Notes

Navigating Nationality: The Rights to Birth Registration and Nationality in Refugee Magnet States

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The rights to registration at birth and to nationality are codified in international human rights treaties. Many states have attempted to ensure children born within their borders enjoy these rights by bolstering civil registration regimes and by expanding nationality laws, which rely on birth certificates as evidence for establishing citizenship. In prosperous developing countries, which are also refugee magnet states, these efforts have served to exclude the children of refugees, asylum-seekers, and undocumented migrants from exercising the right to nationality.
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INTRODUCTION

In 2005, Archbishop Desmond Tutu described birth registration as “a key event in a child’s life,” which “acts as the starting point for engagement between the state and the individual.”¹ Only fifteen years earlier, the United Nations Convention on the Rights of the Child, which explicitly provides for the universal right to registration at birth, entered into force. It has now been ratified by 194 states² and is widely hailed as a comprehensive human rights treaty regime.³

International law also recognizes a universal right to acquire a nationality at birth.⁴ After significant debate, the drafters of the Convention on the Rights of the Child codified the right to registration at birth and the right to nationality as separate provisions of Article 7.⁵ As distinct obligations, these two rights have been implemented in practice through different procedural mechanisms.⁶

Unfortunately, attempts to implement and enforce these rights have produced a troubling trend. As states have created registration regimes and expanded the scope of citizenship laws,⁷ they have come to rely on birth registration as a means of applying for and granting citizenship. Persons whose births were not registered are therefore unable to produce sufficient evidence of identity and birthplace to es-

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³ Ursula Kilkelly, *The CRC at 21: Addressing the Legal Impact*, 62 N. Ir. L.Q. 143, 143 (2011) (noting that the Convention is celebrated for its detail and breadth, as well as its adoption as “the common interdisciplinary language for those who work with and for children”).
⁶ Ineta Ziemele, *Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* 8 (2007) (describing the distinctions between the domestic laws implementing each of these rights).
establish citizenship. Communities that face obstacles to birth registration, including refugees, are thus unable to exercise the right to nationality. Without birth certificates, the children of refugees, asylum-seekers, and undocumented migrants cannot satisfy this burden—and thus become stateless.

Predictably, the disparate causes of this phenomenon converge in a specific subset of countries. Relatively wealthy developing states often serve as regional refugee magnets, attracting significant influxes of refugees, asylum-seekers, and undocumented migrants each year. Despite efforts to universalize birth registration, these states also suffer from budgetary and other constraints, such that existing birth registration regimes are inadequate. The births of children of refugees, asylum-seekers, and undocumented workers often go unregistered due to legal and practical obstacles. This Note argues that the implementation of the rights to registration at birth and nationality have served to exclude such children from exercising the right to nationality in such states. It does so by analyzing the legal regimes in South Africa, Thailand, and Venezuela—three middle-income developing states that serve as regional refugee magnets and exemplify the proliferation of statelessness resulting from inadequate birth registration.

This Note proceeds in five parts. Part I introduces the topic and the basic issues addressed. Part II explores the sources and scope of the rights to birth registration and nationality under international law by examining multilateral human rights treaties. It also examines the interaction between these two rights in practice. Part III analyzes the confluence of unique factors in three relatively prosperous developing states—South Africa, Thailand, and Venezuela—with significant populations of refugees, asylum-seekers, and undocumented migrants. This Note demonstrates that, despite positive efforts to protect these rights, the domestic registration regimes in these states

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11. Barry N. Stein, Durable Solutions for Developing Country Refugees, 20 INT’L MIGRATION R. 264, 265 (1986) (describing how massive refugee influxes into a developing country “can have a severe impact on the host country and the local population . . . and the host’s own development efforts may be adversely affected”).
are difficult to navigate and often expensive. As a result, the children of refugees, asylum-seekers, and undocumented migrants often grow up without documentation and cannot prove their identity or citizenship.

Part IV of this Note seeks to contextualize these case studies by briefly appraising the situation in other states and emphasizing the need for systematic change. Furthermore, it considers and weighs strategies for effecting change, looking specifically to successful means of securing reform on the national level and advocating for these rights before international tribunals. This Note shows that effective reforms will lower the cost of registration, increase the accessibility of registration services, and promote public awareness of the importance of registration. Individuals can stimulate such changes by bringing claims before international tribunals, such as the Inter-American Court of Human Rights. Finally, Part V of this Note draws conclusions from these findings—highlighting the inadvertent and disastrous impacts of inadequate registration regimes in refugee magnet states.

I. THE LEGAL FRAMEWORK FOR THE PROTECTION OF BIRTH REGISTRATION AND NATIONALITY

In assessing the implementation of the rights to registration at birth and nationality, it is important to understand the sources and scope of these obligations. Both of these rights are codified in global and regional human rights treaties. The states targeted by this study—South Africa, Thailand, and Venezuela—are each bound by these treaty obligations, although some have argued that these rights could be enforceable as norms of customary international law.

A. The Right to Registration at Birth

The right of a child to be registered at birth is critical because it facilitates access to basic rights and services in the future, including education and healthcare. The right of registration is incorporated in the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child, and the Af-

Many of these instruments frame registration not merely as a general right, but as an obligation. The African Charter on the Rights and Welfare of the Child, for instance, demands that “[e]very child shall be registered” at birth. The European Union has required that member states register the births of all children, including children whose parents are not lawfully present in the territory. Some have argued that this obligation has also crystallized into a norm of customary international law, defined by the International Court of Justice as a norm supported by state practice and corresponding opinio juris. It has been administered by states in domestic legislation and recognized by international tribunals.

16. Id. (emphasis added).
20. Id. ¶ 77.
While the existence of this norm is established, the extent of the obligation is uncertain. The interpretations supplied by international bodies provide some insight into the scope of the right to registration. In 1989, the Human Rights Committee (HRC), which provides authoritative interpretations of the ICCPR, noted that states must issue documentation such as birth certificates in order to fulfill their obligations under the Covenant. The HRC also indicated that the obligation imposed on states is “designed to promote recognition of the child’s legal personality.” The right to registration at birth is critical and well-established under international law.

B. The Right to Nationality

International law also recognizes a separate right to nationality, defined as the “legal bond” between a state and an individual, which is based on “a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.” The right to nationality is established in multilateral conventions, other international instruments, and domestic legislation.
It likewise has been affirmed by international tribunals\textsuperscript{32} and scholars\textsuperscript{33} as a universal right. Although there is no distinct body of principles related to nationality applicable to children,\textsuperscript{34} children have the right to acquire a nationality from birth.\textsuperscript{35}

Notably, there are some limits on the role of international law in this realm.\textsuperscript{36} In particular, states have long sought to characterize nationality law as a matter of exclusive domestic jurisdiction,\textsuperscript{37} large-
ly because it is fundamentally linked to state sovereignty. This concern permeated discussions during the drafting of the Convention on the Rights of the Child. The drafters of the Convention eventually concluded that each state is entitled to determine the legal basis of citizenship. States are thus free to grant nationality based on birth in the territory (jus soli) or based on parentage (jus sanguinis). Still, because the Convention expressly recognizes the right to nationality, several states emphasized the primacy of municipal law through declarations and reservations upon signature.

International tribunals and national courts have historically entertained this position by recognizing that states are entitled to...


41. Jus Soli and Jus Sanguinis, 8 Whiteman Digest §16, at 119 (1967); Van Buren, supra note 34, at 367 (“The Convention [on the Rights of the Child] is silent as to which of the two principles of granting nationality a state should apply.”).


43. The Cook Islands, the Holy See, and Singapore each reserved the right to apply domestic legislation respecting nationality. The reservation of the United Arab Emirates expresses the position that the acquisition of nationality is “an internal matter.” Id.

44. E.g., Exchange of Greek and Turkish Populations (Gr. v. Turk.), Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10 at 19 (“Whereas the national status of a person belonging to a State can only be based on the law of that State.”); Flegenheimer Claim (U.S. v. Italy), 25 I.L.R. 91, 97 (1958) (asserting the “unquestionable principle of international law” that states have the right to determine who its nationals are).

45. E.g., Stoeck v. Public Trustee [1921] 2 Ch. 67, 82 (U.K.) (“Whether a person is a national of a country must be determined by the municipal law of that country.”); In re Van A., 8 I.L.R. 290. (Dist. Ct. 1937) (Neth.), 1935–37, Case No. 126 (Neth.) (deferring to the “competent authorities” in Estonia with respect to the conferral of Estonian citizenship); United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898).
determine qualifications for citizenship. Still, the right to determine nationality law is not absolute. In 1923, for instance, the Permanent Court of International Justice held that, while matters of nationality were “in principle” within the exclusive domestic jurisdiction of the state, a state’s discretion is restricted by the rules of international law. By 1930, during the Hague Conference for the Codification of International Law, at least ten participating states recognized that the right to establish nationality was in some way limited by international law, though several continued to reject the applicability of international norms in this field. Ultimately, “the power of a state to confer its nationality is not unlimited.”

The emergence of international human rights and other norms aimed at the protection of stateless persons, such as the conclusion of the Convention on the Reduction of Statelessness (Statelessness Convention), has reinforced this well-established understanding. Consistent with the general right to nationality, the Statelessness

46. See, e.g., Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B), No. 7, at 16 (Sept. 15) (asserting that the right “to decide what persons shall be regarded as its nationals” is constrained by a state’s other international obligations); Nottebohm Case, supra note 28, at 20–21 (“a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with” other obligations.); Georges Pinson v. United Mexican States, 5 R.I.A.A. 327, 393 (Franco-Mexican Claims Comm., 1928) (rejected the contention of the Mexican agent that the tribunal had no right to consider the provisions of Mexico’s municipal law relating to nationality in light of its general international obligations).

47. Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B), No. 4, at 23–24 (Feb. 7).

48. See Weis, supra note 38, at 83 (referencing the official positions taken by Austria, Czechoslovakia, Denmark, England, France, Germany, Norway, Poland, South Africa, and the United States).

49. See id. (citing the views expressed by Egypt, Estonia, Hungary, and the Soviet Union).


Convention obligates member states to grant nationality to stateless persons within their jurisdiction. In this way, the international community has continued to impose limitations on states’ traditional exercise of discretion with respect to nationality and has affirmed that all persons have a basic right to nationality.

C. Permissible Departures from Treaty Obligations

1. Derogations under Special Circumstances

Before proceeding to the application of the rights to birth registration and nationality, it is important to note that states are permitted to suspend the discharge of treaty obligations under certain circumstances. According to Article 4(1) of the ICCPR, for instance:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with international law.

Article 4(2) enumerates the set of obligations to which this provision does not apply and from which states parties cannot derogate. The rights to registration at birth and nationality are not included in this list and may therefore be suspended under the circumstances described.

Fortunately, however, the Covenant and subsequent interpretations by the HRC impose strict limits on states’ ability to derogate from the rights not excepted in Article 4(2). While derogation is permitted in light of public emergencies, for example, not all armed conflicts or catastrophes qualify as public emergencies threaten-
ing the life of the nation. Furthermore, states availing themselves of the right to derogate must notify the other states parties through the U.N. Secretary-General\(^61\) and provide information about the reasons for and extent of derogations.\(^62\) Lastly, any measures taken by a state in the context of a derogation must be strictly necessary under those circumstances, must be temporally limited, and must not discriminate\(^63\) on the basis of “race, colour, sex, language, religion or social origin.”\(^64\)

The circumstances under which a state may abandon its duties to ensure registration at birth and nationality under the ICCPR are thus highly “exceptional and temporary.”\(^65\) Moreover, the Convention on the Rights of the Child does not contain an express derogation clause; instead, its provisions remain applicable in emergency situations.\(^66\) In practice, of course, these rights are not perfectly protected. The HRC has noted that states parties sometimes derogate from their obligations in violation of the constraints imposed by Article 4,\(^67\) but

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\(^{60}\) General Comment 29: States of Emergency (Article 4), supra note 58, ¶ 1; Lawless v. Ireland (No. 3) 1 Eur. H.R. Rep. 15, 31 (1961) (interpreting a similar derogation provision in the European Convention to require “an exceptional situation or crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed”).

\(^{61}\) ICCPR, supra note 13, art. 4(3).


\(^{63}\) General Comment 29: States of Emergency (Article 4), supra note 58, ¶ 8.

\(^{64}\) ICCPR, supra note 13, art. 4(1).


\(^{66}\) Id. ¶ 5; see UNCRC, supra note 14, art. 38(1).

these provisions serve to subject such practices to international scrutiny and review.68

2. Reservations upon Ratification or Accession

When signing, ratifying, or acceding to a treaty, states are entitled to formulate reservations,69 defined as: “A unilateral statement, however phrased or named, made by a State . . . whereby it purports to exclude or to modify the legal effect of certain provisions of a treaty in their application to that State.”70 Generally, reservations are allowed, except those prohibited by71 or incompatible with the object and purpose72 of a treaty. According to the International Court of Justice, however, a party that objects to a reservation that it considers incompatible with the object and purpose of the treaty can consider that the reserving state is not a party to the treaty.73

In articulating this view, the Court emphasized the importance of encouraging the participation of as many states as possible.74 Absent the opportunity to make reservations, it is unlikely that multilateral action would be prevalent,75 particularly in the form of agreements designed to recognize and address human rights.76 In

68. Higgins, supra note 55, at 283.
70. id. art. 19.
71. Id. art. 19(a).
72. Id. art. 19(c).
74. Id. at 21–23.
fact, the number of reservations made to human rights treaties tends
to be higher than those made to other multilateral conventions.  Although reservations do not necessarily have the effect of lowering
the standards embodied by a treaty, the widespread use of reservations in the context of human rights instruments may diminish the
scope and effectiveness of their protections. As a result, a meeting
of the chairpersons of the U.N. human rights treaty bodies produced
an appeal to states parties to withdraw their reservations to such trea-
tries.

In light of these considerations, the number and breadth of
reservations to the Convention on the Rights of the Child is partic u-
larly troubling. The Convention expressly allows for all reserva-
tions, except those which are incompatible with its object and pur-
pose. As previously discussed, states are sensitive to the perceived
intrusion of international law into domestic nationality regimes, and
the reservations of some states reflect that resentment. Indeed, sev-
eral states have enacted domestic legislation that serves to deprive
individuals of their nationality under certain circumstances. By

Catherine Sevcenko, Treaty Reservations and the Economics of Article 21(1) of the Vienna
Convention, 21 BERKELEY J. INT’L L. 1, 2 (2003) (“As of now, the benefits of a human rights
treaty are not considered tangible enough to motivate a state to give up its right to attach
reservations.”).

77. Belinda Clark, The Vienna Convention Reservations Regime and the Convention

78. William A. Schabas, Reservations to the Convention on the Rights of the Child, 18

79. U.N. Secretary General, Effective Implementation of International Instruments on
Human Rights, Including Reporting Obligations Under International Instruments on Human
Rights, ¶ 36, U.N. Doc. A/47/628 (Nov. 10, 1992) (“It was agreed that the States parties
concerned should be urged to withdraw the reservations [to the Convention on the
Elimination of Discrimination against Women and the Convention on the Rights of the
Child.

80. See VAN BUREN, supra note 34, at 366 (referencing those reservations “which
invoke either religious or national laws as reasons for not considering themselves bound by
provisions of the Convention,” namely those of Bangladesh, Djibouti, Indonesia, Jordan,
Tunisia, Thailand, and Turkey).

81. UNCRC, supra note 14, art. 51(2).

82. The Cook Islands, the Holy See, Singapore, and the United Arab Emirates have
standing reservations relating to the right to nationality. U.N. Treaty Collection, Status of
the Convention on t he Rights of the Child, https://treaties.un.org/Pages/View

83. For example, some domestic laws deprive individuals of nationality based on entry
into foreign civil or military service. See WEIS, supra note 38, at 118 (citing legislation in
Austria, Brazil, Bulgaria, Cuba, the Dominican Republic, Egypt, France, Guatemala,
contrast, no state has explicitly objected to the Convention’s stipulation with respect to birth registration.84 In analyzing the implementation of these rights, it is important to take such derogations and reservations into account.

D. Implementing the Rights to Registration and Nationality

The rights to registration at birth and to nationality are well established in treaty law. Both rights, which are seemingly congruent, often appear side-by-side in human rights conventions,85 but have produced unintended consequences when put into practice. Over time, states have shored up domestic registration regimes and expanded the scope of citizenship laws.86 As a result, birth certificates and other registration documentation has been used as primary evidence in citizenship applications.87 Children whose births were not registered are therefore unable to prove their identity and birthplace in order to establish citizenship.88

The tension created by birth registration regimes and the right to nationality is increasingly apparent. In 2007, the Committee on the Rights of the Child, which oversees state implementation of the

Honduras, Hungary, Indonesia, Iraq, Italy, Mexico, Monaco, the Netherlands, Panama, Peru, Portugal, Romania, Spain, Syria, Turkey, and the United States).


85. See, e.g., UNCRC, supra note 14, art. 7.


87. See, e.g., Act on Nationality of the Slovak Republic, 40/1993 Coll. 4 Dec. 2010, § 8(3)(c) (requiring a birth certificate in order to apply successfully for Slovak nationality); Brunei Nationality (Registration) Regulations, Regulation 4, CAP.15, Rg. 1, B.L.R.O. 3/2002 (2002); Austrian Citizenship Act, Staatsburgerschaftsgesetz (1985) (requiring an original birth certificate for citizenship applications); 22 C.F.R. § 51.42 (2008) (classifying a birth certificate, including “the full name of the applicant, the applicant’s place and date of birth, the full name of the parent(s),” as “primary evidence of birth in the United States,” without which documentary evidence such as a hospital birth certificate must be produced); U.K. BORDER AGENCY, CONFIRMATION OF BRITISH NATIONALITY STATUS: A GUIDE FOR APPLICANTS REQUESTING CONFIRMATION THAT THEY ALREADY HOLD BRITISH NATIONALITY STATUS, GUIDE NS, 8 (2009), available at http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/nationality/guide_ns.pdf (requiring a birth certificate to obtain a British passport, in the absence of which investigation of nationality is entailed).

88. Todres, supra note 12, at 32–33 (2003); What Would Life be Like If You Had No Nationality?, supra note 9.
Convention on the Rights of the Child,89 warned that children whose births are not registered are “extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour.”90 Specifically, unregistered children are at risk of “falling prey to organized crime,” including human trafficking networks.91 A 2004 report from the Office of the U.N. High Commissioner for Refugees (UNHCR) noted that, because birth registration is key in establishing parentage and identity, “[l]ack of registration of births can lead to problems of statelessness.”92 The Inter-American Court of Human Rights went so far as to find that the denial of a birth certificate amounted to, among other things, a violation of the right to nationality93 guaranteed by the American Convention on Human Rights.94

Targeted studies have also recognized the impact of the implementation of the right to registration at birth on access to nationality. The most obvious instances of such issues occur in countries like Bangladesh and Tanzania, where overall birth registration rates are reportedly below 15%, and the Democratic Republic of Congo, where civil war has impaired civil registration.95 Other studies have observed the effects of disparities in the registration of births on specific populations. According to one study, for instance, unmarried mothers are unable to register births because of social prejudices in Benin, Bolivia, China, India, Pakistan, and Uganda.96 The plight of

89. UNCRC, supra note 14, art. 43.
95. Todres, supra note 12, at 32–35 (2003); SHARP, supra note 1 (linking the utter failure of registration regimes in such countries to access to the right to a name, identity, and nationality); see also INTEGRATED REG’L INFO. NETWORKS, Zimbabwe: Reform of Birth Registration Law Urged (July 23, 2004), http://www.irinnews.org/report/50803/zimbabwe-reform-of-birth-registration-law-urged (reporting the high levels of unregistered birth and noting the subsequent lack of identification and documentation).
indigenous populations in Australia, many of which live at or below the poverty line, recently has drawn much attention. As a result, these individuals frequently face obstacles in accessing registration services and obtaining identification. Without birth certificates, many are denied the ability to participate in basic activities like sporting events. More importantly, they cannot obtain driver’s licenses or passports. As early as 1905, British jurisprudence linked passports to nationality, as “document[s] issued in the name of the Sovereign” to be used for identification and protection as nationals.

Similar patterns have emerged for Roma populations in Greece and Serbia, as well as for indigenous communities in the Philippines. While the predicaments faced by specific minorities are well documented, few comprehensive reviews of other vulnerable populations exist.

Children of non-nationals frequently face these same chal-

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106. See, e.g., U.N. Comm. on the Rights of the Child, General Comment No. 11: Indigenous Children and Their Rights under the Convention, ¶ 42, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009) (“States parties should take special measures in order to ensure that indigenous children, including those living in remote areas, are duly registered.”).

107. See, e.g., Todres, supra note 12, at 32–35; SHARP, supra note 1 (observing that the children of refugees and asylum-seekers may not always be registered, but failing to link this phenomenon with specific factors or states).
lenges. The Committee on the Rights of the Child has noted that children of non-nationals are less likely to be registered in specific countries, including Chile,108 Djibouti,109 and Iran.110 However, it is important to recognize the broader trend: Reforms with respect to birth registration and citizenship in certain states have prevented the children refugees, asylum-seekers, and undocumented migrants born on those territories from acquiring nationality.

II. THE RIGHTS TO BIRTH REGISTRATION AND NATIONALITY IN REFUGEE MAGNET STATES

States parties to the treaty regimes described above have international obligations to ensure recognition of the rights to registration at birth and nationality.111 In certain states, however, legislative and administrative reforms designed to implement these rights have marginalized vulnerable populations. This phenomenon is particularly apparent in high-income developing states, which serve as regional refugee magnets.

A. A Unique Formula: High-Income Developing States, Refugees, and Birth Registration Regimes

The international community has long prioritized the protection and resettlement of refugees,112 defined in the Convention Relating to the Status of Refugees as persons outside of their country of origin who are unwilling or unable to return based on a well-founded fear of persecution.113 Asylum-seekers, by contrast, are individuals asserting refugee status whose claims have not yet been determined. Stateless persons may or may not fall within one of these catego-

111. See infra Part II.
112. G.A. Res. 8(1), Preamble, U.N. Doc. A/RES/8(1) (Feb. 12, 1946) (“recognizing that the problem of refugees and displaced persons of all categories is one of immediate urgency”).
The international community continues to grapple with “the global refugee problem,” particularly in developing countries. According to scholarship, states parties to the Convention on the Rights of the Child that are also countries of asylum have a special legal duty to register all children born in their territory, whether through existing registration regimes or by creating special procedures. Yet because of economic constraints, not all states receiving and hosting these populations are able to undertake this duty. In reality, “[a]pproximately 90 percent of the world’s ten million or so refugees are from developing countries and over 90 percent of these refugees will stay in developing countries,” often by settling in their country of first asylum. The most attractive developing countries are those that are most economically stable. This Note analyzes three such countries; South Africa, Thailand, and Venezuela are all classified as “upper middle income” developing countries and have each faced the very real consequences of “the global refugee problem.”

This is not to suggest that developing countries are entirely unable to ensure registration and nationality. In fact, many—including South Africa, Thailand, and Venezuela—have recognized

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116. See Van Buren, supra note 34, at 366.

117. Loescher, supra note 115, at 76 (observing that external assistance from Western countries is often still necessary for developing countries to effectively address domestic refugee issues).


121. See Loescher, supra note 115, at 76.
these rights and incorporated them into the domestic legal regime. Legislative reform, however, is often insufficient and does not guarantee the practical application of these rights. In South Africa, Thailand, and Venezuela, attempts to universalize the rights to birth registration and nationality have inadvertently served to create a new generation of stateless children by singling out the children of refugees, asylum-seekers, and undocumented migrants born on the territory.

B. Case Study: South Africa

South Africa, “a major migration hub” of the African continent, regularly receives migrant and refugee populations from Central, East, and West Africa as well as Asia and Eastern Europe. Its popularity is largely the result of its political transformation and post-apartheid economic success, though the ramifications of this attractiveness are not all positive. UNHCR has described South Africa, which received more than 61,000 asylum applications in 2012, as “overwhelmed” by the influx of refugees and asylum-seekers. Because of its reliance on birth registration as a means of identification, young members of its vulnerable populations are unable to gain access to nationality.


126. Id. at 9.


1. Birth Registration in South Africa

As a party to the ICCPR, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child, South Africa is formally obligated to ensure the right to registration at birth and the right to nationality. The state has made concerted efforts to implement these protections. With respect to registration at birth, recent legislation mandates that parents give notice to the Government of the live birth of any child. Following such notice, the Government is required to furnish documentation in the form of a receipt of notice. The law also provides for notice and documentation of abandoned children. As for the issuance of birth certificates—considered by many to be part of the right to registration at birth—Parliament enacted the Identification Act of 1997. Under the Identification Act, the Director-General of the Department of Home Affairs is instructed to issue a birth certificate “as soon as practicable” after receipt of an application.

The right of every child to a nationality from birth also has


133. UNCRC, supra note 14, art. 7(1); African Charter, supra note 15, art. 6(2).

134. ICCPR, supra note 13, art. 24(3); UNCRC, supra note 14, art. 7(1); African Charter, supra note 15, art. 6(3).

135. South Africa has enacted legislation to grant the right of birth registration to all children. See Births and Deaths Registration Act 51 of 1992 (S. Afr.) [hereinafter South African Registration Act].

136. Id. art. 9(1).

137. Id. art. 9(5).

138. Id. art. 12.

139. See supra Part I.A.


141. Id. art. 13(1).
been incorporated into domestic law, most prominently by inclusion in the South African Constitution. While South Africa has not signed or ratified the Statelessness Convention, it recently announced its intention to do so. Furthermore, South Africa has expanded the scope of its citizenship laws to grant nationality to any person born in the Republic who has no right to citizenship of another state.

On its face, the legal framework established by South Africa is progressive and encouraging; the government demands universal registration and issuance of birth certificates and has sought to guarantee the right to nationality by granting citizenship to those without another nationality. In practice, however, these laws work to exclude and disadvantage the children of refugees, asylum-seekers, and undocumented migrants.

These problems result from both the structure of the legislation and the corresponding regulations promulgated to execute these provisions. In establishing procedures to facilitate universal birth registration, in particular, the state has created a system that is both onerous and confusing. A parent or other responsible person must give “notice” of a live birth in the Republic within thirty days. Registration, which results in the issuance of a birth certificate, must also take place within thirty days of the birth. According to guidance published by the Department of Home Affairs, an application submitted within thirty days of the child’s birth entails the submission of Form BI-24 to the nearest Home Affairs Office.

This system has proved a disappointment to at-risk populations because the state does not have the resources to support it. Despite being classified as an “upper middle income” country, South Africa faces extreme challenges with service delivery for refugees.

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146. Births and Deaths Registration Act 51 of 1992 § 9(1) (S. Afr.).


148. Id.
and asylum-seekers. The limited number of local branches of the Department of Home Affairs creates an initial burden, as parents in remote communities must travel to the nearest office. Parents and children who manage to appear at a Home Affairs office are likely to face more adversity upon arrival, as children born in the Republic to undocumented parents are often denied birth certificates because of their parents’ immigration status. In fact, current regulations suggest that Department officials “refer” certain cases to immigration services if there is suspicion of unlawful presence, which creates a deterrent to registration.

If a child was not registered within one year of his or her birth, the process becomes more complicated. A parent or responsible adult must visit a Home Affairs office to complete Form BI-24 and attach written reasons as to why the birth was not originally registered. The application also must contain documentation to establish the identity and status of the child. Home Affairs recommends that the parents bring an affidavit and a hospital certificate, school register, baptismal certificate, or—in the case of abandoned children—a report by a government social worker.

Each of these procedures poses unique challenges to non-native South Africans, and especially to refugees, asylum-seekers, and undocumented migrants. First, although the regulations published by the Department of Home Affairs do not make this clear, the parent or parents must present identification in order to register a birth. The submission of an application for a birth certificate also entails a fee. Furthermore, many of the undocumented migrants and asylum-seekers only become aware of the need for birth registra-

151. Regulation to the Births and Deaths Registration Act, GN R128 of 26 Feb. 2014, §§ 6–7 (S. Afr.).
153. Id.
154. Id.
155. George, supra note 150, at 47.
tion when applying to obtain identification when it is too late. 157 As adults applying for late registration of birth, many are rejected due to lack of evidence of local birth or suspicion that they were actually born abroad and are attempting to illegally gain citizenship. 158

Children born abroad who have since entered the Republic face similar, often insurmountable, obstacles. A parent or responsible adult must present a birth certificate or comparable document from the state of origin in order to register the child’s birth with South Africa and obtain identification. 159 The likelihood of the parent possessing such documentation is low. Most refugees, asylum-seekers, and undocumented migrants entering South Africa come from the Democratic Republic of Congo, Zimbabwe, Somalia, and Ethiopia. 160 Children under the age of five whose births are registered reportedly range from 3% of the population in Somalia to 49% in Zimbabwe. 161 Children born elsewhere, and particularly those fleeing from persecution, are thus unlikely to meet the initial burden of production and cannot seek documentation from their countries of origin. 162

In sum, the current system is complex and difficult to navigate for refugees and asylum-seekers in South Africa. Despite attempts to bolster universal registration, many children born to these parents are not registered and do not obtain birth certificates. 163 The fundamental problem emerges when these undocumented children seek to exercise their legally protected right to nationality. 164

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158. George, supra note 150, at 47.

159. Regulation to the Births and Deaths Registration Act, GN R128 of 26 Feb. 2014, §3(3) (S. Afr.).


163. George, supra note 150, at 47.

164. See ICCPR, supra note 13, art. 24(3); UNCRC, supra note 14, art. 7(1); African Charter, supra note 15, art. 6(3); S. AFR. CONST. art. 28(1), 1996.
2. Acquiring Nationality in South Africa

Under domestic law, South African citizenship may be obtained by descent, birth, or naturalization by the following categories of children whose parents are not South African citizens:

1. A person born in the Republic who is otherwise not a South African citizen by birth, who does not have the citizenship of any other country, and whose birth is registered\(^{165}\) within thirty days (per the Births and Deaths Registration Act of 1992); or\(^ {166}\)

2. A person born in the Republic whose parents have been admitted for permanent residence, who has lived in South Africa from birth to age eighteen, and whose birth was properly registered.\(^ {167}\)

A certificate of naturalization is available to children born in the Republic (whose parents are not South African citizens or permanent residents) if he or she has lived in South Africa since birth and his or her birth was properly registered.\(^ {168}\) Such a child qualifies to apply for citizenship by naturalization when he or she is eighteen years old.\(^ {169}\)

Each of these means of obtaining nationality requires that the birth of the child be duly registered. More importantly, the burden of proof rests on the applicant; to acquire a certificate of naturalization, for example, the individual must present an original birth certificate.\(^ {170}\)

UNHCR estimates that there were 65,881 refugees and 232,211 asylum-seekers residing in South Africa as of January 2014.\(^ {171}\) International law demands that South Africa facilitate the local integration and settlement of these individuals when repatriation is not legally possible.\(^ {172}\) In the long term, this would include the

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166. Births and Deaths Registration Act 51 of 1992 (S. Afr.).
168. Id. § 4(3).
169. Id. § vi (changed the definition of “major” to any person who has attained 18 years).
provision of identification and nationality, yet nationality cannot be achieved without proper documentation and birth registration. Refugees, asylum-seekers, and undocumented migrants face significant obstacles in registering the birth of their children. Without such documentation, the children of these non-nationals become stateless. The South African attempt to implement expanded birth registration and nationality regimes has thus excluded this vulnerable population.

C. Case Study: Thailand

South Africa is not alone in this predicament. Because of regional instability and its high demand for foreign labor, Thailand is also home to hundreds of thousands of refugees, asylum-seekers, and stateless persons. The high concentration of these vulnerable populations within its borders has had serious implications for national security, healthcare, domestic politics, the environment, and the economy.

Like South Africa, Thailand has accepted international legal
obligations to ensure every child’s rights to registration at birth\textsuperscript{179} and to nationality.\textsuperscript{180} More importantly, the Thai government recently enacted reforms that explicitly grant the right to registration to all children born on its territory.\textsuperscript{181} The existence of such an inclusive statute, however, has not yielded overwhelming success in registering all births. The Committee on the Rights of the Child has expressed concern that the births of certain children are unregistered based on the immigration status of their parents.\textsuperscript{182} Furthermore, birth registration is merely “the first hurdle” in the race to achieve the right to nationality.\textsuperscript{183}

1. Birth Registration in Thailand

Thailand has adopted new legislation, implemented in 2010, which entitles all children born in the country to registration at birth.\textsuperscript{184} This law amended the 1991 Civil Registration Act,\textsuperscript{185} under which only Thai citizens could register their children.\textsuperscript{186} The law was subsequently expanded, but granted the right to registration only to citizens and individuals with lawful permits to reside in Thai-

\begin{itemize}
  \item \textsuperscript{183} Brad K. Blitz & Maureen Lynch, \textit{Statelessness and the Deprivation of Nationality}, in \textit{STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY OF THE BENEFITS OF NATIONALITY} 1, 9 (2011) (describing how registration is only the first step in ensuring that children are protected by the state).
  \item \textsuperscript{184} Civil Registration Act (No. 2) B.E. 2551 § 16 (2008) (Thai.).
  \item \textsuperscript{185} Civil Registration Act B.E. 2534 (1991) (Thai.).
  \item \textsuperscript{186} Ministerial Regulation to the Civil Registration Act B.E. 2535 (1992) (Thai.).
\end{itemize}
land. In light of the fact that these regulations excluded undocumented and illegal migrants, new legislation was adopted.

The improved registration regime does more than broaden the scope of the right to registration. In particular, the law acknowledges the need for cooperation amongst government agencies by mandating that other departments comply with requests for personal data from the Director of Central Registration. Thailand also has ensured more effective management of the registration process by computerizing the civil registration system and creating traveling registrars to improve accessibility. In addition, the government has made great strides by reaching out to children directly to educate them about their rights through the Child Friendly Schools Programme.

Despite this progress, issues with the reformed registration regime persist. While public hospitals are responsible for the provision and completion of delivery certificates for all children born on their premises, the delivery certificates merely confirm the locations of the births. They do not officially “declare” or “register” the births. For the many children born at home or in remote areas, parents or responsible adults must report the birth to a local registrar or village headman, which produces a certificate confirming that the birth has been reported. Neither of these certificates is sufficient to register the birth. The parents must instead proceed to the district registrar, which will accept the birth report and issue a birth certificate. The registrar is then responsible for registering the birth

187. Ministerial Regulation to the Civil Registration Act B.E. 2548 (2005) (Thai.).
188. Civil Registration Act § 9.
189. Birth Registration: Right from the Start, supra note 18, at 19.
192. Ministerial Regulation to the Civil Registration Act, B.E. 2535 (1992) (Thai.).
196. Civil Registration Act, B.E. 2534 art. 4, (1991) (Thai.).
198. Civil Registration Act (No. 2) B.E. 2551 § 16 (2008) (Thai.).
with the Central Registration Bureau.199

Beyond these cumbersome procedural hurdles, births of certain children are frequently not registered for a variety of other reasons, chief among them a lack of awareness about the importance of registration.200 Parents also may not know where to register or are often unable to complete the requisite form because of a language barrier.201 Moreover, parents residing in refugee camps do not always understand why registration of newborns is necessary because access to basic health care and education is already provided.202 Some Thai authorities have also ceased requiring birth certificates for enrollment in primary education.203

In sum, efforts to implement and improve the right to birth registration in Thailand have proved challenging. These problems multiply when appreciated in a broader context, in that the emphasis on birth registration prevents many children from achieving citizenship.

2. Acquiring Nationality in Thailand

As is often the case with domestic citizenship law, the provisions defining eligibility for Thai citizenship may be found in myriad legislative acts.204 Under these laws, eligibility for citizenship is restricted to children with a parent of Thai nationality.205 Children born in Thailand to “alien parents,” including refugees, asylum-seekers, and undocumented migrants, are not permitted to acquire Thai citizenship at birth.206 Other children born in Thailand may acquire nationality at birth, but evidence, such as a birth certificate, is required.207 Moreover, an entirely separate regime applies to mem-

199. Civil Registration Act B.E. 2534 art. 26 (1991) (Thai.).
203. Birth Registration: Right from the Start, supra note 18, at 5.
205. Nationality Act (No. 2), B.E. 2535, § 7 (1992) (Thai.).
206. Id.
207. Id.
bers of the hill tribe and highlander populations from Myanmar, who are granted status according to the date on which they entered the country.208 These applicants must produce a Thai birth certificate before applying for citizenship, despite the fact that many of their births are not registered.209

In 2011, UNHCR reported a number of positive results from its engagement with Thailand, including the issuance of 2,000 birth certificates to children born in refugee camps and 40 birth certificates to refugee and asylum-seeker children born in urban areas.210 Yet UNHCR also estimated that there were 506,200 stateless people living in Thailand that same year.211 Thai nationality law, described above, is highly selective in granting the fundamental right of citizenship. To the extent that opportunities to acquire citizenship exist, they are unavailable to many children because documents like birth certificates and certificates of registration “make the distinctions between citizen and non-citizens enforceable by law.”212 The process of registering a birth is burdensome and many parents are unaware of the importance of registration. This issue is particularly prominent in vulnerable communities like refugee camps. As a result, there remains much progress to be made in ensuring that all children, especially those whose parents are not Thai nationals, have access to the right of nationality.

D. Case Study: Venezuela

Despite efforts to implement the rights of refugees and asylum-seekers in the domestic legal regime, Venezuela likewise has struggled to effectively address the social and economic issues presented by the influx of refugees, asylum-seekers, and undocumented migrants. Venezuela originally became a magnet for regional refugees and international migration as a result of the rapid growth of its economy during the 1970s.213 Forced displacement in Colombia

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209. Toyota, supra note 201, at 101.
211. Id.
since the late 1990s also contributed to this phenomenon. Now home to more than 200,000 refugees, asylum-seekers, and stateless persons, Venezuela has encountered difficulties in ensuring the rights of the children born to these vulnerable communities.

1. Birth Registration in Venezuela

Like South Africa and Thailand, Venezuela has accepted its obligations to ensure the right to birth registration and the right to nationality under the ICCPR and the Convention on the Rights of the Child. Venezuela is a unique case study, however, due to the comprehensive scope of its national legislation. The Protection of Children and Adolescents (Organization) Act requires that the state “guarantee that the registration of newborns be both compulsory and timely” because “[a]ll children have the right to be identified immediately after birth.” The Act further specifies that public health institutions are responsible for registering children delivered in the facility. Four copies of the birth certificate must be produced, one of which is to be provided to the person who presents the child. Article 464 of the Civil Code also requires that a birth be registered “with

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218. Id. art. 18.

219. Id. art. 19.
the highest civil authority of the parish or municipality” within twenty days.

In many ways, the steps taken by the Venezuelan government exemplify the measures needed to universalize birth registration. Specifically, it has allocated public funding to strengthen the birth registration system and launched a national campaign designed to educate the public about the importance of identity and nationality. By law, the civil registration system administered by the state must follow a “free, simple and quick process.” Venezuela also has worked to integrate birth registration into health services by placing civil registrars in hospitals and by including birth registration in public health campaigns.

Nevertheless, as noted by the Committee on the Rights of the Child, the benefits of these reforms are not felt by the children of many non-citizens. Under Decree No. 2819, in effect since September 1998, only parents who are documented are able to register the births of their children. Of the approximately 200,000 persons in refugee-like situations in Venezuela in 2010, only 2,790 were recognized as refugees with the proper documentation to be able to

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220. Código Civil, art. 464 (Venez.).
223. Ley para la Protección de los Derechos de Niñas, Niños y Adolescentes, (Protection of Children and Adolescents Act), Special Official Gazette No. 5,859, Dec. 10, 2007 art. 18 (Venez.).
224. UNICEF Good Practices in Integrating Birth Registration into Health Systems, supra note 221, at 12.
227. Id.
229. Id. (according to data produced by the National Commission for refugees).
register births under the 1998 Decree. According to the Committee, the impacts of the decree are amplified by the lack of awareness about the need for registration among African migrants, in particular.\footnote{Concluding Observations: Venezuela, supra note 226, ¶¶ 40–41 (“[C]hildren of Afro descendants do not receive sufficient information relevant to their needs.”).}

These defects in the Venezuelan birth registration regime have far-reaching consequences. In particular, the state’s reliance on its shored-up registration regime for the administration of its citizenship laws serves to exclude the children of undocumented asylum-seekers and migrants from accessing their right to nationality.

2. Acquiring Nationality in Venezuela

The Venezuelan Constitution mandates that the state “promote the celebration of international treaties related to nationality”\footnote{CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZ. art. 37.} and defines Venezuelan citizenship according to the principles of \textit{jus soli} and \textit{jus sanguinis}.\footnote{Id. art. 37.} All children born in the territory of the Republic are thus Venezuelans by birth. Nationality is conferred on foreign-born children whose:

1. Parents are both Venezuelans by birth;
2. Father or mother is a Venezuelan by birth, provided that the child has established residency in the Republic or has declared an intention to obtain Venezuelan nationality; or
3. Father or mother has been naturalized in Venezuela, provided that the child has established residency in the Republic and has declared intention to obtain Venezuelan nationality before reaching the age of twenty-five.\footnote{Id. art. 32.}

To be naturalized, an individual must maintain ten years of uninterrupted residence in Venezuela or marry a Venezuelan.\footnote{Id. art. 33.}

Birth certificates play a central role in the acquisition of nationality through any of the preceding processes. For children seeking recognition under the principle of \textit{jus sanguinis}, official guidelines make clear that a birth certificate from another country detailing the names of the parents and the location of birth must be presented.

\begin{itemize}
\item \footnote{230. Concluding Observations: Venezuela, supra note 226, ¶¶ 40–41 (“[C]hildren of Afro descendants do not receive sufficient information relevant to their needs.”).}
\item \footnote{231. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZ. art. 37.}
\item \footnote{232. Id. art. 32.}
\item \footnote{233. Id.}
\item \footnote{234. Id. art. 33.}
\end{itemize}
to Venezuelan authorities. \footnote{235}{See, e.g., Embassy of the Bolivarian Republic of Venezuela, \textit{Civil Registry: Birth Certificates}, http://venezuela-us.org/registro-civil/ (last visited Feb. 1, 2014) (listing the requirements for registering children born in the United States).} More importantly, however, birth certificates are necessary to prove citizenship by birth for children born in the territory. \footnote{236}{\textsc{const. of the Bolivarian Republic of Venezuela} art. 56 (establishing the right to identity as well as the right to be registered free of charge and characterizing public documents as “evidence” of biological identity for the purpose of governmental review).} The benefit of supplying citizenship based on the principle of \textit{jus soli} is that it ensures the right to acquire nationality to all children born in the state, regardless of parentage or immigration status. \footnote{237}{See U.N. Comm’n on Human Rights, \textit{Question of a Convention on the Rights of the Child: Report of the Working Group}, 36th Sess., Agenda Item 13, U.N. Doc. E/CN.4/1407 (1980) (indicating the express preference for the embodiment of the principle of \textit{jus soli} at the national level, based on a proposal by Australia, because it would help to prevent instances of statelessness among children).} Yet because the children of asylum-seekers and migrants are unable or unlikely to acquire birth certificates through registration, \footnote{238}{Concluding Observations: Venezuela, supra note 226, ¶ 39 (describing both the 1998 decree, which precludes registration of children by undocumented parents, and the lack of awareness of the need for registration in certain communities).} the benefit of citizenship by birth does not extend to them.

\textit{E. Summary of Findings}

South Africa, Thailand, and Venezuela epitomize a troubling trend: Well-off developing states that attract foreigners have established birth registration regimes which do not apply to, or in practice are not available to, the children of refugees, asylum-seekers, and undocumented migrants. These states rely on their inadequate registration regimes to determine citizenship, so that these children are unable to acquire nationality—even when progressive citizenship laws aim to provide for them.

Problems of statelessness in these countries cannot be fairly imputed to the presence of these factors alone. Each case study represents a state with a distinct national identity and approach to immigration issues. In South Africa, for example, the official stance adopted by the government with respect to refugees has been fundamentally shaped by the fall of the apartheid regime and the transition to a more equitable government. \footnote{239}{After the 1994 elections, there were widespread expectations of a government more accepting of migrants. The Republic was said to be “riding a wave of moral legitimacy.” Aurelia Segatti, \textit{Reforming South African Immigration Policy in the Postapartheid Period}} But the truth is far less promis-
ing. In reality, the newly elected African National Congress of the 1990s tended to view the influx of migrants in a negative light and largely embraced a “security-oriented approach” to immigration issues.240 The government’s attempts to appeal to both liberal and xenophobic constituencies has thus resulted in some confusion.241

In Thailand, confusion has resulted from frequent policy changes. Additionally, the economic boom of the late 1980s and 1990s sparked a migration movement for which the government was unprepared.242 Furthermore, according to studies undertaken by the World Bank, the perception held by most migrants is that gaining documentation is costly and has few benefits, so many do not seek to regularize their status.243 Venezuela, by contrast, is primarily concerned with the security implications of accepting refugees, asylum-seekers, and migrants.244 Wary of the spillover effects of the ideological, economic, and territorial dispute raging in Colombia, Venezuela has generally embraced a restrictive approach.245

In sum, although failure to register births “does not equate to statelessness,” lack of documentation has operated in practice to “deny people access to citizenship and state services.”246 The confluence of specific factors, including insufficient registration regimes, reform in nationality laws, and high concentrations of vulnerable populations, contributes to problems of statelessness in these countries.


240. Id. at 52.

241. The enactment of the Refugees Act, which mirrors international law with respect to asylum-seekers, is seen as a reason to behave more harshly towards undocumented migrants. Id.

242. Id. at 33.

243. Id. at 40.

244. Venezuela’s current stance is thought to be closely tied to the revolution launched by former President Hugo Chávez. Martin Gottwald, Protecting Colombia Refugees in the Andean Region: The Fight Against Invisibility, 16 INT’L J. REFUGEE L. 517, 526 (2004) (“This perception [of the negative impacts of refugees, asylum-seekers, and migrants] has been expressed in stronger terms since left-leaning populists re-emerged as leaders of state in Venezuela.”).

245. Id. at 519.

III. THE WAY FORWARD

A. Case Studies in Context

Despite the problems identified above, South Africa, Thailand, and Venezuela have generally made positive efforts to implement the right to birth registration for all children born in their territories. Unfortunately, this cannot be said of all states that routinely receive significant numbers of vulnerable populations. Israel, for instance, is subject to massive influxes of asylum-seekers from several African states, including Sudan, Eritrea, and the Ivory Coast. Although Israel is a party to the CRC, the Committee on the Rights of the Child has reported that the state refuses to issue official birth certificates to the children of migrants born in Israel. The decision to deny documentation to the children of foreigners, as well as its strict restriction and detention policies, constitute


clear violations of Israel’s international obligations.254

The Dominican Republic is likewise responsible for deliberate efforts to prevent certain groups from accessing the right to nationality.255 The Dominican Constitution specifically grants nationality based on birth in the territory (jus soli), but excludes the children of unlawful residents.256 In 2005, the Supreme Court of Justice ruled that undocumented migrants and workers, many of whom are Haitians,257 fall within this specific category of excluded persons.258 This decision has prevented many children of Haitians born in the Dominican Republic from obtaining nationality.259

Such attitudes, while regrettable, are essentially pragmatic; countries of asylum are focused on ensuring temporary solutions, rather than paving the way for long-term resettlement options.260 This view of the refugee regime presents one of the strongest possible arguments against ensuring that vulnerable populations have access to birth registration and nationality. The argument, however, is wholly inconsistent with the nature of the refugee regime. UNHCR itself was established for the “primary purpose” of safeguarding the rights and well-being of refugees, but with the “ultimate goal” of finding

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durable solutions to allow refugees to rebuild their lives.261 The fact that states want to eventually reverse the settlement of refugees, asylum-seekers, and illegal migrants within their borders does not mean that the states’ obligations to those individuals and their children cease. The Convention on the Rights of the Child does not guarantee the right to registration at birth only under certain circumstances, or only to the children of parents whose immigration status suits the state.262 More importantly, issues resulting from inadequate birth registration regimes are not limited to refugees, asylum-seekers, and illegal migrants. As described above, this phenomenon has been observed amongst indigenous populations of Australia and the Philippines as well as minority communities around the world. In light of their treaty obligations and these considerations, states cannot shirk their responsibilities by blaming the populations at risk.

Furthermore, incidents of the violation of an international norm do not impugn the existence of that norm.263 The 1959 Declaration of the Rights of the Child, adopted by the General Assembly, makes clear that every child is entitled to acquire nationality at birth.264 The HRC has likewise affirmed that, under the ICCPR, “[s]tates are required to adopt every appropriate measure, both internally and in cooperation with other states, to ensure that every child has a nationality when he is born.”265

B. The Need for Systematic Change

There has been some progress in ensuring the rights of children at birth, but positive developments have been inconsistent.266 While relatively few states have acceded to the Statelessness Convention, its primary obligation (requiring that nationality be granted

262. See supra, Part I.A, C.
263. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 186 (June 27) (“It is not to be expected that in the practice of States the application of the rules in question should have been perfect . . . instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”).
265. General Comment No. 17: Rights of the Child (Article 24), supra note 27, ¶ 8.
to children born in the territory who would otherwise be stateless)\(^{267}\) has been implemented unilaterally.\(^{268}\) Where states have refused to adopt such an exception into their citizenship laws, legal experts have reacted unfavorably.\(^{269}\) In fact, the first judgment issued by the African Committee of Experts on the Rights and Welfare of the Child found Kenya in violation of its international obligations for failure to include such a provision in its domestic citizenship laws.\(^{270}\) In spite of these positive legal reforms, problems persist; UNHCR has reported that there is an “increasing number of cases of statelessness among refugee children.”\(^{271}\) These children are among the most vulnerable in the world.\(^{272}\)

The existing regime, in other words, is inadequate. The reporting system overseen by the Committee on the Rights of the Child has been criticized as ineffective\(^{273}\) and overburdened.\(^{274}\) For exam-

\(267\) Statelessness Convention, \textit{supra} note 52, art. 1; see UNCR, \textit{supra} note 14, art. 7(2); Nationality of Natural Persons in relation to the Succession of States, G.A. Res. 54/112, U.N. Doc. A/RES/54/112 (Feb. 2, 2000) (adopting the draft articles on nationality of natural persons in relation to the succession of states, which asserts that a child born without any nationality has the right to acquire the nationality of the state of the territory in which he or she was born).


\(271\) U.N. High Commissioner for Refugees, Refugee Children, Executive Committee of the High Commissioner’s Programme No. 47, ¶ g (Oct. 12, 1987).


ple, states are frequently late in submitting mandatory reports to the Committee, a common issue plaguing most treaty bodies. When a state does report, the system effectively recognizes that state as the “judge in its own cause.” In the absence of a more powerful enforcement mechanism at the international level, major change can only be wrought by the governments responsible for registering children and by those excluded from the existing regimes.

1. Recommendations at the National Level

According to a study by the World Health Organization, the most successful registration reform efforts are designed to address the flaws discussed above, namely the cost of registration, distance to registration offices, and general lack of public awareness. In Ghana, for instance, the government launched a universal birth registration campaign that has produced positive results. The government has waived fees, trained community health volunteers, and worked to educate the public about the importance of birth registration. One prominent element of the Ghanaian campaign has been the training of traditional birthing nurses to register children after delivery.

The strength of the legal regimes established in South Africa, Thailand, and Venezuela demonstrate that legal reform alone is not sufficient to correct issues with birth registration, especially for at-


277. Fottrell, supra note 274, at 6 (describing the Committee’s approach as consultative rather than supervisory).


279. Id.


282. Goonesekere, supra note 273, at 3.
risk populations like refugees and migrants. States need to implement practical programs to ensure that laws are administered fairly and to ensure that the public understands the importance of birth registration.

2. Activism as a Strategy for Change

Individuals can stimulate these changes by advocating for children’s rights in legal fora. Historically, there has been some success in garnering attention to these rights by bringing litigation on behalf of individuals before international tribunals. In one such case, the Inter-American Court affirmatively found a violation of the right to nationality. According to the Court, the Dominican Republic failed to comply with its legal obligations by preventing Dominican children of Haitian origin from acquiring citizenship. The Court determined that the state was required to “adopt all necessary positive measures” to facilitate citizenship and held that “requirements needed to prove birth on Dominican territory should be reasonable and not represent an obstacle for acceding to the right to nationality.” The same logic can and should apply to the registration regimes and burdensome citizenship laws in South Africa, Thailand, and Venezuela.

Successful claims have been brought even in the absence of a specific legal obligation to protect the right to nationality. The African Charter on Human and Peoples’ Rights, for instance, does not include a provision ensuring the right to nationality, yet the African Commission has adjudicated citizenship cases framed as violations of other rights protected under the Charter. In 2000, the Commission found against the Government of Botswana for depriving the claimant of citizenship, characterizing the government’s actions as a violation of the Charter’s right to inherent human dignity. The Commission likewise found that the Government of Zambia violated this right in Amnesty International v. Zambia by forcing the claimants to live as stateless persons.

285. Id. ¶ 171 (emphasis added).
286. See generally African Charter on Human and Peoples’ Rights, supra note 268.
288. Id. ¶ 91; African Charter on Human and Peoples’ Rights, supra note 268, art. 5.
The European Court of Human Rights accepted similar logic in 2012, when it held that the creation of statelessness resulting from Slovenia’s independence from the Socialist Federal Republic of Yugoslavia amounted to a violation of the victims’ right to private life. The Court viewed the concept of private life as encompassing “the network of personal, social, cultural, linguistic and economic relations,” which are inevitably damaged by an erasure of citizenship. In disallowing an individual to possess a legal identity, a state interferes with that individual’s right to a private life.

Another, potentially stronger, means of contesting national policies is to prove the discriminatory impact of the birth registration and citizenship regimes. Both domestic legislation and relevant international instruments unequivocally prohibit discrimination based on, inter alia, national origin. Moreover, discrimination on the basis of “race, colour, sex, language, religion or social origin” is proscribed even when states have followed the proper procedures to permit a derogation from treaty obligations due to a national emergency. Such claims, of course, present challenges to potential litigants, who bear the burden of proving discriminatory intent or effects. Yet there is some hope. The HRC, for instance, has paved the way by issuing observations about the targeted impact of nationality legislation on non-native populations. Moreover, litigants themselves can bolster their claims by using the results of studies undertaken by state governments. In 2012, the Research Unit of the Parliament of South Africa issued a background paper on statelessness in South Africa. In describing the protection regime established for

(2000).


291. Id. at 65.


293. S. AFR. CONST. art. 9, 1996; INDIA CONST. arts. 15, §§ 1–2.

294. ICCPR, supra note 13, art. 24(1); Declaration of the Rights of the Child, supra note 30, prin. 1; European Convention on Nationality, supra note 29, art. 5; African Charter on Human and People’s Rights, supra note 268, art. 2.

295. ICCPR, supra note 13, art. 4(1); General Comment 29: States of Emergency (Article 4), supra note 58, ¶ 2.


the thousands of asylum-seekers entering the country, the authors stumbled upon a troubling trend: “Due to a conflict of citizenship laws and practice between various African nations, and intentionally discriminatory laws and practice, many Africans . . . do not qualify for citizenship under any nation’s legal system.”298 This observation, published by the government itself, is startling. Activists should seize on such opportunities to win claims on behalf of individuals and to publicize this cause.

CONCLUSION

In sum, the implementation of the rights to birth registration and nationality has generated unforeseen consequences. In upper-middle income developing states like South Africa, Thailand, and Venezuela, governments are often hard-pressed to find the resources and political motivation needed to ensure the protection of refugees, asylum-seekers, and undocumented migrants that regularly cross their borders. Whether by design or inadvertently, birth registration regimes do not extend to children born into these vulnerable communities. As a result, even where states have expanded citizenship laws to ensure the right to nationality, the children cannot meet the burden of proving their identities. Without documentation or nationality, the children of refugees, asylum-seekers, and undocumented migrants become stateless, left to wander through life as “legal ghosts.”299

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298. Id. at 3.


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