

# Born of the Islamic State: Addressing Discrimination in Nationality Provision through a Rule of Law Framework

*By Sean Lees*

Statelessness Working Paper Series  
No. 2016/08

The Institute on Statelessness and Inclusion Statelessness Working Paper Series is an online, open access resource, which offers an avenue for centralising and sharing the latest knowledge, developments, and research findings on statelessness from multiple fields (including, but not limited to law, sociology, history, economics and health). It aims to inform a more effective response to the issue globally by facilitating the flow of knowledge and information between actors engaged with the issue across different contexts, countries and disciplines.

Submissions can be made at any time but papers will, in principle, be reviewed in two cycles each year (March and September). Contributions are welcomed from both scholars and practitioners, at any stage of their career. Research papers may present the findings of studies relating to statelessness in any discipline and may offer a discussion of theoretical/conceptual issues or an analysis of on-the-ground realities. Policy papers may report and comment on developments in the area of statelessness-related law, policy or programming.

For more details, visit <http://www.institutesi.org/forum/workingpapers.php>.  
Submissions and questions should be addressed to [papers@institutesi.org](mailto:papers@institutesi.org).

**Statelessness Working Paper Series No. 2016/08**  
**December 2016**

*The Statelessness Working Paper Series is fully Open Access and published digitally on the website of the Institute. All papers have been reviewed by an editorial team, but the opinions expressed in the papers are solely those of the authors.*

# **Born of the Islamic State: Addressing Discrimination in Nationality Provision through a Rule of Law Framework**

Sean Lees

*Statelessness Working Paper Series No. 2016/08  
Institute on Statelessness and Inclusion  
December 2016*

## **Author biography**

Sean Lees is an independent consultant with over ten years of experience in rule of law programming and policy development. Lees was the former Senior Policy Advisor for International Development Law Organization and a Rule of Law Officer in the UN Secretary-General's Executive Office. Lees has worked on rule of law and access to justice programmes in Afghanistan, Fiji, Iraq, Sudan and Thailand. Lees is a graduate of Boston College Law School and University of California at Berkeley.

## **Author email**

[seanlees@gmail.com](mailto:seanlees@gmail.com)

## **Key words**

access to justice — rule of law — Iraq — discrimination — SGBV — violence against women— Islamic State

## **Abstract**

The steady march towards the liberation of Iraq from the control of Islamic State (ISIS) is raising concerns for the children born of sexual slavery and forced marriages. How can we guarantee access to nationality for the children of women abducted by ISIS? What role might gender discrimination play in denying these children the right to nationality and how can it be addressed? This paper argues that the rule of law provides a conceptual framework to help rationalize and strengthen approaches towards addressing statelessness, particularly in cases involving discrimination in nationality provisions.



## 1. Introduction

In a windowless conference room at the Ministry of Labour and Social Welfare (MOLSA) in Sadr City, Iraq, a spirited debate is momentarily interrupted by a power outage. The room is cloaked in darkness and the air conditioning unit whirrs to a stop. The dozen or so participants gathered for a UN-sponsored working group on Sexual and Gender Based Violence (SGBV) are quickly enveloped in a stifling heat. “We do *not* need a special register for babies born of ISIS fathers,” a voice from the far side of the room insists, “because under the Constitution, *all* children born of Iraqi mothers are citizens.” Another voice, from the other side of the room responds, “Yes, we have the legal framework, *but* we must somehow *activate* the law.” Several people begin to talk at once, seemingly taking sides in the exchange, when the electricity returns with a click and a chime. A MOLSA official in attendance brings order to the room. “We will need legal advice on this issue,” she states imperially. “Let us move on for now.”

Experts working to end SGBV have many reasons to doubt the efficacy of Iraq’s laws, including the Constitution, to promote the interests of Iraqi women. Pockmarked with conflicting legislation, gaps in rights protection, and bold-faced discriminatory provisions, Iraq’s legislative framework is directly at odds with a women’s empowerment and equality agenda.<sup>1</sup> Even where the law provides for equitable treatment, as in the nationality provisions of the Iraqi Constitution, action in implementing the laws is far from guaranteed. Deep capacity deficits of institutional service providers, coupled with bureaucratic ambivalence and/or contempt towards women, discourages many from demanding their rights, particularly in cases involving SGBV.<sup>2</sup>

Iraq’s traditional norms also present challenges to women survivors of violence. A woman who is raped may bring great dishonour to her family. As a consequence, she may later be killed by a family member in order to reinstate the family’s standing. Weighing these circumstances, survivors of SGBV often choose to keep silent about the crimes committed against them or run away from home. As traditional women’s shelters are rare in Iraq, survivors are sometimes sheltered in detention facilities or nursing homes for the survivor’s protection. Women and girls who are sold, gifted or otherwise forced into sexual slavery to Islamic State (ISIS) soldiers, many of whom are non-Iraqis, face particularly grave circumstances. As if the lives of these women were not tragic enough, their children stand a good chance of joining the growing ranks of stateless people in the Middle East.

The status of Syrian refugee children in Iraq has been a key concern for people working on statelessness for several years now.<sup>3</sup> But less is known about the potential obstacles to nationality provision that face children born of women kidnapped and raped by ISIS soldiers in Iraq. It is in this context, that rule of law theory and practice reveals a potentially valuable contribution towards addressing statelessness. The rule of law, defined and explored in more detail later in this paper, provides a conceptual framework that gives shape to a multi-pronged and coordinated approach to addressing statelessness. In its most skeletal form, the framework is composed of three types of

---

<sup>1</sup> See Article 41 of the Iraqi Criminal Code, interpreted as providing license for a husband to physically abuse his wife for disciplinary purposes and; Article 409 of the Iraqi Criminal Code interpreted as a sanction for men to commit so-called honor killings. Iraq Criminal Code, Art. 41 and 409 (Act No. 111 (1969)); for a review of controversies relating to legislation see for example, Iraqi Women in Armed Conflict and Post Conflict Situation, Shadow Report submitted to the CEDAW committee, 57th Session, 2014; UN Office of the High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq: June – December 2013, June 2014; Marilou Grégoire-Blais, Iraqi Women: Lost Liberties, Alternatives, Summer 2010.

<sup>2</sup> See Iraqi Women in Armed Conflict and Post Conflict Situation, Shadow Report submitted to the CEDAW committee, 57th Session, 2014.

<sup>3</sup> According to the Brookings Institute, “The Middle East now faces the prospect of adding hundreds of thousands to the stateless population. Of the 4 million Syrian refugees, over 1 million are children under 18—many having left Syria without proper papers. There are also around 10,000 minors who have arrived in neighboring countries paperless and without an accompanying adult.” Omer Karasapan, The State of Statelessness in the Middle East, 15 May 2015; Charlie Dunmore, ed. Leo R. Dobbs, Born in Exile, Syrian Children Face Threat of Statelessness, UNHCR, November 2014.

interventions: non-discriminatory laws, accountable and inclusive institutions, and access to justice for the most vulnerable. Across these interventions are a set of procedural and normative requirements. The framework implicitly embraces both a top-down approach to reform, focused as it is on laws and institutions, but also a bottom-up approach, supporting the potential of individual rights-holders to demand that the government meet its legal obligations.

## 2. De jure and de facto discrimination in nationality provision

Any review of rule of law conditions must start with its Constitution or its equivalent. Constitutions, in the words of UN Deputy Secretary-General Jan Eliason, "...form the central repository and ultimate safeguard of the rule of law at a national level, providing a blueprint for a functioning system of rule of law and protecting and empowering the institutions that implement and enforce this system." As the body of fundamental principles or rules by which a state is governed, constitutions also often define the terms of nationality and citizenship.

Article 18 of the Iraqi Constitution of 2005 provides that, "Iraqi nationality is a right of every Iraqi and is the basis of his citizenship."<sup>4</sup> Article 18 also provides that, "An Iraqi is any person born to an Iraqi father or mother."<sup>5</sup> These and other Constitutional provisions would bring gladness to the hearts of hundreds of thousands of marginalized men and women in Iraq, as a promise to reverse arbitrary withdrawals of nationality under Sadaam Hussein's regime.<sup>6</sup> Unfortunately, however, Iraq's 2006 Nationality Law contains a significant number of provisions that discriminate against women.

For example, Article 4 of the 2006 Nationality Law stipulates that an Iraqi woman who gives birth outside of Iraq confers nationality only if she applies for Iraqi nationality for her child within one year of his or her reaching majority, and providing that the child's father is unknown or stateless and the child is residing in Iraq at the time of the application.<sup>7</sup> In other words, an Iraqi mother cannot pass nationality to a child born outside of the country on an equal basis with an Iraqi father. Under the terms of Article 5, a non-Iraqi mother who was nevertheless born in Iraq cannot pass nationality on to a child born in the country on an equal basis with a non-Iraqi father who was also born in Iraq.<sup>8</sup> Further, a woman who was born in Iraq who has lost her Iraqi nationality through marriage to a foreigner cannot regain it on the termination of marriage, on the same basis as a man, similarly situated.<sup>9</sup>

Gender discrimination in nationality laws is by now a well-documented phenomenon. According to UNHCR, laws or policies prohibiting or limiting the rights of women to pass citizenship to a child are

---

<sup>4</sup> Iraq Constitution 2005, Art 18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html>.

<sup>5</sup> In 2011, the Iraqi Parliament also lifted its longstanding reservation to Article 9 of the Convention on the Elimination of Discrimination Against Women (CEDAW), providing for equal rights in regards to nationality. See UN Convention on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the combined fourth to sixth periodic reports of Iraq, CEDAW/C/IRQ/CO/4-6, para. 6.

<sup>6</sup> See Institute on Statelessness and Inclusion, *The World's Stateless*, December 2014, p. 107.

<sup>7</sup> Iraqi Nationality Law, Law 26 of 2006, Art. 4, 7 March 2006, available at <http://www.refworld.org/docid/4b1e364c2.html>; UN High Commissioner for Refugees (UNHCR), Background Note on Gender Equality, Nationality Laws and Statelessness 2015, 6 March 2015, available at <http://www.refworld.org/docid/54f8369b4.html>.

<sup>8</sup> Iraqi Nationality Law, Law 26 of 2006, Art. 5, 7 March 2006, available at <http://www.refworld.org/docid/4b1e364c2.html>; Equality Now, *The State We're In: Ending Sexism in Nationality Laws*, January 2016, available at [http://www.equalitynow.org/sites/default/files/NationalityReport\\_EN.pdf](http://www.equalitynow.org/sites/default/files/NationalityReport_EN.pdf).

<sup>9</sup> Iraqi Nationality Law, Law 26 of 2006, Art. 13, 7 March 2006, available at <http://www.refworld.org/docid/4b1e364c2.html>; Equality Now, *The State We're In: Ending Sexism in Nationality Laws*, January 2016, available at [http://www.equalitynow.org/sites/default/files/NationalityReport\\_EN.pdf](http://www.equalitynow.org/sites/default/files/NationalityReport_EN.pdf).

currently in force in 27 countries.<sup>10</sup> Half of these are found in the Middle-East North African region.<sup>11</sup> As a result, unknown numbers of children grow up without access to identity documents that unlock education, health care or employment opportunities.

A plain reading of the Iraqi Constitution would indicate that the children born of rape survivors would automatically enjoy nationality. Yet, as evidenced in a number of other countries, ending statelessness is not merely a matter of black letter law.<sup>12</sup> Like Iraq, Nepali legal provisions allow that a child obtains nationality by descent from either the mother or the father, or both. In practice, however, a child seeking nationality through his or her mother faces nearly insurmountable challenges. According to a legal aid advocate, “The problem is not in the laws but in the mind-sets of government employees entrusted with the responsibility of issuing citizenship cards. They cannot imagine a women’s identity independent of a man.”<sup>13</sup> Nepal's bureaucratic system reportedly discriminates widely against all women, but especially those who have gone abroad for work, women who have been raped or abandoned, trafficked, married to foreigners, or otherwise, forced to leave home or divorce.<sup>14</sup> Consequently, there are over 4 million Nepalese<sup>15</sup> estimated to live without citizenship papers and who cannot obtain driving licenses, open bank accounts, pursue higher education or conduct legal transactions.<sup>16</sup> As explained by Van Waas, “there are persons who would legally be eligible for a particular nationality, who are nonetheless not considered as nationals by the state, and whose statelessness is consequently hidden.”<sup>17</sup>

### 3. The importance of documents in Iraq

Though there is evidence of significant levels of domestic violence, rape and early marriage in Iraq’s IDP camps, legal aid organizations report that they are rarely asked for assistance in addressing these crimes.<sup>18</sup> Instead, legal aid organizations receive a significant number of requests from IDPs to secure official documentation, including identity cards and marriage and death certificates in order to secure free movement and to access basic services, including education, health care, and welfare

<sup>10</sup> UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2016, 8 March 2016, available at <http://www.refworld.org/docid/56de83ca4.html>; see also, Angelina E. Theodorou, 27 Countries Limit a Woman’s Ability to Pass Citizenship to Her Child or Spouse, Pew Research Center, August 5, 2014.

<sup>11</sup> The Global Campaign for Equal Nationality Rights, available at: <http://www.equalnationalityrights.org/index.php/countries/middle-east-north-africa>.

<sup>12</sup> See Institute on Statelessness and Inclusion, *The Worlds Stateless*, December 2014, p. 107, “The Iraqi authorities have since reported that the vast majority of those Faili Kurds who remained in or returned to Iraq have now had their nationality reinstated...Nevertheless, the requirements to be met by Faili Kurds seeking to regain their nationality were described in one report as “almost crippling” and a relatively small but unknown number of persons concerned have been able to satisfy the evidentiary requirements such that statelessness remains a problem in Iraq.” Citing, F. J. Darah, “Faili Kurds: The curse of compound identity and scars of collective memory,” in S. Salloum, *Minorities in Iraq: Memory, Identity and Challenges*, Masarat for Culture and Media Development, 2013, page 120.

<sup>13</sup> Bhuwan Sharma, *Rights-Nepal: Laws Have Changed, Mindsets Haven’t*, Inter Press Service, 8 April 2010, available at <http://www.ipsnews.net/2010/04/rights-nepal-laws-have-changed-mindsets-havenrsquot/>.

<sup>14</sup> Getting Nepali citizenship is a tough call, BBC, 21 June 2012, available at <http://www.bbc.com/news/world-asia-india-18232250>.

<sup>15</sup> Susann Nowack, *Gender Discrimination in Nepal and How Statelessness Hampers Identity Formation*, Statelessness Working Paper Series No. 2015/02, Institute on Statelessness and Inclusion, December 2015, available at [http://www.institutesi.org/WP2015\\_02.pdf](http://www.institutesi.org/WP2015_02.pdf).

<sup>16</sup> Getting Nepali citizenship is a tough call, BBC, 21 June 2012, available at <http://www.bbc.com/news/world-asia-india-18232250>.

<sup>17</sup> Institute on Statelessness and Inclusion, *The Worlds Stateless*, Institute on Statelessness and Inclusion, December 2014, available at <http://www.institutesi.org/worldsstateless.pdf>.

<sup>18</sup> UN Convention on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the combined fourth to sixth periodic reports of Iraq, CEDAW/C/IRQ/CO/4-6, para. 9; Iraqi Women in Armed Conflict and Post Conflict Situation Shadow Report submitted to the CEDAW committee at the 57th Session February 2014; UN Office of the High Commissioner for Human Rights (OHCHR), *Report on Human Rights in Iraq: January - June 2014*, August 2014.

assistance.<sup>19</sup> The consequences are stark for those not in possession of documents. There are repeated stories of IDP women minutes away from giving birth that are denied entry into hospital for a lack of registration papers. Men are refused passage through checkpoints in search of work and children are turned away from school. Possession of divorce or death certificates can make a difference between destitution and moving on with one's life.

According to Iraqi women's advocates and legal aid attorneys, obtaining legal documentation is also a herculean task involving convoluted procedures, and multiple, in-person visits to far-flung ministries. The processes involved in obtaining documents have a discriminatory impact on women IDPs who lack transport, money and spare time. Further complicating the effort, traditional restrictions on women's freedom of movement and freedom to consult with a group of men outside of trusted circles, significantly curtails a woman's ability to discuss issues with administrative officials. It is in this context that advocates rightfully question whether Iraqi women, further burdened by the stigma of sexual violence, will be able to apply for the nationality of children born of an ISIS soldier.

#### 4. A global effort to fight statelessness

The international community's increased interest in the plight of an estimated 15 million<sup>20</sup> stateless people is a welcome, albeit much delayed development. Statelessness—now rightly regarded as a human rights issue of first order—is more widely recognized as a cause of political and social instability, and is specifically identified as a challenge to achieving sustainable development.<sup>21</sup> Recognizing the broader implications of statelessness, experts and researchers are deepening the discourse on statelessness with provocative questions. They ask, for instance, what is the value of granting legal status or documentation, where discrimination in health care provision, education and other essential services persists? What does it mean that a state claims that individuals from a marginalized group are nationals of the state, and yet effectively or purposely denies them legal documentation? Why does gender discrimination in nationality provision continue even after the laws are reformed, and what are the consequences? For a growing chorus of researchers, advocates, and humanitarian aid and development practitioners, efforts to end statelessness must go beyond law reform to address underlying conditions of inequality, marginalization, and exclusion at the heart of the statelessness experience.

In the spirit of cross-disciplinary cooperation, the second half of this working paper provides a rough sketch of how the rule of law might provide a conceptual framework with which to approach the multi-dimensional challenge of statelessness.<sup>22</sup> This paper explores how the promotion of sound legal frameworks, coupled with accountable institutions, and access to justice for stateless individuals, creates the necessary conditions for stateless populations to realize their rights to both nationality and legal identity, but also to essential services, land ownership and political participation.

---

<sup>19</sup> See for example, United States Agency for International Development, Iraq Access to Justice Program Final Report, OCTOBER 1, 2010 – September 30, 2015, available at [http://pdf.usaid.gov/pdf\\_docs/PA00KTXJ.pdf](http://pdf.usaid.gov/pdf_docs/PA00KTXJ.pdf).

<sup>20</sup> The Institute on Statelessness and Inclusion has estimated that there are over 15 million stateless people world-wide, when stateless refugees and Palestinians are also included in estimates. See Institute on Statelessness and Inclusion, *The World's Stateless*, December 2014, accessed at <http://www.institutesi.org/worldsstateless.pdf>.

<sup>21</sup> See, for example, Guidance Note of the Secretary-General: The United Nations and Statelessness, June 2011; UN Human Rights Council, Human rights and arbitrary deprivation of nationality, 28 June 2012, A/HRC/20/L.9; see also, UN General Assembly, Report of the Secretary-General for the World Humanitarian Summit, 2 February 2016, A/70/709; Amal de Chickera, Statelessness, Human Rights and Development: It's time to Connect the Dots, 8 October 2013, available at: <http://www.statelessness.eu/blog/statelessness-human-rights-and-development-its-time-connect-dots>.

<sup>22</sup> This is certainly not the first time the rule of law has been proposed as a conceptual framework to address statelessness or refugee issues. See UN High Commission for Refugees (UNHCR), Executive Committee of the High Commissioner's Programme, EC/66/SC/CRP.10, 8 June 2015.



## 5. Defining the rule of law

For many years, research on statelessness was largely confined to the analysis, interpretation and identification of gaps in national and international law.<sup>23</sup> Academics pointed to constitutional law reform, or state accession to international conventions on statelessness, or new interpretations thereof, to reduce statelessness or better the conditions of stateless people. This approach remains important. If statelessness is the lack of a legal bond to the state, then logically, new laws or amendments must be passed in order to create that bond and end statelessness.

Today, however, there is wider recognition that research on statelessness, “must evolve beyond the study of statelessness law. There is an evident need to explore statelessness from an interdisciplinary perspective, to better understand why this extreme form of exclusion is allowed to happen—and why it can so stubbornly persist—and what its true impact is on the lives of individuals, the fabric of communities and the integrity of the modern nation-state system.”<sup>24</sup> This sentiment is welcome, if only because it opens the door to more incisive look at the political, cultural, and economic forces behind statelessness, and allows us to hold decision-makers and institutions accountable for their actions.

Given its traditional focus on laws, it seems only natural that the research and advocacy agenda on statelessness should consider a rule of law perspective. Indeed, the rule of law provides a conceptual framework for approaching statelessness that may further rationalize an interdisciplinary approach, while providing new impetus for policy formation and programmatic undertakings.

The rule of law is not an idea borne of contemporary political scientists. In fact, the first expressions of the principle may have originated around 2000 BCE with King Hammurabi of Babylonia, in current day Iraq. As old as the concept may be, it still lacks an agreed definition between and among academics, advocates and governments. Speaking on behalf of the UN system, the UN Secretary-General has defined the rule of law as:

*...a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal identity, avoidance of arbitrariness and procedural and legal transparency.*<sup>25</sup>

The definition is by some accounts long-winded, seeking to capture every possible aspect of the concept at the cost of accessibility and perhaps, coherence. Breaking the definition down further, however, three essential elements emerge. Under the rule of law: 1) those who wield power are to be held accountable; 2) laws must clear, stable and just; 3) the ways in which laws are processed and executed must likewise be accessible and just.<sup>26</sup> In short, the rule of law is about controlling power and directing it towards positive or just ends, mostly through agreed-upon rules that detail the

<sup>23</sup> Laura van Waas and Mark Manly, *The State of Statelessness Research: A human rights imperative*, January 2014.

<sup>24</sup> *Id.*

<sup>25</sup> United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23 August 2004, para.6.

<sup>26</sup> See World Justice Project, *Rule of Law Index*, 2015, available at <http://worldjusticeproject.org/rule-law-around-world>.

legitimate use of authority.<sup>27</sup> Unsurprisingly perhaps, the rule of law is considered essential to the protection of human rights.<sup>28</sup>

The Secretary-General's definition of the rule of law also attempts to merge two constituent though sometimes competing interpretations of the concept, both hinging on what level of prominence to give the related but distinct notion of justice. Proponents of the 'thin definition' of the rule of law, are firm believers that justice is too subjective, or too wrapped up in cultural notions to have a place in our understanding of what constitutes the rule of law. For them, the quality of institutions and formal decision-making processes are primary. The emphasis is on ensuring legal consistency, guaranteeing efficient and transparent justice services, and providing for the equal application of the laws and due process.<sup>29</sup>

Under the 'thick definition', proponents argue that it the results that flow from our legal processes that are central to our understanding of the rule of law. Here the emphasis is on norms, often expressed in human rights conventions and national constitutions that strengthen civil, economic, social and cultural rights.<sup>30</sup> A thick definition requires that our processes actually result in a more equitable and just society for all. In the context of statelessness challenges, a 'thin approach' to the rule of law would ensure that legal status provision is handled efficiently, transparently and equitably. Thus, in the case of a child born as a result of rape, nationality would be conferred by administrative officials through an accessible mechanism and coupled by an effective appeals procedure. Both would be free of burdensome application requirements including unreasonable fees. An Iraqi mother would be provided adequate information about those procedures and would not need to pay a bribe.

Under the 'thick approach' one would look beyond the processes of providing nationality to include efforts at ensuring nationality is enjoyed by all. It might also mean that violations of fundamental rights, including economic and social rights of stateless or formerly stateless people are formally recognized and addressed concurrently. Again, using the Iraqi context to demonstrate, the Iraqi government would fulfil its positive obligations to reach out to the women of newly liberated areas, to proactively provide birth registration or other documents leading to or conferring nationality to their children. It might also take measures to ensure that the Faili Kurds and other formerly stateless groups are provided access to education, clean water, social welfare assistance, health care, or access to affirmative action programmes.

## **6. Linking human rights, the rule of law and statelessness**

The rule of law is key to creating rights-respecting environments, informed by a relationship of trust and confidence between the public and the state. Stateless people, of course, are defined as those who have no link to any state, implying that they lack "the right to have rights."<sup>31</sup> They are as such,

---

<sup>27</sup> "The basic premise of the rule of law is that no institution, entity, or individual is above the law. This is in contrast of course, to rule by force or decree, or to rule of man, family, or cabal." Doing Justice to Sustainable Development, International Development Law Organization, 2014.

<sup>28</sup> "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>29</sup> Brian Z. Tamanaha; *On the Rule of Law: History, Politics, Theory*, St John's University, New York, November 2004.

<sup>30</sup> International Development Law Organization, *Doing Justice to Sustainable Development*, 2014.

<sup>31</sup> See Hannah Arendt, *The Origins of Totalitarianism*, Harcourt Books, 1994, p. 292; See also, *Trop v. Dulles*, 356 U.S. 86, 101-102 (1958).

“the most excluded people in the world,” as described by the former High Commissioner for Refugees, António Guterres.<sup>32</sup>

Though their status as the ‘most excluded’ is not contested, the popular and tragic refrain that the stateless are ‘without the right to have rights’ is an unfortunate characterization of statelessness that leads to a narrow construction of the challenge and potential solutions. Stateless people are human of course, and therefore are entitled to a whole host of rights on account of their human status alone. Their economic, social, cultural, and political rights are protected without the need to prove legal status. This obligates states to both refrain from violating the rights of the stateless, but also to take positive steps towards the realization of their rights, including the right to nationality. This argument is no mere academic exercise, but rather has important, practical implications for stateless people.

Under strengthened human rights mechanisms led by the Human Rights Council, the human rights conditions of stateless people receive formal attention and public exposure.<sup>33</sup> In particular, the Universal Periodic Review (UPR) lifts the lid on the conditions that stateless people suffer, providing leverage for statelessness experts to pressure states to do more. The UPR is also essential to maintaining the norms that protect rights of stateless people and prevent violations from happening in the future. These norms might make it more likely that the police of a host state responds to allegations of slavery or trafficking of stateless individuals with investigations and arrests, or that a ministry provides emergency food supplies to a stateless group facing starvation. Barbaric as these examples may sound, they compel us to think clearly about the power behind the idea of human rights—in this case the right to life, liberty and security of person—and the importance of the rule of law. Stateless people derive their rights from being human and the rule of law is the instrument by which those rights are protected. Overtime, dedicated investments in the rule of law should also lead to a strong rights-based culture founded on human rights norms, discouraging deviations from equitable treatment, while holding (Iraqi) bureaucrats accountable for arbitrarily denying women the right to confer nationality upon their children.<sup>34</sup>

## 7. Rule of Law framework and its contribution to solving statelessness

High rates of statelessness tend to correlate with deficits in the rule of law. Aligning UNHCR’s most recent Statelessness Statistics<sup>35</sup> with the World Justice Project, Rule of Law Index for 2015,<sup>36</sup> reveals

<sup>32</sup> Vivian Tan, ed. Leo Dobbs, New Campaign: UNHCR launches global campaign for the stateless millions, 25 August 2011, available at <http://www.unhcr.org/news/latest/2011/8/4e54f6b36/new-campaign-unhcr-launches-global-campaign-stateless-millions.html>.

<sup>33</sup> Rachel Brett, Using the UPR to Address Statelessness, 14 May 2015, available at <http://www.statelessness.eu/blog/using-upr-address-statelessness>.

<sup>34</sup> See UN High Commission for Refugees (UNHCR), Executive Committee of the High Commissioner’s Programme, EC/66/SC/CRP.10, 8 June 2015, pg. 30. “At the national level, respect for the rule of law requires States to provide a safe and rights-respecting environment, supported by a functioning judicial sector and other accountability structures. In response to displacement and statelessness, this means that domestic laws and policies need to be framed fairly and non-arbitrarily, taking into account age, gender and diversity considerations. Strong national law and policies governing displacement can lead to more effective responses in situations of crisis. By aiming to achieve legal certainty in the application of rules, as well as accountability, equity and transparency in governance, national protection systems based on the rule of law ensure that the displaced can exercise their rights freely, in accordance with the law. Civil society, the legal community and persons of concern play an important role in working with States and UNHCR to identify challenges and potential responses, and to advance accountability.”

<sup>35</sup> UNHCR Global Trends 2015, Annex tables, available at <http://www.unhcr.org/global-trends-2015.html>.

<sup>36</sup> The World Justice Rule of Law Index relies on over 100,000 household and expert surveys to measure how the rule of law is experienced in everyday life around the world. Performance is assessed through 44 indicators organized around 8 themes: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. World Justice Project, Rule of Law Index, 2015, available at <http://worldjusticeproject.org/rule-law-around-world>.

that the countries with stateless populations of 100,000 or more tend to be ranked in the bottom third of the rule of law index. Myanmar, with a stateless population of 938,000 is ranked 92 out of 102 countries. Cote d'Ivoire at 700,000 stateless people is ranked 76. Only Thailand breaks from this pattern, with 444,000 stateless people and a ranking of 56 on the Rule of Law Index. Even at 56, Thailand is but one step above El Salvador (suffering from one of the world's highest homicide rates) and several below Albania (a country with significant levels of organized criminal activity). Unfortunately, the World Justice Project was unable to conduct its survey in Iraq for its 2015 review.

A rule of law framework to address statelessness is based on: 1) sound legal frameworks; 2) accountable and inclusive institutions and; 3) wide levels of access to justice. Working together, these interventions promote participation, accountability non-discrimination and equity in the provision of nationality, legal identity, legal documentation and essential services. The chart below provides a rough illustration of how the rule of law framework might be applied to statelessness challenges:

Rule of Law Framework for Addressing Statelessness		
	Procedural considerations/ Thin definition of the rule of law	Substantive considerations/ Thick definition of the rule of law
Legal frameworks	Eligibility requirements for nationality are clear, and not narrowly drawn so as not to undermine the intent of new laws granting nationality and legal identity documents.	All discriminatory laws are stricken. Legal frameworks guarantee non-discriminatory access to nationality. Laws related to political, civil, economic and social rights are found to apply to stateless or formerly stateless people; the State undertakes to remedy human rights violations of the past, including through compensation. Stateless groups participate in the development of nationality laws.
Institutions	Authorities across all relevant institutions provide equitable access to information and processes related to nationality. Implementation of nationality regulations is done without corruption and without arbitrariness, consistent with transparent and publically promulgated procedures. Women are employed as administrators or adjudicators in the provision of legal status/legal identity. Special consideration given to women, who may require additional time to file applications and/or appeals.	Authorities across all relevant institutions recognize right to access nationality and act accordingly. Authorities provide unencumbered access to essential services in health, education, water and sanitation and other rights to stateless or formerly stateless groups. Authorities allow for greater voice, respecting the political and civil rights of stateless or formerly stateless people. Women are treated as equals to men and realize their right to nationality in large numbers.
Access to Justice	Any adjudication over nationality is conducted efficiently, and in a transparent and easily understood manner, including by illiterate groups. Negative status determinations on applications for nationality can be appealed efficiently and effectively. Lawyers or civil society actors are free to discuss process and rights without fear of intimidation or other obstacles.	Stateless individuals enjoy the right to access justice, and apply for nationality; have recourse to bring violations of their human rights before a court or other dispute resolution mechanism and receive a remedy that is in furtherance of those rights. The process is empowering and leads to greater equality between groups.

As delineated above, the rule of law requires the development of legal frameworks that provide access to nationality, and ensure the protection of the human rights of stateless persons. Legislation to prevent or reduce statelessness must be participatory and inclusive, and be consistent with

international human rights law and other international standards—such as those laid out in the 1961 Convention. Such legislation should ensure, for example, that all children acquire citizenship at birth and receive relevant birth registration documents regardless of their ethnicity or race, or father’s nationality or stateless status. As an initial step, Article 4 of Iraq’s 2006 Nationality Law, among others, should be amended to eliminate any discriminatory impact.

The rule of law also promotes accountable institutions that respond to the needs of all individuals, including the stateless. Institutions that are held accountable for their delivery are composed of a network of decision-makers that have the capacity to manage the legal requirements related to legal documentation or nationality, and the independence and character to do so equitably and with integrity. Thus, in the situation of Iraq, institutional actors should be disciplined for denying children their right to a nationality through their mothers. Administrative appeals procedures should be made available.

Though there is no agreed definition, access to justice has been defined by some UN entities as the ability to seek and obtain a remedy for grievances in accordance with human rights principles and standards.<sup>37</sup> The rule of law requires wide-levels of access to justice so that stateless populations and other vulnerable groups can demand recourse for violations of their human rights or their rights to legal identity, and otherwise hold relevant institutions accountable for delivering on their economic, social, and political rights. In pursuit of their substantive rights, stateless people should be made aware of their rights, including procedures for applying for nationality. The processes themselves, should be straightforward and not cumbersome. Furthermore, individuals must also be given the right and the ability to appeal negative status determinations for nationality.

The Global Action Plan to End Statelessness 2014-2024, highlights the role that strategic litigation can play in reforming laws and institutional practices.<sup>38</sup> As a principle means of identifying cases with potential impact on law and policy, i.e. strategic litigation, legal aid provision should be more widely resourced. Access to justice programming interventions that address violence against women can and should also focus on addressing inequality in nationality provision in relevant contexts.

## 8. Conclusion

Solutions to statelessness require that we do more than amend laws or pass new legislation providing for equal access to nationality; solutions require the adoption of measures that strengthen respect for the rule of law more broadly. The rule of law framework discussed here—calling for the promotion of sound laws, accountable institutions and access to justice—can help us conceptualize strategic approaches to solving statelessness, including the urgent need to overcome discrimination against women in nationality provision. Despite the potential impact that rule of law and access to justice can play in ending the discriminatory application of nationality laws, much programming in this area has historically been piecemeal and uncoordinated.<sup>39</sup> The rule of law framework outlined here might provide a helpful template to better rationalize interventions to rule of law challenges, including discrimination in nationality provision and justice for survivors of SGBV.

In Iraq, this would mean coordinated advocacy campaigns at the national and international levels to reform discriminatory nationality laws. These efforts would be coupled with capacity building efforts

<sup>37</sup> UN Development Programme, Access to Justice Practice Note, 2004.

<sup>38</sup> “Support initiatives by the legal community to ensure the grant of nationality to children who would otherwise be stateless, including through strategic litigation. Build the capacity of legal professionals and the justice sector on statelessness and nationality issues.” UNHCR, Global Action Plan to End Statelessness 2014-2024, p. 10.

<sup>39</sup> See Camino Kavanagh and Bruce Jones, *Shaky Foundations: An Assessment of the UN’s Rule of Law Support Agenda*. New York University, 2011, pp. 42, 63.

across multiple institutions including the Ministry of Immigration and Displacement, the High Judicial Council, the Ministry of Labour and Social Affairs, and the Ministry of Justice, among others. Further, legal aid organizations, particularly those supporting mobile legal aid teams in newly liberated areas, would actively pursue cases involving nationality provision for children born of ISIS fathers. Actors working on these separate initiatives would need to coordinate and share experiences among themselves to strengthen public awareness, enhance knowledge and generate political will.

The Global Action Plan 2014-2024 provides a road map that encompasses elements of the rule of law framework outlined above. The Action Plan has the potential to engender the necessary political will to solve statelessness where specific national circumstances allow. The 2030 Agenda for Sustainable Development also provides an incentive for UN Member States to recommit to the rule of law and to issues related to nationality provision under Sustainable Development Goal (SDG) 16.<sup>40</sup> However, more research is required to clarify how legal identity provision (Goal 16, target 16.9) and the rule of law (Goal 16, target 16.3) can address statelessness effectively and without unintended consequences.

---

<sup>40</sup> UN General Assembly, Transforming Our World: the 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015.