

## Submission to the OHCHR: Human Rights of Migrants

**To:** Office of the High Commissioner for Human Rights (OHCHR)

**By:** Peter McMullin Centre on Statelessness, Melbourne Law School

**Date:** 18/05/2023

### Purpose of the Submission

The Peter McMullin Centre on Statelessness (PMCS) makes this submission to the Office of the High Commissioner for Human Rights (OHCHR) in response to its call for inputs regarding the UN Secretary-General's report on the Human Rights of Migrants which will cover all aspects of the General Assembly Resolution A/RES/76/172 on the protection of migrants. The main concern of this submission is the situation of stateless migrants and their need for protection.

### Information about the Contributor

Melbourne Law School's Peter McMullin Centre on Statelessness was established in 2018 with the objective of undertaking research, teaching and engagement activities aimed at reducing statelessness and protecting the rights of stateless people in Australia, the Asia Pacific region, and as appropriate more broadly.

The focus of the Centre is to develop teaching, research and engagement projects with three major aims:

- To properly understand the scope, scale and reasons for statelessness in order to develop targeted and effective responses to it;
- To work towards reducing and, over time, eliminating statelessness; and
- Until statelessness is eliminated, working to protect the human rights of stateless people within the countries in which they reside.

As a Centre working on stateless populations, our main interest is in principles and tools that ensure the concerns of stateless and/or other marginalised populations are appropriately considered in the design and implementation of legal documents. For further information about the Centre, see <https://law.unimelb.edu.au/centres/statelessness#about>.

## Response to the Call for Inputs

### *Stateless Migrants*

- In the OHCHR’s consideration of the human rights of migrants, it is crucial to note the circumstances and rights of stateless migrants whose situation might be different from other migrants in several respects.
- A stateless person is a person ‘who is not considered as a national by any state under the operation of its law’.<sup>1</sup> While the exact number of stateless persons is unknown, the UN Office of the High Commissioner for Refugees (UNHCR) estimates that there are at least 10 million stateless persons globally.<sup>2</sup> There is no clear estimate of the number of stateless migrants.
- Without the right to nationality which is considered as ‘the right to have rights’, stateless persons are often deprived of their basic human rights including the right to food, housing, education, freedom of movement (due to arbitrary arrests and detention) and other civil and political rights as well as social and economic rights.<sup>3</sup> Often, these circumstances force stateless persons to migrate.<sup>4</sup> Accordingly, the New York Declaration for Refugees and Migrants recognised statelessness as a root cause of forced displacement and also noted that forced displacement can lead to statelessness.<sup>5</sup>
- Stateless migrants face specific vulnerabilities given their situation of statelessness. For instance, without nationality, they may not be able to access consular services and diplomatic protection.<sup>6</sup> They may be without effective remedy, particularly against discrimination and intolerant acts that migrants might face since they may not possess necessary legal identity documents.<sup>7</sup> They may not be able to migrate legally without identity documents.<sup>8</sup> Stateless migrants who are admitted into a state territory, being stateless and lacking a country of nationality, will not be able to exercise their right to return in the same manner as other migrants.<sup>9</sup> Ultimately, stateless persons face risks of indefinite detention, deportation and human trafficking.<sup>10</sup>

<sup>1</sup> Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entry into force 6 June 1960) 360 UNTS 117 (1954 Convention) art 1.

<sup>2</sup> United Nations High Commissioner for Refugees (UNHCR), ‘Statelessness Around the World’ <<https://www.unhcr.org/ibelong/statelessness-around-the-world/>>.

<sup>3</sup> UNHCR, ‘What is Statelessness?’ <<https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness-2pager-ENG.pdf>>; see also Jason Tucker, ‘Statelessness and Displacement: The Cause, Consequences, and Challenges of Statelessness and Capabilities Required of Social Workers’ in Nancy J. Murakami, Mashura Akilova (eds), *Integrative Social Work Practice with Refugees, Asylum Seekers, and Other Forcibly Displaced Persons* (Springer 2022) 356-7.

<sup>4</sup> *Ibid*; Zahra Albarazi, Laura van Waas, ‘Statelessness and Displacement: Scoping Paper’ (*Institute on Statelessness and Inclusion*) <[https://files.institutesi.org/stateless\\_displacement.pdf](https://files.institutesi.org/stateless_displacement.pdf)>; Tendayi Bloom, ‘Statelessness and the Global Compact for Migration’ (*Refugee Law Initiative*, 11 September 2017) <<https://rli.blogs.sas.ac.uk/2017/09/11/statelessness-and-the-global-compact-for-migration/>>.

<sup>5</sup> New York Declaration for Refugees and Migrants, UNGA Res 71/1 (3 October 2016), para 72.

<sup>6</sup> See for instance Annemarieke Vermeer-Künzli, ‘Diplomatic Protection and Consular Assistance of Migrants’ in Vincent Chetail, Céline Bauloz, *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited 2014) 272-3.

<sup>7</sup> See Institute on Statelessness and Inclusion (ISI), *The World’s Stateless* (Wolf Legal Publishers 2014) 28-31.

<sup>8</sup> Sophie Nonnenmacher, Ryszard Cholewinski, ‘The Nexus Between Statelessness and Migration’ in Alice Edwards, Laura van Waas, *Nationality and Statelessness under International Law* (CUP 2014) 247.

<sup>9</sup> *Ibid*.

<sup>10</sup> See ISI, *supra* note 7, 28-31; see also Laura van Waas, ‘Nationality Matters: Statelessness under International Law’ (*Institute on Statelessness and Inclusion*, 2008) 12-3 <[https://files.institutesi.org/Nationality\\_Matters.pdf](https://files.institutesi.org/Nationality_Matters.pdf)>.

- Migrants also risk statelessness particularly when they are unable to access identity documents.<sup>11</sup> Furthermore, they face this risk when they lose their documents while fleeing emergency situations such as natural disasters, armed conflict or are victims of trafficking.<sup>12</sup> Frequently, children of migrants face risk of statelessness when their birth in countries of transit or destination cannot be registered.<sup>13</sup> Migrants and their children who have lived in a country for several years often lose ties with their home country and may also be unable to obtain nationality in their country of destination, leaving them at risk of statelessness.<sup>14</sup>
- In particular, two specific emergency situations – climate change and armed conflict – can lead to movement across borders and result in statelessness or risk of statelessness. First, climate change can result in displacement and those displaced may be at risk of statelessness when they lose their identity documents. Their children also face this risk when they are unable to obtain documents.<sup>15</sup> This risk also arises for displaced persons when there are gaps in the nationality laws of their countries of origin, which at times can lead to a loss of nationality on account of displacement.<sup>16</sup> Second, where armed conflict leads to displacement, displaced persons face risks of statelessness due to lack of access to civil registration, discriminatory nationality laws in their country of origin or due to a combination of both.<sup>17</sup>

### ***Protection of Stateless Migrants under International Law***

- *Protection of Stateless Migrants:*  
96 states are parties to the 1954 Convention Relating to the Status of Stateless Persons.<sup>18</sup> This Convention obligates state parties to protect stateless persons including their freedom to practise their religion (Article 4), property (Articles 13-14), right of association (Article 15), right to access courts (Article 16), right to employment

<sup>11</sup>Alice Sironi, 'The Double Plight of Stateless Migrants' (*European Network on Statelessness*, 13 May 2016) <<https://www.statelessness.eu/updates/blog/double-plight-stateless-migrants>>; Albarazi, Waas, 'Statelessness and Displacement: Scoping Paper', *supra* note 4, 19-21.

<sup>12</sup> Anne Althaus, Laura Parker, 'Preventing Statelessness Among Undocumented Migrants: The Role of the International Organization for Migration' (*LSE Blogs*, 7 May 2019) <<https://blogs.lse.ac.uk/mec/2019/05/07/preventing-statelessness-among-undocumented-migrants-the-role-of-the-international-organization-for-migration/>>; Sironi, 'The Double Plight of Stateless Migrants', *supra* note 11.

<sup>13</sup> UNHCR, 'What is Statelessness?', *supra* note 3; Albarazi, Waas, 'Statelessness and Displacement: Scoping Paper', *supra* note 4, 19-20; Bloom, 'Statelessness and the Global Compact for Migration', *supra* note 4.

<sup>14</sup> Althaus, Parker, 'Preventing Statelessness Among Undocumented Migrants: The Role of the International Organization for Migration', *supra* note 12.

<sup>15</sup> See UNHCR, Norwegian Refugee Council, Peter McMullin Centre on Statelessness (PMCS), 'Statelessness and Climate Change' (*Refworld*, October 2021) <<https://www.refworld.org/pdfid/617c01da4.pdf>>.

<sup>16</sup> See generally Michelle Foster, Nicola Hard, Hélène Lambert, Jane McAdam, 'The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the Context of Climate Change' (*PMCS and Kaldor Centre*, May 2022) <<https://law.unimelb.edu.au/centres/statelessness/resources/reports/the-future-of-nationality-in-the-pacific>>.

<sup>17</sup> Tucker, *supra* note 3, 356-7; Jyothi Kanics, 'Migration, Forced Displacement, and Childhood Statelessness' (*World Stateless Children*) <<http://children.worldsstateless.org/3/migration-displacement-and-childhood-statelessness/migration-forced-displacement-and-childhood-statelessness.html>>.

<sup>18</sup> UN Treaty Collection, 'Convention Relating to the Status of Stateless Persons' <[https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en)>.

(Article 17), right to housing (Article 21), right to education (Article 22), freedom of movement (Article 26), right to receive identity papers (Article 27) and travel documents (Article 28), protection from expulsion (Article 31) and naturalization of stateless persons (Article 32). While states are required to guarantee some of these protections on the same basis as other aliens, other protections are to be accorded on par with nationals. The provisions of the Convention are applicable without discrimination on the basis of race, religion or country of origin (Article 3). Accordingly, state parties have the obligation to provide these protections to stateless migrants, regardless of their country of origin. Furthermore, while some provisions of the Convention are available only to stateless migrants lawfully within a state, there are other provisions that apply to all such persons irrespective of the legality of their presence within the state.<sup>19</sup> To comply with the obligations under this Convention towards stateless migrants, state parties have an implied obligation to identify stateless persons within their jurisdiction.<sup>20</sup> Accordingly, states should establish a statelessness determination procedure for this purpose.<sup>21</sup>

- *Right to Nationality of Stateless Migrants:*

Under international human rights law, everyone has a right to a nationality and states are prohibited from arbitrarily depriving persons of their nationality.<sup>22</sup> This right is considered as a ‘cross-cutting and enabling right’ in relation to other human rights,<sup>23</sup> and is applicable to stateless migrants. Under the 1954 Convention Relating to the Status of Stateless Persons, state parties have a duty ‘as far as possible [to] facilitate the assimilation and naturalization of stateless persons’, thus upholding their right to nationality. Furthermore, pursuant to the right to nationality, the 1961 Convention on the Reduction of Statelessness obligates states to grant nationality to persons born within their territory who would otherwise be stateless.<sup>24</sup> This is applicable to stateless migrants and their children. In general, states have an obligation under international law to avoid statelessness.<sup>25</sup> This also applies to stateless migrants and their children.

<sup>19</sup> PMCS, ‘Factsheet: The 1954 Convention Relating to the Status of Stateless Persons’ (*University of Melbourne*, September 2020) 3 <[https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0003/3489600/1954-Convention\\_factsheet\\_Sept\\_2020.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3489600/1954-Convention_factsheet_Sept_2020.pdf)>.

<sup>20</sup> *Ibid.*, 1.

<sup>21</sup> *Ibid.*

<sup>22</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 15; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 24; 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) art 5; 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) art 9; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 7; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICMW) art 29; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD); UN Human Rights Council, ‘Human Rights and Arbitrary Deprivation of Nationality—Report of the Secretary-General’ (19 December 2013) UN Doc A/HRC/25/28.

<sup>23</sup> John Tobin, Florence Seow, ‘Article 7: The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 239.

<sup>24</sup> Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention) art 1.

<sup>25</sup> See Michelle Foster and Helene Lambert, ‘Statelessness as a Human Rights Issue: A Concept Whose Time Has Come’ (2016) 28(4) *International Journal of Refugee Law* 564, 577-80; see also Andrea Marilyn Pragashini Immanuel, ‘The Customary Obligation to Avoid, Reduce, or Prevent Statelessness in South Asia’ (2022) *Asian Journal of International Law* (First View) <<https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/customary->

Under the Convention on the Rights of the Child, states have to guarantee the right to acquire a nationality to stateless children as well as to the children of stateless migrants through their national laws especially where a child would otherwise be stateless.<sup>26</sup> While international law does not obligate states to grant nationality to all children born within a state's territory, states have an obligation in cooperation with other states to ensure that every child has a nationality at birth.<sup>27</sup> Furthermore, states have a duty of non-discrimination in their nationality laws in relation to transmission or acquisition of nationality.<sup>28</sup> Accordingly, states have to ensure that their nationality laws do not discriminate on the basis of gender in relation to the transmission of nationality to children from the parent.<sup>29</sup>

- *Right to Legal Identity and Birth Registration for Stateless Migrants:*

Stateless migrants have the right to be recognized as a person before the law under international human rights law.<sup>30</sup> Accordingly, states have an obligation to guarantee the legal identity of stateless migrants and their children. An important aspect of legal identity is birth registration which enables access to other basic human rights. Goal 16 of the UN Sustainable Development Goals (SDGs) aims that by 2030, there will be 'legal identity for all, including birth registration'.<sup>31</sup> This includes stateless migrants and their children. Objective 4 of the Global Compact for Safe, Orderly and Regular Migration commits to providing proof of legal identity and adequate documentation for all migrants. In line with this objective, the Compact calls for 'strengthen[ing] measures to reduce statelessness, including by registering migrants' births, ensuring that women and men can equally confer their nationality to their children, and providing nationality to children born in another State's territory, especially in situations where a child would otherwise be stateless, fully respecting the human right to a nationality and in accordance with national legislation'.<sup>32</sup> Accordingly, states should facilitate the provision of legal identity documents as well as civil registration and birth registration facilities for stateless migrants.

- *Protection as Stateless Refugees*

Stateless persons including stateless migrants who meet the criteria of a refugee under the 1951 Convention Relating to the Status of Refugees (Refugee Convention) are

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obligation-to-avoid-reduce-or-prevent-statelessness-in-south-  
asia/BBA9B26B53BFF6D6A2276A3EC0C79ACD>.

<sup>26</sup> CRC art 7; ICCPR art 24; ICMW art 29. For an analysis of recent case-law in relation to the ICCPR see Michelle Foster, 'DZ v The Netherlands', (2022) 116(4) *American Journal of International Law* 850-857.

<sup>27</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child, 'Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (16 November 2017) UN Doc CMW/C/GC/4-CRC/C/GC/23, para 24.

<sup>28</sup> *Ibid*, para 25-6; ICERD art 5.

<sup>29</sup> CEDAW art 9.

<sup>30</sup> ICCPR art 16; UDHR art 6.

<sup>31</sup> UN Development Programme (UNDP), 'Goal 16: Peace, Justice and Strong Institutions' <[https://www.undp.org/sustainable-development-goals/peace-justice-and-strong-institutions?gclid=EAIAIQobChMIj7iJ5MPs\\_gIVUmAPAh2DTg80EAAYASAAEgJjFjD\\_BwE](https://www.undp.org/sustainable-development-goals/peace-justice-and-strong-institutions?gclid=EAIAIQobChMIj7iJ5MPs_gIVUmAPAh2DTg80EAAYASAAEgJjFjD_BwE)>.

<sup>32</sup> Global Compact for Safe, Orderly and Regular Migration, UNGA Res 73/195 (11 January 2019), para 20(e).



entitled to protection as refugees under this Convention.<sup>33</sup> In particular, where a person faces denial of nationality due to discrimination, this could constitute persecution (since persecution in general includes ‘sustained or systemic violation of human rights norms’).<sup>34</sup> With the right to nationality being a human right, depending on the circumstances, the denial of nationality by itself could also constitute persecution, although this position is contested.<sup>35</sup> Furthermore, withdrawal of nationality that results in statelessness could amount to persecution where such withdrawal is not in line with international law.<sup>36</sup> Notably, stateless persons often are unable to access basic civil, political, social and economic rights and so their situation of statelessness might give rise to a claim for refugee status.<sup>37</sup> Thus, it is important to consider that stateless migrants may be entitled to protection under the Refugee Convention because they lack nationality or because of the violation of other human rights including their right to nationality. Also, stateless migrants may face cruel, inhuman, degrading treatment or punishment linked to their situation of statelessness upon return to their country of former nationality or habitual residence. This means that in situations where stateless migrants do not meet the criteria for refugee status, states may still have a non-refoulement obligation towards such individuals which prevents them from returning such individuals to their country of former nationality or habitual residence.<sup>38</sup>

Thank you for considering this submission and we remain at your disposal should you require any further information.

Signed,



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<sup>33</sup> See Michelle Foster, H el ene Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019), Chapter 4; see also Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1.

<sup>34</sup> Foster and Lambert, *Ibid*, chapter 5.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid*.