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Reconceptualising the Right-less Children's Right to Legal Identity

***Child Statelessness in Protracted Refugee Situation
Case of Thailand***

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Declaration Statement

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With the hope of contributing to the lives of children and youths in Mae La, Umpiem Mai, Nu Po and other camps, who own no passport, yet remain enthusiastic and hardworking – to become a doctor, a teacher, a someone who can contribute to their society.

Executive Summary

The study illustrates the consequences of the absence of legal identity to the child's development and meaningful life. By doing so, this research aims to confirm that child statelessness in protracted refugee situation is a grave child-rights issue that needs targeted solutions. At the heart of their vulnerability stands the lack of legal identity. Recognising this, the research focuses on the stateless children born to refugee parents in Thailand, and conduct a thorough analyses of the Thai national laws and policies affecting their right to legal identity.

The introduction (Chapter 1) introduces the research questions and above aims of this study. The limited scope and rather broad definitions applied in this research are also explained here. The chapter also introduces the broader context of 21st century migration and changing discourse on the international protection scheme, within which this study finds its relevance. Following this, Chapter 2 offers a brief introduction to the background information on the phenomenon of child statelessness and refugee context in the border areas between Thailand and Myanmar.

Chapter 3 provides theoretical insights and aims to answer the question of what the stateless children's right to legal identity entails under the international legal framework, namely the UDHR, CRC, ICCPR, ICESCR and CERD. In particular, the chapter elaborates on the international obligations the RTG has vis-à-vis stateless children born to refugee parents in Thailand.

Chapter 4 presents national laws and policies concerning nationality, civil registration and immigration control. After elaborating on the RTG's responses to the protracted refugee situation, the last section evaluates the challenges raised by such laws and policies in realising their right to legal identity as well as fully enjoying their other fundamental human rights.

Building upon the previous chapters, Chapter 5 analyses the present situation faced by the stateless children born to refugee parents in Thailand, in order to answer the question whether the RTG complies with its international obligations. After evaluating what children's rights are at stake due to potential infringement of the international standards, the chapter concludes with recommendations on measures to ensure the safety and dignity of stateless children living in protracted refugee situation.

Based on the research, it is argued that these children's reality reflects the state's conscious making of 'universal' child rights policies which intentionally exclude those deemed to be 'illegal migrants'. Their legal status remains ambiguous and unrecognised due to the absence of any legal framework or formal procedures on refugee protection. Living in limbo, they have no access to basic rights, no opportunities to develop as a human being with agency and a voice, and no control over their life or future.

The study aims to reconceptualise the citizen-noncitizen dichotomy, which creates the gap in human rights protection, by focusing on the child's agency and ability to develop a sense of belonging within the framework of the most widely ratified UN treaty, the CRC. By doing so, the study hopes to provide a perspective into solutions to the emerging child statelessness in protracted refugee situation. This is highly relevant today, as the number of forced displacement and asylum seekers have drastically increased in the past decade and the refugee situation is becoming more and more protracted, while some states have started to close off their borders rather than opening them up. Given the universality of the CRC, a child-rights centred approach to the global refugee and stateless problems may offer an alternative way forward – a path that is more sustainable, inclusive and beneficial for all.

Overview of Main Findings

The research showed that the case of stateless children born to refugee parents in Thailand raises particular, yet potentially systemic children's rights issues which should be given larger accounts in forming laws and policies concerning child statelessness as well as immigration control.

In doing so, the research focused on the case study of stateless children born to refugee parents in Thailand, and two research questions that are to be answered. Firstly, the right to legal identity and the right to protection and enjoyment of fundamental rights are entitled to *every* child including stateless children, regardless of their and their parents' status, in the light of the non-discrimination principle. Therefore, the RTG has an international obligation to protect the rights of children born to refugee parents in Thailand, including: the right to be registered and have a name immediately after birth; the right to acquire a nationality particularly when the child would otherwise be stateless; and the fundamental human rights (education, health care, adequate standard of living, and protection). Secondly, while the RTG has implemented measures to address the problems of child statelessness and promote universal coverage of basic services, such legislative and policy efforts appear to have created more challenges for some groups, while solving problems of others.

The case study illustrated how stateless refugee children experience dual deprivation of their rights due to the invisibility of children's rights: while the lack of full enjoyment of their fundamental rights pose obstacles to access to birth registration and nationality acquisition procedures, deprivation of their legal identity in turn significantly reduced the enjoyment and realisation of their fundamental rights. The strict immigration measures, combined with their ambiguous status, fear for being identified and subjected to detention, deportation and/or abuse, reinforce the statelessness and invisibility of the children born to refugee parents with irregular legal status. This in turn makes them vulnerable to trafficking, exploitation and violations of their rights as they remain hidden behind the radar without access to state protection, basic services and economic opportunities to build a secure life.

The study has revealed that statelessness amongst children born in the protracted refugee situation at the border areas in Thailand is a striking issue that needs to be addressed urgently. Under the present laws and policies, the target group of this study are one of the most marginalized ethnic minority groups who are particularly vulnerable to trafficking, re-recruitment by military junta and other forms of violence and exploitation. In addition, the emerging political situation in Myanmar and the increased promotion for repatriation and closing borders raise additional child rights issues and challenges to the RTG and international community. Without an official identification document to prove their nationality, they cannot return to Myanmar safely, nor integrate into the Thai society.

At the heart of their vulnerability stands the lack of legal identity. Lack of legal identity reduces the child's ability to make claims on the state in today's human rights scheme. This in turn allows states to exclude stateless children from the scope of its laws, policies and implementation measures adopted to meet the international obligations. In this regard, statelessness is a grave child rights issue that concerns the child's physical and emotional well-being and social and personal development from early stage of their life and throughout.

Recognising this crucial role legal identity plays in protection of children's rights, particularly in the protracted refugee situation, the paper provided recommendations for improvements. Besides legislative reforms concerning the legal status of refugee children, the RTG is recommended to take targeted, multi-sectorial and child-centred approach to address the barriers to accessing the basic services and registration procedures. The recommended measures not only are vital to protect the rights, safety and dignity of these children, but also will serve the long-term interests of both the RTG and Myanmar government. Ensuring all children have the right to grow as a human being is the key to sustainable economic growth and peace.

Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ASEAN	Association of Southeast Asian Nations
CAT	Convention Against Torture
CBOs	Civil Society Organisations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ESCR	European Committee on Social Rights
HRC	Human Rights Council
HR Committee	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ISI	Institute on Statelessness and Inclusion
MoE	Ministry of Education
Mol	Ministry of Interior
MOU(s)	Memorandums of Understandings
NGO	Non-governmental Organisations
NHRCT	National Commission on Human Rights of Thailand
NLD	National League for Democracy
(r)ESC	Revised European Social Charter
RTG	Royal Thai Government
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Emergency Fund
1951 Refugee Convention	1951 Convention Relating to the Status of Refugees
1954 Stateless Convention	1954 Convention Relating to the Status of Stateless Persons
1961 Reduction Convention	1961 Convention on the Reduction of Statelessness

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1. Introduction

1.1. Global responses to child statelessness in protracted refugee situation

I would like to have a home and chance to study. I like to draw and would like to have hope for a future that is better than now.

– A young girl from Myanmar living on the streets along the Thai border¹

Above is a quote from a stateless child residing in Thailand. Every year, more than 40,000 children are born unregistered in Thailand alone.² Over 2 million stateless people are estimated to live across Thailand.³ Although they are born in Thailand, they live without an official legal identity nor have their fundamental human rights recognised by the RTG: they have no access to birth registration, education, health care or social services, legitimate employment opportunities, or protection from violence, abuse, exploitation and trafficking.⁴ Of such population, some⁵ are born to refugee parents from Myanmar⁶ who have resided in a protracted situation since 1984. With no legal identity recognised by any state, they have nowhere to 'belong' or 'go home to'. These stateless children born to Myanmarese refugee parents in Thailand reflect an emerging, unique case of statelessness.

Traditionally, the concept of refugee is associated with the temporariness of displacement, flight and consequent stay in a host country.⁷ Although it is true that most flee their countries of origin with the hope of returning, refugee situations across the globe have increasingly become protracted.⁸ According to the UNHCR, in such situations, "refugees find themselves in a long-lasting and intractable state of limbo".⁹ Although many of them are out of the emergency phase and may no longer face risks of persecution, most are also "prevented from returning home and from integrating into host communities ... due to political stalemates".¹⁰ Their citizenship to country of origin is often transformed into an artificial one by the act of 'persecution' and/or protracted exile.¹¹ Furthermore, the persistent violence and insecurity prevents them from returning, while they are perceived as security threats and subjected to strict immigration measures in the host states.¹² Trapped in limbo, children who have been born and raised in such conditions have "limited knowledge of life beyond the artificial [walls] of a refugee camp".¹³

¹ Taken from Caouette, M. T. *Small Dreams Beyond Reach: The Lives of Migrant Children and Youth Along the Borders of China, Myanmar and Thailand*. A Participatory Action Research Project of Save the Children (UK). (Year unknown), at 2.

² UNICEF (http://www.unicef.org/thailand/media_14285.html), last visited (08-06-2016).

³ As of 2009. It should be noted that UNHCR's estimate significantly differs in number (443,862 persons in 2015), see UNHCR (<http://reporting.unhcr.org/node/2552?y=2016#year>), last visited (08-06-2016).

⁴ NGO shadow report. Submission to the HRC regarding Article 24 of the ICCPR. Selected Documents on low levels of birth registration for certain groups in Thailand. (Year Unknown), at 4.

⁵ Although the exact number of stateless refugee children is unknown for obvious reasons, refugees and migrants from Myanmar are the second largest stateless population in Thailand after the Hill Tribes.

⁶ In 1989, the regime changed the country's name from Burma to Myanmar. As the UN refers to the country officially as Myanmar, as it is the official name of the government, this thesis will also refer as such. However, a disclaimer should be given here that the author does not in any way mean to show any support for the oppressive acts of the regime or less respect for the opposing sides and their people.

⁷ Zeus, B. Exploring Barriers to Higher Education in Protracted Refugee Situations: The case of Burmese refugees in Thailand. *Journal of Refugee Studies*, 24(2). (2011).

⁸ This is a global trend, as estimated 10 million refugees, amounting to 90 % of all refugee situations, are protracted according to UNHCR, see Seltzer, A. Human Trafficking: The case of Burmese refugees in Thailand. *International Journal of Comparative and Applied Criminal Justice*, 37(4): 279-293. (2013).

⁹ UNHCR. *The state of the world's refugees 2006: Human displacement in the new millennium*. New York: Oxford University Press. (2006), at 106.

¹⁰ Seltzer (2013), supra note 8, at 279.

¹¹ Long understands "refugeehood" as a "collective experience" of deprivation of political rights including citizenship, see Long, K. *The Point of No Return*. Oxford University Press. (2013), at 10&11.

¹² Mostly confined in detention centres or refugee camps with no prospects of local integration, see Zeus (2011), supra note 7, at 257.

¹³ Zeus (2011), supra note 7, at 257.

In a larger context, emerging awareness of the long-term impacts of protracted crises on resilience and sustainable development has led to a call for a paradigm shift in international protection scheme and responses to refugee crisis and displacement. The relevance of the traditional 'staged' paradigm, the dichotomy of the short-term humanitarian/emergency relief assistance and development aid, is shrivelling.¹⁴ The protracted and complex nature of the crises has raised the need for more coordinated approaches and tools that integrate and enable parallel implementation of "short-term relief and long-term development assistance".¹⁵ Sustainable solutions should contribute to both empowering the refugees themselves and stabilising and improving the economy and security of the host countries.¹⁶ A shift towards joint, complementary and continuous responses to protracted refugee situations is already happening across the world:¹⁷ the most recently signed global declaration¹⁸ is a good example of this shift towards an economic development approach, focusing on increasing education and employment opportunities for refugees in host countries.

It is in this larger context of protracted refugee situations and the shifting paradigm of international responses that this research aims to re-think the stateless children's right to have a legal identity. In particular, it aims to reconceptualise the citizen-noncitizen dichotomy, which creates the gap in human rights protection, by focusing on the child's agency and ability to develop a sense of belonging within the framework of the most widely ratified UN treaty, the CRC. In doing so, the study will present particular child rights issues raised by the complex interplay between statelessness and protracted refugee situations, and will conclude with recommendations on reforming the legislation, policies, and implementation measures aiming to address child-specific needs and challenges.

1.2. Research question and methodology

To serve the aforementioned aims of the study, the following research questions are asked:

- 1) *From the children's rights perspective, what obligations does the RTG have under the relevant international laws concerning children's right to legal identity?¹⁹ In particular, should the right to legal identity of children born to asylum seeking and refugee parents in Thailand be protected? And, if so, how?*
- 2) *Does the RTG comply with such obligations in law and policy, and if not, what are the child rights issues raised from the deprivation of legal identity?*

In order to answer the questions above, the study seeks to answer several subsidiary questions. What does the stateless children's right to legal identity entail under the international framework? Which gaps exist between and within nationality and citizenship laws of Thailand? Does the gap contribute to the statelessness of children born to refugee parents? And, if so, how? What are the challenges faced by these children in realising their rights in Thailand? How can the present laws and policies be improved to protect and promote the rights of stateless children in Thailand?

¹⁴ Since 2010, see Zeus (2011), supra note 7.

¹⁵ The Syrian refugee crisis is a prominent example where such coordination is needed, as pointed out by the UN High Commissioner for Refugees António Guterres. *Refugees Have the Right to Be Protected*. (2015). TedTalks. (<https://www.youtube.com/watch?v=potB0voQzNg>), last visited (08-08-2016).

¹⁶ Particularly in face of the mass influx of Syrian refugees in Europe, see Betts, A. Support for Building Self-Reliance of Refugees: Economic development approach to refugee crises. Foreign Affairs Japan. December 2015. (https://www.foreignaffairsj.co.jp/articles/201512_betts_collier/), last visited (15-06-2016).

¹⁷ The nexus between humanitarian crises and development is well documented and has already taken place in practice, see Bennett C., *The Development Agency of the Future*. ODI Working Paper. (2015).

¹⁸ Signed by Abdullah II King of Jordan, Prime Minister Cameron (UK), and Jim Yong Kim Director of World Bank in the winter of 2015. A pilot project will be implemented in Jordan in the summer of 2016, see Betts, A. Jordan's New Refugee Response Model. Foreign Affairs Report Japan. July 2016. (https://www.foreignaffairsj.co.jp/articles/201607_betts_collier/), last visited (15-06-2016).

¹⁹ I use this rather inclusive, yet vague term 'legal identity', with the intention of emphasizing the importance to recognize children's rights not only to birth registration and to nationality, but also to citizenship and identity, equally protected under articles 7 and 8 of CRC, see more in Section 1.3.

In search of answers to these questions, the thesis is divided into four main chapters, each of which focusing on a particular set of questions. Chapter 2 offers a brief introduction to the background information on the phenomenon of child statelessness and the refugee context in the border areas between Thailand and Myanmar. Chapter 3 provides theoretical insights and aims to answer the question of what the stateless children's right to legal identity entails under the international legal framework, namely UDHR, CRC, ICCPR, ICESCR and CERD. In particular, the chapter elaborates on the international obligations the RTG has vis-à-vis stateless children born to refugee parents in Thailand. Chapter 4 presents national laws and policies concerning nationality, civil registration and immigration control. After elaborating on the RTG's responses to the protracted refugee situation, the last section evaluates the challenges raised by such laws and policies in realising their right to legal identity as well as fully enjoying their other fundamental human rights. Building upon the previous chapters, Chapter 5 analyses the present situation faced by the stateless children born to refugee parents in Thailand, in order to answer the question whether the RTG complies with its international obligations. After evaluating what children's rights are at stake due to potential infringement of the international standards, the chapter concludes with recommendations on measures to ensure the safety and dignity of stateless children living in protracted refugee situations.

1.3. Definitions, scope of research and academic relevance

The research intentionally broadens its scope to include various forms of legal identity, such as birth registration, nationality, citizenship, name, and personality before the law. The scope is not limited to one of such identity only, nor does it distinguish each category of legal identity, mainly for two reasons. Firstly, much of the limited available research and documents on stateless children concern realisation of either social economic and cultural rights or right to birth registration solely. As much as birth registration is essential for establishing a child's link to a nation, and is therefore a first step towards preventing and reducing statelessness, it does not always lead to acquiring a nationality.²⁰ Secondly, to date, the content of Article 7 and 8 and how to realise these rights remain under-addressed by the CRC Committee, despite the ample consensus that the possession of a nationality and/or citizenship is the norm for the entitlement of fundamental human rights.²¹ Moreover, a limited number of studies has documented the Committee's interpretations expressed across its concluding observations.²² Although such research provides thorough investigation and recommendations on how to realise the right under Article 7 of the CRC, the analyses remain distanced from the contextual reality of a given state.²³ The aim of this research is therefore to fill the gap and illustrate the crucial link between the realisation of the right to legal identity and the protection of other fundamental rights.

While much of the present legal frameworks draw on an assumption that they are distinct categories of people on the move, the line between asylum seekers, refugees, and irregular and undocumented migrant workers is blurred and difficult to draw in practice. This is particularly the case in the context of Thailand, which has historically been the destination of migrants from Myanmar,²⁴ and where the RTG does not officially recognise any refugees by law.²⁵ Some 2-3 million migrants living outside the camps "are acutely vulnerable and left their homeland for similar reasons to the

²⁰ UN DOC A/HRC/31/29. (HRC). *Annual Report of the Secretary-General: Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned*. (16 December 2015).

²¹ ISI, *The World's Statelessness*. Wolf Legal Publishers. (2014). at 28

²² In fact, the only available academic resources that did such research are: Stein, J. *The Prevention of Child Statelessness at Birth Under the Convention on the Rights of the Child: the Committee's Role & Potential*. Leiden University. (2014)., and ISI. *Realising the Right of Every Child to Acquire a Nationality: An analysis of the work of the Committee on the Rights of the Child*. (September 2015).

²³ The HRC reported that the extent to which relevant safeguards are implemented to ensure the full enjoyment of the right to nationality in practice is scarcely documented, see HRC (Dec.2015), *supra* note 20, para.16.

²⁴ Particularly the north-western areas have received many migrants from Myanmar since the 1960's, see Baek, S. B. & Subramaniam, G. *Myanmarese Refugees in Thailand: The need for effective protection*. Cornell Law School J.S.D./Doctoral Student Papers. (2008).

²⁵ See Chapter 4

refugees”,²⁶ but have chosen to live outside of the camps to “keep some degree of freedom and a sense of independency”.²⁷ On the other hand, it is also suspected that not all residents in the camp are asylum seekers: for example, many children are sent from Myanmar irregularly to receive better quality education.²⁸ At the same time, it is also important to recognise the different nature of the two groups here (in theory at least): most of the irregular migrants freely move across the border and still have the established link with Myanmar, while asylum seekers and refugee children born in Thailand have always lived in Thailand and their parents still face difficulties returning ‘home’.

Keeping these issues in mind, for the purpose of this research, the term refugee is used as an inclusive concept which encompasses all those who have been displaced from Myanmar,²⁹ regardless of whether they reside in the camps or outside, and whether they are officially registered as refugees or considered as ‘illegal migrants’. Therefore, the target group – children born to refugee parents – include both those who are born in Thailand to recognised refugee parents in the camps, and those born to ‘illegal migrants’ or unrecognised refugees. However different their circumstances and legal categorisation may be, the distinction is blurred and both groups of children share many aspects that hinder them vulnerable to the issues surrounding statelessness and protracted displacement.

The research will focus on the RTG’s obligations vis-à-vis the particular group of stateless children born to displaced parents from Myanmar for four reasons. Firstly, generally, refugees who are stateless or at risk of becoming stateless are not included in UNHCR’s stateless statistics, but counted within its refugee statistics only.³⁰ This may hinder protection to the target group of this research. Secondly, the territorial ambiguity of refugee camps and interventions by UNHCR, UNICEF and other international agencies, which initially aimed to compensate the state’s lack of capacity and resources, may undermine if not cancel out the state’s obligations and political will in turn.³¹ Thirdly, while much is documented on the statelessness and human rights issues of Rohingya population,³² street children,³³ and the Northern hill tribes,³⁴ other groups of stateless children remain invisible in both public policy and academic research. Lastly, the issue of child statelessness is made highly relevant by the protracted situation, recent political developments in Myanmar, and subsequent responses by the international community and the RTG, pushing the prospects for ‘voluntary’ return.³⁵

As the ISI rightly points out, the statelessness of refugee population must also be taken into account and addressed in the larger protection framework of statelessness when providing durable solutions.³⁶ The issue of durable solutions has become particularly relevant in the context of the refugee situation at the Thai border, due to the emerging dialogues concerning repatriation strategies

²⁶ South, A. & Jolliffe, K. New Issues in Refugee Research: Forced Migration and the Myanmar Peace Process. UNHCR, Research Paper No.274. (2015). available at: <http://www.unhcr.org/54f588cb9.pdf>

²⁷ Burma Link. In Exile Outside the Camps. (<http://www.burmalink.org/background/thailand-burma-border/displaced-in-thailand/in-exile-outside-the-camps/>), last visited (28-06-2016).

²⁸ In Mae La, the biggest camp of the nine, alone is reported to have 1.039 boarding house students who emigrated to study, see Burma Link. Refugee Camps. (<http://www.burmalink.org/background/thailand-burma-border/displaced-in-thailand/refugee-camps/>), last visited (30-06-2016).

²⁹ See section 2.2.1. for the causes of displacement which in the author’s view satisfies the Refugee Convention criteria

³⁰ Id.

³¹ Frey, B. and R. Jegen, Motivation Crowding Theory, *Journal of Economic Surveys*, 15(5): 589, (2001).

³² ISI (2014), supra note 20.

³³ For example, Wandee, S., Promotion and Protection of the Rights of Children in Street Situations in Bangkok, Thailand, Uppsala University, 2013.

³⁴ Becker, C. Impact of Statelessness in Thailand: Universal Human Rights Violations in Relation to U.S. Foreign Policy. *UW Bothell Policy Journal*. (2008).; Wetherholt, K.J. Nowhere People and the Plight of Stateless Communities. *The Huffington Post*. (http://www.huffingtonpost.com/kj-wetherholt/nowhere-people-and-the-pl_b_9245236.html), last visited (08-06-2016).; Waas, L. V., & Rijken, C. *The Nexus Between Statelessness and Human Trafficking in Thailand*. Oosterwijk: Wolf Legal Publishers. (2015).

³⁵ The camps also have the largest concentration of forced migrants across Thailand. See section 2.2. for more.

³⁶ ISI (2014), supra note 20, at11.

and reduction of humanitarian assistance.³⁷ Whichever solution(s) the international agencies, the RTG and the Myanmar government will agree upon, the problem of statelessness cannot be ignored nor undermined if the fundamental rights of these children are to be protected.

While acknowledging the limited scope of a given country case study and the risks of generalisation, this study hopes to provide a perspective on solutions to emerging child statelessness in protracted refugee situations. This is highly relevant to the global 21st century migration issues, as the number of displaced persons and asylum seekers have drastically increased in the past decade.³⁸ The refugee situation is becoming more and more protracted, while some states³⁹ have started to close off their borders rather than opening them up in response. In this larger context,⁴⁰ an integrated, sustainable, and human rights centred approach to refugee situations has become more desirable.

2. Background

2.1. Introduction

Before examining the concerns raised by child statelessness in Thailand, it is necessary to provide background information on the phenomenon and context. Therefore, the first part of this chapter briefly presents the consequences of child statelessness. The following section provides background information on child statelessness in the protracted refugee situation in Thailand: the first sub-section presents the origin of the protracted refugee situation of ethnic minority groups from Myanmar; the second states that such situations may contribute to the problems of child statelessness and their particular vulnerability; the last section then introduces the emerging political situation affecting their future prospects, the latter making this a highly relevant and interesting case to study.

2.2. Child statelessness as a global child rights concern

Although in principle all children fall under the scope of international human rights protection,⁴¹ the harsh reality for stateless children remain intact as they are left outside many states' policy agendas. Without a legal identity, they functionally lack a government – the guardian of their 'inalienable' human rights.⁴² Statelessness frequently results in invisibility, and they are too often neither recognised as rights holders nor as 'child citizens' to whom the state owes the duty to protect. Hanna Arendt is right to state that belonging nowhere, they are "scum of the earth ... deprived of citizenship and therefore [of] the 'right to have rights'" by the powerful.⁴³

The existence of millions of stateless children challenges the fundamental norms of liberal democracy and human rights (i.e. non-discrimination, universality and equality).⁴⁴ It discloses the gap

³⁷ See Chapter 2.2.3.

³⁸ "The global refugee total, which a year ago was 19.5 million, had as of mid-2015 passed the 20 million threshold (20.2 million) for the first time since 1992. Asylum applications meanwhile were up 78 per cent (993,600) over the same period in 2014. And the numbers of internally displaced people jumped by around 2 million to an estimated 34 million." See Gaynor, T. 2015 likely to break records for forced displacement. UNHCR. 18 December 2015. (<http://www.unhcr.org/5672c2576.html>), last visited (30-06-2016).

³⁹ Besides the recent Turkey-EU deal, Kenyan government's recent announcement to close down the Dadaab refugee camp, the world's largest refugee camp built 25 years ago, is a good example of the negative response to the protracted refugee situation, see Mutiga, M. Refugees Urge Kenyan Leaders to Rethink Closure of Dadaab Camp. *The Guardian*. (13 May 2016).

⁴⁰ See also Section 1.1.

⁴¹ See Section 3.2.2.

⁴² Bhabha, J. Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights? *Human Rights Quarterly*, 31: 410-451. (2009).

⁴³ Hanna Arendt described the Jewish refugees' situation after the World War II, Arendt, H. Chapter 9: The Decline of the Nation-State and the End of the Rights of Man'. In *The Origins of Totalitarianism* [2nd ed.]. World Pub. Co. (1958).; Also see Bhabha (2009), supra note 41, at 411.

⁴⁴ Bhabha, J. (ed.), *Children Without a State: A global human rights challenge*, MIT Press. (2011).

in the protection scheme which “distributes ‘human’ rights through ‘national’ structures”.⁴⁵ Due to the very nature of the state’s competence to protect its citizens’ rights, the right to nationality has always involved the process of ‘selecting the deserving, appropriate ones’ while excluding others.⁴⁶ The problem of statelessness and the entitlement of nationality are therefore two sides of the same coin.

The denial of legal identity can lead to serious deprivation of fundamental rights “that have longstanding consequences [on] children’s social, economic, and personal development”.⁴⁷ Discriminatory policies requiring a citizen status and/or documentation to access state services often implies the total exclusion of children from education, basic healthcare services and social benefits.⁴⁸ Such exclusion often prevents them from getting official educational certificates or legal employment. All this combined, many stateless children and youths face extreme poverty, chronic morbidity and uncertainty, and in turn, are forced to resort to street crime and substance abuse as survival or coping strategies.⁴⁹ Having no documentation can also expose children to risks of arbitrary arrest, detention, and deportation.⁵⁰ Being in conflict with the law and going through legal procedures may further put them at risk of violence and deprivation of their rights, as children are often treated as adults, especially in the context of migration control.⁵¹

For the fear of being exposed to violence and arbitrary detention, many stateless children live behind the veil. Yet, their invisibility leaves them out of the state protection, making them particularly vulnerable to illegal and/or harmful practices, such as trafficking, exploitation in sex industry or labour market, illegal adoption and orphanage ‘business’, early marriage, and child soldier recruitment for armed forces.⁵² Additionally, the invisibility can raise challenges to receive assistance in cases of disaster or emergency, such as shelter, food and health care.⁵³ Unaccompanied and separated stateless children may face further deprivation of their rights, including the right to be cared for by his or her parents.⁵⁴ When family reunification is not possible or inadequately realised, they are even more vulnerable to above mentioned risks of exploitation and abuse.

The inability to demonstrate one’s legal identity entails the inability to make claims on the state in today’s human rights scheme.⁵⁵ This in turn allows states to exclude stateless children from its national action plans, resource allocation, and social services.⁵⁶ In this regard, statelessness is a grave child rights issue that concerns the child’s physical and emotional well-being and social and personal development from an early stage of their life and throughout. How such consequences of the absence of legal identity affect the child’s development and meaningful life will be illustrated further in Chapter 4, which presents the case of stateless children born to refugee parents in Thailand. No children should be denied a right to have rights. In this regard, the right to legal identity seems crucial to ensure the enjoyment of universal ‘human’ rights.

⁴⁵ Long, K. *The Point of No Return*. Oxford University Press. (2013)., at 1.

⁴⁶ Arakaki, O. The Formation and Development of the Convention Relating to the Status of Stateless Persons. *Refugee Studies Journal*, 4. 2014.

⁴⁷ Blitz, B.K. Chapter 2: Neither Seen Nor Heard: Deprivation among Stateless Children. In: Bhabha (2011), supra note 44, at 50.

⁴⁸ Id.; Also see Plan & UNHCR. *Under the Radar and Under Protected: The urgent need to address stateless children’s rights*. Surrey: Plan Ltd.. 2012, at 8-10.

⁴⁹ HRC (Dec.2015), supra note 20.

⁵⁰ Bhabha (2009), supra note 52; Stein (2015), supra note 21.

⁵¹ Jaghai, S. Statelessness and Transnational Migration. Tilburg Law School. 2015.; HRC(2015), supra note 20; Bhabha (2009), supra note 52; Stein (2015), supra note 21.

⁵² Blitz (2011), supra note 46; HRC (Dec.2015), supra note 20.

⁵³ Plan & UNHCR (2012), supra note 61, at 9; Stein (2015), supra note 21.

⁵⁴ Article 8 of CRC; this is mainly because when children are undocumented and separated from parents, it is difficult to establish a link with his or her parent.

⁵⁵ Bhabha (2011), supra note 43, at 1 & 13.

⁵⁶ Id.

2.3. Conflicts in Myanmar, Refugees and Statelessness in Thailand

2.3.1. Conflicts in Myanmar and causes of displacement

Myanmar is home to 135 ethnic groups, each of which has unique history, culture and language.⁵⁷ The majority is Burmese (68%), and the other largest ethnic groups consist of Shan (9%), Karen (7%), Rakhine (4%), Chinese (3%), Indian (2%) and Mon (2%).⁵⁸ Despite the existence of other ethnic minorities, such as Rohingya, the 1974 Constitution only recognises the seven ethnic minority states and seven divisions.⁵⁹ The country has a long history of inter-(ethnic)group conflicts and grave human rights violations which are yet to be solved to the present day. The serious and protracted nature of the human rights violations in Myanmar is reflected by the appointment of a country-specific Special Rapporteur by the HRC in 1992 and his/her extended mandate.

There are three categories of asylum seekers and refugees from Myanmar residing in Thailand: students and political activists who have most likely sought refuge in urban areas;⁶⁰ Rohingya Muslims who suffer from systematic persecution, trafficking, inhumane deportation, abuse, beating, dire living conditions and/or death throughout their journey;⁶¹ and civilians from ethnic minority areas most of whom reside in the camps along the border.⁶² The former two categories of asylum seekers are affected by human rights violations particularly relating to the civil and political rights, which will not be discussed further as they fall outside the scope of this research. The last group is the focus of this research, and for this reason, the most relevant causes of displacement are two-folds: widespread oppression and human rights violations based on discrimination; and counter-insurgency measures by the national military (*tatmadaw*).⁶³ These causes of mass displacement particularly affect ethnic minority groups from the Eastern states of Karen, Shan, Karenni, and Mon.⁶⁴

Although the ethnic strife existed over hundreds of years,⁶⁵ the unequal distinctions between ethnic groups are rooted in the British colonial practices which favoured Karen and Burmese for positions in the military and administrations.⁶⁶ Since the official independence in 1948, the country has been destabilised by the series of internal sectarian conflicts between the central military government ruled by Burmese and the insurgents by the communists and ethnic groups who felt under-represented.⁶⁷ The oppressive measures by the military rule has intensified since 1962 when General Ne Win began to promote a one race nation.⁶⁸

⁵⁷ Smith, M. *Ethnic Groups in Burma: Development, Democracy and Human Rights*. (1994).

⁵⁸ Ceelen, A.N.D. *Myanmar's Unaccompanied Child Asylum Seekers in Thailand: Protection from Refoulement under International Law*. Science Shop of Law, Economics and Governance, Utrecht University. (2011), at 10.

⁵⁹ Chin, Kachin, Kayah, Kayin, Mon, Rakhine and Shan States and Ayeerwady, Bago, Magway, Mandalay, Sagaing, Tanintharyi, and Yangon Divisions, see Burma Library web and Meurs, I. *Burmese Refugees in Thailand: 'What are their rights?'* The Hague School of European Studies. (2005).

⁶⁰ The crackdown of pro-democracy demonstrations in 1988 and the house arrest of Daw Aung San Suu Kyi after the 1990 election are examples of oppressive measures against democratic movements by the military junta. Freccero, J. & Seelinger, K. T. *Safe Heaven: Sheltering displaced persons from sexual and gender-based violence*. Case study: Thailand. Human Rights Center: Berkeley Law, University of California. (2013).

⁶¹ The systematic persecution of Rohingya Muslims is due to discriminatory exclusion and lack of freedom of religion which have been intensified after the 2015 election. They are effectively deprived of citizenship under the 1982 Citizenship Law and lack any form of identity document. Amnesty International. *Myanmar 2015/2016*. (<https://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar/>), last visited (30-07-2016). Also see, Human Rights Watch, *Southeast Asia: Accounts from Rohingya Boat People*. 27 May 2015. (<https://www.hrw.org/news/2015/05/27/southeast-asia-accounts-rohingya-boat-people>), last visited (01-07-2016).

⁶² Ceelen (2011), supra note 37.

⁶³ Ceelen (2011), supra note 37.

⁶⁴ Ceelen (2011), supra note 37.

⁶⁵ Ceelen(2011), supra note 37.

⁶⁶ The British colony existed between 1824 and 1947, see Canadian Friends of Burma. *History of Burma*. (<http://www.cfob.org/HistoryofBurma/historyOfBurma.shtml>), last visited (08-06-2016).

⁶⁷ Freccero & Seelinger (2013), supra note 58.

⁶⁸ Through so called 'Burmanization' campaign, the regime tried to assimilate all ethnic, cultural and religious differences by restricting the use of cultural practices and languages, see Meurs (2005), supra note 58.

The military rule is characterised by their brutal and oppressive anti-insurgent measures. Villages in ethnic minority areas were turned into free-fire zones where soldiers burned down the residences and raided livelihood resources and land.⁶⁹ Residents were forcibly evicted or relocated, and their homes were made inaccessible by landmines.⁷⁰ Furthermore, civilians have been subjected to systematic human rights violations by both sides of the conflict, including torture, imprisonment, abuse and exploitation, coercive enlistment, sexual violence and rape, and extrajudicial killings.⁷¹ Children are particularly subjected to forced labour, slavery and soldiering: “as young as eleven...most children are forcibly recruited through intimidation, harassment and abuse, or simply kidnapped”.⁷²

Although most fled due to the generalised armed conflicts, the aforementioned atrocities should be understood in the context of underlying oppression and discriminatory human rights violations, which primarily and disproportionately target ethnic minority groups from the Karen, Shan, Karenni, and Mon States. In addition to the aforementioned grave violence and killings, they suffered from extreme poverty and dire living conditions due to the economic mismanagement, discriminatory exclusion and arbitrary taxing⁷³ combined with the systematic destruction of livelihood sources by the central military.⁷⁴ Therefore, it is understood that they have been forced to flee internally or across the border for the fear of being persecuted for belonging to their particular ethnic group.⁷⁵

In summary, the mass displacement was caused by a combination of several inter-related conditions, namely: food insecurity and violence caused by the armed conflict, forced evacuation and confiscation of land by the military government for natural resources or infrastructure development, and lack of access to basic services and protection due to discriminatory exclusion.⁷⁶

2.3.2. Protracted situation, statelessness and vulnerability

Due to its long history of internal conflicts and infringements of international humanitarian and human rights law, Myanmar has become the origin of one of the world’s most protracted refugee situations.⁷⁷ The international community has repeatedly expressed its concerns about the military oppression, conflicts, and systematic human rights violations.⁷⁸ In response, a number of efforts to promote national reconciliation, democracy, and rule of law have taken place since 1989. Formal transition to a civilian government took place, human rights organisations were established in 2011, and Daw Aun San Suu Kyi and NLD members won the parliamentary election in 2012, to list a few examples.⁷⁹

Nevertheless, the fragile nature of political reform and cease-fire agreements is reflected in the persistent violence and discrimination. For example, the sectarian conflicts aggravated after the first

⁶⁹ Over 3,200 villages were destructed between 1996 and 2007, see Ceelen (2011), supra note 37, at 12.

⁷⁰ Freccero & Seelinger (2013), supra note 76, at 27.

⁷¹ Freccero & Seelinger (2013), supra note 76, at 27; Also see Wregett, I. Protecting Vulnerable Children in Thailand. Thailand Journal of Law and Policy, 17(1). (2014), at 13.

⁷² As of 2012, approximately 70,000 child soldiers belong to the government force, while estimated 6,000-7,000 are fighting for the ethnic opposition arms, see Cleen(2011), supra note 37.at 12.

⁷³ Ceelen (2011), supra note 37.

⁷⁴ “Looting and excessive confiscation of crops, livestock, agricultural areas, water supplies, and personal possessions”, see Ceelen (2011), supra note 37, at 12

⁷⁵ Freccero & Seelinger (2013), supra note 76, at 27; Ceelen (2011), supra note 37.

⁷⁶ Freccero & Seelinger (2013), supra note 76, at 28.

⁷⁷ Ceelen (2011), supra note 37; As of 2014, there are 479,706 refugees originated from the country, and 662,400 internally displaced persons, data taken from International Displacement Monitoring Centre.

⁷⁸ Even the ICRC, renowned for its neutrality, has published its report urging for actions (International Committee of the Red Cross, Myanmar: ICRC denounces major and repeated violations of international humanitarian law, 29 June 2007.), and at least 30 resolutions have been adopted by the UNGA and the HRC on Myanmar only (Most recent one is Resolution 61/232 on the Situation of Human Rights in Myanmar. (13 March 2008)).

⁷⁹ Formal transition to a civilian government took place and human rights organisations were established in 2011, Daw Aun San Suu Kyi and many NLD members won the parliamentary election in 2012, to list a few examples, see Freccero & Seelinger (2013), supra note 76.

general election in 20 years took place in November 2010.⁸⁰ The military-backed ruling party remained in power⁸¹ and sought to take control over new territories, particularly in the aforementioned ethnic minority areas where the biggest ethnic insurgents remain powerful.⁸² As a result, the nine camps (or so called ‘temporary shelters’)⁸³ and settlements in towns along the border of Thailand and Myanmar have been home to a large number of the displaced population since 1984 until today.⁸⁴ Although the exact number of the affected population is difficult to measure, it is estimated that there are around 120,000 registered and unregistered refugees from southeast Myanmar living in the camps.⁸⁵

It is important to note that the issue of asylum seekers and refugees is not specific to the camps at the eastern border. Since the end of the World War II, Thailand has received mass influxes of asylum seekers from the neighbouring countries, including Laos, Cambodia and Vietnam,⁸⁶ and many of them reside in settlements in urban areas, such as Bangkok and Chain Mai.⁸⁷ Furthermore, not all stateless population residing in Thailand are refugees or asylum-seekers, and not all of them are *de jure* stateless. In fact, such population consists of groups of various origins and legal statuses. Some enter the country as irregular and/or illegal migrant workers (they are *de facto* stateless).⁸⁸ Others may belong to mountain tribes who live in rural, remote areas, or may be living in the streets or the ‘dump camps’ (slums) in larger cities (they are *effectively* stateless).⁸⁹

Nevertheless, the statelessness issue of the target group of this research are of different and more complex nature in that they may face triple statelessness (*de jure*, *de fact*, and *effective*). Their protracted situation led to unique causes and consequences of statelessness which do not seem to fall under the ‘mainstream’ categories of statelessness.⁹⁰ More than half of the displaced population consists of an entire generation who know nothing about “life beyond the confines of the camps”.⁹¹ Their prolonged situation therefore raises the question whether they fall under the category of *in situ* statelessness, - a situation where stateless persons “have significant and stable ties (through birth, long-term residence, etc.)”⁹² -, and to which state these children actually belong. While Waas is right to argue that focusing on *in situ* statelessness provides a better understanding of the consequences of statelessness on children’s rights as the causal link is clearer than looking at stateless migrants,⁹³ the protracted refugee situation creates a grey area where the line between *in situ* statelessness and statelessness in migration context is often blurred: when does their tie to the country of residence

⁸⁰ The election was considered unfair and not free, leaving many opposition groups out of the election process. As a result, an armed conflict between the military regime and the Democratic Karen Buddhist Army (DKBA) broke out right after the election, see Meurs (2005), *supra* note 58, at 8.

⁸¹ The 2008 Constitution, exclusively drafted by the SPDC, provides for the military authority over the civilian government, see HRW. Vote to Nowhere: The May 2008 Constitutional Referendum in Burma. (<https://www.hrw.org/report/2008/04/30/vote-nowhere/may-2008-constitutional-referendum-burma>), last visited (01-07-2016).

⁸² Particularly in Karen, Shan, Kayah, Chin and Arakan states, see Ceelen(2011), *supra* note 37.

⁸³ See **Annex I** for the camp map.

⁸⁴ Ceelen(2011), *supra* note 37, at 15.

⁸⁵ South & Jolliffe (2015), *supra* note 26; See **Annex I** for the detailed and latest demographics of each camp population (April 2016).

⁸⁶ International Law Association of Thailand. National Forum Report on Refugees and Displaced Persons in Thailand: Assistance and Durable Solutions. (12 December 2001), at 17, available at (<http://www.refugees.org>).

⁸⁷ Ceelen, (2011), *supra* note 37.

⁸⁸ ISI (2014), *supra* note 20, at 10.

⁸⁹ *Id.*

⁹⁰ The causes of statelessness are mainly understood to include: i) Lack of birth certificate or inability to register birth, ii) Discriminatory nationality clauses or laws that exclude certain groups of people, iii) Gaps, ambiguity and conflicts in nationality laws within a state, prohibiting inheritance, iv) Conflicts in citizenship and nationality laws between states, v) Emergence of new states and changes of borders, and vi) Loss or deprivation of nationality. See Massey, H. Legal and Protection Policy Research Series: UNHCR and *De Fact* Statelessness. *UNHCR Division of International Protection*. (2010).

⁹¹ Ceelen(2011), *supra* note 37, at 1.

⁹² Gyulai, G. Statelessness in the EU Framework for International Protection. *European Journal of Migration and Law*, 14:279-295. (2012), at 279.

⁹³ In the latter case, the causal factors affecting the deprivation of their rights can be both irregular migrant status and statelessness, see Waas & Rijken (2015), *supra* note 33.

become strong enough for them to be considered as *in situ* stateless?⁹⁴ Although answering this question is a research project of its own, it is important to recognise that this study's target group is in this grey area, and poses a challenge to the existing protection scheme and academic theories which reinforce the dichotomy of stateless migrants and stateless persons in their country of origin.

2.3.3. Recent political development and durable solution

The latest cease-fire agreements between the military and eight major ethnic armed groups followed by the election of Daw Aun San Suu Kyi are landmarks of the state's path towards peace and democracy.⁹⁵ In response to the gradual improvements and expected progress in the peace process and political reforms in Myanmar, the RTG and the newly elected NLD government in Myanmar⁹⁶ as well as the international community and NGO network⁹⁷ have initiated dialogues on potential opportunities for the preparation and facilitation of voluntary return. These recent developments in Myanmar, Thailand, and the international community particularly raise several protection and human rights concerns regarding children born to refugee parents, whose birth is not registered and who lack an official record establishing a link between him/her and any nation. Not only is it uncertain whether the acquisition of a Myanmar nationality is assured for these children, but also no official statement has been made by the new government concerning whether it will cooperate to receive all the returnees.⁹⁸ Moreover, many undocumented refugees fear being subjected to arrest, detention and fines were they to return.⁹⁹

Furthermore, major obstacles against return remain intact for many displaced persons generally due to the fragile and unpredictable nature of the ceasefires and peace processes. The aforementioned developments in Myanmar have not resulted in peace, and conflicts in some areas have even intensified.¹⁰⁰ The UN General Assembly and the Special Rapporteur on Myanmar expressed concerns for the persistent political disenfranchisement and discriminatory disqualification, human rights violations and abuses, displacements, and "economic deprivation affecting members of various ethnic and religious minorities and stateless populations",¹⁰¹ particularly along the eastern border areas.¹⁰² Therefore, significant challenges for legislative and institutional reform exist,¹⁰³ and the prospects of durable solutions for refugees in Thailand depend on the peace process and "sustainable improvements in the political and security environment and an end to armed conflict".¹⁰⁴

⁹⁴ Although the HRC provides with its interpretation of the concept of *in situ* situation, it does not provide with what factors creates the establishment of close and enduring connections between a person and a country, nor where the category of 'long-term' resident becomes rooted enough to say that person has an established link to the country of residence to call it 'his own country', see UNDOC CCPR/C/21/Rev.1/Add/9, (HRC). *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*. (2 November 1999).

⁹⁵ The Nationwide Ceasefire Agreement was signed on 15 October 2015. The election took place in November 2015, see AI (2016), *supra* note 65; Also see UNDOC A/C.3/70/L.39/Rev.1, (GA). Seventieth session third committee. *Revised Draft Resolution: Situation of human rights in Myanmar*. (16 November 2015), para 1, 2 and 7.

⁹⁶ Mediated by UNHCR, see Shaung, S. Senior Thai Official Puts Burma's Refugee Repatriation Back on the Agenda. *Karen News*. (May 2, 2016).

⁹⁷ It is expected that the process for repatriation will "begin within two to three years' time", see UNHCR, *supra* note 3

⁹⁸ Shaung (2016), *supra* note 109.

⁹⁹ According to Burma's Immigration Act of 1947: No citizen of the Union of Myanmar shall enter the Union of Myanmar without a valid Union of Myanmar Passport or a certificate in lieu thereof, issued by a competent authority (Article 19). See Caouette, M. T. & Pack, M. E. *Pushing Past the Definitions: Migration from Burma to Thailand*. Refugees International and Open Society Institute. (2002).

¹⁰⁰ The break outs of fighting in northern Shan, Kachin, and Kayin states were reported. IDMC. Stakeholder report to the UPR mechanism established by the HRC in Resolution 5/1 of 18 June 2007. Myanmar. (23 March 2015).; HRW. UN Human Rights Council: Interactive Dialogue with the Special Rapporteur on Myanmar. (14 March 2016).

¹⁰¹ GA(2015), *supra* note 108, para 3, 10, 12&14; Factors such as remaining landmines, extreme poverty, and limited education and employment opportunities are also seen as obstacles, see AI (2016), *supra* note 78.

¹⁰² UNDOC. A/HRC/13/48 (HRC). Progress report of the Special Rapporteur on the situation of human rights in Myanmar. Tomás Ojea Quitana. (10 March 2010).

¹⁰³ The Economist. Why Myanmar's Path to Democracy will be Bumpy. (3 April 2016).

¹⁰⁴ South & Jolliffe (2015), *supra* note 26.

Recognising this, UNHCR is of the view that the conditions within Myanmar “are not yet conducive” for promoting organised repatriation immediately.¹⁰⁵ Furthermore, it has also stressed that adequate resource and assistance should be given to the most vulnerable during the process of voluntary repatriation.¹⁰⁶ The RTG has publically announced that the refugees will not be forcibly returned, no repatriation will take place before a solid plan is developed, and in principle, repatriation should proceed according to international standards.¹⁰⁷ Despite this consensus that no repatriation should take place without peace, comprehensive assistance, consent, and a sense of dignity,¹⁰⁸ lack of engagement with the camp community in the preparation dialogue,¹⁰⁹ coupled with aid reduction¹¹⁰ and tightened immigration control,¹¹¹ has made many refugees feel anxiety and uncertainty. These factors have resulted in some returns, not because they want to but because their living condition and dignity in the camps have been undermined.¹¹²

These recent developments raise particular concerns regarding the target group of this research, as most of them are unregistered and unidentified and may fall into the protection gap with neither international nor communal assistance. With unclear policies from the Myanmar government, it is uncertain whether return is the safest and most desirable for these children. Without a comprehensive strategy, the prospects for voluntary return, resettlement and local integration are constrained for the vast majority of refugees and asylum seekers in Thailand. Considering the continued insecurity and violence in Myanmar and rather exclusive repatriation dialogues, the future prospects of durable solutions for those who do not have official identifications remain too hazy.

Keeping these issues in mind, this research focuses on the Thai government’s obligation towards these children to protect their fundamental rights not only in terms of their present lives, but also their future. Be it voluntary repatriation, third country resettlement, or local integration, the protection of their legal identity is crucial for ensuring a voluntary, safe, and dignifying solution.

3. Right to Legal Identity under the International Legal Framework

3.1. Introduction

Statelessness raises intertwined child rights issues, and the right to legal identity is crucial to protecting children’s fundamental rights. This chapter aims to answer the question of whether stateless children have a right to legal identity. To serve this aim, the first section presents the international legal framework providing for this right, and assesses whether stateless children born to refugee parents in Thailand fall under its personal scope. The following section evaluates what their right to legal identity entails and analyses the state’s legal obligations vis-à-vis this right provided by the relevant laws with a particular focus on Articles 7 and 8 of the CRC. The CRC Committee has not yet drafted a general comment concerning these two provisions, nor stateless children. Therefore, the content of the right of stateless children to legal identity needs further clarification. For this reason, this chapter’s analyses are based on the general comments, concluding observations and resolutions of relevant UN bodies as well as the few available academic literature.¹¹³ It should be noted however that the relevant bodies’ general comments and concluding observations are not legally binding, and there are many challenges of domestication, implementation and enforcement as discussed in Chapter 4 and 5.

¹⁰⁵ UNHCR, *supra* note 3.

¹⁰⁶ *Id.*

¹⁰⁷ Shaung (2016), *supra* note 109.

¹⁰⁸ News Deeply: Refugees Deeply. Myanmar Refugees: ‘No Repatriation Without Peace’. (30 March 2016).

¹⁰⁹ Shaung (2016), *supra* note 109.

¹¹⁰ Burma Link, *supra* note 27.

¹¹¹ The May 2014 military coup resulted in tightened measures, see Freccero & Seelinger (2013), *supra* note 76.

¹¹² Even access to basic services is now limited due to reduced donor funds, see Burma Link, *supra* note 27.

¹¹³ Stein (2015) and ISI (2015) are the only research done so far that document the CRC Committee’s interpretations and opinions expressed across its concluding observations, *supra* note 21.

3.2. Stateless children has a right to legal identity

3.2.1. International Legal Framework

The right to legal identity is guaranteed for every child, regardless of nationality or status, by various international instruments. This right has been reaffirmed by UN human rights treaties as well as the UN human rights monitoring bodies.¹¹⁴

Article 24 of the ICCPR stipulates that:

1. Every child shall have, *without any discrimination* as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered *immediately* after birth and shall have a name.
3. Every child has the right to *acquire* a nationality. (Emphasis added)

The CRC follows a similar formulation as this provision: Article 7(1) provides that the child “shall be registered *immediately* after birth and shall have the right from birth to a name, the right to *acquire a nationality*”. Although the right to acquire a nationality is weaker than the right to a nationality,¹¹⁵ it is evident that the CRC Committee recognises the link between this right and prevention of child statelessness. This right is further strengthened by specifically stressing that states should “ensure the implementation of these rights ... *in particular where the child would otherwise be stateless*”.

Recognising the fundamental nature of nationality to enjoyment of human rights, the UDHR entitles all persons (including children) the right to a nationality and prohibits the arbitrary deprivation of this right.¹¹⁶ This principle of universal protection of the right of every child to (*acquire*) a nationality is reaffirmed by Article 24(1) of ICCPR, Article 7 seen in conjunction with Article 2 of the CRC, and other relevant international instruments: Article 29 of the ICRMW, Article 18(2) of the CRPD, Articles 5(d)(iii) and 10(3) of the CERD and article 9 of the CEDAW. According to these provisions, every child shall enjoy the right to legal identity without discrimination of any form, on the basis of race, colour, sex, language, religion, national, ethnic or social origin, birth, legal or migration status, or disability.

Additionally, two international legal instruments specifically focused on statelessness were developed to complement these norms. The 1954 Stateless Convention provides standards on protection of the substantive rights of stateless persons, and the 1961 Reduction Convention sets out rules and procedural rights of stateless persons, aiming to reduce and prevent statelessness.¹¹⁷

3.2.2. Personal scope

Before elaborating on the substance of the right to legal identity, the personal scope of the above international framework needs to be clarified. In many countries, the *full enjoyment* of the rights appears to depend on citizenship status.¹¹⁸ As the inherent sovereignty of a state to control over the “entry, residence and removal of aliens” is recognised by international laws,¹¹⁹ many states claim their discretionary competence to decide the personal scope of human rights accordingly to the domestic laws in the context of migration.¹²⁰ Furthermore, quite a number of countries including Thailand reserved its obligations under the Article 22 of the CRC, and are not a party to the 1951 Refugee

¹¹⁴ See the GA resolution 50/152, 20/5, and 26/14 for example.

¹¹⁵ The right to a nationality provided under the Article 15 of UDHR, see Stein (2015), supra note 21.

¹¹⁶ Art.15(2) of Universal Declaration of Human Rights, December 10, 1948, 217A(III), (GA).

¹¹⁷ Articles 1-4

¹¹⁸ Vandenhoe et al., Undocumented Children and the Right to Education: Illusory right or empowering lever? International Journal of Children’s Rights. (2011).

¹¹⁹ For example, in the *Jeunesse v. NL* Case, the ECtHR says “a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there”, see ECHR, 3 October 2014, *Jeunesse v. NL* (No.12738/10).

¹²⁰ Jaghai (2015), supra note 50.

Convention.¹²¹ Accordingly, the reservation, together with the lack of regular legal status, are often used to exclude undocumented asylum seekers and migrants (including children) from their jurisdiction.

Nevertheless, limitation to the personal scope of application is not accepted by the human rights monitoring bodies particularly in light of the non-discrimination principle. According to the CRC Committee, “state obligations under the Convention apply within the borders of a State, [and the enjoyment the Convention rights are] not limited to children who are citizens...and must therefore, if not explicitly stated otherwise in the Convention, also be available to *all* children – including asylum-seeking, refugee and migrant children – irrespective of nationality, immigration status or statelessness”.¹²² The states therefore have obligations to protect, respect and fulfil all the rights provided under the CRC comprehensively without discrimination of any kind.

Similarly, the HR Committee prohibits states from excluding certain groups of children from its jurisdiction by using discriminatory distinctions between legitimate children and illegitimate children.¹²³ This prohibition of non-discrimination applies to both the traditional grounds (i.e. race, colour, sex, language, religion, national or social origin, property or birth) and other grounds particularly identified by the HR Committee, such as “the statelessness of the parents, their nationality or marital status”.¹²⁴ The Committee’s emphasis on this principle reflects its concern about the lack of nationality or regular legal status serving as a basis for discrimination.¹²⁵

Although the ICESCR does not explicitly refer to any distinction according to the nationality or legal status, the CESCR prohibits discriminatory treatments or conditions that render children from accessing basic services and rights.¹²⁶ On the other hand, Article 1(2) of the CERD explicitly states that the non-discrimination principle does not apply to the distinction between citizens and non-citizens. Similarly, at the regional level, the case of *CEC v. The Netherlands*¹²⁷ shows that the non-discrimination principle is not absolute, and discriminatory treatments may be justified if they serve legitimate aim, and the means taken are necessary, lawful, and proportionate to achieve proposed goal.¹²⁸

Nevertheless, the CERD Committee recently has reviewed its opinion that any distinctions between nationals and non-nationals can be discriminatory if considered unreasonable and/or contrary to relevant international standards:¹²⁹ Article 1(2) “must not be interpreted to detract in any way [non-citizens] from the rights and freedoms recognised and enunciated in other instruments, especially the [UDHR]”.¹³⁰ Based on Article 1(3) read together with Article 5(d)(iii), the Committee is

¹²¹ Thailand submitted a reservation stating that the application of Articles 22 [and 29] of the Convention on the Rights of the Child shall be subject to the national laws, regulations and prevailing practices in Thailand”. However, the government has lifted the reservation to article 7 in 2010. See United Nations Treaty Collection. (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en), last visited (20-06-2016).

¹²² Article 2 of CRC; Also see UNDOC CRC/GC/2005/6, (CRC). *General Comment No.6: Treatment of unaccompanied and separated children outside their countries of origin*. (1 September 2005), para 12.

¹²³ HRCommittee (1999), supra note 92, para 25.

¹²⁴ HRC Communication to Australia, cited in Ziemele, I. *Article 7: the Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents. A Commentary on the United Nations Convention on the Rights of the Child*. Martinus Nijhoff Publishers: Leiden. (2007), at 16&17.

¹²⁵ Id.

¹²⁶ See UNDOC E/C.12/1999/10, (CESCR). *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*. (8 December 1999), para 34.

¹²⁷ Although they are entitled to emergency social assistance to meet their basic needs under article 13 of Revised Social Charter, the ECSR has acknowledged that undocumented migrants in principle do not fall under the state’s jurisdiction, therefore limiting the personal scope of the (r)ESC to foreigners who are “nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned”. See ECSR, 21 Jan. 2013, *CEC v. The Netherlands* (No.90/2013).

¹²⁸ Id.; Also see Doek, E. J. The CRC and the Right to Acquire and to Preserve a Nationality. *Refugee Survey Quarterly*, 25(3). (2006), at 85.

¹²⁹ Ziemele (2007), supra note 122, at 17.

¹³⁰ UNDOC HRI/GEN/1/Rev.5, CERD Committee, General Recommendation No.11: Non-Citizens(Article 1), (2001).; Ziemele (2007), supra note 122, at 17.

now in the view that “the prohibition of discrimination applies fully to nationality legislation, including naturalisation”.¹³¹

To conclude, states have obligations to ensure the full enjoyment of the right to legal identity of every child born and reside within its territory under the relevant international instruments, particularly in the light of the non-discrimination principle. The fact that Thailand is not a party to neither of the stateless conventions nor to the ICRMW may seem to undermine the state’s obligations regarding stateless children born to refugee parents in its territory. Nevertheless, Thailand ratified the UDHR, CERD, CEDAW, ICCPR, ICESCR, and CRC, and its obligations to protect the rights enshrined in these conventions apply to *all* children within its jurisdiction regardless of reservation to Article 22 of CRC and of the child’s and his or her parents’ legal and/or immigration status.¹³² Therefore, in theory, every child is entitled to the right to legal identity, including stateless children, and stateless children born to refugee parents in Thailand in particular.

3.3. Content of the right to legal identity and state’s obligations

Having established that stateless children have the right to legal identity, this section presents what this right and the state’s international obligations entail. The obligations of the state are three-folds: prevention, reduction and protection.¹³³ In the light of this, the below sub-sections elaborate on the elements of the right to legal identity. The first four elements relate to both measures to prevent and reduce statelessness: i) right to birth registration and name immediately after birth, ii) right to acquire a nationality when the child would otherwise be stateless, iii) implementation ‘in accordance with their national law and their obligations under the relevant international instruments in this field’, and iv) right to preserve and re-establish a legal identity and prohibition of deprivation. After addressing the obligation to protect stateless children’s fundamental rights, the last section evaluates the implications of the guiding principles of the CRC for realising the child’s right to legal identity.

3.3.1. Right to birth registration and name immediately after birth

The right to be registered immediately after birth and to have a name is contained in Article 7(1) of the CRC and Article 24(2) of the ICCPR. Although the drafters initially did not associate birth registration to the right to nationality, the crucial link between birth registration and prevention of statelessness is now recognised by both the CRC Committee and the HRC.¹³⁴ Birth registration is a first step to establish the child’s link to birth parents and a state. Therefore, it “promote[s] recognition of the child’s legal personality”,¹³⁵ and often serves as a “prerequisite for acquiring a nationality”.¹³⁶ Establishing this connection is also a vital step to realise and ensure all child rights, including the right to acquire a nationality, to have access to basic services and to special measures of protection provided by a state.¹³⁷ Nevertheless, birth registration does not grant a nationality,¹³⁸ and the two procedures – registering a birth and acquiring a nationality – are often separated in practice.¹³⁹

¹³¹ Id. at 18.

¹³² Article 2 of CRC, article 1 of CERD, article 9 of CEDAW, article 24(1) of ICCPR.

¹³³ HRC (Dec.2015), supra note 19; ISI (2015), supra note 21 at 2.

¹³⁴ UNDOC CRC/C/GC/11, (CRC). *General Comment No.11: Indigenous children and their rights under the Convention*. (12 February 2009), para 41; UNDOC A/HRC/RES/28/13, (HRC). Resolution 28/13 on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law. (7 April 2015).

¹³⁵ UNDOC HRI/GEN/1/Rev/5/2001, (HRC). *General Comment No.17: Rights of the Child (Article 24)*. (7 April 1989), para 7; HRC (Apr.2015), supra note 132, preamble.

¹³⁶ Stein (2015), supra note 21.

¹³⁷ HRC(Apr.2015), supra note132, Preamble; ISI (2015), supra note21, at17. The HR Committee only recognises a link between birth registration and recognition of legal personality, not the right to a nationality; Waas, L. V. *Nationality Matters: Statelessness under international law*. School of Human Rights Research Series, 29. (2008).

¹³⁸ “While nationality is normally acquired independently and birth registration in and of itself does not normally confer nationality upon the child concerned, birth registration does constitute a key form of proof of the link between an individual and a State and thereby serves to prevent statelessness”, in UNHCR Standing Committee.

The obligation concerning birth registration is clearly indicated: states must establish a national framework for registering a child immediately after birth. What ‘immediate’ registration implies is explained by neither relevant treaties nor bodies: the procedure is to be determined by each state in accordance with their national laws.¹⁴⁰ However, the ‘immediate’ nature is interpreted to suggest a much shorter period of time than ‘reasonable’ time, a formulation used in the context of a fair trial.¹⁴¹ Furthermore, facilitating late registration is considered better than never.¹⁴²

Regarding parental responsibilities, the failure to register a child’s birth can constitute neglect “when those responsible for children’s care have the means, knowledge and access to services to do so”.¹⁴³ Despite this parental responsibility as the primary care-giver,¹⁴⁴ the state’s failure to prevent parental negligence, resulting in delayed and/or lack of birth registration cannot be excused.¹⁴⁵ The primary responsibility to ensure that every child’s birth is registered lies in the hands of the state, not parents.¹⁴⁶ This implies that individuals should be enabled to appeal and receive effective remedies if the state does not comply with this duty.¹⁴⁷

States have a minimum obligation to ensure that the birth registration of every child is given priority in the light of the special protection entitled for children due to their vulnerability.¹⁴⁸ In particular, states should not only establish a legal framework providing for a birth registration system, but also “actively ensure that [every child is] registered”, recognised as a person before the law and enjoys full protection of their rights provided by the CRC.¹⁴⁹ This implies an obligation to “identify and remove physical, administrative, procedural and any other barriers that impede access to birth registration”.¹⁵⁰

What this obligation entails in terms of implementation measures can be derived from the concluding observations and general comments of relevant treaty bodies. States are required to develop and implement an effective system of birth registration,¹⁵¹ which is universally accessible, free of charge, and flexible and adaptable to the circumstances of families.¹⁵² This can be established by waiving registration fees, introducing mobile registration office and/or units in communities and schools, and enabling simple, expeditious and effective procedures.¹⁵³ States should also take all appropriate measures to permanently store and protect civil registration records, with the view to prevent the loss or destruction of records, particularly due to emergency or armed conflicts.¹⁵⁴ Other measures to both promote registration at birth and to identify and register children who are not yet registered can

Birth Registration. A topic proposed for an Executive Committee Conclusion on International Protection. EC/61/SC/CRP.5, (9 February 2010).

¹³⁹ The HR Committee recognised that statelessness is a considerable problem for children even when their births are registered, see Ziemele (2007), supra note 122.

¹⁴⁰ Id. at 8.

¹⁴¹ Id.; Also see Stein (2015), supra note 21.

¹⁴² UNDOC CRC/C/GC/7, (CRC). *General Comment No.7: Implementing child rights in early childhood*. (20 September 2006), para 25.

¹⁴³ UNDOC CRC/C/GC/13, (CRC). *General Comment No.13: The right of the child to freedom from all forms of violence*. (18 April 2011), para 20.

¹⁴⁴ Preamble and Art.18 of the CRC

¹⁴⁵ Ziemele (2007), supra note 122, at 21; ISI (2015), supra note 21.

¹⁴⁶ This includes obligation to take measures to reduce child statelessness, see UNDOC A/HRC/RES/20/5, (HRC). Resolution 20/5 on Human Rights and Arbitrary Deprivation of Nationality. (16 July 2012).

¹⁴⁷ For example, although only applicable to the African region, the ACERWC requires states to “establish administrative and judicial review mechanisms to enable individuals to appeal any decision denying them any of the rights enshrined in Article 6” (the right to name, birth registration and nationality). ACERWC/GC/02. General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child. (16 April 2014), para 102.

¹⁴⁸ Article 7(1) of CRC; HRC (1989), supra note 133, para 7.

¹⁴⁹ Ziemele (2007), supra note 122, at 9.

¹⁵⁰ HRC (Apr.2015), supra note 132, para 9.

¹⁵¹ CRC(2006), supra note 140, para 25; CRC(2009), supra note 132, para 41.

¹⁵² Id.; UNDOC CRC/C/GC/9, (CRC). *General Comment No.9: The rights of children with disabilities*. (27 February 2007), para 36.

¹⁵³ Id.; also see HRC (Apr.2015), supra note 132, para 6.

¹⁵⁴ HRC (Apr.2015), supra note 132, para 5.

include: disaggregated data collection, awareness raising campaigns, and cross-sectorial and international cooperation.¹⁵⁵

To conclude, “registration of a child is the minimum guarantee for the enjoyment of his or her rights”.¹⁵⁶ This should not be affected by the uncertain legal status of the child or his or her parents in any way as it will be discussed further below.

3.3.2. Right to acquire a nationality ‘where the child would otherwise be stateless’

Every child’s right to acquire a nationality is provided by Article 24(3) of the ICCPR and Article 7(1) of the CRC. It is important to highlight that the right to *acquire* a nationality does not grant a certain nationality to the child. Nationality is defined as a legal bond and allegiance to a nation, established on the basis of “a social fact of attachment, a genuine connection of existence, interests and sentiments”.¹⁵⁷ Generally, states confer a nationality to individuals by birth through *jus sanguinis*¹⁵⁸ or *jus soli*¹⁵⁹ principles or combination of both, accordingly to their nationality laws. In the light of this definition of nationality, Article 7 can be interpreted to set a rule that a child should be allowed to acquire a nationality equally from both parents and from the land where s/he is born and has lived.¹⁶⁰

Nevertheless, states to neither Conventions have an unconditional obligation to “grant a nationality to every child born in its territory”, nor to apply the *jus soli* principle to every child.¹⁶¹ Rather, the minimum standard here is that states take all necessary measures to prevent child statelessness. According to the HR Committee, “states are required to adopt every appropriate measure, both internally and in cooperation with other states, to ensure that a child has a nationality when they are born”.¹⁶² Similarly, the CRC committee has recommended that states shall *ensure* full enjoyment of this right by taking special measures of implementation (legislative and other measures) and providing safeguards in domestic laws, particularly where the child would otherwise be stateless.¹⁶³

In this regard, states are required to identify and pay particular attention to the special needs of “children who are born and/or living within their jurisdiction” and who are stateless.¹⁶⁴ This requires states to take measures to “facilitate and/or expedite procedures for the acquisition of nationality”.¹⁶⁵ Such measures may take a form of cooperation with another state where the child may be entitled to a nationality.¹⁶⁶ Nevertheless, cooperative processes can be complex and long, especially when the counter-part state does not recognise the child’s right to acquire that nationality. Prolonged statelessness and failure to assist the child to improve his or her situation have adverse effects on children and their development, and therefore may be perceived as in contrary to Article 7 and the best interest of the child principle.¹⁶⁷

¹⁵⁵ CRC (2007), supra note 149, para 36; HRC (Apr.2015), supra note 132, para 7, 10 & 11.

¹⁵⁶ Ziemele (2007), supra note122, at 23.

¹⁵⁷ ICJ, *Nottebohm Case* (Liechtenstein v. Guatemala), 6 April 1955, cited in UNDOC A/HRC/C/25/28, (HRC). *Human Rights and Arbitrary Deprivation of Nationality*, Report to Secretary General. (19 December 2013), para 7.

¹⁵⁸ Nationality is inherited by blood link from the parent(s) to whom the child is born.

¹⁵⁹ Nationality is inherited by the territorial link to the land where the child is born.

¹⁶⁰ Read together with Article 8, See also Doek (2006), supra note 126, at 31.

¹⁶¹ CRC nor ICCPR, see HRCommittee, para 25, in Ziemele (2007), supra note122, at 13.

¹⁶² HRCommittee (1999), supra note 92, para 8, cited in Doek (2006), supra note 126, at 27.

¹⁶³ Art.7(2) of CRC, see Ziemele (2007), supra note122, at 13. HRC also recognises the special vulnerability of children and stresses this point in its Resolution 3/29 (HRC(Dec.2015), supra note 19, para 42).

¹⁶⁴ Doek (2006), supra note 126, at 28.

¹⁶⁵ Id.; Also see Ziemele (2007), supra note122, at 22.

¹⁶⁶ In light of the Article 4 of the CRC (particularly international cooperation), states have an obligation to promote the right of every child to acquire a nationality, wherever they may be born. UNDOC CRC/GC/2003/5, (CRC). *General Comment No.5: General measures of implementation of the Convention on the Rights of the Child (arts.4, 42 and 44, para.6)*. (27 November 2003), para 7; Also see ISI (2015), supra note 21, at 24.

¹⁶⁷ Article 3 of CRC; UNDOC CRC/GC/14, (CRC). *General Comment No.14: The right of the child to have his or her best interests taken as a primary consideration*. (29 May 2013), para 87 & para 93. In this regard, the CRC Committee may receive some inspirations for developing its jurisprudence from the ACERWC’s decisions made in the *Nubian Children case*. The case not only reaffirms the state’s obligation to allow a child born within its territory

To prevent such situation where a child is left stateless for longer period of time than desired, states are recommended to take measures to allow and assist the child to acquire a nationality of the state where he or she is born and/or is living.¹⁶⁸ This is particularly required of a host country, when acquiring the nationality of another state is very unlikely or impossible.¹⁶⁹ It is worth mentioning that the HRC stresses that these safeguards should “allow for the acquisition of nationality by an otherwise stateless child as soon as possible after birth”.¹⁷⁰

States are also required to adopt minimum procedural standards, such as review and monitoring, in order to prevent arbitrary decisions concerning the acquisition, deprivation or change of nationality.¹⁷¹ Such safeguards should be incorporated comprehensively in domestic laws and implemented effectively in practice, “without being subject to unreasonable conditions”.¹⁷² Furthermore, states should refrain from discriminatory measures and enacting or maintaining legislation that would render a child stateless, amend such discriminatory and/or exclusionary laws and/or adopt nationality law which complies with international standards.¹⁷³

Additionally, this right should be implemented in accordance with the guiding principles of CRC.¹⁷⁴ Furthermore, although they have not yet been explicitly linked with Article 7, general measures of implementation can also provide instructions regarding implementation and realisation of this right. Targeted resource allocation and visibility of children in public spending are considered an important measure to be specified further, together with cooperation with and involvement of civil society.¹⁷⁵ In addition, the CRC Committee has recommended many states to: accede and ratify the relevant international instruments (the stateless conventions in particular), take special measures to reduce the barrier to accessibility, enhance data collection through conducting a stateless mapping study, and seek for technical assistance from UNHCR and UNICEF.¹⁷⁶

Evidentially, there is a consensus that the child’s right to acquire a nationality, especially when the child would otherwise be stateless, should be protected and respected in order to reduce and prevent statelessness. Discriminatory treatments resulting in statelessness of particular group(s) are perceived as inconsistent with the principles of international human rights law. Accordingly, the minimum standard is that the *jus soli* principle applies to all children when they are otherwise stateless, and that states have an obligation not to render children stateless within its territory where they are born and/or reside, or are found.¹⁷⁷ It is important to note that the right to acquire a nationality should be treated “globally in a fair and equal manner, on the same footing and with the same emphasis” as any other child rights, considering the interdependency and interrelated nature of human rights.¹⁷⁸

to acquire its nationality if he or she would otherwise be stateless, but also found that prolonged procedures infringing the child’s right to acquire a nationality is a violation of article 6(3) of ACERWC read together with the best interest principle (art.4). Although the outcome of the case reflects the enforcement challenges faced by the ACERWC and its decisions are only applicable to African states, this land-marking decision reaffirmed that every child should have a nationality at birth, and set out international standards limiting the state’s discretionary competence. See ACERWC, 22 March 2011, *Nubian Children Case* (IHRDA and OSIJ v. Kenya; No. Com/002/2009), para 50.

¹⁶⁸ Doek (2006), supra note 126.

¹⁶⁹ Id.

¹⁷⁰ HRC (Dec.2015), supra note 19, para 42.

¹⁷¹ HRC(2012), supra note 144, para 10.

¹⁷² HRC (Dec.2015), supra note 19, para 43.

¹⁷³ HRC(2012), supra note 144, para 4.

¹⁷⁴ See Section 3.3.6.

¹⁷⁵ ISI (2015), supra note 21, at 23 & 24.

¹⁷⁶ See for example, concluding observations on Senegal (CRC/C/SEN/CO/3-5, 29 January 1990), Zimbabwe (CRC/C/ZWE/CO/2, 29 January 2016), and Indonesia (CRC/C/IDN/CO/3-4, 13 Jne 2014), taken from the Analytical Database of ISI (<http://www.statelessnessandhumanrights.org/tools/analytical-database>), last visited (08-07-2016).

¹⁷⁷ Ziemele (2007), supra note 122, at 16.

¹⁷⁸ HRC(2012), supra note 144, Preamble.

Nevertheless, probably due to the very sensitive nature, no relevant bodies have addressed in depth what states' obligations vis-à-vis this right entail.¹⁷⁹ It remains unclear which state is responsible for conferring a nationality to a child who is otherwise stateless, as the provision does not prescribe to which nationality a child is entitled.

3.3.3. Implementation 'in accordance with their national law and their obligations under the relevant international instruments in this field'

The formulation of Article 7(2) of the CRC recognises each state's sovereignty to regulate the acquisition, renunciation or loss of a nationality accordingly to its domestic law and procedures set forth by a national authority, so long as they meet their obligations under the relevant international instruments.¹⁸⁰ This very wording reflects the sensitivity of, and the persistent opposition by the states concerning the regulation of nationality and citizenship.¹⁸¹ Imposing international obligations to grant a nationality to every child born in its territory was perceived as intervening with a state's sovereignty.¹⁸² Nevertheless, the formulation of the latter part of this provision implies that determination of a child's nationality is not exclusively a domestic matter.

The provision spells out three guidelines on implementing all rights provided in the first part of Article 7. Firstly, states should consider relevant international laws as living instruments and take the domestic contexts into account when establishing implementation measures.¹⁸³ This implies that the domestic laws and policies concerning birth registration, name and nationality should respond to the particular needs of communities, with varying language, culture and geographical location.

Secondly, although nationality in particular is considered primarily a matter of domestic affairs,¹⁸⁴ the state's sovereignty is limited to some extent: so long as "it is consistent with international conventions ... and the principles".¹⁸⁵ Therefore, states to the relevant international instruments, the CRC and ICCPR in particular, but also including customary laws, have obligations to comply with international standards, while implementing this provision in their domestic laws. Such obligations are understood to include human rights protection.¹⁸⁶ Furthermore, when the national law does not comply with them the international standards prevail.¹⁸⁷

Additionally, some scholars argue that this formulation expands the scope of article 7 of the CRC to include the additional safeguards set forth under the 1954 Stateless Convention and the 1961 Reduction Convention.¹⁸⁸ The two conventions together provide a set of principles and norms that must be applied when states are determining nationality procedures.¹⁸⁹ The states therefore may take into account the application of related norms derived from the relevant instruments such as the 1961 Convention when implementing the provision.¹⁹⁰

¹⁷⁹ The CRC Committee for example has only briefly mentioned the child's right to acquire a nationality in two general comments, GCNo.9 (CRC(2007), supra note 149, para 34) and GCNo.11 (CRC(2009), supra note 132, para 41); Also important to note that the only extensive analyses of this right is the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)'s *General Comment No.2 on Article 6 of the ACRWC: The right to a name, registration at birth, and to acquire a nationality* (16 April 2014), which is not applicable to the other regions.

¹⁸⁰ Article 7(2) of CRC, Article 24 of ICCPR; See Ziemele (2007), supra note 122, at 13.

¹⁸¹ Id., at 12.

¹⁸² Doek (2006), supra note 126, at 26.

¹⁸³ Doek (2006), supra note 126, at 12; Ziemele (2007), supra note 122, at 28.

¹⁸⁴ ASEAN in particular has adopted an approach that rather relies on respect for sovereignty and the pursuit of economic prosperity, see Jaghai (2015), supra note 50, at 16.

¹⁸⁵ Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws

¹⁸⁶ HRC (Dec.2015), supra note 19; CRC art.7(2); Also see the Preamble of the HRC resolution 20/5 (HRC(2012), supra note 144).

¹⁸⁷ Art. 26 & 27 Vienna Convention on the Law of Treaties, in Rishmawi, M. A Commentary on the UNCRC, Article 4: The Nature of States Parties' Obligations. Martinus Nijhoff Publishers: Leiden. (2006), at 24.

¹⁸⁸ ISI(2015), supra note 21.; Ziemele (2007), supra note 122, at 14 & 28.

¹⁸⁹ Id.

¹⁹⁰ ISI (2015), supra note 21, at 19.

3.3.4. Right to preserve and re-establish a legal identity and prohibition of deprivation

The significant link between the right to legal identity and protection of human rights was stressed when interpreting the child's rights under the Article 7 of the CRC and Article 24 of the ICCPR.¹⁹¹ This link appears to be reaffirmed by Article 8 of the CRC, which guarantees the child's right to "preserve [and re-establish] his or her identity, including nationality, name and family relations ... *without unlawful interference*". This is the only provision in all international instruments that explicitly entitles the right to preserve an identity, and its significant relevance in relation to stateless children is clear, as it explicitly mentions nationality as one aspect of the child's identity.¹⁹²

The details on what makes deprivation of a child's nationality lawful is out of the scope of this research. However, it should be noted that any measures of interference with a child's legal identity must be grounded in law, and must not be in contrary to the best interests of the child nor result in violation of the other rights.¹⁹³ Given the invisibility of child rights and its grave consequences on full enjoyment of human rights, the HRC stressed that states may not justify the loss or deprivation of nationality, resulting in statelessness, in terms of the principle of proportionality.¹⁹⁴ Therefore, deprivation of a legal identity not only infringes the child's rights under Articles 7 and 8 of the CRC and Article 24 of the ICCPR, but also all other rights.¹⁹⁵ The arbitrary deprivation of nationality on discriminatory grounds such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status, is a violation of human rights and fundamental freedoms.¹⁹⁶

Not only is the state obliged to prevent and reduce statelessness, but also to refrain from any measures that would arbitrarily deprive persons of their nationality.¹⁹⁷ Therefore, read together with Article 7(2), this provision can be interpreted to protect the child's right to preserve his/her nationality when his/her parent loses a nationality, particularly if that may render the child stateless.¹⁹⁸ More specifically, the obligation to 'undertake to respect' this right implies the obligation to take specific legislative, administrative and other measures to appropriately and effectively register and store "all the relevant elements of the identity" of the child, including name, nationality and family relations.¹⁹⁹

Regarding the re-establishment of the child's identity, the CRC committee stresses that the deprivation of legal identity must be diligently solved.²⁰⁰ When a child is illegally deprived of some or all of the elements of his or her identity, the state has an obligation to provide with appropriate assistance and protection to ensure that s/he has access to effective and appropriate remedies, with the aim to speedily re-establish his or her identity and/or nationality promptly.²⁰¹ In order to do so, the states are also required to establish a system to identify stateless children.²⁰²

To conclude, Articles 7 and 8 of the CRC prohibit the denial and deprivation of legal identity on any ground, regardless of the status of his or her parents, by guaranteeing the child's right to birth registration and name and to acquire and preserve nationality as well as to re-establish a personal identity before the law.²⁰³

¹⁹¹ Blitz (2011), supra note 46, at 45.

¹⁹² Other aspects of identity include, race, culture, religion and language, Doek (2006), supra note 126, at 29.

¹⁹³ Id.

¹⁹⁴ HRC (2013), supra note 159, para 4.

¹⁹⁵ The HRC for example expressed its concern regarding the adverse impact of the deprivation of nationality on the enjoyment of civil, political economic, social and cultural rights, such as poverty, social expulsion, and limited legal capacity, see HRC(2012), supra note 144, para 6 and HRC (Dec.2015), supra note 19.

¹⁹⁶ HRC(2012), supra note 144, Preamble & para 2.

¹⁹⁷ Id., para 4.

¹⁹⁸ Doek (2006), supra note 126, at 30.

¹⁹⁹ Id., at 12 & 29.

²⁰⁰ Ziemele (2007), supra note 122, at 22.

²⁰¹ Article 8(2); CRC(2009), supra note 132, para 45.

²⁰² ISI (2015), supra note 21, at 11.

²⁰³ Blitz (2011), supra note 46, at 45; ISI (2015), supra note 21, at 19, drawn from the concluding observations of the CRC Committee.

3.3.5. Protecting the substantive rights of stateless children

In general terms, states have an obligation to undertake all appropriate legislative, administrative and other measures to respect, protect and fulfil all rights of every child, including those stateless, enshrined in the CRC.²⁰⁴ This obligation under Article 4 can be interpreted to imply the duty of a state vis-à-vis stateless children in two-folds: the duty to prevent child statelessness, and the duty to ensure that no child is “given less protection because of his/her statelessness”.²⁰⁵

The latter implies the obligation to guarantee that stateless children are not denied protection and full enjoyment of rights entitled under the CRC and other relevant international instruments.²⁰⁶ Protecting their substantive rights is vital for two reasons. Firstly, many children remain stateless especially in countries where the state has reserved its obligation under Article 7(2) concerning the application of their domestic citizenship and nationality laws. Secondly, lack of legal identity places children in particularly vulnerable position with little to no protection against human rights violations.

In particular, states are required to take measures to allow stateless children to fully enjoy their right to education (art.28&29), health (art.24), adequate standard of living (art.27), family life (art.9), and freedom of movement (art.37). They must be protected from all forms of violence and grave violations, in particular exploitation, trafficking, torture or other cruel, inhuman or degrading treatment and the arbitrary detention and/or deportation (art.19, 32, 34, 35, 36, 37). States must also pay particular attention to the special needs of refugee and asylum seeking child (art.22), indigenous and minority child (art.30), and a child in conflict with the law and/or deprived of liberty (art.37&40).

Similarly, the ICESCR prohibits discriminatory treatments or conditions that render children from accessing basic services and rights. In particular, Article 11(1) explicitly obliges states to prevent the conditions that “undermine the social and economic survival of individual and their family members and specifically sets out principles to protect children.” Article 10(3) guarantees children and young persons the state protection from any forms of social and economic exploitation, and every child has a right to access free primary education (art.13(2)). Additionally, states-parties to CERD are prohibited to limit the rights and freedoms provided in the Convention based on birth, citizenship or immigration status, particularly if such differential treatments “are not applied in pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.²⁰⁷ Instead, they should take special measures to ensure the enjoyment of all economic, social and cultural rights, without any discrimination.²⁰⁸

To conclude, the state has an obligation to respect, protect and fulfil all rights of stateless children, regardless of whether they have ratified the 1954 Stateless Convention.

3.3.6. Guiding principles of CRC

Article 7 and 8, as well as all other rights enshrined in the CRC should be interpreted and implemented in the light of the guiding principles: non-discrimination (Article 2), the child’s best interests (Article 3), the right to life, survival and development (Article 6), and the right to be heard (Article 12).²⁰⁹ It is important to note that these provisions not only provide the guidance for implementation measures and procedural safeguards vis-à-vis other rights, but also are a right in itself. Much of the documented recommendations made by the CRC Committee focus heavily on the non-discrimination and best interest principles,²¹⁰ and explicitly states that the provisions of Article 7 to be fully enforced in line with

²⁰⁴ Article 4 of CRC; CRC (2005), supra note 168.

²⁰⁵ HRC (1989), supra note 133, para 25; Ziemele (2007), supra note122, at 13.

²⁰⁶ HRC (Dec.2015), supra note 19, para 46.

²⁰⁷ UNDOC.Rec.No.30 (CERD). *General Recommendation No.30: Discrimination Against Non-Citizens*. (2004).

²⁰⁸ Article 10(3) of CERD; UNDOC E/C.12/GC/20, (CESCR). *General Comment No.20 on Non-discrimination in economic, social and cultural rights*. (2 July 2009), para 26.

²⁰⁹ CRC(2003), supra note 168, para 12.

²¹⁰ For more detailed analyses, see ISI (2015), supra note 21, at 6.

these two principles.²¹¹ Nevertheless, the latter two principles also contribute to developing the jurisprudence on the scope, content and implementation of the provisions.²¹²

3.3.6.1. *Non-discrimination*

The principle of prohibition of discrimination implies that aforementioned obligations are not limited to citizen children but apply to all children within a state's jurisdiction, regardless of their or their parents' nationality, legal and immigration status, or statelessness.²¹³ In this light, states should ensure that all children are registered at birth and acquire a nationality, without discrimination of any kind, in law and practice.²¹⁴ Inaccessible mechanism and lack of registration thereof may constitute discrimination and can be seen as contrary to the relevant international standards.²¹⁵

In this regard, the accessibility to birth registration and nationality acquisition procedures are particularly important for specific group(s) of children who are vulnerable, disadvantaged, and/or marginalised and to whom statelessness is more likely to have severe impacts.²¹⁶ Such groups of children include those: who are not registered at birth; who are indigenous and from other ethnic minorities; who are on the move as migrants or refugees, or who are displaced and/or trafficked; and who become separated and/or are unaccompanied.²¹⁷ According to the CRC Committee, children's vulnerabilities require special measures of protection in order to ensure *de facto* equality in enjoyment of rights.²¹⁸ This is because they often face structural barriers in accessing birth registration and state protection, and are more likely to be exposed to violence, exploitation and other forms of violation of their rights.²¹⁹ Such measures should be agreed following consultation with the communities concerned, and may include mobile units, periodic birth registration campaigns or the designation of birth registration offices within communities.²²⁰

Children on the move and asylum seeking children are recognised as particularly vulnerable to abuse and rights violations.²²¹ Registering children with illegal status raises particular child rights concern, as being identified can expose them to abusive migration control measures such as arbitrary detention and deportation²²² Nevertheless, the recognition and registration of their statelessness and personality before the law are minimum requirements to ensure the protection of their fundamental rights.²²³ In this regard, states are recommended to consider the negative consequences the movements may have on access to nationality for refugee, asylum-seeking or migrant children, and provide special and appropriate safeguards.²²⁴

Furthermore, states are prohibited to create different categories of citizenship, resulting in discriminatory treatments of children and their parents (i.e. stigmatisation, denial of certain rights).²²⁵ Any discriminatory laws affecting children's rights should be amended in accordance with the CRC,

²¹¹ CRC (2007), supra note 149, para 36.

²¹² See for example, ISI(2015), supra note 21.

²¹³ CRC (2005), supra note 120, para 12; Also see Section 3.2.2.

²¹⁴ CRC(2006), supra note 141, para 25; Also see ISI (2015), supra note 21, at 18.

²¹⁵ Articles 24, 26 and 27 of ICCPR, Articles 2, 7, 22, and 30 of CRC, Article 1 and 5 of CERD; Also see Section 2.1.2. for further discussion.

²¹⁶ CRC (2009), supra note 132, para 42; Also See CRC Committee's concluding observations on Belize (2003) on children of immigrants; Nepal (2005) on refugee children; and Thailand (2006) on children of refugee, asylum seeking and stateless parents, cited in Doek (2006), supra note 126, and ISI (2015), supra note 21, at 17.

²¹⁷ CRC (2011), supra note 143, para 72(g)

²¹⁸ Id.

²¹⁹ ISI (2015), supra note 21, at 18.

²²⁰ CRC (2009), supra note 132, para 42.

²²¹ Ziemele (2007), supra note 122, at 10.

²²² Blitz (2011), supra note 46; Bhabha (2009), supra note 41.

²²³ Ziemele (2007), supra note 122, at 23.

²²⁴ HRC (Dec.2015), supra note 19, para 44. See Chapter 5.2 on specific measures recommended.

²²⁵ ISI (2015), supra note 21, at 18.

with particular views to register all children and prevent of *de jure* statelessness.²²⁶ For example, coercive assimilation, the arbitrarily defined requirements (e.g. language, years of legal residence, cultural background), and unnecessarily complicated and lengthy procedures for acquiring citizenship and/or nationality may constitute violation of the non-discrimination principle as well as the state's obligation not to render children stateless and to respect the child's right to cultural identity.²²⁷

3.3.6.2. *Best interest of the child*

Article 3(1) stipulates that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration".

The term 'public or private social welfare institutions' is to be understood to include "all institutions whose work and decisions impact on children and the realisation of their rights".²²⁸ As such, institutions dealing with birth registration falls under this category.²²⁹ Similarly, the scope of actions undertaken by 'administrative authorities' broadly includes decisions made at all levels "concerning education, care, health, living conditions, the environment, protection, asylum, immigration, access to nationality, among others".²³⁰ Therefore, individual decisions and all measures concerning a child's immigration status, birth registration and acquisition of a nationality should be guided by the child's best interests as a paramount consideration.²³¹ All procedures and decisions concerning or impacting children should be transparent, objective, prioritised and completed in the shortest time possible,²³² as the preservation of a child's identity is stressed as crucial in protecting the best interests of the child.²³³

Similarly, regarding children born to illegal migrant parents, the HR Committee has decided that the child's best interests and rights to family life (art.24 of ICCPR) should be given more weight than parent's illegal activities against the national immigration legislation.²³⁴ This decision is applicable to the target group of this study, as the child of such status are particularly vulnerable to abuse, and their situations can be understood to be analogous or relatively similar to the situation of this case: the child was born in the state's territory, was a citizen and had never known or lived in any other place.²³⁵

In order to ensure that the child's best interests are a paramount consideration, strict "child-friendly procedural safeguards" should be designed to assess and determine the child's best interests, including mechanisms for evaluation.²³⁶ Considering the uniqueness of each child's best interest and characteristics, individualised assessment of the child's history from birth should be conducted by multidisciplinary team to determine his or her best interests.²³⁷ Such individual assessment is particularly essential for the protection of vulnerable children's rights provided by the CRC and other relevant international instruments.²³⁸

As this process requires obtaining all necessary facts and information,²³⁹ establishing the child's link with biological birth parents and their country of origin may fall under the state's obligation.

²²⁶ *Id.*

²²⁷ Art.2, 7, 8 & 30 of CRC and Art.27 of ICCPR; Also see Ziemele (2007), *supra* note122, at 20.

²²⁸ CRC (2013), *supra* note 169, para 26.

²²⁹ *Id.*

²³⁰ *Id.*, para 30

²³¹ *Id.*

²³² CRC (2013), *supra* note 169, para 87 & para 93.

²³³ "The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.", CRC (2013), *supra* note 169, para 55.

²³⁴ HRC Communication to Australia, para 7(2) and 7(3), cited in Ziemele (2007), *supra* note122, at 10.

²³⁵ *Id.*

²³⁶ CRC (2013), *supra* note 169, para 87.

²³⁷ *Id.* para 76.

²³⁸ *Id.* para 75.

²³⁹ *Id.* para 92.

In this regard, the CRC Committee stresses that “the assessment of the consequences of alternative solutions must be based on general [and multidisciplinary] knowledge of the key consequences of each possible solution for the child, *given his or her individual characteristics and past experience*” (emphasis added).²⁴⁰ This latter wording may imply that when facilitating a stateless child in improving his/her status, the relevant authorities must take into account the length of the residency (legally or illegally), education history, views of the child, and other relevant elements of the child’s identity.

3.3.6.3. *Right to life, survival and development*

Article 6 provides that every child has an inherent right to life and that states shall ensure, to the maximum extent possible, the survival and development of the child.²⁴¹ Right to legal identity plays an essential role in ensuring the full enjoyment of this right.²⁴² A child lives, and might even die, under the radar without his or her legal identity recognised by a state. As illustrated in Chapter 2 and 4, this can have a severe impact on a child’s sense of human dignity, development, and personal identity, as s/he may be denied access to basic services such as health care, education and social welfare.²⁴³

This negative correlation between the violation of the child’s right to legal identity and the right to life is recognised by the CRC Committee: “statelessness undermines the enjoyment of childhood and the child’s opportunity to develop to his or her full potential”.²⁴⁴ For this reason, states are obliged to prevent statelessness at earliest possible stage of child’s development.²⁴⁵ In particular, registration of children at birth, and registration of unregistered children as soon as possible, are stressed as crucial implementation measure to realise their right to healthy life and development.²⁴⁶

Furthermore, states are required to ensure that children who have not been registered have equal access to basic services.²⁴⁷ In doing so, states are required to provide adequate assistance to parents, develop mechanisms to eradicate social, economic, cultural and geographical barriers such as poverty, language and discrimination, and train and collaborate with public service providers, local authorities and civil societies to ensure effective access and full enjoyment.²⁴⁸

3.3.6.4. *Right to be heard*

Article 12 provides for the child’s right to have an influence on her or his life, freely express their views concerning matters that affect them, and have their views given due weight in accordance with the age and maturity of the child.²⁴⁹ According to the CRC Committee, this right not only derives from the child’s vulnerability nor dependency on adults, but also from the child’s rights as a right-holder.²⁵⁰ Promoting this right is also consistent with Article 6 and Article 29, as promoting opportunities for the child’s participation stimulates the “full development of the personality and evolving capacities of the child”.²⁵¹ This has several implications concerning the state’s obligations to ensure the child’s right participate and to develop procedural safeguards.

²⁴⁰ Id. para 95.

²⁴¹ UNDOC CRC/C/GC/12, (CRC). *General Comment No.12: The right of the child to be heard*. (20 July 2009), para 79.

²⁴² CRC(2006), supra note 140, para 25; Nowak, M. A. *Commentary on the UN Convention on the Rights of the Child, Article 6: The right to life, survival and development*. Leiden:Brill. (2005), at 39.

²⁴³ Id.

²⁴⁴ ISI (2015), supra note 21, at 1.

²⁴⁵ CRC(2006), supra note 140.

²⁴⁶ Articles 6, 24, 28&29(1)(a); Nowak (2005), supra note 245, at 43-44.

²⁴⁷ Nowak (2005), supra note 245.

²⁴⁸ Article 4 & 5; CRC Committee. *Report of the 2012 Day of General Discussion on the rights of all children in the context of international migration*. (2012), para 86.

²⁴⁹ CRC(July2009), supra note 244, para 18; Also see Doek (2006), supra note 126, at 31.

²⁵⁰ Id.

²⁵¹ Id., para 79.

The provision applies to all relevant judicial and administrative proceedings affecting the child, without limitation.²⁵² Therefore, states have an obligation to introduce legal framework(s) and mechanisms (i.e. procedural safeguards) necessary to facilitate active involvement of the child in all matters concerning their immigration and nationality status as well as access to education, health, environment, living conditions or protection.²⁵³ The CRC Committee recognises the particular vulnerability of children of irregular migrant or refugee parents, and urges that their right to express their views on all aspects of the immigration and asylum proceedings be fully realised.²⁵⁴ States are required to pay particular attention and adopt specific measures to guarantee that marginalised children can freely express his or her views and have those views equally taken into account in the decision-making and best-interests determination processes, “within the territories where they reside”, without discrimination of any kind, by providing reasonable accommodation and support.²⁵⁵

More specifically, read in conjunction with Article 17, the states are required to ensure that asylum-seeking, refugee, migrant or stateless children are provided with and have access to all relevant information in their own language and “in formats appropriate to their age and capacities on all issues of concern to them”.²⁵⁶ The procedures should be available to all children, conducted in a child-friendly manner with an appointed guardian or counsellor, free of charge.²⁵⁷ In addition, educational and awareness raising campaigns should be organised at community levels.

Regarding the child’s right to legal identity, this provision raises the question on whether a child has – and should be given – the right to choose a nationality when s/he is old and mature enough, and was born and raised in a territory of a country other than the country of origin of the parents without registration. The CRC Committee does not provide any views explicitly on this matter. Nevertheless, it stresses that neither the child’s age nor vulnerable situation should deprive him or her of this right, and any decision that does not give due account to the child’s views is considered in contrary to the best interest principle.²⁵⁸ Furthermore, according to the Committee, participation helps children to regain control over their lives, rehabilitate, and develop a sense of identity.²⁵⁹ Therefore, “children affected by emergencies should be encouraged and enabled to participate in analysing their situation and future prospects”.²⁶⁰ States are recommended to enable children in refugee camps to “contribute to their own safety and well-being through the establishment of children’s forums”.²⁶¹

The concept of identity is interpreted to include not only nationality, name and family relations, but also other aspects that constitutes the child’s characteristics, such as race, culture, religion, language as well as biological origin.²⁶² From sociological perspective, national identity is associated with not only self-identification as a member of a nation, but more importantly a “sense of belonging, unity, loyalty and solidarity”.²⁶³ From a psychological insight, a child develops this sense of identity and belonging in the course of cognitive development, following age-related stages.²⁶⁴ Furthermore, considering the evolving capacities of children, it is argued that “competence as a citizen is not limited

²⁵² Id., para 32.

²⁵³ Id., para 32 and 81; Also see Doek (2006), supra note 126, at 31.

²⁵⁴ Id., para 123.

²⁵⁵ Id., para 75, 118 & 124.

²⁵⁶ Information on their entitlements, the services available (including means of communication, and the procedural guidelines), the situation in their country of origin and family link etc., see CRC (July 2009), supra note 244, para 82&124.

²⁵⁷ Ziemele (2007), supra note 122, at 25, drawn from CRC Committee’s concluding observation on Estonia.

²⁵⁸ CRC (July 2009), supra note 244, para 53&54.

²⁵⁹ Id.

²⁶⁰ This point was emphasised after the day of general discussion in 2008, see CRC (July 2009), supra note 244, para 125.

²⁶¹ CRC (July 2009), supra note 244, para 126.

²⁶² Doek (2006), supra note 126, at 29

²⁶³ Bar-tal, D. Identities: Conflict or conciliation? Editorial in *Palestine-Israel Journal of Politics, Economics & Culture*, 8/9(4/1): 4-6. (2002), at 4.

²⁶⁴ Doek (2006), supra note 265, at 11.

to adults and neither is incompetence restricted to children".²⁶⁵ Children learn and gain the sense of their citizenship and identity through every day experiences of family and community life, education, civic and political awareness".²⁶⁶ It is therefore important to recognise the child's capacity to recognise his or her own legal identity depending on the age and maturity.²⁶⁷

To conclude, read in conjunction with Article 3, stateless children's views should be given due weight in all procedures and matters affecting them, taking their age and maturity into consideration.

3.4. Conclusion

This chapter presented that the right to legal identity is entitled to every child including stateless children regardless of their own and their parents' status. In the light of the non-discrimination principle, this obligation applies to all children, including stateless children born to refugee parents in Thailand, regardless of whether Thailand has acceded to the 1951 Refugee Convention or 1961 Stateless Convention.

Drawing on the relevant international instruments and opinions of human rights monitoring bodies, the chapter elaborated on what states' obligations vis-à-vis this right entail. The obligations of the state are three holds: protection of stateless children's rights, reduction of statelessness, and prevention. In order to reduce and prevent child statelessness, states have positive obligations to take all measures to ensure registration at birth for every child born within its territory. Additionally, states have positive obligations to take special measures to ensure that children acquire a nationality as soon as possible, particularly when a child is otherwise stateless. The implementing measures to realise the child's right to legal identity should be developed and implemented in accordance with the guiding principles of CRC. This implies that special measures and adequate assistance are required to ensure equal enjoyment of the rights and meaningful participation by the child, and that best interests of the child should be a paramount consideration in all matters and procedures affecting him/her. Keeping these obligations in mind, the following chapter will assess the national laws and policies concerning stateless children born to refugee parents in Thailand.

4. Country Study: Stateless Children Born to Refugee Parents in Thailand

4.1. Introduction

Chapter 3 presented the content of the right to legal identity and what state's obligations entail vis-à-vis stateless children. This chapter addresses the case of children born to refugee parents in Thailand to illustrate the unique and interrelated child rights issues emerging from the combination of their immigration status and statelessness. Section 4.2. aims to answer the question of whether gaps in the civil registration and nationality laws and policies exist, and may contribute to their statelessness. Section 4.3. presents the RTG's responses to the protracted refugee situation near the border areas, reflected in its immigration laws and policies, that largely affect the target group's enjoyment of their human rights. The last section then evaluates the challenges raised by such laws and policies as well as their protracted situation.

²⁶⁵ Inter-Agency Working Group on Children's Participation (IAWGCP). *Children as Active Citizens: A policy and Programme Guide*. (2008), at 5.

²⁶⁶ *Id.*

²⁶⁷ Article 12 of CRC

4.2. Laws and Policies on Civil Registration and Nationality

4.2.1. Birth and civil registration

The Civil Registration Act²⁶⁸ sets out the principles concerning the birth registration processes, from reporting of births to issuing registration documents. The personal scope of birth registration caused much heated controversy and confusions. It was unclear whether children born to alien²⁶⁹ parents with no residence permit are eligible for registration, due to the inconsistency between the Act and the instructions by the Bureau of Registration Administration.²⁷⁰ As a result, the process was inaccessible for children born to parents with irregular migration status in the past.²⁷¹ It was only after the 2008 amendment that the registration of *all* children born in Thailand was reaffirmed. Under Article 4 of the present Civil Registration Act,²⁷² children without Thai nationality are also allowed to receive official birth certificate, regardless of their parents' nationality or the immigration status.

Following the amendment, an action plan was issued by the MoI, establishing specific procedures to facilitate and ensure birth registration for children born in the camps.²⁷³ The registration process for children born to 'illegal migrants' is similar to that of children with Thai nationality, except for the form used to create the birth certificate.²⁷⁴ After his or her birth being registered, a child also receives a certificate with a 13-digit identification number which is kept as the child's personal record in the computerised system.²⁷⁵ However, this digit numbers can act as an obstacle for stateless children to fully enjoy their basic rights, as the first number defines a person's citizenship status.²⁷⁶

Moreover, the MoI has agreed to implement retrogressive measures to address the lack of birth registration of children born to unregistered parents and children who were born before 2008.²⁷⁷ Whilst a lift of evidences is required to verify the birth information normally, undocumented persons can apply for retroactive birth certificates if there is a 'reliable witnesses' to prove the place of birth and the fact that the birth was not reported.²⁷⁸ In the case of birth at home in the camps, for example, *the birth seems to be verified by the mid-wife, the community leader, and the camp commander.*²⁷⁹

Additionally, the professional personnel at local hospitals and/or clinics has an obligation to issue a delivery certificate for all children born there, including those born to illegal migrants.²⁸⁰ Although it does not declare nor officially register the birth,²⁸¹ a delivery certificate is considered an official document that establishes the child's link to biological parents and the place of birth, and keeps records of the birth. It is also a document required for the registration process to confirm the birth.²⁸² Furthermore, the establishment of an online database has promoted more effective and speedy registration procedures, linking hospital delivery records directly with the district civil registration system, and allowing missing documents to be restored easily.²⁸³

²⁶⁸ Civil Registration Act 1991, B.E. 2534

²⁶⁹ An 'Alien' is any person who is not of Thai national, defined under Section 4 of the Nationality Act.

²⁷⁰ The instructions states that persons with no residence permit cannot proceed with any civil registration other than notification of death, this was in contrary to the Civil Registration Act, with more inclusive terms. Waas, L. V. The children of irregular migrants: A stateless generation? Netherlands Quarterly of Human Rights, 25(3). (2007).

²⁷¹ UNDOC CRC/C/THA/CO/2, (CRC). *Concluding Observations: Thailand*. (27 January 2006).

²⁷² Thailand Civil Registration Act (No. 2), B.E. 2551 (2008), Section 4 & 21.

²⁷³ Implemented with the technical assistance from UNHCR since 2010, see UNHCR (2010), supra note 274.

²⁷⁴ Aliens receive form called 'Tor Ror 3', while children with Thai nationality receive 'Tor Ror 1'.

²⁷⁵ Article 16 of Civil Registration Act

²⁷⁶ Harris, J. Uneven Inclusion: Consequences of Universal Healthcare. Thailand, Citizenship Studies, 17(1): 111-127. (2013).; See section 4.4. for the relationship between citizenship status and enjoyment of human rights.

²⁷⁷ 2012, Id.; UNHCR. Civil Status Documentation (<http://reporting.unhcr.org/node/2952>), last visited (30-07-2016).

²⁷⁸ UNESCO. Citizenship Manual: Capacity building on birth registration and citizenship in Thailand. (2008), at 15.

²⁷⁹ Taken from the author's field work, see **Annex II** for the delivery and birth registration process in the camps.

²⁸⁰ Article 23 of Civil Registration Act, B.E. 2335 (1992)

²⁸¹ This position was repeatedly expressed by the MoI, see UNESCO (2008), supra note 282.

²⁸² Id.

²⁸³ UNHCR. Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Statelessness Persons in South East Asia. (October, 2010).

According to UNHCR, 7,806 new born babies were registered and additional 8,985 children received birth certificates across the nine camps between the periods of 2010 and 2013.²⁸⁴ In 2015, the civil registration verification was conducted by the RTG and additional 1,853 birth certificates were issued.²⁸⁵ Considering this data, some argue that the right to have one's birth registered has progressively been realised.²⁸⁶

4.2.2. Acquisition of nationality at birth

The present Thai Nationality Act²⁸⁷ adopts a combination of *jus sanguinis* and restricted *jus soli* principles. In addition to the acquisition of nationality from his or her parents who are Thai nationals,²⁸⁸ a child who is born within the Thai territory to alien parents shall acquire the Thai nationality, if they hold permanent residence permit.²⁸⁹

It is interesting to note here that a Thai nationality was granted for all children born in Thailand, accordingly to the *jus soli* principle, regardless of the parents' statelessness, migration and/or legal status.²⁹⁰ By understanding 'Thainess of people' as a socially constructed notion, and allowing aliens and their children to obtain a Thai nationality, the greater unity and assimilation amongst various ethnic groups were achieved.²⁹¹ It was only in 1952 that limitations to the *jus soli* approach were introduced.²⁹² In 1992, the Nationality Act was amended to further adopt limitations to the personal scope of Section 7, which provides for the application of the *jus soli* principle.²⁹³

The present Act,²⁹⁴ combined with immigration laws,²⁹⁵ imposes limitations particularly concerning children born to alien parents with more ambiguous immigration status. Firstly, although aliens can acquire a permanent residence permit if permitted,²⁹⁶ this does not apply to irregular migrants who are considered to have entered the country by means violating the Immigration Act.²⁹⁷ Secondly, Section 7bis of the Nationality Act sets forth three exclusion criteria to the personal scope of aforementioned *jus soli* approach. A child cannot acquire a Thai nationality when s/he is born in Thailand to an alien person who: a) have been given temporal residence permit in Thailand as a special case;²⁹⁸ b) have been permitted to stay temporarily in Thailand;²⁹⁹ and c) have entered and resided in Thailand without permission under the law on immigration.³⁰⁰ Thirdly, Section 7bis(3) further provides that those born to alien parents in Thailand, who do not qualify for Thai nationality by the virtue of these criteria, shall be deemed to have entered and resided illegally in Thailand under the immigration law.³⁰¹ Finally, the Regulation of Revolutionary Party No.337 of 1972 (Por Wor 337)³⁰²

²⁸⁴ Id.; Tan, V. Thailand: Birth registration gives refugee babies a good start in life. UNHCR. (24 September 2012).

²⁸⁵ With the support of UNHCR, supra note 3.

²⁸⁶ UNHCR (2010), supra note 274; Wrettt (2014), supra note 69.

²⁸⁷ Nationality Act, B.E.2508 (1965)

²⁸⁸ Section 7(1)

²⁸⁹ Section 7(2), as added by the Nationality Act (No.4) B.E.2551, 2008)

²⁹⁰ Article 3(3) of Nationality Act B.E. 2456 (1913) and Nationality Act B.E. 2508 (1965) entitled a Thai nationality for the persons who have a connection with Thailand, see Saisoonthorn, K. P. Development of Concepts on Nationality and the Efforts to Reduce Statelessness in Thailand. *Refugee Survey Quarterly*, 25(3): 40-53. (2006).

²⁹¹ Id., at 43.

²⁹² Id., Nationality Act B.E. 2495 (1952)

²⁹³ Article 11(1) of the Nationality Act B.E.2325 (1992) stipulates that "aliens born in Thailand are illegal migrants unless there is an order under Immigration Law specified otherwise".

²⁹⁴ Nationality Act (No.4) B.E.2551, (2008)

²⁹⁵ See below section 4.3. for further discussion.

²⁹⁶ Section 19 of Thailand Condominium Act, B.E. 2522 (1979) as amended by Act (no.3), B.E. 2542 (1999)

²⁹⁷ Section 11 of Thailand Immigration Act, B.E. 2522 (1979)

²⁹⁸ Section 7 bis paragraph 1 of Nationality Act as amended by the Nationality Act (No.4) B.E.2551, 2008

²⁹⁹ Id. Section 7 bis paragraph 2

³⁰⁰ Id. Section 7 bis paragraph 3

³⁰¹ As amended by the Nationality Act (No.4) B.E.2551, 2008

³⁰² Saisoonthorn (2006), supra note 294, at 48.

imposes an additional restriction: the Thai nationality of all children born to alien parents with no permanent residence status before 25 February 1992 was revoked.³⁰³

In general, therefore, children born to alien parents who do not hold permanent residence permit or illegally enter and reside in Thailand cannot acquire a Thai nationality. In particular, the children born to refugee parents can be excluded from the personal scope of Section 7, as their parents are either the camp refugees who have given temporary permission to stay as a special case (criteria a), or illegal migrants who have violated the Immigration Act in the RTG's terms (criteria c).

This regulation may render a child stateless, if their parents cannot confer their nationality to the child. Both nationality laws of Thailand³⁰⁴ and Myanmar³⁰⁵ allow both parents to confer their nationality equally to their children who are born abroad or within its territory, accordingly to *jus sanguinis* principle. However, the conferral of nationality to children born to 'illegal' migrant parents is not granted under the Thai nationality law, especially if they do not possess a permanent residence permit nor an official identification document (i.e. they are themselves *effectively* stateless).³⁰⁶ Moreover, a child cannot be officially recognised as a Myanmar citizen nor be entitled for basic public services without a birth certificate and identity document card issued accordingly to the registration laws in Myanmar.³⁰⁷ It is uncertain whether the birth certificate issued by the RTG is recognised officially by the Myanmar authorities.³⁰⁸

This is particularly problematic for the target group, as many parents who sought asylum had lost their identification documents themselves in the midst or aftermath of the internal conflicts.³⁰⁹ Born to undocumented refugees with irregular migration status, and with no or limited access to birth registration,³¹⁰ many children have no way of proving their link to the biological parents nor to their country of origin. It is important to note here that in Myanmar a child can lose a nationality when one or both parents cannot lose their citizenship.³¹¹ Although the loss of citizenship is limited to associate and naturalised citizens under Myanmar's citizenship law,³¹² a child can become *effectively* stateless when parents cannot prove their nationality in practice. Furthermore, many children born to refugees in Thailand are not granted a nationality from the Myanmar government on the ground that "their parents left the country illegally" in practice.³¹³

Combined with the strict immigration measures, the exclusion clause therefore not only hinder many children born to refugee parents *de facto* and *effectively* stateless, but prevents them from acquiring a nationality accordingly to *jus soli* approach, even when they may be stateless otherwise.

4.2.3. Measures to address statelessness

According to UNHCR, the RTG has assumed primary responsibility to address statelessness issue,³¹⁴ and taken several measures to address statelessness across the country. It should be noted though that these measures mostly target the hill tribes, not those deemed 'illegal migrants'.³¹⁵

³⁰³ Por War 337 (1972), paragraph 1 and 2, see Saisoonthorn (2006), *supra* note 294, at 48.

³⁰⁴ *Id.* Section 7(1)

³⁰⁵ Article 7 of Myanmar Citizenship Law, see Jaghai (2015), *supra* note 50, at 21.

³⁰⁶ Jaghai (2015), *supra* note 50, at 51.

³⁰⁷ The Myanmar Nationality Law requires that a child's birth must be registered within a month of birth, receive a birth certificate, and be registered also for the household registration, which is the requirement for receiving basic public services (health care, education and travel permits). Furthermore, a child receives an ID card at the age of 12. See Caouette & Pack (2002), *supra* note 98.

³⁰⁸ No available academic resources and reports of relevant organisations mention this.

³⁰⁹ Seltzer (2013), *supra* note 8.

³¹⁰ See section 4.4.6. for obstacles to access birth registration process

³¹¹ Article 51 of Myanmar Citizenship Law, see Jaghai (2015), *supra* note 50.

³¹² *Id.*

³¹³ Seltzer (2013), *supra* note 8, at 287.

³¹⁴ Though they do receive technical assistance from UNHCR, *supra* note 3.

³¹⁵ NGO shadow report, *supra* note 4.; Also see below section 4.4.5. on unequal treatment

Firstly, the principles to address statelessness were introduced by the Nationality Act B.E. 2508 (1965). The Act established the principle to protect children born in Thailand to alien parents with no permanent resident status from being hindered stateless by the virtue of the aforementioned exclusionary clauses.³¹⁶ However, the procedure requires the approval by the Minister of Interior who assesses individual cases in the light of the rules prescribed by the Cabinet.³¹⁷ It is unclear who are actually protected under this provision and what circumstances are considered applicable.

Secondly, a nationality verification system³¹⁸ was established under the MOUs signed between Thailand and Myanmar in 2003.³¹⁹ The system allows undocumented migrants to receive a temporary passport as a proof of their nationality and obtain a work permit in Thailand.³²⁰ Therefore, many illegal migrants are enabled to regularise their status, improve the enjoyment of their human rights, and prevent statelessness in migration context.³²¹ This is particularly an important measure for 'illegal migrants'³²² and trafficked persons in Thailand whose identification documents are lost or disrupted, and who require an access to facilitated procedures.³²³

Thirdly, the present Nationality Act allows minors to apply for facilitated naturalisation, without any explicit exclusion of particular groups. The eligibility criteria requires 5 years of habitual residence ("domicile"), knowledge of Thai language and regular occupation.³²⁴ These naturalisation criteria are made less stringent for particular listed circumstances.³²⁵ Children who have not yet reached the age of majority may acquire assistance from their guardian in their application for naturalisation, and are exempt from possessing the qualifications criteria set forth under section 10,³²⁶ except that they must have 'good behaviour'.³²⁷ Then, children born to alien parents may access facilitated naturalisation process regardless of their parents' immigration status in principle. Facilitated naturalisation is often considered a durable solution for *in situ* statelessness.³²⁸ However, it may be a relevant solution to the target group, as they were born and have resided in Thailand for as long as over three decades.

Lastly, the RTG has adopted a Cabinet Resolution to issue an official identity document to every stateless person residing in Thailand.³²⁹ This resolution allows undocumented stateless persons to be registered in civil registry during the process of legal status determination.³³⁰ Additionally, another regulation announced by the Department of Public Administration³³¹ has "established the procedures for issuing identity documents to undocumented persons who are not recognized in any civil registry of any State".³³² The regulation further encourages the cooperation of the MoE to identify every stateless student, register and provide them with an official identity card.³³³ These are significant steps forward, as the RTG now recognises every child's right to a personality before the law.

³¹⁶ Saisoonthorn (2006), *supra* note 294, at 50.

³¹⁷ Section 7 bis paragraph 3, as amended by the Nationality Act (No.4) B.E.2551 (2008).

³¹⁸ UNHCR recognises the importance of the procedures to verify and confirm a nationality, particularly where the nationality of a person of concern is unclear or disrupted, see UNHCR (2010), *supra* note 274, at 17

³¹⁹ UNHCR (2010), *supra* note 274, at 17-18; Also see IOM. Procedures for nationality verification of Myanmar/Burma nationals in Thailand. Migrant Information Note, Issue 2. (August 2009).

³²⁰ *Id.* This process for Myanmar migrants started in July 2009.

³²¹ UNHCR (2010), *supra* note 274.

³²² See Section 4.4. for the reasons why the term is in between "

³²³ UNHCR Executive Committee. Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106. (6 October 2006).

³²⁴ Section 10(3-5) of Nationality Act (No.4) B.E.2551 (2008).

³²⁵ Section 11

³²⁶ Section 12

³²⁷ Section 10 (2)

³²⁸ Gyulai (2012), *supra* note 90.

³²⁹ 2005 National Strategy on Administration of Legal Status and Rights of Persons, see Saisoonthorn (2006), *supra* note 294, at 50.

³³⁰ *Id.*

³³¹ The Regulation of Central Registration Bureau on Conducting a Survey and Registration for the Undocumented Persons B.E. 2548

³³² Saisoonthorn (2006), *supra* note 294, at 50.

³³³ *Id.*, at 51.

To conclude, the Thai Nationality Act does not provide protection for all otherwise stateless children born within its territory. In particular, it does not allow children born in Thailand to alien parents who are refugees or considered illegal migrants to acquire a Thai nationality. The strict exclusion clause, combined with the even stricter immigration regulation policies, can render these children *de facto* and/or *effectively* stateless, as there is no law governing the reacquisition or conferral of nationality particularly safeguarding the rights of those who became undocumented in the midst of conflicts and/or displacement.³³⁴ Nevertheless, in face of increased international pressure and public awareness,³³⁵ the RTG has taken significant legislative and policy measures to address the problems of statelessness faced by children from various ethnic groups across the country. The next chapter presents the migration context in which the target group is considered rather 'illegal migrants' than children entitled for state protection and benefits of these measures.

4.3. Laws and Policies on Immigration and Asylum

4.3.1. Refugee and asylum

Thailand has not ratified the 1951 Refugee Convention or its 1967 Protocol.³³⁶ Consequently, there is no specific legislation nor administrative body governing and addressing asylum procedures.³³⁷ All policies related to asylum seekers and refugees are developed by executive bodies responsible for national security on ad hoc basis.³³⁸ In response to the mass influx of displaced persons from eastern Myanmar, and the increased security concerns at the border, the government has permitted many to stay temporarily on the humanitarian ground since 1970's.³³⁹ In this process, UNHCR signed a MOU with Mol, which provided for its mandate to address protection concerns and monitor and assist the RTG in its operations for refugee registration, resettlement³⁴⁰ and voluntary return.³⁴¹

Nevertheless, the registration documents provided by the UNHCR to recognised refugees³⁴² have no legal validity in Thailand, and other unregistered asylum seekers and stateless persons are not recognised as a person before the law, but are treated as 'illegal migrant'.³⁴³ Furthermore, the 'no new arrivals' policy was implemented in 2004, prohibiting thousands of those who fled Myanmar since then to be admitted into the camps and receiving any documents.³⁴⁴ Therefore, the organisation's role in refugee registration and camp administration have been restricted, and its documents can provide little to no protection against the risks of arbitrary immigration measures.³⁴⁵

4.3.2. Immigration Act and policies

The relevant legislation that has an impact on asylum seekers in Thailand is the 1979 Immigration Act.³⁴⁶ According to this Act, any alien who enters and/or stays in the country without a passport, visa, work permit or other forms of authorization, or with such permission expired/revoked, are considered to have violated the Immigration Act, and become subject to arrest, detention and deportation.³⁴⁷ This

³³⁴ Jaghai (2015), supra note 50, at 53.

³³⁵ Freccero & Seelinger (2013), supra note 58.; Also see UNHCR (2010), supra note 274.

³³⁶ UNHCR, supra note 3.

³³⁷ UNHCR. Analysis of Gaps in Refugee Protection Capacity: Thailand. (November 2006).

³³⁸ Mostly the Mol, see Freccero & Seelinger (2013), supra note 58.

³³⁹ Freccero & Seelinger (2013), supra note 58.

³⁴⁰ This is also done in cooperation with IOM, which provides assistance and logistical coordination.

³⁴¹ Under an agreement signed in 1998.

³⁴² The RTG does not issue any official documents for asylum seekers, but UNHCR issues a household-based identity document (mandate provided by the MOU), see UNHCR (Nov.2006), supra note 344, at 33.

³⁴³ See UNHCR (Nov. 2006), supra note 344, at 1&33; HRW. Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers. (2012), at 5. Also see Section 2.3.3. on restricted movements.

³⁴⁴ Seltzer (2013), supra note 8, at 284.

³⁴⁵ I.e. arrest, detention, deportation and exploitation, see UNHCR (Nov.2006), supra note 344, at 33.

³⁴⁶ Immigration Act, B.E. 2522

³⁴⁷ Section 12(1), 29, 54, 58 and 81 of Immigration Act, B.E. 2522

also applies to those who do not have a Thai identification card registered by MoI.³⁴⁸ Consequently, it is reported that many refugees and asylum seekers, including children, are arbitrary detained, threatened to be or actually deported, and/or further abused and trafficked by corrupt officials.³⁴⁹ Furthermore, children are reported to be incarcerated in the same immigration detention facilities as adults, for prolonged period of time than the shortest and necessary time possible.³⁵⁰

The only provision that implicitly recognises the legality of the refugees' residency, which still remains fragile and fluid even under this provision, is Article 17, which stipulates that:

In certain special cases, the Minister [of Interior], by the Cabinet approval, may permit any alien or any group of aliens to stay in the Kingdom under certain conditions, or may conditions, or may consider exemption from being conformity with this Act.

This exemption clause has been used to grant a permission for those 'who fled the fighting' in Myanmar, to reside in the nine camps in Thailand for humanitarian purposes.³⁵¹ The eligibility for admission into the camps is determined by the Provincial Admissions Boards established under this provision.³⁵² Their official status recognized by the RTG is however 'temporarily displaced persons', not refugees, and therefore the prospect of future return is the underlying assumption.³⁵³ Furthermore, this legal status for protection was strictly entitled the ethnic Hmong, Karen, Shan and Mon-Khmer ethnic groups who had immigrated into Thailand before 9 March 1976³⁵⁴ at the time, and was later amended to those who entered before 3 October 1985.³⁵⁵ Therefore, all other displacers persons entering Thailand since then are considered illegal migrants.³⁵⁶

On the other hand, those who fall under the scope of this provision could access birth registration under the Civil Registration Act 1992, and acquire a Thai nationality.³⁵⁷ Their legal status as lawful migrants is officially recognized by the RTG, and their children have the rights to permanent residence and to acquire a Thai nationality if they are born in Thailand and have "fully assimilated into Thai society".³⁵⁸

To sum, the RTG's responses to the refugee situation at the border can be characterised by its two-sided policies. On the one hand, it has a minimal intervention and hands-off policy regarding protection and basic services, making the camp population heavily reliant on external assistance.³⁵⁹ On the other hand, it has adopted a rather strict, national security oriented policies, developed by the National Security Council, concerning population, security and movement control.³⁶⁰ These policies regularly changed in response to the security concerns, public opinion and mass inflows.³⁶¹

The absence of any legal framework and protection mechanism reduce the status of many children who are refugees, stateless or victims of human trafficking to that of 'illegal migrants', without

³⁴⁸ Section 58 of Immigration Act, in conjunction with Section 5 of the Alien Registration Act, B.E.2493 (1950).

³⁴⁹ Nearly 10,000 migrants from Myanmar are reported to be deported every month for illegal entry, Baek & Subramaniam (2008), supra note 23; HRW (2012), supra note 350, at 110.

³⁵⁰ Stateless Watch for Research and Development of Thailand. Legal Opinion and Proposal to protect Pol (Abdulla). (3 August 2009).; Migrant Working Group. Indefinite detention of asylum seekers should be abolished, the extra judicial killing of a Rohingya in Phang-Nga must be independently investigated. HRDF. (3 June 2016).

³⁵¹ Freccero & Seelinger (2013), supra note 58, at 29.

³⁵² UNHCR (Nov.2006), supra note 344, at 8.

³⁵³ Id.

³⁵⁴ B.E.2519, see UNESCO (2008), supra note 282, at 4.

³⁵⁵ Id. B.E.2543 and B.E.2528.

³⁵⁶ Though some have been given residence permit. Id.

³⁵⁷ Id.

³⁵⁸ Cabinet Resolution on 29 August 2000, see Saisoonthorn (2006), supra note 294, at 49.

³⁵⁹ The assistance is coordinated under the umbrella network called the Committee for Coordination of Service to Displaced Populations in Thailand (CCPSDPT) and UNHCR. See Baek and Subramaniam (2008), supra note 23

³⁶⁰ This is done by appointing a MOI commander per camp who is in charge of daily camp operations and regulation of movements, see Freccero, J. & Seelinger (2013), supra note 59.

³⁶¹ Seltzer (2013), supra note 8.; UNHCR (Nov.2006), supra note 344.

distinguishing them.³⁶² Therefore, the strict immigration laws and policies in Thailand leave the stateless children trapped in desperate conditions without adequate legal protection and social assistance. The below section addresses how this in turn contribute to their prolonged vulnerability and violations of their fundamental rights.

4.4. Challenges for and Vulnerabilities of Stateless Children at the Border

Although the rights of children and vulnerable groups are provided and protected under the National Constitution,³⁶³ it does not refer to non-nationals' rights.³⁶⁴ Above sections illustrated the recent developments in laws and policies governing nationality, civil registration and immigration that altogether affect the rights of stateless children born to refugee parents. While it became apparent that the RTG has adopted many laws and policies to address child statelessness across the country, it is unclear whether they have been effective particularly concerning the target group of this study.

This section therefore aims to answer the question whether the relevant Thai laws, policies and other factors pose obstacles for children born to refugee parents in accessing above measures to prevent and/or resolve their statelessness and fully enjoy their fundamental rights. In order to do so, each section focuses on relevant fundamental human rights, namely, the right to freedom of movement, education and employment, standard of health and living, protection from all forms of violence and exploitation, non-discrimination, and legal identity. As illustrated in Chapter 3, not only does the RTG have obligations to ensure full enjoyment of these rights to all children within its jurisdiction, but also failure to do so may create additional obstacles for the target group to realise their right to legal identity, and therefore can be considered in contrary to its international obligation under Articles 7 and 8 of CRC.

4.4.1. Restriction of movements, resettlement and reduced assistance

The Thai Constitution provides for the right to liberty of movement and residence.³⁶⁵ Nevertheless, the RTG may impose restriction on such liberties "by virtue of the law specifically enacted for maintaining the security of the State, public order, public welfare, town and country planning, or welfare of the youth".³⁶⁶ In the light of the immigration control and public order, the movement of camp residents are therefore strictly controlled, prohibiting them to exit. Consequently, the aforementioned official status as 'temporarily displaced persons' is confined within the physical boundaries of the camps: "anyone who leaves the camps without documentation to do so, however, regardless of their camp registration status, is regarded as an irregular or illegal migrant", and are vulnerable to the strict immigration control measures enforced under the aforementioned provisions.³⁶⁷ Many children born in the camps therefore have limited or no access to basic services provided by the RTG, including opportunities for higher education and employment.³⁶⁸ Moreover, the access to birth registration and nationality acquisition processes is extremely limited, as they take place in district offices outside the camps.³⁶⁹

³⁶² McConnachie. *Forced migration in South-East Asia and East Asia*. The Oxford Handbook of Refugee and Forced Migration Studies. Oxford University Press. (2014), In: Jaghai (2015), *supra* note 50, at 32.

³⁶³ The Constitution of the Kingdom of Thailand, B.E.2550 (2007) asserts the rights of all Thai nationals under Article 5. Additionally, the most relevant provisions concerning vulnerable children are: human dignities, rights, equality and freedom of persons (Article 4), the right of children and youths to survival and development (Article 52), rights of street children to state assistance (Article 55), and social and cultural rights (Article 80).

³⁶⁴ Wrettt (2014), *supra* note 69.

³⁶⁵ Article 4, 32 & 34 of Thai Constitution B.E.2550

³⁶⁶ Article 34

³⁶⁷ Freccero & Seelinger (2013), *supra* note 58, at 29.

³⁶⁸ Zeus (2011), *supra* note 7.

³⁶⁹ See Section 4.4.6.

In addition to the challenges posed by the confined movement, the resettlement programme³⁷⁰ has impacted the lives of children left behind, despite positive intentions. The programme's eligibility criteria exclude the most vulnerable stateless children from the scheme, as an official refugee status recognised under the UNHCR's registration scheme is required.³⁷¹ As a result, the undocumented persons are left behind while their family members resettle.³⁷² Moreover, while the resettlement has caused much brain drain out of the camps,³⁷³ it also has been one of the key justifications for the donors to refrain from 'investing' the resources on higher education programmes in the camps.³⁷⁴

Moreover, the two-sided policies of the RTG resulted in a unique system of community-based camp management by camp committees, which generally consist of each camp's majority ethnic group.³⁷⁵ The presence of various actors with different mandates led to the development of multiple registry systems that provide inconsistent camp demographics.³⁷⁶ Considering over 40,000 individuals are not registered,³⁷⁷ and the camp's population growth rate is 2.7 per cent, the inadequate registry system is a concerning limitation.

Furthermore, the recent developments in political atmosphere in Myanmar³⁷⁸ have led drastic reduction in funds from international donors. The withdrawal of international NGOs, combined with the side-effects of resettlement programme, have resulted in reduced qualities and quantities of basic services (education, health care, food ration, and so on),³⁷⁹ undermining the dignity and adequate standard of living for the left behind children. While the push for repatriation increases, the protection needs of these children, particularly those who are stateless, are increasing and require much more attention, adequate resource and assistance during the preparation process.³⁸⁰

In general, "constraining refugees in camps causes them to become dependent on international assistance for basic survival needs, prevents them from achieving economic self-reliance, and exposes them to human rights abuses".³⁸¹ Indeed, as elaborated in below sections, the present camp atmosphere is characterised with lack of food, basic supplies, health and education services, and increased sentiments of fear and uncertainty, due to their (almost) complete reliance on the external assistance. This in turn has negatively affected children's social and psychological well-being: a study revealed that many youths and adolescents showed heightened anxiety, frustration and tension due to lack of control over their life and future.³⁸² Furthermore, many youths in the camps also suffer from "mental health problems, loss of self-sufficiency and increased short-term thinking".³⁸³

4.4.2. Education, training and employment opportunities

The Thai Constitution provides for universal right to free and quality primary education for all, at least till the age of 12 years.³⁸⁴ The provision does not explicitly refer to 'temporary displaced' or stateless

³⁷⁰ The programme was introduced by UNHCR and IOM in 2005. Since then, over 80,000 camp refugees have been sent to various hosting countries, including the U.S., Canada and Australia, UNHCR (2010), supra note 274.

³⁷¹ Freccero & Seelinger (2013), supra note 58.

³⁷² Freccero & Seelinger (2013), supra note 58.

³⁷³ For example, more educated ones who speak good English are more likely to be selected than others, resulting in reduced numbers of teachers, doctors, and other personnel who were taking charges of daily operations in the camps, see Zeus (2010), supra note 7, at 260.

³⁷⁴ Id.

³⁷⁵ Freccero & Seelinger (2013), supra note 58, at 30-31.

³⁷⁶ Id.

³⁷⁷ Freccero & Seelinger (2013), supra note 58.

³⁷⁸ See Section 2.2.3.

³⁷⁹ Burma Link, supra note 27.

³⁸⁰ UNHCR, supra note 3.

³⁸¹ Seltzer (2013), supra note 8, at 279.

³⁸² Akiyama, T. et al. Mental Health Status Among Burmese Adolescent Students Living in Boarding Houses in Thailand: A cross-sectorial study. *BMC Public Health*, 13:337. (2013).

³⁸³ Bandow, D. Time to Close Thailand's Camp for Burmese Refugees? CATO Institute. (16 December 2014). (<http://www.cato.org/blog/time-close-thailands-camps-burmese-refugees>), last visited (28-07-2016).

³⁸⁴ Article 49 of Thai Constitution B.E. 2550 and Section 10 of Education Act (1999).

children. However, the present 'Education for All' policy asserts that education opportunities should be accessible for all children "irrespective of whether they could produce evidence of Thai nationality or civil registration".³⁸⁵ Furthermore, every child is entitled to obtain an official graduation certificate and movement restrictions should be waived to enable access to suitable schools for migrant children.³⁸⁶

This policy not only aimed at promoting access to education for all, but also was combined with the effort to reduce child statelessness. The regulation set out procedures to enhance the accessibility and allocate public funds to educational institutions for undocumented and stateless persons.³⁸⁷ It also entitled them to acquire an identity card, access the facilitated status determination process, and be granted "a permission to travel outside the designated areas for education[al purposes]" until graduation.³⁸⁸ Nevertheless, stateless children born to refugee and illegal migrant parents are excluded from this measure.³⁸⁹ Concerning this particular group of children,³⁹⁰ MoE only has an obligation to "provide appropriate education programs [for the children and youth in the camps] in order to improve their quality of life and peaceful integration into society".³⁹¹

Generally, many migrant and refugee students and their families are more interested in accessing the Thai state education system, as they seek for local integration rather than eventual return to Myanmar.³⁹² The official certificate from Thai schools not only enables them to access higher education and employment opportunities, but also can serve as an identity document for stateless students.³⁹³ Nevertheless, although there has been a substantial increase in the attendance since the policy change in 2005,³⁹⁴ there are several obstacles to access quality education.³⁹⁵ In addition to financial³⁹⁶ and language constrains,³⁹⁷ administrative and procedural complications discourage many from actually enrolling into the schools.³⁹⁸ Moreover, the fear of having their illegal status exposed to the state authorities and high mobility of their parents³⁹⁹ prevent children from enrolling and staying in one school. Additionally, in reality, the access to education for majority of children is limited to the physical boundaries of the camps due to the strict immigration control.⁴⁰⁰ In the camps, the education available to children is limited in quality and capacity due to reduced funds and teachers.⁴⁰¹

The MoE regulation on teaching curriculums⁴⁰² is another issue that has both positive and negative implications: while it enhances the child's ability to integrate into the local society and

³⁸⁵ Minister of Education regulation, approved by the Cabinet on July 5, 2005, see Nawarat, N. Thailand education policy for migrant children from Burma. *Procedia – Social and Behavioural Sciences*, 47: 956-961. (2012), at 957.

³⁸⁶ *Id.*

³⁸⁷ Saisoonthorn (2006), *supra* note 294, at 51.

³⁸⁸ *Id.*

³⁸⁹ *Id.* For detailed demographics of camp population, see **Annex I**.

³⁹⁰ For demographics of the target group, see Chapter 1 and 2.

³⁹¹ Saisoonthorn (2006), *supra* note 294, at 51.

³⁹² Many are pessimistic about the living conditions and peace processes at home, and wish to integrate and seek employment and future opportunities in Thailand, see Nawarat (2012), *supra* note 390, at 960.

³⁹³ *Id.*

³⁹⁴ See Nawarat (2012), *supra* note 390, at 958 for factors contributing to the increase and statistics on attendance.

³⁹⁵ In fact, 57 % of children without citizenship do not go to primary school, more than half do not make it to upper school, see Hepburn, S. & Simon, R. J. *Human Trafficking Around the World: Hidden in plain sight*. Columbia University Press. (2013), at 82.

³⁹⁶ The school fee is free, however, the other costs for school materials and uniforms fall heavily on the poor migrants, particularly those who have limited access to economic opportunities, Nawarat (2012), *supra* note 390.

³⁹⁷ *Id.* Although some NGOs assist to employ bilingual teachers in some provinces, such as Mae Sot and Chiang Mai, this is very limited.

³⁹⁸ *Id.*

³⁹⁹ *Id.* There is a conflict between migration labour policy and education policy, and many of those who live outside the camps are rootless and have to move according to seasonal patterns of the job market.

⁴⁰⁰ Su-Ann, O. & Stouwe, M., Education, Diversity, and Inclusion in Burmese Refugee Camps in Thailand, *Comparative Education Review*, 2008, at 590 & 593, in Wrettt (2014), *supra* note 69, at 1.

⁴⁰¹ The educational materials, infrastructure repair, and salaries and training for the teachers are all provided by NGOs, who have seen reduction in funds, Wrettt (2014), *supra* note 69.

⁴⁰² Both in camps and migrant schools, Zoa, 'Thailand' <<http://www.zoa-international.com/content/thailand>> accessed 1 August 2014

potentially naturalise, it also limits their right to freedom of thought, conscience and religion and to ethnic cultures and values.⁴⁰³ Balancing the two interests is particularly a challenge in the migrant schools, where the organisers are “largely concerned with preserving and developing Karen and Shan national identities”.⁴⁰⁴

Many youths from the camps are unable to receive higher education and therefore have no prospects for future employment.⁴⁰⁵ While increasing numbers of NGOs have implemented vocational training for youths, employment is prohibited for those who are deemed to have entered Thailand illegally.⁴⁰⁶ Furthermore, all ‘migrants’ who have not registered with the MoI before 2004 are prohibited from acquiring a work permit.⁴⁰⁷ The lack of employment opportunities and work permit and prohibition to own or rent property⁴⁰⁸ altogether limit their access to food, livelihood activities, and economic means to sustain the adequate standard of living. In such dire conditions, some chose to attend the state-run or migrant schools outside the camps, and seek for better employment opportunities, despite the risks of immigration measures as well as criminal proceedings.⁴⁰⁹

To sum, despite the national laws and policies promoting the right to education for all, the citizenship and immigration status as well as socio-economic situation create obstacles to the full enjoyment of this right in practice. While a school certificate can serve as an important identification document and a step towards local integration and naturalisation, lack of access to education can keep many children trapped in the protracted statelessness, making them vulnerable to further exploitation, trafficking, sexual and economic exploitation and prostitution, as these are “one of the few opinions available” for those faced with dire living conditions and no future prospects.⁴¹⁰

4.4.3. Healthcare and adequate standard of living

In 2002, the RTG introduced a major social policy reform aiming at providing universal health care across the country.⁴¹¹ As a result, the Universal Coverage (UC) program was established, aiming to improve the access to health care through the benefit package targeting the poor and most vulnerable⁴¹² and the existing health insurance schemes.⁴¹³ In practice, it was implemented as a pilot program in administrative hurry before any clear guiding legislation was passed, resulting in inconsistent and uneven coverage among stateless population.⁴¹⁴ While those who have registered and received the UC card during the pilot phase continued to benefit from the scheme to access subsidised health care, others were excluded after the law redefined the eligibility criteria for the government healthcare programs.⁴¹⁵ Although the new law provides for targeted resource allocation to promote efficient and accessible service in local areas,⁴¹⁶ it also explicitly states that only Thai population is entitled to benefit from the new scheme.⁴¹⁷

⁴⁰³ Articles 8, 14 & 30 of CRC; Those living in refugee camps have reportedly been detained for expressing their opinions, see Wreth (2014), supra note 69.

⁴⁰⁴ They are called ‘migrant learning centres’, see Nawarat (2012), supra note 390, at 959.

⁴⁰⁵ Only primary and middle school education are available in the camps, see Hepburn & Simon (2013), supra note 400.; Also see Zeus (2011), supra note 7.

⁴⁰⁶ Section 9 & 10 of Thailand Alien Working Act, B.E. 2551 (2008)

⁴⁰⁷ Immigration Act, see Baek & Subramaniam (2008), supra note 23.

⁴⁰⁸ Condominium Act, Section 19, in Wreth (2014), supra note 371.

⁴⁰⁹ Especially if they are found working illegally, especially in prostitution and other illegal labour, see Wreth (2014), supra note 69.

⁴¹⁰ Id, at 13.

⁴¹¹ The Universal Health Care (UHC) policy was launched and the National Health Security Act was passed, see ILO. Thailand: Universal Health Coverage. Fact Sheet. (March 2014).

⁴¹² So called ‘30-Baht program’, see Harris (2013), supra note 279, at 114.

⁴¹³ The Civil Servant Medical Benefit Scheme and the Compulsory Social Security Scheme

⁴¹⁴ Harris (2013), supra note 279, at 114.

⁴¹⁵ Id. at 117.

⁴¹⁶ Article 38 of National Health Security Act, B.E.2545 (2002).

⁴¹⁷ Article 5 of National Health Security Act

Furthermore, the introduction of the new national ID card⁴¹⁸ and computerised civil registry system posed additional obstacle for stateless migrants to access health care and other basic services. While Thai citizens received 'Smart cards', stateless people received a distinct, pink plastic card.⁴¹⁹ This served as a visible marker of their status and further consolidated the exclusion in practice, as the access to treatments to health centres and hospitals required a presentation of the Smart ID card.⁴²⁰

Therefore, the universal health coverage and basic social benefits are limited to Thai nationals in law and policy. However, in practice, some hospitals treat stateless people for free at their discretion,⁴²¹ and others receive and treat individuals from the camps as long as the bills are paid.⁴²² This 'charity' commitment by local hospitals, together with the heightened public health concerns⁴²³ and international pressure,⁴²⁴ pushed the RTG to expand its public funding to cover costs for treating stateless persons in 2010. Although it is 'contingent rights',⁴²⁵ the right to healthcare was therefore granted to stateless persons in practice.

Nevertheless, the lack of proper identification card and official recognition of their legal status⁴²⁶ combined with the limited mobilisation⁴²⁷ hinders many children of 'illegal migrants' and refugees from accessing hospitals and clinics outside the camps. This has many negative implications concerning the right to legal identity as well as right to health and adequate standard of living. Without access to state healthcare institutions, many cannot receive an official delivery certificate, which is the fundamental document required for birth registration.⁴²⁸ Without documentation, children cannot legally receive vaccination neither.⁴²⁹ Due to the lack of assistance from the RTG⁴³⁰ and the fund reduction, basic services provided by NGOs including health care have been reduced in quality and quantity,⁴³¹ having detrimental effects on children in the camps. The reduced food rations⁴³² and geographical disparity in access to drinking water and adequate sanitary conditions⁴³³ have left some children suffering from curable illness such as malaria and malnutrition.⁴³⁴

4.4.4. Protection from all form of violence and exploitation

Although it is much less evident, there is a close "link between protracted displacement and increased risks of human trafficking".⁴³⁵ There are a number of factors that create the higher vulnerability of stateless children born to refugee parents including: experiences in and consequences of conflicts (i.e. trauma, loss of family and separation, military recruitment and sexual exploitation and abuse), gender discrimination, pressure to support the family, limited means of income generation and dire economic

⁴¹⁸ 'Smart cards' store substantial amount of personal information on database, see Harris (2013), supra note 279.

⁴¹⁹ Id., at 119.

⁴²⁰ Id.

⁴²¹ Id.

⁴²² HRW (2012), supra note 350, at 31.

⁴²³ Infectious diseases emerged at the border areas

⁴²⁴ The IoM and WHO for instance put pressure on government to include stateless persons in the UC scheme claiming that access to healthcare is a basic human right, see Harris (2013), supra note 279, at 119.

⁴²⁵ In Harris' term, as it is not the same as the unconditional rights entitled to Thai nationals. Id.

⁴²⁶ The refugee registration with UNHCR is said as the prerequisite to accessing health care, see NGO Shadow Report, supra note 4

⁴²⁷ Exit from the camp requires an authorisation from the RTG even for medical purposes, see Wwrett (2014), supra note 69.

⁴²⁸ See **Annex II** for procedures of birth registration and delivery certificate for 'illegal migrants'.

⁴²⁹ ISI. CMW-CRC Joint General Comment on the Human Rights of Children in the Context of International migration. Stakeholder Submission. (2016), at 8.

⁴³⁰ Wwrett (2014), supra note 69, at 13.

⁴³¹ HRW (2012), supra note 350, at 30.

⁴³² Burma Link, supra note 27.

⁴³³ This was highlighted by the UN Special Rapporteur, with explicit reference to stateless and undocumented migrant children in the rural and border areas, see UN News Centre. UN expert calls on Thailand to eliminate disparities on access to water and sanitation. (8 February 2013),

(<http://www.un.org/apps/news/story.asp?NewsID=44099#.U9up-fldXT9>), last visited (08-06-2016).

⁴³⁴ Wwrett (2014), supra note 69.

⁴³⁵ Seltzer (2013), supra note 8, at 279.

situation, lack of legal protection, and lack of identity.⁴³⁶ Moreover, the desperate and protracted refugee situation adds another dimension to the economic and social insecurity. Children who have no access to proper education and legitimate employment opportunities, no identity documentation, and live in dire conditions become an ideal prey from their early age for those who want to exploit them.⁴³⁷ They “have no choice but to undertake unlawful and exploitative work” in order to improve their social, economic and political situations.⁴³⁸ Former victims of trafficking, abuse and military recruitment are particularly at higher risks, as they are less vigilant about their well-being.⁴³⁹ They experience various forms of exploitation and child labour, the most common ones being “domestic service, sex services, and begging rings”.⁴⁴⁰

In addition to the protracted and dire circumstances, the lack of official rule of law, justice, police protection and identification documents increases the vulnerability of these stateless children living in the camps.⁴⁴¹ The RTG does not offer specialised services and assistance for child victims of trafficking.⁴⁴² In contrary, the collusion between immigration officers and owners/employers involved in child labour, economic and sexual exploitation, smuggling and trafficking reflect the insecure legal status of stateless children born to refugee parents.⁴⁴³ The case of Samaesan⁴⁴⁴ illustrates how many displaced children and women are subjected to smuggling and trafficking, mostly by agents in Myanmar, Thai fishermen and corrupt soldiers and officials,⁴⁴⁵ due to their lack of documentations and (often inevitable) choice to take irregular route.⁴⁴⁶ Some of them are coercively brought into forced labour, mainly sold to serve the fishermen.⁴⁴⁷ If they try to escape or demand better work conditions, they will face further abuse, rape, and detention and deportation enforced by the Thai officials.⁴⁴⁸ As a result, many cases go unreported as the victims fear of being identified as illegal and with criminal activities, and being subject to prosecution, imprisonment, deportation and/or further abuse.⁴⁴⁹

Regardless of the national laws and policies aiming to prevent and address the problems of child labour,⁴⁵⁰ prostitution⁴⁵¹ and trafficking,⁴⁵² it is evident that the RTG fails in practice to protect all

⁴³⁶ For further discussions on each factors, see Seltzer (2013), supra note 8.

⁴³⁷ Mostly smugglers, traffickers and corrupt Thai officials. While most trafficking cases target the undocumented persons living outside the camps, some incidents of traffickers entering the camps to take women and children away have been reported, see HRW (2012), supra note 350, at 111.

⁴³⁸ Seltzer(2013), supra note 8, at 280; HRC(Dec.2015), supra note19, para36, in ISI (2015), supra note 21, at 9.

⁴³⁹ Id.

⁴⁴⁰ Id., at 288.

⁴⁴¹ Id.

⁴⁴² Id.

⁴⁴³ Id., at 284.

⁴⁴⁴ UN Doc THA011. Centre Against International Human Trafficking, Office of the Attorney General. 'Samaesan' Criminal Court of Bangkok. (28 January 2013).

⁴⁴⁵ ECPAT International. Alternative Report following the initial report from Thailand on the implementation of the optional protocol to the convention on the rights of the child on the sale of children, child prostitution and child pornography. (July 2011), at 7.

⁴⁴⁶ 'Samaesan' case (2013), supra note 449.

⁴⁴⁷ Wrett (2014), supra note 371, at 14.

⁴⁴⁸ Seltzer (2013), supra note 8.

⁴⁴⁹ For instance, the residents complained that the absence of responses from the Thai guards even when some cases of missing children are reported, Wrett (2014), supra note 69, at 14; Also see Seltzer (2013), supra note 8.

⁴⁵⁰ Article 26(6) of Child Act prohibits employment of (including seeking to employ) children for labour and in conditions that may be physically and mentally harmful for them. The Thai Labour Protection Act prohibits child labour, which is defined as employment of those aged under 15. In addition, Sections 16 and 89 set out safeguards of the rights of workers and labour conditions in Thailand, including, inter alia, guaranteeing minimum wage regardless of nationality and prohibition of sexual exploitation of child employees. UNHCR (2013), at 29.

⁴⁵¹ Article 26(5)&(9) prohibits any acts that would “force, threaten, induce, encourage, consent to or allow a child to be used as an instrument of performing or acting in a pornographic manner”, in Wrett (2014), supra note 69; also see Section 11 of Thailand Prevention and Suppression of Prostitution Act, B.E. 2539 (1996) (Prostitution Act)

⁴⁵² Thailand has signed the Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region in 2004. Article 22 of this agreement calls for the state-parties to not only provide protection, remedies and means of rehabilitation and support, but also for measures of prevention of trafficking, such as poverty reduction programs, increased medical care, provision of personal legal documentation, including

children from violence, sexual and economic exploitation child labour and trafficking/prostitution, nor to provide procedural safeguards to ensure effective remedies and rehabilitation assistance for the victims. Due to the extreme poverty and lack of identification document(s), these children fall out of the personal scope of the national regulations and protection schemes.⁴⁵³

Another category of vulnerable group of children that needs special attention is former child soldiers. The CRC Committee has expressed its concerns that the asylum seeking and refugee children residing in the border areas may be former child soldiers.⁴⁵⁴ Myanmar is the origin of the largest number of child soldiers in the world.⁴⁵⁵ Children recruited by militants are subject to systematic violence, humiliation, and forced involvement in violence, abuse and killings against civilians.⁴⁵⁶ Despite the recent demobilisation, disarmament and reintegration (DDR) efforts, the Special Rapporteur expressed her concern about the remained quota-based recruitment system which still allows the recruitment of children into security forces as latest as March 2015.⁴⁵⁷

The children born to the camps, those who are unregistered and stateless in particular, are vulnerable to re-recruitment⁴⁵⁸ or may voluntarily opt to enlist themselves “as a means of protection and survival ... given their lack of education and economic prospects”.⁴⁵⁹ Enslavement of a person⁴⁶⁰ and/or causing a person to be in such a position similar to slavery is criminalised under the Criminal Code in Thailand.⁴⁶¹ It appears migrant workers and children from Myanmar who are victims of forced labour and enslavement receive remedy under the Thai criminal proceedings.⁴⁶² Nevertheless, the lack of targeted identification and protection schemes, leaving many stateless children without any assistance, place them at higher risk of re-recruitment.⁴⁶³

In general, the inconsistency in terms⁴⁶⁴ and lack of understanding about the problems result in grouping children into one category of statelessness, ignoring particular circumstances that might make specific groups of children more vulnerable and require targeted strategies to protect.⁴⁶⁵

4.4.5. Unequal treatment

The Thai Constitution provides that all persons are equal before the law and shall enjoy equal protection under the law, and state shall take special measures to eliminate obstacles to promote

birth registration Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region (Yangon, 29 October 2004), (COMMIT MOU), see Wrett (2014), supra note 371.

⁴⁵³ Seltzer (2013), supra note 8, at 288.

⁴⁵⁴ UNDOC CRC/C/OPAC/THA/CO/1, (CRC). Consideration of reports submitted by States parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict' 59th Session. (21 February 2012), para 21.

⁴⁵⁵ See also Section 2.2.2.

⁴⁵⁶ UNDOC S/2013/258, Security Council. Report of the Secretary General on Children and Armed Conflict in Myanmar. (1 May 2013).

⁴⁵⁷ Id.

⁴⁵⁸ In 1995, the conflicts in Myanmar was extended to the neighbouring camps in Thailand, and the siege was said to have aimed at obtaining forced labour for military operations, see Seltzer (2013), supra note 8, at 288.

⁴⁵⁹ Id.

⁴⁶⁰ Slavery is defined as the “holding of an individual for the purpose of performing forced or compulsory labour”, see UNDOC CRC/C/THA/Q/3-4/Add.1, (CRC). List of issues concerning additional and updated information related to the third and fourth combined periodic reports of Thailand. Written replies of Thailand' 59th Session. (20 January 2012), at 66.

⁴⁶¹ Section 312 of Criminal Code B.E.2499 (1956), as amended until the Criminal Code (No.17), B.E. 2547 (2003).

⁴⁶² See for example the case of Sanya Boonmee, Kaew Kongmuang and Manus Boonmee, in Wrett (2014), supra note 69, at 10. The remedies normally take a form of compensation, and the effectiveness therefore is questionable.

⁴⁶³ CRC Committee (2012), supra note 465, at 21; Also see Security Council (2013), supra note 461.

⁴⁶⁴ Inconsistent and divergent concepts are used by administrative bodies of RTG to describe statelessness, including: “stateless, status-less, nationality-less, and rootless, UNHCR. Greater Reduction of Statelessness. (<http://reporting.unhcr.org/node/2957>), last visited (28-07-2016).

⁴⁶⁵ UNHCR (2010), supra note 274, at 12.

equal rights.⁴⁶⁶ Nevertheless, the discrimination grounds prohibited by the constitution do not explicitly include immigration status, but “difference in origin, race, language, sex, age, physical or health condition, personal status, economic or social standing, religious belief, education or Constitutional political views”.⁴⁶⁷ The provision is not an open clause as Article 2 of CRC and Article 14 of ECHR which includes ‘other status’ as one of the prohibited discrimination grounds. Therefore, it is unclear to what extent the rights of the target group of this study are protected under the law in Thailand in the light of the non-discrimination principle.

In practice, two types of unequal treatments that may be considered discriminatory can be observed. Firstly, there is a clear difference in treatments between regularised/authorised migrants and citizens, and those considered ‘illegal’ and ‘temporary displaced persons’. Above sections illustrated children born in Thailand to parents from the latter categories generally fall out of most of the universal coverage policies, due to the prevalence of immigration measures over child rights principles.

Secondly, some field studies⁴⁶⁸ show that there is inequality amongst the target groups of this study, leaving some ethnic minority groups more excluded and marginalised than others. In particular, people from the ethnic Shan have much limited access to the established camps. The Kuang Jor camp, established by them in 2002, has not been officially recognised by neither the RTG nor UNHCR.⁴⁶⁹ As a result, the assistance by INGOs to this camp is only authorised at the district level, and therefore very limited.⁴⁷⁰ People from the Shan community feel that they have been unfairly treated, with UNHCR not recognising their refugee status and ‘preferring’ other ethnic groups for the resettlement programme.⁴⁷¹ Furthermore, women and girls from ethnic Shan group are reportedly more vulnerable to social, economic and sexual exploitation, trafficking and prostitution, due to the deep rooted prejudice against them.⁴⁷²

4.4.6. Access to procedures

Section 4.2. illustrated that the RTG has adopted and implemented measures to address the issue of statelessness.⁴⁷³ In theory, all children born in the camps should have access to at least official birth certificate and assistance to naturalisation, irrespective of their parents’ legal status. Nevertheless, in practice, majority of them grow up without being registered their birth or even having delivery certificate issued. In addition to aforementioned immigration, socio-economic and vulnerable status, there are various challenges of effective implementation contributing to this protection gap.

The largest obstacle is the fear of being identified as illegal migrants and being subjected to arbitrary arrest, detention, deportation and/or exploitation. For this fear, many unregistered migrants are hesitant to give birth at local hospitals, and more babies are assumed to be delivered by midwives in their community and remain unregistered.⁴⁷⁴ As a result, the state and international agencies such as UNHCR face significant obstacles to identify the exact number and profile of stateless children and unregistered babies.⁴⁷⁵

⁴⁶⁶ Article 30 of Thai Constitution B.E. 2550

⁴⁶⁷ *Id.*

⁴⁶⁸ Wrrrett (2014), *supra* note 69.

⁴⁶⁹ The Branch Foundation. Kung Jor Shan Refugee Camp @ Thai-Burma Border.

(<http://www.thebranchfoundation.org/projects/thai-burma-border/shan-refugee-camp/>), last visited (08-6-2016).

⁴⁷⁰ See **Annex I**.

⁴⁷¹ Wrrrett (2014), *supra* note 69, at 13.

⁴⁷² Crawford, C. F. Cultural, Economic and Legal Factors Underlying Trafficking in Thailand and Their Impact on Women and Girls from Burma. *Cardozo Journal of Law & Gender*. (2006), at 821.

⁴⁷³ The first effort to implement the civil registration started in 1956.

⁴⁷⁴ Hepburn, S. & Simon R. J., *Human Trafficking Around the World: Hidden in Plain Sight*, Columbia University Press, 2013, at 81-82.

⁴⁷⁵ Freccero & Seelinger (2013), *supra* note 58.

In addition, lack of human and financial resources for the district teams raise additional challenge to provide facilitated travel arrangements or mobile registration units for unregistered populations in the camps.⁴⁷⁶ In particular, ‘illegal migrants’ and ‘temporarily displaced persons’ fall out of the recent commitments by the RTG to allocate its funds for inclusionary policies. Therefore, there is a lack of adequate funding allocated specifically to meet the specific needs of the most vulnerable, stateless children born to refugee parents.⁴⁷⁷

The geographical discrepancy and lack of recognition of national laws and policies at the provincial and district level are another obstacles to accessing the naturalisation or civil registration processes.⁴⁷⁸ Although the Cabinet Resolutions and Civil Registration Act should prevail over provincial orders in legal terms, many district officers follow Provincial orders which are not always in compliance with the national policies in practice.⁴⁷⁹ In addition, the amendment to the Nationality Act led to further confusion: many interpret the implications of the wording of Section 7bis as to indicate that unregistered children born in Thailand may be considered illegal aliens.⁴⁸⁰ Therefore, local hospitals tend not to issue an official birth certificate for children of migrants, or even remove the records from its registry in order to prevent them from claiming a Thai nationality.⁴⁸¹

Moreover, the time limit to report the birth to the district registrar, the first step to initiate the birth registration process, can also be an obstacle. The birth must be reported to a district registrar within 15 days, with a possible extension up to 30 days after the birth.⁴⁸² Language is another barrier to accessibility: the application form and procedures are all in Thai, and no interpretation is available for aliens.⁴⁸³

In addition to these practical, physical and geographical constrains, the lack of awareness regarding the need and importance of official documentation to establish proof of birth for children is another challenge. Many parents simply lack intensives to put their effort to register their children’s birth, given the day-to-day hardships.⁴⁸⁴ For them, the time and money they would have to spend in acquiring a birth certificate is not worth it when they could be spending it on getting food and other basic necessities.

Despite the aforementioned policy of retrogressive measures, children born to unregistered parents and those without birth certificate (“backlog cases”) face challenges to gain access to the established procedures.⁴⁸⁵ Although there is no age limit provided in law, a child older than 15 years old cannot apply for a retroactive birth certificate in practice.⁴⁸⁶ The only solution for those who are above the age 15 is to have his or her name registered in the household registration.⁴⁸⁷ Without official birth certificate, they have no means of acquiring neither Myanmarese nor Thai nationality.

Furthermore, the nationality verification process is rather complex, costly,⁴⁸⁸ requires the assistance from an employer, and involves some rules that excludes certain groups of migrants from

⁴⁷⁶ UNHCR, supra note 281.

⁴⁷⁷ Hugué, J. W. & Punpuing, S. *International Migration in Thailand*. IOM. (2005), at 43.

⁴⁷⁸ See the case of Ms.Aryu Namthep and Ms.Lun-Hom, in Saisoonthorn (2006), supra note 294, at 52.

⁴⁷⁹ Id.

⁴⁸⁰ Hepburn & Simon (2013), supra note 400.

⁴⁸¹ Nyo, N. *Burmese Children in Thailand: Legal aspects*. *Legal Issues on Burma Journal*, 10. (2001).; Also see Hepburn & Simon (2013), supra note 479, at 81.

⁴⁸² Article 18 of Civil Registration Act

⁴⁸³ At least not found in the available sources. For the official application and related forms, see UNESCO (2008), supra note 282, at 16.

⁴⁸⁴ NGO shadow report, supra note 4.

⁴⁸⁵ UNHCR, supra note 281.

⁴⁸⁶ UNESCO (2008), supra note 282.

⁴⁸⁷ Id.

⁴⁸⁸ The application for a Visa alone requires a fee of THB 2,000, in addition to the THB 100 for apply to work permit, and THB 1,800-3,600 for a 1-2 years permit, see IOM (2009), supra note 324.

benefitting.⁴⁸⁹ In practice, only migrants with valid work permits are eligible for applying and those who work in the fishery and household work sectors cannot enter social security schemes,⁴⁹⁰ while they are most vulnerable to trafficking and statelessness. Furthermore, there is no possibility to improve the status for those who could not have their nationality confirmed by any state.⁴⁹¹

To sum, this section illustrated that the strict immigration control leads to dual deprivation of children's rights, due to their interdependency and invisibility: on the one hand, the access to the process to acquire birth registration and nationality is often limited by infringements of other rights, and on the other hand, lack of identification documents often undermines the enjoyment of fundamental human rights. Undocumented children face various obstacles to access basic services, such as education, healthcare, and food, are excluded from the UNHCR's resettlement programme, and are at higher risks of abuse, violence, economic and sexual exploitation, abduction and trafficking, and re-recruitment for military services. The restricted movements for camp residents creates additional barrier to access higher education and further job opportunities. Altogether, lack of official identification document(s), confinements imposed by the Thai government, and subsequent uncertainty have negative social and psychological consequences for the children living in protracted refugee situation.

4.5. Conclusion on Thai Country Situation

The RTG has adopted and implemented measures to address the problems of child statelessness and promote universal coverage of basic services. Nevertheless, such legislative and policy efforts appear to have reduced problems for some groups, while creating more challenges for others. The strict immigration measures, combined with their ambiguous status, fear for being identified and subjected to detention, deportation and/or abuse, reinforce the statelessness and invisibility of the children born to refugee parents with irregular legal status. This in turn makes them vulnerable to trafficking, exploitation and violations of their rights as they remain hidden behind the radar without access to state protection, basic services and economic opportunities to build a secure life.⁴⁹² These children's reality reflects the "phenomenon of uneven inclusion" which intentionally exclude those deemed to be 'illegal migrants'.⁴⁹³ Their legal status remains ambiguous and unrecognised due to the absence of any legal framework or formal procedures on refugee protection.

Statelessness amongst these children is a striking issue that needs to be addressed given the increased promotion for repatriation.⁴⁹⁴ Without an official identification document to prove their nationality, they cannot return to Myanmar safely,⁴⁹⁵ nor integrate into the Thai society. What are appropriate responses that the RTG can adopt to better protect the rights of these children during the processes of durable solutions, in the light of international human rights standards, while respecting the interests for public security and immigration control? Keeping in mind aforementioned challenges, the next chapter analyses the RTG's compliance with the international standards⁴⁹⁶ and provides recommendations on measures to ensure the safety and dignity of stateless children living in protracted refugee situation.

⁴⁸⁹ Id.

⁴⁹⁰ Id.

⁴⁹¹ The pertinent resolution of the Cabinet calls for the National Security Council and related authorities to look into how to address the situation of persons whose applications for nationality verification are rejected. See IOM. Extension of Nationality Verification Process: Frequently Asked Questions. Migrant Information Note, Issue 4. (February 2010).

⁴⁹² See Section 2.3.2. and 4.4. on their vulnerability.

⁴⁹³ Harris (2013), supra note 279, at 123.

⁴⁹⁴ Naing, S. Y. Burma: Unseen Pressures Behind Refugee's Voluntary Return. The Irrawaddy. (17 June 2016), (<http://www.irrawaddy.com/burma/unseen-pressures-behind-refugees-voluntary-return.html#.V2RG6tdTcMU.linkedin>), last visited (01-07-2016).

⁴⁹⁵ Id. Even if some of them actually wish so.

⁴⁹⁶ See Chapter 3.

5. Analyses

5.1. Introduction

Building on the previous two chapters, this chapter evaluates the RTG's compliance with the international obligations vis-à-vis stateless children born to refugee parents in Thailand. Reflecting on the challenges in realising their rights,⁴⁹⁷ the first section assesses child rights issues raised by the present laws, policies and implementation measures concerning their right to legal identity. The chapter then concludes with recommendations on measures to ensure the safety and dignity of stateless children living in protracted refugee situation throughout the processes of durable solution.

5.2. Thailand's Compliance with International Obligations

As presented in chapter 4, although positive developments to address statelessness in general can be observed, the legal frameworks specifically concerning stateless children born to refugee parents are not expressly guided by the international standards, the CRC in particular. In contrary, many of their fundamental human rights can be negatively affected by their lack of legal identity particularly in the context of migration control.

One of the major concerns are the child's right to birth registration and name immediately after birth,⁴⁹⁸ and to acquire a nationality particularly when the child may otherwise be stateless,⁴⁹⁹ arising from the gaps in laws and policies concerning civil registration, nationality and immigration control.

Regarding birth registration,⁵⁰⁰ it is evident that the RTG has introduced legislative reforms and developed policies and action plans to address child statelessness by promoting effective registration system in remote areas and taking specific measures to meet the needs of the target group. These legislative, policy and administrative measures are in compliance with the international obligations to register every child's birth immediately under Article 7(1) of the CRC and Article 24(2) of the ICCPR,⁵⁰¹ when strictly looking at laws and policies on birth registration.

Regarding nationality acquisition, the present Nationality Act does not provide protection for all otherwise stateless children born within its territory. Under the exclusion clauses, children born in Thailand to alien parents, who are deemed illegal migrants and/or do not possess permanent residence permit, are prohibited from acquiring a Thai nationality at birth. Furthermore, the present Immigration Act prevents those deemed 'illegal migrants' from accessing the facilitated naturalisation and nationality verification procedures by requiring the applicant to have a regular occupation and proof from the employers. Additionally, there is no law governing the reacquisition or conferral of nationality particularly safeguarding the rights of those who became undocumented in the midst of conflicts and/or displacement. All in all, combined with the strict immigration measures, the present Nationality Act and policies concerning nationality acquisition not only hinder many children born to refugee parents *de facto* and *effectively* stateless, but prevents them from acquiring a nationality accordingly to *jus soli* approach, even when they may be stateless otherwise.

This can be understood as in contrary to the international standards, particularly Article 24(3) of the ICCPR and Article 7(1) of the CRC, as these provisions require states to provide safeguards in national laws and take special measures of implementation to ensure that a child has a nationality at birth where the child would otherwise be stateless.⁵⁰² This does not mean that states are required to apply the *jus soli* principle to every child born in its jurisdiction. Nevertheless, considering the high

⁴⁹⁷ See Section 4.4.

⁴⁹⁸ Article 24(2) of ICCPR and Article 7(1) of CRC

⁴⁹⁹ Article 24(3) of ICCPR and Article 7(1) of CRC

⁵⁰⁰ See Section 4.2.1.

⁵⁰¹ See Section 3.3.1.

⁵⁰² This was also reaffirmed by HRC(2012), *supra* note 144, para 2, 8 & 9; Also see Section 3.3.2.

risks of becoming stateless and subjected to trafficking, exploitation and re-recruitment by the military junta, as well as from the perspective of durable solutions, the RTG has an obligation to take further steps to facilitate procedures for the acquisition of nationality, either via naturalisation or cooperation with the government of Myanmar, under Article 7(1) of the CRC, read in conjunction of Article 3.⁵⁰³ The prolonged deprivation of a legal identity is considered disproportionate, and should be solved diligently in the light of the best interests of the child.

On the other hand, although it does not guarantee a nationality, the RTG has taken significant legislative and policy measures to address the problems of statelessness faced by children from various ethnic groups across the country. The establishment of the personal legal status determination process and provision of special identity document for all stateless persons is a significant step towards recognising every child's right to a legal identity. Moreover, the computerised civil registration system and nationality verification system have enabled them to store records on relevant information on a child's identity and/or restore their lost identity.⁵⁰⁴ The RTG therefore appears to have complemented its international obligations concerning the right to preserve one's identity⁵⁰⁵ through these targeted measures combined with its universal coverage policies.

Nevertheless, the RTG fails to acknowledge the negative consequences the immigration laws and policies have on the accessibility and effective implementation of birth registration and nationality acquisition processes. The RTG has made a reservation to Article 22 of the CRC, and appears to disregard its obligations vis-à-vis the target group. A state may make a reservation "so long as it is compatible with the object and purpose of the treaty".⁵⁰⁶ This does not strictly justify the exclusion of the target group from the personal scope of national laws and policies. Quite the contrary, all rights under the CRC are equally entitled to asylum seeking, refugee and stateless children residing within Thailand's jurisdiction regardless of the reservation,⁵⁰⁷ in the light of the non-discrimination principle.⁵⁰⁸

In this regard, Chapter 4 has revealed that the strict implementation of the Immigration Act and the absence of legal framework for refugee protection undermine the target group's status to that of 'illegal migrants' without recognising their personality before the law. Furthermore, status of who are refugees, stateless or victims of human trafficking are all categorised as illegal migrants without distinguishing the difference. Due to the limited mobilisation and fear for being identified and subjected to arbitrary immigration measures, they face various obstacles to accessing the birth registration and nationality acquisition procedures.⁵⁰⁹ This is not only contributed by but also in turn reinforces their limited access to state protection, basic services and economic opportunities and their consequent socio-economic status. Their statelessness and invisibility are therefore underpinned by the present immigration laws and policies, despite above measures and efforts. Considering the detrimental effects and subsequent deprivation of children's fundamental human rights,⁵¹⁰ the reservation to Article 22 and the present immigration law and policies are arguably not compatible with the object and purpose of the CRC.⁵¹¹ Additionally, they may be perceived as in conflict with Article 7(2) of the CRC, read together with Article 8, as the restricted access may result in deprivation of the legal identity of these children when their parent(s) loses a nationality as a result of displacement.⁵¹² In this regard, although not applicable directly to Thailand, ACRWC explicitly states that denying the right to

⁵⁰³ See Section 3.3.2. and Section 3.3.6.2.

⁵⁰⁴ See Section 4.2.3.

⁵⁰⁵ Article 7(2) and 8 of CRC

⁵⁰⁶ ICJ, Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, cited in Wrettt (2014), supra note 69, note 150.

⁵⁰⁷ See Section 3.2.2.

⁵⁰⁸ Article 2 of CRC

⁵⁰⁹ See Section 4.4.

⁵¹⁰ See Section 4.3.

⁵¹¹ Deprivation of the right to legal identity on discriminatory grounds is also prohibited by the recently adopted GA Resolution 20/5 para 2 & 4, see HRC(2012), supra note 144.

⁵¹² See Section 3.3.4.

legal identity to children belonging to refugee and IDP groups is an act of discrimination and constitute a violation of the non-discrimination principle.⁵¹³

Immigration laws and policies also appear to be in contrary to its international obligations under the guiding principles of the CRC. They may be considered discriminatory, as the target group is treated differently from other stateless population based on their immigration status or ethnicity in particular case of Shan population.⁵¹⁴ Furthermore, as discussed below, the RTG fails to take special measures to protect the rights of particularly vulnerable groups of children, such as former child soldiers and child victims of trafficking. Therefore, it can be concluded the RTG has not fully complied with its international obligations under the non-discrimination principle (Article.2 of the CRC).

As discussed, the present migration scheme, national security concerns and public interests are weighted more over the best interests of these children concerned.⁵¹⁵ This is in contrary to the principle of the best interests of the child (Article 3), which should guide all individual decisions and measures concerning a child's immigration status as well as processes.⁵¹⁶ Furthermore, the child's best interests and rights to family life and protection⁵¹⁷ should be a paramount consideration over parents' illegal activities against the national immigration legislation.⁵¹⁸

The lack of due consideration of the child's best interests raises additional concerns regarding the child's right to life, survival and development.⁵¹⁹ As presented, despite the 'universal coverage' policies, the lack of legal identity combined with the strict immigration control deprives the target children of basic rights including: the right to adequate standard of living (e.g. food, water and sanitation, basic supplied for housing and infrastructure),⁵²⁰ right to health care,⁵²¹ right to education training, and future employment opportunities,⁵²² right to freedom,⁵²³ and the right to state protection.⁵²⁴ The subsequent (almost) complete reliance on external assistance, lack of future prospects and dire living conditions lead to a grave impairment of the child's healthy development and physical and mental well-being. With the increased sentiments of fear and uncertainty, these children are unable to enjoy their childhood and develop to his or her full potential to become a constructive part of their society.⁵²⁵ Furthermore, the uncertainty and dire living conditions increases the vulnerability of children as further discussed below.

The child's right to be heard⁵²⁶ is also relevant here as these measures affect their lives largely. The lack of child participation in developing policies and measures concerning matters affecting them, such as legal status determination procedures, stateless reduction policies, and preparation dialogue for repatriation⁵²⁷ may have further detrimental effect on their mental well-being. It should be stressed that the access to educational opportunities,⁵²⁸ information,⁵²⁹ freedom of

⁵¹³ CRC (2009), supra note 241, para 57.

⁵¹⁴ Discrimination can be understood as unlawful, unreasonable and/or disproportionate differential treatment of persons who are "in analogous or relatively similar situations which is based on an identifiable characteristic." See FRA. Handbook on European Non-Discrimination Law. European Union. (2011).

⁵¹⁵ Article 3 of CRC

⁵¹⁶ CRC(2013), supra note 169; Also see Section 3.3.6.2.

⁵¹⁷ Article 24 of ICCPR and Article 9 and 19 of CRC

⁵¹⁸ Article 2(2) of CRC; Also see UNHCR. Guidelines on Statelessness No.4: Ensuring Every Child to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness. (21 December 2012).

⁵¹⁹ Article 6 of CRC

⁵²⁰ Article 27

⁵²¹ Article 24

⁵²² Articles 28 and 29, and Article 14 of ICESCR

⁵²³ Articles 13, 14, 15, & 37 of CRC; Also see Zeus (2011), supra note 7, at 259.

⁵²⁴ Articles 19, 32, 34, 35, 36, & 37

⁵²⁵ In conjunction with Article 29 (aim of education); Also See Section 3.3.6.3.

⁵²⁶ Article 12 of CRC

⁵²⁷ See Section 4.4.1.

⁵²⁸ Article 28 of CRC

⁵²⁹ Article 17

expression⁵³⁰ and religious/cultural values⁵³¹ as well as leisure⁵³² are crucial for “developing and practicing citizenship skills”.⁵³³ In this light, the strict immigration laws, policies and measures as well as lack of child participation opportunities within and outside the camps (largely due to lack of official documentations and consequent lack of access to education opportunities) are in conflict with the RTG’s international obligations under Article 12 of the CRC.

Apart from being one of the biggest obstacle in accessing the birth registration and nationality acquisition processes, the arbitrary detention by itself can constitute an infringement of a child’s right, namely protection from deprivation of liberty.⁵³⁴ In general, detention of children should be a measure of last resort and for the shortest possible time, separate from adult inmates.⁵³⁵ The prohibition of arbitrary deprivation of liberty is considered applicable to immigration control.⁵³⁶ Detaining children for immigration control purposes, mostly with adult inmates and great fear of deportation,⁵³⁷ cannot be justified as reasonable or proportionate measure. Furthermore, these practices are not only infringement of international standards, but also in contrary to its own national laws concerning children’s rights in juvenile justice system: children under the age of 14 shall not be imprisoned or detained as a criminal punishment measure⁵³⁸ and the right to be separated from adults in detentions is provided for children below 18 years.⁵³⁹ Additionally, as a state-party to the CAT, the RTG has an obligation to refrain from detention and deportation resulting in torture, cruel, inhuman or degrading treatments of children.⁵⁴⁰

Another relevant child rights issue is the right to protection from all forms of violence⁵⁴¹ and from all forms of sexual exploitation and sexual abuse.⁵⁴² As presented,⁵⁴³ due to the dire living conditions combined with the lack of protection, law enforcement systems and official identification document, many have no choice but to expose themselves to economic and sexual exploitation, trafficking, and re-recruitment for child soldiering. Therefore, the child’s right to equal protection before the law⁵⁴⁴ has not been respected particularly for the target group and especially those children who belong to the Shan ethnic group, former victims of trafficking and child soldier recruitments. Additionally, the definition of torture pertaining to children under the Thai Child Protection Act includes any acts that may be mentally or physically harmful to the child.⁵⁴⁵ In this light, the present laws and policies concerning the target group, resulting in restricted movements, dire living conditions, lack of effective opportunities, and putting these vulnerable categories of children at higher risks without adequate pursuant to relevant international law are in contrary to the RTG’s obligations under Articles 2, 3, 6, 19, and 37 of the CRC and Articles 7 and 24 of the ICCPR.

⁵³⁰ Article 13

⁵³¹ Article 14

⁵³² Article 31

⁵³³ IAWGCP (2008), supra note 268, at 5.

⁵³⁴ Article 37 of CRC

⁵³⁵ Id. Also see UNDOC CRC/C/GC/10, (CRC). General Comment No.10: Children’s rights in juvenile justice. (25 April 2007), para 23, 28, 70, & 85.

⁵³⁶ UNDOC HRI/GEN/1/Rev.9, Human Rights Instruments (Vol. I). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies. (27 May 2008), at 179, para 1.

⁵³⁷ See Section 4.4.1.

⁵³⁸ Section 74 of Criminal Code

⁵³⁹ The Juvenile and Family Court and Procedures Act of 2010, cited in CRC (2012), supra note 465, at 66.

⁵⁴⁰ Article 2 and 3 (non-refoulement) of CAT

⁵⁴¹ Article 19 of CRC

⁵⁴² Article 34

⁵⁴³ See Section 4.4.4.

⁵⁴⁴ Article 24 & 26 of ICCPR and Article 19, 32, 34, 35, 36, & 37 of CRC

⁵⁴⁵ Section 4 of the Thailand Child Protection Act, B.E. 2546 (2003) reads that “any commission or omission of acts which cause the deprivation of freedom of, or mental or physical harm to, a child; sexual abuses committed against a child; inducement of a child to act or behave in a manner which is likely to be mentally or physically harmful to the child, unlawful or immoral, regardless of the child’s consent.”

To conclude, the case of stateless children born to refugee parents in Thailand raises particular, yet potentially systemic children's rights issues which should be given larger accounts in forming laws and policies concerning child statelessness as well as immigration control. RTG has generally taken specific, targeted and decentralised measures to address statelessness in line with the four pillars of addressing statelessness: "identification, prevention and reduction of statelessness and protection of stateless persons".⁵⁴⁶ Nevertheless, the 'universal' coverage policies and statelessness campaigns appear to exclude those whose parents are deemed 'illegal migrants', due to the strict immigration control policies prevailing over children's rights standards. This in turn results in not only deprivation of legal identity but also violations of other fundamental rights.

The case study has revealed that stateless refugee children in Thailand experience dual deprivation of their rights due to the interdependent nature of children's rights: while the lack of full enjoyment of their fundamental rights pose obstacles to access to birth registration and nationality acquisition procedures, the deprivation of their legal identity in turn significantly reduced the enjoyment and realisation of their fundamental rights. Left in legal limbo, they are deprived of their rights to develop to their fullest potential and take a constructive part of a society.⁵⁴⁷

In face of the recent changes in political atmosphere on both sides, a shift towards a more child-rights centred approach is desirable in order to ensure a safe and dignified durable solution for these children. Keeping aforementioned challenges and child rights issues in mind, the following section provides recommendations on legislative, policy and implementation measures to address statelessness of the target group, which hopefully will also be relevant to other groups of stateless children in similar protracted refugee situation.

5.3. Recommendations for Improvements

As expressed by UNHCR during its ASEAN regional consultation, identification of those who are or at risks of becoming stateless is a first crucial step for prevention, reduction and protection.⁵⁴⁸ It is rightly pointed out that effective and inclusive efforts are impossible without comprehensive and consolidated mapping identifying various categories of stateless persons.⁵⁴⁹ In the case of Thailand, many children who are born to refugees, and are or at risks of becoming stateless, are unidentified, left behind as unregistered and subsequently neglected from the protection schemes implemented by the RTG, mostly for obvious reasons.⁵⁵⁰ In order for the 'universal' policies to truly become universal and inclusive for all children, and to enable them to be identified and registered, a paradigm shift is inevitable. In particular, the ideas about 'migrants' need to be reconceptualised: Rather than being perceived as purely a burden to the state's economy and security, they should be received as 'learner citizens to become'⁵⁵¹ who can potentially contribute to the greater society and sustainable development in both hosting and sending states.⁵⁵² Keeping this ideological point in mind, following suggestions on concrete measures are made in order to ensure the rights of these children, as equally as other stateless children born in Thailand.

Concerning the absence of laws governing refugee protection, the RTG is strongly recommended to withdraw its reservation to Article 22 of the CRC, and to become a party to the 1951 Refugee Convention, the 1954 Stateless Convention, and the 1961 Reduction Convention in

⁵⁴⁶ Proposed by UNHCR in its regional consultation held in 2010. See UNHCR (2010), supra note 274, at 4.

⁵⁴⁷ Article 6 of CRC

⁵⁴⁸ UNHCR (2010), supra note 274, at 12.

⁵⁴⁹ Id.

⁵⁵⁰ See Section 4.4. for obstacles faced by the target group.

⁵⁵¹ Pinson, H., Arnot, M. and Candappa, M. *Education, Asylum and the 'Non-Citizen' Child: The politics of compassion and belonging*. Palgrave Macmillan. (2010).

⁵⁵² As presented in Chapter 1, this paradigm shift has already been introduced. Furthermore, IOM recently published a report on remittances and potential economic contributions migrants can make, see IOM et al. Asia-Pacific Migration Report 2015: Migrant's Contributions to Development. (2016).

accordance with relevant UPR recommendations.⁵⁵³ The ratification will not be a pull factor to more migrants, but rather will enable the state to clearly identify refugees who meet the criteria set forth by the Conventions and other illegal immigrants. In this regard, the RTG is also recommended to cooperate with the NHRCT in amending the national Immigration Act to provide for an establishment of a refugee status and stateless status determination mechanism.⁵⁵⁴ For the time being, it is also encouraged to seek and strengthen cooperation with the UNHCR and UNICEF to ensure that stateless children born to refugee parents have access to status determination process and have access to basic rights at least until their status is determined.⁵⁵⁵

In order to address special needs of (potentially) stateless children born to refugee parents, and guarantee full realisation of their basic rights (to health care, housing, education and employment opportunities) as well as their right to legal identity, without being feared of strict immigration measures, the RTG is recommended to review and enact its laws and policies.⁵⁵⁶ In doing so, the RTG should take targeted, multi-sectorial and child-centred approach. This would enable them to grow and develop as a social agent and take constructive part and contribute to the economic growth, sustainable development and peace of both Thai and Myanmar societies.⁵⁵⁷

In particular, all processes, policies and laws affecting children should be reviewed in accordance with its international obligations under the CRC and other relevant instruments, recognising that children's rights, best interests in particular, are a paramount consideration over immigration and security interests. The RTG is recommended to undertake all legislative, administrative or other measures to appropriately and effectively register, store and restore children's identity. Such civil records should be publically available and accessible to children and their parents and/or care givers, and children should be given a card stating relevant information on the child's identity, preferably with a picture.⁵⁵⁸ An identification card plays a particularly important role in protecting the rights of children, especially for family reunification and/or return, in the context of mass displacement caused by emergency situation and armed conflict.⁵⁵⁹

More specifically, the Nationality Law should be amended to grant a nationality to all children born on its territory, when the child would otherwise be stateless.⁵⁶⁰ To cover the most marginalised, simplified birth registration and nationality acquisition procedures with increased assistance should be developed, with such as interpreters, application forms in various languages, and waving or reducing application fees.⁵⁶¹ Furthermore, the RTG is recommended to include a targeted plan for stateless children born to refugee and 'illegal migrant' parents when drafting, monitoring and reviewing the action plans for implementing the National Child and Youth Development Plan for 2012-2016.⁵⁶²

⁵⁵³ NHRCT. Alternative Report on Thailand's Implementation of the Convention on the Elimination of All Forms of Racial Discrimination, Submitted to the CERD. (2014), para 46; Also see The Permanent Mission of Thailand to the UN. Thailand's Response to the Questionnaire of the Ad Hoc Committee on the Elaboration of Complementary Standards to the CERD. Report to OHCHR. (28 January 2014).

⁵⁵⁴ Id.; Also see UNDOC CRC/C/THA/Q/3-4, (CRC). *Consideration of reports submitted by States parties under the article 44 of the Convention. Concluding Observations: Thailand*. (17 February 2012), para 42.

⁵⁵⁵ Id., para 8; NHRCT (2014), supra note 565, para 49.

⁵⁵⁶ Focus on the special needs of migrant stateless children in general was also emphasized as one of the good practices for South East Asian countries, see UNHCR (2010), supra note 274.; CRC (2012), supra note 566, para 42.

⁵⁵⁷ As discussed in Chapter 1, this is the more favoured approach to the present 21st century refugee situation recognised by the international community, see IOM (2016), supra note 564.

⁵⁵⁸ Id., including the date and place of birth.

⁵⁵⁹ Doek (2006), supra note 126, at 30; also see article 78(3) of Protocol I to the Geneva Conventions of 1949.

⁵⁶⁰ The RTG can learn from the Federal Constitution of Malaysia in this regard. See UNHCR (2010), supra note 274, at 11.

⁵⁶¹ The recent development in Serbia can be an example of best practice in this regard, see European Network on Statelessness. No Child Should Be Stateless. (Year Unkown), at 27.

⁵⁶² CRC (2012), supra note 566, para 12.

The central authority should not only allocate sufficient public resources⁵⁶³ for targeted programmes for refugee children, but also articulate its policies in a clearer manner, conduct training and sensitisation activities for the regional and local officials, police, soldiers, and employees of other relevant institutions (hospitals, clinics, schools, etc.) to reduce prejudice and xenophobia against ‘illegal migrants’.⁵⁶⁴ Such training should be multidisciplinary and “developed through a participatory process involving communities and other stakeholders”.⁵⁶⁵ The RTG should also strengthen the existing mechanism of monitoring and evaluation to identify and overcome obstacles for effective and inclusive implementation of national action plans.⁵⁶⁶

Stateless children and their parents themselves should be given appropriate assistance to learn about their rights and relevant laws and policies on matters affecting their lives.⁵⁶⁷ Considering the evolving capacities of children, enabling children to participate has emancipating effects on their development as an active citizen.⁵⁶⁸ With due consideration of age and maturity of the child and via involvement of child-led associations (student unions, youths representatives etc.), children themselves should be given opportunities to freely express their views and enabled to analyse their own situation and future prospects, to take control over their lives.⁵⁶⁹ In addition, awareness raising campaigns should be more widely organised at community and local levels, preferably in their own language and in a manner that is appropriate for children and their parents.⁵⁷⁰ Particular attention should be given to the most marginalised population who deliver birth outside of hospitals and clinics. Their access to delivery and birth certificate can be ensured by building the capacities and strengthening the cooperation between the community leaders, mid-wives and local officials to confirm the birth.⁵⁷¹

Children should also be empowered to take control over their lives and future, by providing more opportunities for official higher education as well as participation and integration to the local communities.⁵⁷² To ensure full enjoyment of these rights, the RTG should facilitate children to access, remain at schools, and receive quality education by: cooperating with and assisting CBOs and NGOs⁵⁷³ to promote alternative education services;⁵⁷⁴ ensuring that all children receive an official school diploma upon graduation;⁵⁷⁵ providing a separate budget to allow additional funds for schools which admits children with ambiguous legal status; ensuring that these schools are not forced to cooperate with immigration agency for the purpose of identifying ‘illegal migrants’;⁵⁷⁶ and addressing underlying obstacles such as poverty, discrimination and marginalisation through prioritized social and health services and ensured equal opportunities to education.⁵⁷⁷ Schools can be used as a focal point for support groups and organisation of child participation, as well as educational programmes on

⁵⁶³ Human, technical and financial

⁵⁶⁴ NHRCT (2014), supra note 565.

⁵⁶⁵ CRC (2012), supra note 566, para 17.

⁵⁶⁶ For example, the Second Five-Year National Human Rights Plan (2009-2013) was welcomed for its targeted approach to promote the rights of stateless persons, migrant workers and refugees, and their access to basic services, yet, the NGO shadow report recommended further development of such a monitoring mechanism, see NHRCT (2014), supra note 565.

⁵⁶⁷ Saisoonthorn (2006), supra note 294, at 52.

⁵⁶⁸ See Section 3.3.6.4.

⁵⁶⁹ CRC (July 2009), supra note 244; Also see Section 3.3.6.4.

⁵⁷⁰ UNHCR (2010), supra note 274.

⁵⁷¹ NGO shadow report, supra note 4, at 5.

⁵⁷² There is a positive link between participation and psychological well-being, UNHCR (2012), supra note 526.

⁵⁷³ CBOs are more community based, civil society organisations, while NGO may be international.

⁵⁷⁴ See for example the good practice by Malaysia, UNHCR (2010), supra note 274, at 23.

⁵⁷⁵ NGO shadow report, supra note 4, at 5.

⁵⁷⁶ CRC (2012), supra note 566.

⁵⁷⁷ CRC (2006), supra note 274, para 25; CRC (2012), supra note 566, para 70; NHRCT (2014), supra note 565, para 21. The RTG is also recommended to incorporate topics on ethnic groups, statelessness, refugees, social inclusion, cultural diversity and tolerance into its educational curriculum starting from as early level as appropriate, Also see Article 29 of CRC; UNDOC CRC/C/GC/2001/1, (CRC). *General Comment No1, Article 29(1): The aim of education.* (17 April 2001).

registration and nationality acquisition processes.⁵⁷⁸ Regarding the content of education, the existing educational system within and outside the camps can be improved to enable these children to develop their capacity to naturalise and assimilate into the Thai society should they wish so.⁵⁷⁹

The RTG has an obligation to take targeted measures of protection and assistance, taking into consideration the persistent risks, vulnerability and special needs of these children.⁵⁸⁰ In this regard, the RTG is urged to “develop, in collaboration with non-governmental and international organizations, comprehensive system of psychological support and social assistance for children affected by violence and conflict”, and child victims of the crimes under the two Optional Protocols to the CRC.⁵⁸¹ When concerning the target group, it should be recognised that the particular vulnerability of stateless children to “abuse, sexual violence, trafficking, child exploitation and labour, and military recruitment” is further “exacerbated by [the fact that they are in] a traumatized state, having been victims or witnesses of atrocities”.⁵⁸² Therefore, they should receive rehabilitation and social reintegration assistance as well as special measures of protection against further economic, social and sexual exploitation.⁵⁸³ The present lack of identification and protection schemes targeting these children⁵⁸⁴ also needs to be addressed.

The crucial role mapping can play in identifying the most vulnerable groups and their special needs should be stressed here.⁵⁸⁵ The CRC Committee also recommended the RTG to “strengthen its efforts to develop and implement a comprehensive, coordinated and effective system of data collection, analysis, monitoring and impact assessment”.⁵⁸⁶ In this regard, the use of disaggregated data is strongly recommended to identify the special needs of vulnerable children, particularly stateless children, immigrant and refugee children, and “children who are at risk of becoming victims of crimes under the Optional Protocol(s)”, such as trafficking, sale, and prostitution, as well as child soldiering.⁵⁸⁷

Furthermore, in the face of 21st century migration and globalisation, international cooperation – bi-/multi-lateral MOU in particular – is the key to sustainable solutions to protracted crises.⁵⁸⁸ The existing MOU schemes between the RTG and the government of Myanmar, such as one on protection of the rights of migrant workers⁵⁸⁹ and the other on tackling the trafficking of persons,⁵⁹⁰ can be used to establish a more effective system of identification of stateless refugee children, confirmation of their legal status and nationality, and protection of their fundamental rights, particularly throughout the repatriation procedures.⁵⁹¹ Ensuring that at least the birth registration issued by the RTG is recognised by the Myanmar government at the time of return is of utmost importance. Ideally though, the nationality of parents should be re-established and conferred to the children, should they wish to do so.

⁵⁷⁸ UNHCR guidelines; also see for example the school unit statelessness programme by UNICEF for Hill Tribe stateless children, Keenapan, N. Stateless Classroom. UNICEF. (23 June 2009).

⁵⁷⁹ Similar project was implemented by UNHCR in Myanmar, targeting the Muslim population in the northern Rakhine State, see UNHCR (2010), supra note 274, at 22.

⁵⁸⁰ CRC (2011), supra note 142.

⁵⁸¹ CRC CO Thailand 2006, para 28

⁵⁸² Bierwirth, C. The Protection of Refugee and Asylum-Seeking Children: The Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child. *Refugee Survey Quarterly*, 24(2). (2005), at 99.

⁵⁸³ Article 7 of OPI and Article 8 of OPII to CRC (Thailand ratified in 2006), and Article 10(3) of ICESCR

⁵⁸⁴ CRC (2012), supra note 459.

⁵⁸⁵ RTG may learn from the good practice of Malaysian NGOs in mapping using population data and household surveys, see UNHCR (2010), supra note 274, at 5.

⁵⁸⁶ CRC (2012), supra note 459, para 8. It should be noted that the survey mapping stateless hill tribes conducted by the Thai Ministry of Social Development and Human Security is welcomed as a good practice for the region. Such practice should be extended to include other groups of marginalised, stateless population across Thailand, see UNHCR (2010), supra note 274, at 7.

⁵⁸⁷ Such data should be disaggregated inter alia by sex, age, nationality and ethnic origin, region and socio-economic status, see CRC (2012), supra note 459, para 8; CRC (2006), supra note 274, para 21.

⁵⁸⁸ Article 4 of CRC; NHRCT (2014), supra note 565, para 49; IOM (2016), supra note 564.

⁵⁸⁹ See Section 4.2.3. (Thai-Myanmar MOU on nationality verification process for migrants, for example)

⁵⁹⁰ See Section 4.4.4. (COMMIT MOU).

⁵⁹¹ The importance of multilateral, regional and bilateral arrangements in promoting international cooperation is recognised by the CRC Committee, see CRC (2012), supra note 566, para 36.

The RTG should be reminded that aforementioned measures, particularly ensuring the access to birth registration and issuing of birth certificate for *all* children, would in fact serve the state's interest in the long-term. The value of a child-rights centred approach is twofold: on the one hand, the official birth certificate will enable them to more smoothly and safely move on with their voluntarily return to Myanmar when the country situation becomes stable; on the other hand, should they wish to remain and assimilate in Thailand, they are enabled and empowered to take a constructive role in improving the socio-economic aspects of the society,⁵⁹² rather than becoming a burden to social benefits, criminals or victims of trafficking and/or exploitation. Implementing legislative and policy measures to ensure protection and promotion of the rights of stateless children born to refugee parents, and migrants in general, is not only in line with the ASEAN community's collective vision on promoting and protecting human rights across the region,⁵⁹³ but also of the RTG's and other ASEAN member-states' interests in promoting closer regional integration, cooperation and sustainable development.⁵⁹⁴

6. Conclusions and Recommendations

This thesis aimed to illustrate the consequences of the absence of legal identity to the child's development and meaningful life in the context of protracted displacement. In doing so, the research focused on the case study of stateless children born to refugee parents in Thailand, and two research questions that are to be answered here.

Firstly, the right to legal identity, the right to protection and enjoyment of fundamental rights are entitled to *every* child including stateless children, regardless of their and their parents' status, in the light of the non-discrimination principle. Therefore, the RTG has international obligations to protect the rights of children born to refugee parents in Thailand, including: the right to be registered and have a name immediately after birth; the right to acquire a nationality particularly when the child would otherwise be stateless; and basic rights (education, health care, adequate standard of living, and protection). Moreover, measures of implementation should be developed and enforced in accordance with the guiding principles of the CRC. This implies that special measures and adequate assistance are required to ensure equal enjoyment of the rights and meaningful participation by the child, and that best interests of the child should be a paramount consideration in all matters affecting him/her.

Secondly, the case of stateless children born to refugee parents in Thailand raises particular, yet potentially systemic, children's rights issues which should be given larger accounts in forming laws and policies concerning statelessness as well as immigration control. The RTG has adopted and implemented measures to address the problems of child statelessness and promote universal coverage of basic services. Nonetheless, such legislative and policy efforts appear to have reduced problems for some groups, while creating more challenges for others. The target group of this study was excluded from the protection and social benefit schemes, due to the strict immigration control prevailing over children's best interests. The absence of legal framework and a comprehensive system of mapping and identifying various categories of refugee, migrant and stateless children leave their legal status ambiguous and unrecognised. At the heart of vulnerability of the stateless children born to refugee parents in Thailand is their lack of legal identity. Without the official ID cards and registration in the civil registry, they have no representation in the state protection scheme or access to universal public services. On the other hand, the fear of being identified and subjected to stricter immigration control prevents many from registering their babies. Therefore, the RTG has not fully complied with its

⁵⁹² IOM (2016), *supra* note 564.

⁵⁹³ See Chalermphanupap, T. 10 Facts about ASEAN Human Rights Cooperation. (<http://www.asean.org/wp-content/uploads/images/archive/HLP-OtherDoc-1.pdf>), last visited (07-07-2016).

⁵⁹⁴ This is certainly the present vision of the ASEAN community along with its recent (virtual) establishment of the ASEAN Free Trade Area and its commitment to SDGs, see ASEAN (<http://asean.org/asean-economic-community/asean-free-trade-area-afca-council/>), last visited (07-07-2016).

international obligations vis-à-vis the target group's right to a legal identity nor their fundamental human rights, namely, the right to freedom of movement, education and employment, standard of health and living, and protection from all form of violence and exploitation.

The emerging political situation in Myanmar raise additional child rights issues and challenges to the TRG and international community. For this reason, the research focused on the Thai government's obligation towards these children to protect their fundamental rights not only in terms of their present lives, but also their future. Be it voluntary repatriation, third country resettlement, or local integration, the protection of their legal identity is crucial for ensuring voluntary, safe and dignifying solution.

While acknowledging the recent developments implemented by the RTG as well as the practical challenges and obstacles in Chapter 4 and 5, this thesis seeks to provide suggestions and recommendations on measures to ensure the safety and dignity of stateless children living in protracted refugee situation. In doing so, the last section (5.3.) followed the guiding principles of CRC and other relevant standards and guidelines offered by the CRC Committee, UNHCR as well as good practices from the region. Besides legislative reforms concerning the legal status of refugee children, the RTG is recommended to take targeted, multi-sectorial and child-centred approach to address the barriers to accessing the basic services and registration procedures. In particular, such obstacles as strict immigration measures, discriminatory exclusion, and administrative, financial, physical and other barriers to access should be addressed in a coordinated and comprehensive manner, in order to identify, recognise and address their special needs and vulnerabilities. Furthermore, the importance of international cooperation – bi-/multi-lateral MOU in particular – in providing protection for these children is stressed given the international nature of the refugee situation. All these recommended measures not only are vital to protect the rights, safety and dignity of these children, but also will serve the long-term interests of both the RTG and Myanmar government. Ensuring all children have the right to grow as a human being is the key to sustainable economic growth and peace.

The author's choice of this particular target group aimed to offer a perspective to the present measures addressing child statelessness in the context of protracted refugee situation, given the global relevance of this topic.⁵⁹⁵ Child statelessness in protracted refugee situation is a grave child-rights issue that needs targeted solutions. Prevalent reality of invisible stateless children is not inevitable, but a product of the state's own making. Within the larger framework of the recent call for a shift in global protection paradigm, the thesis aimed to reconceptualise the citizen-noncitizen dichotomy as well as the notion of 'illegal migrants' by focusing on children's agency and ability to develop a sense of belonging. Considering the grave consequences of the complex interplay between protracted refugee situation and statelessness on children, the author supports the recommendations made by ISI⁵⁹⁶ and Stein⁵⁹⁷ for the CRC Committee to draft a general comment on article 7 of CRC, and also would like to suggest the Committee to give due weight on this right in its forthcoming joint general comments on the Human Rights of Children in the Context of International Migration.⁵⁹⁸ In doing so, the CRC Committee is not only recommended to take due accounts of relevant stakeholders' submissions,⁵⁹⁹ but also the voice of children themselves. Given the universality of the CRC, a child-rights centred approach to the global refugee and stateless problems may offer an alternative way forward – a path that is more sustainable, inclusive and beneficial for all.

⁵⁹⁵ See Introduction (Chapter 1) and Chapter 2.

⁵⁹⁶ ISI (2015), supra note 21.

⁵⁹⁷ Stein (2015), supra note 21.

⁵⁹⁸ Currently being drafted, OHCHR.

(<http://www.ohchr.org/EN/HRBodies/CMW/Pages/JointGeneralCommentonChildren.aspx>), last visited (08-06-2016).

⁵⁹⁹ ISI for example provides a thorough analyses of article 7 as well as recommendations regarding protecting the rights of stateless children in the context of international migration in its submission, see ISI (2015), supra note 21.

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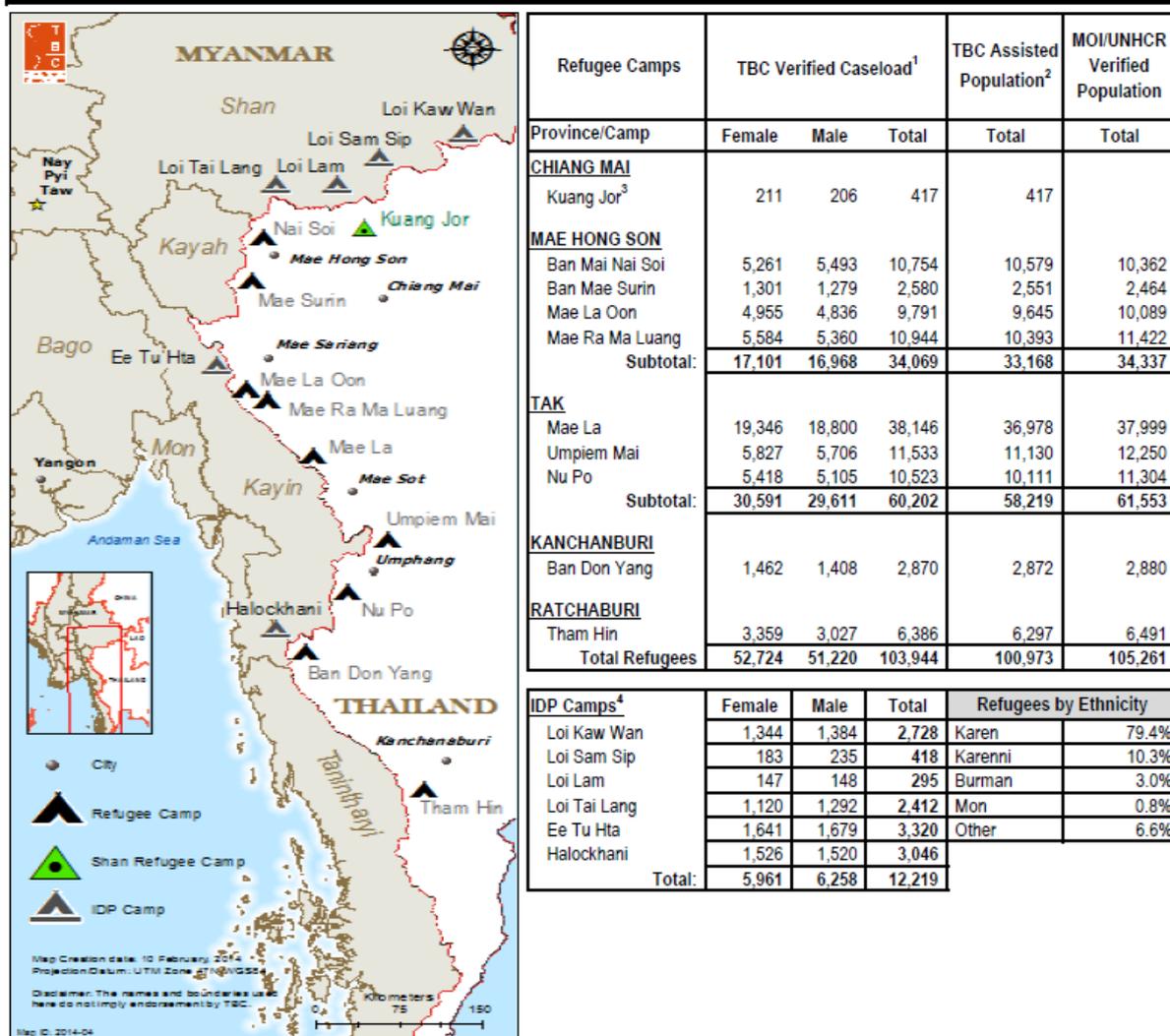
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Annex I: Refugee Camps at the Border of Myanmar and Thailand and Camp Demographics⁶⁰⁰

Refugee and IDP Camp Populations: April 2016



Notes:

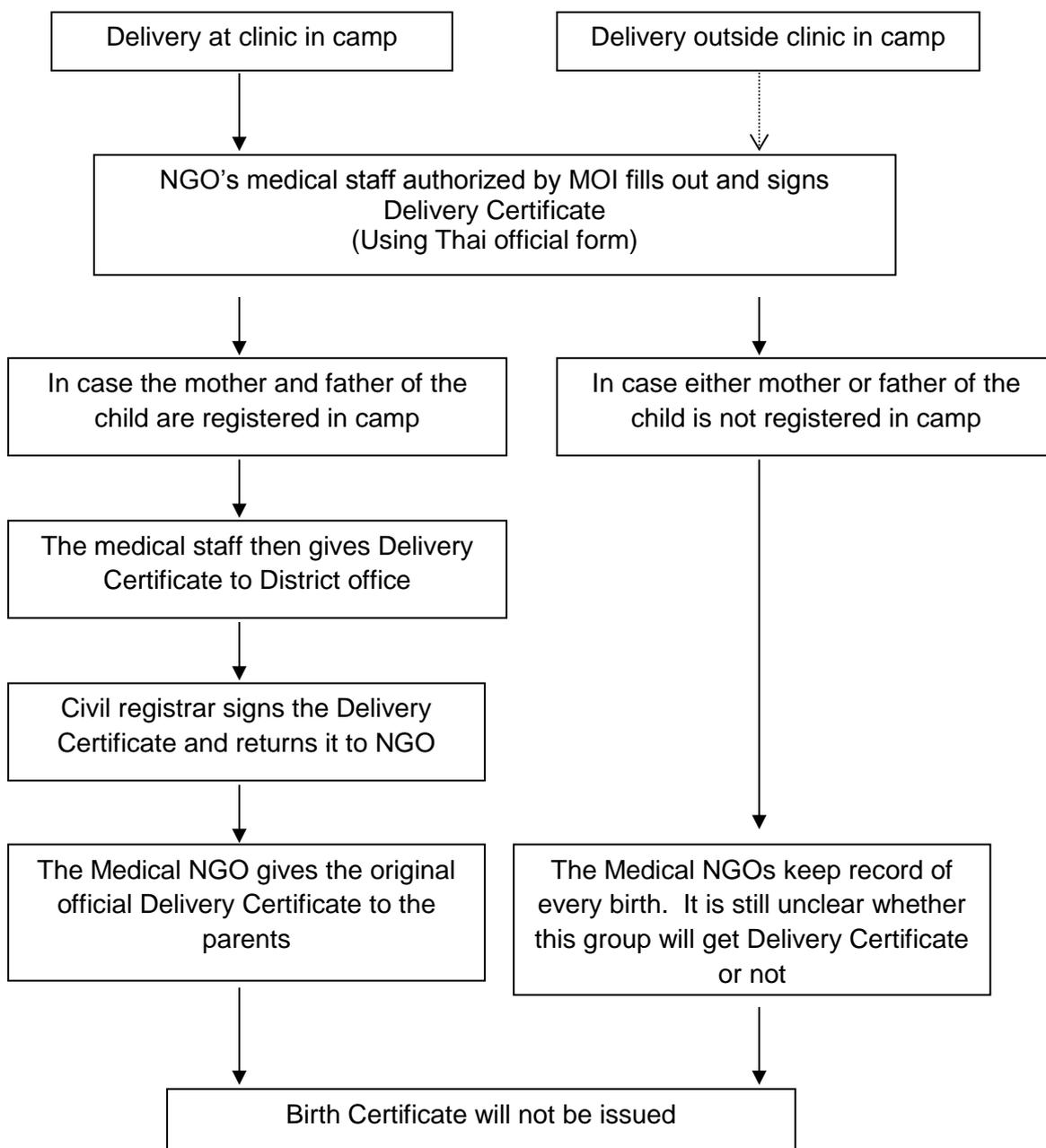
1. The verified caseload includes all persons, registered or not, confirmed living in camp & eligible for rations.
2. The TBC Assisted Population is the number of beneficiaries who collected rations during the previous month. Rations are only provided to those who are physically present at distributions.
3. Access and assistance authorised at the District level.
4. IDP camp population figures are derived from camp committees on a monthly or quarterly basis.

⁶⁰⁰ (<http://www.theborderconsortium.org/media/69419/2016-04-apr-map-tbc-unhcr.pdf>), last visited (07-07-2016).

Annex II: Delivery and Birth Registration Process⁶⁰¹

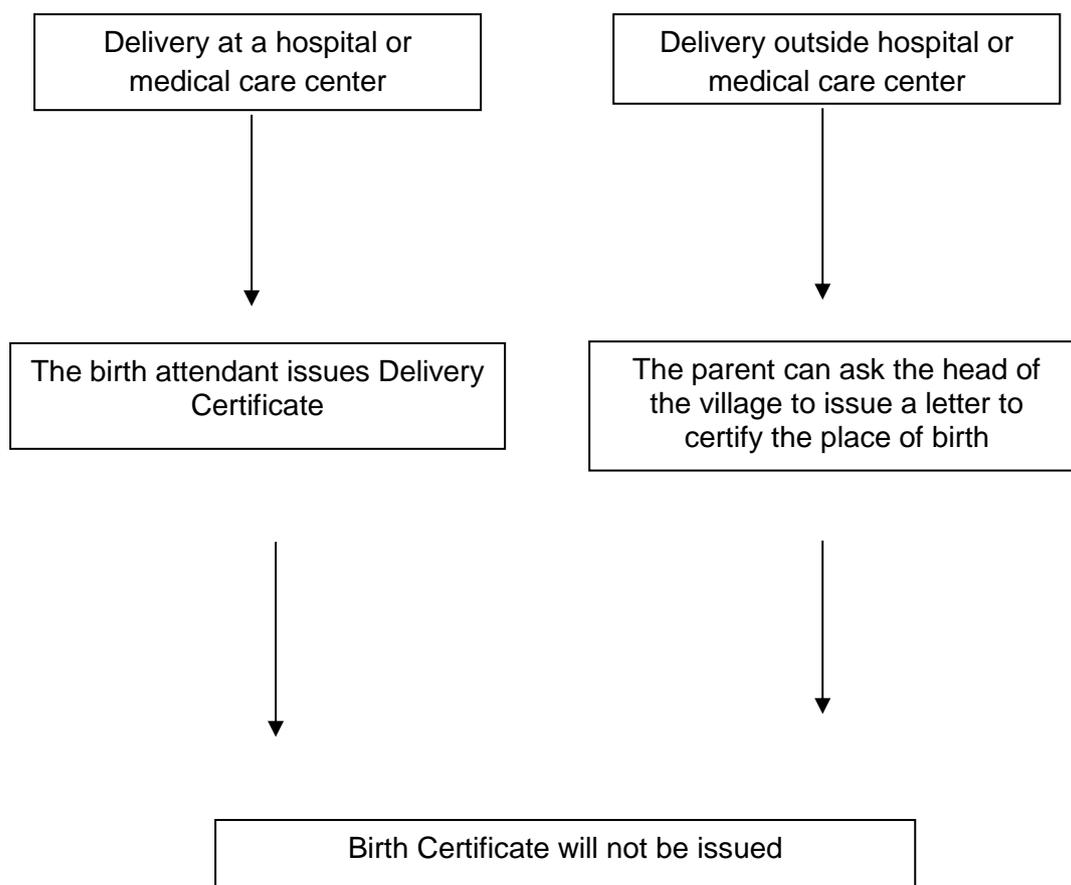
Birth registration of a child whose parents are illegal migrants

A. In case the child's parents are persons fleeing fighting residing in temporary shelter along Thai-Burma border



Note: In case the pregnant mother is referred to hospital or medical care center outside camps, the delivery certificate will be issued by birth attendant of the hospital or medical care center.

⁶⁰¹ Taken from NGO Shadow report, supra note 4, at 36&37.

B. In case the child's parents are not registered in refugee camps

Note: In case the child is born outside hospital or medical center, the child will neither get delivery certificate nor birth registration.