

Stateless Indigenous People(s)

The Right to a Nationality, Including Their Own

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Abstract

According to the 2007 UN Declaration on the Right of Indigenous Peoples, every indigenous individual has the right to a nationality. The present paper focuses on the right to a nationality as a 'gateway' to the recognition of a plurality of other rights. Doing so, two issues are given special attention: 1) the lack of adequate birth registration and the consequences of this 'false start' for other rights, such as, again, the right to a nationality. 2) The recognition of indigenous identity papers: while regularly Indigenous Peoples do not want to establish an independent sovereign State, many of them strive for the recognition of their own Indigenous identity papers. The paper discusses some of the advantages and consequences thereof.

Keywords

nationality – birth registration – indigenous identity papers

1 Introduction

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007 by the UN General Assembly, is very strict on many issues. Amongst them: equal treatment, 'Indigenous peoples and individuals (...) have the right to be free from any kind of discrimination'.¹ (Non-)discrimination is the noun most used in the Declaration (15 times), as a goal as such and as applied to a range of other substantive rights. For the present publication, Article 6 of the Declaration is also very relevant: 'Every indigenous individual has the right to a nationality'.² Taken together this sounds like a convincing and safe legal system for the approximately 5000 indigenous peoples worldwide as well as for their individual community members: if national legal systems meet these internationally recognized human rights standards, indigenous people(s) can claim equal treatment, and they can do so on the basis of a solid recognition of their right to a nationality, which as such can be seen as a 'gateway' to the recognition of a plurality of other rights.³

In publications on the history of the UNDRIP, the provisions on non-discrimination and the right to a nationality have not been labeled as controversial.⁴ No State has claimed to be in favor of discrimination or has stated that some of its inhabitants should live their lives without a nationality or the proof thereof: an identity certificate like a passport. This should not come as a surprise, but it is only one side of the story. The other side is that in reality all over the world indigenous communities and individuals do *not* enjoy these rights and live in a legal vacuum. This problem is called 'statelessness'.

Because the topic of 'indigenous people(s) and statelessness' has not been given much attention so far, neither in academic literature nor in policy papers, and given the limited length of the present article, the authors have decided to refrain from tabling possible solutions, but to focus on a clarification of the problem (Part 2), and to highlight two selected issues related to the recognition of a nationality for indigenous people(s) (Part 3), followed by two concluding remarks (Part 4).

1 UNGA, United Nations Declaration on the Rights of Indigenous Peoples (2 October 2007) UN Doc A/RES/61/295, Art 2.

2 Ibid, Article 6.

3 This matter will be discussed in more details in Part 3.

4 More controversial issues were: the (collective) rights to self-determination and to own and control lands, territories and resources.

2 What Does the Problem Look Like?

Everybody knows some examples of indigenous peoples, like Australian Aboriginals, Kenyan Maasai or Native Americans. Although there is no world-wide accepted definition of indigenous peoples, it is agreed upon that these people(s) are indigenous because of the fact that they inhabited a country, or part thereof, before conquerors or colonial powers came in; that they had and still have their own customs and traditions; and, on the subjective side, that they identify themselves as indigenous and want to be recognized as such. Taking this broad description as a starting point, it is assumed that about 5 to 6 percent of the world population consists of indigenous people(s). Approximately two-thirds of them live in Asia.⁵ The Tilburg University Statelessness Programme stresses that '[s]tatelessness is a global phenomenon that currently affects as many as 12 million people worldwide'.⁶ Official numbers communicated by governments to the UNHCR are limited to about 3 million.⁷ However, there is no clear data on how many of those qualify as indigenous people. On the other hand, some quantitative (as well as qualitative) research has been conducted on the situation of specific indigenous communities in countries where the issue of statelessness has become extremely problematic, like in India,⁸ Thailand,⁹ and, in a more positive sense, the Philippines.¹⁰

The following example of the Hill tribes in Thailand illustrates the profound consequences of statelessness on all aspects of the life of indigenous people, in this case an estimated half a million people.¹¹ The lack of citizenship renders

5 IRIN 'ASIA: Indigenous Groups - Stateless and Sick' *IRIN* (9 February 2012) <<http://www.irinnews.org/report/94816/ASIA-Indigenous-groups-stateless-and-sick>> accessed 5 October 2013.

6 <<http://www.tilburguniversity.edu/research/institutes-and-research-groups/statelessness/>> accessed 21 October 2013.

7 UNHCR Global Trends 2012, *Displacement, the New 21st Century Challenge* (2012) 2. <<http://www.unhcr.org/51bacbof9.html>> accessed 21 October 2013.

8 See for instance the research project aiming to map the statelessness in India: Mahanirban Calcutta Research Group (2009) <http://mcrg.ac.in/Statelessness/Statelessness_Concept.html> accessed 5 October 2013.

9 Charlotte Becker, 'Impact of Statelessness in Thailand: Universal Human Rights Violations in Relation to U.S. Foreign Policy' (2008) *UW Bothell Policy Journal* 37, 37-38. Available at: <<http://uwbpolicyjournal.files.wordpress.com/2012/06/impact-of-statelessness.pdf>> and Thailand, New Constitution and Indigenous Peoples (Asian Indigenous and Tribal Peoples Network) <<http://www.aitpn.org/IRQ/vol-II/Issue-03/story01.html>> both accessed 21 October 2013.

10 See below Part 3.

11 *Ibid*, n 9.

them extremely vulnerable, not only to abuse as cheap laborers and in relation to crimes like human trafficking, but also in relation to violations of many (other) basic human rights by ‘their own’ Thai authorities. More specifically, those people are denied:

the right to vote and to participate in the administration; the right to land ownership; the right to travel beyond their home districts or provinces, which limits their job opportunities; the right to attend school, or if given the chance to attend, the right to obtain a certificate after finishing school; the right to access state welfare services such as medical care¹² and treatment.¹³

The study on the Chakmas in India further mentions: being denied the right to open a bank account; being prohibited from getting married with persons from other communities; and not being able to register births and deaths.¹⁴ The following Part contains additional information on this matter.

3 Nationality and Indigenous People: Two Selected Issues

3.1 *Nationality as the Basis for other Rights: The Importance of Birth Certificates*

One reason why indigenous people are especially vulnerable to statelessness is the difficulties they face regarding the registration of births. Lack of birth registration, especially when combined with other factors such as migration, discrimination or intergenerational lack of documentation, does cause problems in relation to recognition of nationality and often leads to a situation where – even if the person would be entitled to nationality under the law – the state does not recognize the person as a national because it is not convinced of the facts of birth. Not being recognised as a national by any state is in fact equal to statelessness, while receiving a birth certificate can be seen as a first link in a chain of rights: if missing, the rest is often problematic as well.¹⁵ And although

12 IRIN ‘ASIA: Indigenous groups - Stateless and Sick’ (n 5).

13 Ibid, 39 and Mahanirban Calcutta Research Group ‘The State of being Stateless: A Case Study on Chakmas in Arunachal Pradesh, India’ <http://mcrg.ac.in/Statelessness/Statelessness_Concept.html> accessed 21 October 2013.

14 Mahanirban Calcutta Research Group (n 13).

15 UN Convention Relating to the Status of Stateless Persons, 1954, art. 1: ‘For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.’ For further clarification, see: UNHCR,

the recognition of nationality rights is possible without adequate birth registration, in practice the latter often serves as precondition for the first.

In a lengthy UN report on the *State of the World's Indigenous Peoples*¹⁶ the nationality issue is not touched upon in any systematic way, but one paragraph on the documentation of citizens is rather telling:

Batwa living in the Democratic Republic of Congo have (...) lost their territories and thus their traditional livelihoods. A majority of the Batwa in the DRC are not documented as citizens, like other Congolese, preventing them from legally owning land, as land entitlements are tied to Congolese nationality.¹⁷

For indigenous peoples, the recognition of land rights is particularly important, considering the special, spiritual relation they often have with their traditional territories.¹⁸ The example illustrates that the right to a nationality is a precondition for the exercise of other important rights. The example relates to the Democratic Republic of the Congo, but is, *mutatis mutandis*, relevant for numerous jurisdictions worldwide, although the specific rights do vary per jurisdiction, from voting rights to access to social security, from property rights to becoming a country's Head of State.

Laying the basis for legal recognition normally starts after the birth of a child. The UN report quoted above reminds the reader of Article 7 of the Convention on the Rights of the Child, which requires 'that a child be registered immediately after birth', while the Convention also recognizes the child's right to acquire a nationality (Article 7 as well). The report adds that '[m]any indigenous people have neither' and proceeds by saying that:

When a child's birth goes unregistered, that child is less likely to enjoy his or her rights and to benefit from the protection accorded by the state in which he or she was born. Furthermore, the unregistered child may go unnoticed when his or her rights are violated. Later in life, he or she will

HCR/GS/12/01, Guidelines on Statelessness No. 1: 'The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons,' 20 February 2012.

16 Department of Economic and Social Affairs of the UN Secretariat, *State of the World's Indigenous Peoples* (2009) UN Doc ST/ESA/328.

17 *Ibid.*, 35.

18 See Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law, From Victims to Actors*, (Transnational Publishers 2008). *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* [2001] Int.-Am. Ct. H.R. [2001] Ser. C 79.

be unable to vote or stand for election. (...) These children are also at risk of falling victim to child trafficking and are often easy prey for those who exploit their vulnerability recruiting them as street beggars, domestic servants in slave-like arrangements, or as child soldiers.¹⁹

Notwithstanding growing international and national attention for the importance of proper birth registration, even in rich and developed States like Australia, ensuring an effective birth registration process, and thereby laying the basis for other rights and preventing statelessness, continues to constitute a challenge. For instance, the Australian government has been unable to tackle the case of several thousands of unregistered Aboriginal and Torres Strait Islander births in Australia.²⁰ This seems a bit odd considering the fact the reasons behind this under-registration are believed to include rather practical and overall quite solvable issues such as *the high costs of birth registration fees* (between \$26 and \$50); the *lack of awareness* among Aboriginal and Torres Strait Islander communities of the importance of registering newborns and obtaining a birth certificate; *language barriers or literacy* issues in completing the birth registration process; *lack of confidence* among Aboriginal and Torres Strait Islander peoples in dealing with authorities and *marginalisation* from mainstream services; and finally, a *general suspicion of authorities* amongst Aboriginal and Torres Strait Islander peoples stemming, in part, from the policies that led to the so-called Stolen Generations.²¹

The example again makes clear how important the role of birth registration is as a stepping stone towards the enjoyment of nationality rights. Although birth registration and acquiring a nationality can be seen as two separate issues as well (see above), in this particular example their relation becomes very clear.

It does not come as a surprise that the United Nations Committee on the Rights of the Child recently stated in relation to Australia that:

The Committee urges the State party to review its birth registration process in detail to ensure that all children born in Australia are registered at birth, and that no child is disadvantaged due to procedural barriers to registration, including by raising awareness among the Aboriginal population on the importance of birth registration and providing special support to facilitate birth registration for illiterate persons. It further

19 Department of Economic and Social Affairs of the UN Secretariat (n 16) 142.

20 Drum, 'Aboriginal people are still denied full citizenship' *ABC News* (1 November 2012) <<http://www.abc.net.au/unleashed/4344704.html>> accessed 21 October 2013.

21 *Ibid.*

urges the State party to issue birth certificates upon the birth of a child and for free.²²

More promising is a case in the southern Philippines, which demonstrates that all kinds of practical obstacles to ensuring birth certificates, even for remote indigenous people, can be overcome. Here, in order to prevent statelessness and to tackle the root causes of further problems, a UNHCR-funded programme was carried out by the government's Department of Social Welfare and Development, aiming to provide birth certificates to indigenous communities living in the Autonomous Region Mindanao.²³ To meet this purpose, a 15-member team travelled long distances to meet and register people in those remote areas. Undoubtedly, their reward for this effort lies in the following reactions from indigenous individuals: 'I can now say that I am really who I am'; 'The first thing that I will do with my birth certificate is apply for a job'; 'I also want to go to school. And I want to help my fellow Teduray and become a member of the registration team.'²⁴

3.2 *Recognition of Indigenous Identity Papers*

A slightly different issue we would like to touch upon is the phenomenon of 'Indigenous passports' as it reveals the surprising resilience of (some) indigenous peoples and a tremendous confidence in their 'own' nationality and maintaining a sense of national belonging and cultural identity. The following example of the Iroquois, also called Haudenosaunee, passport illustrates that (some) indigenous peoples are not so much interested in obtaining the nationality of a particular State, but rather in keeping and cultivating their own nationality.

The Iroquois Confederacy, a confederation of six Indian tribes (the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora) across upper New York State,²⁵ is a formal government established a thousand years ago and is considered by some to be 'the oldest continually operating democracy in North America.'²⁶ The Iroquois passport was first used in 1923 by Cayuga statesman

²² Ibid.

²³ 'Statelessness: A New Lease on Life Thanks to a Birth Certificate' *News Stories* (3 November 2011) <<http://www.unhcr.org/4eb2d8136.html>> accessed 21 October 2013.

²⁴ 'Statelessness: A New Lease on Life Thanks to a Birth Certificate' *News Stories* (3 November 2011) <<http://www.unhcr.org/4eb2d8136.html>> accessed 21 October 2013.

²⁵ Iroquois Confederacy, (Britannica Academic Edition) <<http://www.britannica.com/EBchecked/topic/294660/Iroquois-Confederacy>> accessed 21 October 2013.

²⁶ 'Rights of Indigenous Peoples gained international attention, support in 2010' *Native Times* (17 January 2011), <http://nativetimes.com/index.php?option=com_content&view

Deskaheh²⁷ who travelled using that passport to the League of Nations headquarters in Geneva to file the grievances of the Haudenosaunee/Iroquois people. While Chief Deskaheh was not admitted to the League of Nations meetings, his famous voyage was not in vein. For a long time, other countries recognized the Iroquois document, and it even led to an agreement between the Iroquois League and the US Department of State, Canada, the United Kingdom and other nations, to accept the Iroquois passport, in 1977.²⁸

After the 9/11 attacks, however, things began to change.²⁹ In 2010, for instance, members of the Iroquois Nationals lacrosse team missed out on competing in the world championships because the British government had refused to recognize the low-tech passport issued by the Six Nations Confederacy. Not the incident itself, but rather the reactions by the Haudenosaunee/Iroquois people to this incident, and other similar incidents,³⁰ are illustrative for the emanating self-esteem and confidence: 'A passport is more than a key to the world — it is an expression of national identity symbolizing sovereignty and peaceful resistance.'³¹ And: 'Your passport is kind of a means of showing who you are in the world and we're Haudenosaunee, so carrying our own passport, we're able to represent ourselves as such.'³² Another interesting quote to be cited: 'We're not going to carry a U.S. passport or a Canadian passport to an international competition as the Iroquois. We have our passport. We've been carrying it for a long time.'³³ Within the U.S., federally recognized Native American tribal documents are a common and valid form

=article&id=4825%3Arights-of-indigenous-peoples-gained-international-attention-support-in-2010&catid=51&Itemid=27> accessed 21 October 2013.

27 'Levi General', (Dictionary of Canadian Biography) <http://www.biographi.ca/en/bio/deskaheh_15E.html> 'The Last Speech of Deskaheh', (Indymedia), <http://rochester.indymedia.org/node/878>> both accessed 21 October 2013.

28 'Haudenosaunee Passports', (Iroquois Museum) <<http://www.iroquoismuseum.org/PASSPORTS.htm>> accessed 21 October 2013.

29 'Ottawa in 'explosive' situation over rejected Iroquois passport' *National Post* (11 July 2011) <<http://news.nationalpost.com/2011/07/11/ottawa-in-explosive-situation-over-rejected-iroquois-passport/>> accessed 21 October 2013.

30 Ibid.

31 'Six Nations Passports more than Travel Document say Users' *The Star* (15 July 2010), <http://www.thestar.com/news/canada/2010/07/15/six_nations_passport_more_than_travel_document_say_users.html> accessed 21 October 2013.

32 Ibid.

33 Ibid.

of identification, although they do not always suffice as a valid travel document.³⁴

This is all in all a position most stateless people worldwide can only dream of. This positive approach can probably be explained by the fact that the indigenous peoples in question feel 'backed up' by internationally acknowledged pre-colonial sovereignty and entitlements to ancestral territory.³⁵ In the case of the Haudenosaunee/ Iroquois this independent position can be traced back to their first treaty with the Dutch government in the 17th century, called Guswhenta, or the Two Row Wampum belt treaty.³⁶ To celebrate the 400th birthday of this treaty symbolizing peace and mutual friendship, three Haudenosaunee leaders were recently allowed to travel to the Netherlands on their own passports.³⁷

In addition, they and other indigenous peoples can derive some assurance from the UNDRIP, from provisions such as Article 33, stating that 'Indigenous peoples have the collective right to determine their own citizenship in accordance with their own customs and traditions', while, however, 'Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.'

4 Concluding Remarks

As indicated in the introduction, this short article is to be seen as a problem statement and a first exploration of the problem of indigenous people(s) and statelessness, rather than as a paper that wants to come up with (easy) solutions. The latter can only be done after more research and would need to include country-specific case studies in order to make sense. The history of

34 See US Department of Homeland Security, Customs and Border Protection, <https://help.cbp.gov/app/answers/detail/a_id/998/~-/travel-documents-for-native-americans,-including-u.s.-canadian-and-mexican> accessed 21 October 2013.

35 New South Wales Government, 'Tracing the History of Citizenship and Rights for Indigenous People' (New South Wales Government, 2012), <<http://k6.boardofstudies.nsw.edu.au/go/hsie/background-sheets/tracing-the-history-of-citizenship-and-rights-for-indigenous-people/>> accessed 10 October 2013.

36 Robert W Venables, 'The 1613 Treaty' (Honor the Tworow) <<http://honorthetworow.org/wp-content/uploads/2012/01/VenablesonTwoRow-1.pdf>> accessed 21 October 2013.

37 IUCN, 'Indianen komen op eigen paspoort naar Nederland om 400 jaar oud verdrag te vieren' (IUCN, 11 September 2013), <<http://www.iucn.nl/?13650/Indianen-komen-op-eigen-paspoort-naar-Nederland-om-400-jaar-oud-verdrag-te-vieren>> accessed 10 October 2013.

States and for instance local power structures would have to be understood first, before solutions could be worked out.

From this explorative article it becomes clear that many stateless people do not seem to have the 'luxury' to (re-)create and cultivate their own nationality, including a passport. Despite the fact that some indigenous people do have their own passports, often they can do little more than wait and hope for a change in national legislation and procedures, for effectively functioning national bureaucracies, and often for just some benevolence of the governments of the States within which they live.³⁸ This especially relates to issues such as birth registration, being the basis for and stepping stone to many other rights. Without such legal recognition it regularly becomes impossible for them to enjoy a wide range of other practical (human) rights, like ownership over their lands, access to school systems, jobs, social security, medical care, and sometimes, formal nationality rights.

The phenomenon of the indigenous passports also shows that indigenous people(s) sometimes want formal and visible recognition of their special indigenous status, even if, as is regularly the case, they do not plea for an independent State. Such passports have a practical meaning if accepted as travel documents, but furthermore they are an important manifestation of the distinct cultural identities of indigenous peoples.

Both claims– to be treated equally to other citizens and to be recognized as distinct people(s) – are backed up by international law. Strong international legal standards might not only be useful for 'waking up' and steering States, but can also constitute a source of confidence and hope for people(s) struggling for fundamental rights, like, in this case, the right to own a nationality and the right to a nationality of their own.

38 Cindy L Hodler and Jeff J Cornassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 *Human Rights Quarterly* 141.