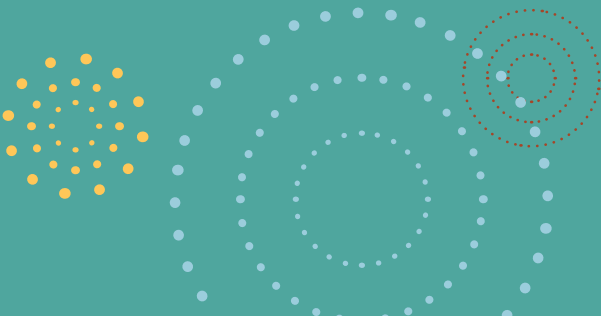




**STATELESSNESS IN
SOUTH AFRICA**



INTRODUCTION

Childhood statelessness in South Africa is a generally unaddressed, largely preventable, but growing phenomenon. This short publication presents the experiences of 9 children who have been let down by the system, denied their right to acquire a nationality and rendered stateless in South Africa. The many issues that come to rise through their stories and the proposed solutions were brought to the attention of the Committee on the Rights of the Child (the Committee) by Lawyers for Human Rights (LHR) and the Institute on Statelessness and Inclusion (ISI) in a joint submission to the Committee in 2015¹. South Africa's obligations under the Convention on the Rights of the Child (CRC) are such that all children in the country who would otherwise be stateless, should have the right to acquire a nationality: no child should be left stateless (Article 7 of the Convention). This obligation is reiterated in the African Charter on the Rights and Welfare of the Child and the International Covenant on Civil and Political Rights. In addition Article 28 of the South African Constitution protects the right of every child to a name and a nationality from birth and more broadly protects a common citizenship.

Despite its international and domestic obligations, South Africa's legislative framework collectively creates and perpetuates childhood statelessness. Discrimination in the South African Citizenship Act, 1995 can be seen in the stories illustrated in this publication. Positive provisions are constrained by restrictive birth registration requirements of the Births and Deaths Registration Act (BDRA), 1992, which can lead to statelessness. The Immigration Act, 2004 also fails stateless unaccompanied migrant children who cannot be returned to their country of origin by not providing them

with a legal immigration status. The Committee has expressed its concern with regards to the above gaps in the law and problematic national practice in their concluding observations to the Government of South Africa in October 2016².

South Africa is regrettably not a signatory to the 1954 UN Convention on the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness. The Committee recommends that South Africa accede to these conventions.

LHR has been providing assistance to stateless persons since 2011 through legal clinics nationwide with the support of the UNHCR. A series of interventions on behalf of children at the Department of Home Affairs and through the courts have led to the production of this publication. The cases in this booklet are based on the stories of LHR's clients and contain the children's experiences in their own words. We hope that these illustrations will lead to a better understanding of the occurrence and cause of childhood statelessness in South Africa and its impact on children, and will lead to legislative and policy reform towards universal birth registration and the elimination of statelessness.

LHR and ISI would like to thank the Haella Stichting for its financial support, which made this publication possible.

We also thank UNHCR for funding the reprint of this publication.



DANIELLA - AGE 6

“ONE OF MY COUSINS IS HAVING A BABY IN CUBA. I FEEL SO HAPPY FOR THEM. I WANT TO GO VISIT THEM SO SO SO SO SO MUCH.”



Daniella was born in Cape Town. Her mother and father thought that she would automatically be Cuban because they are Cuban. However, the Cuban embassy would not recognise Daniella as a citizen, because she was not born in Cuba. Contrary to popular belief, a child does not become a South African citizen by merely being born in the country. A child becomes a citizen when they have a parent who is South African. As Daniella does not, she is stateless. Daniella would like to visit her granny in Cuba, because her granny is sick, but Daniella cannot get a passport to travel, because she is stateless. One day Daniella will not be able to finish school, because she does not have a legal status in South Africa. When Daniella's parents have to leave South Africa to go back to Cuba they will face the dilemma of having to leave Daniella behind or choose to live in South Africa illegally, because she cannot travel.

PROBLEM:

Section 2(2) of the South African Citizenship Act provides citizenship to children who are born stateless in South Africa. However, it is not possible for stateless children to apply for citizenship using this provision, because there is no regulation to provide a form to fill out at the local office. There are no guiding

principles on determining whether a child is stateless in the Act.

SOLUTION:

The Minister of Home Affairs should write a regulation which will provide guidance and a form to make it possible for stateless children to apply for, and obtain, citizenship.

This solution will bring South African practice into compliance with the CRC and was included in the Committee's recommendations to South Africa. The Committee has urged States Parties to ensure that no child is or risks being stateless³, and has deemed that providing safeguards against statelessness is a mutual responsibility of states to which a child has a genuine link. It has recommended therefore, that migrant sending states (in this case Cuba) remove restrictions on attribution of nationality to children born abroad⁴, and that host states (South Africa in this instance) ensure that all children *who are otherwise stateless* should acquire the country's nationality, irrespective of the parent's or legal guardians' (legal) status sex, race, religion or ethnicity, or social origin⁵.

RUDZANI - AGE 9

Rudzani was born in Johannesburg to a Congolese mother. Although Rudzani's mother registered his birth with the South African authorities, she did not report his birth to the Congolese embassy. Shortly after his birth she abandoned Rudzani without having ensured that he had either Congolese or South African citizenship. Foreign children are issued with birth certificates, but this does not give them South African citizenship. Because of his mother's disappearance, he is unable to prove his link to the DRC in order to obtain citizenship. The Department of Home Affairs will not allow him to apply for naturalisation in South Africa, because he was born before 2013, when the provision was first enacted to allow children like him to apply for citizenship. Although Rudzani has been able to attend primary school using his birth certificate, he will not be able to formally pass his final year in school without a valid identity document. He will not be able to study at a university for as long as he is stateless.

PROBLEM:

Section 4(3) of the South African Citizenship Act allows a child born in South Africa to parents with no citizenship or permanent status to apply for South African citizenship, but only once the child becomes an adult at age 18 and the birth is registered. This means that such a child will remain stateless until he is an adult and even then the application is subject to the discretion of the Minister. Application of

this section is currently interpreted to be limited to children born after the provision was enacted in 2013, meaning it currently excludes Rudzani who was born in 2007. In addition, there is no form to allow children to apply for this status.

SOLUTION:

The Department of Home Affairs should amend their restrictive policy so that section 4(3) applies to all otherwise stateless children born before 2013. Further, in line with the Committee recommendation that States Parties expeditiously grant nationality to all children born in their territory⁶, stateless children should not have to wait until they turn 18 to apply for South African nationality. Lastly, the Minister of Home Affairs should enact a regulation to clarify the application of the provision of South African nationality to all children, regardless of the parents' nationality or legal status, as well as provide a form to facilitate the application process.



NKATEKO - AGE 6

Nkateko was born in South Africa. His mother is undocumented, but has a claim to South African citizenship. His father is a South African citizen with a valid identity document. Nkateko has a claim to South African citizenship, because of his South African father. However, the Birth and Deaths Registration Act does not allow children to be registered if their mothers are undocumented. It further bars single fathers from registering their children without the mother giving her consent and providing her documents. Nkateko is now 6 years old and has started school, but could only be provisionally registered because he has no birth certificate. If he does not produce a birth certificate soon, he will not be able to return to school. For as long as his South African citizenship remains unrecognised, he is stateless.

PROBLEM:

Regulation 3, 4 and 5 of the BDRA require a child's parents to produce a valid identity document or passport with a valid

permit in order to register a child's birth. Regulation 12 of the BDRA allows only mothers to register the births of children born out of wedlock even if the father is documented. This leaves the children of all undocumented mothers undocumented and at risk of statelessness.

SOLUTION:

Regulations 3, 4, 5 and 12 should be amended to allow children of undocumented mothers to be registered and to allow single fathers to register the births of their children where the mother is unavailable, unwilling or undocumented. The Committee requires States Parties to guarantee that all children born in the country are registered at birth regardless of their parents' citizenship status and/or country of origin⁷. The Committee also stresses the need for states to review discriminatory legislation on birth registration. This recommendation was made to South Africa in 2016.



“I WANT A BIRTH CERTIFICATE SO
I CAN GO TO SCHOOL”



EVE – AGE 8

“I WISH I COULD STAY WITH MY GRANDPARENTS”



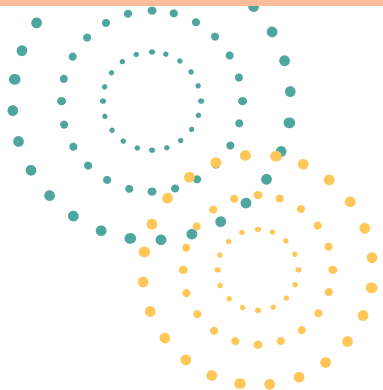
Eve was born in Ghana to a Lebanese mother. Her father was a South African citizen, however, he died in Ghana before her birth was registered in South Africa and her South African citizenship confirmed. Her mother was unstable and gave up guardianship to Eve's South African grandparents in South Africa where she came live. The South Africa government has refused to register her birth and recognise her as a South African, because the BDRA does not allow legal guardians to register children unless the parents have passed away. It also requires the father to sign for paternity at registration. Eve's mother is unavailable and her father is deceased. Eve's grandparents are unable to financially support her and are unable to apply for a social grant to look after her. She has been placed in foster care. Eve is stateless.

PROBLEM:

Section 9 of the BDRA does not allow guardians to register children unless both biological parents are dead. Regulation 12 requires the father to sign for paternity in order to be recorded as the father of the child and to pass nationality to his child where the child is born outside of wedlock.

SOLUTION:

The BDRA should be amended to allow legal guardians to register children where the parents are alive, but unavailable. The regulations should be amended to allow paternity to be recognised even after the father's death, in order to allow them to pass nationality to their children on an equal basis with children born within marriage. The Committee has urged States Parties to abide by Article 7 obligations to ensure that all children within the territory have the right to be registered at birth and acquire a nationality, irrespective of the child's or his or her parents' or legal guardians' sex, race, religion or ethnicity, social origin or status⁸.



SARAH – AGE 17

Sarah was born at home (i.e. not in a hospital) to a foreign mother. Her mother passed away before her birth was registered and Sarah was left undocumented. Sarah was placed in a children's home, but the social workers cannot register her birth because there was no South African citizen to witness her birth. Sarah's mother was assisted in birth by a non-South African woman. Sarah does not have any provable link to the country of her mother's birth. She might be able to access South African citizenship through the Citizenship Act which allows South African citizenship for children born stateless in South Africa. However, this is not possible without birth registration. She is therefore stateless. Sarah cannot go to school because of her lack of legal status. Once she turns 18, she will no longer be considered a child and will be at risk of arrest, detention and deportation to a country she has no citizenship in. Sarah recently had a child of her own and cannot register her child because she is undocumented and stateless.



PROBLEM:

Regulations 3, 4 and 5 require children born at home to produce an affidavit from a South African citizen who witnessed their births in order to get a birth certificate. Section 2(2) of the SA Citizenship Act requires birth registration in order to recognise otherwise stateless children as citizens in South Africa.

SOLUTION:

The BDRA should be amended to allow foreign witnesses to produce affidavits regarding home births. It should also make provision for children who were born at home with no witness other than their mothers. The SA Citizenship Act should be amended to remove the requirement for birth registration in order to allow stateless children to apply for citizenship. The Committee has recommended that South Africa review and amend all legislation and regulations relevant to birth registration and nationality to ensure their full conformity with the Convention, including through the removal of requirements that may have punitive or discriminatory impacts on certain groups of children⁹.

**“I CANNOT REGISTER MY CHILD
BECAUSE I AM UNDOCUMENTED
AND STATELESS”**



VUSI – AGE 10

10 year old Vusi was born out of wedlock and abandoned by his mother as an infant. His father, a South African citizen, is his sole care giver and has raised Vusi. Throughout the years and even with the support of the Department of Social Development, he has been unsuccessful in registering the birth of his son at the Department of Home Affairs. This is a cause for concern for Vuyo's father as he fears for his son's future in the event that anything should happen to him. It also saddens him that Vusi will be unable to access socio economic rights or be added as a dependent to the house registered in his father's name without an identity document.

PROBLEM:

According to regulation 12 of the Birth and Deaths Registration Act, children born out of wedlock are to be registered by their mothers. A father can only register such a child's birth with the mother's consent. A new directive requires single fathers to provide and pay for expensive DNA paternity testing in order to register births, discriminating against applicants who cannot afford them or do not live near the prescribed DNA laboratories.



“MY FATHER LOOKS AFTER ME, BUT HE CANNOT REGISTER MY BIRTH”



SOLUTION:

The regulations should be amended to allow single fathers to register their children and remove the requirement for DNA tests. This will prevent discrimination against children born out of wedlock and against single fathers who have parental responsibilities and rights. The Committee has recommended that States Parties guarantee that all children within the territory of state, including children born out of wedlock, refugee and stateless children are registered at birth¹⁰.



ANNIE – AGE 3

Annie's mother was a Lesotho citizen. She gave birth to Annie in South Africa, but gave her up for adoption shortly after birth. Annie was registered as a foreigner in South Africa. Annie was adopted by a South African mother and father. Once the adoption was legalised, the Department of Home Affairs refused to register her as a South African citizen and the child of her adoptive parents. Annie has a claim to South African citizenship, but the South African Citizenship Act requires birth registration before citizenship is effective. The BDRA only allows for a change of identity number once a child is adopted and does not specify the procedure for foreign adopted children who did not have a South African ID number before the adoption. Because Annie lost her improbable claim to Lesotho citizenship as a result of the adoption, she was stateless until her registration could be negotiated.

PROBLEM:

The BDRA does not make specific provision for the re-registration of foreign adopted children even though the Children's Act requires it.

SOLUTION:

The BDRA should be amended to include specific procedures for the registration of foreign adopted children. The Committee has recommended that States Parties take measures in accordance with Article 7 CRC, to ensure birth registration and to facilitate applications for citizenship, so as to avoid statelessness in cases of foreign adoption. The Committee also recommends that a child is not left stateless or discriminated against during the waiting period between his or her arrival in the State party and formal adoption¹¹.



"I AM HAPPY AND PROUD, BECAUSE I HAVE THE SAME NAME AS MY SISTER"



MANNY – AGE 17

Social workers found Manny in the care of a Portuguese speaking woman who was not his mother and who was neglecting him. He was two years old when he was removed from her care by the Department of Social Development. Since then, there has been no sign of the woman who he was found with. He had no documents and was too young to remember any of the details of where he was born or who his parents were. He may or may not have been born in South Africa and/or to South African parents. Manny has been living at a children's home in Cape Town his whole life. He remains unregistered, because the Department of Home Affairs believe he is foreign as he was found with a seemingly foreign woman. Manny is now 17 and will soon be regarded as an adult. Manny only knows South Africa and is terrified at the idea of being considered an illegal foreigner once he turns 18. He may be subject to arrest and deportation to a country where he holds no citizenship. Manny is a bright young boy who wants to study and make a life for himself, but his future is unclear and he cannot make plans to be successful, because he is undocumented and stateless.

PROBLEM:

Section 12 of the BDRA requires the registration of children who are abandoned or orphaned and have not been registered before. However, it is currently only applied to young babies and it requires the Department of Home Affairs to register children as foreigners when they are clearly

foreign. The Department thinks that Manny is Angolan, because he had a Portuguese speaking caretaker when he was 2 years old. However, there is no proof to that effect and the Angolan embassy has confirmed that he is not considered as such. Manny is therefore stateless.

SOLUTION:

The BDRA should be amended to specifically include foundlings. These are children whose parentage is unknown, regardless of their age. As supported by the Committee and Article 7 CRC, foundlings should be registered and recognised as South African citizens in terms of section 2(2) of the Citizenship Act which gives citizenship to stateless children. The Committee has recommended that South Africa put measures in place to grant nationality to children in their jurisdiction who are stateless or at risk of statelessness. This includes children who were not born in South Africa¹².



CALEB – AGE 20

Caleb was born in the DRC. His father fled the DRC as a refugee and settled in South Africa with Caleb, where he claimed refugee status. Before his father obtained refugee status in South Africa, he passed away, leaving Caleb undocumented and unaccompanied. Caleb was placed in a child and youth care centre where he has been living ever since his father's death. Caleb has no individual refugee claim. He was very young when he came to South Africa with his father. He does not remember the DRC at all. He cannot establish a claim to nationality in the DRC and cannot be returned there, because he has no known relatives there. The Children's Court has placed him in the care of a South African foster home, but neither the SA Citizenship Act, nor the Immigration Act makes provision for a legal status for someone like him. He is stateless in South Africa.

PROBLEM:

Caleb's only hope of obtaining legal status and documentation is through section 31(2)(b) of the Immigration Act, under which he relies upon the Minister's discretion. This status is not widely applied and will only give Caleb permanent residence and not citizenship.

He may be able to apply for citizenship after 5 years of having permanent residence, but until then he will remain stateless.

SOLUTION:

Address the current gap in the law which allows particularly vulnerable children who are stateless or at risk of statelessness, to reach adulthood without having accessed South African nationality. In particular, make provision for an immigration status and an identifying document for unaccompanied or separated migrant children in order to facilitate naturalisation. In line with the Committee's General Comment No.6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, the Committee recommends state parties to provide birth registration and access to basic rights, such as health and education, to all stateless children and their families, on a state party's territory, irrespective of their legal status. This may be a first step in the possibility to acquire a nationality for children in such circumstances¹³. In accordance with Article 7, the Committee has urged the States Parties to ensure the implementation of the right of all children to acquire a nationality, as far as possible, in order to prevent statelessness¹⁴. The Committee has made a recommendation to South Africa to consider providing migrant, asylum-seeking and refugee children with an option of permanent settlement in the State party, in order to avoid the deportation of children.



THE UN COMMITTEE ON THE RIGHTS OF THE CHILD'S CONCLUDING OBSERVATIONS ON SOUTH AFRICA

Civil rights and freedoms (arts. 7, 8 and 13-17) Birth registration, name and nationality (par 31 & 32)

“PUT IN PLACE REGULATIONS TO GRANT NATIONALITY TO ALL CHILDREN UNDER THE JURISDICTION OF THE STATE PARTY WHO ARE STATELESS OR ARE AT RISK OF BEING STATELESS.”

The Committee welcomes the substantial increase in the level of birth registration in the State party. However, the Committee is concerned that:

- a. Administrative and practical obstacles in obtaining birth registration, including punitive measures for late registration under the Births and Deaths Registration Act (Act No. 51 of 1992), may have negative and discriminatory impacts;
- b. The South African Citizenship Act (Act No. 88 of 1995) sets disproportionately strict conditions for granting the nationality of the State party to certain groups of children, and also allows for deprivation of nationality from children on the basis of the loss of nationality of their parents;
- c. There are reportedly many children, who either migrated to or were born in the State party, in child and youth care centres who are undocumented and/or whose births have not been registered;
- d. Possession of one's birth certificate is a rigid requirement for accessing social and child protection services.

Taking note of target 16.9 of the Sustainable Development Goals on providing legal identity for all, including birth registration, the Committee strongly recommends that the State party:

- a. Review and amend all legislation and regulations relevant to birth registration and nationality to ensure their full conformity with the Convention, including through the removal of requirements that may have punitive or discriminatory impacts on certain groups of children;
- b. Put in place regulations to grant nationality to all children under the jurisdiction of the State party who are stateless or are at risk of being stateless;
- c. Carry out regular monitoring and ensure that measures adopted in such legislation, regulations and guidelines guarantee the birth registration of all children in the State party, including non-nationals;
- d. Systematically identify all undocumented children currently residing in child and youth care centres in all parts of the State party and ensure their access to a birth certificate and a nationality;



- e. Ensure that a lack of birth registration does not hinder access to child protection services and basic social services, while enhancing its efforts for universal birth registration;
- f. Consider ratifying the Convention relating to the Status of Stateless Persons, of 1954, and the Convention on the Reduction of Statelessness, of 1961;
- g. Seek technical assistance from the Office of the United Nations High Commissioner for Refugees (UNHCR) and UNICEF, among others, for the implementation of these recommendations.

“CONSIDER RATIFYING THE CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS, OF 1954, AND THE CONVENTION ON THE REDUCTION OF STATELESSNESS, OF 1961.”



Special protection measures (arts. 22, 30, 32, 33, 35, 36, 37 (b)-(d) and 38-40) Migrant, asylum-seeking and refugee children (par 61 & 62)

The Committee welcomes the development of a legal and policy framework to protect asylum-seeking and refugee children in the State party. However, it is concerned at:

- a. The increasing number of unaccompanied children migrating into the State party and the heightened risk of destitution, exploitation, violence and abuse faced by unaccompanied children;
- b. The lack of accurate and disaggregated data on migrant, asylum-seeking and refugee children, including those who are unaccompanied and/or undocumented, as well as on child victims of trafficking;
- c. The ineffective implementation of relevant laws and policies; The definition of “dependents” and “family” under the Refugees Amendment Bill (notice No. 806 of 2015), which may not fully protect

THE UN COMMITTEE ON THE RIGHTS OF THE CHILD'S CONCLUDING OBSERVATIONS ON SOUTH AFRICA

the right to family unification that is provided in the Convention;

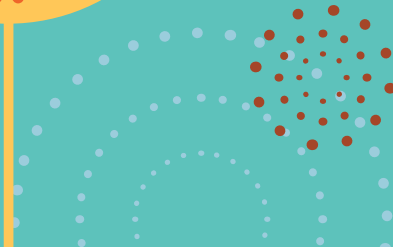
- d. The risk of deportation that is faced by migrant, asylum-seeking and refugee children due to the lack of legislation to allow permanent settlement in the State party as a durable solution;
- e. The arrests and detention of children on account of their immigration status.

With reference to its general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin and to the conclusion of the day of general discussion held in 2012 on the rights of all children in the context of international migration, the Committee recommends that the State party:

“CONSIDER PROVIDING MIGRANT, ASYLUM-SEEKING AND REFUGEE CHILDREN WITH AN OPTION OF PERMANENT SETTLEMENT IN THE STATE PARTY

- a. Strengthen systematic and disaggregated data collection on migrant, asylum-seeking and refugee children, in particular unaccompanied and/or undocumented children, as well as on child victims of human trafficking, and conduct a study on their situation as a basis for effective responses;
- b. Expedite the development and implementation of a protocol to streamline the delivery of timely child-protection services to migrant, asylum-seeking and refugee children, including services for (i) registration and issuance of identity documents; (ii) protection from violence and abuse; (iii) family unification or the provision of alternative care; and (iv) access to basic services; and apply the protocol consistently throughout the State party;
- c. Ensure that the Refugees Amendment Bill (notice No. 806 of 2015) is fully consistent with the Convention;
- d. Consider providing migrant, asylum-seeking and refugee children with an option of permanent settlement in the State party, in order to avoid the deportation of children;
- e. Expeditiously and completely cease the detention of children in irregular migration situations.

“





DOWNLOAD A GUIDE TO
MAKING SUBMISSIONS
TO THE UNCRC¹⁵



FOOTNOTES

¹The submission can be accessed here: http://www.institutesi.org/CRC_SouthAfrica_2015.pdf

²The concluding observations of the UNCRC Committee can be accessed here:
<http://www.lhr.org.za/sites/lhr.org.za/files/g1624198.pdf>.

³Bhutan, 2008, CRC/C/BTN/CO/2.

⁴Cuba, 2011, CRC/C/CUB/CO/2.

⁵Switzerland, 2015, CRC/C/CHE/CO/2-4; Kuwait, 2013, CRC/C/KWT/CO/2; South Africa, CRC/C/ZAF/CO/2.

⁶Czech Republic, 2011, CRC/C/CZE/CO/3-4; South Africa, CRC/C/ZAF/CO/2.

⁷Zimbabwe, 2016, CRC/C/ZWE/CO/2; South Africa, CRC/C/ZAF/CO/2.

⁸Kuwait, 2013, CRC/C/KWT/CO/2; South Africa, CRC/C/ZAF/CO/2.

⁹South Africa, CRC/C/ZAF/CO/2.

¹⁰Algeria, 2012, CRC/C/DZA/CO/3-4; South Africa, CRC/C/ZAF/CO/2.

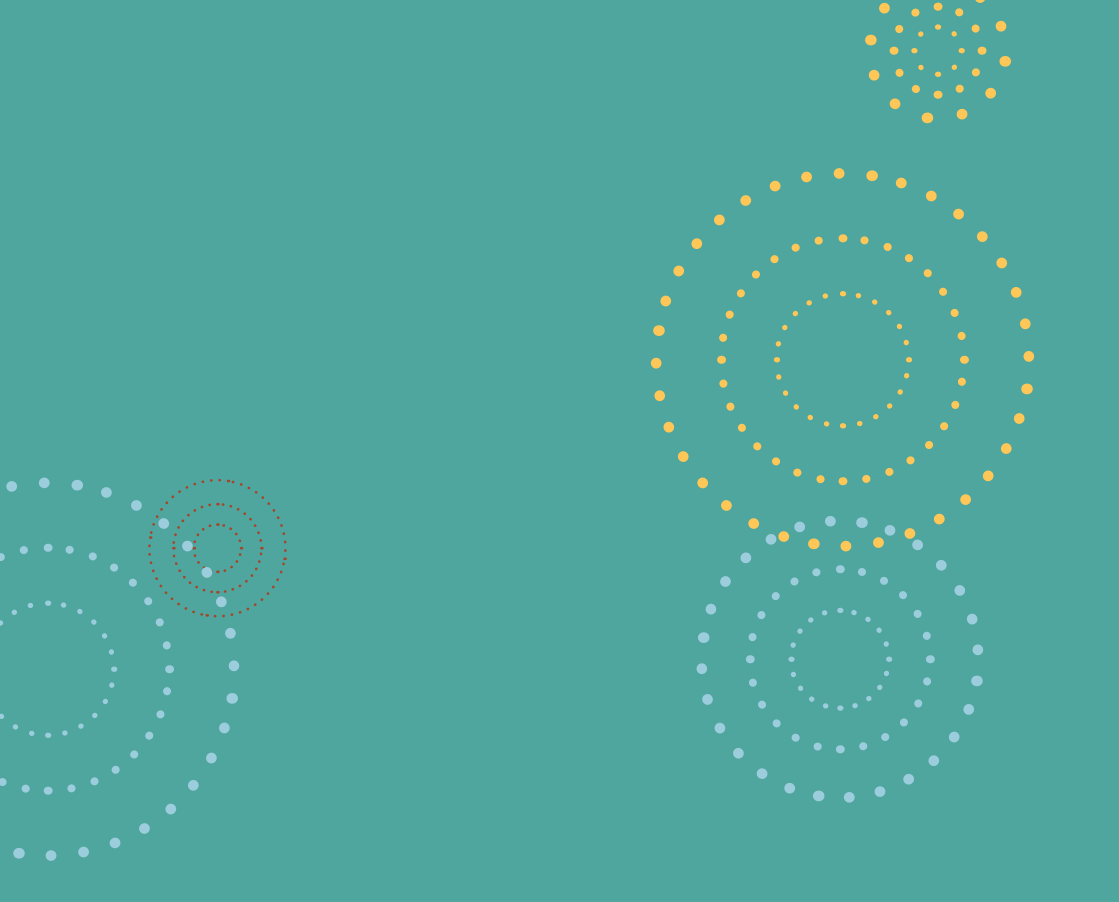
¹¹Canada, 2003, CRC/C/15/Add.215; Switzerland, 2015, CRC/C/CHE/CO/2-4.

¹²South Africa, CRC/C/ZAF/CO/2.

¹³Brunei Darussalam, 2016, CRC/C/BRN/CO/2-3; South Africa, CRC/C/ZAF/CO/2.

¹⁴Belarus, 2011, CRC/C/BLR/CO/3-4; South Africa, CRC/C/ZAF/CO/2.

¹⁵<http://www.statelessnessandhumanrights.org/>



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