



## Stateless Children

*"Born here and there, separated, orphaned, unaccompanied and without documentation. Stateless children are excluded from educational, health and social services".<sup>1</sup>*

### 1. Introduction

At the beginning of the 2016 educational year it came to the attention of 'Thembaletu Nkomazi', an NGO working in the Nkomazi area of Mpumalanga, that approximately 600 children in the immediate vicinity of their centre were being refused entry for the 2016 academic year because they did not have any proof of identity and were unable to obtain it. This was not an isolated occurrence; children are being excluded from educational facilities around South Africa due to a lack of birth certificates or any other proof of identity, and are increasingly marginalized. Stateless children are unable to obtain such documentation. This effectively means that they are 'nobody' and belong 'nowhere'.

The reasons for the Department of Education's insistence on the legal documentation are unclear, but its stance appears to be at variance with the Children's Act 35 of 2008 and the Bill of Rights in the Constitution, as well as with the African Charter on the Rights and Welfare of the Child. The latter provides that "[in] all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. Every child shall have the right from his/her birth to a name... Every child shall have the right to a nationality".<sup>2</sup> While it is not necessarily the task of the Education Department to resolve the question of a child's statelessness, it can hardly be argued that to deprive such a child of an education is in its best interests. Regrettably, it is clear that many children living in South Africa do not enjoy the nationality and citizenship rights envisaged in the African Charter and in our Constitution, and that as a result their other rights are increasingly marginalized.

### 2. Definition of Statelessness

Being stateless is not the same as being a refugee. Refugees are nationals who have been forced to leave their country of origin due to particular circumstances or events such as war, natural disaster, epidemic or famine. Repatriation is possible should circumstances change. On the other hand, 'statelessness' effectively means that an individual has no documentation confirming birth registration and indicating a name and nationality.

The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are the key international conventions addressing statelessness. They are complemented by international human rights treaties and provisions relevant to the right to a nationality, including the UN Declaration of Human Rights of 1948.<sup>3</sup> This instrument of human rights followed the mass global upheaval and tragedy as a consequence of the Second World War.<sup>4</sup>

The 1954 Convention states that the term 'stateless person' means "a person who is not considered as a national by any State under the operation of its law".<sup>5</sup> The 1954 Convention also establishes minimum standards of treatment for stateless people. These include, but are not limited to, the rights to education, employment and housing. Importantly, the 1954 Convention also guarantees stateless people a right to identity, travel documents and administrative assistance in their attempts to acquire nationality and citizenship.<sup>6</sup> Unfortunately, South Africa is not a signatory to this Convention. Likewise, South Africa is not a signatory to the 1961 Convention on the Reduction of Statelessness, which sought to

reduce statelessness over time. The 1961 Convention is the leading international instrument that sets rules for the conferral and non-withdrawal of citizenship to prevent statelessness.

### **3. Apartheid South Africa**

The South Africa of the previous era was occupied with the legislative implementation of 'grand apartheid' and was obsessed with documentation and the rigid application of the Group Areas Act, the pass laws and the protection of employment opportunities for certain racial groups and the regulations pertaining to these matters. It is therefore not surprising that these international instruments of human rights were ignored. Furthermore, it was very difficult to gain entry to South Africa without documentation. In time, an electric fence would traverse the border between South Africa and Mozambique. Very few 'non-whites' were granted passports enabling them to travel out of South Africa and even fewer, with the exception of migrant labourers, were allowed entry into South Africa. The apartheid government thus saw no reason to concern itself with international humanitarian law on citizenship and statelessness.

However, as yet post-apartheid South Africa has not signed either Convention and, if the position of the Department of Basic Education represents government's thinking, it is unlikely to do so. This means that the protections afforded by these Conventions place no obligation on the South African state. Given the support and refuge offered by South Africa's neighbours during the struggle against apartheid, this is a sad irony.

### **4. Stateless Children**

Fortunately, other international conventions and treaties (specifically, the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child) provide protection for stateless children, and South Africa is signatory to both these instruments. Therefore, even if government fails to live up to its duties under domestic law – the Children's Act and the Constitution – it should be possible for those who act on behalf of stateless children to invoke our international law obligations.

'Destination Unknown' campaign points out that "children moving for a variety of reasons,

voluntarily or involuntarily, within or between countries, with or without their parents or other primary caregivers, and whose movement, while it may open up opportunities, might also place them at risk (or at an increased risk) of economic or sexual exploitation, abuse, neglect and violence".<sup>7</sup>

### **5. Porous Borders, Wars, HIV/AIDS**

The 'Scramble for Africa' and the imposition of colonial boundaries has meant that even at an official level borders are contested. The second half of the 20<sup>th</sup> century saw the decolonization of most of Africa in response to the rise of the liberation movements and the struggle for independence, wars of liberation and civil wars, and the eventual overthrow of the apartheid regime. These struggles blurred the borders imposed by the colonial powers and resulted in the migration of families and communities. Places and spaces all over Africa became contested.

This dislocation has been aggravated by the HIV/AIDS pandemic and the advent of child-headed households, as well as the increasing number orphaned vulnerable children. All these historical factors have compounded the marginalization of children. SOS Children's Villages estimate, for example, that there are 100 000 Swazi orphans. The particularly porous nature of the Swazi border has made it an easy point of access for human trafficking, including that of children. (It must be noted that, in response to this situation, Swaziland has established a Border Restoration Committee, which may go some way to dealing with the problem.)

As Linda Martindale emphasises "the Nkomazi region is one beleaguered by the sheer virtue of its geography; bordered by Mozambique on the east and Swaziland on the south. The region absorbed thousands of refugees during the Mozambican civil war, which ended in the early 90s. Language and culture similarities, as well as traditional connections between groups, enhanced the inevitability and relatively seamless transition of those fleeing the war".<sup>8</sup> Furthermore, "When there is human tragedy of this nature, documentation is low on the priority list and migration was not regulated," says Maseko. The area took strain and continues to do so today.<sup>9</sup> Paternity is often difficult to prove, and the DNA tests required in order to confirm paternity and help confirm nationality cost in the region of R700.00, which is far beyond the reach of most people. Hospitals and

clinics where some of the children may have been born are reluctant to assist. And of course, stateless children cannot be repatriated because they are 'stateless' and consequently there is nowhere for them to go.

The NGO-based 'Consortium for Refugees and Migrants in South Africa' (CoRMSA) is an organisation committed to the promotion and protection of refugee and migrant rights. It argues that, "the movement of people into, within and through South Africa raises fundamental questions about the country's commitments to human rights, regional integration, security, and economic development. Where it was once a side issue occupying minor corners of government and civil society, a combination of domestic debates and global trends has put the country's response to migrants at the heart of South Africa's policy agenda".<sup>10</sup>

## 6. Conclusion

Linda Martindale points out that, "all complications and suggested solutions aside, no child living in South Africa should be denied the right to be educated for any reason in South Africa".<sup>11</sup> It is vitally important to document the incidence of statelessness and to advocate for the recognition of the rights of these children. Statelessness deprives children of the most fundamental rights in that it effectively denies their very existence and in so doing withdraws from them their access to practically everything. One young girl at Nkomazi was heard to remark that she was unable to take a book out of the library because she lacked any documentation. This shows the problem in stark contrast: due to a combination of statelessness and government intransigence, this girl and hundreds, maybe thousands like her, could grow up unable to read.

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<sup>1</sup> 'Destination Unknown: Campaign to protect children on the move'

<sup>2</sup> African Charter on the Rights and Welfare of the Child

<sup>3</sup> <http://www.unhcr.org/pages/4a2535c3d.html>

<sup>4</sup> It is arguable that one of the reasons for the present conflict in the Middle East stems from the inability of the Allies to address the issue of the displacement of the Jewish people after the Holocaust.

<sup>5</sup> Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons which was entered into force on the 6<sup>th</sup> June 1960

<sup>6</sup> Articles 28; 31 and 32 of the 1954 Convention relating to the Status of Stateless Persons

<sup>7</sup> 'Destination Unknown : Campaign to protect children on the move'

<sup>8</sup> 'You can go home now'; Stateless Children denied access to education' February 2016

<sup>9</sup> See 9 above

<sup>10</sup> <http://www.cormsa.org.za/wp-content/uploads/2008/06/CoRMSA-Report-2011.pdf>

<sup>11</sup> See 9 and 10 above