

### INVOKING INTERNATIONAL HUMAN RIGHTS LAW TO PREVENT STATELESSNESS OF INTERNATIONAL REFUGEE CHILDREN BORN IN INDONESIA

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#### Abstract

*The right to a nationality is an essential human right. The importance of having a nationality lies in the fact that it is a necessary condition for the protection and enjoyment of certain basic human rights. Consequently, the failure to fulfil the right of a child to get citizenship will have an impact on the fulfillment of their basic rights. This study explores the urgency of granting citizenship status for the statelessness of international refugee children born in Indonesia, and Indonesia's responsibility to fulfill the right to a nationality for International Refugee children born in Indonesia under International Human Rights Law. This type of research is normative research using statutory and conceptual approaches. The results of this study indicate that, under international human rights law, everyone has the right to have citizenship and be recognized by their nationality from birth, including children born to refugees. Citizenship status in a person has become a practical prerequisite to be able to obtain respect, protection, and optimal fulfillment of human rights. Indonesian laws and regulations provide two approaches to obtaining citizenship status for refugee children born in Indonesia. The first solution is to prevent citizenship through positive law, and the second solution is to provide citizenship through naturalization. It is hoped that the Indonesian government will be proactive in fulfilling its obligation to provide Indonesian citizenship rights in refugee children's best interests, and the Indonesian government is expected to ratify the 1954 and 1961 Refugee Conventions.*

**Keywords:** *Human Rights, Right to a Nationality, Citizenship, Stateless.*

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## A. Introduction

Indonesia is an archipelagic country located in Southeast Asia, lying between the Indian and Pacific Oceans. It is located in a strategic location astride or along major sea lanes connecting East Asia, South Asia, and Oceania. This strategic position has led Indonesia to become one of the transit countries for international asylum seekers and refugees with Australia as the destination country.<sup>3</sup>

Refugees are people who cross international borders in order to flee human rights abuses and conflicts. Refugees are prime evidence of human rights violations and vulnerability. People who are persecuted and deprived of their homes and communities and means of livelihood are frequently forced to flee across the borders of their home countries and seek refuge abroad.<sup>4</sup> According to the data provided by the United Nations High Commissioner for Refugees (UNHCR) in Indonesia, at the end of September 2021, the cumulative number of refugees and asylum seekers in Indonesia was recorded at 13.273 people from 49 countries and more than half of the population came from Afghanistan.<sup>5</sup> The majority of refugees do not enter Indonesia as a destination, but only a place to stop temporarily before going on to countries that they consider ideal for meeting the needs of refugees, including Australia and America.<sup>6</sup>

There are several problems faced by international refugees arriving in Indonesia, one of which is not being granted the right to a nationality for babies born to international refugees in Indonesia. This includes both those born from both parents who are international refugees or from one of their parents who is an international refugee. Like many Southeast Asian states, Indonesia is not a party to the 1954 Convention relating to the Status of Refugees and Convention on the Reduction of Statelessness of 1961 (the Refugee Convention). This lack of international protection for refugees is exacerbated by the absence of a regional human rights convention, like those found in Europe and the Americas. Furthermore, domestic legal protections are absent as no national legislation comprehensively provides for refugee rights. Indonesia has no asylum system but allows

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<sup>3</sup> Lin Karita Sakharina and Kadarudin, *Pengantar Hukum Pengungsi Internasional (Perbedaan Istilah Pencari Suaka, Pengungsi Internasional Dan Pengungsi Dalam Negeri)* (Deepublish, 2017), 38.

<sup>4</sup> Alexander Betts and Gill Loescher, *Refugee in International Relations* (Oxford University Press 2011), 1.

<sup>5</sup> UNHCR. 'Indonesia Factsheet' (2021) <<https://reporting.unhcr.org/document/858>> accessed 19 March 2023.

<sup>6</sup> Antje Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia* (ISEAS-Yusof Ishak Institute 2015), 7.

UNHCR to carry out refugee status determination in the country. Despite no international legal obligation, Indonesia has acceded to several core human rights treaties, which provide a range of protections for asylum seekers and refugees.<sup>7</sup>

The Indonesian government's attitude toward the right to citizenship for international refugee children born in Indonesia has triggered a population of stateless persons. In research conducted by the Non-Governmental Organization (NGO) SUAKA entitled *A Life Forsaken: Fate Research Report on Rohingya Refugees in Indonesia*, Civil registration is still considered discriminatory regarding the registration of the births of Rohingya refugees, making it difficult for Rohingya refugees to truly enjoy their basic rights as refugees, such as the right to education, the right to work, the right to health, and the right to obtain legal protection status from the Indonesian government.<sup>8</sup> Humans who are born stateless create a situation of being caught between having rights and non-rights. It causes stateless people born in Indonesia not to guarantee any rights and protection from the Indonesian government.

## **B. Problem Formulations**

These research analyses two main issues: first, how far the urgency of having citizenship status for the statelessness of international refugee children born in Indonesia?. Second, what is the Indonesia's responsibility towards fulfilling rights to a nationality for International Refugee Children Born in Indonesia under International Human Rights Law?

## **C. Methodology**

This research adopts normative legal research, namely research conducted on legal principles, and legal rules in terms of legal norms which relate to the research material. The approaches of this research are the statutory and conceptual approaches. The research data was gathered through a literature review, in which data collection is carried out using secondary data as the primary material for research by searching for regulations and other literature related to the problem being researched. The analysis used is qualitative, including highlighting the problem-solving efforts, in the sense that the data will be

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<sup>7</sup> Nikolas Feith Tan, 'The Status of Asylum Seekers and Refugees in Indonesia,' 28 (3) *International Journal of Refugee Law* (2016), 366. Dodik Setiawan Nur Heriyanto, Sefriani, and Fezer Tamas, 'No Choice but to Welcome Refugees: the Non-Refoulement Principle as Customary International Law', 10 (1) *Lentera Hukum* (2023), 315-316.

<sup>8</sup> Riva Dessthania Suastha. 'Perkara Status Hambat Pemenuhan Hak Pengungsi Rohingya Di RI' (*CNN Indonesia*, 2016) <<https://www.cnnindonesia.com/internasional/20161205204330-106-177559/perkara-status-hambat-pemenuhan-hak-pengungsi-rohingya-di-ri>> accessed 1 April 2023.

analyzed and then arranged systematically, which in turn is used as material for drawing conclusions.

#### **D. Discussion and Results**

##### **1. Urgency of providing citizenship status for otherwise stateless international refugee children born in Indonesia**

Children are the most vulnerable group because they cannot live independently without others' assistance. Therefore, children have a range of human rights and basic freedoms that have been recognized in international human rights instruments, including the right to have a nationality.<sup>9</sup> As is a universal principle in human rights, these basic rights and freedoms apply to children without exception, including stateless children.<sup>10</sup> The fact is, however, many countries make the citizenship of a person a practical prerequisite to obtain respect, protection, and optimal fulfillment of human rights.

Furthermore, this happens because citizenship leads to a reciprocal legal relationship between the state and citizens. In other words, citizens have rights and obligations to their country, and likewise the state has certain authority and obligations towards its citizens. In addition, a person's citizenship status is related to two basic aspects, namely they a clear legal status, and also social status, meaning that their position as citizens is socially recognized.<sup>11</sup>

In addition, stateless children indirectly make them stateless persons. Stateless persons are “persons who either from birth or as result of subsequent changes in their country of origin are without citizenship.”<sup>12</sup> On the other hand, stateless children are generally born without being registered and do not have residence documents that can show their legal identity. As a result, if a child does not have a residency document, then the child will find it difficult to be able to take care of everything that requires self-identity. According to David Owen, *de jure* statelessness is the condition of lacking an effective nationality, where possessing an effective nationality requires not only access to civil rights within the territory of

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<sup>9</sup> Convention on the Rights of the Child, 1990, Art 7.

<sup>10</sup> Vienna Declaration on Programs of Action, 1993, Art 5 which stated, "All human rights are universal, undivided, interdependent, and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".

<sup>11</sup> Made Nurmawati and I Nengah Suantra, 'The Arrangement of Dual Citizenship of the Indonesian Diaspora: A Legal and Human Rights Perspective', 9 (3) *Jurnal Magister Hukum Udayana* (2020), 499.

<sup>12</sup> Lin Karita Sakharina and Kadarudin (n 3) 21.

one's state of nationality, but crucially also these rights of entry, resident, and diplomatic protection.<sup>13</sup>

Therefore, the right to citizenship is the key right of all human rights. This is based on Hannah Arendt's theory about everyone has a "right to have rights," in which the right to citizenship is the link between human rights and the state.<sup>14</sup> This is based on the fact that without attachment to a particular political community (state), there is no guarantee of someone's rights, even for someone who was previously said to have rights attached to him. This is the reason stateless children are avoided because they will lose the capacity to enjoy essential rights in their life. On the other side, depriving a person of the status of a member of a community constitutes a crime against humanity.<sup>15</sup> Consequences of Statelessness cause children to find it difficult to get their rights such as:

- a. Right to an education: In the field of education in Indonesia, the Government has adopted a compulsory education policy, wherein every citizen aged six years and above, can attend basic education free of charge.<sup>16</sup> This would be difficult to obtain if there is no intervention from the Indonesian government because stateless children do not have official identities in the form of residence documents or birth certificates as Indonesian citizens.
- b. Access to Healthcare: Without citizenship status, stateless persons will have difficulty getting social program guarantees and access to health provided by the government for their citizens. Access to health is one of the most important things, especially for children under five who are susceptible to disease and need immediate help if they get sick. On the other hand, in the case of the COVID-19 pandemic, some foreign refugees in Indonesia had difficulty accessing vaccines and felt that their fates were increasingly unclear in the midst of the Covid-19 pandemic. Some of them questioned the guarantee of healthcare pr in the midst of the outbreak, including vaccinations. Meanwhile, the risk of their exposure is the same as that of other residents and if ignored, it has the potential to be dangerous. For example, a refugee told journalist JN Joniad reporting for BBC News

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<sup>13</sup> David Owen, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights,' 65 (3) *Netherlands International Law Review* (2018), 303.

<sup>14</sup> Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 2004), 291.

<sup>15</sup> Hannah Arendt (n 14), 376.

<sup>16</sup> Law No. 20 of 2003 on the National Education System, Art 34 (2).

Indonesia “Armed with a refugee ID card, he went to a vaccination service located near the market. But when he showed them his card, they rejected him and said that the vaccine was only for Indonesians, not foreigners.”<sup>17</sup>

- c. Legal protection: Stateless children are generally born without being registered and do not have residency documentation to show their legal identities. Therefore, this results in the absence of a legal relationship between the child as a person and the state. As a result of the absence of a legal identity, it is possible for a person not to get the guaranteed protection, legal certainty, and respect for their human rights from the state. This happens because the state does not have a direct legal obligation to stateless children. Without citizenship, a person is almost unable to do much and there is no legal protection from the state, and without proper treatment as a citizen.
- d. A job when becoming an adult: Stateless children will find it difficult to get a job as an adult because the difficulty of getting access to education deprives them of the skills and education certificates needed for employment. This happens because Indonesia is not a signatory to the 1954 convention on refugees, therefore Indonesia doesn't have an obligation to provide refugees work and almost all countries that are not parties to the refugee convention do not have regulations on how refugees are given access to employment. The problem is not that it is forbidden to work, but that there are no regulations. On the other hand, countries that have become parties to the conventions have an obligation under the 1954 convention, to ratify the convention into national regulations, allowing them to work in their country.<sup>18</sup>
- e. Access to government programs: Without citizenship status, especially for children, it can be nearly impossible to access government programs. According to Agustina Erni, “If a child is not registered and is not counted as a resident of Indonesia, then he or she cannot access all programs that exist in the

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<sup>17</sup> JN Joniad. 'Pengungsi Asing Di Indonesia Selama Pandemi: Mereka Menolak Saya Dan Mengatakan Vaksin Hanya Untuk WNI' (*BBC News Indonesia*, 2021), <<https://www.bbc.com/indonesia/indonesia-58068808>> accessed 2 April 2023.

<sup>18</sup> Victor Maulana. 'Pengungsi Tidak Diperbolehkan Bekerja' (*Sindonews*, 2019) <<https://international.sindonews.com/berita/1418654/40/soal-pengungsi-tidak-diperbolehkan-bekerja-ini-kata-kemlu>> accessed 25 April 2023.

Government.”<sup>19</sup> This causes stateless children to face difficulty getting access to government programs that benefit their lives.

Therefore, if a child does not have citizen status and becomes stateless. Then, the child will find it difficult to be able to take care of everything that requires an official identity as a citizen. Considering that human rights are interrelated and interdependent in principle, it appears that the non-fulfillment of the right to a nationality/citizenship status for a child will have an impact on the fulfillment of other human rights. In a state where these human rights and basic freedoms are not protected, stateless children will be vulnerable to violence, abuse, and exploitation. By looking at the urgency of the right to citizenship for children, every country, including Indonesia, has an obligation to fulfill and protect children's citizenship rights under international law and applicable laws and regulations.

## **2. Indonesia's responsibility for the fulfillment of rights to a nationality for International Refugee Children Born in Indonesia under International Human Rights Law**

The right to a nationality is firmly anchored in international law. The explicit mention of the right to a nationality appears in international documents: primarily in human rights instruments and, to some extent, in international treaties concerning nationality. Although Indonesia did not ratify the Convention on the Status of Stateless Persons in 1954 or the Convention on the Reduction of Statelessness in 1961, Indonesia as a country of law, has ratified several international human rights instruments that regulate children's rights to citizenship, namely: Article 15 (1) of the 1948 Universal Declaration of Human Rights (UDHR), which emphasizes that,<sup>20</sup> “everyone has the right to a nationality.” While the UDHR itself is not binding because it is only in the form of a declaration, it applies as a guide or a moral obligation for countries in the world. However, moral obligation in this case does not only have the meaning of being kind but must be interpreted as behavior or attitudes that reflect concern in society and state. Furthermore, Indonesia as a legal state that upholds human rights has a moral obligation to respect the UDHR which contains general principles of law and is the basic foundation of humanity.

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<sup>19</sup> Sabik Aji Taufan. 'Tanpa Akta Kelahiran, Anak Tidak Bisa Akses Semua Program Pemerintah' (*Jawa Pos*, 2022) <<https://www.jawapos.com/nasional/28/03/2022/tanpa-akta-kelahiran-anak-tidak-bisa-akses-semua-program-pemerintah/>> accessed 28 April 2023.

<sup>20</sup> Universal Declaration on Human Rights, 1948. Art 15 (1).

Therefore, all arrangements regarding the rights regulated in the UDHR must be respected and recognized as a form of Indonesian concern in upholding human rights, including the right to citizenship status.

Additionally, Article 24 paragraphs 2 and 3 of the International Covenant on Civil and Political Rights (ICCPR) guarantees, that ‘Every child shall be registered immediately after birth and shall have a name,’ and that “[e]very child has the right to acquire a nationality.” Like the UDHR, this provision does not indicate to which state a child may claim his or her right to a nationality. Moreover, Article 24(3) only guarantees a right to acquire a nationality, without any specification at which time this right has to be implemented.<sup>21</sup> Indonesia as a country that has ratified the ICCPR through law number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights has obligation to respect, protect and fulfill the human rights of every person (especially the right to a nationality), including stateless children born in its territory and subject to its legal jurisdiction.

Furthermore, Article 7 (1) of the CRC mentions, “[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality....”<sup>22</sup> Based on this article, children have the right to obtain citizenship status from the moment they are born. Therefore, every Covenant State should be active in fulfilling the right to citizenship of children. Article 7 (2) CRC mentions that “State Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”<sup>23</sup> Indonesia as a country that ratified the CRC by Presidential Decree Number 36 Year 1990 should prevent statelessness of children. Furthermore, to prevent statelessness, the Indonesian government can officially register births. Birth registration proves where a person was born and parentage, key pieces of information needed to establish which country nationality a child should acquire.

In addition, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) mentions discrimination on the basis of race, color, descent, or national or ethnic origin is often the root cause of statelessness. Moreover, stateless populations are particularly vulnerable to further

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<sup>21</sup> Covenant on Civil and Political Rights, 1966. Art 24.

<sup>22</sup> Convention on the Rights of the Child (n 9). Art 7 (1).

<sup>23</sup> Convention on the Rights of the Child (n 9). Art 7 (2).

discrimination.<sup>24</sup> Article 5 ICERD provides that “State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of... the right to equal treatment before the tribunals and all other organs administering justice... (and) other civil rights, in particular... the right to nationality...”<sup>25</sup> Therefore, it can be understood that the right to get citizenship is the right of every person without discrimination in the refusal to grant the right to citizenship status for certain reasons. This is expected to prevent someone from being born stateless and to cut off the passing of stateless status to their descendants. Indonesia, as a country that has ratified ICERD in law number 29 of 1999 has a responsibility as a State Party to ensure the right to a nationality of everyone without racial discrimination and take steps to eliminate all forms of discrimination to prevent statelessness for children.

Most importantly, Islam guarantees the protection of children rights. Those rights embodied in every children since born and to become adult. The prophet also guided moslems to consider the rights of the children as mentioned in the Hadith: “Do not belong to our group, people who do not love the little ones among us and do not know the rights of the big ones among us.”<sup>26</sup>

As a state party to these international human rights instruments, Indonesia is obligated to carry out its obligations in good faith. From a human rights perspective, Indonesia's obligation to respect, protect and fulfill human rights is not only limited to Indonesian citizens. The ICCPR, CRC, and ICERD emphasize that state parties are obliged to respect and guarantee the rights recognized in the present Covenant for all persons within its territory and subject to its legal jurisdiction, without distinction of any kind. Therefore, based on this explanation, Indonesia should respect, protect and fulfill the human rights of everyone, including stateless children who are within its territory and are subject to its legal jurisdiction.

Citizenship is a matter of sovereignty and each state, through its legislative bodies, can decide on the legal requirements that are considered necessary for

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<sup>24</sup> Convention on the Elimination of All Forms of Racial Discrimination, 1965.

<sup>25</sup> Convention on the Elimination of All Forms of Racial Discrimination (n 24), Art 5.

<sup>26</sup> *Hadith Abu Daud and Tirmidzi*, n.d.

membership of the state.<sup>27</sup> Therefore, the right to a nationality in the form of obtain citizenship status is recognized as a constitutional right under the Constitution of the Republic of Indonesia year 1945 article 28 D paragraph (3) which states that: "Everyone is entitled to citizenship status."<sup>28</sup>

The law, which is a derivative of the Constitution, governs the rights to a nationality. It is Law Number 39 Of 1999 Regarding Human Rights: Art 53 (2): Every child from birth has the right to a name and citizenship status. Law No. 23 of 2002 on child protection in article 5 states that: "Each child is entitled to a name as Identity and citizenship status."

Furthermore, referring to the provisions of Law No. 12 of 2006 on citizenship, the stateless condition of a refugee child born in Indonesia can be avoided application of the limited principle of *ius soli*. Based on the explanation of Law No. 12/2006, the principle of limited *ius soli* is a principle that determines a person's citizenship based on the country of birth, which is limited to children under the provisions governed by the law. The meaning of the word "limited" in this case is that Indonesian citizenship can only be given as a limitation to avoid a child falling into statelessness.<sup>29</sup> Law No. 12 of 2006 provides for several methods of becoming an Indonesian national: by birth, by naturalization, by adoption, and by marriage. Article 4 of the Citizenship Law states that Indonesian Citizens are:<sup>30</sup>

- a. Any person based on laws and/or based on an agreement between the Government of the Republic of Indonesia with other countries before this Law comes into effect has become an Indonesian citizen;
- b. Children born from a legal marriage of a father and mother of Indonesian citizens;
- c. Children born from a legal marriage to an Indonesian citizen father and a foreign mother;
- d. Children born from legal marriages to a foreign father and an Indonesian mother;
- e. Children born from a legal marriage of an Indonesian citizen mother, but the father does not have citizenship or the law of the country of origin of the father does not grant citizenship to the child;
- f. Children born within a period of 300 (three hundred) days after the father's death from a legal marriage and the father is an Indonesian citizen;
- g. Children born out of legal marriage to an Indonesian citizen mother;

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<sup>27</sup> Susi Dwi Harijanti. *Report on Citizenship Law: Indonesia* (Robert Schuman Centre for Advance Studies 2017), 3.

<sup>28</sup> Indonesian Constitution, 1945 (n 28). Art 28 D (3).

<sup>29</sup> Bagir Manan. *Hukum Kewarganegaraan Indonesia Dalam UU No. 12 Tahun* (FH UII Press 2006), 76.

<sup>30</sup> Law No. 12 of 2006 on Indonesian Citizenship. Art 4.

- h. Children born out of legal marriage to a foreign mother who is recognized by an Indonesian citizen father as his child and the acknowledgment is made before the child is 18 (eighteen) years old or unmarried;
- i. Children born in the territory of the Republic of Indonesia who at the time of birth the citizenship status of the father and mother was not clear;
- j. A newborn child found in the territory of the Republic of Indonesia as long as the father and mother are unknown;
- k. A child born in the territory of the Republic of Indonesia if their father and mother do not have citizenship or their whereabouts are not known;
- l. A child born outside the territory of the Republic of Indonesia from a father and mother who are Indonesian citizens who due to the provisions of the country where the child was born give citizenship to the child concerned; and
- m. The child of a father or mother whose citizenship application has been granted, then the father or mother dies before taking the oath or swearing allegiance.

Based on Article 4 of Law Number 12 of 2006 concerning Citizenship, legally international refugee children have the right to Indonesian citizenship, based on subparagraphs (i), (j), and (k). Therefore, by applying the principle of birth (*ius soli*), people born in the territory of the Republic of Indonesia get legal protection and certainty, because they are citizens of the Republic of Indonesia. Emphasis is placed on his birth in the territory of the Republic of Indonesia with the aim that no child is born into apatrid (stateless).

### **3. Fulfillment of the right to a nationality as a state obligation based on the protection of human rights**

As a manifestation of a country's identity and sovereignty, nationality is a sensitive issue. Not surprisingly, disputes about citizenship can result in tension and conflict, both within and between States.<sup>31</sup> The issue of nationality falls under the jurisdiction of the domestic law of the state but is not absolute. According to international human rights law, the right of states to determine who their nationals are must not run afoul of their human rights obligations when granting and revoking citizenship in the avoidance of statelessness. The form of state recognition of a person's right to a nationality is the fulfillment by the state of granting citizenship status. A person's citizenship status is proof of his membership in the state. Therefore, the state is obliged to protect him/her.

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<sup>31</sup> UNHCR. 'Nationality and Statelessness: A Handbook for Parliamentarians Research and Analysis: Carol Batchelor and Philippe Leclerc' (*UNHCR*, 2005) <[https://www.un.org/ruleoflaw/files/Nationality and Statelessness.pdf](https://www.un.org/ruleoflaw/files/Nationality%20and%20Statelessness.pdf)> accessed 2 May 2023.

Citizenship is defined as any kind of relationship with a country which results in that country's obligation to protect the person concerned.<sup>32</sup> Citizenship is a very important thing for a person. This is because citizenship gives people a sense of self-identity and represents the key to participating fully in society. In addition, without citizenship status, individuals are generally excluded from political processes because they do not have the right to vote.<sup>33</sup> Moreover, under international law, only "citizens" have the unrestricted right to enter and remain in a country.<sup>34</sup>

Although various international human rights instruments explicitly regulate children's rights to citizenship, these instruments do not oblige the state to grant citizenship to every child born in its territory. In addition, these instruments also do not determine the procedure for granting citizenship by a country on a practical level. Each country is given the discretion to determine the criteria for granting citizenship under their respective national laws. However, the procedure for granting citizenship must be carried out within limits to ensure that there are no stateless children.

According to Simon Butt, Indonesia does not regulate the status of international law in its national law. What is regulated is only the procedure for the adoption of international treaties. In addition, other sources of international law including customary international law are not certain of the extent of its legitimacy in Indonesia.<sup>35</sup> However, Indonesia's domestic laws and regulations explain in more detail the procedures for granting citizenship. In addition, the right to a nationality can be fulfilled by granting citizenship status. In general, the acquisition of citizenship status can be divided into two systems, an active system and a passive system.<sup>36</sup> In an active system a person gets citizenship status by actively taking certain legal actions, while in a passive system citizenship status acquisition, a person is automatically considered a citizen without taking any legal action.<sup>37</sup> Based on Indonesian laws and regulations, there are two solutions for obtaining citizenship

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<sup>32</sup> Rokilah. 'Implikasi Kewarganegaraan Ganda Bagi Warga Negara Indonesia'. 1 (2) *Journal Ajudikasi* (2017), 55.

<sup>33</sup> Covenant on Civil and Political Rights (n 21). Art 25.

<sup>34</sup> Covenant on Civil and Political Rights (n 21). Art 12 (4).

<sup>35</sup> Simon Butt. 'The Position of International Law within the Indonesian Legal System'. 28 (1) *Emory International Law Review* (2014), 3. Nimatul Huda, Dodik Setiawan Nur Heriyanto, and Allan Fatchan Gani Wardhana. 'The Urgency of the Constitutional Preview of Law on the Ratification of International Treaty by the Constitutional Court in Indonesia' (2021) 7 (9) *Heliyon* 1, 2-3.

<sup>36</sup> C.S.T. Kansil, *Hukum Kewarganegaraan Republik Indonesia* (Sinar Grafika 1992), 11.

<sup>37</sup> C.S.T. Kansil (n 36).

status for refugee children born in Indonesia, namely acquisition of citizenship through positive law and naturalization.

Regarding obtaining citizenship through positive law, the Indonesian government must adopt national legislation and policies, even enacting a new law to ensure that a child born in Indonesia is not stateless. The Indonesian government has recognized and regulated in national legislation the right of every child to obtain a name and citizenship status from birth as a human right.<sup>38</sup> According to Law Number 12 of 2006 regarding citizenship of the Republic of Indonesia, those who are recognized as Indonesian citizens are people of the original Indonesian nation and people of other nations who are citizens by operation of law. This provision is not discriminatory because it does not determine a particular nation, ethnicity, or ethnic group which is the original Indonesian nation. In addition, the provision recognizes that a person outside the original Indonesian nation can become an Indonesian citizen if he or she has fulfilled the requirements of the law. Based on these provisions, stateless children who are not native Indonesians still have the opportunity to become Indonesian citizens if they fulfill the provisions of the law.

To prevent the possibility of statelessness, the Indonesian government should apply the limited *Ius Soli* principle to children born to international refugees in Indonesia. In accordance with Article 4 of Law Number 12 of 2006 concerning Citizenship, subparagraphs i, j, and k, de jure children of international refugees have the right to Indonesian citizenship."<sup>39</sup> According to Bagir Manan, four main categories fall within the scope of this limited *ius soli* principle based on the subparagraphs i, j, and k of Article 4 of Law Number 12 of 2006 concerning Citizenship. The four basic categories have different meanings. First, the phrase "children born in Indonesia to parents whose citizenship status is not clear" means that a child is confirmed as born in Indonesia but there is uncertainty regarding the citizenship status of the parents, whether they are Indonesian citizens or foreigners, indicating that the whereabouts of the parents of the child are known. Second, the phrase "a child found in Indonesia as long as the father and mother are unknown" means that a child is found but it cannot be ascertained whether he or she was born in Indonesia or not. Third, the phrase "children born in Indonesia to stateless

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<sup>38</sup> Law No. 39 of 1999 on Human Rights, Art 53 (2).

<sup>39</sup> Law No. 12 of 2006 on Indonesian Citizenship (n 30), Art 4.

parents” means that a child is confirmed to be born in Indonesia to stateless parents, indicating that the whereabouts of the child's parents are known. Fourth, the phrase “children whose parents are not known” means that a child is confirmed to have been born in Indonesia but the whereabouts of his parents are unknown.<sup>40</sup>

The problem in the applying of the limited *ius soli* principle for children born to refugees in Indonesia is related to the absence of the definition and official understanding of stateless and unknown nationality in Law No. 12 of 2006. This gives rise to confusion and uncertainty as to whether a child born to stateless person of unknown nationality in Indonesia can be granted citizenship status under Article 4 subparagraphs i or k of the law. Furthermore, in the embodiment of the principle of limited *ius soli*. Article 28 paragraph 1 of Law Number 23 of 2006 concerning Population Administration, and Article 33 paragraphs 2 and 3 of Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration regulates birth registration for children of unknown origin or whereabouts of his parents are unknown. It is problematic because the scope of the limited *ius soli* principle as required by Law No. 12 of 2006 is not only limited to children whose origins or parents’ whereabouts are unknown, but also includes children born in Indonesia to stateless persons and unknown nationality. Thus, proactive action from the state is required to ensure that the parents of a child meet the requirements for the subject referred to by law. It will be difficult to formulate more detailed provisions in these implementing regulations without a formal understanding of the terms in question. Therefore, there is no understanding of parents who are stateless people of unknown nationality under Law No.12 of 2006 resulting in a lack of regulation of birth registration for children born to stateless persons of unknown nationality whose citizenship status is unclear.

The application of limited *ius soli* citizenship cannot be automatic, because specific procedural steps are required for a child to obtain evidence in the form of a birth certificate proving that he is an Indonesian citizen.<sup>41</sup> Thus, without a legal document that certifies his citizenship status, a child will not be able to claim his rights as a citizen. Under Indonesian laws and regulations related to population administration, the birth of a child is an important event that must be reported by

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<sup>40</sup> Manan, *Hukum Kewarganegaran Indonesia Dalam UU No. 12 Tahun* (n 29), 76.

<sup>41</sup> *Presidential Regulation No. 96 of 2018 on Requirements and Procedures for Population Registration and Civil Registration*, Art 33 (1).

residents to the local Implementing Agency no later than 60 days after birth.<sup>42</sup> Based on these provisions, birth certificates are not only given to Indonesian citizens but also to non-Indonesian citizens residing in Indonesia. This regulation also accommodates birth registration and the issuance of birth certificates for the birth of a child whose origin or parents' whereabouts are unknown. However, this legislation still lacks legal certainty for children born as refugees whose parents here are stateless or of unknown nationality to obtain Indonesian citizenship, because they do not have the various legal documents required to obtain a birth certificate, such as a marriage certificate, family card (KK), or identity card (KTP).<sup>43</sup>

Naturalization is the process where a person applies for citizenship to the state. In this case, the government of Indonesia must adopt national legislation and policies to ensure that a child who is already stateless and residing in the territory of Indonesia can obtain the right to citizenship through naturalization. This is explained in Article 8 of the Indonesian Citizenship Law, which explains that the citizenship of the Republic of Indonesia can also be obtained through naturalization. A citizenship application can be submitted if it meets the requirements as stipulated in Article 9 of the Law of the Republic of Indonesia Number 12 of 2006 concerning Citizenship.

However, the naturalization of refugee born children difficult to accomplish. This happened because of two requirements of Indonesia's naturalization. The naturalization requirement of having resided in the territory of the Republic of Indonesia for a minimum of 5 (five) consecutive years or a minimum of 10 (ten) non-consecutive years will be difficult to establish.<sup>44</sup> This is because Law No. 6 of 2011 concerning Immigration states that only foreigners who have valid Travel Documents (visas) can have a residence permit.<sup>45</sup> Meanwhile, a person with refugee status in Indonesia who does not have a permanent residency permit only lives temporarily in Indonesia under the supervision of immigration officers, before being placed in a third country by UNHCR. Furthermore, the naturalization requirements regarding having a job or steady income will be difficult for refugees to fulfil. This is because Indonesia has not ratified the 1954 Convention. Therefore, Indonesia is

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<sup>42</sup> Law No. 24 of 2013 on the Amendment to Law Number 23 Year 2006 Concerning Population Administration. Art 27.

<sup>43</sup> Presidential Regulation Number 96 of 2018 on Requirements and Procedures for Population Registration and Civil Registration (n 41). Art 33 (1).

<sup>44</sup> Law No. 12 of 2006 on Indonesian Citizenship (n 30). Art 9 (b).

<sup>45</sup> Law No. 6 of 2011 on Immigration. Art 48 (2).

not obliged to find work for refugees. Work is one of the basic economic rights that must be protected for everyone for the sake of survival and dignity. The 1945 Constitution guarantees "decent work and livelihood for humanity."<sup>46</sup> Providing jobs for refugees is a more comprehensive solution than giving away monthly rations, while at the same time contributing to community development.

The problem with the Indonesian Law on Citizenship is that it does not specifically regulate Indonesian citizenship applications of children born in Indonesia to international refugees. The absence of a law that specifically regulates the procedure for granting Indonesian citizenship to children born from stateless and unknown nationality parents in Indonesia makes it difficult to determine a child's status as an Indonesian citizen through the limited *ius soli* principle. In addition, the lack of regulations governing the granting of residence permits for refugees in Indonesia, and the prohibition of refugees from having jobs for refugees makes it impossible for children born to international refugees in Indonesia to meet the naturalization requirements stated in article 9 law no 12 of 2006 concerning Indonesian Citizenship.

The citizenship status of a refugee child born in Indonesia is important for the children. However, providing Indonesian citizenship to a refugee child born in Indonesia has some impacts on the country as well, including:

- a. Economically. Indonesia's government needs to spend additional funds on assisting these children in supporting children's growth and development, such as government healthcare programs, and formal public education. This is very important because the tendency of parents who are still refugees will limit this accessibility even more considering that Indonesia alone did not ratify the 1954 Refugee Convention. Granting their basic rights has become a basic obligation of all countries considering that children's rights are already part of customary international law.
- b. Internationally. This will raise the good name of Indonesia in the international society. This is based on the actions of the Indonesian government which upholds human rights by granting Indonesian citizenship to refugee children born in Indonesia.
- c. Potential taxpayers. In the long term, refugee children who become Indonesian citizens will be able to contribute to state tax revenues as taxpayers when they grow up and find jobs.

Granting citizenship to refugee children born in Indonesia will undoubtedly have consequences for Indonesia. However, refugee children born in Indonesia need to be granted citizenship status. This will make it easier for children to gain access to

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<sup>46</sup> *Indonesian Constitution* (n 28). Art 27 (2).

facilities owned by the government. Thus, they will have an easier time growing up and surviving.

#### **4. Fulfillment of the right to a nationality in the best interest of the child**

The principle of the best interest is something that needs to be considered in the attitude of the state to children as provided for by Article 3(1) of the 1989 United Nations Convention on the Rights of the Child, which states that 'In all actions concerning children, whether committed by public or private social welfare agencies, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration because this provision applies also to all actions concerning the nationality of a child and the avoidance of statelessness.

Furthermore, the application of the concept of the best interest is the main responsibility of a State, which is based on its international legal obligations. States should use an appropriate mechanism to consider the child's best interests in the context of their national child protection system without discrimination, ensuring the proper participation of children and the involvement of relevant experts, to decide and assess better solutions.<sup>47</sup> Considering the widely documented negative impact of statelessness on children's ability to enjoy various human rights (identity, education, health care) and the variety of international legal instruments and recommendations that stipulate the necessity to avoid statelessness and it is in the child's best interest to have a nationality.

In applying the principle of the best interest of the child in Indonesia, the government of Indonesia regulates the rights of children in the child protection law. The principle of the best interest of the child has been stated as one of the principles in Article 2 Law Number 23 of 2002 Regarding Child Protection, which states that the best interest of the child is mentioned in the explanatory article which can be interpreted as all actions concerning children by the government, society, the legislature, and the judiciary, the best interests of the child must be the main consideration.

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<sup>47</sup> UNHCR. 'Conclusion on Children at Risk No. 107 (LVIII)' (*Executive Committee of the High Commissioner's Programme*, 2007) <<https://www.refworld.org/docid/471897232.html>> accessed 4 May 2023.

Additionally, the Indonesian government's efforts to limit the state of stateless children in the best interest of children begins with Article 5 Law No. 23 of 2002 regarding Child Protection which states that every child has the right to a name as self-identity and citizenship status.<sup>48</sup> Furthermore, Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 in article 27 states that a child's identity or birth certificate must be given from birth.<sup>49</sup> In addition, if the child's birth origin is unknown and the whereabouts of the parents are unknown, the making of a birth certificate is based on the information of the person who found it and is accompanied by an official report on the police examination. The articles in the child protection law can be interpreted to mean that a child does have the right to self-identity as proof of their citizenship status, on the other hand, the Indonesian government should be involved in giving self-identity to children as an attitude of government action to prevent the stateless child's condition in Indonesia.

## **E. Conclusion**

Everyone has the right to citizenship and be recognized by their nationality from birth, including children born to refugees. Moreover, the fulfilment of the right to get citizenship is in the best interests of the children considering that human rights are interrelated and interdependent in principle. The non-fulfilment of the right to a nationality for a child to get citizenship will have an impact on the fulfilment of their basic rights. In this situation, citizenship is needed as a fundamental element of human security, as well as providing people with a sense of belonging, identity as individuals, protection of the state, and provides a legal basis in exercising many civil and political rights. Children born to stateless parents will potentially receive stateless status as well, perpetuating the generational cycle. This is the reason for the importance of birth certificates for children born to stateless parents. Upon the birth of a child, a birth certificate is the first official document that officially recognizes the child's legal status. While a birth certificate does not grant citizenship, it can provide information related to the legal relationship between the child and the parents and the place of birth of a child, and can be the initial evidence to determine the nationality of a child.

Basically, the right to citizenship has been guaranteed in international human rights law and Indonesian domestic law. From the perspective of international human rights,

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<sup>48</sup> Law No. 23 of 2002 on Child Protection. Art 5.

<sup>49</sup> Law No. 35 of 2014 on Amendments to Law No. 23 of 2002. Art 27.

Indonesia as a state party should respect, protect and fulfil the human rights of everyone, including stateless children residing in its territory and subject to its legal jurisdiction. On the other hand, Indonesian laws and regulations especially law No. 12 of 2006 regarding Indonesia Citizenship provides two approaches to obtain citizenship status for children born to refugees in Indonesia, namely by granting citizenship through positive law and naturalization. However, there are two obstacles to these approaches. In granting citizenship through positive law there is a lack of law that specifically regulates the procedure for granting Indonesian citizen status to children born from stateless and unknown nationality parents in Indonesia. In naturalization, the lack of regulations governing the granting of residence permits and difficulty in finding work for refugees makes it impossible for children born from international refugees in Indonesia who have refugee status to meet the naturalization requirements.

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