Courts intervening in these ways. The impacts will be tremendous (eliminating or seriously disrupting childhood statelessness), and the rights-of-the-child basis for the reasoning will give these judgments an air of inevitability. These hypothetical judgments are also useful as they relate litigation to broader advocacy strategies that can obviate litigation altogether.

3. Finding litigants and setting up cases

To start putting these theories into practice, we should dismiss the idea that strategic litigation involves an inherent tension between

¹⁰ Center for Theory of Change, 'What is Theory of Change?', available at <http://www.theoryofchange.org/what-is-theory-of-change/>,

the interests of the litigants and the ‘strategic’ interests of the case. Instead, we should think about two kinds of litigants, or rather litigants who fall somewhere along a spectrum.¹¹ At one end there is the ‘self-interested’ litigant who is involved in a case solely to improve her/his personal situation. For example, a family who has just had a child and instructs lawyers to challenge a refusal to issue a birth certificate or recognise that child’s nationality is understandably anxious to get the case resolved quickly so their child will have a legal identity and a nationality. At the other end are litigants whose sole purpose of getting involved in the case is to see the case decided as framed. For example, if an NGO has legal standing to bring a case in its own name under the anti-discrimination law, or by way of a constitutional challenge to a practice, policy, or statute which perpetuates childhood statelessness among a particular minority group, they would be going to court with the sole aim of getting that question decided, probably at the highest level.

‘Activist litigants’ fall somewhere in between, but towards the latter side. For example, parents who have tried in vain to secure birth certificates for all of their children, and realise that the problem goes far beyond their situation, might see the benefit in theirs becoming a test case; they may instruct a lawyer to secure a strategic victory, even if it takes time, because they feel they have nothing to lose. There is no better or worse place to be on this spectrum; it depends on your institutional position. A legal aid provider, for example, is necessarily taking on self-interested litigants. If you believe that such work can lead to strategic litigation (which I do), it is because you believe that a critical mass of cases can secure the desired behaviour change. This endeavour can be advanced by a second, strategic mind reviewing a case load to identify cases that could be boosted to favour the chances of producing strategic outcomes. For example, NGOs that scan current litigation for opportunities to intervene as a third party or an *amicus curiae* are usually looking at cases that started out as legal aid to push them in a more strategic direction. Likewise, a lawyer at an NGO might identify one case out of the many to be taken forward, and approach the client to see if they willing to move from self-interested to activist litigants.

¹¹ This is described in more detail in Adam Weiss, ‘What is Strategic Litigation’ (ERRC Blog, 1 June 2015), <http://www.errc.org/blog/what-is-strategic-litigation/62>

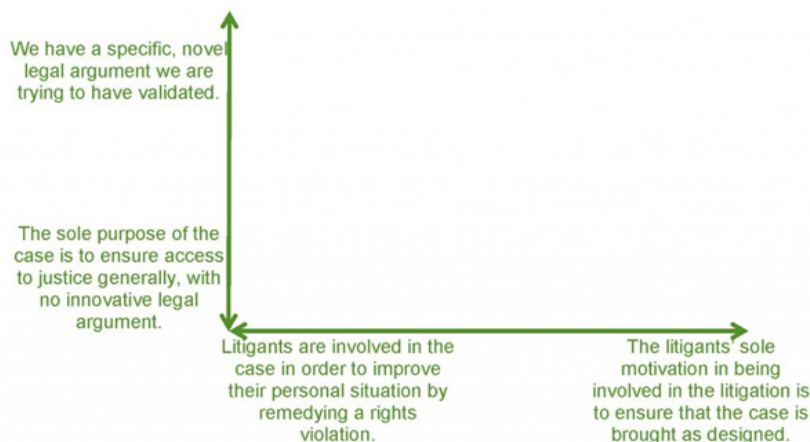
By contrast, a small NGO with limited resources but a big mission, unable to invest in a large number of individual cases, would be better off starting litigation in its own name if it can do so, in order to make its point more directly. This kind of public interest litigation can avoid certain pitfalls associated with individual cases (such as when authorities try to make those cases go away by resolving the individual's situation, but not the systematic problem), which can be fatal for those who do not have the resources to invest time or money in supporting a large number of self-interested litigants. Jurisdictions where class actions or other forms of group litigation are available to challenge failures by public authorities, make for an interesting hybrid: harnessing the power of a large number of self-interested litigants, represented by a few activist litigants acting as class representatives.

Choosing litigants goes alongside choosing a legal theory to carry out our theory of change in the Courts. This is where the lawyers come in – and only here, since the questions about behaviour change are at their core questions of activism. Example 'a' from the previous section has already been given this treatment by the European Roma Rights Centre and Praxis, in work supported by the European Network on Statelessness as part of its litigation strategy.¹² The problem in Serbia is that register offices will not register the birth of children whose parents do not have identity documents – as is the case for many Roma in Serbia, following displacement during the wars of the 1990s.¹³ The NGOs took two approaches, at two ends of the litigant spectrum.

The first was to bring a 'constitutional initiative', an abstract complaint to the Constitutional Court in their own names challenging the primary legislation that allows register offices to delay birth registration in order to verify the details to be entered in the register. This is classic abstract litigation brought by litigants simply to get the legal point aired; if it works, register offices will lose their discretion to turn away parents of new-borns, realising the Convention on the Rights of the Child's (CRC) promise of 'immediate' registration.

¹² Adam Weiss, 'Roma in Serbia still denied birth certificates – ENS members take legal action to challenge register offices' unlimited power' (ENS Blog, 7 March 2016), available at <http://www.statelessness.eu/blog/roma-serbia-still-denied-birth-certificates-ens-members-take-legal-action-challenge-register>

¹³ Also see *Using the CRC to help protect children from statelessness in Serbia* by Praxis Serbia in Chapter 8.



The second approach was to identify cases from Praxis's legal aid practice that could form the basis of individual constitutional complaints (again to the Constitutional Court). Such self-interested litigants offer a chance for a high-level judgment, although a critical mass of cases is necessary for the chance of even a single case leading to a strategic judgment.

Similar approaches can be taken with the other cases set out above. For case 'b', an NGO with a legal aid approach could make a large number of applications to the authorities to recognise the citizenship of children who would otherwise be stateless and see what the response is. This could be complemented by a strategy of using freedom-of-information requests to establish how many children have actually benefited from that provision of law (if one exists), and then trying to formulate a more abstract challenge in the administrative courts if the authorities are not fulfilling their duty or using their power to ensure that children in this situation are not left stateless. Case 'c' could involve data collection about how particular policies affect certain ethnic groups, followed by litigation on behalf of members of that group. Anti-discrimination laws often give NGOs working in the field standing to take cases, meaning that the litigation would not be dependent on self-interested litigants. Anti-racist movements often have activist litigants among their members in any event.

Case 'd' could also be done in a legal aid context: for example, lawyers could develop abstract constitutional arguments that can be deployed in the pleadings in a wide range of individual cases. Abstract constitutional cases could also be set up by NGOs, such as the one described above in Serbia, if national law allows.

4. Conclusion

This essay makes it all sound easy - however, it is not. The main reason is complexity and unpredictability. Whatever your view of the role of Courts in society, they are one actor in a complicated system. Sometimes politics is stronger, or the dividing line between law and politics disappears entirely.¹⁴ More importantly, the judicial system itself is complex. There are too many moving parts to guarantee that your theory of change will work. If you are dependent on self-interested litigants, any one case may fall apart because of their situation; their cases may even get resolved favourably but with no further impact. You may have a perfect argument under anti-discrimination legislation only to find yourself faced with judges who do not understand concepts such as indirect discrimination or the shift of the burden of proof. Litigation can be long and costly. Implementation of positive judgments is sometimes unimaginable.

The unpredictability of strategic cases (which nonetheless seem inevitable in retrospect) is an important point. If a case is an obvious win, it probably is not strategic, unless your goal is to bring hundreds of them and overwhelm the defendant. If a lawyer tells you 'it cannot be done', then you are probably on to something. If you believe that the story of ending childhood statelessness needs to unfold partially in a courtroom, be prepared to take risks, to lose, and to have disagreements with lawyers. These cases are about taking chances that present little or no risks to stateless children, but potentially massive pitfalls for state officials who are not working towards ensuring children's right to a nationality. Also make sure your case links to a larger strategy. Anything that a court can order a defendant to do, a defendant might also be persuaded to do through more targeted advocacy (perhaps operating under the shadow of pending litigation). Once you have developed a sound approach to litigation, it is easily applicable to advocacy and other efforts, which might be important to undertake simultaneously or instead of litigation.

¹⁴ See, e.g., *Kurić and others v Slovenia* (2013) 56 EHRR 20 (describing how a referendum was held on implementation of a law designed to give effect to a constitutional court judgment concerning the rights of the so-called 'erased people', certain citizens of other former Yugoslav republics who did not have legal residence status in Slovenia).

An Italian recipe for reducing childhood statelessness

*Nicole Garbin (Chef de Cuisine) and Adam Weiss (Executive Chef)**



The chefs spend their days cooking at the European Roma Rights Centre

Ingredienti

15,000 Roma children. That's the number of Roma children in Italy who are stateless or at risk of statelessness. Despite being born in Italy to families often in Italy for several generations, these children are not only without Italian nationality, but they also have no residence permit or any identity document. According to Italian law, these children do not acquire Italian nationality at birth. You can find them all over Italy.

A handful of countries in South East Europe. Most of these children's families come from the former Yugoslavia. Many of them do not acquire any other nationality because of the complexity of the

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procedures in those new countries, or because the parents themselves are not citizens of them.

A heaping bowlful of messy Italian legislation. The technicalities of the Italian legislation play a major role in leaving Roma children in this situation. Under Law 91/92, *“A foreigner born in Italy, who has resided legally without interruption until reaching the age of majority, becomes a citizen if (s)he elects to acquire Italian citizenship within one year of reaching that age”*. Keep an eye on that phrase ‘resided legally’. In 2013, a new provision (art. 33, Decree 69/2013) came into force which states that children cannot suffer from failures attributable to their parents or the public administration.

Preparazione

Take just one of those 15,000 children. Emina, for example, a Romani woman born in Turin (Torino) who has lived in Italy since her birth. Her family originally comes from Bosnia. She was taken into care at the age of eight along with her sister. When she turns 18 (as she did back in 2012), help her apply for ‘election of citizenship’ under Law 91/92. Emina could prove she lived continuously in Italy since her birth. She sent the authorities school and scout group attendance certificates, social worker statements, and her vaccination record. But the authorities didn’t like something in the sauce: she was turned down, on the basis that she only secured a residence permit when she was fourteen, which meant that she was not ‘legally resident’ since birth.

In 2013, ask the authorities to apply the new legislation on children retroactively. Don’t be surprised if they refuse; that’s what they did here.

Repeat over, and over, and over again for the many Roma in this position who apply for Italian citizenship (and don’t forget about the many, many others who won’t even bother).

Then – and don’t forget about this part – take the bureaucrats to court. And pepper your lawsuit with lots of language about the rights of the child, EU law, international conventions, and Italy’s obligations to reduce statelessness. With the support of the ERRC and a local lawyer, that’s what Emina did.

Wait a few months. (Or, in Italy, maybe a few years.) And then, if you're lucky, you get a judgment like Emina got on 22 January 2016. The judgment is a big deal in our efforts to end Roma statelessness. The court found that the authorities were too strict by making 'legal residence' conditional on two requirements: uninterrupted registered residence and the continuous possession of a residence permit. The court invoked international principles stemming from, among others, the Hague Convention on the Civil Aspects of International Child Abduction, EU law, the European Convention on the Exercise of Children's Rights, the Charter of Fundamental Rights of the EU, as well as case law of the Court of Justice of the European Union. Moreover, the court stated that a 'constitutionally oriented' interpretation of the 2013 rule protecting children should apply retroactively to this case.

The decision represents an achievement in the Italian legal system and an example to be followed elsewhere. This judgment can and should be invoked before reluctant local authorities refusing to acknowledge that Roma in this situation have Italian nationality. It provides a clear precedent for the retroactive application of a provision protecting children from statelessness.

It is a taste of justice based on a new Italian recipe that, like the country's cuisine, should be imitated and enjoyed everywhere.

The full judgement is available (in Italian) online.¹ The case was litigated by Alessandro Maiorca, a lawyer based in Turin and member of ASGI,² and is one of several cases that ERRC are supporting across Europe.

¹ Available at: <http://briguglio.asgi.it/immigrazione-e-asilo/2016/marzo/trib-roma-cittadinanza.pdf>

² See also *Out of limbo: Promoting the right of undocumented and stateless Roma people to a legal status in Italy through community-based paralegals* by Elena Rozzi in this Chapter.

Out of limbo: Promoting the right of undocumented and stateless Roma people to a legal status in Italy through community-based paralegals

*Elena Rozzi**

A significant proportion of Roma people originating from the Balkans and living in Italy are stateless or at risk of statelessness and lack a residence permit and identity documents. As undocumented persons, they have no or limited access to social services, health care, education, employment and housing. They also risk receiving expulsion orders and being detained. An estimated 15,000 Roma children born in Italy find themselves in such a limbo of legal invisibility, even though their families have been living in Italy for decades. To promote the access of these people to a legal status, Association for Legal Studies on Immigration (ASGI),¹ in partnership with the NGOs Associazione 21 Luglio and Fondazione Romanì, carried out the project OUT OF LIMBO,² with support from the Open Society Foundations (September 2013-June 2015).

30 Roma and non-Roma social workers and activists working with Roma communities in different Italian cities received legal training through two residential workshops. This prepared them to play the role of 'community-based paralegals.'³ As part of the training, 15 of these paralegals, in cooperation with ASGI's lawyers, supported one or two undocumented/stateless Roma people in acquiring a legal status. This process required a significant effort in coordination, training

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¹ See <http://www.asgi.it/>

² See <http://www.asgi.it/progetti/out-of-limbo-english-version/>

³ See Open Society Justice Initiative, 'Community-Based Paralegals: A Practitioner's Guide' (2010), available at <http://www.opensocietyfoundations.org/publications/community-based-paralegals-practitioners-guide>

and supervision, but it reaped significant positive results. Out of the 27 individual documentation cases supported during the project, five undocumented youth born in Italy acquired Italian citizenship and five individuals obtained a residence permit on humanitarian grounds (the other cases are still pending or were rejected).

Thanks to their knowledge and the trust they built with the community, the paralegals were very effective in raising awareness about their rights and allowing for the identification and protection of individuals that are otherwise hidden from the system. Paralegals played a crucial role in collecting the information and documents needed to obtain a legal status, facilitating access of supported persons to public offices and administrative practices, advocating local authorities and reporting to lawyers for litigation when needed.

The paralegals also allowed ASGI to better understand the problems and possible solutions regarding statelessness, leading us to partly change our advocacy priorities. For example, we discovered that in the Roma communities that the paralegals worked with, many of the adults born in the former Yugoslavia held a nationality, while their children born in Italy were stateless or at risk of statelessness. According to Italian law, children born in Italy to non-nationals can acquire the Italian nationality when they come of age, if they submit an application to the Municipality by the age of 19, proving that they have been legally resident from birth to the age of 18, without interruptions.⁴ An important change to the law in 2013 provided that, in case of interruptions in legal residence, the youth can submit with his or her the application, any other evidence to prove his or her presence in Italy (school documentation, vaccinations etc.).⁵ Some Municipalities however, interpret this provision restrictively. Considering the positive results obtained in the individual documentation cases, as well as the difficulties met, we decided to partly change our advocacy focus from statelessness determination to the prevention of statelessness and the acquisition of Italian citizenship by youth born in Italy.

Based on the evidence collected by the paralegals, a report was published and presented at a national conference, organised in cooperation with the Commission on Human Rights of the Italian

⁴ Law n. 91/92, art. 4, par. 2.

⁵ Law n. 98/2013, art. 33.

Senate, UNHCR and the National Association of Italian Municipalities.⁶ Relevant representatives of the Ministry of Interior and judges participated as speakers, making important commitments.

It must be said that the involvement of Roma paralegals proved a useful strategy to promote the participation and empowerment of this marginalised minority. Roma activists worked with non-Roma colleagues on an equal basis and were able to ensure their community's rights thanks to their competences. Moreover, the professional and competent qualities they demonstrated through their work, made them strong role models for Roma communities and the majority population, challenging negative stereotypes of the Roma.

In conclusion, the methodology of paralegals, even though quite time-consuming and costly in terms of coordination, training etc, led to the opening up of new perspectives and relationships and sowed the seeds for longer-term strategies to ensure that marginalised stateless or at risk of statelessness persons can exit the limbo of legal invisibility.

⁶ See http://www.asgi.it/wp-content/uploads/2014/04/Rapporto-OUT-OF-LIMBO_def.pdf

Landmark case notes from Africa and Europe

In the past few years, there has been a series of landmark judgments issued by the regional courts of Africa, the Americas and Europe, which confirm the well-entrenched position of the right of every child to a nationality and the duty to safeguard against childhood statelessness under the regional and international human rights frameworks. The next essay, by David Baluarte, provides a detailed analysis of the two Inter-American Court of Human Rights judgments on the right to nationality in the Dominican Republic: The Girls Yean and Bosico v Dominican Republic and Expelled Dominicans and Haitians v Dominican Republic. Below, are shorter case notes on equally important judgments from Africa and Europe.

1. Nubian Minors v Kenya¹

Although the Nubians have lived in Kenya for over 100 years, they have historically been regarded as ‘aliens’ with uncertain citizenship status. On reaching the age of 18, all Kenyan children apply for ID cards that prove citizenship. For most Kenyan children, this is a simple process. However, Nubian children must go through a long and complex vetting procedure with an uncertain result. In this case before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the petitioners argued that the following rights of the Nubian children in Kenya are violated through this system:

- A violation of the child’s right to acquire a nationality at birth, protected by Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC);
- Unlawful discrimination against Nubian children on grounds of their ethnic and religious origins, in violation of the prohibition of discrimination in Article 3 of the ACRWC; and

¹ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011, available at: <http://www.refworld.org/docid/4f5f04492.html>

- Consequential violations in relation to denial of access to education, health care, property rights etc.

The ACERWC found Kenya's actions violated the Charter's provisions protecting children's right to nationality, observing that statelessness is the antithesis of the best interests of the child. The ACERWC also found that Kenya's vetting system unlawfully discriminates against Nubian children in violation of Article 3 of the ACRWC, leaving them stateless or at risk of statelessness, with no legitimate hope of gaining recognition of their citizenship. As a result, Nubian children lack access to adequate healthcare and education, in violation of Kenya's obligations to provide the highest attainable standard of health and education to all children (Articles 14(2)(a)-(c), (g) and Article 11(3) of the ACRWC, respectively). The ACERWC issued five detailed recommendations including legislative and administrative reforms, an obligation to consult with affected communities in developing implementation strategies and the requirement that Kenya implement a non-discriminatory birth registration system. It also established implementation monitoring mechanisms, including an obligation that Kenya report back on implementation within six months and a dedicated ACERWC member to monitor implementation.²

2. *Genovese v Malta*³

The case of *Genovese v Malta* concerned a young man, Genovese, who was born out of wedlock and is the son of a British mother and a Maltese father. His father, whose paternity was established judicially and scientifically, had not acknowledged his son and did not want to have any relationship with him. Genovese is a British national, but also wanted to become a Maltese national (because his father is a Maltese citizen). After applying for Maltese nationality, he learned that Maltese

² This case note is a shorter version of the case note titled *Nubian children denied a future*, published by Open Society Foundations on 30 September 2011, and available at: <https://www.opensocietyfoundations.org/litigation/nubian-minors-v-kenya>. See also in *Safeguards against childhood statelessness under the African human rights system* by Ayalew Getachew Assefa in Chapter 11 and *Using the African regional framework to realise children's nationality rights in Kenya* by Mustafa Mahmoud Yousif in Chapter 8.

³ *Genovese v. Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011, available at: [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-106785\"\]}](http://hudoc.echr.coe.int/eng#{\)

citizenship could not be granted to a child born out of wedlock, if the child's mother is not Maltese and the father is.⁴ Litigation in Malta was unsuccessful and Genovese complained to the European Court of Human Rights (ECtHR) that the Maltese laws on the acquisition of citizenship discriminated against him contrary to Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR).

The Court agreed with Genovese and found a violation of Article 14 in conjunction with Article 8 in this case, because the difference in treatment between children born in and out of wedlock could not be justified. In its judgment, the Court made two important points that relate to addressing childhood statelessness. Firstly, the Court expressly stated that nationality falls within the scope of protection of the ECHR as part of a person's social identity, which is part of the concept of private life under Article 8. Secondly, the Court clarified that countries with laws and procedures that grant a right to citizenship by descent, such as Malta in this case, must ensure that this right is secured without discrimination.⁵

3. *Mennesson v France*⁶

The case of *Mennesson v France* dealt with one of the more complex issues related to childhood statelessness: surrogacy.⁷ This case concerned two French commissioning parents and their two children born abroad through a surrogacy arrangement. They tried to secure legal recognition of the parent-child relationship in France, but their claims were dismissed throughout the domestic judicial process up to the French Court of Cassation. Subsequently, the family complained of a violation of Article 8 (right to respect for private and family life) of

⁴ See also *Campaigning for gender equality in nationality laws* by Catherine Harrington in Chapter 13.

⁵ For a more comprehensive analysis of this case, see Sebastian Kohn, *ECHR and citizenship: the case of Genovese v Malta*, 11 October 2011, available at: <http://www.statelessness.eu/blog/echr-and-citizenship-case-genovese-v-malta>

⁶ *Mennesson v. France*, Application no 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014, available at: [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-145389\"\]}](http://hudoc.echr.coe.int/eng#{\)

⁷ See also *International surrogacy arrangements and statelessness* by Sanoj Rajan in Chapter 11.

the ECHR to the ECtHR. Their complaint was based on the inability to obtain recognition of the parent-child relationship that had been established abroad through the surrogacy arrangement, which they found to harm the children's best interests.

The government emphasised in this case that French law prohibits surrogacy as a method of assisted reproduction and therefore must refuse to register the French commissioning parents as the parents of a child, because permitting such registration would present a risk to consistent application of this prohibition. The Court, however, attached more weight to the consequences of non-recognition of the legal parent-child relationships for the children as part of their right to respect for private life. Furthermore, it questioned the compatibility of that situation with the best interests of the child. Thus, the Court found a violation of Article 8 of the ECHR with regard to the two children in this case. The Court stated that respect for the child's best interests should guide any decision in their regard, which would include one that concerns children's right to a nationality.⁸

⁸ For a more comprehensive analysis of this case, see Liesbet Pluym, *Mennesson v. France and Labassee v. France: Surrogate motherhood across borders*, 16 July 2014, available at: <https://strasbourgobservers.com/2014/07/16/mennesson-v-france-and-labassee-v-france-surrogate-motherhood-across-borders/>

The perpetuation of childhood statelessness in the Dominican Republic

*David Baluarte**

1. Introduction

In 2013, the Constitutional Court of the Dominican Republic (DR) issued a decision that reinterpreted the Dominican Constitution so as to retroactively exclude the children of unauthorised migrants born in the country since 1929 from the regime of *jus soli* nationality acquisition. This effectively denationalised more than 100,000 people who the United Nations High Commissioner for Refugees (UNHCR) have declared stateless, and complicated an already troubling situation of childhood statelessness. Widespread criticism both domestically and on the international level compelled the Dominican State to craft a legislative response to either restore nationality or provide a path to naturalisation for persons who had been born in the DR.¹ However, Dominican-born persons of Haitian descent and their children continue to face a range of impediments to their rightful acquisition of Dominican nationality.²

Stateless children in the DR face substantial barriers to their integration into society and full realisation of their human potential. The most immediately apparent challenge stateless children face is the difficulty in

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¹ SAIS International Human Rights Clinic, 'Justice Derailed: The Uncertain Fate of Haitian Migrants and Dominicans of Haitian Descent in the Dominican Republic' (2015), available at <https://www.sais-jhu.edu/sites/default/files/Final-Report-Justice-Derailed-The-Uncertain-Fate-2015-v1.pdf>.

² Amnesty International, "'Without papers, I am no one' Stateless people in the Dominican Republic' (2015), available at <https://www.amnesty.org/en/documents/amr27/2755/2015/en/>.

accessing education due to their lack of proper nationality documents.³ Blocking access to the fundamental right to education serves as a harbinger for the social exclusion that awaits children who grow up on the margins of Dominican society. They see others in their community unable to marry, own property, vote, or register their own children, and it can crush their burgeoning desire to 'be someone.' This feeds into a general sense of insecurity, which manifests most concretely during the collective expulsions conducted in communities populated by persons of Haitian descent with no regard for the rule of law or human dignity.

Litigation has been an important part of the strategy that the advocacy community has elaborated over the years to challenge the injustice of childhood statelessness in the DR. At a regional level, the Inter-American Court of Human Rights (IACtHR) has issued two decisions that have specifically discussed the human rights dimensions of Dominican nationality law and policy. In *The Girls Yean and Bosico v Dominican Republic* and *Expelled Dominicans and Haitians v Dominican Republic*, the Court has clarified important human rights norms and ordered legal reform with the aim of addressing the most brutal aspects of childhood statelessness. The importance of these decisions cannot be understated, but observers have also raised reasoned concerns about the aggravating effect of international condemnation which has fuelled nationalist fervour in the DR.⁴

This essay will provide a contemporary history of the human rights struggle for Dominican nationality and review the important contributions of the IACtHR so as to better understand that tribunal's leadership in developing norms for the protection of stateless children. The essay will also consider critiques of this Inter-American litigation and balance the added value of the efforts to compel statelessness protection against the harsh response it has received. Concluding remarks will consider the significance of these normative developments and strategic insights on the global stage.⁵

³ Georgetown University, 'Left Behind: How Statelessness in the Dominican Republic Limits Children's Access to Education' (2014), available at <http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/Left-Behind-HRI-Report-2014-English-Final.pdf>.

⁴ S. Martinez, 'The Price of Confrontation: International Retributive Justice and the Struggle for Haitian-Dominican Rights', in *The Uses and Misuses of Human Rights: A Critical Approach to Advocacy*, pp. 89-115 (2014).

⁵ See also *Using the Inter-American regional framework to help stateless children*

2. An Overview of the Nationality Crisis in the Dominican Republic

The centrepiece of the nationality debate in the DR has been the constitutional provision that declared as Dominicans, all persons born in the national territory with the exception of those born to foreigners in diplomatic service or foreigners in transit. This same provision, virtually unaltered, can be found in every Dominican Constitution from 1929 until the constitutional reform of 2010. The main issue of contention has been the scope of the ‘in transit’ exception to *jus soli* nationality.



This 13-year-old was born in the Dominican Republic. He and his brothers have no documents because their parents are of Haitian ancestry. They are unable to go to school because they lack the necessary documents.

© Greg Constantine

By the 1990s, it was well-documented that many Dominican civil registry officials refused to issue birth certificates to the children of Haitian migrants born in the national territory because of their Haitian parentage.⁶ Dominican civil society mobilised, pressured local civil registries to process applications in accordance with the law, and even filed legal cases to protect their right to Dominican nationality. In 2003, an appeals court in the DR found that the ‘in transit’ exception could not reasonably encompass a large irregular migrant population, and must

in the Dominican Republic by Francisco Quintana in Chapter 8.

⁶ Inter-American Commission on Human Rights, ‘Report on the Situation of Human Rights in the Dominican Republic’ (1999), available at <http://www.cidh.org/countryrep/DominicanRep99/Chapter9.htm#196>; Human Rights Watch, ‘“Illegal People” Haitians and Dominico-Haitians in the Dominican Republic’ (2002), available at <https://www.hrw.org/reports/pdfs/d/domnrep/domnrep0402.pdf>

be construed in a limited manner.⁷ While this reflected the commonly held understanding of the nationality provision of the Constitution at that time,⁸ powerful dissenting voices continued to press for a more expansive interpretation.

In 2004, the Dominican legislature passed an immigration law that provided the first direct legislative interpretation of the 'in transit' concept for the purposes of nationality acquisition under the Dominican Constitution. That law provided that all 'non-residents' were foreigners in transit, and it listed nine different categories of non-residents, including temporary workers and border residents, among others.⁹ Dominican civil society organisations filed a legal action challenging the constitutionality of the 2004 immigration law. The Dominican Supreme Court of Justice upheld the law as constitutional in 2005, concluding that the legislature acted within its authority to interpret the Constitution, and specifically finding that the law was not discriminatory and that it posed no risk of producing statelessness.

2.1 A campaign to deprive Dominicans of Haitian descent of nationality

In 2007, mandated by the 2004 immigration law, the Central Electoral Board (CEB) created a separate birth registry for the inscription of non-nationals born in the national territory. At the same time, that entity issued guidance known as Circular 17 and Resolution 12 to civil registry officers directing them to review and seize birth certificates with irregularities and initiate nullification proceedings in cases where persons had been mistakenly registered as nationals. Pursuant to this guidance, when an individual came to the civil registry to request a certified copy of his birth certificate for school, or renew her national identity card known as a *cédula*, officers would make a determination whether the individual may have foreign parents and hold their documents for further study. In effect, the CEB guidance began the retroactive application of the legal framework set forth in the 2004

⁷ Dominican Republic, Civil Chamber of the Court of Appeal of the National District of 16 October 2003 (cited by the Inter-American Court in both *The Girls Yean and Bosico* and *Expelled Dominicans and Haitians*).

⁸ See expert opinion provided by Cecilio Gómez Pérez before the Inter-American Court during the public hearing of *Expelled Dominicans and Haitians v. Dominican Republic*.

⁹ Dominican Republic: Law No. 285 of 2004 (2004), Sec. VII. About Non-Residents, available at <http://www.refworld.org/docid/46d6e07c2.html>.

immigration law, and led to the deprivation of nationality of tens of thousands of Dominicans of Haitian descent.

Human rights advocates in the DR sounded the alarm bell, and international bodies that had been following the abusive nature of Dominican nationality policy began to denounce the denationalisations. There were claims that the 2004 immigration law, notwithstanding the 2005 decision from the Supreme Court of Justice, was indeed inconsistent with the Dominican Constitution, as well as international law obligations that bound the DR. The DR passed a new Constitution in 2010 with a revised nationality provision that excluded from birth right nationality the children of “*foreigners in transit or residing illegally in the Dominican territory*”, and stated explicitly that “foreigners in transit” were whatever Dominican law declared.

The 2010 Constitution also established the Constitutional Court, which three years later heard the case of Juliana Deguis Pierre, a woman whose *cédula* had been seized by the civil registry in accordance with the CEB guidance. In its now infamous decision 168-13, the Constitutional Court concluded that the ‘in transit’ exception had always been intended by legislators to cover four groups of non-immigrants, including temporary workers and their families.¹⁰ The Court ordered the CEB to review all births registered from 1929, which was the first year that the ‘in transit’ exception appeared in the Dominican Constitution, until 2007 to ensure that no children of foreigners ‘in transit’ had mistakenly been registered as Dominican nationals.¹¹

2.2 The fallout from the 2013 ruling and the need for a legislative response

The 2013 Constitutional Court decision triggered widespread outrage against what was perceived as a racially motivated reinterpretation of the Constitution to retroactively strip the citizenship of Dominicans of Haitian descent in contravention of human rights protections against discrimination and deprivation of nationality. UNHCR estimates that 133,770 people were left stateless as a result of the decision, though

¹⁰ Dominican Republic: Constitutional Court, Sentence TC/0168/13, p. 60 (23 September 2013), available at: <http://www.refworld.org/docid/526900c14.html>.

¹¹ Presumably, the Court specifies 2007 because that was the date that the CEB instituted the birth registry for foreigners under the 2004 immigration law.

initial estimates were even higher.¹² The consistent response of the DR on the question of statelessness was that Dominicans of Haitian descent who lost their Dominican nationality, like Juliana Deguis Pierre, were not stateless because they had acquired Haitian nationality *jus sanguinis*. However, there are a number of legal and bureaucratic impediments to these individuals acquiring Haitian nationality, particularly those who had lived a lifetime with Dominican nationality documents.¹³ Moreover, this rejoinder by the Dominican government was insufficient to appease international observers and rights groups.

A remedial response from the Dominican State became imperative, and in May 2014 the Dominican legislature unanimously passed Law 169-14 as its proposed solution to the crisis. This law ordered the reinstitution of Dominican nationality to approximately 55,000 individuals who had acquired Dominican nationality by birth in the national territory, but who were denationalised pursuant to the order of the Constitutional Court ("Group a"). The law also created a path to naturalisation for those individuals who had been born in the DR prior to 2007, but had never acquired nationality documents ("Group b").¹⁴

Group b, as it has become known, was and continues to be quite controversial. These are individuals who considered themselves Dominican nationals by birth right, and the prevailing interpretation of the Constitution supported this understanding at the time of their birth. The solution that they naturalise through a procedure that required them to declare themselves Haitian nationals was unacceptable to many. Compounding the social and political implications of the proposed solution, bureaucratic complications and tight timeframes

¹² The UNHCR estimates that there are 133,770 stateless people in the Dominican Republic. While the initial estimate of stateless persons was in the order of 210,000, UNHCR recently announced a downward revision of that estimate based on more precise data analysis. See UNHCR Mid-Year Trends 2015, available at <http://www.unhcr.org/statistics/unhcrstats/56701b969/mid-year-trends-june-2015.html>.

¹³ See C.A. Tobin, 'No Child is an Island: The Predicament of Statelessness for Children in the Caribbean' (2015) 1(1) International Human Rights Law Journal, available at <http://via.library.depaul.edu/ihrj/vol1/iss1/1>.

¹⁴ Presumably, the law used the 2007 cut-off because of the Constitutional Court's decision instructing the CEB to review registrations before that date. Dominican Republic, Civil Chamber of the Court of Appeal of the National District of 16 October 2003 (cited by the Inter-American Court in both *The Girls Yean and Bosico* and *Expelled Dominicans and Haitians*).

to initiate the naturalisation process for Group b resulted in only 8,755 applications. This number is far below initial estimates of the number of people who would qualify to naturalise under this provision of the law, which the Dominican government believed to be the order of 50,000. Accordingly, an unknown number of people remain in a legal limbo and are likely stateless.

3. Efforts to Protect the Right to Nationality through Inter-American Litigation

The IACtHR has issued two timely decisions on the nationality rights of Dominican-born persons of Haitian descent. *The Girls Yean and Bosico v. Dominican Republic*, handed down a year after the promulgation of the 2004 immigration law, held the DR internationally responsible for human rights violations committed in the refusal by Dominican authorities to register the births of two young girls. *Expelled Dominicans and Haitians v. Dominican Republic*, handed down a year after the 2013 Constitutional Court decision, found the DR to have violated its international human rights obligations when it conducted collective expulsions of Dominicans and Haitians. These two landmark decisions by the IACtHR advanced important norms of protection against childhood statelessness at strategic moments, and each set off an international relations firestorm.

3.1 The Girls Yean and Bosico v. Dominican Republic

The case concerned the plight of Dilcia Yean and Violeta Bosico, two girls born in their homes in agricultural communities known as *bateyes* who were taken by their mothers to register their births when they were small children. The girls' mothers were Dominican nationals in possession of *cédulas* and their fathers were Haitian migrant workers. Civil registry officials found that the girls' mothers did not provide sufficient documentation for late registration and denied the requests. In declining to register the girls and issue them birth certificates, the civil registry denied the girls essential evidence of Dominican nationality that they needed to study, thereby limiting their prospects for social mobility while simultaneously condemning them to a life on the margins of Dominican society.

The Court began its analysis of this case by observing that the authority of States to determine who is a national “*is limited, on the*

one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness."¹⁵ This statement of the law then drove the Court's analysis, as it dug into both the questions of discrimination and statelessness.

The Court considered the actions by the civil registry in denying the girls' applications for birth certificates, and found that officials had applied onerous documentary requirements not established in the law. The Court considered the context and history of anti-Haitian sentiment, and concluded that the documentary requirements were a pretext to deny the girls' birth certificates because of their race, and that the denials were arbitrary and discriminatory. The Court concluded that the arbitrary denial of birth registration deprived the two girls of their Dominican nationality in violation of Article 20 of the American Convention.¹⁶ The Court further found that this deprivation of nationality had left the girls stateless, and that their vulnerability was compounded by their status as children.

Another important aspect of the case was the decision by the Court to take up an argument posed earlier in the proceedings by the Dominican State that the girls were not entitled to nationality because their fathers were foreigners 'in transit'. The girls had certainly derived Dominican nationality from their mothers under the Dominican Constitution, but the question of the effect of the fathers' Haitian nationality and status as migrant workers loomed large in the case. While the language of the Constitution was generally understood to provide a broad grant of *jus soli* nationality, there was no authoritative judicial interpretation of the 'in transit' exception at the time the case was filed. The mixed nationality of the girls' parents gave the IACtHR the option to either decide the case without addressing the question of who was a qualifying foreigner, or to take the question up if deemed appropriate.

Ultimately, the IACtHR did address the question of who should qualify for Dominican nationality under the constitutional and legislative

¹⁵ *Case of the Yean and Bosico Children v The Dominican Republic* (IACrtHR, 2005), para 140, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf.

¹⁶ *Ibid*, para 166.

framework in broad terms, and this became one of the greatest contributions of the case.¹⁷ The Court cited a 2003 decision from a Dominican appeals court, decided after *The Girls Yean and Bosico* had been submitted to the jurisdiction of the IACtHR, that had interpreted the ‘in transit’ exception narrowly.¹⁸ It also found relevant a 1939 immigration regulation that indicated that the concept of transit suggested a stay of 10 days or less in the country.¹⁹ The IACtHR used this authority to conclude that “*the State must respect a reasonable temporal limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit*”.²⁰

In this way, the IACtHR addressed the responsibility of the Dominican State to guarantee its nationality to children born in its territory to Haitian parents. It found inappropriate the suggestion that the ‘in transit’ exception would be linked to migratory status, and it emphasised that birth in the territory should be the only relevant criteria in cases in which a child would not have a right to any other nationality.²¹ However, because the girls’ mothers were Dominican, these questions were not determinative of their claims to Dominican nationality. The next case decided by the Inter- IACtHR against the DR provided the opportunity to address the ‘in transit’ exception in analysing more complex nationality claims.

3.2 *Expelled Dominicans and Haitians v. Dominican Republic*

Petitioners in this case included four families and two individuals who had been the victims of collective expulsion from the DR to Haiti. This practice involved Dominican authorities rounding up entire communities on trucks and forcing them across the border to Haiti without process.²² The Court analysed the right to nationality with regard to two groups of petitioners: Dominican nationals whose nationality documents were disregarded by authorities at the time of their expulsion; and persons who had been

¹⁷ Ibid, para 152.

¹⁸ Ibid, para 154.

¹⁹ Ibid, para 157.

²⁰ Ibid.

²¹ Ibid, para 156.

²² *Case of Expelled Dominicans and Haitians v The Dominican Republic* (IACrHR, 2014), p 54 (providing a general description of the practice in A.3. *The alleged existence of a systematic practice of collective expulsions of Haitians and Dominicans of Haitian descent*), available at: http://corteidh.or.cr/docs/casos/articulos/seriec_282_ing.pdf

born in the DR, but were unable to acquire nationality documents, and were subsequently expelled. This second group was similarly situated to the girls Yean and Bosico before they received their birth certificates, in that they had been born in the DR and had been denied birth registration. The main differences were that the parents of the petitioners in *Expelled Dominicans and Haitians* did not have Dominican nationality documents, and the Dominican State was actively arguing that they were not entitled to Dominican nationality as the children of foreigners 'in transit'.

Victor Jean was the Dominican-born father of three Dominican-born children, who he cared for together with his Haitian wife at the time that they were expelled as a family from the DR to Haiti. Neither Mr. Jean nor his three children had acquired nationality documents and they asserted before the IACtHR that their right to Dominican nationality had therefore been violated. The Dominican State was adamant that Mr. Jean and his three children did not have a right to Dominican nationality because they had been born to foreigners 'in transit' as defined under Dominican law. The Dominican State further argued that the Jean family would not be left stateless without Dominican nationality, because they could all acquire Haitian nationality *jus sanguinis*.²³

The IACtHR proceeded to examine the human rights implications of the Dominican State's failure to issue nationality documents to Mr. Jean and his children, examining each of its arguments for failing to do so in turn. The Court noted that the Dominican State relied on the 2005 Supreme Court of Justice decision and the 2013 Constitutional Court decision to support its claim that the Jeans were not nationals under Dominican law. The Court highlighted, however, that these decisions did not represent the prevailing understanding of *jus soli* nationality at the time the Jeans were born, such that the Dominican State was retroactively applying newly developed legal precedent to deny the Jeans' right to nationality.²⁴ Interestingly, the Court here acknowledged the Dominican State's position that this was not discriminatory *per se*, but then turned to the Dominican State's obligation to reduce statelessness.²⁵

The Court highlighted that the Dominican State itself recognised that it would have to guarantee Dominican citizenship to any children

²³ Ibid, para 279.

²⁴ Ibid, para 289-90.

²⁵ Ibid, para 292.

born stateless in its territory. The Court then examined the claim that the Jeans had acquired Haitian nationality *jus sanguinis*, and were not stateless. The Court criticised the State's bare assertion that the Jeans had acquired nationality under the Haitian Constitution, finding that it had failed to demonstrate that the Jeans had acquired Haitian nationality because the State had not reconciled a number of contradictory laws.²⁶ The Court found that the Dominican State's retroactive application of the above cited legal framework to justify the denial of the Jean's nationality claims when they had faced a risk of statelessness at birth constituted an arbitrary denial of their right to Dominican nationality.²⁷ Here, the IACtHR took a tremendous step forward in the regional jurisprudence on the protection against childhood statelessness. Stopping short of actually declaring the Jeans stateless, as it had with the girls Yean and Bosico, the Court found that the risk of statelessness in conjunction with the Dominican State's failure to adequately resolve the question of nationality had triggered the State's obligation to guarantee nationality.

The IACtHR then took the very important step of analysing whether the 2013 Constitutional Court decision and the promulgation of Law 169-14 constituted a violation of the Dominican State's obligation to ensure that its laws respect the right to nationality enshrined in the American Convention.²⁸ The IACtHR found that the 2013 Constitutional Court decision violated both equal protection and the right to nationality of those petitioners who had previously acquired nationality despite their parents' irregular status, where it unreasonably distinguished between the acquisition of nationality by regular and irregular migrants.²⁹ The Court further found that Law 169-14 violated both equal protection and the right to nationality of the Jean family, because it forced them to accept alien status and gave them only the option to naturalise as the children of foreigners in transit.³⁰

3.3 Backlash against the Inter-American rulings

Both of the IACtHR rulings were met with staunch opposition from Dominican authorities. In 2005, after *Yean and Bosico* was decided, high government officials claimed that it served as evidence of

²⁶ Ibid, para 297.

²⁷ Ibid, para 298.

²⁸ Ibid, para 308.

²⁹ Ibid, para 314, 317-18.

³⁰ Ibid, para 323-24.

a conspiracy by international actors to overwhelm Dominican sovereignty and force the DR to buffer the regional insecurity posed by the Haitian State.³¹ This notion of an international conspiracy fed into a nationalist narrative that gained steam in the lead up to the wave of denationalisations that began in 2007, and some have suggested that international human rights advocacy in primarily international fora before 2005 contributed more than anything to the hardening of Dominican nationality law and policy.³²

Such critiques are well-founded, and an absolute rejoinder is difficult to honestly articulate. At the same time, nationality practices had been deteriorating throughout the 1990s, and the law would have likely deteriorated along with such practices in time. What is also true is that nationality rights advocates within the DR developed comprehensive and complex policy advocacy and litigation strategies in the years following 2007. It is difficult to identify the specific role of *Yean and Bosico* in consolidating and reinforcing the efforts at the national level to confront the institutionalisation of discriminatory nationality policies, but few would deny the importance of that seminal case in this regard. Nevertheless, the die may have been cast when national strategic litigation efforts to end the denationalisations arrived before the newly established Dominican Constitutional Court that issued the fateful 2013 judgement.

The promulgation of Law 169-14, albeit limited in scope, did restore nationality to many and set forth a path to nationality for some. If this represents the negotiated solution produced through the transnational legal process, then the inadequacy of that solution has once again been laid plain by the IACtHR in the *Expelled Dominicans and Haitians*. Moreover, the IACtHR decisions continue to provide the legal platform for advocacy at all levels as we look to the future challenges of eradicating childhood stateless in the Dominican context.

³¹ See D.C. Baluarte, 'Inter-American justice comes to the Dominican Republic: An island shakes as human rights and sovereignty clash', *American University Human Rights Brief*, (2006) 13(2), available at <http://www.wcl.american.edu/hrbrief/13/2baluarte.pdf?rd=1>

³² See S. Martinez, 'The Price of Confrontation: International Retributive Justice and the Struggle for Haitian-Dominican Rights', in *The Uses and Misuses of Human Rights: A Critical Approach to Advocacy*, pp. 89-115 (2014).

4. Conclusion

Law 169-14 was an imperfect and incomplete solution for those individuals commonly referred to as Group b and their children. Together the IACtHR decisions provide a roadmap for how we should understand the legal rights of this population and the risk of statelessness it faces. The UNHCR estimates that there are 133,770 stateless persons who were born in the DR to two foreign parents at a time they were believed to qualify for Dominican nationality, and as of yet, there is no estimate for the number of children they have reared in the country they always considered home.³³

Notably, under the jurisprudence of the IACtHR, everyone in this group is a Dominican national, both because that was the law of the DR at the time of their birth, and because they faced a risk of statelessness at birth that was unaddressed by the Dominican State. Sadly, the DR remains unwilling to engage in a real conversation about protection for stateless persons beyond Law 169-14, insisting that all persons of Haitian descent must be Haitian. Tragically, the problem of childhood statelessness threatens to become more severe as generations of persons with legitimate claims to nationality go unrecognised by the DR.

On review, the question as to whether regional and international litigation is an appropriate or effective means to address the problem of childhood statelessness in the DR merits real consideration. Moreover, this is a topic for earnest debate in any country where entrenched discrimination is one of the main drivers of statelessness. The problem of societal discrimination is deeply complex, and successes in combating that phenomenon are always incremental and debatable. The Dominican context is no exception, though the role of the rights-centred pronouncements of the IACtHR have played a unique role in both organising advocacy messages as well as lending legitimacy to the plight of Dominicans of Haitian descent. In the face of unrelenting persecution by the Dominican State, litigation continues to be an important tool, but it must be mindfully formulated and informed by past experience.

³³ See UNHCR Mid-Year Trends (2015). Presumably, the Court specifies 2007 because that was the date that the CEB instituted the birth registry for foreigners under the 2004 immigration law.

Stateless children of the Dominican Republic

*Allison Petrozziello**

Richardson

Richardson is a 10-year-old student in the rural batey community of Palmarejo just outside the capital of the Dominican Republic (DR), who likes to “play basketball and all kinds of sports, baseball, soccer.” He will be starting the fourth grade in school, and spent last summer playing and making a little money bending rebar on a construction site.



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Richardson was born in a maternity hospital in Santo Domingo in 2006 to Haitian migrant parents, neither of whom had a regular migration status up until 2015 when they applied to the national regularisation plan. Despite having been born during a time when the Constitution recognised Dominican citizenship for all those born in country, Richardson’s parents were undocumented and unable to get a birth certificate for him or his two sisters and brother.

Discrimination against Haitian immigrants in the DR – instead of being eliminated from nationality policies as ordered by the landmark 2005 Inter-American Court of Human Rights (IACtHR) judgment *Yean and Bosico v. Dominican Republic* – has been codified into law. In 2010, the Dominican government adopted a new Constitution, restricting *jus*

* Allison works for the Observatory on Caribbean Migrants (OBMICA), Dominican Republic, www.obmica.org. These profiles were put together with the assistance of Adriana Valerio. The photographs of the children were also taken by Allison. The names of the children profiled have been changed.

*sol*i to legally resident foreigners. In 2013, the Constitutional Tribunal made a controversial ruling ordering the civil registry to examine its records going back to 1929 to strip the citizenship of all whose births had been declared by migrant parents with irregular status. Following a national and international outcry, the Dominican government quickly set into motion a national regularisation plan for irregular migrants, followed by the Naturalisation Law 169-14 for descendants of irregular migrants. The latter made some concessions, ordering the civil registry to restore the identity documents of those born on the territory (whom they designated “group A”), but offering only an ambiguous option of facilitated naturalisation for descendants of irregular migrants born on the territory whose birth had never been registered (“group B”). A 90-day window was opened for registration for the latter group, extended for another 90, then promptly shut. Richardson was not one of the 8,755 people who managed to apply.¹

School is important to Richardson: *“I was in third and now I am going to start fourth grade. I was going in the morning last year and now I will be going in the afternoon. I like studying all of the subjects, especially handwriting and mathematics.”* He dreams of going to university, becoming an engineer, and living in the capital. But the school where he studies – a non-accredited primary school for undocumented children run by the Dominican NGO MUDHA – only goes up to fourth grade. He is worried about how he will continue his education.

They were going to sign me up at another school. My mama went for nothing, and she wasn’t even going to tell me what happened. She said it was a waste of her time getting up so early... [It is important to have a birth certificate] because then you can go to another school. From the time you pass fourth grade here, and you want to sign up at another school there are problems. But if you have your birth certificate, from the time you are going to fifth grade you can go to any school you want. Look, Danilo [Medina, president of the Dominican Republic] built a new school in Villa Flor, a really big one, and a lot of people want to study there but they can’t because they don’t have a birth certificate.

Richardson has heard rumours that *“Migration is going to take you*

¹ Also see *The perpetuation of childhood statelessness in the Dominican Republic* by David Baluarte in this Chapter.

away” if you do not have a birth certificate, but he remains hopeful that the government will figure out a solution. “The government needs to change that [practice] of not giving documents. It’s the government that has the people like this. The government doesn’t want to give papers to almost anyone. Don’t you watch the news? Yesterday I saw that there were like 1000 people and they gave a card to like 300.”

Elsa

Elsa is an 8-year-old student who lives in a batey community on the outskirts of Santo Domingo, DR. She is in the second grade, and enjoys playing the hand-clapping game ‘La Vaca Lechera’ (‘The Milk Cow’) with her best friends Yessica, Chelo, Rosalinda and Lucia. Her mother, Genoveve, says she is a helpful little girl who runs errands and washes the dishes “*without putting on a long face or talking back*”. During her free time, Elsa says she enjoys going to stay with her grandmother, whom she also helps around the house.

Elsa was born to Haitian migrant parents in the DR. She has three siblings, but only her older brother, Mack (10), who was born in Haiti, has a birth certificate. Elsa and her younger brother Angelo (4) and sister Katira (2), who were born in the DR, are at risk of statelessness due to various factors:

Haitian authorities’ ineffectual documentation efforts; Dominican policy changes; gender inequalities such as paternal irresponsibility; and gender discrimination in the birth declaration process. Together, these factors produce different options and obstacles for accessing a nationality for each of the children of this family.

Elsa was born in 2008, before the 2010 Constitutional amendment which limited the *jus soli* grounds for accessing citizenship. She



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should, in theory, have the right to Dominican nationality. Yet a 2014 Naturalisation Law considers those born to migrants with irregular status, and whose birth was never registered, foreign nationals who would have to register and eventually naturalise as Dominicans in two years' time. But when the window for registration was open in 2015, Elsa's mother was busy trying to obtain a passport from the Haitian consulate so she could apply for the national regularisation plan and also apply for late birth declaration for her three children born in the DR. All of these processes hinge on the mother's positive documentation status, which she was unfortunately unable to secure.

In 2014, the Haitian government, under pressure to document its nationals in the DR so they could regularise their migration status, offered a short-lived 'Program for the Identification and Documentation of Haitians' (PIDIH). While many thousands applied and paid the fees to receive their identity documents, few benefitted. An audit later revealed that the programme had only documented 5% of those who applied. Genoveve, Elsa's mother, was among those negatively affected:

I have a birth certificate from Haiti. When they were doing the documents [in 2015], I went [to get my passport] but my birth certificate was in bad shape, so they sent me to get another one. But now it is all over and I haven't had any luck getting my papers.

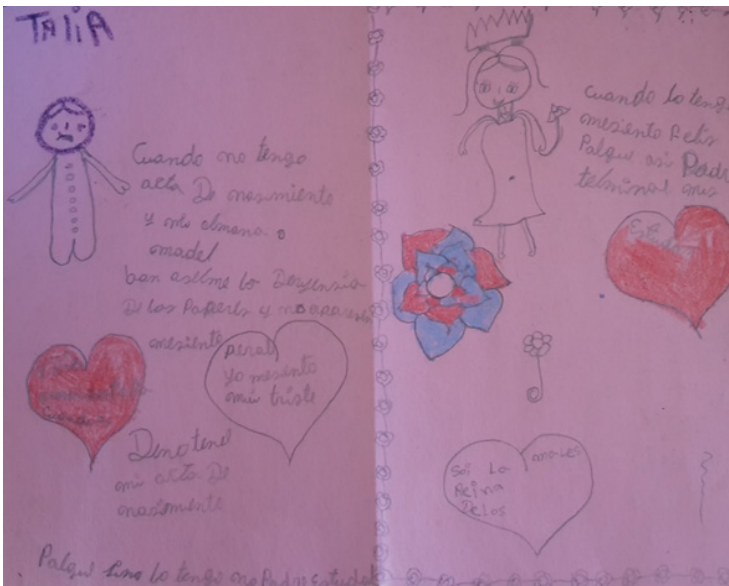
In the DR, the birth declaration process is linked to the mother's documentation status as per the 2004 Migration Law. If the foreign mother remains undocumented, so too will her children. In this way, statelessness has begun to be transmitted matrilineally, even when the child's father is Dominican with a Constitutional right, via *jus sanguinis*, to transmit his citizenship. This means that Elsa's younger sister, two-year-old Katira, whose father is Dominican, may not be able to obtain Dominican citizenship either. Even when Genoveve gets her passport, the hospital paperwork she was issued is a foreigner's certificate, which in practice gets her child into the Foreigner's Book but not the Dominican civil registry.

Without their father's support, Elsa's mother feels a lot of pressure. She worries about her ability to protect her children as she remains undocumented and three of her four children are at risk of statelessness:

Yes, I worry about my children because they don't have their father['s support*] so I think to myself, "I am their mother and I have to bring them up so that one day they can work." I love my children, but look at the direction they are going now... All children need to have their papers. If something happens to your kids out there and you don't have papers, you can't speak for them. If they don't have any paper that says their name, how can their mother go to represent them before the court? You don't have papers and you can't protect them.*

In the meantime, Elsa does her homework, plays with her doggie Milka, and dreams of becoming a teacher one day. She has no idea what the word 'nationality' means, but if granted one wish, says, *"I would wish for a star!"*

Talia - creative contribution



On the left, Talia, aged 9, shows how she feels at the present time: "When I do not have a birth certificate and my sister or mother go to run errands to try to get papers and they do not appear, I feel sorrow. I feel even more sad. If I don't have my birth certificate I will not be able to study."

On the right, she depicts herself as "Queen of Misfortune" alongside the text "When I have it I feel happy because I will be able to finish my schooling."

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The role of Legal Clinics and local communities in securing the right to a nationality in Chile

*Delfina Lawson and Macarena Rodriguez**

The Chilean Constitution guarantees the right to a nationality both through the *jus soli* and *jus sanguini* principles. All persons born within the territory, save for the children of foreign diplomats and ‘in-transit aliens’ (hijos de extranjeros transeúntes) are entitled to Chilean nationality. However, starting in 1995, a flawed administrative interpretation of the meaning of ‘in-transit aliens’ resulted in the denial of nationality rights to thousands of locally-born children whose birth certificates were marked ‘child of in-transit alien’ (CITA). These children consequently found themselves at risk of being stateless. Registration as CITA effectively denies the nationality rights accruing to all children born in Chile and consequently has limited access to various other fundamental rights, including the right to education, to health, and principally, to preserve one’s identity.

As of 2008, legal clinics started filing nationality claims before the Supreme Court to restore Chilean nationality to those who were denied their nationality as a result of this interpretation. However, between 2008 and 2013, only 13 nationality claims were adjudicated. Financial hardship, geographical distance, lack of access to legal counsel and unfamiliarity with the consequences of CITA registration kept court actions to a minimum. Encouragingly, the Supreme Court of Justice consistently ruled that the notion of ‘in-transit aliens’ must be interpreted ‘in its natural, obvious meaning’, as required under Article 20 of the Civil Code.¹ Most dictionaries

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¹ “Terms in the law shall be interpreted to have the natural and obvious meaning given in common usage. When expressly defined otherwise, they shall be interpreted accordingly.”

define the meaning of in-transit as “*not residing in a particular place*”. In this light, foreign tourists or crew members are clearly in-transit, but individuals living in a country and showing intent to remain should not be classed as such.²

These judgments and the advocacy efforts of migrant rights groups eventually led the Interior Ministry’s Department of Immigration and Foreign Residents to concede that the 1995 interpretation was incorrect. The Department publicly agreed that the ‘in-transit alien’ category should be reserved for the children of persons actually in transit at the time of birth, notably foreign tourists and ship or flight crew members. While the new interpretation was a step in the right direction, it did not repeal the 1995 directive, resolve the underlying CITA issue, or make reparations for violating the rights of many thousand improperly registered children, some of whom were now of a legal age, and all of whom remained branded as CITA.

In 2015, the Migration Legal Clinics of two Chilean Universities (Diego Portales University and Alberto Hurtado University), together with the Migrant Jesuit Service, and with the support of Open Society Justice Initiative, implemented a collaborative project to address the situation of these children through research, outreach and strategic litigation activities.

Approximately half of these children at risk of statelessness live in provinces in the north of the country (Tarapacá and Arica Parinacota regions), close to the borders with Peru and Bolivia. Therefore, a team of legal clinic students and professors travelled to these communities and worked for several weeks with local institutions and actors, such as school directors, social workers, municipalities and the people affected by the denial of their nationality. Many of the children (around 80%) belong to indigenous communities of the area (aymaras and quechuas). As a result of this outreach program, 167 children were identified as being at risk of statelessness. The role of local communities proved to be fundamental to this project’s success. Legal Clinics, or paralegal initiatives can facilitate these processes, but the active involvement of communities

² Supreme Court Cases No. 12551/2013, judgment of March 7, 2013; No. 10897/2013, judgment of January 14, 2014; No. 9422/2013, judgment of January 6, 2014; No. 5482/2013, judgment of November 26, 2011; No. 4108/2013, judgment of September 16, 2013; No. 300/2013, judgment of April 29, 2013 and No. 9168/2012, judgment of March 11, 2013.

is essential. Local actors are the ones who know the people best, their needs and the way in which they perceive them, and can communicate and transfer information in ways that no other actor can. The involvement of communities also increases the likelihood of sustainability.

The main commitment made to the people interviewed for this project was that we would pursue every available option to obtain recognition of their or their children's right to Chilean nationality. The options were to apply through administrative channels, or file a constitutional nationality claim with the Supreme Court. Having determined that the administrative route was cumbersome and long-drawn-out (in some cases taking over a year), and taking into consideration the additional goal of seeking redress for all persons affected by this massive violation of rights, the team opted to go to court.

In November 2015, the three institutions presented—for the first time in the country—a collective nationality claim on behalf of the 167 children. With the intervention of the Supreme Court of Justice, and within the framework of a legal conciliation, the government agreed to correct all of their registrations, recognising immediately their Chilean nationality. Nevertheless, and despite this important landmark, many children remain at risk of statelessness in the country, and at present there continue to be many challenges to ensure that the right to nationality of every child born in Chile is protected.

As a further result of this strategic litigation initiative, in the second half of 2016, the government (Department on Migration and the Civil Registry) agreed to implement a joint collaborative project together with the legal clinics, the Jesuit Migrant Service, the National Institute on Human Rights, and the United Nations High Commissioner for Refugees (UNHCR), to ensure that all those children registered as sons or daughters of in transit aliens, are recognised as Chilean nationals. This project was under way at the time of writing, and we expect it to have positive results.

Ultimately, we believe that Chile can become a leading country on the road to ending childhood statelessness. We also believe that the way in which our objective is being pursued, through close collaboration between civil society, local communities and government actors and a combination of strategic litigation, partnership and advocacy, is a strong model which may inspire similar action in other parts of the world as well.

ESTELA VISITS THE LEGAL CLINIC

Delfina Lawson and Macarena Rodriguez*

Estela visited a Legal Clinic in the city of Calama (in the north of Chile) in June 2016. Her sister, Dayana was at risk of statelessness. As a result of the project conducted by the Legal Clinics and National Institute on Human Rights, in September 2016, Dayana was recognised as a Chilean national.

Good morning, could you please tell us your name?

Hi, my name is Estela.

Estela, what brings you here today?

I am here because my ten-year-old sister (Dayana) has had many difficulties in obtaining her Chilean document.

Where was your sister born?

She was born here in Calama.

For how many years had her parents been living here in Chile at the time of her birth?

My mother had been living here since the year 1995 and her father is foreigner.

So that means that your mother had been living here for more than ten years, and nevertheless, your sister was registered as a 'Child of an in transit alien' (CITA)...

Yes.

What problems did your sister face for being registered as a CITA?

On many occasions, we went to the Civil Registry to obtain my sister's

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ID, but they always told us that she could not obtain her documents because she was a CITA.

So that means that the only document your sister has at present –as a ten year old- is a birth certificate?

Yes, she does not have any other identification document.

What other obstacles has your sister faced?

My sister was born at the hospital, but after that that whenever she had to go to the doctor, my mother had to pay for the health services, going to private doctors because she has no Chilean document. She has also faced problems when going to school. Many schools did not accept her because she does not have her Chilean document.

Have you tried going to the government offices for some help?

Yes, but after ten years of trying, we have lost hope.

How does your sister Dayana feel?

She feels different to other children, she does not have the same benefits that her friends have. She has limited access to health, she feels different at school. She does not understand why she does not have a Chilean document when she was born in Chile, and she feels Chilean

Mobile legal services and litigation in Kyrgyzstan

*NGO Ferghana Valley Lawyers Without Borders (Ferghana Lawyers)**

Ferghana Lawyers is an NGO based in Kyrgyzstan, and is the host (coordinator) for the Central Asian Network on Statelessness (CANS).¹ The Kyrgyz Republic is one of the fifteen republics of the former Soviet Union. After the fall of the Soviet Union, the country inherited numerous nationality issues that persist to this day. Tens of thousands of persons failed to exchange their old Soviet passports for new passports issued by the successor states. Thousands of persons still hold those Soviet passports, which have been invalid since 2000, leaving their bearers with no recognised documentation. State succession also resulted in unsettled borders with Kyrgyzstan's Tajik and Uzbek neighbours. To this day, in some areas, it is impossible to tell where one country ends and another begins. Unsettled borders mean unsettled nationality, as those living in disputed areas fall into legal and political gaps.

The closure of international borders with Uzbekistan also contributes to statelessness. Until December 2013, there was complete freedom of movement between Kyrgyzstan and Uzbekistan, with inter-marriage and movement across the border being a common phenomenon. After the sealing of the Kyrgyz-Uzbek border, thousands of people found themselves stuck on either side of the border with expired documents, therefore increasing their risk of statelessness. Poor birth registration is another contributing factor for the persistence of statelessness

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¹ See further on civil society developments in Asia and the Pacific Chapter 4.

in Kyrgyzstan. Several families in rural areas choose to give birth at home, and fail to register their new-borns with the civil registration authorities. Kyrgyz legislation also fails to ensure that every single child born on the territory is registered and receives a birth certificate. No one can tell how many stateless and undocumented persons reside in the country, as there are no reliable statistics.

Ferghana Lawyers has been working on nationality issues since its establishment in 2003. The NGO has vast experience working with refugees and stateless persons in and around Ferghana Valley, one of the troubled regions of Central Asia. Ferghana Lawyers also has a lengthy history of fruitful cooperating with the government and UNHCR, in ongoing efforts to address statelessness. It runs a number of stationary and mobile legal clinics in the region that provide free legal aid to stateless and undocumented persons.

Ferghana Lawyers has created and supervised 30 mobile legal teams that travel to remote areas of the country to provide legal consultations to beneficiaries. Under Kyrgyz legislation, there are two procedures to acquire nationality:

1. Confirmation of citizenship, which is administered by the local Citizenship Determination Commissions, who process the cases of persons with undetermined citizenship within two months.
2. Naturalisation, which is a procedure administered by the Citizenship Commission under the President of Kyrgyzstan, who determines cases of stateless persons within six months.

Since June 2014, Fergana Lawyers has provided legal aid to more than 9,400 stateless persons, of whom about 7,000 have already obtained solutions by way of citizenship determination or acquisition.² The organisation also undertakes strategic litigation, and has contributed to setting important precedents in matters of statelessness.

Additionally, Ferghana Lawyers also works closely with governmental partners in developing proposals for legislative amendments, such as a

² Statistics on file with Fergana Lawyers for the period from January 2014 until October 2016 show that 9,419 stateless persons (SP) have been identified, 9,051 SP's cases have been submitted to authorities, 6,988 cases have been resolved and 2,063 cases are still pending.

proposal for the Creation of a National Stateless Status Determination and Documentation Procedure, that is hoped will reduce and prevent statelessness in the country.

Helping members of the Domari community

The Domari people are an ethnic minority group residing in southern Kyrgyzstan. This group, akin to the Roma of Europe, has been living in Kyrgyzstan for many decades. Many Domaris do not hold any official documents and face problems when applying for passports or citizenship determination. Their freedom of movement is limited, and it is difficult - if not impossible - for them to register marriages or the births of their children. They have no access to legal employment and social welfare. The Domari people face discrimination and are socially marginalised. At the same time, crimes and other exploitative actions that victimise this vulnerable group often remain undocumented and unreported.

The Urmanov family are a typical example of statelessness in the Domari community. The entire family – parents and four children - never had any documents, including birth certificates. In 2010, Ferghana Lawyers took this family's case to court to assist them with obtaining documentation, but also to create a legal precedent of recognising the Domari's legal place in the country. Fergana lawyers spent a lot of time and effort to represent the family's interests before the newly established Citizenship Commission, and to have the Urmanov family legalised on the basis of primary medical documents. The successful pursuit of the case was the first such effort in the whole region. The litigation also impacted on the development of legislative changes in matters of citizenship, since most difficulties encountered by Ferghana Lawyers during the proceedings concerned faulty legislation and faulty administrative procedures. The resolution of the Urmanov case has contributed to fixing and strengthening the national procedures of legalisation and naturalisation of stateless persons in the country. The patience and the courage displayed by the Urmanov family during the lengthy litigation was the main inspiration throughout. The family are now full citizens of Kyrgyzstan.

Legal action to address childhood statelessness in Malaysia

*Development of Human Resources in Rural Areas (DHRRA) Malaysia**

1. Background: Statelessness Among Malaysian Indians in Peninsular Malaysia

Statelessness is a longstanding and multifaceted issue in Malaysia. Malaysians of Tamil Indian descent, the majority of whom can trace their roots to colonial times, are a group that has been particularly affected. In the 19th and early 20th centuries, a large number of Indian Tamils were brought to Malaysia by the British colonial administration as indentured labourers on plantations. The root causes of statelessness within this group include administrative technicalities as well as chronic socioeconomic marginalisation and discrimination. Many Tamil people would have been eligible to claim Malaysian nationality during the transition to independence after 1957, but did not obtain the documentary evidence needed to substantiate their claims. Because the Malaysian government primarily abides by a *jus sanguinis* citizenship regime, the failure to acquire papers such as birth certificates and identity cards during this period has resulted in the perpetuation of statelessness across multiple generations. In addition, poverty, geographical segregation, racial discrimination, and social exclusion in the contemporary era place Tamil Malaysians at a higher risk of not possessing vital documents.

2. Community-Based Legal Aid

DHRRA (Development of Human Resources in Rural Areas) Malaysia has been providing legal assistance to stateless communities in West

* Development of Human Resources in Rural Areas (DHRRA) Malaysia is a non-governmental organisation working towards the social protection of Malaysian communities. DHRRA's mission is to enhance self-awareness and equip living skills among vulnerable communities for them to become self-reliant and empowered to take charge of their lives.

Malaysia since 2006 through an initiative known as *Projek Mendaftar Anak Malaysia*. In 2014, DHRRA significantly scaled up its work on statelessness by carrying out a comprehensive mapping, registration, and community-based legal assistance project across the Peninsular region. Harnessing innovative mobile app technologies and a centralised digital database, mobile registration teams (consisting of 11 volunteers in each district) went from door to door brightly dressed in orange shirts to identify stateless and at risk of statelessness individuals, and guide them through Malaysia's civil registration system.

In 2014, registration began in Kedah and Perak, moving on to Negeri Sembilan and Selangor in 2015. Based on this mapping, a total of 12,341 cases of individuals lacking birth certificates, identity cards, or citizenship were identified.

3. Evidence-Based Advocacy and Awareness-Raising

DHRRA recognises that quality evidence is needed to inform federal level policy discussions on the provision of legal identity to marginalised and hard-to-reach populations. In the past, the number of persons affected has been highly contested with estimates varying from 9,000 to 300,000. Through the mapping and registration initiative, DHRRA aimed to establish more accurate estimates of the size of the stateless population, with a focus on the Indian community in West Malaysia. The customised database not only facilitates the work of paralegals and case workers to resolve people's documentation issues with the National Registration Department (NRD), but also functions as an important data-generating tool. The database, for example, provides baseline data on births, deaths, marriages and related matters, and can be disaggregated by key demographic characteristics such as age, gender, ethnicity, educational attainment, employment status, nationality status, nationality status of parents, documentation of parents, and residence/location.

4. Strategic Litigation

Strategic litigation is an important pillar of DHRRA's initiative. There are a number of provisions within the Malaysian Federal Constitution

that, if implemented fully and consistently, could result in the resolution of many cases of statelessness in West Malaysia. Therefore, legal action with the aim to set legal precedent and reform policy is one way to reduce and eventually eradicate statelessness.

Cases that cannot be resolved at the NRD level by community-based paralegals are taken to court by pro-bono lawyers. DHRRA has so far identified 260 of such cases, which mainly fall under four categories:

- 1) Adoption: Malaysian parents who adopt children either formally or informally, are unable to pass their citizenship on to them. DHRRA maintains that adopted children should be entitled to inherit the citizenship of their adoptive parents under Article 15 of the Federal Constitution. In cases concerning adopted children, DHRRA's pro-bono lawyers first aim to formalise the adoption process, and secondly to argue in favour of the right of the adopted child to inherit the citizenship of their adoptive parents.
- 2) Children born out of wedlock: According to Malaysian nationality law, children who are born in Malaysian territory but out of wedlock inherit citizenship from their mother only. DHRRA has encountered many situations in which a child is born to a Malaysian man and non-Malaysian woman who can no longer be located (due to, for example, having returned to their country of origin), rendering the child with undetermined nationality. DHRRA's position is that in these circumstances, it is in the best interest of the child to inherit Malaysian citizenship through his/her father.
- 3) Safeguard against statelessness: The Constitution states that a child born in Malaysia who is not the citizen of another country and who cannot register to acquire the citizenship of another country within 12 months is a Malaysian citizen. However, while this provision theoretically provides a powerful safeguard against statelessness, it has not been implemented in practice by the Malaysian government. Cases filed on behalf of foundling children aim to test this provision.
- 4) MyPR/MyKas Holders: Article 14 of the Federal Constitution states that every person born on or before Malaysia Day (independence day) is a citizen by operation of law. People who meet these qualifications, but who are unable to produce the documentary evidence to prove their presence in the Federation prior to 1957, are

often given temporary or permanent residence status. Due to their inability to satisfy the administrative requirements set out by the NRD, they face rejection despite the fact that most have lived their entire lives in Malaysia. DHRRA advocates for a reform of NRD's administrative procedures in the interest of establishing a more flexible approach to applying the nationality law. Another common scenario that falls under this category concerns foundlings who are raised in welfare homes. Because their parents cannot be located, they are given temporary residence status (MyKas), renewable every five years.

5. Impact made

Using a community-based paralegal approach, DHRRA has been able to empower community members to help one another acquire or confirm their nationality. Community-based paralegals help link local society and government institutions in flexible, accessible, and cost-effective ways. As of 1 November 2016, DHRRA Malaysia has registered a total of 12,350 people who do not have any documentation that establishes their Malaysian (or foreign) citizenship. The Community Paralegals have assisted 9,247 people to make applications for nationality documentation to the NRD. So far, 1,461 of these applications have been successful.

Through DHRRA Malaysia's evidence-based advocacy and awareness campaigns, we have encouraged the Government of Malaysia to be more open to addressing statelessness. Progressive developments include shortening the processing time of cases referred by DHRRA Malaysia and expediting the search in NRD state offices. Apart from that, the Special Implementation Task Force for Indian Committee was established by the Prime Minister's Office in coordination with the Ministry of Home Affairs to assist and engage in dialogue to address documentation issues and statelessness.

Often, stateless youth and children are asked to discontinue their studies or to pay a much higher fee/levy (charges for foreigners) to continue their education. We have assisted over one hundred stateless youth and children whose applications are pending before the NRD to continue their education and skill/vocational training with relevant government institutes.

6. Challenges/reflections and lessons learned

DHRRA has confronted numerous challenges in its work. Stateless populations are not concentrated in one place, but are geographically dispersed across both urban and rural areas. Most communities in Kedah, for example, live in hard-to-reach palm oil plantation sites and cannot afford to travel into town. Volunteers have had to brave torrential rainstorms and other extreme weather conditions to reach and map these populations.

Furthermore, volunteer teams have had to work hard to gradually gain the trust of the communities they work with. Some people have endured a lifetime of legal invisibility, instilling within them a sense of scepticism and hopelessness towards the prospect of undergoing the registration process.

Lastly, the administrative procedures laid out by NRD are costly, complicated and lengthy, and applicants are held to high standards of proof in order to obtain vital documents. For example, we have faced difficulties retrieving proof of birth from hospitals because the date of birth provided by applicants does not line up with their hospital records. People who were born on plantations are especially at risk of not being able to produce birth records due to the likelihood that the clinics in which they were born have since been closed down. Although there is a provision for a declaration to be submitted in such instances, it is not considered as conclusive evidence. Furthermore, family members may not be willing to cooperate in providing necessary documents proving their biological relation to the applicant, or may be estranged or deceased.

Even when applications have been fully assembled, the time that applicants must wait for a decision is lengthy. The NRD's initial procedure of looking through the database for duplicates before accepting an application alone can take four to eight weeks. The standard waiting period for a decision by the NRD is two to three years.

Despite these challenges, our evidence based work with statistical output has worked to our advantage, providing us with the necessary platform to discuss opportunities to strengthen the administrative framework and improve operational policy to resolve cases.

The struggle for documentation: A family story

*Development of Human Resources in Rural Areas (DHRRA) Malaysia**

Mageswari (19), Manisha (14), and Sanjay (11) are siblings who, despite having been born in Malaysia, do not possess birth certificates and were at the risk of becoming stateless. Their mother, Saraswati d/o Murugesu (49) is illiterate and claims to have been unaware of birth registration procedures. Her husband has left the family.

When DHRRA Malaysia spoke to Saraswati recently, she said with remorse:

I only went to primary school for three years, and I am quite illiterate. I do not know much about the government requirements, and even if I did, I would not be able to fill out the relevant forms in English or Bahasa Malaysia [the national language].

Mageswari, the oldest child, studied until the age of 14 before dropping out of school to help her mother support the family financially. As she had no proper education or documentation, most employers were reluctant to give her a job. She says:

I was underage and no one was willing to offer me any job. but I had to work, because I really wanted to take some of the burden off my mother's shoulders. I really want to study. Many nights, I cried alone thinking of the future that I would not be able to achieve because I left school. I really wish there was some other way, but without a birth certificate, I cannot even dream of a future. I was completely in the dark, but I never quit praying or hoping, because I want my siblings to have a bright future.

* Development of Human Resources in Rural Areas (DHRRA) Malaysia is a non-governmental organisation working towards the social protection of Malaysian communities. DHRRA's mission is to enhance self-awareness and equip living skills among vulnerable communities for them to become self-reliant and empowered to take charge of their lives.

Conversely, Manisha, the second sibling, was lucky in that her school allowed her to sit for her UPSR (public exam at the age of 12), even though she did not have a birth certificate. But when she began Form 2 at the age of 14, there was uncertainty as to whether she would be able to sit for her PT3 (public exam at the age of 15). She says:

I felt like an alien. Friends would make fun of me because I did not have a birth certificate. I often asked my mother about this but all she can do is cry helplessly. So, I stopped asking. I was lucky enough to have been allowed to sit for UPSR without a birth certificate. But once I turned 12, I could not apply for an identity card. I became the target of bullying in school. I often feel so helpless. There seems to be no future at all for myself and my siblings.

As for Sanjay, he had to skip Standard 1 at the age of seven due to his undocumented status. Luckily, his school allowed him to enrol in Standard 2 the following year. Sanjay is now in Standard 5 and has received praise from his teachers for his good academic performance. His expression brightens when he talks about school:

My teachers say that I am very clever, but they are concerned that I may not be able to go far because I do not have a birth certificate. I don't understand what they are talking about. I asked my mother but she hasn't given me an answer. I've asked my sisters but they only tell me to never lose hope.



Sanjay with his mother Saraswati as he receives proof of nationality
© DHRRA Malaysia

Mageswari, Manisha and Sanjay are just three of the many Malaysians of Indian descent whose childhoods have been compromised due to their legal status. Luckily, their story has a happy resolution: Saraswati's concern for her children were put to rest after DHRRA Malaysia succeeded in assisting her in securing birth certificates for them. She rejoiced, hugging her children: *"I have never imagined that this could happen. My prayers were finally answered. I am speechless"*.

Today, Manisha, newly empowered with her papers, is looking forward to sitting for her PT3, while Sanjay is hoping to get good results in his UPSR next year. He says, *“I want to study hard, and then start working to take good care of mum”*.

As for Mageswari, she is glad that her siblings do not need to drop out of school. While she has no plans to go back to school, her life has changed for the better after having secured her Malaysian legal identity. Now, she qualifies for the Employees Provident Fund (EPF) and Social Security Protection (SOCSO) in her workplace.

CHAPTER 13: MOBILISING TO ADDRESS CHILDHOOD STATELESSNESS



Foundlings' artwork on the theme of nationality and statelessness
© UNHCR Côte d'Ivoire / SOS Villages Aboisso

In this chapter:

Mobilising to address childhood statelessness: The experience of the European Network on Statelessness through its #StatelessKids campaign	Chris Nash
Schools outreach in Poland	Katarzyna Przybyslawska
Excerpts from the ENS Schools Outreach Toolkit	
Campaigning for gender equality in nationality laws	Catherine Harrington
Mobilising to address childhood statelessness in Nepal	Subin Mulmi
Interview with a child in Nepal who is stateless due to gender discrimination in the nationality law	
The mobilisation of Bidoon youth	Marie Brokstadt Lund-Johansen
Being accountable to stateless children and youth: The 2016 UNHCR NGO Consultations session on statelessness	Amal de Chickera
Introducing statelessness to Model United Nations conferences	Aleksandra Semeriak Gavrilienok
Researching childhood statelessness	Charlie Rumsby
Street theatre to address statelessness in the Dominican Republic	Laura Quintana Soms

INTRODUCTION

This final chapter looks at how we can mobilise more effectively to address childhood statelessness. The previous chapters in this report paint a complex picture of the challenges that stateless children face (as a result of discrimination, forced migration, the denial of socio-economic rights and exclusion); and the various frameworks through which statelessness and its negative impacts can be raised and addressed (such as international human rights mechanisms, the courts, legal safeguards against statelessness and the sustainable development goals). Addressing these challenges and tapping into these different frameworks requires the sustained engagement of many actors across different fields and at all levels. Furthermore, creating the political climate for change requires the engagement of political leaders and the general public. This level of change cannot be achieved without effectively mobilising different groups - the public, affected persons, political leaders and professional actors to take statelessness up as an issue worth fighting to eradicate.

And so, the issue of mobilisation is an extremely important one for the statelessness field. It is an area in which, for a relatively young field, we have made a lot of progress and we can collectively continue to learn from other more established movements as well. In this context, it is important to note that mobilisation can be a particularly challenging issue for statelessness actors, as the subjects of our focus are disenfranchised by definition. The disenfranchisement of the stateless can make them a difficult community to mobilise – as the cost of publicly claiming rights can be higher for those whose legal standing is tenuous. Similarly, their disenfranchisement can mean that it is more difficult to find an ‘advocacy target’ that will seriously consider their cause.

As this chapter shows, in a short time, statelessness actors have developed many ‘good practices’ and creative mobilisation techniques, some of which are having a strong impact. Those who have gone down the path of mobilisation, have understood that the statelessness field cannot necessarily blindly copy other movements – the LGBTI or race equality movements for example, that have effectively mobilised public action and support around the world - but have to draw on the

experiences of others, to find creative, effective and sustainable ways to mobilise around the unique issue of statelessness. Mobilising to address statelessness is a ‘work in progress’, and this chapter presents a range of experiences, reflections and perspectives, which provide a glimpse into what has been done and the challenges that lie ahead.

This chapter begins with the reflections of those who have campaigned and mobilised to address childhood statelessness around the world. The first essay is by Chris Nash, the director of the European Network on Statelessness, on the Network’s #StatelessKids campaign, which has well and truly put the issue of childhood statelessness on the European agenda. The campaign’s strategies and successes provide a lot of food for thought, for actors around the world who are considering campaigning on statelessness at regional or national levels. One of the #Stateless Kids Campaign strategies – schools outreach – is the focus of the second short essay by Katarzyna Przybyslawska, who implemented such a programme in Poland. A couple of example activities from the ENS Schools Outreach Toolkit have also been included. This chapter then looks at another campaign, the Global Campaign on Equal Nationality Rights. Campaign manager Catherine Harrington shows how the campaign has drawn on the momentum and experience of the women’s rights movement at large, to promote gender equal nationality rights around the world. In the next essay, Subin Mulmi guides us through the cat and mouse game that campaigners for equal nationality rights in Nepal played with law makers, as they garnered massive public support to challenge gender discriminatory nationality provisions in the draft constitution. This essay is followed by an interview with a stateless child from Nepal, herself a member of the affected persons network campaigning for change.

The second half of this chapter focuses on other strategies and factors to bear in mind when mobilising around the issue of childhood statelessness. Marie Brokstad Lund-Johansen’s short essay looks at the mobilisation of Bidoon youth in Kuwait, and argues that developments in technology and greater access to information have spurred the younger generation to take a different, more combative approach to advocating their cause. The next piece by ISI Co-Director Amal de Chickera reflects on an exercise of accountability towards stateless children and youth at the 2016 UNHCR NGO Consultations, arguing that accountability to affected persons is of central importance to the notion of mobilisation on their behalf. This is followed by a short

essay by Aleksandra Semeriak Gavrilienok, which reflects on how statelessness can be introduced as an 'ideal' topic for debate at Model UN Conferences – a useful strategy to strengthen awareness, interest and ultimately mobilisation among young students. Charlie Rumsby's essay which follows, speaks to the importance of and challenges related to researching statelessness. She guides us through methodologies that can be adopted, particularly when interviewing children. Her essay demonstrates how strong and sensitive research can serve as the basis for subsequent and effective mobilisation for change. This chapter ends with an overview by Laura Quintana Soms of an innovative mobilisation technique of using theatre to address social prejudice and challenge statelessness in the Dominican Republic.

Mobilising to address childhood statelessness: The experience of the European Network on Statelessness through its #StatelessKids campaign

*Chris Nash**

1. Introduction

It is important to frame recent success achieved in mobilising to address childhood statelessness in Europe, within the wider development of the European Network on Statelessness (ENS)¹ and related dynamics which have helped propel the ‘issue emergence’ of statelessness in recent years. These developments also need to be understood as part of a larger global trend, further galvanised by the UNHCR-led #IBelong campaign to eradicate statelessness globally within a decade,² which commenced with an initial two-year focus on children and youth. UNHCR and UNICEF recently also launched a global coalition on every child’s right to a nationality,³ and there have been various initiatives in other regions to address childhood statelessness.

2. The development of the European Network on Statelessness

The European Network on Statelessness (ENS) is a young and vibrant civil society alliance of NGOs, academics and experts committed to addressing statelessness in Europe. ENS was founded to fill a historical gap by acting as a coordinating body and expert resource for organisations working to end statelessness in Europe. At the heart of our strategy has been an understanding of the need to mainstream

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¹ See www.statelessness.eu

² See <http://www.unhcr.org/ibelong/>

³ See <http://www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/>

and raise awareness about statelessness and nationality issues, to build the capacity of civil society, and to act as an effective catalyst for change. The need for an umbrella organisation dedicated to working on statelessness has been vindicated by the fact that, since our launch in June 2012, ENS has attracted over 100 members in 39 European countries.⁴

3. Planning the ENS #StatelessKids campaign

From its early days, ENS was conscious that new cases of statelessness continued to arise within Europe's borders. This was due to a number of factors including because several European countries were failing to ensure that all children could realise their right to nationality. ENS conducted some initial scoping research – published in April 2014 in its report 'Preventing Childhood Statelessness in Europe: Issues, Gaps and Good Practices' which provided an initial snapshot of how Europe was performing with respect to relevant standards in this regard.⁵ Subsequently, in April 2014, ENS decided that its second region-wide campaign would centre on childhood statelessness, and be launched on International Children's Day, 20 November 2014.⁶

⁴ For more information see European Network on Statelessness, *2014/15 Annual Report Working Together to Tackle Statelessness in Europe* (2016), available at http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_Annual_Report_2014-15.pdf

⁵ European Network on Statelessness (ENS), 'Preventing Childhood Statelessness in Europe: Issues, Gaps and Good Practices' (2014), available at <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/Preventing%20childhood%20statelessness%20in%20Europe%20-%20issues%2C%20gaps%20and%20good%20practices.pdf>

⁶ By way of background, ENS's first pan-European campaign to improve the protection of stateless persons in Europe was launched in October 2013. Timed to coincide with the 60th anniversary of the 1954 Statelessness Convention, this campaign brought together a broad spectrum of actors and aimed to put a human face on the statelessness issue in order to encourage more European states to accede to the 1954 Statelessness Convention and/or to introduce dedicated statelessness determination procedures. The campaign included an online petition (and short animation) which attracted over 7,000 signatures and culminated in a concerted day of action against statelessness across Europe on 14 October 2014 – more information is available here <http://www.statelessness.eu/act-now-on-statelessness>

3.1 *Why focus on childhood statelessness - the strengths of a child-focused campaign*

The following considerations helped inform the decision to focus the campaign on ending childhood statelessness:

- The benefit of being able to pursue a truly Council of Europe wide campaign because the issue is relevant in Western Europe (incomplete or poorly implemented legislative safeguards), Southern and Eastern Europe (birth registration issues), as well as countries with large, protracted populations (intergenerational statelessness).
- The potential for ENS to engage a wider range of stakeholders, including some which do not traditionally work on statelessness but have an interest in children's rights.
- The greater scope to interest the media and engage people through social media.
- The opportunity to also engage otherwise 'unlikely' partners, e.g. a celebrity goodwill ambassador, children's authors, schools, and others.
- The chance to make good use of existing research, including the ENS paper on preventing childhood statelessness in Europe, the EUDO database of nationality laws in Europe,⁷ and work in the Western Balkans on problems accessing birth registration for children.⁸



#StatelessKids campaign logo

© European Network on Statelessness

3.2 *Scope of the campaign and key objectives*

At an early stage of planning it was decided that the campaign would have a narrow scope, focusing on preventing childhood statelessness in Europe. Other dimensions of the problem, such as protection of

⁷ European Union Democracy Observatory on Citizenship <http://eudo-citizenship.eu/databases>

⁸ S. Marsal, 'From Commitments to Achievements? The Zagreb Declaration on Access to Civil Documentation and Registration in South Eastern Europe' (ENS Blog, 2013), available at <http://www.statelessness.eu/blog/commitments-achievements-zagreb-declaration-access-civil-documentation-and-registration-south>

stateless children, could be highlighted, but in support of rather than as part of the campaign's key objective. It was therefore agreed that the core campaign message should be simple and easy to communicate: namely that none of Europe's children should be stateless. This approach left open the option of widening the scope if the campaign were extended beyond 2014-2016.

We had the following specific objectives:

1. Raise awareness of the issue of childhood statelessness in Europe and measures to address it;
2. Discuss the importance of children's right to a nationality for the work of child rights actors, build capacity of the child rights community to engage on the issue and develop partnerships;
3. Study the content of and extent to which national legislative safeguards are implemented;
4. Study the legislative and practical barriers to accessing nationality for children born to stateless parents in countries with large stateless populations;
5. Identify situations in which lack of birth registration is putting children at risk of statelessness;
6. Promote accessions to the 1961 Convention on the Reduction of Statelessness and/or the 1997 European Convention on Nationality;
7. Promote the introduction/improvement and effective implementation of safeguards within nationality laws;
8. Promote facilitated access to nationality for children born to stateless parents in countries with large, protracted situations of statelessness;
9. Study the obstacles that prevent effective birth registration among populations at risk of statelessness, with a focus on identifying good practices to ensure access to birth registration.

3.3 Engaging partners and fostering a strong campaign alliance

A key to the success of the campaign would be ENS's ability to engage not only its members but also other partners as part of a broad and growing alliance. One obvious and key partner was UNHCR given the #IBelong campaign's priority focus on youth and children, and action two of its ten-year plan to eradicate statelessness. Dedicated discussions ensued, including with UNHCR's Europe's Bureau, which resulted in support for various joint initiatives. Another key partnership forged was with the Institute on Statelessness and Inclusion, which as an expert-partner for the campaign, helped supervise and coordinate pan-European research.

Other key partners included the European Union (particularly the European Parliament) and Council of Europe (particularly the Parliamentary Assembly of the Council of Europe (PACE) Committee on Migration, Refugees and Displaced Persons).⁹ We also strengthened collaboration with UNICEF and the OSCE High Commissioner of National Minorities, national ombudspersons, the European Network of Ombudspersons for Children (ENOC) and the Children's Rights Ombudspersons Network in South and Eastern Europe (CRONSEE). Given the importance of engaging youth, key partners identified included CoE Youth organisations (e.g. European Youth Forum), the European Youth Parliament, Model United Nations conferences and schools. Another anticipated key collaboration was with academia, for example through the EUDO-Citizenship Observatory, the European Network of Masters in Children's Rights,¹⁰ Children's Rights Erasmus Academic Network¹¹ and various University law clinics. Finally, a key objective of the campaign was to engage regional networks and large international NGOs specialising on child rights issues.

4. Implementing the ENS #StatelessKids Campaign

The campaign was designed to develop organically, with flexibility to react to and explore new opportunities. However, in broad terms it was anticipated that the first year should focus more on research and building a stronger evidence base, whereas the second year should focus more strongly on awareness-raising, including a more visible public-facing campaign phase.

4.1 Year one of the campaign – Research, raising awareness and building alliances

4.1.1 Research

In December 2014 ENS related a call to its members (and more widely) inviting applications to conduct country studies on childhood statelessness. Each study would be undertaken on the basis of

⁹ See for example PACE provisional report, The Need to eradicate statelessness of children (2015), available at <http://website-pace.net/documents/19863/2057396/20160126-ChildStatelessness-EN.pdf/c14852c7-146d-455e-a25e-8d27a0a100cd>

¹⁰ See <http://www.enmcr.net/>

¹¹ See <http://www.crean-home.net/>

a common methodology and template. This required detailed analysis of law and policy; the identification and analysis of relevant jurisprudence; and interviews with implementing authorities, lawyers, other service providers and relevant organisations. In addition, researchers were asked to produce case studies of stateless (or formerly stateless) children in the country and to discuss the cause of the child's statelessness, its impact and measures taken to address their situation.

Eight country studies were published (Albania, Macedonia, Italy, Poland, Latvia, Estonia, Slovenia and Romania).¹² This information/research, combined with analysis of nationality laws in 45 Council of Europe member states, also informed a final synthesis/comparative report titled 'No Child Should be Stateless',¹³ which was intended as a platform for continuing advocacy and campaigning. One aspect of the research process that worked particularly well was the opportunity it provided to utilise research funds to resource and capacitate ENS members to engage more broadly on the issue, and to support advocacy during and after research had been completed. Commissioning research by members unlocked their additional buy-in and in-kind support during the remainder of the campaign.

4.1.2 Raising awareness

In parallel to the research, we developed accessible tools to engage a wider constituency. With limited resources available, this took three main forms:

- i) Design and dissemination of two fact sheets on children's right to nationality.¹⁴
- ii) Social media engagement to raise awareness.
- iii) Preparation and piloting of outreach kits for schools.

¹² See <http://www.statelessness.eu/resources/ens-working-papers>

¹³ European Network on Statelessness (ENS), *No Child Should be Stateless* (2015), available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf

¹⁴ European Network on Statelessness (ENS), 'How do children become stateless?' (2015), available at <http://www.statelessness.eu/sites/www.statelessness.eu/files/Factsheet%201%20-%20how%20do%20children%20become%20stateless.pdf> and European Network on Statelessness (ENS), 'Statelessness and Rights' (2015), available at <http://www.statelessness.eu/sites/www.statelessness.eu/files/Factsheet%202%20-%20statelessness%20and%20rights.pdf>

Recognising the wider lack of awareness about the causes and consequences of childhood statelessness, we decided to design accessible fact sheets to help inform those new to the issue, support planned outreach work in schools and a dedicated social media strategy.

Our starting point was that most children – and adults – take their nationality for granted: they do not think about how or why they got it, what it allows them to do or what would be different if they had another nationality or no nationality at all. Few even know that it is possible to be *stateless*. This was a key rationale for designing and rolling out a school's outreach pilot (initially in Poland and Macedonia).¹⁵ This involved a short series of classes at which secondary school students were required to reflect on the meaning of their own nationality and learn about the phenomenon of statelessness. The activities were intended to prompt students to think about how divisions are drawn between 'us' and 'them', and how these divisions can serve to create statelessness. By learning about stateless persons as a vulnerable group in society, students gained a greater awareness of their own rights, helping them to be better informed citizens. After looking at how statelessness can affect children in Europe, students were asked to apply their new knowledge by contributing ideas to ENS's campaign.

One such outlet related to the campaign's social media strategy, and the potential provided by the schools outreach component to bring the issue of childhood statelessness 'out of the classroom' for school children across Europe, and to engage them as campaigners on this issue. Moreover, it was envisaged that Facebook pages linking up students from two or more schools in different European countries could be an exciting way for young people to get involved with the campaign.

Evaluation forms completed by participating students certainly suggested that the classes had developed a useful social change perspective, with most students declaring the experience as eye-opening. They admitted that they learned about things (and people) they would otherwise blissfully ignore.

¹⁵ See also *Schools outreach in Poland* by Katarzyna Przybyslawska in this Chapter.

Social media was also identified as an important vehicle to expand the reach of our messaging to new audiences. Over recent years, social media has brought about a change in how supporters view campaigns and campaigning organisations; it is not hyperbolic to say that it has revolutionised the campaigning landscape. The informality of the medium, coupled with its potential to facilitate interaction and dialogue, makes for a much more exciting communications environment for NGOs. Communications for campaigns are moving from a traditional, top-down model, which sees supporters as passive recipients of messages and information, to a more dynamic model that conceptualises communications as a peer-peer dialogue.

4.1.3 Engaging child rights actors and other key stakeholders

Underpinning broader awareness raising work, specific attention was paid to engage child rights actors, as well as the process of establishing advocacy relationships with other key stakeholders.

The first phase of country research was presented at a pan European conference¹⁶ in Budapest in June 2015 which was attended by 100 participants from 30 European countries.¹⁷ ENS and other experts presenting their research, and a conference action statement, which would guide ongoing collective efforts to eradicate childhood statelessness in Europe was issued.¹⁸

Conference participants recognised the importance of identifying any misconceptions, myths or fears surrounding the issue and conducting

¹⁶ European Network on Statelessness (ENS), 'Conference "None of Europe's Children Should be Stateless"' (2015), available at <http://www.statelessness.eu/capacity-building/training/conference-none-europes-children-should-be-stateless>

¹⁷ Participants included lawyers, NGOs, child rights actors, academics, UNHCR, UNICEF, journalists, ombudspersons and representatives from the European Parliament and the Committee on the Rights of the Child. See http://www.statelessness.eu/sites/www.statelessness.eu/files/Budapest%20Participants%20List_final.pdf

¹⁸ European Network on Statelessness (ENS), '"None of Europe's Children should be Stateless" action statement' (2015), available at http://www.statelessness.eu/sites/www.statelessness.eu/files/Conference%20Action%20Statement_long%20version_final.pdf

research to counter them. Also identified was the importance of designing and implementing research projects to enable the generation of different types and format of product, for different audiences and purposes, including integrating storytelling or multimedia components, as appropriate.

Another theme highlighted was the inadequacy of existing data on children's access to nationality and birth registration and the scale of childhood statelessness. It was noted that government bodies should be encouraged to review and improve their disaggregated data collection, including through national censuses and municipal/population registries. As a solution, it was recognised that this could also be encouraged through human rights mechanisms (including the CRC) and by working with UNICEF and other child rights actors to promote the systematic generation of reliable data.

The action statement, which was endorsed at the conference, proved a useful way to communicate these and other key findings and build consensus among participants (and a wider constituency). The format of the conference, combining a diverse mix of stakeholders (government and civil society) with a series of inter-linked and free-flowing panel discussions helped facilitate a lively and interactive discussion. Finally, the strategy of combining the presentation of research by ENS members with a wider call for proposals enabled the conference to encompass a broad perspective. Many participants commented that the conference helped 'to put the issue of childhood statelessness on the map'.

Timed to coincide with the regional conference in Budapest, a training workshop was held, as part of the efforts to engage child rights actors. This helped increase capacity of participants but it proved challenging to attract as many child rights actors as hoped. However, the seeds of effective collaboration were successfully forged with conference speakers, including the Chair of ENOC, a member of the Committee on the Rights of the Child and a representative of UNICEF.

Later in 2015, it was decided to organise two separate launch events for the report 'No Child Should be Stateless'. The first was jointly organised with the UNHCR Representation in Strasbourg on 21 September

2015.¹⁹ It was attended by around 50 participants, including PACE members, other CoE representatives, national representations, NGOs and academics. A keynote address was given by CoE Commissioner for Human Rights, Nils Muiznieks, who welcomed and endorsed the report. A presentation was also made by Stefano di Manlio, the rapporteur for a PACE report on children's right to a nationality.²⁰

A second launch event, held in the European Parliament in Brussels on 01 December 2015 and hosted by Jean Lambert MEP, sought to promote the issue of statelessness more widely among EU Institutions.²¹ The event was jointly organised with the European Parliament's Inter Group on Children Rights, thereby enabling the childhood statelessness issue to be mainstreamed among the wider portfolio of child rights issues championed by the Group and its member MEPs.²²

4.2 Year 2 of the campaign – Advocacy focus and public-facing campaign phase

The second year focussed on public-facing campaign work aimed at engaging a wider constituency, coupled with targeted action to achieve concrete change in selected priority countries.

4.2.1 Developing key messages and a call for action on European leaders to address the issue

The overall lack of knowledge on the issue among the general public prompted the idea of designing a pan-European petition calling on European leaders to end childhood statelessness. The petition involved a series of revelations or communication exercises to take the

¹⁹ See <http://www.statelessness.eu/news-events/news/announcing-our-next-campaign-event-launch-our-report-no-child-should-be-stateless>. The report launch was featured in an article by E. Batha for Thomson Reuters. See E. Batha, 'European refugee crisis risks creating a generation of stateless children' (20 September 2015), available at <http://news.trust.org/item/20150920230231-jdujs/> and was picked up by various other news outlets across Europe,

²⁰ Parliamentary Assembly of the Council of Europe (PACE), 'The need to eradicate statelessness of children' (2015), available at <http://website-pace.net/documents/19863/2057396/20160126-ChildStatelessness-EN.pdf/c14852c7-146d-455e-a25e-8d27a0a100cd>

²¹ See <http://www.statelessness.eu/news-events/news/brussels-launch-ens-report-no-child-should-be-stateless>

²² For a list of members see http://www.europarl.europa.eu/pdf/intergroupes/VIII_LEG_04_Childrens_rights.pdf

‘audience’ from a state of ignorance, through interest to concern. The petition (which is now closed) was hosted on the WeMove platform²³ and was translated into 11 languages. The petition text explained some of the most common problems associated with childhood statelessness, while calling all European states to:

- Accede to the UN 1954 and 1961 Statelessness Conventions;
- Address gaps in their laws and practice to implement comprehensive safeguards to identify and grant nationality to children born on their territory who would otherwise be stateless; and
- Ensure access to free and universal birth registration in order to prevent statelessness.

The petition was further supported by a range of online materials, primarily designed around case studies highlighting the impact of statelessness on the lives of individual children, such as access to healthcare, education and birth registration. It was launched in June 2016 and was signed by over 20,000 individuals within the first 30 days. This first collection of signatures was delivered to the Chair of the European Parliament Intergroup on Children’s Rights, Ms Corraza Bildt MEP, at an event in the European Parliament in July 2016.²⁴

As part of the public campaign drive, a short animation piece²⁵ was produced explaining what it is like to be stateless and what impact this has on children. The video was narrated by an eight-year-old girl using direct quotes from stateless children collected by ENS’ national members. The video was published on Facebook and YouTube in over 10 different languages, and consistently used throughout the campaign by ENS members, partners and the ENS secretariat.

The petition was further underpinned by a dedicated micro-site²⁶ providing a space to keep supporters up-to-date on campaign developments as well as to highlight the case studies and host other

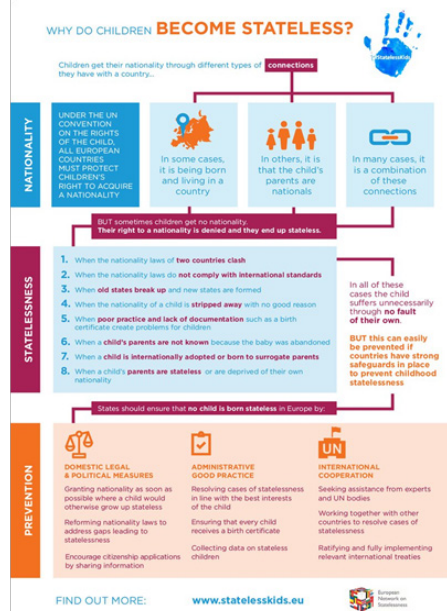
²³ See ‘Help us end childhood statelessness in Europe’, <https://you.wemove.eu/campaigns/end-childhood-statelessness-in-europe>

²⁴ See ‘ENS organises first ever Youth Congress on Statelessness’ <http://www.statelessness.eu/news-events/news/ens-organises-first-ever-youth-congress-statelessness>

²⁵ See ‘StatelessKids – No child should be stateless’, <https://www.youtube.com/watch?v=VvUMZanVToA>

²⁶ See ‘No child should be Stateless’, <http://statelesskids.eu>

campaign materials. In the final stages of the campaign, ENS designed a visually engaging and easy to comprehend set of infographics explaining the main concepts behind statelessness.



Infographics on childhood statelessness
© European Network on Statelessness

4.2.2 Engaging youth with the campaign and staging the first ever Youth Congress on Statelessness

In order to broaden the group of volunteer supporters working at national level, ENS designed a programme to engage young European activists and to equip them with skills necessary to become Youth Ambassadors supporting the #StatelessKids campaign.

The first ever Youth Congress on statelessness was held in Brussels between 11 and 13 July. Supported by the Maastricht University School of Law and UNHCR's Europe Bureau, the event provided an opportunity for 35 selected young delegates to hear about the effects of statelessness and participate in training, planning sessions and direct advocacy activities. The event gave the Youth Ambassadors an opportunity to hear from leading experts and academics, UN agencies and Members of the European Parliament on the issue, as well as

advocacy and communications experts on how to advocate for change. The congress proved an exceptionally dynamic forum²⁷ to inspire engagement, as evident from feedback by individuals who attended.²⁸ This included the design of individual campaign plans in the 12 countries represented.



The Youth Ambassadors at the first Youth Congress on Statelessness

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Individuals were selected from a pool of over 200 applicants, giving special priority to those living and working in countries of particular interest. They were paired with ENS national members and were given assistance to develop national level advocacy plans. Following the congress, the youth ambassadors continued to play an important voluntary role in supporting the ongoing work and running active ENS Youth Chapters in their countries. As an

engagement exercise prior to the Youth Congress, ENS also attended and spoke at a session on statelessness at a European Youth Parliament conference in Leipzig.²⁹

4.2.3 Partnering youth ambassadors and ENS members in a coordinated series of national-level campaign actions

Based on the national advocacy plans submitted, different countries developed campaign actions to secure progress towards the main

²⁷ See <https://storify.com/ENStatelessness/statelesskids-youth-congress>

²⁸ See D. Brennan, 'Young ambassadors from across Europe take on the challenge of tackling childhood statelessness' (ENS Blog, 2016) available at <http://www.statelessness.eu/blog/young-ambassadors-across-europe-take-challenge-tackling-childhood-statelessness>

²⁹ See A. Semeriak, 'Taking Inspiration from Europe's youth committed to ending Statelessness' (ENS Blog, 2015) available at <http://www.statelessness.eu/blog/taking-inspiration-europes-youth-committed-ending-statelessness>

#StatelessKids campaign objectives, through a combination of awareness-raising activities, online advocacy and political lobbying, culminating in a pan-European coordinated day of action around 20 November 2016 (international Children's Day). National level work increased the profile of statelessness more generally, encouraged greater engagement among stakeholders and children's rights groups and demonstrated the impact that can be achieved through a dedicated day of action.

Some of the activities include:

- Collection and presentation of short stories illustrating the problems faced by stateless children
- Preparation of short briefings and materials to support advocacy and campaigning
- Production of multimedia pieces highlighting the issue
- Organising national stakeholder roundtables
- Press work to mark the dedicated day of action on/around 20 November 2016
- Schools outreach work and targeted policy advocacy meetings

The impact of these, and other campaign activities, will be evaluated and this analysis will be used to inform a follow-up strategy to resource and continue advocacy at both a national and pan-regional level.

4.2.4 Legal advocacy – Utilising strategic litigation and the UN human rights mechanisms

Complementing these public-facing activities, the campaign also included several legal advocacy components, which will remain a priority for ENS's continuing focus on addressing childhood statelessness. Together with Praxis and the European Roma Rights Centre, and under the auspices of the ENS pan-European litigation strategy, we filed a constitutional "initiative" (challenge) with the Constitutional Court of Serbia in January 2016. This challenge related to a provision allowing late birth registration in contradiction of Art 7(1) of the Convention on the Rights of the Child.³⁰

³⁰ See A. Weiss, 'Roma in Serbia still denied birth certificates – ENS members take legal action to challenge register offices' unlimited power' (ENS Blog, 2016) available at <http://www.statelessness.eu/blog/roma-serbia-still-denied-birth-certificates-ens-members-take-legal-action-challenge-register>

The campaign strategy also included a concerted effort to highlight problems with regard to a child's right to acquire a nationality in submissions to UN human rights mechanisms such as the Universal Periodic Review and the Committee on the Rights of the Child.³¹ To date, five joint submissions have been made with the Institute on Statelessness and Inclusion and ENS members in Estonia, Hungary, Ireland, Serbia and the UK.

5. Conclusion

The campaign has provided several important lessons to help inform ENS's ongoing work, as well as potential initiatives to address childhood statelessness by organisations in other regions, including as part of an emerging global civil society coalition. Linking all these efforts is the need to create public and political space for effective reform through strong awareness-raising and social mobilisation, and to develop an integrated strategic response that builds on the growing knowledge base by disseminating it more widely. As a complement to this, there is a need to harness the power of social media and public engagement to create societal and political pressure to address childhood statelessness. It is imperative to tailor messaging to non-expert audiences and build communications around stories and facts, not abstract concepts.

In order to improve law, policy and practice at a domestic level there is a common need in all countries to engage and provide technical support to different government bodies, with a particular focus on (decentralised) authorities responsible for birth registration, population registration and nationality procedures, as well as on the judiciary. Linked to this, there is an onus to create opportunities – such as trainings, conferences and study visits – for peer-to-peer learning and sharing of good practices between countries, and to integrate statelessness components within existing training nexuses. This should be supplemented with enhanced legal advocacy, including to build stronger engagement in individual casework on childhood statelessness through the development of legal assistance, paralegal and strategic litigation projects targeting this issue. Likewise, more systematic reporting to the Committee on the Rights of the Child,

³¹ See <http://www.statelessness.eu/resources/ENS-submissions>

National Human Rights Institutions and Ombudspersons, as well as other human rights mechanisms is required. Linked to this, there exists an opportunity to explore and develop avenues for direct interaction between persons affected by childhood statelessness (children/parents) and relevant regional and international bodies.

With the potential to help underpin all these efforts, is the development and implementation of National Action Plans adopted under the auspices of UNHCR's #IBelong campaign, to ensure that ending childhood statelessness is sufficiently prioritised. Equally, all these components could be greatly strengthened by consolidating efforts to engage regional and international child rights organisations, with advocacy and campaigning on the issue of ensuring all children's right to a nationality.

Schools outreach in Poland

*Katarzyna Przybyslawska**

In 2015, the Halina Niec Legal Aid Center (HNLAC) continued its efforts aimed at promoting the rights of stateless persons, advocating with the national Ombudsman's Office for accession to the UN Stateless Conventions and emphasising the need for an introduction of a national identification procedure. As a result, in 2014 the Polish Ministry of the Interior announced it would proceed towards signing the 1961 Convention and consider acceding to the 1954 Convention. As of 2016, there was no movement on this issue. Preparations for possible accession are visibly coming to a standstill.

In this context, mustering meaningful social support and highlighting the plight of the stateless remains a crucial goal for HNLAC, but the increasingly negative atmosphere towards migrants and refugees contributes to a generally non-receptive environment. Nevertheless, in April and May the HNLAC carried out a positively evaluated pilot school project educating teenage students on statelessness and childhood statelessness.¹ The classes followed a toolkit developed by the European Network on Statelessness (ENS), and included a broad array of teaching tools and methods including handouts, case studies and assignments. Students working in groups and individually, discussed the themes of nationality and the rights it entails, statelessness and child statelessness. The last class, which focused on ways to address statelessness, had the most enthusiastic response. The feeling that 'your voice', even as a teenager, can improve the life of others, was empowering.

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¹ For a more comprehensive overview of project, see Katarzyna Przybyslawska, *Teaching Children About Statelessness*, 24 June 2015, available at: <http://www.statelessness.eu/blog/teaching-children-about-statelessness>



The students

© European Network on Statelessness

One of the biggest challenges of the class was the fact that the stateless are truly invisible in Poland. There is no in situ population here and Poland has not signed the statelessness conventions. The stateless do exist here but are widely ignored, pushed to the margins of the society. The majority of the students involved thought that our classes were useful and eye-opening. They admitted that they learned about things (and people) they would otherwise blissfully ignore. One evaluation form stated:

“I want to tell the stateless people, that they aren’t alone and they will have a better life. We are with them and we want to help.”

Excerpts from the ENS Schools Outreach Toolkit

The ENS Toolkit, for students aged 15 – 17, reflects on the key question “what is childhood statelessness and why is it a problem? It is designed to be taught in three class periods. Through this programme, students will be helped to reflect on the role that nationality plays in their lives, learn why some children have no nationality, understand how statelessness affects children and develop arguments against childhood statelessness. Below are two activities that have been taken from the Toolkit.

Activity 1a. My nationality – Belonging (15-20 minutes)

Start the activity by holding up the (picture of) a passport. Ask the students: “what is this?” and “what is it for?” Collect a few different answers then summarise the key points.

*Key points: The **passport** is a **travel document** and a type of **identity document**; it is for establishing your identity and nationality, for instance when you want to cross an international border; it is also the document in which an entry visa can be attached, for instance for visiting a country as a tourist.*

Next, ask the students who has a passport (they can raise their hand if they do). Ask one of the students who has a passport to explain how they got it. Can they explain what they had to do? Who issues the passport? Who else can get one?

*Key points: Probably not all students have a passport because they are under the age of majority and may not yet have needed one, they may not have travelled much yet or – if inside the EU – they may travel on a national ID card; a passport is **issued by the national authorities / government** of the country of which they are a national; to apply for one, certain documents/paperwork need to be completed, a passport photo handed in and probably a fee paid; passports are **usually only issued to people who hold the nationality of the country** – they are proof of ‘membership’, i.e. nationality.*

Next, ask the students which nationality they have. Do they have the nationality of the country the school is in? Or another country? Or

more than one? Can they explain when, why and how they got their nationality? How do those students who do not have a passport, know that they have a nationality?

Optional: if there is still time within this assignment, recap what different ways there are that a person can get a nationality (family and territory links), then as, can the students think of a reason why nationality is given in these ways? What does this have to do with belonging?

Key points: Link through family = link to culture through upbringing, close connection to the 'tribe' or community, way to keep nationality 'within the group', ethnic conception of belonging. Link through territory = link to society through place in which a person grows up and participates, close connection to land, way to integrate immigrants and forge new belonging.

CLASSROOM ASSIGNMENT FOR WEEK 1, "Missing out on nationality"

Describe:

- What can you see in this picture? Which details stand out to you when looking at this photograph?
- How many people can you see on this photograph? How old do you think these children would be?
- What can you tell about the environment when looking at how the picture of taken (Do you think this is a house or not? What other things do you see, such as clothes, wood/ machines outside).



© Greg Constantine

Analyse:

- When looking at how the picture is taken, why do you think the photographer chose to photograph the girl (the two kids) standing behind the window? Why do you think the photographer did not decide to directly photograph the girl/ kids posing?
- What can you tell from the girl's facial expression/ body language? And what about the boy's body language?

- What do you think the children are doing there (i.e. does it seem they are playing or rather bored?)
- Do you think these children can go to school?
- Do you think they can see a doctor when they feel sick?
- Do you think they can enjoy living in a warm house and that their parents can give them a warm home and basic necessities?

Interpret:

- What message do you get from this picture? How do you think this message conveys any of the human rights problems that have been discussed earlier in class (i.e. the right to education, the right to healthcare)
- How do you think being stateless would make you feel? When looking at this picture, what words would you use to describe this girl's situation of statelessness?

Background on the picture to help with discussion with the students...

This photograph is from the series 'Legally invisible in Serbia' and was taken in 2014 (can be viewed in Praxis slideshow, http://www.praxis.org.rs/praxis_gallery/by/greg_constantine.html):

"Roma throughout Serbia are some of the most vulnerable people in the country. Though many Roma were born in Serbia or have lived in Serbia for decades, many continue to be unsuccessful in proving their identity, registering their birth or acquiring citizenship and are 'legally invisible', like this young girl who lives in an informal Roma settlement in Belgrade. Recent changes in Serbian court procedures for the determination of date & place of birth have helped Roma in Serbia receive proper birth registration, but many have not benefited from the recent changes and continue to be at risk of statelessness because they still face challenges in acquiring documentation and citizenship"

Campaigning for gender equality in nationality laws

*Catherine Harrington**

1. Introduction

Twenty-seven countries¹ deny mothers the ability to confer nationality on their children on an equal basis with fathers. Five countries² maintain nationality laws that discriminate against unmarried fathers, denying them the right to confer their nationality on their children on an equal basis with mothers. In addition to violating the right to non-discrimination by explicitly discriminating on grounds of sex, these laws cause other significant and wide-ranging human rights violations including statelessness. In fact, gender discrimination in nationality laws is a leading cause of childhood statelessness.³

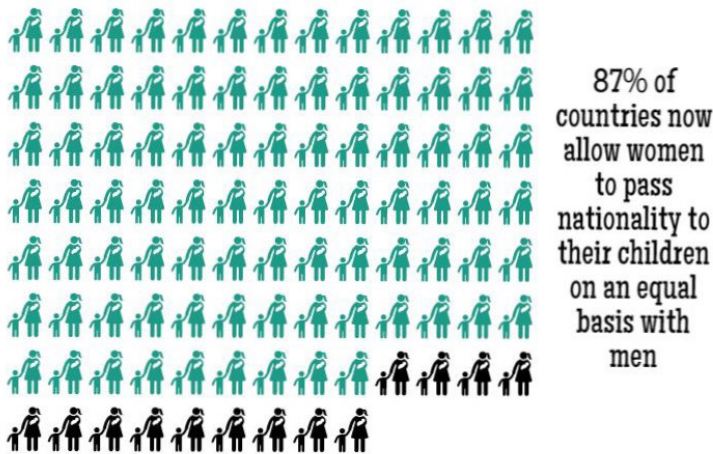
Historically, most countries around the world considered a child's nationality to be derived from his or her father. However, over the course of the 20th century most states enacted reforms, recognising that not only do women deserve equality, but that society benefits when the children of *all* citizens — men and women — are included in the essential civil contract of citizenship. Despite the enactment of nationality law reforms in most countries to address this discrimination, gender discriminatory nationality laws persist in multiple regions, with many of these laws concentrated in the Middle East, North Africa, and Sub-Saharan Africa. While the majority of gender-discriminatory nationality laws deny women the same rights as men, all are rooted in outdated, unequal notions of gender roles and parenthood.

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¹ See <http://equalnationalityrights.org/the-issue/the-problem>

² Ibid.

³ Reform of gender-discriminatory nationality laws is listed as Action 3 in UNHCR's ten-year Global Action Plan to End Statelessness.



© Institute on Statelessness and Inclusion

Today, there is growing recognition that gender equal nationality rights are critical to ensuring the rights of children, while being essential to achieving gender equality. While there are significant obstacles to realising reforms, in the past decade alone over a dozen countries have changed their law. The Global Campaign for Equal Nationality Rights (Global Campaign) was launched in 2014⁴ with the mission to advocate for legal reforms to ensure that women and men have the equal right to acquire, change, retain, and confer their nationality on children and spouses. Following tireless advocacy by civil society, momentum for reform in a number of countries is building, with new laws advancing gender equal nationality rights currently being drafted by several governments.

2. Challenges

Recent reform efforts provide important insights into effective strategies and messages. They also illustrate the notably similar arguments and fears expressed by those opposed to reform — similarities made all the more obvious by common assertions of exceptionalism.

⁴ The Global Campaign was launched by its Steering Committee members – Women’s Refugee Commission, which houses the Global Campaign, Equality Now, Equal Rights Trust, the Institute on Statelessness and Inclusion, and UNHCR –.

Many opposed to reforms maintain beliefs — spoken or unspoken — that the father's 'natural' role is head of the household, the root of family identity, and thereby the rightful source of nationality. "We are a patriarchal society" was the answer given by one authority, when asked why women cannot equally confer nationality. Some maintain religious justifications, even though no religious text calls for citizenship to be derived from the father. In fact, gender discrimination in nationality laws is generally a legacy of colonial rule, not religion.

Those who understand family identity to be derived from the father, also frequently express fears that the children of foreign men will assume allegiance to the father's country, even when the child was born in and lived only in the mother's country. This in turn is frequently linked with perceived security concerns by the government. In Nepal for example, the open border with India is frequently cited as a justification for women's unequal nationality rights, with fears expressed that intermarriage could result in the country being overtaken by the children of Indian men.



Convening on the Right to a Nationality with Members of the Malagasy National Assembly, affected persons, UNHCR, OHCHR, Global Campaign for Equal Nationality Rights, and Equal Rights Trust, November 2, 2015

© Global Campaign for Equal Nationality Rights

Across the globe, gender discrimination in nationality laws is often linked with other forms of discrimination — religious, ethnic, and/or racial — with xenophobia playing a notable role. In many places, gender-based discrimination disproportionately impacts individuals

from marginalised ethnic or religious groups, especially when authorities have discretion to grant nationality to the children of women citizens in ‘exceptional’ circumstances, such as when the mother is single, paternity hasn’t been established, or the father is stateless. In Madagascar, while the law permits Malagasy nationality to children of single mothers, such individuals are often denied citizenship documents by authorities who claim that their name doesn’t ‘sound’ Malagasy – a justification often used by authorities in many countries. Many of the arguments used by those opposed to enacting reforms are quite similar to arguments used in debates regarding immigration policy and expanding access to citizenship more generally. For example, many opposed to reforms express fears regarding the loss of jobs, especially to foreign men, as well as, anxiety over potential loss of political power.

Somewhat ironically, a justification expressed almost universally by those opposed to reform is the ‘exceptional’ concerns of that country. Across regions and in varying contexts, political leaders justify the existence of gender discriminatory law because of ‘X’ unique concern, be it economic, political, or security-related. This is not to say that sexism does not inform the debate — it is fundamental to the acceptability of discrimination in the name of other goals — but rather that explicit arguments for women’s inferior legal status are rarely used. Many Lebanese political leaders assert that the country’s confessional system of government, which assigns political power according to the supposed size of religious communities (based on the outdated 1932 census), would be undermined if the law is reformed. The demographics of the country could change, the argument goes, so better to maintain the status quo at the expense of equality. Tellingly, similar concern is not expressed with regard to potential demographic shifts that may occur through granting citizenship to the children and spouses of Lebanese men and non-national women. Similarly, the Jordanian government cites the preservation of Palestinian identity as a reason for gender discrimination, even though gender discrimination is not only applied to Jordanian women with Palestinian husbands. Furthermore, Jordanian men confer nationality on Palestinian wives and children from those unions without question.⁵

⁵ While the Arab League previously encouraged Arab states to not grant citizenship to Palestinian refugees to protect their right to return, the League has subsequently asserted that the acquisition of other citizenship has no

States may have legitimate concerns regarding the acquisition of citizenship. However, such concerns can and must be addressed without resorting to discrimination, including on grounds of sex, as required under international human rights law. Unfortunately, many authorities and elected officials are unaware of their state's international legal obligations.⁶ When there is an awareness of relevant international laws, many authorities portray such obligations as an affront to national sovereignty, dictated by 'the international community.' In fact, countries exert their sovereignty by voluntarily committing themselves to uphold international conventions.

Outside of international legal obligations, many discriminatory nationality laws are in contradiction with mandates for equality enshrined in national constitutions, which sometimes explicitly protect equal nationality rights. In some cases, the nationality law is in contradiction with other laws, though it is the discriminatory nationality law that is applied by authorities at the local level. In Togo, both the Constitution and the Children's Code state that the children of Togolese fathers or mothers should have the right to citizenship, but the nationality law only permits mothers to confer their nationality if the father is stateless or of unknown nationality.

A lack of awareness among the public and policy makers regarding the existence of the problem and its impact poses additional challenges. In many instances, parents are not aware of their inability to confer nationality on their children, nor the impact this will have on daily life, until they are confronted with the situation. A related challenge lies in the fact that there is a lack of statistics on the number of individuals who are stateless because of gender discriminatory nationality laws. In many countries, the problem can be hidden from the public and policy makers, with affected individuals living in the margins, working in the

connection with the right to return – a fact that has been emphasized in regards to the many children of Egyptian women and Palestinian men who now hold Egyptian citizenship. "Egypt reiterates children with Palestinian fathers get citizenship," *Ma'an News Agency*, September 23, 2012, available at: <http://www.maannnews.com/Content.aspx?id=522755>

⁶ Gender discrimination in Nationality Laws results in violations of the Convention on the Elimination of All Forms of Discrimination against Women (Articles 2 and 9) and other international human rights conventions, including the Convention on the Rights of the Child (Articles 2, 7 and 8) and the International Covenant on Civil and Political Rights (Articles 2, 3, and 24).

informal sector, and afraid to disclose their situation, while suffering overwhelming hardships.

The question of gender equal nationality rights, like any political issue, can also fall victim to other political realities and challenges, such as when it is linked with other contentious issues or a political party/group. A 2016 referendum in The Bahamas, which would have eliminated gender discrimination pertaining to nationality rights, failed in large part because of false connections made between nationality reforms and same sex marriage, with the opposition counting on high levels of homophobia and dissatisfaction with the ruling party that was promoting reform.

In many countries that have enacted law reform, implementation remains a major challenge. It is not uncommon for some officials with deeply entrenched discriminatory beliefs to refuse to implement the law. For example, in Egypt, Morocco⁷ and other countries which have reformed their law, there are cases of authorities refusing to provide citizenship documents based on the mother's nationality to children born out of wedlock or whose parents lack a marriage certificate, as well as children born out of inter-religious marriages. Furthermore, when laws are reformed, there are often insufficient resources devoted to training civil authorities and raising public awareness to ensure that affected populations may benefit from the reforms. In Indonesia and Kenya, even years after reforms had been enacted, local authorities and families who could benefit from reforms were not aware of women's equal ability to confer nationality.⁸

The existence of other gender-discriminatory laws, including some personal status and penal codes, can also result in children being denied nationality. For example, inter-religious marriage and sex out of wedlock, even in instances of rape, are offences punishable by prison sentences or worse in a few countries. Consider the especially tragic example of a child conceived through rape in a country where the law permits mothers to confer nationality to children when the father is unknown, though sex outside of wedlock may result in imprisonment.

⁷ Women's Refugee Commission, Tilburg University, *Our Motherland, Our Country: Gender Discrimination and Statelessness in the Middle East and North Africa*, June 2013.

⁸ Equal Rights Trust, *My Children's Future: Ending Gender Discrimination in Nationality Laws*, September 2015.

Jordan, Saudi Arabia, and the U.A.E. all permit mothers to confer nationality to children when the father is unknown or paternity has not been established — rights that are severely compromised when the price for accessing them could be imprisonment or worse. Rape victims in many Gulf countries have been jailed and even sentenced to lashings.⁹ Consensual sex outside of marriage in Jordan can result in three years' imprisonment and children born out of wedlock are frequently, forcibly removed from their mother's care.¹⁰ Because of mothers' fears of persecution, children born in such circumstances may lack documentation needed to claim citizenship. Even where sex out of wedlock is not a criminal offence, discrimination by authorities or reticence to register children due to social taboos may result in children being denied nationality.

Additionally, there is a strong link between gender discrimination in nationality laws and obstacles to accessing birth certificates. As described later in this article, Sustainable Development Goal (SDG) 16.9 — provide legal identity for all by 2030 — cannot be achieved without ensuring gender equal nationality rights for all. In contexts where nationality is almost universally accessed through the father, authorities frequently require marriage certificates before granting the birth certificates needed to secure citizenship through the paternal line. As previously referenced, women who have children out of wedlock are often denied birth registration documents, thereby compromising single mothers' ability to secure citizenship for children, even when permitted by law.

In contexts of displacement, with access to documentation compromised and families often separated, the inability of mothers to confer nationality significantly increases the risk of children being born stateless. Today, with the greatest displacement since World War II, forced displacement and migration from countries with gender-discriminatory nationality laws threatens to create a new generation of stateless children, with the impact of gender discriminatory

⁹ An especially horrific example includes the case of a Saudi victim of gang rape sentenced to six months in jail and 200 lashes. "Rape victim sentenced to 200 lashes and six months in jail," *The Guardian*, November 17, 2007, available at: <https://www.theguardian.com/world/2007/nov/17/saudi-arabia-international>

¹⁰ "Getting away with sexual abuse in Jordan," *IRIN News*, January 27, 2014, available at: <http://www.irinnews.org/report/99544/getting-away-sexual-abuse-jordan>

nationality laws on refugees, internally displaced persons and persons living in conflict contexts especially dire.¹¹

3. Lessons learnt: creative and effective methods to mobilise for change

One mark of successful reform campaigns is the ability to share the stories of affected individuals,¹² especially the negative impact of gender discriminatory nationality laws on the lives of children. This plays an important role in securing public support and action by policy makers. Whenever possible, it is especially impactful to facilitate opportunities for affected women and children to personally share the serious, negative impact of the law on their lives. This can be done through multiple forms of media — video,¹³ news articles, web profiles, and social media — and should ensure that affected persons can share their stories anonymously if desired. This has been a core and effective strategy in the campaign for women's nationality rights in Lebanon,¹⁴ where affected children and their families are frequently front and centre at sit-ins before parliament, garnering significant media attention.¹⁵

Another effective strategy is to appeal to traditional values centred on family unity and the wellbeing of the national family. For example, as part of their successful efforts to secure support for women's nationality rights in the new Constitution, Kenyan activists including the Federation of Women Lawyers-Kenya, appealed to grandparents,¹⁶

¹¹ See for example, Institute on Statelessness and Inclusion, *Understanding statelessness in the Syria refugee context*, (2016), available at <http://syrianationality.org/pdf/report.pdf>

¹² Equal Rights Trust, *Ending Gender Discrimination in Nationality Laws - Sapana's Story* (2015) available at <https://www.youtube.com/watch?v=GtllhGSIM80>

¹³ BarefootWorkshops, "Nationality" (*Arabic*) (YouTube, 2009), available at <https://www.youtube.com/watch?v=KfblwFui60>

¹⁴ See <https://nationalitycampaign.wordpress.com/>

¹⁵ The Daily Star, 'Lebanese women demand right to pass on nationality to children' (2014), available at <http://www.dailystar.com.lb/News/Lebanon-News/2015/Nov-04/321661-lebanese-women-demand-right-to-pass-nationality-to-children.ashx>

¹⁶ Equal Rights Trust, *The Impact of Reform: Stories from Indonesia and Kenya* (YouTube, 2015), available at <https://www.youtube.com/watch?v=ZJfI3wrEXY4>, (min 5:06-48)

especially grandfathers, to imagine their grandchildren being told they did not belong and were not Kenyan, simply because their daughters married foreign men. When such a personal connection is made and citizens are confronted with the idea of the potential impact on their own family, many can be convinced to support reforms.

Similarly, it is often beneficial to emphasise that, rather than being in contradiction with religious tenants, ensuring children's access to their mother *or* father's nationality is very much in line with religious values that advance the wellbeing of the child and sanctity of the family. It is important to note though, that as non-discrimination, equality and the right to nationality are human rights obligations, advocacy for gender equal nationality rights need not be framed as being reliant upon religious justifications — in fact such arguments can undermine the long-term advancement of universal human rights norms. Rather, highlighting the link between religious values supportive of children's wellbeing and family unity and the advancement of gender equal nationality rights is often an important complement to other key messages.



Human Rights Council Side Event “Achieving Women’s Equal Nationality Rights in Law and Practice,” United Nations Palais, Geneva, Switzerland, 15 June, 2016
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While obligations to uphold international conventions are disregarded by some governments, many have an interest in their country's international reputation, including perceptions around their human rights record. Periodic reviews by human rights bodies provide useful

opportunities to highlight state failures to uphold human rights obligations and have been shown to influence reform processes in a number of cases. At the Human Rights Council side event, “Women’s Equal Nationality Rights in Law and Practice,” held during the 32nd session of the Council,¹⁷ representatives of Algeria and Madagascar emphasized that attention by human rights mechanisms encouraged their governments to advance women’s nationality rights. However, while interventions at the international level can be an important component of advocacy, civil society-led advocacy at the national level, including through following up on international human rights bodies’ recommendations and commitments made by governments at the international level, is critical to achieving reform.

Most successful campaigns have been framed around strong calls for gender equality. In fact, in many contexts it is easier to approach this issue from a gender equality perspective than to have an emphasis on combating statelessness — a problem many governments are loathe to acknowledge. There is a growing international consensus that it is in societies’ benefit to end discrimination against women and even in some of the most gender-discriminatory contexts, states are seeking to present themselves as supportive of women’s empowerment. Most governments have made numerous international commitments to this effect, with all but six¹⁸ having ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which explicitly obliges States to ensure gender equal nationality rights (Article 9), while also obliging States to end discrimination against women in all legislation (Article 2).

In some contexts, it is strategic to link nationality law reform with other efforts to advance gender equality. For example, Algeria’s nationality law reforms were undertaken as the country engaged in a review of the family code to advance women’s rights. In some instances, there is ripeness for nationality law reforms in the wake of other substantial reforms for gender equality, such as in the case of Morocco where women’s right to confer nationality to children was achieved following ground-breaking reforms to advance women’s rights in the family

¹⁷ See <http://equalnationalityrights.org/news/66-event-women-nationality-human-rights-council>

¹⁸ Iran, Somalia, Sudan, Tonga and the United States have not ratified CEDAW.

code, *Moudawana*.¹⁹ Constitutional review processes provide another entry point. It was through such a Constitutional review that Kenyan women's rights activists secured women's ability to equally confer nationality to children and spouses. Activists have also leveraged government initiatives to harmonise national legislation with international legal commitments under CEDAW and CRC, a process that has also at times been driven by new or amended Constitutions calling for such harmonisation. This approach can also come with significant challenges. For example, The Bahamas June 2016 referendum failed in large part because of misinformation and inflammatory rhetoric regarding a broader gender equality bill linked with the referendum.²⁰

The SDGs provide significant entry points as well. Gender-discriminatory nationality laws clearly contradict SDG 5, "Achieve gender equality and empower all women and girls," which includes target 5.1 "End all forms of discrimination against all women and girls everywhere," and SDG 16, which seeks to promote peaceful and inclusive societies and includes target 16.9, "by 2030, provide legal identity for all, including birth registration." However, given the wide-ranging human rights violations that result from these laws, they in fact negatively impact nine out of the seventeen SDGs.²¹ Importantly, linking the SDGs with nationality rights facilitates discussions around the negative impact of discriminatory nationality laws on economic development, a priority area for most governments including some less concerned with human rights obligations. As governments are presently working to develop SDG national action plans, activists have an opportunity to highlight the linkages with discriminatory nationality laws and advocate for reforms to realise the SDGs.

¹⁹ 'Moroccan feminist groups campaign to reform Moudawana (Personal Status Code/Islamic family law), 1992-2004' (1994-2004) Global Nonviolent Action Database, available at <http://nvdatabase.swarthmore.edu/content/moroccan-feminist-groups-campaign-reform-moudawana-personal-status-codeislamic-family-law-19>

²⁰ The Nassau Guardian, 'The challenge for a new generation' (2016), available at <http://www.thenassauguardian.com/opinion/editorial/65387-the-challenge-for-a-new-generation>

²¹ SDGs negatively impacted by gender discrimination in nationality laws: SDG 1 No Poverty; SDG 3 Good Health and Wellbeing; SDG 4 Quality Education; SDG 5 Gender Equality; SDG 8 Decent Work and Economic Growth; SDG 10 Reduced Inequalities; SDG 16 Peace, Justice and Strong Institutions



Al Bilad Press (<http://albiladpress.com/>) 17 February, 2016 Media coverage of Global Campaign for Equal Nationality Rights Gulf Conference on Women's Nationality Rights, Manama, Bahrain
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Cross regional collaboration has also been vital to successful reform movements. The regional Arab Women's Right to Nationality Campaign,²² launched in the first decade of the 21st century, provides a strong example of the power of regional exchange and solidarity. Through this campaign, leading women's rights organisations across the region provided mutual support in developing advocacy strategies, shared lessons learned, and provided solidarity during multi-year advocacy campaigns. By the end of the decade, reforms were achieved in eight countries: Algeria, Egypt, Iraq, Morocco, Libya, Palestine, Yemen, and Tunisia. The impact of such exchanges between activists was evident in recent interventions undertaken in Bahrain by the Global Campaign and coalition member Bahrain Women Union. By facilitating the participation of an Egyptian activist who had been heavily involved Egypt's successful nationality reform campaign, Bahraini parliamentarians learned about the positive impact of the reforms in Egypt and subsequently

requested a copy of the Egyptian law to inform national reform efforts. Furthermore, the Egyptian activist was able to impart lessons learned to Bahraini NGOs, who integrated successful strategies into the ongoing national effort.

Women's rights groups have traditionally led the fight for women's equal right on confer nationality to children and make up the majority of coalition members of the Global Campaign for Equal Nationality

²² See <http://crtdd.org.lb/project/nationality>

Rights. Given the impact of gender discriminatory nationality laws on children's human rights, it would be strategic for campaigns for women's nationality rights to engage organisations and activists focused on other issue areas – such as access to education, healthcare and children's welfare – in the international effort to ensure men and women's equal ability to confer nationality on their children. By expanding our coalitions, learning from successful campaigns, and building on recent momentum for reform through increased pressure at national, regional, and international level, activists today have a real opportunity to eradicate gender-discriminatory nationality laws, thereby eliminating a leading cause of childhood statelessness and a key barrier to achieving equality between women and men.

Mobilising to address childhood statelessness in Nepal

*Subin Mulmi**

1. Introduction

Nepal is one of 27 states that still have discriminatory nationality laws which engender different treatment between men and women, affecting women's right to confer nationality to their children and their foreign spouse.¹ Before Nepal's Interim Constitution of 2006, nationality by descent could only be conferred by Nepali men. Despite the progressive citizenship provision in Article 8(2)(b)² of the Interim Constitution of 2006, the subsequent clause in Article 8(7)³ restricted the rights of women to confer citizenship independently to their children, and was thus discriminatory. With the supposed objective of making a 'non-discriminatory' provision in citizenship, the first Constituent Assembly (hereinafter 'CA') came up with a more regressive "father and mother" provision which would require both the father and the mother to be citizens of Nepal for their children to acquire Nepali citizenship by descent.

Unsurprisingly, the citizenship provision was a contentious issue on which consensus was not reached by the first CA of Nepal, leading to the dissolution of the CA on 28 May 2012. The draft provision on

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¹ UN High Commissioner for Refugees (UNHCR), *Background Note on Gender Equality, Nationality Laws and Statelessness 2016*, 8 March 2016, available at: <http://www.refworld.org/docid/56de83ca4.html>, page 1.

² Article 8(2)(b) states "...person whose father or mother was a Nepali citizen at the time of his/her birth...shall be deemed to be citizens of Nepal by descent."

³ Article 8(7) states "Notwithstanding anything contained elsewhere in this Article, in the case of a person born from a woman citizen of Nepal married to a foreign citizen, if such person was born in Nepal, has permanently resided in Nepal and has not acquired the citizenship of a foreign country on the basis of the citizenship of his or her father, he or she may acquire the naturalized citizenship of Nepal, pursuant to the laws in force."



1000 rising for citizenship

© Forum for Women, Law and Development

citizenship was met with widespread criticism, particularly by female CA members and women's rights organisations. The second CA that was formed on 21 January 2014 was expected to right the wrong. However, the second CA astoundingly categorised the citizenship provision as an already settled issue and attempted to restrict any meaningful deliberation on it.

2. The Campaign

Forum for Women, Law and Development (hereinafter 'FWLD') since its inception in 1995 has been advocating for equal nationality rights in Nepal. Under the leadership of FWLD various protests and demonstrations were organised even before 2006, demanding citizenship through mothers in the new constitution. Two key networks were mobilised by FWLD during that time: the Victims Network⁴ and the Civil Society Network on Citizenship Rights.⁵ All strategic interventions of the ensuing campaign for equality, were devised in consultation with the two Networks.

After extensive deliberations with former and current female CA members, a new campaign was initiated by the revived Civil Society

⁴ This Network comprised of persons who were either denied the citizenship of Nepal or could not confer citizenship to their children and spouses.

⁵ This Network comprised of more than 30 human rights organizations.



Human chain
© Forum for Women, Law and Development



Sleep protest
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Network on Citizenship Rights on 4 September 2014. The civil society and the female CA members agreed that the issue had to reach the public domain, in order to pierce the patriarchal mind-set of many senior political leaders, and enable a more meaningful discourse on citizenship. The Network mobilised young activists and stateless persons to execute its strategic plan of action in the street. The campaign was named ‘Citizenship in the name of mother’ and was largely operated through social media.⁶ Advocacy papers were published and submitted to lawmakers by NGOs while youth activists took to the street and organised a series of rallies, signature campaigns

⁶ <https://www.facebook.com/ornotand/>

and human chains to express their dissent against the proposed provision on citizenship.⁷

The first rally was organised on 20 September 2014. Over 1,000 people who also signed a petition to change the draft provision on citizenship participated in this rally. A second, similar rally took place on 15 November 2014 at which 2000 signatures were collected in Kathmandu. This was followed by the collection of more than 8000 signatures from 10 other districts on 21 November 2014. All collected signatures were submitted to the Chair of the CA on 25 November 2014. An online petition was initiated where Nepalese people from all over the world voiced their concern against the draft provision. On 9 January 2015, this petition signed by 2000 Nepalese overseas residents, was also submitted to the Chair of the CA, and simultaneously to the Nepalese Embassies in New Delhi, Washington DC and Ottawa. In between these events, three human chains and two more rallies were organised with over 300 people participating in each event. While the earthquake in April 2015 had an impact on the campaign,⁸ a few months after the earthquake, several innovative demonstrations were organised, including a full day protest with more than 5000 participants, a sleep protest during which activists literally slept on the street, street debates, slam poetry events and drama performances.

Stateless persons took centre stage during these protests. The media was understandably more responsive to them and their stories, than the heads of NGOs. The increase in mainstream media coverage of their stories, further strengthened the campaign.⁹ Senior human rights activists and senior political leaders gradually extended their support to the campaign and even participated in some of the protests.¹⁰

⁷ <http://kathmandupost.ekantipur.com/printedition/news/2015-01-08/2000-signatures-submitted-to-ca-chair.html>

⁸ Nepal suffered a devastating earthquake on 21 April 2015 that killed more than 9000 people.

⁹ <http://nepalitimes.com/article/nation/citizenship-in-the-name-of-the-mother.2076>

¹⁰ <http://kathmandupost.ekantipur.com/printedition/news/2015-06-29/hundreds-rally-in-capital-against-inequalities.html>

A number of advocacy and awareness materials were prepared through the campaign. Three advocacy leaflets were submitted to CA members:

- A civil society position paper on the draft citizenship provision.¹¹
- A comparison of the consequences of a 'Father AND Mother' provision against a 'Father OR Mother' provision¹².
- An exploration of the myths and realities of the citizenship provision.¹³

These provided counter arguments to those who advocated for a restrictive provision on citizenship. Infographics were circulated in social media which can still be found in the campaign Facebook page.¹⁴

3. Impact

A delegation of senior human rights activists and the Civil Society Network presented a series of alternatives on the proposed provision on citizenship. Minor changes were made but the substantive meaning of the provision still remained the same. The first draft of the constitution retained the AND provision despite the continuous public pressure. Immediately after the submission of the online petition, the three major parties made a decision to amend the draft provision on 12 January 2015 but this was later reverted on the same day.

As part of the public campaigning process, a nationwide signature campaign calling for the draft to be amended, resulted in more than 58,000 signatures being submitted to CA members.¹⁵ Consequently, CA members had to give in and they amended the proposed provision in line with the language of the Interim Constitution of Nepal, 2006. Though still discriminatory to women, the language was far less regressive than initially proposed.

¹¹ <http://fwld.org/publications/advocacy-position-paper-citizenship-civil-society-network-citizenship-rights/>

¹² <http://fwld.org/publications/consequences-father-mother-father-mother-provision-constitution/>

¹³ <http://fwld.org/publications/draft-provision-citizenship-myths-realities/>

¹⁴ See <https://www.facebook.com/ornotand/>

¹⁵ <http://kathmandupost.ekantipur.com/news/2015-08-08/women-activists-continue-citizenship-protests-demand-for-or-provision.html>

4. Challenges

The general public was largely receptive to the principle of equal nationality rights, in particular, the equal right of mothers to confer citizenship on their children. Hence, attracting the general population to the protests through social media was relatively uncomplicated. However, senior leaders and most male CA members are beset with patriarchal and xenophobic mind sets. Despite numerous discussions with them, they refused to relate with the plight of stateless people.¹⁶ Public pressure was essential to push them to change. The Communist Party of Nepal United Marxist Leninist party (CPN UML) was the most opposed to the OR provision. Their senior leaders had initially agreed to change the provision but later retracted their position.¹⁷ The campaign reached a roadblock when this happened. Youth activists decided to publicly expose those leaders by informing their vote bank in the districts about their stand on citizenship. Each CA member of the party was personally telephoned by an activist who inquired about their position which was subsequently disclosed to the public. This proved to be a significant game changer as those leaders had to finally give into campaign's demands.¹⁸

5. Lessons

Two significant lessons were learnt when we reflect on the campaign. Firstly, such campaigns need to distinguish themselves from politicians when taking to the streets. The involvement of political leaders in protests transforms social issues into socio-political issues, which tends to repel the general public. Secondly, the reason for the partial success of the campaign was the persistence of civil society. The campaign organised regular protests for two years amidst the earthquake, the blockade and frequent political upheavals.¹⁹ Political leaders opposed

¹⁶ <http://kathmandupost.ekantipur.com/printedition/news/2014-12-28/nepali-congress-and-cpn-uml-are-insisting-on-and-provision.html>

¹⁷ <http://kathmandupost.ekantipur.com/printedition/news/2015-01-13/uml-blocks-proposal-to-issue-citizenship-through-mothers.html>

¹⁸ <http://www.nepalmountainnews.com/cms/2015/06/11/leaders-agree-on-citizenship-through-father-or-mother/>

¹⁹ The devastating earthquake on 21 April 2015 was followed by a five-month blockade by the Indian government from September 2015 to January 2016 cutting down essential supplies. Nepal also witnessed the change of government on 11 October 2015.

to campaign demands waited for civil society pressure to die down so that they could bury the issue but this pressure never eased off and they had to budge first.

6. Next Steps

The Constitution of Nepal, 2015 though a small step in the right direction, is still discriminatory towards women and subsequently restricts certain groups of people from acquiring the citizenship. NGOs are continuously making collective efforts to generate political will to amend the constitution, specifically Article 11(5)²⁰ and 11(7).²¹ However, due to the absence of political will and the dominance of the rhetoric of nationalism in Nepal right now,²² the current focus of the civil society is on the amendment of the Citizenship Act to ensure that the positive changes of the new constitution are reflected in the Act. The Ministry of Home Affairs has initiated the process of preparing a draft amendment and NGOs are working with the government to ensure that the amended Act addresses issues of statelessness.

²⁰ Article 11(5): A person who is born in Nepal from a Nepali woman who is a citizen of Nepal and has resided in Nepal and whose father is not traced shall be provided with the citizenship of Nepal by descent.

²¹ Article 11(7): Notwithstanding anything contained elsewhere in this Article, in the case of a person born from a woman who is a citizen of Nepal and married to a foreign citizen, the person may acquire the naturalized citizenship of Nepal in accordance with the Federal law if he or she has permanently resided in Nepal and has not acquired the citizenship of a foreign country.

²² After the blockade by India, the current national sentiment is against liberal provisions on citizenship which is perceived as a nationalistic agenda.

Interview with a child in Nepal who is stateless due to gender discrimination in the nationality law

Q: Where are you from?

A: I am from Nepal and my parents are from Nepal as well.

Q: Do you go to school?

A: Yes I go to school and I am in grade eleven. Art Classes and library are the two best things that I like in school apart from studies.

Q: Do you do any extra-curricular activities?

A: I love music. I love to play guitar and sing along. However, I like to take serious participation in sports, but it is bit expensive so I gave up.

"I wish my country would accept me the way I am. I wish to do so much good for my country when I grow up but the bitterness that is filled I spend my time trying to replace it with positive energy for tomorrow's possibility. I wish children brought up by single mothers or fathers to be accepted by law as any normal children with both parents. When the child is born in any land he/ she must have the rights to belong to that land and call it a motherland"

Q: Do you want to do any higher studies?

A: I have wished to apply to university but I have dropped that idea because I do not have citizenship. My friends all are applying for university abroad and are currently studying in A-Levels. This course is mainly to prepare students for abroad studies. But because I know I cannot apply for it I changed my school recently and have joined +2 course in a private school.

Q: Have you ever had to work?

A: I have done voluntary works during my holidays but never had to work for money as my mother always encourages us to focus on our studies.

Q: Describe yourself in 10 years' time.

A: I see myself as a successful Chartered Accountant in ten years'

time. I will also have established an organisation (hopefully) to help the street dogs and rescue animals. If in case I have my citizenship, I would also like to prepare myself for an international platform such as National Geographic or CNN.

Q: What does 'home' mean to you?

A: To me, home is a place where I get unconditional love, encouragement and support. Home is the only place where you will be loved even if the whole world is against you. I can be myself and I am not judged for who I am. When in trouble, I can rely on my family with no hesitation. Home is where you get your confidence from. This is where I can put all the troubles out of the window and sleep with no fear. A place where I know where to look for real food when I am hungry. This is also a place where my loyalty lies and I know I can fight and defend my home from the rest of the world if the time comes.

Q: What makes you most sad?

A: The fact that our country does not recognise women's identity and that women are not considered trust worthy enough to pass on their citizenship to their children. In fact, women are proven to be more reliable as far as their children are considered.

Q: What makes you most happy?

A: When I think about how my mother and different organisations are working for the cause. I am happy to see women are getting more empowered.

Q: What is the one thing that you would love to do, that you cannot?

A: One thing I DREAM of is to travel. I wonder how it be to travel around the world, learn and see with my own senses and to do good to people I meet along my way. At the most I wish I could go to a nearby place like Thailand with my family. I know I cannot because me, my elder sister and my step dad, we all do not have citizenship and passports. We avoid the topic of traveling as much as possible because I don't want to see my mum sad.

Q: Do you have documentation?

A: The documentation I have is birth registration which my mum acquired after a long fight at the Supreme Court. It says I am the daughter of "Mr. Unidentified" and the granddaughter of "Mr. Unidentified". I find it very difficult to carry such documentation. I am

told that even tomorrow if the government decides to issue citizenship to me, that is if my mother wins another case in the Supreme Court, I will be issued citizenship with the tag of daughter of "Mr. Unidentified". So yes, that would be wonderful to have complete documentation, to establish myself as a citizen, a human being so that me and my family do not have to suffer this ordeal which we do not know will ever be ended.

Q: Have you ever been in a situation which showed to you that you are treated differently to your friends?

A: I always felt the same as my friends until the day when I had to fill in my form for the School Leaving Certificate's board exam. I had to attach my birth registration certificate and for that my father's identity was required. Every friend's form was accepted but not mine. My family went through a traumatic phase during that time. My mother then filed a petition in the Supreme Court. The Supreme Court then made a stay order and my form was accepted but to get the final verdict it took us one and half years. And after much waiting, to our disappointment, I received my birth registration certificate with the tag of daughter of "Mr. Unidentified". My friends often ask me about my father's whereabouts and I feel my existence itself is wrong. I feel sad for my mother.

The mobilisation of Bidoon youth

*Marie Brokstad Lund-Johansen**

Kuwait has had a stateless population since the 1950s, known as the Bidoon community. It is not, however, a homogenous group, and the divisions go along several lines. The Kuwaiti government has segregated Bidoons from the national population, by dividing the community into a hierarchy based on their relation to the state. In this hierarchy, children of Kuwaiti mothers are at the top, followed by holders of 1965 census ID cards, and at the bottom we find Bidoons with no documents at all. This discriminatory system became institutionalised when colour-coded ID cards were introduced in 2012.¹ Prior to 1986, Bidoons had been treated similarly to Kuwaitis, whereas children born after 1986 were excluded and deprived of rights at birth.² These anti-Bidoon policies have shaped the post-1986 generations' relationship with the state, their parents and their own identity as stateless Kuwaitis.

In my Master thesis "Fighting for Citizenship in Kuwait" I studied the Bidoon rights movement.³ The movement emerged during the spring of 2011 and in 2013 I did a fieldwork in Kuwait where I interviewed young *Bidoon* activists about what had motivated them to take action. These activists expressed frustration with the government, with the national population and with their own parents. They felt the older generation had maintained their loyalty to the Emir in hopes that by

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¹ The cards are red, yellow and green and indicate the holder of legal status. Green= children of Kuwaiti mothers and 1965 census ID. Yellow= needs to be assessed. Red= illegal resident. UNHCR 18.06.2012: 8,000 Bidoons to become 'illegal residents' soon.

² Human Rights Watch 2000: *Kuwait: Promises Betrayed. Denial of Rights of Bidun, Women, and Freedom of Expression*. Available at: <http://www.hrw.org/legacy/reports/2000/kuwait/index.htm#TopOfPage>.

³ The thesis is available at https://www.academia.edu/19225835/Fighting_for_Citizenship_in_Kuwait

waiting obediently, they would be awarded Kuwaiti nationality. Protest or critique was perceived as too risky. In contrast, these young Bidoons explicitly identified the Emir and his government as the source of their problems, and they accused their parents of “ruining their opportunities” in life. The people I interviewed said they first realised the full consequences of being stateless when they became teenagers and met closed doors everywhere; at schools, in universities, when seeking jobs and at the country’s borders. Some members of this group of disillusioned Bidoon youth have taken action to fight for citizenship in spite of their parents’ objections.

Bidoons share ethnicity, language, culture and religion with Kuwaiti nationals, and Kuwait has been their homeland for generations. My interviewees described mixed feelings of belonging to a country that rejected and harassed them once their legal status was exposed. In oil-rich Kuwait, nationality is more than a legal status; it is linked with economic privileges and a generous welfare system. Young Bidoons are growing up adjacent to an extremely rich society and this is likely to influence their expectations, but, although unemployment, poverty, and limited education prevail in the stateless community, Bidoons today have access to the online world, through their (second-hand) smartphones discarded by their super-consuming neighbour citizens. Access to technology has had a profound impact on the younger generations. It has given them access to information about human rights, as well as the ability to gather, mobilise and bring attention towards their intolerable situation. Directly inspired by the Arab Spring in 2011, young Bidoons used Twitter and Facebook to organise demonstrations and demand citizenship. When the government met the protesters with violence, they uploaded footage to YouTube.

Young Bidoon activists acknowledged that the movement has been facilitated by the support of Kuwaiti human rights organisations and activists. Following the protests in 2011 the government has started to issue birth certificates to Bidoons.⁴ Now, the topic is trending, but although the Bidoon case is on the agenda, state repression remains a threat. Kuwait has promised to solve the problems for decades without taking action. Bidoon teenagers today have more awareness about their rights than previous generations but they will need more support

⁴ Human Rights Watch: <https://www.hrw.org/news/2015/03/26/kuwaits-plan-pawn-its-stateless>

from the international community. The Kuwaiti government has introduced “steps” to solve the issue that can be regarded as attempts to buy time and avoid local and international criticism. These steps include offering to buy them citizenship of the Comoros Islands and to DNA test the entire population. This indicates that the government is desperate to get rid of the problem, yet it remains unwilling to grant Bidoons the right to citizenship.

Being accountable to stateless children and youth: The 2016 UNHCR NGO Consultations session on statelessness

*Amal de Chickera**

The UNHCR NGO Consultations is an important event in the refugee and statelessness calendars, providing a forum each summer for NGOs from around the world congregate in Geneva. Where they meet for three days of discussion, debate and networking amongst each other and with UNHCR's senior management.¹ The theme of the 2016 UNHCR NGO Consultations was 'youth', and one of the sessions at the Consultations focussed exclusively on stateless youth. In organising this statelessness session, for which ISI served as the NGO Focal Point,² we aimed to engage in an exercise of direct accountability to stateless children and youth from around the world.

NGOs, UNHCR and other actors have a crucial role to play in mobilising action to promote and fulfil the human rights of stateless children and youth to address, and ultimately solve their statelessness. In order to do this more effectively, stronger and more sustained efforts are needed to place stateless children and youth at the centre and ensure we collectively hear their voices, take direction from them and are held accountable to them. It was this idea of direct accountability which served as the basis for the session.

One of the main challenges of including stateless people in such global events, is that their lack of nationality can make it impossible for them to travel abroad. Given this context, to be as inclusive as possible of

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¹ For more on the UNHCR NGO Consultations, see <http://www.unhcr.org/uk/annual-consultations-ngos.html>

² As NGO Focal Point, we were responsible with UNHCR colleagues, for conceptualising and organising the session.



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different voices, we directly solicited questions from stateless children & youth (through NGO partners and UNHCR offices) beforehand. Through this process, questions from over 40 stateless children and youth, from 12 countries were collected.³ The expectation was that these young stateless people's inputs would instigate thought-provoking discussions on issues that directly affect them, even though they could not be physically present in Geneva. The aim of this process was to both maximise the participation of stateless children and youth and to promote our collective accountability to them.

The session began with an overview of some of the challenges that stateless children and youth face around the world, which was given by Jyothi Kanics, an independent researcher and child rights expert

³ The contributors were **Madagascar:** Sakina, Felana, Yousef, Kourban, Ali, Mahamed and Hassan. **Ivory Coast:** Gnonsoa Ble, Junior Blo, Grace Debahi, Hino Ble, Francois Guei, Korie Ble, Erariste Gnonsoa and Junior Ble. **Malaysia:** Sheellin and Subhashini. **Thailand:** Kwanchanok, Nong Air, Jaruwan, Meechu, Chanida, Chandhra, Saw Hae Ma Bi, Thida Aryee, Wa, Phra (monk) Pranat Layoi and Yod Pong. **Tanzania:** A.S. **Serbia:** P.G. **Nepal:** Nikita, Neha, Diwakar. **Bulgaria:** Vardan and David. **Tajikistan:** Nurjamal and Zalina. **South Africa:** A.S., Khumbulani; **Kyrgyzstan:** Bakhrom. **Romania:** Roma homeless mother and Roma boy (anonymous). Several individuals, NGOs and UNHCR offices kindly acted on the request to solicit questions from stateless children and youth, including: UNHCR representations of Kyrgyzstan, Cote D'Ivoire, Thailand & Tajikistan; FAR (Bulgaria), Praxis (Serbia), ARCHWAY (Romania) Deepti Gurung & FWLD (Nepal), DHRAA (Malaysia), Lawyers for Human Rights (South Africa) and FOCUS (Madagascar).

based in Europe. This was followed by the question and answer session, at which a selection of the questions from stateless children that were grouped into three categories (questions about my past, my present and my future) were put to the participating NGO and UNHCR personnel. Below, are some of the questions that were asked:

1) Questions about my past

How did I become stateless and what is being done to protect other children from this problem?

1. How is it possible that a person is stateless? What is the point of establishing that a person is stateless if no real effort is being made to address this? (A.S, 24 years old, South Africa)
2. Why was I deprived of my documents when I had the right to them? (P.G, Serbia, 24 years old)
3. Why can't we get citizenship through our mothers, who gave birth to us and raised us? Are women not worthy enough to pass on citizenship to their children? Maybe you are doing something, but we feel nothing. (Diwakar, Nepal).

2) Questions about my present

Why am I disadvantaged and denied access to basic rights and what is being done to protect me?

1. Do I look any different than anyone here? I look normal and yet I am different than anyone else who was born here (Subhashini, 12, Malaysia)
2. Why am I condemned that my nationality is always called into question each time, for any administrative action that I have to deal? (Felana, 25, Madagascar)
3. Why did I have to face such embarrassment in school, for not having a birth certification? Why do I have to limit my dreams and compromise with my studies? Why did the human rights organizations not see that there are thousands of people like me, who are prisoners of their own country? What actions are the organisations ready to take to free prisoners like us from this isolation? (Nikita, Nepal. Similar questions by Frederick, South Africa; Neha, Nepal; Yod Pong, Thailand; Zalina, Tajikistan, Kourban, Madagascar; Vardan, Bulgaria and others).
4. I was born in Thailand in the forest. My parents were born in Thailand, but could not speak Thai and nobody told them that they

had to inform the officers when their child was born. I do not have nationality. I cannot work and I am so afraid every time I travel that I would be arrested and the police would tell me to get off the bus. What do I do? (Wa, 22, Thailand)

3) Questions about my future

What hope do I have for my future and what steps are being taken to grant me an appropriate nationality?

1. Will we always have to resort to illegal means to live like everyone else? What should we do to raise awareness about this problem? (Sakina, 20, Madagascar)
2. How long will I have to wait to have equal rights to other people? I have been fighting for it my whole life. (Phra, 21, Thailand).
3. To avoid discrimination that I have always experienced throughout my life due to my name, will I have to deny my religion and avoid Muslim names for my children to give them a greater chance to be recognised as Malagasy citizens? (Yousef, 24, Madagascar)
4. How long must I wait? How can I remedy immediate needs? 10 years' worth of life has been taken from me. What will happen when my case has been sorted out? And then what? Will I be financially supported for the 10 years of education I have lost? Will I be given a chance somewhere to start a decent living? I pray that mine, and many other stateless people's futures will soon start (Khumbulani Frederick Ngubane, South Africa).

This session was very much an experiment, and as the NGO Focal Point for the 2016 statelessness session, we were nervous to whether it would be a success or not. What followed surpassed our expectations, as the session allowed for a sincere discussion on difficult issues. It was a starting point, which showed the importance of consulting with and being held accountable to stateless persons in all our work, at global, regional, national and local levels. The following reflections stuck with me, in particular:

- When stateless people are represented in movements and actions to address statelessness, it tends to be in the more passive and victim-centric role of the person whose terrible life is on display through an interview or testimony. While it is important for the world to know what hardship is inflicted on the stateless, it is more important for the world to hear the true voice of stateless people. Not the voices which only relate their life stories, but the voices which

speak with agency about what they want, what frustrates them and how they feel about the way things are looking. This agency, which came with the simple act of stateless youth and children asking questions of NGOs and UNHCR as a way to hold them accountable, was refreshing and profound. The act of subverting the traditional victim role into one of active questioning and assertion, was an important one which must be repeated. This is the essence of true mobilisation.

- The sense of urgency that many of the questions engendered, posed a real challenge to participants. A reminder that every decision we take or do not take, has a real impact in terms of the ongoing experience of statelessness for so many. Particularly children, for whom 'time' is a more valuable currency and 'lost time' is more irrevocable, the need to address statelessness so they can get on with their lives is the most urgent thing in the world. A person's childhood does not wait for project proposals or conferences, it passes, and with it, so much vitality and potential. It was important to hear this sense of urgency directly from stateless children and youth; a reminder that we have to redouble our efforts.
- The respect that participants gave the questions and the seriousness with which they grappled with them was reassuring. Conference sessions can often be messy affairs, with participants 'multi-tasking' - laptops and smartphones in full operation - or being less willing to listen and more inclined to push their agenda forward and tweet about it later. This session had a different feel to it, there was a sense of focus and attention which was encouraging. In responding to questions, participants bounced ideas off each other, built on what was said before, acknowledged the challenges they faced and took responsibility. At this session, we were acutely aware that we were really speaking to those who we are ultimately working for – the stateless.

As an 'experiment', the session worked, however the session can certainly be improved upon in future. A key limitation was that ultimately, the stateless children and youth did not have the opportunity to participate in the debates that were stimulated by their questions. With advances in technology, it may be possible to video-conference people in, so that future events are even more dynamic and meaningful. There is also the question of 'reporting back' and following up through action – which are so important to ensure that events such as this lead to something tangible. Language complicates the picture, but can be overcome.

The strongest message to me, was that we need to develop a much stronger culture of consultation, participation and accountability in our programming. Global events such as the UNHCR NGO Consultations are a good platform to get this message across, however, real accountability and consultation should happen in daily operations. It adds cost and time, and can be messy. But keeping stateless people at the centre of our focus is essential if we are to effectively mobilise to achieve real change.

Introducing statelessness to Model United Nations conferences

*Aleksandra Semeriak Gavrilienok**

The phenomenon of Model United Nations (MUN) conferences has largely expanded in the past 20 years across different educational institutions around the world, bringing people from different disciplines together. From middle schools to universities, from political science to engineering studies or medicine, MUN conferences have been attended by millions of students in thousands of cities. On top of being an engaging experience through which students improve their public speaking and debating skills, MUN conferences are also an exciting opportunity to work together with other bright young minds to find solutions to socio-political, economic, and environmental problems around the world.

Every organising team of a MUN conference faces the same dilemma: which topics should be debated? There are plenty of problems in the world, but students, whether first-timers or *MUN-experts*, look for topics that trigger their interest and are debateable, while also being easy to understand. Participants will need to have a good comprehension of the subject, so they can defend the position of the country they're representing. After more than five years organising MUN conferences and despite being very familiar with the issue of statelessness from a personal and professional perspective, it wasn't until recently that I decided to try out statelessness as a debate topic for a high school MUN conference in Turkey. I was sceptical, and even a little bit afraid to begin with. I thought the topic may not be welcomed

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or understood by students, particularly as much of the existing information on statelessness is written for academic and professional audiences, which may be too difficult for non-specialists to follow.



Tilburg MUN on statelessness
© Tilburg Model United Nations

In reality though, the issue of statelessness is not ‘rocket science’, and its solutions can be clear. For those hearing about the problem for the first time the idea of someone having no nationality might seem inconceivable, but once the causes and consequences of statelessness are defined and understood by the delegates, statelessness gives considerable scope for a strong debate. Additionally, material on the topic, including videos and factsheets, help explain the issue to newcomers. Whether the model forum is the Executive Board of the UNHCR, the UN Human Rights Council, the International Organisation for Migration (IOM) or the European Council, statelessness is an appropriate topic for MUN conferences due to the fact that it is a global problem that can be found in any country, making it easy for participants to relate to and find concrete examples. Moreover, ongoing campaigns, such as UNHCR’s #IBelong campaign and ENS’ #StatelessKids campaign, provide a framework for possible solutions. But it is the concrete short and long-term actions, agreed on collectively during the debate, which make this topic so engaging for participants. In order to achieve these collective agreements, it is recommended that delegates relate to existing resolutions and campaign objectives on the topic, adding the perspective of the country they’re representing at the conference. Thus, it is useful to ask questions such as:

- Does your represented country have good practices that can be shared with other Member States and serve as a basis to end statelessness?
- How can your represented country contribute to the media strategy and dialogue on the topic of statelessness?
- Which additional mechanisms and legal measures could your country adopt to improve the existing legal framework on statelessness?
- How can you address legal gaps in national regulations without interfering in the sovereignty of the state? And what concrete steps can states take to recognise their stateless residents?

It is also important to discuss commitments to improve the situation of stateless people, such as:

- How do you reduce the risk of social exclusion of stateless persons?
- How do you improve the integration of former stateless persons into society?
- How do you protect particularly vulnerable groups of stateless persons?
- How do you involve stateless people in the decision-making process?
- How do you drive a long-term political solution to protect stateless individuals?

Eventually, the advantage children and youth have when discussing a topic like statelessness, in comparison to academics and diplomats, is that their imagination has no limits, which leads to a wide variety of creative ideas to raise awareness and to put pressure on decision makers and governments. For example, my delegates from the high school MUN conference in Turkey, pleasantly surprised me with a resolution that not only urged Member States to provide all stateless individuals with a valid international identity document and to ensure their access to education, healthcare, housing and the labour market, but also suggested “the creation, in collaboration with other UN bodies and NGOs, of an international social fund for stateless people, sponsored by Member States according to their national income, to reduce the risk of social exclusion and provide stateless persons with basic needs, which they aren’t able to access due to their status”. Additionally, they proposed to adopt an International Awareness Day for Statelessness. I remember that one concrete delegate said that a

nationality was “as necessary as shoes” and suggested that on that day to raise awareness “people would walk around without shoes to feel like a stateless person”. If you add to these original ideas the strong social media and IT skills, which most of young people have, the result can be an extraordinary combination of ingenuity, productivity, learning and good fun.

Researching childhood statelessness

*Charlie Rumsby**

1. Introduction

Statelessness research is a difficult endeavour regardless of whether your research participants are adults or children. However, there are specific and particular issues associated with researching children's experiences of statelessness. In this essay, I aim to bring this type of research to life by sharing some reflections on the study that I have conducted, as a PhD candidate, among ethnic Vietnamese children living in Cambodia with 'undetermined nationality'.

The majority of children I carried out research with belong to families with a long history living in Cambodia, but do not appear to have been able to secure access to Cambodian nationality (hence the label adopted in my research of 'undetermined nationality'). Most had been born in Cambodia to parents who had also been born in Cambodia, and had departed the country for a brief period from 1975 to 1979, during Khmer Rouge rule. Some children's grandparents were also born in Cambodia. Despite this, only a few had birth certificates and most live with undetermined nationality. Without citizenship and other documentation for themselves, it is extremely difficult for ethnic Vietnamese parents to secure Cambodian nationality for their children based on Nationality Law (1996). For instance, despite introducing a *jus soli* provision, ethnic Vietnamese children born in Cambodia can acquire nationality only insofar as their parents can prove that they were either born or have lived legally in the country.¹ However,

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¹ B. Ang & J. Chan, 'The Situation of Stateless Ethnic Vietnamese in Cambodia LIMBO ON EARTH: An Investigative Report On the Current Living Conditions

most Vietnamese who returned to Cambodia after the Khmer Rouge period lost their papers and cannot prove their residence before the adoption of the 1994 Immigration Law; therefore, their children are not considered Cambodian citizens.

The objectives of my research were to understand the everyday reality and experiences of Vietnamese children living in Cambodia with undetermined nationality. What came into focus during the research was how identity and a sense of belonging are being formulated by young people and the role that religion plays in this process. This essay will discuss how I approached the research as well as the ethical and methodological considerations.

2. Researching 'with' rather than 'on' children

It is important to stress one significant change that has taken place within anthropology that has informed the approach I have taken during my fieldwork. Traditionally, when anthropologists carried out their ethnographies, children were either studied as 'adults in waiting', or the focus was research *on* children rather than *with* children.² Research *on* children would have focused largely on how childhood is constructed across cultures and on the rituals and cultural practices that ushered in adulthood. What was lacking in anthropological studies concerning childhood were the voices of children themselves.³ Children's voices were not completely missing from ethnographic texts but they were few and far between.

and Legal Status of Ethnic Vietnamese in Cambodia' (2014), available at http://vnpp.net/files/MIROs_Stateless_Vietnamese_Report_2014.pdf

² R. Levine & R. New, *Anthropology and Child Development: A Cross-Cultural Reader* (Wiley, 2008); H. Montgomery, *An Introduction to Childhood: Anthropological Perspectives on Children's Lives* (John Wiley & Sons, 2008); A. Solberg, 'The Challenge in Child Research; from "being" to "doing"' in J. Brannen & M. O'Brien (eds), *Children in Families: Research and Policy* (London: The Falmer Press, 1996).

³ P.H. Christensen, 'Children's Participation in Ethnographic Research: Issues of Power and Representation' (2004) 18 *Children and Society* 165.

Today the anthropology of childhood has taken significant steps to carry out research *with* children. Taking children's agency seriously and believing that a child is the best person to explain their world, meaning that research on childhood statelessness, for instance, can best be understood by asking children themselves, and that they, therefore, must be involved where possible, in research design and practice.

3. Ethical considerations

Doing academic research with children is fraught with important ethical considerations, which feels like working in a minefield at times.⁴ Anyone considering embarking on such research should talk to academics with experience working with children. (Those without experience will say unhelpful things like "you're working with children; the ethics process is going to be a nightmare!") A common ethical mistake is confusing what ought to be a robust process of protecting children from harm, with ignorance about researching with children and their ability to talk about their experiences and traumatic instances with profound resolve. For instance, I spent much time preparing to be reflexive throughout the research process and not to unhelpfully raise issues that could cause a participant to become upset. However, in hindsight I actually needed to prepare *myself* mentally for listening to children's intimate accounts of their lives, often from out of the blue and without having built any prior rapport. For instance, whilst completing an exercise exploring concepts of time and history, participants drew a timeline of their lives from being born to the present day. Afterwards I proceeded to ask a participant what they wrote as their earliest memory on their timeline:

⁴ Virginia Morrow and Martin Richards, 'The Ethics of Social Research with Children: An Overview' (2007) 10 *Children & Society* 90.

Excerpt of interview

INTERVIEWER: You've started the timeline when you were 7, what happened when you were 7?

PARTICIPANT: When I was 7 years old my younger sister fell into the water and died.

INTERVIEWER: Oh I am sorry to hear that. How old was she?

PARTICIPANT: 3 years old.

INTERVIEWER: Was she on her own when she fell or was someone else there?

PARTICIPANT: That time I stay at home to do to the house work. I brought for her the life jacket but she took it off.

INTERVIEWER: Is this your first memory?

PARTICIPANT: Yes.

INTERVIEWER: What happened in your life from 0-7?

PARTICIPANT: Nothing happened in my life until I am 7 years old. Then my sister died.

This shocking story was one of many I heard about the vulnerability of living on the river. Many children with undetermined nationality live on the water because their family cannot buy land or cannot afford land taxes which most Vietnamese have to pay. Living in the community and continuing with the research after learning of this unfortunate death, I did not feel the full impact of this story on my own mental wellbeing until I had space to reflect. Having people to talk to and process emotional encounters whether they are supervisors or trusted friends, is essential.

4. 'Child-friendly' methodologies

In the social sciences there has been a long debate on issues to do with 'child friendly' research and what methodology will best capture children's experiences as they happen.⁵ At the fore of this discussion is the question of whether children should be treated differently to adults when it comes to interviews and interaction. Interviews that consist of

⁵ S. Punch, 'Research with Children: The Same or Different from Research with Adults?' (2002) 9(3) *Childhood* 321, available at <http://chd.sagepub.com/content/9/3/321.short?rss=1&ssource=mfc>

straight talking about topics for an hour - with the potential to unearth sensitive data - have been considered potentially arduous for children.

My research design had two important cornerstones: firstly, children are agents in their own right. They ought to be listened to and taken seriously. As people who experience their world directly they are the best people to explain that experience – not adults. Secondly, the research agenda ought to be formulated with participants and not be undertaken without their consent and vital input into the research questions. In my situation, I pitched the research idea to around 70 children, explained my interests, and asked them whether they thought my project was worthwhile, getting feedback on what they considered the important issues present in their lives. Giving over the research agenda is a nerve-wracking moment. If research is going to be participatory - and participant's voices really do matter – I had to prepare myself for the possibility that participants might not think the project was worthwhile and therefore would not want to participate. Thankfully the response was positive and the research was seen as a way for children to speak to the world; as one participant replied, “we can share our lives with people who have the same problems.”

Preliminary focus groups explored what participants thought should be included in the research, what questions they wanted to be asked and not asked, and what they wanted the world to know about their lives. Once the research questions had been decided I also discussed with participants what kind of methods they would like to use, sharing ideas based on other research that had been carried out with children across the world.⁶ During these discussions it was agreed that arts-based methods were preferred and drawings could be used to enhance conversations during interviews. Therefore participants would first

⁶ M. Moskal, 'Visual Methods in Researching Migrant Children's Experiences of Belonging' (2010) 7 Migration Letters 17, available at https://www.researchgate.net/publication/46542387_Visual_methods_in_researching_migrant_children's_experiences_of_belonging; O'Kane, 'The Development of Participatory Techniques Facilitating Children's Views about Decisions Which Affect Them' in Christensen and James (eds), *Research with Children: Perspectives and Practices* (Routledge, 2008); R. Waterson & D.K. Behera, 'Introduction: Extending Ethnographic Research with Children in the Asia-Pacific Region' (2011) 12 The Asia Pacific Journal of Anthropology 411, available at <http://www.tandfonline.com/doi/abs/10.1080/14442213.2011.611163>; P. Sapkota & J. Sharma, 'Participatory Interactions with Street Children in Nepal' (1996) 25 PLA Notes, Special Issue on Children's Participation.

spend time carrying out a creative exercise before an interview and I would seek to understand what they found easy or difficult about each task before interviewing to understand the effectiveness of each tool.

Excerpt of interview with stateless child (translated from the original Vietnamese)

Since I was small, I have lived in Cambodia. My family is Vietnamese, and not having papers hurts my life. I am scorned/despised by some Cambodian people and I cannot study. My parents try to find every penny in order to get by day by day, but our homeland is not my country and I don't know if I will ever return. When we are not able to study, our futures are bleak; Cambodian people hate me and force me back to my homeland. When I travel back to my homeland, and the people in Vietnam do not accept me, my life will be difficult.

Using arts-based methods empowered participants as it was their creative outputs which would lead discussions. My role was to follow their lead and listen with attentiveness, directing the conversation when necessary. Shyness was a factor I encountered among a few participants and creative methods helped with this too as there was something to talk about from the outset. Some participants were not confident drawers and would prefer to write, whilst younger participants in the 6-10 age brackets interviewed better in groups. Consent was an ongoing practice. I would ask each participant if they would like to continue with the research after each interview. This proved important as two participants did withdraw.

5. The 'least teacher' role

To an even greater degree than with adults, when researching with children one has to consider relational proximity. I used UK guidelines for working with children and obtained a Disclosure and Barring Service (DBS) check, following ethical guidelines from the Association of Social Anthropologists.⁷ Considerations which were particular to

⁷ The Disclosure and Barring Service (DBS) helps employers make safer recruitment decisions and prevent unsuitable people from working with



I WANT:

The children here do not have papers, which means that they cannot study and are shouted at by many people, just when walking to a neighbour's house. They are insulted and do not dare reply, but can you imagine how it feels? I only know that I am a child who really wants papers so I can go to different places, and work for the Lord. I also want to study, and be able to travel and not be afraid of anyone, and have the freedom to do many things and then my dream will become reality.

PRAYER: O LORD, do you hear my prayer? I ask you for papers, for the many children here. Dear LORD, my wish is to follow your word more. O Lord, I know you are merciful, I know you are always with me, thank you LORD.

© Charlie Rumsby

working with children consisted of how to define a child for consent purposes, in what spaces to conduct interviews and how to carry out participant observation among young participants.

There are, for instance, limitations in participant observation among children, as adults or culture can hinder this. I conducted my research in a school that provided much needed education for marginalised children, and had to negotiate my role as a researcher who also did voluntary teaching. The Vietnamese pronoun with which children addressed me was 'cô', meaning 'miss', as in teacher, or a respected elder in the social hierarchy. Teaching English to students at the school meant I was considered a member of staff, so culturally it was appropriate for me to address participants as 'con', meaning child. This meant I could not use more informal, less hierarchical pronouns when having day-to-day conversations outside the classroom, despite trying to shake off the linguistically constructed relationship.

A way to break down this formalised relationship was to share my own personal life experiences during conversations and interviews which somewhat undermined the dynamic of teacher and student. Furthermore, I did not wear the official uniform for teachers, and did

vulnerable groups, including children. For more information see <https://www.gov.uk/disclosure-barring-service-check/overview>

not always challenge what might be ‘inappropriate’ behaviour in the classroom, taking the opportunity instead to explore young people’s experiences. For instance, in one class a student teased another by accusing her of being on drugs, due to her lethargic behaviour. This kind of joke would have been seen as disruptive and potentially immoral and therefore lead to a reprimand from other teachers. Instead, I probed with some non-judgmental questions and was able to learn about the prevalence of drugs within that community, the young people’s opinions on drug taking and their level of experimentation.

Despite my attempts of taking on what might be considered a ‘least teacher’ role, I still had to discipline students. On these occasions I worried that it might affect my relationships with the children. This highlights another reality of conducting research among young people – they may not actually like you. Just like a playground situation where children can form cliques and alliances, often I was aware that my behaviour, especially when disciplining, could have produced exclusion. On one occasion a participant did stop speaking to me for two days, only to return to the project. Thankfully, I was able to explain my rationale for discipline that most students did accept. Ensuring there were no ‘hard’ feelings was a crucial element, which I learned to negotiate.

6. Conclusion

This essay has explored how to approach research focused on childhood statelessness. With regard to the debate whether separate ethical or methodological considerations should be employed for research with children, I support a ‘child-friendly’ methodology and have mentioned some of the distinctive ethical nuances related to researching with children. Taking children’s voices seriously is a vital part of research. As active agents, who experience the lived reality of undetermined nationality (as in this case), children guided me through their world with outstanding resilience to circumstances beyond their control. I am truly grateful for every participant who shared with me the deep sorrow of living in limbo, as well as the joys they encounter in their everyday lives. I owe a deep gratitude to the school for hosting me and introducing me to the communities I have been able to build relationships with.

Street theatre to address statelessness in the Dominican Republic

*Laura Quintana Soms**

Dominicans of Haitian descent constitute the largest minority group in the Dominican Republic (DR). Despite being born in the DR, members of this minority group are being systematically and arbitrarily denied Dominican nationality by the government in contravention to national laws, international norms, and rulings of the Inter-American Court of Human Rights. According to the last UNHCR Global Trends report, there are at least 133,770 stateless people in the DR, including adults and children.¹ Dominicans of Haitian descent live mostly in slums near sugar cane plantations called *bateyes*, where they used to work before the decline of the Dominican sugar industry in the 1980s. Most *bateyes* are in rural areas with limited access to basic services (water, education, health care etc.). Their inhabitants are largely excluded from Dominican society and face extreme poverty.

In 2010, Minority Rights Group International (MRGI)² launched its first street theatre project to encourage young Dominicans to explore the idea of belonging and better understand and challenge the discrimination that this minority group faces. Central to the project was a cultural exchange between majority and minority community

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¹ UNHCR, *Global Trends on Forced Displacement 2015* (2015), available at <http://www.unhcr.org/576408cd7.pdf>

² MRGI is an INGO working to secure the rights of ethnic, linguistic and religious minorities and indigenous peoples worldwide. See <http://www.minorityrights.org/>



Children of the Bateyes

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members to challenge deeply entrenched stereotypes and prejudices. Professional actors/actresses from the majority Dominican community and less experienced actors/actresses from the minority community worked and lived together for a short period, receiving training on theatre and, ultimately, designing a play which was performed on the streets of their neighbourhoods, sparking much fruitful debate. Following this successful experience, MRGI launched a second phase (2013-2016). This time the troupe was made up solely of minority community members who were trained on theatre, human rights, and community activism. The objective was to build on the experience gained during the first phase, and to help further empower young Dominicans of Haitian descent to become leaders in their respective communities.

Over more than three years, 12 young minority community members—some of them stateless—designed two plays on accessing basic services and on the statelessness faced by their community. They performed to more than 5,000 people in the DR and their story was shared on national media. In parallel, the project ran a national and international advocacy strategy targeting the Dominican government which contributed to more than 20 states raising the issue of statelessness in the DR during the Universal Periodic Review of this country in 2014.



Street theatre

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The Dominican government later implemented a naturalisation law, which improved the situation but did not solve it.

The street theatre technique has proved to be an extremely useful medium at the personal, minority community, and majority community levels. Those people who directly participated gained or further developed personal skills such as public speaking and leadership. They also learned how to use street theatre for social change and human rights. At the same time, theatre also created space for communities to discuss challenging topics using an interactive and entertaining methodology, while sharing knowledge and raising awareness of issues they are concerned about.

Since MRGI's street theatre initiatives took off in 2010, we have implemented four similar projects in Europe, Central Africa, and Middle East and North Africa.³ What our work has shown is that through street theatre we can better explore ideas of belonging and discrimination, and encourage people to recognise that everyone should have the opportunity to have a place they call home.

³ To learn more about this work, see the Documentary "Our lives in transit" in English: <https://www.youtube.com/watch?v=DAqGuj8AT1U>; and in Spanish: https://www.youtube.com/watch?v=IhHipVnG_gM; the MRGI publication "Statelessness in the Dominican Republic" in English: <http://stories.minorityrights.org/dominican-republic/>; and in Spanish: <http://stories.minorityrights.org/dominican-republic-es/>

LIST OF ABBREVIATIONS

#IBelong Campaign	UNHCR's #IBelong Campaign to End Statelessness within 10 Years
1930 Hague Convention	1930 Hague Convention on certain questions relating to the conflict of nationality laws
1951 Convention	1951 Convention relating to the Status of Refugees
1951 Refugee Convention	
1954 Convention	1954 Convention relating to the Status of Stateless Persons
1954 Statelessness Convention	
1961 Convention	1961 Convention on the Reduction of Statelessness
1961 Statelessness Convention	
2030 Agenda	2030 Agenda for Sustainable Development
Abidjan Declaration	Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRD	ASEAN Human Rights Declaration
ASEAN	Association of South-East Asian Nations
AU	African Union
Brazil Declaration	Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean
Brazil Plan of Action	Brazil Plan of Action: A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity
CANS	Central Asian Network on Statelessness
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women

LIST OF ABBREVIATIONS

CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
Committee on Racial Discrimination	Committee on the Elimination of All Forms of Racial Discrimination
CERD	
CoE	Council of Europe
Committee on Discrimination against Women	Committee on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRVS	Civil Registration and Vital Statistics
DR	Dominican Republic
ECHR	European Convention on Human Rights (CoE)
ECJ	European Court of Justice (EU)
ECN	European Convention on Nationality (CoE)
UN ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights (CoE)
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
EU	European Union
EU Charter	European Union Charter of Fundamental Rights
GAP	UNHCR Global Action Plan to End Statelessness
Global Indicators	Indicators developed in the 2030 Agenda framework
GRULAC	Group of Latin American and Caribbean Countries (in the UN framework)
IACtHR	Inter-American Court of Human Rights
IACommHR	Inter-American Commission of Human Rights
IAEG-SDGs	Inter-Agency and Expert Group on Sustainable Development Goal Indicators
ICCPR	International Covenant on Civil and Political Rights

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDP	Internally Displaced Person
ILC	International Law Commission
LGBTI	Lesbian, Gay, Bisexual, Transsexual and Intersex
MDGs	Millennium Development Goals
MENA	Middle-East and North Africa
MERCOSUR	Southern Americas Common Market
NGO	Non-Governmental Organisation
INGO	International Non-Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	United Nations Office of the High Commissioner for Human Rights
SDGs	Sustainable Development Goals
SuR	State under Review (in the UPR)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programmes
UNGA	United Nations General Assembly
UN HRC	UN Human Rights Council
UNHCR	United Nations High Commissioner for Refugees
UNHCR ExCom	Executive Committee of the High Commissioner's Programme
UNICEF	United Nations Children's Fund
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UPR	Universal Periodic Review (UN Human Rights Council)

LIST OF CONTRIBUTIONS

Alphabetically by author

A

- Zahra Albarazi
Syria's displacement crisis, statelessness and children, Chapter 9 233
- Heather Alexander
The open sky or brick-and-mortar school? Statelessness, education and nomadic children, Chapter 9 248
- Betsy Apple [and Laura Bingham]
The SDGs: An opportunity to leave no stateless child behind, Chapter 10 295
- Semegnish Asfaw
Churches advocating for birth registration, Chapter 10 333
- Azizbek Ashurov
Civil society networks in the Asia-Pacific region: The Central Asian Network on Statelessness, Chapter 4 70
- Ayalew Getachew Assefa
Safeguards against childhood statelessness under the African human rights system, Chapter 11 359

B

- David Baluarte
The perpetuation of childhood statelessness in the Dominican Republic, Chapter 12 434
- Jacqueline Bhabha
The importance of nationality for children, Chapter 7 112
- Laura Bingham [and Betsy Apple]
The SDGs: An opportunity to leave no stateless child behind, Chapter 10 295
- Tendayi Bloom
The SDGs and childhood statelessness, Chapter 10 304

Laura Bosch	
<i>Birth registration problems in complex migration contexts – case studies from the Netherlands, Chapter 9</i>	265
Peggy Brett	
<i>Discrimination and childhood statelessness in the work of the UN human rights treaty bodies, Chapter 8</i>	169
Marie Brokstadt Lund-Johansen	
<i>The mobilisation of Bidoon youth, Chapter 13</i>	518
Helen Brunt	
<i>The stateless Rohingya, Chapter 9</i>	223
<i>Stateless at sea, Chapter 10</i>	290
 C	
Francesco Cecon	
<i>Advancing children's right to a nationality through the UN Committee on the Rights of the Child, Chapter 8</i>	146
Greg Constantine	
<i>We see you, Chapter 7</i>	
 D	
DHRRRA Malaysia	
<i>Legal action to address childhood statelessness in Malaysia, Chapter 12</i>	460
<i>The struggle for documentation: A family story, Chapter 12</i>	465
Amal de Chickera	
<i>The boy, Chapter 8</i>	167
<i>Being accountable to stateless children and youth: The 2016 UNHCR NGO Consultations session on statelessness, Chapter 13</i>	521
 F	
Ferghana Lawyers	
<i>Mobile legal services and litigation in Kyrgyzstan, Chapter 12</i>	457
Betsy Fisher	
<i>Gender and birth status discrimination and childhood statelessness, Chapter 8</i>	185

G

- Nicole Garbin [and Adam Weiss]
An Italian recipe to address childhood statelessness, Chapter 12 424
- Ivonne Garza
Americas Network on Statelessness and Nationality, Chapter 3 54
- Gábor Gyulai
The long-overlooked mystery of refugee children's nationality,
 Chapter 9 242

H

- Bernadette Habib
*Using the UN system to advocate for nationality law reform
 in Lebanon*, Chapter 8 191
- Catherine Harrington
Global campaign for equal nationality rights update, Chapter 1 18
- Campaigning for gender equality in nationality laws*, Chapter 13 495

K

- Jyothi Kanics
Migration, forced displacement, and childhood statelessness,
 Chapter 9 209
- Lilana Keith
*Risks of statelessness for children of undocumented parents
 in Europe*, Chapter 9 267
- Melanie Khanna
State of the world's stateless, Chapter 1 11

L

- Delfina Lawson [and Macarena Rodriguez]
*The role of Legal Clinics and local communities in securing the
 right to a nationality in Chile*, Chapter 12 452
- Estela visits the Legal Clinic*, Chapter 12 455
- Anne-Sophie Lois
Every child counts, Chapter 10 327

M

Michela Macchiavello [and Alice Sironi] <i>Preventing statelessness of migrant children</i> , Chapter 9	256
Bronwen Manby <i>"Legal identity for all" and childhood statelessness</i> , Chapter 10	313
Thomas McGee <i>Axin – an interview</i> , Chapter 8	189
<i>Stateless refugee children of Syria</i> , Chapter 9	239
Benyam Dawit Mezmur <i>An interview with Benyam Dawit Mezmur, Chairperson of the UN Committee on the Rights of the Child by Maria Jose Recalde Vela</i> , Chapter 8	130
Liesl Muller <i>The Citizenship Rights in Africa Initiative (CRAI)</i> , Chapter 2	39
<i>Making safeguards work: A perspective from South African legal practice</i> , Chapter 11	401
Subin Mulmi <i>Mobilising to address childhood statelessness in Nepal</i> , Chapter 13	508

N

Chris Nash <i>The European Network on Statelessness (ENS)</i> , Chapter 5	92
<i>Mobilising to address childhood statelessness: The experience of the European Network on Statelessness through its #StatelessKids campaign</i> , Chapter 13	474

P

Laura Parker <i>Foundlings in Côte d'Ivoire</i> , Chapter 11	369
Allison Petrozziello <i>Stateless children of the Dominican Republic</i> , Chapter 12	447
Praxis Serbia <i>Using the CRC to help protect children from statelessness in Serbia</i> , Chapter 8	140

Katarzyna Przybyslawska <i>Schools outreach in Poland</i> , Chapter 13	490
---------------------------------------------------------------------------	-----

Q

Francisco Quintana <i>Using the Inter-American regional framework to help stateless children in the Dominican Republic</i> , Chapter 8	191
-------------------------------------------------------------------------------------------------------------------------------------------	-----

Laura Quintana Soms <i>Street theatre to address statelessness in the Dominican Republic</i> , Chapter 13	539
--------------------------------------------------------------------------------------------------------------	-----

R

Sanoj Rajan <i>International surrogacy arrangements and statelessness</i> , Chapter 11	374
-------------------------------------------------------------------------------------------	-----

Maria Jose Recalde Vela <i>An interview with Benyam Dawit Mezmur, Chairperson of the UN Committee on the Rights of the Child</i> , Chapter 8	130
-------------------------------------------------------------------------------------------------------------------------------------------------	-----

Macarena Rodriguez [and Delfina Lawson] <i>The role of Legal Clinics and local communities in securing the right to a nationality in Chile</i> , Chapter 12	452
<i>Estela visits the Legal Clinic</i> , Chapter 12	

Elena Rozzi <i>Out of limbo: Promoting the right of undocumented and stateless Roma people to a legal status in Italy through community-based paralegals</i> , Chapter 12	427
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----

Charlie Rumsby <i>Researching childhood statelessness</i> , Chapter 13	531
---------------------------------------------------------------------------	-----

S

Monica Sanchez Bermudez <i>Accessing documents, preventing statelessness</i> , Chapter 9	226
---------------------------------------------------------------------------------------------	-----

Aleksandra Semeriak Gavrilienok <i>Introducing statelessness to Model United Nations conferences</i> , Chapter 13	527
----------------------------------------------------------------------------------------------------------------------	-----

Alice Sironi [and Michela Macchiavello] <i>Preventing statelessness of migrant children</i> , Chapter 9	256
------------------------------------------------------------------------------------------------------------	-----

T

Laurel Townhead <i>Preventing childhood statelessness of children of prisoners</i> , Chapter 11	385
-------------------------------------------------------------------------------------------------------	-----

V

Hernan Vales <i>Human rights and stateless children</i> , Chapter 8	163
Juliana Vengoechea Barrios <i>Do jus soli regimes always protect children from statelessness?</i> <i>Some reflection from the Americas</i> , Chapter 11	393

W

Laura van Waas <i>International and regional safeguards to protect children from statelessness</i> , Chapter 11	342
Davina Wadley <i>Civil society networks in the Asia-Pacific region: The Statelessness Network Asia Pacific</i> , Chapter 4	70
Adam Weiss <i>Strategic litigation to address childhood statelessness</i> , Chapter 12	416
Adam Weiss [and Nicole Garbin] <i>An Italian recipe to address childhood statelessness</i> , Chapter 12	424

Y

Mahmoud Yousif <i>Using the African regional framework to realise children's nationality rights in Kenya</i> , Chapter 8	198
---------------------------------------------------------------------------------------------------------------------------------	-----

Z

Tini Zainudin <i>Stateless and invisible</i> , Chapter 11	407
--------------------------------------------------------------	-----