



Ending Statelessness Within 10 Years

Good
Practices
Paper

Action 2

Ensuring that no child is born stateless

UNHCR is publishing a series of Good Practices Papers to help States, with the support of other stakeholders, achieve the goals of its #IBelong Campaign to End Statelessness by 2024. These goals are to:

Resolve the major situations of statelessness that exist today

Prevent the emergence of new cases of statelessness

Improve the identification and protection of stateless populations

Each Good Practices Paper corresponds to one of the 10 Actions proposed in UNHCR's *Global Action Plan to End Statelessness 2014 – 2024* (Global Action Plan) and highlights examples of how States, UNHCR and other stakeholders have addressed statelessness in a number of countries. Solutions to the problem of statelessness have to be tailored to suit the particular circumstances prevalent in a country. As such, these examples are not intended to serve as a blueprint for strategies to counter statelessness everywhere. (Indeed, some of the examples are of countries where gaps in law and practice remain.) However, governments, NGOs, international organizations and UNHCR staff seeking to implement the Global Action Plan will be able to adapt the ideas they find in these pages to their own needs.

Background

Action 2 of the Global Action Plan calls on States to ensure that no child is born stateless. Only if statelessness among children is addressed will the objective of the Global Action Plan – to end all statelessness by 2024 – be fully realized. The goal of Action 2 is to ensure that by 2024 all States have provisions in law to grant nationality to (i) children born in their territory who do not acquire another nationality at birth, (ii) children of unknown origin found on their territory, and (iii) children born to their nationals abroad who do not obtain another nationality at birth.

Obligations to prevent and reduce statelessness among children are found in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC), both of which recognize the right of every child “to acquire a nationality.”¹

¹ International Covenant on Civil and Political Rights, Article 24(3); Convention on the Rights of the Child, Article 7(1). See also, UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, Para. 8, available at <http://www.refworld.org/docid/45139b464.html>.

In addition, the 1961 Convention on the Reduction of Statelessness (the 1961 Convention) places a particular obligation on the State where the child is born. Article 1 requires that “[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.” Sub-articles of this provision give States some flexibility in the manner in which they achieve this outcome, prescribing that the child should either acquire the nationality of the State at birth or at a later time by application. The 1961 Convention prescribes that the maximum period of residence after birth before a nationality is confirmed is to be no more than 10 years.²

It is in the best interests of the child to acquire a nationality at or very soon after birth.³ Therefore, UNHCR’s Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness (UNHCR Guidelines on Statelessness No. 4) and the Global Action Plan recommend that States automatically grant their nationality to children in such situations, rather than providing for an application process. The Global Action Plan emphasizes that a State must assess whether a child born on its territory possesses the nationality of another State; if not, the birth State must confer nationality on the child.

Article 2 of the 1961 Convention provides specific protections for children of unknown parents, a group at particular risk of statelessness. It also restates the long-standing principle that: “A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.”⁴ UNHCR’s Guidelines on Statelessness No. 4 recommend that this safeguard “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.”⁵

The 1961 Convention places the primary responsibility to prevent statelessness among children on the State of birth. However, a State Party to the Convention also has obligations to children of its nationals born outside its territory. Article 4 of the Convention requires a State to recognize the nationality of a child born outside its territory to a parent who has its nationality if the child would otherwise be stateless.

In regional human rights systems, both the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child provide for the right to a nationality. Both place an obligation on the State of birth similar to that in the 1961 Convention with regard to children who do not acquire another nationality at birth.⁶ UNHCR’s guidelines provide guidance on the interpretation of the 1961 Convention, including in situations in which it must be considered that a child would otherwise be stateless, emphasizing that this is a mixed question of fact and law.⁷

² 1961 Convention on the Reduction of Statelessness, Article 2(b).

³ Convention on the Rights of the Child, Articles 2, 3, 7 and 8; UN High Commissioner for Refugees (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, Para. 11, available at <http://www.refworld.org/docid/50d460c72.html>.

⁴ This protection dates back to the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, which provides: “A child whose parents are both unknown shall have the nationality of the country of birth. If the child’s parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known. A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found.”

⁵ See note 3, *UNHCR Guidelines on Statelessness No. 4*, Para. 58.

⁶ American Convention on Human Rights, Article 20(2); African Charter on the Rights and Welfare of the Child, Article 6(4). In 2014, the African Committee of Experts on the Rights and Welfare of the Child adopted a *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, ACERWC/GC/02, 2014, available at <http://www.refworld.org/docid/54db21734.html>.

⁷ UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014, para 23, available at <http://www.refworld.org/docid/53b676aa4.html> and see note 3, *UNHCR Guidelines on Statelessness No. 4*, Para. 18-19.

The relationship of Action 2 to other Actions in the Global Action Plan

The commitment to ensure that no child is born stateless, as set out in Action 2 of the Global Action Plan, cannot be examined in isolation from the other actions to be taken under the Plan. In particular, Action 2 is closely connected to Action 1: Resolve existing major situations of statelessness; Action 3: Remove gender discrimination from nationality laws; Action 4: Prevent denial, loss or deprivation of nationality on discriminatory grounds; Action 7: Ensure birth registration to prevent statelessness; and Action 8: Issue nationality documentation to those entitled to it.

Action 1, which seeks to resolve existing major situations of statelessness, is critical to ending statelessness among children at birth. Major situations of statelessness often trace their origins to the time of a State's creation, when particular groups were excluded from citizenship for discriminatory reasons. They also arise when the law does not provide any right to nationality based on birth in a country after the date of that country's creation, even for otherwise stateless children. In order to halt inter-generational statelessness, some States have amended the rules for acquisition of nationality so that stateless persons are automatically considered nationals of the State in which they were born, provided they meet criteria that demonstrate strong links to the country.⁸

Action 3, which aims to end gender discrimination in nationality laws, addresses one of the main causes of statelessness among children, even in countries that do not have a substantial population of persons whose nationality is not recognized.⁹ Action 4, which calls on States to prevent denial, loss or deprivation of nationality on discriminatory grounds, aims at eradicating the most significant cause of statelessness globally. The majority of the world's known stateless populations, including children, belong to minority groups whose members face discrimination when it comes to the right to a nationality.

Action 7, which aims to ensure birth registration for all children, is also vitally important. Although a birth certificate generally does not in itself serve as proof of nationality, birth registration is critical to establishing, in legal terms, the place and time of birth and parental affiliation. This in turn serves as documentary proof underpinning acquisition of the parents' nationality or the nationality of the State where the child is born.¹⁰

Reforms to nationality laws to prevent statelessness among children

Nationality is usually acquired at birth on the basis of the nationality of one or both of the parents or the place of birth, with most countries providing for elements of both rules to apply. But some follow one rule almost to the exclusion of the other, and the interaction of these laws can create problems of statelessness among children. The most common situation is for a child to be born in the country of nationality of one or the other of his or her parents, in which case attribution of nationality at birth is generally straightforward (where there is no gender discrimination in the laws of the country). But for many children the situation is not so clear.

An important first step is the removal of discrimination in law, not only on the basis of gender, which is the subject of Action 3, but also on the basis of race, ethnicity or religion. Countries whose laws include discriminatory provisions of this type significantly increase the risk of statelessness for children. Reforms undertaken to remove discrimination reduce this risk.

⁸ See also UN High Commissioner for Refugees (UNHCR), *Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness*, 23 February 2015, available at: <http://www.refworld.org/docid/54e75a244.html>.

⁹ See also UN High Commissioner for Refugees (UNHCR), *Good Practices Paper – Action 3: Removing Gender Discrimination from Nationality Laws*, 6 March 2015, available at: <http://www.refworld.org/docid/54f8377d4.html>.

¹⁰ Convention on the Rights of the Child, Article 7.

Children who cannot acquire a nationality from their parents

The Global Action Plan notes that only about 60 per cent of the States in the world have laws that allow children born in their territory to acquire their nationality if they do not acquire any other nationality at birth. Even where such laws exist, their effectiveness depends to a great extent on accessible and fair procedures to determine whether a child has acquired a nationality or is otherwise stateless.¹¹

UNHCR recommends that children who would otherwise be stateless are automatically granted nationality at birth. Given that some sort of assessment will be needed, there may be little difference between automatic attribution of nationality at birth (to a child who has not acquired another) and a process that requires an application for nationality. But if there are time limits within which such an application must be made, the difference can be significant, since a delay may lead to statelessness. An automatic attribution, on the other hand, could be substantiated at any point. In addition, it is important that the procedure is non-discretionary and not subject to conditions such as legal residence or the “good conduct” of the parent(s) or child.

The determination of nationality is often particularly contentious following the succession of States, when sovereignty over a territory changes. In relation to those who are already alive at the date of succession, the basic rule recommended by the International Law Commission is that nationality should be attributed on the basis of habitual residence on the date that sovereignty changes, with a right to opt between different nationalities during a transitional period.¹² Procedures should exist to resolve the cases of people of undetermined nationality promptly. For those born after the succession of States, the usual protections against statelessness should apply, including safeguards for children born in the territory who would otherwise be stateless (including if their parents are stateless or of undetermined nationality as a result of the change in sovereignty).

Since the dissolution of the former Soviet Union, Latvia and Estonia have gradually adopted reforms that allow the children of former Soviet citizens whose nationality has remained in question to obtain nationality more easily based on birth in their territory. In **Latvia**, since 2011 an application for nationality of the child of “Latvian non-citizens” (those residents who were formally citizens of the Soviet Union but are not Latvian nor citizens of any other country) can be submitted not only to the Office of Citizenship and Migration Affairs, but also to the civil registry office when registering the birth of the child. Since October 2013, the recognition of a child as a Latvian national is possible through registration of the birth by one parent. As a result, the number of children acquiring Latvian nationality by this route has greatly increased; between early 2013 and early 2014, it rose from 52 per cent to 88 per cent of births to “Latvian non-citizen” parents.¹³ Since January 2016, **Estonia** has provided for automatic attribution of nationality by naturalization to children of parents of “undetermined citizenship” (*please see the country case study on pages 13-15*).

Procedures permitting children with unclear nationality or with weak links to any other State to acquire the nationality of the State of birth or residence are helpful in avoiding childhood statelessness. In the **United Kingdom**, for example, the British Nationality Act of 1981 makes provision for a child born in the country to be registered as a British citizen on application, if he or she “is and always has been stateless” and has been resident for five years (Schedule 2, paragraph 3). There is also a general provision permitting the Secretary of State to register a child as a citizen on application “if he thinks fit” (Section 3(1)).¹⁴

¹¹ See note 3, *UNHCR Guidelines on Statelessness No. 4*, Para. 20.

¹² *Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries*, International Law Commission, 1999.

¹³ Svetlana Djackova, *Reduction of statelessness among children in Latvia*, Latvian Centre for Human Rights, presentation at ENS Conference, 7 April 2015.

¹⁴ *British Nationality Act 1981*; Chapter 61, 30 October 1981, available at <http://www.refworld.org/docid/3ae6b5b08.html>.

Whether the child is at risk of statelessness is one of the considerations taken into account for use of the general discretionary power under Section 3(1). In practice, the general power is exercised much more often than the ‘otherwise stateless’ provision.¹⁵ It has been used, for example, to allow children born outside the United Kingdom to surrogate mothers commissioned by British parents (children who would not otherwise have British citizenship) to be registered as British citizens. In some circumstances, the discretionary power is used to grant citizenship to the second or subsequent generations born abroad to a British citizen (who are not usually automatically attributed British citizenship).¹⁶

In **France**, the courts play an important role in confirming the nationality of stateless children (*please see country study, pages 8-9*). The French Civil Code concept of *possession d'état de national* – apparent status as a national – can also provide a useful safeguard against statelessness in countries following the French tradition with low rates of birth registration. In **Senegal**, for example, the law provides that if someone has his or her habitual residence in the country and has always behaved and been treated as a national, it shall be presumed that he or she is a national. This provision is applied in the courts on application for a nationality certificate.¹⁷

Children of unknown parents¹⁸

A safeguard in law for children of unknown parents is much more common than one for children who do not acquire a nationality from their parents. Many countries have a process for such children to be declared to the courts or administrative authorities and for nationality to be recognized based on evidence supplied by the police, hospital, social worker or reception centre caring for the child. The protection is more effective at preventing childhood statelessness where it does not apply only to abandoned infants but is extended to 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.¹⁹ This approach was followed by **Kenya** in its 2010 constitutional reform (*please see country study, pages 16-18*).

Other children born in the country

States that provide the strongest protection against statelessness for children born in their territory adopt the *jus soli* approach: a child born in the territory of a State has the nationality of that State by virtue of birth in the territory alone.²⁰ This approach dominates in the Americas, though it is less common elsewhere; for instance, a child born in the **United States** is an American citizen whatever the nationality of the parents. This approach is not, however, required by international law. The 1961 Convention and the Global Action Plan only provide for specific protections in national law for children born in the country who do not acquire another nationality at birth or for children of unknown parents.

¹⁵ Unofficial statistics obtained for the UNHCR study Mapping Statelessness in the United Kingdom indicated that, between 2001 and 2010, there were only 10 applications and five grants under the “otherwise stateless” provision, whereas officially published statistics show that between 2002 and 2014, almost 250,000 children were registered as British citizens (and almost 30,000 refused) under the general discretionary power. *Mapping Statelessness in the United Kingdom*, Asylum Aid and UNHCR, 2011, text with note 448; *British citizenship applications under Section 3(1) of the British Nationality Act 1981*, Home Office and UK Visas and Immigration, 24 October 2014.

¹⁶ “Registration of minors at discretion,” *Nationality Instructions*, UK Visas and Immigration, Home Office, Volume 1, Chapter 9, revised April 2015.

¹⁷ Loi n° 61-70 du 7 mars 1961 déterminant la nationalité sénégalaise (as amended), article 1. See Bronwen Manby, *Nationality, Migration and Statelessness in West Africa*, UNHCR and IOM, 2015.

¹⁸ 1961 Convention on the Reduction of Statelessness, Article 2.

¹⁹ See note 3, *UNHCR Guidelines on Statelessness No. 4*, Para. 58.

²⁰ Another variant of *jus soli* is the automatic attribution of nationality based on birth in the territory of one parent also born there. This rule, known as ‘double *jus soli*’, is applied in France and in many countries following the French tradition. Although this rule does not fulfil the requirements of Action 2, it protects against inter-generational statelessness of the sort that has created the major situations of statelessness targeted by Action 1. It does so by ensuring that a nationality is attributed at birth to the second generation born in the country since each subsequent generation is likely to find it more difficult to establish a nationality in any other country.

It is important that any exceptions that apply to attribution of nationality based on birth in the territory take account of stateless children. For example, many Latin American and Caribbean countries that generally apply a *jus soli* approach have an exception for children born on their territory whose parents are “transient” (*transeúnte*), i.e. only temporarily in the country; in these cases, unless there is an additional provision to grant nationality to children who would otherwise be stateless, even a general *jus soli* approach may leave many at risk of statelessness.²¹ In other countries, the exception for “transient” parents is much less restrictively applied. In **Chile**, for example, the courts have consistently ruled that the exception should apply to only a very limited number of children (*please see country study, pages 19-22*).

Children of nationals born abroad²²

Many countries following *jus sanguinis* rules provide for unlimited transmission of nationality for multiple generations of those born abroad to their nationals. Others, however, do not allow transmission of nationality for the children of a parent who has been resident outside the country for an extended period, or for a second or third generation born abroad. Since a substantial number of States do not have safeguards in their nationality law for children born stateless or found in the country to acquire their nationality automatically, it is critical that States provide the right to children born abroad to acquire the nationality of a parent, so long as the child does not acquire the nationality of the State of birth.

A number of Latin American countries have in recent years amended their laws to provide easier access to nationality for children born to their citizens abroad. This is so even where the children do not establish residence in the country of nationality of the parents. Historically, these countries have had a *jus soli* tradition and therefore did not previously provide an automatic right to nationality for children of their nationals born abroad. Examples are **Chile** (*see country study, pages 19-22*) and **Brazil** (*see country study in the Good Practices Paper for Action 1*).²³

The United Kingdom, which also had an absolute *jus soli* rule until 1983, restricts transmission of citizenship by descent for those born outside the country to only one generation. This restriction does not apply, however, if the child does not acquire any other nationality at birth. In such cases, the child is entitled to registration as a citizen.²⁴

²¹ This has been the case, for example, in the Dominican Republic, which had such a constitutional provision until 2010, and began to interpret it in a very restrictive way from the 1990s, an interpretation confirmed by the constitutional court in 2013. See, for example, reports by Amnesty International, Human Rights Watch, and UNHCR.

²² 1961 Convention on the Reduction of Statelessness, Article 4.

²³ See note 8, *UNHCR Good Practices Paper - Action 1*.

²⁴ However, a child over 10 years old is subject to a “good character” test even if stateless. “Registration by entitlement of minors born outside the United Kingdom/the qualifying territories to British citizens by descent,” *Nationality Instructions*, Volume 1, Chapter 10, 2 December 2013.

Country case studies of law and policy reforms

While they do not illustrate complete protection against childhood statelessness, the examples below highlight initiatives in some countries that other States may be able to draw lessons from in their efforts to avoid statelessness among children.

LAWS ENSURING NATIONALITY FOR CHILDREN BORN IN THE COUNTRY WHO WOULD OTHERWISE BE STATELESS AND FOR CHILDREN OF UNKNOWN PARENTS

France: The French nationality code mixes *jus soli* and *jus sanguinis* principles in a way that generally prevents statelessness. Stateless children automatically acquire French nationality at birth. Particularly important is the role of the courts in determining the nationality of a child of unknown parents or unknown nationality.

Finland: Finnish nationality law is based on the *jus sanguinis* principle, but since 1968 it has also permitted children born in Finland who are otherwise stateless to acquire Finnish nationality automatically. An effective nationality determination procedure ensures that stateless children and children of unknown nationality are confirmed to hold Finnish citizenship.

LAWS ENSURING NATIONALITY FOR CHILDREN BORN IN THE COUNTRY WHO WOULD OTHERWISE BE STATELESS

Estonia: In January 2015 Estonia reformed its law to give children born in the country to former Soviet nationals whose nationality has not been determined the right to Estonian nationality automatically at birth.

LAWS ENSURING NATIONALITY FOR CHILDREN OF UNKNOWN PARENTS

Kenya: Kenya's 2010 constitutional reform and subsequent legislation has for the first time made provision for children of unknown parentage found in the country and less than eight years old to acquire Kenyan nationality.

LAWS ENSURING NATIONALITY FOR CHILDREN OF NATIONALS BORN ABROAD

Chile: Although Chile has a *jus soli* law, some children born in the country of migrant parents were regarded as at risk of statelessness because of their "transient" status. Recent reforms will reduce the risk by enforcing a more restrictive definition of the term "transient." In 2005, Chile also adopted significant reforms improving access to nationality for children of its nationals born abroad.

France

- The Civil Code provides for acquisition of nationality by a child born in France whose parents are either unable to confer nationality or who are unknown.
- French courts play an important role in helping to confirm French nationality by deciding if the facts are established to indicate that the person holds nationality according to the law, including if the child would otherwise be stateless. Where it is decided that a person does not hold French nationality, reasons are provided and avenues of appeal are available.

The basic framework for French nationality law as it exists today dates back to the adoption of the first Civil Code in 1803 in the aftermath of the Revolution, while the characteristic combination of *jus soli* and *jus sanguinis* principles governing acquisition of French nationality was essentially put in place in 1889.²⁵

Today, the Civil Code automatically attributes French nationality at birth if either of the child's parents is French (regardless of place of birth or, since 1973, the sex of the parent)²⁶ or if the child is born in France and has one parent also born in France (the principle of "double *jus soli*").²⁷ A person born in France whose parents are neither French nor were born in France will automatically become French at age 18 if he or she has lived in France for at least five years since the age of 11 and does not take steps to decline French nationality. In addition, the parents of a child who was born in France and has lived in France since the age of eight can claim French nationality on the child's behalf after the age of 13.²⁸ In 2016, the Civil Code was further modified to permit a person resident in France since the age of six to acquire nationality by declaration on reaching his or her majority, under certain circumstances.²⁹

The Civil Code also provides that a child born in France of unknown or stateless parents or whose parents cannot transmit nationality to their child is automatically attributed French nationality at birth.³⁰ Where a foreign law must be interpreted, the court must consult the Ministry of Justice.³¹ Birth registration is a prerequisite for the recognition of French nationality and cannot be refused to any child; a person finding a new-born child must present the child to the civil registry; late registration of birth is given by court judgment.³²

The question of whether the child is stateless usually arises when the child (from the age of 16) or his or her legal representative seeks a document confirming French nationality, or seeks to assert a right based on French nationality – for example, to claim various state benefits, to stay in the country in the context of an immigration enforcement procedure, or to apply for a national identity card – and there is some doubt about

²⁵ Since the Second World War, the most important reforms were adopted in 1945, re-establishing pre-war principles in the aftermath of the Vichy regime; in 1961, regulating nationality in the context of the transition to independence of France's former colonies; in 1973, introducing gender equality and acceptance of dual nationality in all circumstances; in 1993, reducing access to French nationality for those born in France of parents born in a former French territory that had become independent, as well as based on birth and residence in the country; and in 1998, restoring the automatic attribution of French nationality based on birth and residence until majority (that is, on turning 18). More recent reforms have made it more difficult to access French nationality for those not born in the country. Please see Christophe Bertossi and Abdellali Hajjat, *EUDO Citizenship Observatory Country Report: France*, revised and updated January 2013. In the French language, there is a difference between nationality (*nationalité*), the status provided for in the civil code, and citizenship (*citoyenneté*), the right to participate in French civil and political life. Historically, especially in the French colonies, there were important differences between the two meanings that are no longer relevant today.

²⁶ Civil Code, Article 18, 18-1.

²⁷ Civil Code, Article 19-3. The term "double *jus soli*" is used to refer to the automatic attribution of nationality based on birth in the territory of one parent also born there.

²⁸ Civil Code, Articles 21-7 to 21-11.

²⁹ Civil Code, Article 21-13-2, as modified by Loi n°2016-274 du 7 mars 2016, Article 59. The person must have attended a state-run school in France, and have a sibling who has acquired nationality under one of the previous provisions.

³⁰ Civil Code, Articles 19, 19-1, 19-2 and Article 58.

³¹ Circulaire n° 95-8/D3 du 5 mai 1995, NOR : JUS C 95 20374 C, relative à la délivrance des certificats de nationalité française (BOMJ 1995/58).

³² Civil Code, Articles 55 to 62-1.

the child's status. Given the "inherent difficulties in providing proof of French nationality," the law establishes a procedure for the courts – rather than the administrative authorities – to determine if the person has French nationality and to issue documentary proof of that fact.³³ The courts do not grant nationality; they merely decide if the facts are established to indicate that the person has nationality according to the law.

Where the relevant court (the *tribunal d'instance*) determines that a person is entitled to French nationality, a certificate of nationality is issued free of charge by the registrar, based on other documents available. These include the birth registration document of the child showing birth in France and descent from the named parents and, in case of an application for a certificate based on the child being stateless, proof of the parents' statelessness (whether formally recognized by the French refugee agency or not) or inability to transmit nationality to the child. In the absence of any documentation, the nationality of a person may also be recognized by the courts on the basis of *possession d'état de national*: the fact that a person has been treated as a national for at least 10 years prior to the application for the certificate of nationality.³⁴

A certificate of nationality functions as proof of nationality until any court decides otherwise, with the burden of proof on those contesting it, who must show that the holder of the certificate does not have nationality (for example, because the documents on which the application for the certificate was based were fraudulent).

If the registrar decides that the person does not have French nationality, reasons are provided and the person can ask first for review by the Minister of Justice and then appeal to the next level of courts (*tribunal de grande instance*), where he or she must be represented by a lawyer. Alternatively, the person may appeal directly to the next level of court by "declaratory action" against the public prosecutor (*Procureur de la République*), for which there is no time limit.³⁵

French courts have established jurisprudence confirming attribution of French nationality on the basis of birth in France where a child would otherwise be stateless. This would apply, for example, to a child born out of wedlock to an Algerian mother and a father from Morocco where (until reforms in 2007) the law did not allow transmission of either nationality. It would also apply to children whose parents are from Colombia, where the *jus soli* law did not permit transmission of nationality to children born abroad (again, until reforms in 2002). French nationality is not recognized where a child can obtain the nationality of a foreign parent by a simple process of consular registration. An important exception is made where it is impossible for the parents to approach their national authorities, for example, because they are refugees.³⁶

³³ Commentaire Décision n° 2013-354 QPC du 22 novembre 2013 (Mme Charly K), Conseil constitutionnel.

³⁴ Civil Code, Article 21-13.

³⁵ Civil Code, Article 29-3; and Commentaire Décision n° 2013-354.

³⁶ See : Rapport n° 1 (2003-2004) de M. Jean-Patrick Courtois, fait au nom de la Commission des lois, déposé le 1 octobre 2003, Sénat de la République française, section titled « Article additionnel avant l'article 35 A (art. 19-1 du code civil) : Attribution de la nationalité française par défaut aux enfants nés en France de parents étrangers et n'ayant pas leur nationalité, » available at <http://www.senat.fr/rap/103-001/103-00173.html>; also Cour de Cassation Chambre civile 1 du 18 juillet 2000 98-15.265, Bulletin 2000 I N° 215 p. 139; Conseil d'Etat, Conseil d'Etat Statuant au contentieux, N° 182219 Lecture du 12 Février 1997 ; Conseil d'Etat, Statuant au contentieux, N° 158778 Lecture du 14 Octobre 1996.

Finland

- Since 1919, when Finland adopted its first constitution as an independent State, the *jus sanguinis* tradition for acquisition of nationality has remained dominant in law.
- The Nationality Act and Nationality Decree of 1968 contained a safeguard that allowed for children born in Finland who would otherwise be stateless to acquire Finnish nationality automatically.
- The 2000 Constitution made the prevention of statelessness a constitutional principle.
- The Nationality Act of 2003 established a statelessness determination procedure and granted nationality automatically to foundlings and children born in Finland to parents of unknown nationality.
- An effective nationality determination procedure ensures that stateless children and children of unknown nationality are confirmed to hold Finnish nationality.
- The Finnish Immigration Service is responsible for citizenship matters and for improving the consistency of information regarding nationality in the different registries maintained by the authorities.
- The Supreme Administrative Court, Finland's highest Administrative Court, has heard a number of cases that relate to statelessness among children born in Finland. It has consistently delivered judgements that favour an interpretation of nationality law that prevents statelessness among children.

The first Constitution of independent Finland in 1919 established citizenship based on descent, and this *jus sanguinis* tradition has remained dominant since that time.³⁷ Following the promulgation of laws dealing with nationality in the 1920s and in 1941, a new comprehensive Nationality Act and a Nationality Decree were adopted in 1968, with the constitutional provisions amended at the same time.³⁸

In an important provision for the prevention of statelessness among children, the new Act stipulated that all children born in Finland who would otherwise be stateless would automatically acquire Finnish nationality at birth, in line with the 1961 Convention on the Reduction of Statelessness (even though Finland had not at this time acceded to the treaty). Amendments to the Act adopted in 1984 provided that a woman could transmit nationality to her child in all circumstances, added a provision on the nationality of adopted children, and created protections against statelessness in case of loss of nationality.³⁹

A new Constitution adopted in 2000 established the framework for acquisition of nationality and elevated the prevention of statelessness to a constitutional principle: Section 5 provides that voluntary or involuntary loss of nationality is possible only if the person concerned is in possession of or will be granted the nationality of another State. A new Nationality Act was passed in 2003 (2003 Act) and remains in force.⁴⁰ The Act preserved much of the existing framework. It also introduced for the first time full acceptance of multiple citizenship and, crucially for the prevention of statelessness, established a procedure for the determination of citizenship

³⁷ This section is based especially on UNHCR, *Mapping Statelessness in Finland*, November 2014, and Jessica Fagerlund and Sampo Brander, *EUDO Citizenship Observatory Country Report: Finland*, revised and updated January 2013.

³⁸ *Kansalaisuuslaki*, 401/1968; *Kansalaisuusasetus*, 402/1968.

³⁹ Act amending the Nationality Act, *Laki kansalaisuuslain muuttamisesta*, 584/1984.

⁴⁰ *Kansalaisuuslaki*, 359/2003. In Finnish the same word, *kansalaisuus* is used to translate both "nationality" and "citizenship" and both words are used in the English translation used by the Ministry of the Interior. The name of the 2003 Act is translated as the Nationality Act. Several amendments have been made to the 2003 Act since its adoption.

status. Following the adoption of the new law, in 2008, Finland acceded to the 1961 Convention and the 1997 European Convention on Nationality.

Like the 1968 law, the 2003 Act provides for children born stateless in Finland to acquire Finnish nationality automatically. In addition to provisions based on descent,⁴¹ a child acquires Finnish citizenship by birth under section 9(1)(3) of the Act if “the child is born in Finland and does not acquire the citizenship of a foreign State at birth, and does not even have a secondary right to acquire the citizenship of any other foreign State.” The existence of this secondary right depends on the legislation of the parents’ State of citizenship: if citizenship is only granted on application and the deciding authority has discretionary power, the child does not have the right but only the possibility of acquiring his or her parents’ citizenship.⁴²

In addition, under section 9(2) of the 2003 Act, children born in Finland acquire citizenship automatically if the parents have refugee status in Finland or have otherwise been provided protection from the authorities of their State of nationality, and acquisition of the parents’ citizenship depends on registration of the child’s birth or another procedure by the authority of the parent’s State of nationality.

Section 12 of the 2003 Act provides for automatic grant of nationality to foundlings and children born in Finland to parents of unknown nationality. These children are considered Finnish citizens as long as they have not been recognized as citizens of a foreign State. If foreign citizenship is established after the child has reached the age of five, Finnish citizenship is retained.

The government agency responsible for citizenship matters is the Finnish Immigration Service, known as Migri. Section 36 of the 2003 Act provides for Migri to determine citizenship status at the request of a public authority or an individual. In addition, “[e]fforts shall be made to determine the citizenship status of a person with unknown citizenship if his or her municipality of residence is in Finland.” The explanatory memorandum provided when the 2003 Act was first proposed states that the purpose of the provision is to clarify citizenship status in situations where it is unclear, and to improve the consistency of information regarding nationality in different registries maintained by the authorities. Section 41 of the Act provides for decisions made by Migri to be appealed to an Administrative Court.

Section 1 of the Nationality Decree⁴³ providing for implementation of the 2003 Act requires local registry offices to request Migri to determine the citizenship status of a child born in Finland in cases where 1) the child is born out of wedlock and the mother is not a Finnish national; 2) the child’s parents are married and are neither Finnish nationals nor holders of another nationality in common; and 3) the parents of the child are married and are both nationals of another country but the child does not automatically acquire the parents’ nationality under the other country’s law.

Local registry offices must also request a determination of citizenship status for foundlings and children whose parents’ nationality is unknown. About 1,000 applications are made for such children each year.⁴⁴ Guidelines issued by Migri state that when a decision on removal from the country is being made with regard to a family that includes a child born in Finland, it is necessary to check whether the child has acquired Finnish nationality. Removal from the country cannot be implemented before the citizenship status of the child has been determined and it has been confirmed that the child has not acquired Finnish nationality at birth.⁴⁵

The Supreme Administrative Court has heard a number of cases that relate to the prevention of statelessness among children born in Finland and the determination of citizenship status. A case heard in September 2011 dealt with the question of a secondary right to nationality and the extent of a parent’s responsibility to enable

⁴¹ The provisions on descent generally provide for gender equality, but create distinctions based on birth in or out of wedlock: Finnish nationality is always automatically acquired at birth from a Finnish mother; it is also automatically acquired at birth from a Finnish father if the father is married to the (non-Finnish) mother of the child or if the child is born in Finland (to a non-Finnish mother) and paternity is established.

⁴² Government Bill 235/2012. See note 37, EUDO Report, page 17.

⁴³ The current version of the Nationality Decree entered into force in May 2013, and provided further detail on the steps to be fulfilled by the local registry offices.

⁴⁴ See note 37, *Mapping Statelessness in Finland*, page 32.

⁴⁵ *Ibid.*, page 38.

a child born in Finland to acquire the nationality of the parent(s).⁴⁶ The child was born in Finland out of wedlock to a Somali mother. The local registry office requested Migri to determine the citizenship status of the child. Migri decided that although a child could not acquire the nationality of Somalia through the mother, the child did not acquire Finnish nationality because the mother did not want to identify the child's father, which Migri considered to be the reason for the child's 'voluntary' statelessness.⁴⁷

The mother then appealed to the Administrative Court, which found that the child had acquired Finnish nationality at birth; the Supreme Administrative Court confirmed this decision. The Court explained that the obligation of the applicant to provide information to establish a child's nationality did not imply an obligation to establish paternity. It held that given the aim of preventing statelessness enshrined in international law and the Constitution and Nationality Act of Finland, the provision of Section 9 of the Nationality Act with regard to the secondary right of a child to acquire another nationality could not in this case be interpreted to mean that the child had a secondary right to the nationality of Somalia. The Court judged that the child had therefore acquired Finnish nationality at birth.

In a 2012 judgment, the Supreme Administrative Court considered the case of a child born in Finland of two foreign parents of different nationalities and the right of Migri to determine the citizenship status of the child in this case. The Court concluded that, even though it is not explicitly mentioned in the Nationality Act or Decree, one of the aims of citizenship status determination is prevention of statelessness, and the role of Migri in determining citizenship status was critical to the prevention of statelessness in situations where the nationality of a child born in Finland may be unclear.⁴⁸

The case of Finland shows that in addition to safeguards in nationality law, protection against statelessness at birth requires effective implementation mechanisms. This includes a comprehensive system of population registration and nationality status determination, so that doubtful cases may be referred for adjudication or judicial review.

⁴⁶ *Judgment KHO:2011:78*, 16.9.2011/2618.

⁴⁷ Unusually, the Finnish Nationality Act creates separate definitions for "voluntary" and "involuntary" statelessness, relating to actions that could be taken by the person concerned.

⁴⁸ *Judgment KHO:2012:28104*.

Estonia

- Following Estonia's resumption of independence after the dissolution of the Soviet Union, 32 per cent of the country's population had not had its citizenship determined and was thus rendered stateless ("persons with undetermined citizenship").
- The 1995 Citizenship Act, as originally adopted, contained no safeguards against statelessness for children born in Estonia. In 1998, amendments to the law gave children born in Estonia after 26 February 1992 to parents who were "persons with undetermined citizenship" the right to acquire Estonian citizenship through a simplified naturalization procedure, as long as certain conditions were met.
- In January 2015, further amendments to the Citizenship Act granted nationality by naturalization at birth to children born in Estonia whose parents had been legally residing in Estonia for at least five years prior to the child's birth, and were not considered citizens by any other State. This rule applied retroactively to qualifying children under the age of 15.
- The 2015 amendments also allowed for the attribution of nationality by naturalization at birth to children born in Estonia to parents of "undetermined nationality." This was done with the explicit aim of preventing future generations from being born stateless.

In 1991, Estonia re-established its independence and, invoking the concept of "restored sovereignty" and the principle of legal continuity, adopted a somewhat modified version of the Citizenship Law that had been in force prior to 1940. Under this law, which ultimately entered into force in February 1992, Estonian citizenship was granted automatically only to citizens of the first Estonian Republic of 1918-1940 and their descendants. All other Estonian residents were encouraged to obtain Estonian citizenship through a naturalization process, to register themselves as citizens of the Russian Federation (the USSR's successor state), or to choose any other citizenship.

By 1992, almost a third (32 per cent) of the Estonian population (mostly ethnic Russians and other Russian-speaking minorities) had not acquired Estonian citizenship,⁴⁹ and the majority were rendered stateless. According to Estonia, these people were deemed to be "persons with undetermined citizenship" (*määratlemata kodakondsusega isikud*).⁵⁰

In 1993, the Parliament of Estonia adopted the Aliens Act, which guaranteed the right of residency to those who had been registered as residents of the country before 1 July 1990. They were required to obtain temporary residence permits within two years if they wanted to remain in Estonia. Within the same period they also had to decide if they wished to become Estonian citizens, acquire citizenship of another State,⁵¹ or become "persons with undetermined citizenship."⁵²

The Aliens Act further stipulated that those who had been registered as residents of the country before 1 July 1990 could apply for a permanent residence permit⁵³ after five years of residence in Estonia on the basis of a temporary residence permit. The year 1995 saw the enactment of a new citizenship law, the 1995 Citizenship

⁴⁹ UNHCR, *Mapping Statelessness in Estonia*, December 2016, page 15.

⁵⁰ Priit Järve and Vadim Poleshchuk, *Country Report: Estonia*, EUDO Citizenship Observatory Report (2013), page 1.

⁵¹ Those wishing to acquire Russian citizenship had to do so before February 1995.

⁵² Human Rights Watch, *Integrating Estonia's non-citizen minority*, Vol. 5, Issue 20, October 1993.

⁵³ After transposition of the EU Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, all Estonian permanent residence permits were replaced by long-term residence permits.



The Estonian Government regularly organizes ceremonies including for formerly stateless persons and children who have been successfully naturalized and granted Estonian citizenship. © Estonian Police and Border Guard Board, March 2016.

Act,⁵⁴ which retained the prior rules on acquisition of citizenship and established additional⁵⁵ requirements for naturalization.⁵⁶

From 1996, those of undetermined nationality who had previously held Soviet passports could obtain an identity document, known as an “alien’s passport,” which served as official identification within Estonia, provided access to most state services, and allowed its holder to travel abroad. It did not allow the holder to vote in national elections⁵⁷, stand for or be appointed to public office, or to serve in the armed forces.

The 1995 Citizenship Act, as originally adopted, contained no safeguards against statelessness for children born in Estonia. In 1998, amendments to the law gave children born in Estonia after 26 February 1992 to parents who were “persons with undetermined citizenship” the right to acquire Estonian citizenship in some circumstances through a simplified naturalization procedure, as long as certain conditions were met. The conditions were that the child was under 15 years of age at the time of application, his or her parents had resided legally in Estonia for at least five years at the time the application was submitted, and the parents were not nationals of another State.

The main provisions of the citizenship law continued to provide a pure *jus sanguinis* regime for children, with the exception only of children of unknown parents, and provided no rights based on birth in the territory.

⁵⁴ *Kodakondsuse seadus*, RT I 1995, 12, 122, available at: <https://www.riigiteataja.ee/akt/28732>.

⁵⁵ In addition to Estonian language test, the applicants had to pass an exam on the knowledge of Constitution and Citizenship Act.

⁵⁶ Priit Järve and Vadim Poleschuk, *Country Report: Estonia*, EUDO Citizenship Observatory Report (2013), page 1.

⁵⁷ Persons with undetermined citizenship holding the long-term residence permit are eligible to vote in local government elections.

According to data from the Estonian Police and Border Guard Board, by 2014, a total of 13,679 children had acquired nationality on the basis of the procedure adopted in 1998.⁵⁸ However, nationality was still not attributed to those children at birth. Furthermore, agreement of both parents of eligible children was also needed, presenting an obstacle in cases where one parent could not obtain the consent of the other. Moreover, children above the age of 15 were not eligible. In 2003, further reform to the law provided access to Estonian nationality for adopted children, on application by an adoptive parent with nationality.

On 3 June 2014, the Estonian Parliament passed an amendment which made it easier for young persons above 15 years of age to apply for citizenship as long as they had been living in Estonia for at least eight years (regardless of whether or not they held a residence permit or enjoyed the right of residence during this time). These individuals could be granted citizenship if they had not become permanent residents of another country and had valid residence permits or right of residence at the time they were granted citizenship.

From 1992 to the end of 2015, the population with undetermined nationality was reduced from approximately 500,000 to 82,561 persons.⁵⁹ Available statistics covering the period between the years 2000 and 2015 indicate that naturalizations accounted for approximately 50 per cent of the reduction in the number of “persons with undetermined citizenship” during these years, with the remaining reduction due to other factors including deaths, emigration and acquisition of citizenship of the Russian Federation or other countries.⁶⁰

Further reform was undertaken in 2015 based on a political agreement between the parties making up a coalition government. In January 2015, the Estonian Parliament adopted several other important amendments to the Citizenship Act, two of which relate directly to the nationality of children. First, a child born in Estonia would acquire Estonian citizenship by naturalization at birth if one of his or her parents had been legally resident in Estonia for at least five years prior to the birth of the child and was not considered a citizen by any other State. This rule applied retroactively to qualifying children under the age of 15 upon entry into force of the law on 1 January 2016.⁶¹

Secondly, the amendment attributed nationality by naturalization at birth to children born in Estonia to parents of “undetermined nationality” – a significant step towards preventing future generations from being born stateless.⁶²

According to information provided by the Estonian Police and Border Guard Board, at the end of 2016 there were 961 children who could acquire Estonian citizenship pursuant to this amendment. It is estimated that some 300 children with undetermined citizenship are born in Estonia each year.

Despite these commendable changes to the law, challenges still remain for stateless children who have already turned 15 and for others whose parents do not hold the status of “person of undetermined nationality” but are stateless or cannot transmit their nationality to their children.⁶³ Estonia is not a party to the 1954 Convention or to the 1961 Convention.

⁵⁸ ENS Report on Estonia, page 8.

⁵⁹ See Republic of Estonia, Ministry of the Interior, ‘Citizenship and Migration’: <https://goo.gl/anFylH>.

⁶⁰ UNHCR, *Mapping Statelessness in Estonia*, 2016, page 16.

⁶¹ Also, children who hold dual nationality cannot be deprived of Estonian nationality until the age of majority, when they must choose. This second provision is especially important for those children who may in principle be entitled to Russian or other nationality, but have difficulties in obtaining recognition of that nationality.

⁶² For example, *Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Estonia, from 25 to 27 March 2013*, Council of Europe, CommDH(2013)12, 20 June 2013.

⁶³ This includes children of refugees and undocumented migrants, as well as children of the perhaps 2,000 people of “undetermined nationality” who have had their legal residence in Estonia revoked – for example, because they were convicted of a crime – but who hold no status in any other country. Moreover, the category of nationality granted to the children of parents of undetermined nationality under the act is that of a naturalized person – whose nationality may be more easily taken away than if a person is born of parents who are nationals who acquired citizenship by *jus sanguinis* at birth.

Kenya

- The Constitution of Kenya was amended in 1985, with retroactive effect, to move to a purely descent-based system for the provision of nationality.
- As part of a protracted campaign for constitutional reform that began in the 1990s, child rights groups played an instrumental role in advocating for the inclusion of citizenship provisions to address the situation of street children whose parents were unknown, among other reforms.
- In the Constitution revision process, strong opposition by some politicians and certain church-based groups to the inclusion of a provision which allowed abandoned children to acquire Kenyan nationality was eventually overcome.
- After many years of campaigning and consultation, a new Kenyan Constitution was adopted in 2010, which completely rewrote the existing provisions on citizenship. It stated that every child had the right to a name and nationality from birth and included, for the first time, a statelessness safeguard for children of unknown parents who appeared to be under eight years old. These provisions were elaborated in a new Citizenship and Immigration Act adopted in 2011, which established a procedure for the relevant government department responsible for children and the Children's Court to determine the nationality of an abandoned child.

The new Kenyan Constitution of 2010 completely rewrote the existing constitutional provisions on citizenship.

The 1963 Constitution and Citizenship Act had established rules for the acquisition of Kenyan citizenship that were based on standard provisions adopted by Commonwealth countries on attaining independence from Britain. At independence, a person born in the country of one parent who was also born there acquired citizenship of the new State automatically; those born in the country of parents who were immigrants could apply to register as citizens.

In relation to children born after independence, the rule was for *jus soli* attribution of citizenship based on birth in the country. In 1985, however, Kenya amended the constitutional provisions on citizenship based on birth in the country with retroactive effect to independence, and moved to a pure *jus sanguinis* rule: a child born in the country did not acquire citizenship unless one of the parents was a citizen at the time of birth. Those born outside the country acquired citizenship only through the father.

The first important step to protect against statelessness in the 2010 Constitution was the new provision in a rewritten bill of rights that every child had the right to a name and nationality from birth (Article 53(1) (a)). This new right gave constitutional force to a principle already included in the country's Children Act of 2001.⁶⁴

The new citizenship provisions ended gender discrimination in transmission of citizenship to children born outside the country. In addition, the new text included a safeguard for children of unknown parents. Article 14(4) provided that: "A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth." The reform was significant, since neither the 1963 Constitution nor the 1963 Citizenship Act had included such protection for foundlings or children of unknown parents.⁶⁵

⁶⁴ Article 11 of the Children Act, 2001, states: "Every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide appropriate assistance and protection, with a view to establishing his identity."

⁶⁵ In this they followed the British precedent, where the *jus soli* tradition had made such a protection seem less important. Britain itself only introduced in 1964 a formal presumption that a foundling would acquire citizenship.

The campaign for constitutional reform had started in the 1990s with the adoption of a “model constitution” by the Citizens’ Coalition for Constitutional Change (4Cs), an NGO campaign created following the restoration of multiparty democracy and the elections of 1992. In 1997, the Government adopted a package of reforms to allow the 1997 elections to go ahead with the participation of opposition parties, including legislation committing to constitutional review.⁶⁶

Child rights groups had argued strongly throughout the debates on constitutional reform for provisions to protect vulnerable children. Among their concerns was the situation of street children whose parents were not known, and whose Kenyan citizenship therefore could not be established. Kenya has had a national identity card system since before independence; without proof of a parent’s citizenship it is virtually impossible to obtain an identity card, and without such a card it is impossible to operate in the formal economy and exercise many basic rights.

An early draft of a proposed new Constitution presented by the Constitution of Kenya Review Commission in 2002 included provisions that every child had the right to a nationality, and that “a child found in Kenya who appears to be less than eight years of age, and whose parents are not known, is presumed to be a citizen of Kenya.” (The draft also provided for adopted children to register as Kenyan citizens).⁶⁷ The proposed provision drew on international models, especially as applied in Uganda and Ghana,⁶⁸ to argue that older children and not only babies should benefit from a provision on children of unknown parents.⁶⁹

This language on unknown children remained in subsequent drafts of a proposed Constitution, and was not controversial, though many other elements of the proposed charter were hotly debated. A version of the Constitution that included many Government-led changes was rejected by Kenyan voters in 2005.

In 2009 and 2010 a Committee of Experts sat to consider the Constitution once again. However, when the first draft of the constitution put forward by an Expert Committee was published for comment, the “foundling” provision became the subject of strong opposition, in some cases from those who opposed the draft for other reasons. Some politicians and representatives of certain church-based groups opposed inclusion of the foundling provision, arguing that it would create the opportunity for traffickers to bring children to acquire citizenship in Kenya, notably from Somalia.

The Parliamentary Select Committee that reviewed the Committee of Experts’ proposals then amended the proposed text to create the right for foundlings to apply for citizenship rather than to be granted citizenship automatically. However, the Committee restored the automatic attribution of citizenship and overcame objections by adding a provision to the draft text that citizenship could be revoked if an abandoned child’s citizenship elsewhere subsequently came to light.⁷⁰

Throughout this period, human rights organizations had highlighted the situation of certain ethnic groups who struggled to obtain recognition as Kenyan nationals, despite their lack of meaningful connection to any other state. Of special concern was the discrimination suffered by the Nubians resident in Kibera, Nairobi’s largest informal settlement. Of Sudanese origin, the Nubians had been recruited by the British army, and then settled in Kenya before independence. Litigation was launched on their behalf in Kenya in 2003, before the African Commission on Human and Peoples Rights (ACHPR) in 2006, and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in 2009.

⁶⁶ Constitution of Kenya Review Act, 1997. See generally, P.L.O. Lumumba, Morris Kiwinda Mbondenyi, and Steve O. Odero, *The Constitution of Kenya: Contemporary Readings*, LawAfrica Publishing Ltd, 2014.

⁶⁷ The People’s Choice. The Report of the Constitution of Kenya Review Commission, 18 September 2002, Volume Two, The Draft Bill to amend the Constitution, sections 22 and 37(5).

⁶⁸ Section 8 of Ghana’s Citizenship Act 2000 declares: “A child of not more than seven years of age found in Ghana whose parents are not known shall be presumed to be a citizen of Ghana by birth.” Section 13(1) of Uganda’s Citizenship and Immigration Control Act, 1999, states: (1) “A child of not more than five years of age found in Uganda whose parents are not known shall be presumed to be a citizen of Uganda by birth.”

⁶⁹ This is also in line with the recommendation that such provisions 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.” See note 3, *UNHCR Guidelines on Statelessness No. 4*.

⁷⁰ Final Report of the Committee of Experts on Constitutional Review, 11 October 2010, Sections 5.2.1 and 8.5; interviews with Bobby Mkangi (member of the Committee of Experts) and Tom Kagwe (member of the broader Reference Group), Nairobi, 5 and 6 August 2015. The possibility of revocation was included in Article 17(2).

The ACERWC only ruled on this case in 2011⁷¹ (noting that “being stateless as a child is generally the antithesis of the best interests of children”⁷²) while the ACHPR only gave its ruling in 2015,⁷³ but these cases kept the injustice of the situation of the Nubians and other similar groups very much in the public eye. Reports by the Kenya National Commission on Human Rights⁷⁴ and by human rights NGOs⁷⁵ also highlighted the many challenges faced by minorities when it came to documentation.

Once the basic principles were established by the 2010 Constitution, the 2011 Citizenship and Immigration Act (2011 Act), which replaced the 1963 nationality legislation, detailed the procedures to be followed. Article 9 of the 2011 Act established a procedure for presentation of a child of unknown parents appearing to be under eight years old to the government department responsible for children, which would then investigate the origins and identity of the child. If the child’s identity could not be established, Article 9 stated that the department “shall present the child found to the Children’s Courts and take out proceedings for the determination of the age, nationality, residence and the parentage of the child,” after which the court should issue an order directing that the child be presumed to be a citizen by birth, or whatever other order it thinks fit.⁷⁶

Children’s courts had been established by the 2001 Children Act as special divisions of the magistrates’ courts with less formal procedures and a focus on the best interests of the child. The implementing legislation for the constitutional provisions also created an avenue for long-standing stateless populations to apply for citizenship.⁷⁷

Although implementation of the founding provision (as well as other provisions relating to stateless persons) was slow, by 2015 some children’s courts had begun to issue orders in the case of abandoned infants brought to them by officials of the county offices for children, at least in Nairobi. Procedures for older children have yet to be established.⁷⁸

Other legal reforms also remain outstanding. In 2011, the African Committee of Experts on the Rights and Welfare of the Child ruled in its very first decision, relating to the situation of Kenyan Nubian children, that the 2010 constitutional reforms were not in line with Kenya’s obligations under the African Charter on the Rights and Welfare of the Child, in particular by failing to provide for a child who is not granted nationality by any other State at birth to acquire Kenyan citizenship.⁷⁹

⁷¹ African Committee of Experts on the Rights and Welfare of the Child, Communication No.002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya vs. Kenya* (the “Kenyan Nubian Children’s case”), decision adopted 22 March 2011.

⁷² African Committee on the Rights and Welfare of the Child, *Nubian Minors v. Kenya*, Decision, 22 March 2011.

⁷³ African Commission on Human and Peoples’ Rights, Communication 317/2006, *The Nubian Community in Kenya v. Kenya*, decision adopted 28 February 2015 (published May 2016).

⁷⁴ Kenya National Commission on Human Rights, *An Identity Crisis? Study on the Issuance of National Identity Cards in Kenya*, 2007; Kenya National Commission on Human Rights, *Out of the Shadows: Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*, 2010.

⁷⁵ For example, Kenya Human Rights Commission (an NGO established before the KNCHR), *Foreigners at Home: The Dilemma of Citizenship in Northern Kenya*, 2009. The Citizenship Rights in Africa Initiative, an informal pan-African grouping of NGOs, also made extensive submissions on the 2010 text, available at <http://citizenshiprightsafrika.org>

⁷⁶ *Kenya Citizenship and Immigration Act*, 2011, Section 9. The Child Welfare Society of Kenya, previously an NGO, was appointed as a State corporation responsible for the care of abandoned or separated children, though without a specific mandate on citizenship, through The Child Welfare Society of Kenya Order, Legal Notice No. 58, 2014.

⁷⁷ *Kenya Citizenship and Immigration Act*, 2011, Sections 15 and 16; Legal Notice No. 178, Extension of Time.

⁷⁸ Interviews, Nairobi County Children’s Office, 6 August 2015.

⁷⁹ Article 6(4) of the African Charter on the Rights and Welfare of the Child provides that “States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.” See note 72, Kenyan Nubian Children’s case, ACERWC. See also, *Comments on the Citizenship Provisions of the Draft Kenyan Constitution (draft dated 23 February 2010)*, Citizenship Rights in Africa Initiative, 5 March 2010; *Kenya: Submission to the Task Force on Citizenship and Related Provisions of the Constitution*, Citizenship Rights in Africa Initiative, 13 April 2011; *Kenya: Comments on the draft Citizenship and Immigration Bill, 2011*, Citizenship Rights in Africa Initiative, 17 May 2011.

Chile

CHILDREN BORN TO PARENTS OF “TRANSIENT” STATUS

- As with most of the other countries in the Americas, Chile’s nationality law is founded on acquisition of nationality based on birth in the territory. An exception exists for children whose parents are diplomats of another country or who have the status of “transient foreigner;” such children may opt for nationality at majority.
- Administrative changes in Chilean law enlarged the definition of the “transient” category, preventing some children born in Chile from acquiring nationality automatically. However, the Supreme Court repeatedly ruled that the “transient” category was limited to children of tourists and crew members.
- In 2014, proposed changes to the law that would restrict acquisition of citizenship at birth were withdrawn after protests, and the Civil Registry confirmed the Supreme Court’s established definition. Any child who had been affected by the previous interpretations of the term “transient foreigner” could apply to have his or her situation rectified.

CHILDREN BORN TO NATIONALS ABROAD

- Until 1980, children born to Chilean nationals abroad did not acquire Chilean nationality unless they or their parents established residence in Chile.
- In 1980, the requirement of a one-year residence period in Chile for all children born abroad was introduced. Upon restoration of democracy in Chile in 1990, many children of those exiled from the country during the military dictatorship protested at this exclusion.
- Major constitutional reforms in 2005 provided for automatic acquisition of nationality by a child born abroad, provided that at least one parent or grandparent acquired nationality by birth in Chile or through naturalization.

Children born to parents of “transient” status

As in most of the other countries in the Americas, Chile’s nationality law is founded on acquisition of nationality based on birth in the territory. Article 10(1) of the 1980 Constitution provides that Chilean nationality is granted to: “Those born in the territory of Chile, with the exception of those children of foreigners who are in Chile in the service of their Government, and those children of transient foreigners, all of whom, however, may opt for Chilean nationality.”⁸⁰ The implementing decree provides that this option is made by declaration within one year of reaching the age of 21 years.⁸¹

⁸⁰ Chile has a distinction between nationality (*nacionalidad*), used for the legal link to the state, and citizenship (*ciudadanía*) which provides the rights to participate in politics and vote.

⁸¹ *Decree No. 5.142 of 1960*, Art.10. Although revised in 1981, Decree 5.142 still refers to the citizenship provisions of the 1925 Constitution, creating some room for confusion.

There is no legal definition of what is meant by “transient foreigner” in the Constitution. In practice, recognition of Chilean nationality is usually made when a birth is registered. In the case of a child of parents who are “transient foreigners,” this status (*hijo de extranjero transeúnte*) is noted in the birth registry entry of the child, indicating that the child has not acquired Chilean nationality. It is for the Department for Foreigners and Migration (*Departamento de Extranjería y Migración, or DEM*) of the Ministry of the Interior to confirm whether a child born in Chile is a national or not.⁸²

In 1982 the Chilean Civil Registry issued a service order that “transient” meant a person who was a crew member, a tourist, or a person with irregular migration status who had spent less than one year in the country. From 1996, the definition of “transient foreigner” was greatly extended, when a new instruction included the child of any person who was in a situation of irregular migration in the country. In 2002, the definition was changed again, to include those whose residence application had been rejected or who had been expelled from the country.

However, the Supreme Court repeatedly ruled that the child of an irregular migrant would acquire nationality at birth in most cases (when its parents demonstrated that at the time of birth, they were not in transit in the country, but had the intention – “*vocación*” – of remaining), and that the only categories clearly excluded were tourists and crew members.⁸³

Despite the administrative changes in the definition, the number of children officially recorded as having transient parents remained relatively stable, at 100 – 300 children a year. It was not known how many of these were also stateless.⁸⁴

In 2014, the Civil Registry issued two resolutions on the advice of the DEM, which stated – in line with the definition established by the Supreme Court – that only the birth certificates of the children of tourists or crew members would record the “transient” status of their parents. Any other child with this annotation already recorded on the birth registry entry could apply to the Civil Registry to have it removed.⁸⁵

In addition, in August 2014, a group of senators, led by Isabel Allende of the Socialist Party but including opposition members, proposed a bill to amend the Constitution in order to allow parents of a child born in Chile to opt on the child’s behalf for Chilean nationality at any time, without waiting until majority, and regardless of the parents’ migratory status.⁸⁶ In the lower house, another bill was put forward on the interpretation of the constitutional reference to *transeúnte*, confirming the Supreme Court rulings that the term refers only to tourists and crew members, and did not include any restriction on the rights to nationality of children whose parents had any other immigration status.⁸⁷

In 2015, the Civil Registry adjusted its 2014 resolutions based on administrative criteria adopted by the DEM, retaining the ruling that only the children of tourists and crew members would be recorded as “transient,” but now providing that those affected by previous interpretations of the term “transient foreigner,” who wished to correct the record could be referred to the DEM for confirmation of nationality.⁸⁸ A new draft law on migration with amendments to the definition of *transeúnte* was also reportedly under discussion in the Government (not public as at February 2017).⁸⁹

⁸² Ministerio de Justicia, Servicio de Registro Civil e Identificación, Resolución número 102 exenta, de 2015. – Sobre inscripción de nacimiento con anotación de hijo extranjero transeúnte y deja sin efecto resoluciones N° 3.207 y N° 3.509 exentas, de 2014.

⁸³ The Supreme Court jurisprudence is collected at the website of the *Dirección de Estudios de la Corte Suprema*: <http://goo.gl/tq5SiB>. See also Rodrigo Godoy Araya, *Comentarios de jurisprudencia de la Corte Suprema y el Tribunal Constitucional sobre derechos humanos de las personas migrantes durante el año 2013*, Anuario de Derechos Humanos, No. 10, 2014, page 139-150.

⁸⁴ Statistics on *Hijos de extranjero Transeúntes* supplied by Chilean Nationality Directorate, July 2015.

⁸⁵ Servicio de Registro Civil e Identificación Dirección Nacional, *Instruye sobre anotación que indica*, Resolución Núm. 3.207 exenta, 8 August 2014 and Resolución Núm. 3.509 exenta, 1 September 2014, both in the Diario Oficial Núm. 40.977, Año CXXXVII – N° 815.596 (M.R.), 8 October 2014.

⁸⁶ Senado de Chile, *Proyecto de reforma constitucional*, Boletín N° 9.500-17, 12 August 2014; see also Senate Press Release, *Niños de extranjeros nacidos en Chile: podrían optar a nacionalidad: Un grupo transversal de senadores redactaron un proyecto en esa dirección, el que será analizado por los integrantes de la Comisión de Derechos Humanos*, 15 September 2014.

⁸⁷ Cámara de Diputados, *Proyecto de ley interpretativa de la constitución*, Boletín N° 9831D07, 6 January 2015.

⁸⁸ Servicio de Registro Civil e Identificación Dirección Nacional, *Sobre inscripción de nacimiento con anotación de hijo de extranjero transeúnte y deja sin efecto resoluciones n° 3.207 y n° 3.509 exentas, de 2014*, Resolución Núm. 102 exenta, 20 March 2015, Diario Oficial, Núm. 41.121, Año CXXXVIII – N° 815.596 (M.R.), 31 March 2015.

⁸⁹ Government of Chile, *Iniciativas y avances del Departamento de Extranjería y Migración 2014-2015*, 2014.

In September 2016, UNHCR, DEM, the Civil Registry, the National Human Rights Institute (INDH), the *Clinica* of Migrants and Refugees of the Diego Portales University, the Alberto Hurtado University and the Jesuit Service for Migrants launched a pilot project to identify people who were registered as offspring of in-transit aliens, with the aim of confirming their Chilean nationality. The project also sought to identify possible gaps and enhance the existing procedures for confirmation of nationality. By the end of November 2016, 80 children were in the process of confirming their nationality.

Children born to nationals abroad

Before the constitutional reforms adopted in 2005, statelessness was historically a greater risk for the children of Chilean nationals born abroad. Until 1980, such children only acquired Chilean nationality automatically if one parent was in the service of the Chilean state, or if the parents – or the child on attaining adulthood – established residence (*avecindarse*) in Chile.⁹⁰ In 1980, the Constitution was amended to require all children born abroad to have a period of at least one year's established residence in Chile.⁹¹ However, on the restoration of democracy in 1990, the children of those exiled from Chile during the military dictatorship protested at the injustice of this rule excluding them from Chilean nationality since it had been impossible for them to establish residence in Chile during that period.

In 2005, amendments to the nationality provisions were included as part of a much broader set of reforms to strengthen Chile's democracy, advocated for many years by the pro-democracy coalition, *Concertación de Partidos por la Democracia* (CPD).⁹² In relation to nationality, the CPD's initial proposal was simply to allow for indefinite transmission of nationality to children born abroad.

In its discussions, the constitutional committee of parliament considered international human rights law, including the Universal Declaration of Human Rights, the UN human rights conventions⁹³ and Article 20 on the right to a nationality of the American Convention on Human Rights, as well as comparative law from other Latin American countries, France, Portugal, Italy and Spain. It also heard the expert opinion of legal scholars and representatives of the executive, and considered a submission from the Senate Committee on Human Rights, Nationality and Citizenship.

The committee discussed various options. These included unlimited transmission of nationality to those born abroad, a requirement for a declaration before competent authorities and proof of nationality of the parent, limits on the number of generations through which nationality could be transmitted, and removal of the provision that a person naturalized elsewhere lost Chilean nationality (except where bilateral treaties provided otherwise).⁹⁴

Eventually, it was decided that the unlimited extension of *jus sanguinis* nationality to those born abroad went further than necessary to redress the injustice to those born in exile. The final formulation created a two-generation limit on automatic transmission of nationality to those living outside the country. The amended Constitution provided for automatic acquisition of nationality by a child born abroad provided that at least one parent or grandparent acquired nationality by birth in Chile or by naturalization; both the first and the second generation born abroad thus acquired nationality automatically, without any requirement to establish residence in Chile.⁹⁵ There was no need for the parents of a child born abroad to prove that child was stateless:

⁹⁰ 1925 Constitution, Article 5(2).

⁹¹ 1980 Constitution, Article 10(3), before 2005 amendment.

⁹² The 2005 reforms reduced military influence in politics and increased civilian control over the armed forces, reduced the presidential term from six to four years, eliminated appointed senatorial seats, and removed the rules on the electoral system from the constitution to enable easier reform. Claudio A. Fuentes, *A Matter of the Few: Dynamics of Constitutional Change in Chile, 1990–2010*, *Texas Law Review*, Vol. 89, 2011, page 1741–1775.

⁹³ Chile is not, however, a party to the 1954 Convention relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness.

⁹⁴ *Historia de la Ley N° 20.050: Modifica la composición y atribuciones del Congreso Nacional, la aprobación de los tratados internacionales, la integración y funciones del Tribunal Constitucional y otras materias que indica*, Biblioteca del Congreso Nacional, 26 August 2005; *Historia de la Ley: Constitución Política de la República De Chile De 1980: Artículo 10 – Son chilenos*, Biblioteca del Congreso Nacional de Chile.

⁹⁵ 1980 Constitution, Article 10, as amended by Law N° 20.050, 26 August 2005.



Iliana and her family are part of a pilot project in Chile that aims to identify people who were registered as the descendants of “transient foreigners,” with to help them confirm their Chilean nationality. © UNHCR/ David Alarcón, November 2016.

the right to Chilean nationality applied irrespective of the child’s potential right to another nationality. At the same time, the ban on dual nationality was removed.⁹⁶

The impact of the 2005 reform was immediate, triggering a sharp increase in Chilean nationality applications from abroad, which rose 29 per cent between 2005 (17,243 applications) and 2006 (22,248 applications) and continuing to rise thereafter.⁹⁷ At the time, it was estimated that more than 850,000 Chileans and their children were living abroad (half of them in Argentina), and of this number just over 55 per cent had been born in Chile. Among those who were more than 15 years of age, almost 40 per cent either did not hold Chilean nationality or did not know if they did. The percentage was higher for those under 30, especially in those countries that did not have a treaty on double nationality with Chile.⁹⁸ An unknown number of individuals in this group, especially those not born in other South or North American countries applying *jus soli*, would have been stateless.⁹⁹

The 2005 constitutional reforms have greatly reduced the risk of statelessness among children born abroad to Chilean nationals. Chile’s basic *jus soli* rules already provide a broad degree of protection against statelessness for those born on the territory.¹⁰⁰ Nonetheless, the law still does not contain explicit protections against statelessness. Moreover, Chile has not yet acceded to either of the statelessness conventions. In particular, there remains a need for protection for children born abroad without a parent or grandparent born in Chile or who had acquired nationality by naturalization.

⁹⁶ Article 11, as amended.

⁹⁷ *Santiago Times* (Source: *El Mercurio*), *More Foreigners Apply For Chilean Citizenship*, 22 June 2009.

⁹⁸ Enfoque Estadístico, Instituto Nacional de Estadísticas, *Registro de Chilenos en el Exterior Principales Resultados*, August 2005.

⁹⁹ The Committee on the Rights of the Child welcomed the reforms, but noted that children of foreigners without legal residence in Chile remained at risk of statelessness. *Concluding observations: Chile*, UN Doc. CRC/C/CHL/CO/3, 23 April 2007.

¹⁰⁰ The basic *jus soli* rules are subject to limited exceptions with regard to children born in Chile to parents of *transient* status (explained in the text above).